

GOVERNMENT OF PUERTO RICO
PUERTO RICO PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU

NEPR

Received:

Feb 19, 2021

11:58 AM

IN RE:

THE PERFORMANCE OF THE PUERTO
RICO ELECTRIC POWER
AUTHORITY

CASE NO.: NEPR-MI-2019-0007

**SUBJECT: LUMA's Reply to Comments on PREPA's
performance baselines, performance metrics, and
compliance benchmarks.**

**MOTION SUBMITTING LUMA'S REPLY TO COMMENTS FILED BY THE PUERTO
RICO ELECTRIC POWER AUTHORITY AND STAKEHOLDERS ON
PERFORMANCE BASELINES, PERFORMANCE METRICS, AND COMPLIANCE
BENCHMARKS**

TO THE PUERTO RICO ENERGY BUREAU:

COME NOW, LUMA ENERGY, LLC, and LUMA ENERGY SERVCO, LLC
(collectively, **LUMA**), through the undersigned legal counsel and respectfully state and request
the following:

I. Introduction

This honorable Puerto Rico Energy Bureau ("Energy Bureau" and/or "Bureau") initiated proceedings in this case to set performance baselines and compliance benchmarks for Puerto Rico's electric system. *See* Resolution and Order dated December 23, 2020. As established by the Bureau, those performance baselines and benchmarks will be used to "develop the corresponding targets to be applied to certified electric service companies such as LUMA." *Id.* at page 5. A separate proceeding was initiated under the caption, *In re Performance Targets for LUMA Energy Servo, LLC*, NEPR-AP-2020-0025, to establish Performance Incentive Mechanisms ("PIMs")

applicable to LUMA. In the latter proceeding, the Bureau issued a Resolution and Order that outlines the principles that should guide LUMA's request to set PIMs'. *See id.* at pages 5-6.

The Bureau set a calendar of events in this case that includes an initial pre-filing technical conference, followed by the filing of written comments and replies to comments, a subsequent technical conference to discuss the comments and replies, and a final opportunity to file written comments on the information presented at the technical conference. *See* Resolution and Order of December 23, 2020, and Resolutions and Orders amending the calendar, dated February 1st and 11th, 2021, Case No. NEPR-MI-2019-007.

Pursuant to the procedural calendar originally set by the Bureau in its Resolution and Order of December 23, 2020, LUMA submitted three filings whereby it addressed the Bureau's data on PREPA's baselines and presented proposed performance baselines and metrics, and an initial assessment on compliance benchmarks. *See* LUMA's Motion filed on January 29, 2020.

On January 29, 2021, the Puerto Rico Electric Power Authority ("PREPA") filed a document styled "Comments of the Puerto Rico Electric Power Authority on the Establishment of Performance Baseline and Compliance Benchmarks for Electric Service Companies" ("PREPA's Comments"). PREPA later requested leave from the Bureau to re-file the January 29th comments. The Independent Office of Consumer Protection (OPIC by its Spanish acronym) and the Solar and Energy Storage Association of Puerto Rico (SESA), also filed comments for consideration.

Per a Resolution and Order issued by the Bureau on February 1, 2021, that extended the deadline to file comments, on February 5, 2021, LUMA re-submitted its comments, as well as its proposed performance baselines and metrics. On even date, PREPA submitted supplemental comments ("PREPA's Supplemental Comments"). The record also shows that on February 5,

2021, the Rocky Mountains Institute (RMI) filed comments with recommendations on performance-based regulation proceedings.

Within the deadline set by the Energy Bureau, LUMA hereby submits, as Exhibit 1, its Reply to the comments that were filed for the record on performance baselines and compliance benchmarks (“LUMA’s Reply”). Exhibit 1 also includes a summary table that links LUMA’s Recovery and Transformation Goals with LUMA’s proposed Performance Metrics and breakdowns the Goals into its component Objectives. *See* Exhibit 1, Appendix A. Additionally, Exhibit 1 includes LUMA’s proposed Major Outage Events Performance Metrics. *Id.* Appendix C.

LUMA welcomes the opportunity to engage in discussions with the Bureau, PREPA and stakeholders, to develop the administrative record and assist the Bureau in the task that it set out in the Resolution and Order of December 23, 2020.

II. Comments by Stakeholders

The comments filed by stakeholders OPIC, SESA and RMI, enrich this proceeding and allow the Energy Bureau to consider a wide range of relevant information. LUMA has and will continue to carefully consider their input and recommendations.

LUMA agrees that OPIC’s customer-focused approach to Performance Metrics is critical to achieving meaningful outcomes for customers. LUMA looks forward to working toward that end and to engage in productive conversations with OPIC and the Energy Bureau on LUMA’s proposed customer-centric Performance Metrics to objectively measure progress in services to customers.

LUMA recognizes NRI's experience in performance metrics proceedings in other jurisdictions. NRI will provide valuable insights and experiences that may be leveraged in Puerto Rico.

LUMA has also considered SESA's input on guiding principles and Performance Metrics related to renewable energy sources. SESA's recommendations on multi-stakeholder workshops and Act 17 compliance are valuable and LUMA recognizes suggestions for Performance Metrics related to integration of small-scale renewables, among others.

LUMA appreciates that the Bureau has allocated meaningful opportunities from stakeholders to participate in this proceeding.

III. The Scope of the PREB's Order on PREPA's Baseline and Performance Metrics

In its Resolution and Order of December 23, 2020, initiating proceedings on PREPA's baseline performance and compliance benchmarks, the Bureau directed that it intended to use available data on PREPA's performance to **“establish the baseline (*i.e.* PREPA's current performance) and the targets or compliance benchmarks with which the Puerto Rico electric system should comply.”** December 23rd Resolution and Order at page 5; *see also* Resolution and Order of May 14, 2019, Case No. NEPR-MI-2019-0007 (emphasis added). To that end, the Bureau requested comments on the available data on PREPA's performance and on performance metrics that were selected by the Bureau as part of a data gathering phase in this proceeding.

During the pre-filing conference held on January 19, 2020, the Commissioners explained that they expected to receive from LUMA and PREPA. The Bureau further clarified that the purpose of this proceeding is to assess where PREPA's performance is and where it should be and that PIMs for LUMA would be set in the parallel case NEPR-AP-2020-0025.

Despite the intended limited scope of this proceeding which is to set performance metrics for the operation of the electric power system and grid, PREPA's Comments include suggestions that performance metrics should be set for other components of future performance for which there is currently no data available to set performance baselines. LUMA disagrees. *See* Exhibit 1 for a detailed explanation.

IV. PREPA's Comments on the OMA and its Claimed Fiduciary Role Should be Rejected.

Substantial portions of PREPA's Comments are, at heart, a manifesto on its generalized qualms with the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement ("OMA") and with the statutorily-mandated transformation of the energy sector that transferred important elements of PREPA's operations to private actors as the ideal means to reach energy public policy objectives. PREPA has taken issue with provisions of the OMA that bind it as a signatory to the contract and that, more importantly, were adopted in a careful process that involved approval by several public actors, including PREPA's Board of Directors. It is regrettable that PREPA has chosen this proceeding on performance baselines and metrics to obfuscate and present speculative and undocumented concerns.

The OMA and PREPA's current role with regards to the operation of the T&D System arise under conscientious and mature legislative mandates that include, Act 29-2009, known as the Puerto Rico Public Private Partnerships Act ("Act 29-2009"); Act 57-2014, known as the "Puerto Rico Energy Transformation and Relief Act," Act 120-2018, known as the "Puerto Rico Electric Power System Transformation Act ("Act 120-2018"); and Act 17-2019, known as the "Puerto Rico Energy Public Policy Act".

Act 57-2014, was borne out of legislative and public concern with the fact that PREPA "ha[d] become a monopoly that regulate[d] itself; set[] its own rates without actual oversight;

incur[red] operational, managerial, and administrative deficiencies . . . ; and whose governance lack[ed] transparency and citizen participation. *See* Statement of Motives, Act 57-2014. Act 57-2014 adopted a detailed legal framework to transform PREPA. One of the bedrocks of this legally-mandated PREPA transformation is that to “enforce a thorough reform of the energy sector that promotes the operation and administration of an efficient system at just and reasonable costs, . . . a regulatory and legal framework through the creation of a robust independent [is needed] *See* Statement of Motives. To that end, Act 57-2014 created the Bureau (at the time known as the “Puerto Rico Energy Commission”) as the main entity in charge of ensuring compliance with the energy public policy and to carry out energy policy mandates. *See e.g.*, Section 6.3, Act 57-2014.

Thus, since 2014, PREPA’s transformation included important checks on its ill-executed management of operations. Some four years later, a second legislative mandate of transformation was adopted in Act 120-2018. In the aftermath of hurricanes Irma and María, the Legislative Assembly highlighted that PREPA lacked “the conditions to offer an efficient service at a reasonable cost for residential, commercial, and industrial customers and that . . . neither PREPA nor the Government ha[d] the necessary financial resources to carry out its operational restructuring, achieve financial recovery, and make the [required] substantial infrastructures changes.” *See* Statement of Motives, Act 120-2018.

Act 120-2018 established processes to open the energy market to private enterprises and to request proposals from entities that are able to participate in the energy transformation of Puerto Rico, specifically, through the creation of Public-Private Partnerships (PPPs) under the framework of Act 29-2009, as modified with respect to PREPA’s energy transformation. *See Id.*, Statement of Motives and Section 3, Act 120-2018. Act 120-2018 authorizes PREPA and the P3 Authority to establish a PPP for any Function, Service or Facility of PREPA, including PREPA’s

transmission and distribution system and for the optimization of services to consumers (these, in addition to the externalization of the generation assets, among others, the “PREPA Transactions”). *See Id.*, Sections 3, 4, 5(a) and 11(dd).

Act 17-2019 expanded Act 57-2014’s mandate to approve an energy public policy and regulatory framework to govern the transformation of the electric system. *See Id.*, Statement of Motives. Regarding the status of the assets that for seventy-eight years had been entrusted to PREPA, the Legislative Assembly explained that “[e]lectric power services in Puerto Rico are inefficient, unreliable, and provided at an unreasonable cost to residential, commercial, and industrial customers despite the existence of a vertically integrated monopolistic structure. This is mainly due to a lack of infrastructure maintenance, the inadequate distribution of generation *vis-à-vis* demand, the absence of the necessary modernization of the electrical system to adjust it to new technologies, energy theft, and the reduction of the Electric Power Authority’s personnel.” *Id.*

Importantly, Act 17-2019 ordered PREPA to delegate or transfer the operation, administration, distribution, commercialization and operation of the Electric System, including executing one or more PPP Contracts, in accordance with Act 17-2019, Act 120-2018 and Act 29-2009, and to transfer the functions of transmission and distribution – and established a deadline for that process. *Id.*, Articles 1.7 and 1.8(b).

The OMA arises under Act 29-2009 that authorizes Government Entities, to establish PPPs and enter into public-private partnership contracts (“P3 Contracts”) in connection with any Function, Service or Facility for which the Government Entity is responsible under its enabling act or special laws. *Id.*, Article 4. Pursuant to the directives and public policies established in Act 29-2009, Act 120-2018 and Act 17-2019, the P3 Authority conducted the required processes to

procure and secure a private entity to provide operation and maintenance services for PREPA's transmission and distribution system, which processes resulted in the execution of the OMA.

In accordance with Section 8 of Act 29-2009¹ and Section 5 of Act 120-2018,² the Partnership Committee on the OMA (a PREPA Transaction), included the participation of PREPA's Executive Director and of the Chairman of PREPA's Board. Prior to the execution of the OMA, as required by Act 120-2018, the P3 Authority submitted the proposed OMA to this honorable PREB for review.

The P3 Authority also submitted the OMA for review and approval by the Governing Board of PREPA, the Fiscal Oversight Management Board, and the Governor of Puerto Rico (or her representative), all of whom evaluated and approved it. By Resolution and Order in Case NEPR-AP-2020-0002, issued on June 17, 2020, this honorable Bureau issued an Energy Compliance Certificate with respect to the proposed OMA, determining that the proposed OMA

¹ In pertinent part, Section 8 of Act 29-2009 provides that:

The [P3] Authority shall create a Partnership Committee for each Partnership which the former has determined to be appropriate; however, in the case of Small Scale Projects, the provisions of subsection (b) of this Section shall apply. The Committee shall be constituted by (i) the President of the Bank or his delegate; (ii) the officer of the Partnering Government Entity directly concerned with the project or his delegate; (iii) one (1) member of the Board of Directors of the Partnering Government Entity or, in the case of Government Entities with no Board of Directors, the Secretary of the Department to which such Partnering Government Entity is attached, or his delegate or an official thereof with specialized knowledge in the kind of project object of the selected for Partnership by the Board of the Authority; and (iv) two (2) officials from any Government Entity chosen by the Board of Directors of the Authority for their knowledge and experience in the kind of project object of the Partnership under consideration.

27 LPRA §2607 (2020).

² Section 5 (C) of Act 120-2018 provides that:

The [P3] Authority shall designate a Partnership Committee, pursuant to the provisions of Act No. 29-2009, to evaluate and select qualified persons and the PREPA Transaction Proponents, and to establish and negotiate the terms and conditions it deems appropriate for the pertinent Partnership or Sales Contracts in accordance with the provisions of this Act and Act No. 29-2009

(as modified pursuant to PREB's requirements during the process) complied with the Puerto Rico Energy Public Policy and regulatory framework. *See In re Certificate of Energy Compliance*, Case No. NEPR-AP-2020-002 (June 17, 2020). The OMA, as certified by PREB, was subsequently executed among the Parties and entered into effect on June 22, 2020 (the "Effective Date").

Given the aforementioned scenario and legal mandate, it is surprising that, in a filing where PREPA was required to comment on the status of its current performance as a means to establish performance baselines and to set targets and compliance benchmarks, PREPA included an apologia of disagreements with the OMA and claimed interests as owner of the electric grid and assets. In the guise of proposing performance metrics, PREPA's Comments include a list of alleged concerns, a defense of an unprincipled fiduciary duty, and unilaterally claims a supervisory role over LUMA that is contrary to applicable law and public policy. PREPA sidesteps the text of the OAM and the directions of the Resolution and Order dated December 23, 2020, issued by PREB in this case that defined the scope of this docket, and belittles the resounding legislative mandate of regulatory oversight and transfer to third parties of control over key components of PREPA's operations.

PREPA's current role is established by Acts 57-2014, 17-2019, and 120-2019, and is exercised according to the OMA that was approved pursuant to those statutes. PREPA did not invoke any legal authority or contractual provision that may be read as granting it oversight powers over LUMA. Said oversight belongs to this honorable Energy Bureau, to interested stakeholders, and to the ratepayers. More importantly, under the OMA, the P3 Authority plays a key role as Administrator, which fact allays all of PREPA's speculative concerns on the future use and condition of the system's assets. In sum, there are checks and balances to LUMA's responsibilities

under the OMA; none of which recognize or require the fiduciary role that PREPA has claimed in its comments.

PREPA's qualms with its current statutory-mandated role is a quarrel with public policy that is not suited for this proceeding. LUMA requests that the Bureau disregard those portions of PREPA's comments that do not address its current performance and that are outside the purview of this regulatory proceeding.

V. Specific Replies

In Exhibit 1, LUMA addresses the Performance Metrics that were proposed by PREPA and three stakeholders. Additional replies to PREPA's comment on the need for additional performance metrics are included herewith.

A. There is no Incentive to Increase Energy Use.

PREPA suggests that because per Section 5.5(d) of the OMA, LUMA has the option to propose capital improvements for the Bureau's approval, it has an incentive to increase energy use and the size of the system in contravention of energy public policy. LUMA disagrees as that is not a correct reading of the OMA. LUMA's fees will not change due to increase in load (energy use), asset base (size of the system) or increase in rates.

The fact that LUMA is not the owner of the assets and that the contract is not a concession where revenues are owned by the concessionaire, is enough to refute the contention that there is an incentive to expand energy use or to increase the size of the system to increase revenues. PREPA's suggestion that Section 5.5(d) of the OMA requires an additional Performance Metric is misplaced and should be disregarded.

B. The OMA's Requirements Ensure that LUMA Operates According to Prudent Utility Practices.

PREPA suggests that additional performance metrics should be set to ensure that LUMA properly safeguards the system's assets. LUMA disagrees. OMA standards that require LUMA to operate according to Prudent Utility Practices³ are enough to ensure that LUMA meets its contractual obligations without harm to the assets. A performance metric is not proper because there is no indication that there is need to incentivize performance to induce behavior consistent with public policy *that would not otherwise occur to a sufficient degree* in the absence of the PIM, as required by Action 7(B) of Regulation 9137.

C. The OMA's Incentive Structure Complies with Applicable Laws

PREPA's Comments suggest, without specific reference to the OMA, that additional performance metrics are needed to address the agreed-upon compensation structure. PREPA's comments fail to take into account Annex IX to the OMA, which includes proposed metrics on financial performance that were selected to incentivize accurate cost management. LUMA has proposed metrics for the operating and capital budgets –federally funded and non-federally funded–. See Exhibit 2 to LUMA's Submission of February 5, 2021, Section 3. The proposed performance metrics include clear and quantifiable means of measuring LUMA's ability to operate within budget to incentivize effective cost management. They should be accepted as satisfactory to address concerns on the need to incentivize behavior on financial performance.

³ Under the OMA, a "Prudent Utility Practice" is defined, in pertinent part, as:

at any particular time, the practices, methods, techniques, conduct and acts that, at the time they are employed, are generally recognized and accepted by companies operating in the United States electric transmission and distribution business as such practices, methods, techniques, conduct and acts appropriate to the operation, maintenance, repair and replacement of assets, facilities and properties of the type covered by the [OMA]. [...]

Section 1.1.

In any event, the O&M compensation structure (which was adopted after a rigorous 18-month competitive procurement process whereby LUMA offered the best proposal and it was approved by all the government entities mandated by law), also reflects the limits and boundaries that are mandated by the United States Internal Revenue Service (IRS) requirements when a private party manages assets built or improved with tax exempt bonds. As part of the permitted compensation structures, the IRS has historically provided for limits in the proportion or percentages of fixed fees versus incentive fees, calling for caution by parties that enter into these contracts when negotiating compensation. The Parties to the OMA took that into account when establishing the current fees that LUMA can earn under the OMA.

VI. Conclusion

This Bureau plays a fundamental role in the oversight of LUMA and the energy industry, which includes the implementation of the OMA, both during the transition period prior to commencing LUMA's operations, and after commencement of operations. LUMA appreciates that the Bureau will consider comments by LUMA, PREPA and stakeholders. LUMA looks forward to engaging with the Bureau, PREPA and stakeholders, during the next Technical Conference to discuss the comments and proposals that have been filed for the record.

WHEREFORE, LUMA respectfully requests that the Energy Bureau take notice of this motion and accept the reply included as Exhibit 1 to this motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 19th day of February 2021.

I hereby certify that I filed this motion using the electronic filing system of this Energy Bureau and that I will send an electronic copy of this motion to the attorneys for PREPA, Joannely Marrero-Cruz, jmarrero@diazvaz.law; and Katuska Bolaños-Lugo, kbolanos@diazvaz.law. The

case docket and comments filed by the OPIC, SESA and RMI do not include contact information to serve them a copy of this motion via electronic mail. LUMA understands that this motion will be part of the public docket and requests that the clerk's office sends OPIC, SESA and RMI a copy of this filing.

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