

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

NEPR

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IN RE:

COORDINATION OF SYSTEM
PLANNING EFFORTS-FRONT END
TRANSITION OF T&D SYSTEM
OPERATION AND MAINTENANCE

CASE NO.: NEPR-MI-2020-0008

SUBJECT:

Motion for Reconsideration of Order issued on February 17, 2021.

**MOTION FOR RECONSIDERATION OF RESOLUTION AND ORDER OF
FEBRUARY 17, 2021 ON LUMA’S MONTHLY REPORTS ON COSTS AND EXPENSES
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:

1. Beginning on July 2020, LUMA has filed with this honorable Puerto Rico Energy Bureau (“Bureau,” “Energy Bureau” or “PREB”), Monthly Status Reports on LUMA’s Performance During the Front-End Transition Period (“FET Transition Period”) and on Front-End Transition Services (“FET Monthly Reports”). *See* FET Monthly Reports from June 2020 until December 2020 filed in this proceeding Case No. NEPR-MI- 2020-0008. The FET Monthly Reports include a Financial Progress Report in accordance with Section 4.6(d) of the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (“OMA”), where LUMA informs the expenses incurred per Department. The FET Monthly Reports also include the FET Transition Period Hourly Costs (total) and the total sum of additional costs and expenses. *See id.*

2. On February 17, 2021, this honorable Energy Bureau issued a Resolution and Order directing LUMA to file, within ten days, “information related to the additional costs and expenses incurred by LUMA in the course of providing the [Front-End Transition] Services [FET Services], from the date FET Services commenced until the most recent Monthly Report. *See* February 17th Resolution and Order at page 3. The Bureau further directed that, “[p]rospectively, [LUMA shall] submit the aforementioned information as an attachment to all future FET Monthly Reports.” *Id.*

3. In the February 17th Resolution and Order, the Bureau also indicated, in pertinent part, that it is the Energy Bureau's “responsibility that the Front-End Transition Service Fee is prudent and reasonable. In the event the Energy Bureau finds such additional costs and expenses to be unreasonable, it will be obligated to prevent such costs and expenses to be reimbursed to LUMA.” *Id.* at page 2. The Bureau further stated that the February 17th Resolution and Order is based on its powers and duties pursuant to Section 6.3 (c) the “Puerto Rico Energy Transformation and RELIEF Act” (“Act 57-2014”), “to establish and implement the necessary regulatory actions to guarantee reasonability of the rates.” *Id.* Finally, the Bureau invoked Section 6.4(b) of Act 57-2014, on its general jurisdiction to “require any certified electric power service company to produce copies of any records, documents, information, or data deemed necessary by the Energy Bureau to fulfill its responsibilities.” *Id.*

4. For the past seven months, LUMA has filed Monthly Reports in this proceeding, with costs and expenses as part of its commitment with transparency. Prior to the February 17th Resolution and Order, the honorable Bureau had not raised concerns with the scope of the information submitted monthly by LUMA in the FET Monthly Reports on additional costs and expenses nor with the considered procedures set forth in Section 4.6 of the OMA by which LUMA

submits and has submitted invoices and supporting documentation on FET Transition Period costs and expenses to the P3 Authority for review and approval.

5. In establishing the processes to open the energy market to private enterprises through the creation of Public-Private Partnerships (PPPs) under the framework of Act 29-2009, known as the “Puerto Rico Public Private Partnerships Act” (“Act 29-2009”) and Act 120-2018, known as the “Puerto Rico Electric Power System Transformation Act (“Act 120-2018”), Puerto Rico’s Legislative Assembly delegated authority to the P3 Authority to secure a private entity to provide operation and maintenance services for the Puerto Rico Electric Power Authority’s (“PREPA”) transmission and distribution system (“T&D System”).

6. Under Act 29-2009, the P3 Authority is designated as the only governmental entity authorized and responsible for implementing Act 29’s public policy, and is empowered to, among others things: (i) regulate the processes related to the establishment of PPPs; (ii) evaluate the terms and conditions of each PPP contract and make recommendations to the participating government entity (in this case, PREPA), (iii) provide the participating government entity any type of assistance consistent with the purposes of Act 29, including financial, consulting, technical, administrative and advisory services; and (iv) supervise the performance and compliance of a PPP contractor with a P3 contract, with the assistance of the participating government entity. *See* Act 29-2009, Articles 6(b)(ii), (iii) and (ix) 10(d), 27 LPRA §2605 (2019 & Electronic Supplement 2020). Certainty and legal stability were also evaluated and considered when Act 29-2009 was approved to foster PPPs in Puerto Rico.¹

¹ Per Section 3 of Act 120-2018, the OMA is “fully covered and protected by [the] Constitution [of Puerto Rico] in what it pertains to the enjoyment of property, the due process of law, and the enactment of laws impairing contractual obligations.” Act 120-2018, Section 3, 22 LPRA §1113 (2019 & Supplement 2020).

7. The OMA is the product of the aforementioned novel statutory framework that delegated authority to the P3 Authority over PPPs, including supervision of the contract with the private contractor to operate PREPA's T&D System (the OMA for operation of the T&D System).

8. The P3 Authority's role as Administrator of the OMA was validated by the approval by the Governing Board of PREPA, the Fiscal Oversight Management Board, and the Governor of Puerto Rico (or her representative). Importantly, in the 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 (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").

9. Regarding monthly payments for Front-End Transition Compensation, the OMA provides that "[o]n or prior to the tenth (10th) day of each month during which Operator is performing the Front-End Transition Services, Operator shall provide Administrator with a monthly invoice describing in reasonable detail the prior calendar month's Front End Transition Services and the corresponding Front End Transition Service Fee for such prior calendar month. . . ." *See* OMA Section 4.6 (d)(i) (hereinafter, these invoices for Front-End Transition Compensation will be referred to as "FET Invoices"). LUMA is also required to promptly provide to the P3 Authority, "such additional supporting documentation evidencing the provision of the Front End Transition Services, if any, and the calculation of the Front End Transition Service Fee related thereto as Administrator may reasonably request and as may be required by Applicable Law." *Id.*

Upon review of the FET Invoices and supporting documentation the P3 Authority “shall promptly advise Operator of any disputed invoice amounts[...]. *Id.*

10. Disputes regarding the estimated anticipated FET Service Fee or any of the monthly invoiced amounts are to be resolved as a Technical Dispute pursuant to the provisions of Article 15 of the OMA. *See Id.*, Sections 4.6(c)(ii) and (d)(iii). This process has not been activated to date, as LUMA has complied with the processes and requests from the P3 Authority.

11. Since July 2020, in furtherance of its legislatively delegated duties as Administrator of the OMA, the P3 Authority has received, reviewed and approved LUMA’s FET Invoices per Section 4.6(d) of the OMA and pursuant to a process defined by the P3 Authority in its Invoice Evaluation Manual issued for these purposes. To date, the P3 Authority has exercised said oversight, verification and approval roles pursuant to the OMA and in accordance with Acts 29-2009 and 120-2018. When questions and additional information or substantiation of cost has been requested by the P3 Authority, LUMA has responded to the P3 Authority. Based on that process, and after the P3 Authority has validated that the invoicing pre-intervention process has been completed, payment has been authorized. Pursuant to these processes, payments have been made to LUMA and are current. Reports on Invoices submitted to P3 Authority by LUMA and P3 Authority’s evaluation and validation reports can be found at P3 Authority’s website at <https://aafaf.pr.gov/p3/projects/> (under Existing P3s—Electric Power Transmission and Distribution System (T&D)—P3 Monthly Reports and LUMA Monthly Reports).

12. The aforementioned provisions of the OMA implement the authority delegated by the Legislative Assembly to the P3 Authority *via* Acts 29-2009 and 120-2018, for the evaluation, review, request for supporting documentation and approval, when and if appropriate, of FET Invoices. This procedure over FET Invoices is the mechanism established to safeguard the public

interest and ensure that the services, costs and expenses incurred in connection with FET Services are in compliance with the OMA and the expected tasks and activities to be performed by LUMA during the FET Period, and aligned with the transformation goals mandated under a PPP agreement.

13. LUMA recognizes that this honorable Bureau has a role, per Section 8(d) of Act 120-2018, to “assist the [P3 Authority] in supervising the performance and compliance of the Contractor with the Partnership or Sales Contract, in accordance with Section 10(d) of Act No. 29-2009.” 22 LPRA §1118 (2019 & Electronic Supplement 2020). However, Act 120-2018 also provides that “[t]he Commission shall have no authority to alter or amend the Partnership or Sales Contract, and shall not interfere in operational or contractual matters, except as provided in subsection (f) of this Section.” *Id.* It is respectfully submitted that the filing of documentation related to FET Invoices is a contractual matter with a very specific process that is and has been conducted with the P3 Authority in accordance with the OMA and Act 120-2018.

14. LUMA also recognizes that per Section 8(f) of Act 120-2018, the Bureau retained authority “to revise and approve any modification to . . . rates and any other types of fees.” *Id.*, Section 8(f). Respectfully, however, at this juncture, the Bureau’s power to revise and modify rates is not implicated in the OMA procedures under Section 4.6(c) or (d) or expressly requested by any Party to the OMA to pay for LUMA’s services.

15. During the ongoing FET Period, PREPA has not requested a modification of the current rate base or structure. And, as LUMA explained in its Petition for Approval of the Initial Budgets and Related Terms of Service, LUMA is **not** seeking an increase or revision in the base rate, overall revenue requirements, or a change in the current rate structure approved by the Energy Bureau’s 2017 Rate Order, Case No. CEPR-AP-2015-0001, in connection with the Initial Budgets.

See Petition for Approval of Initial Budgets and Related Terms of Service, Case No. NEPR-TEMP-2021-2380. Given these circumstances, the Bureau’s February 17th Resolution and Order requesting information on costs and expenses additional to that included in the FET Monthly Reports, is not reasonably related to its powers with regards to an increase in the rates charged to customers for electric power services. *See e.g. Caribe Communications v. Puerto Rico Telephone Co, Inc.*, 157 DPR 203, 211 (2002) (stating the general principle of delegated statutory authority as a precondition for actions undertaken by administrative agencies).

16. We highlight the fact that at this point LUMA is not acting as operator of the T&D System (i.e., LUMA is not providing Operation and Maintenance Services (“O&M”) per Section 5.1 of the OMA) nor is it providing services akin to the operations of an electric power service company. Contractually LUMA’s role is that of a service provider. In providing services during the FET Period LUMA is not different from other contractors that PREPA has or from contractors that other electric service company may have. With respect to any such contractors, LUMA is not aware that this honorable Bureau may have issued directives such as the February 17th Resolution and Order requesting detailed information and supporting documentation on costs and expenses. Once LUMA begins providing O&M Services for the T&D System, LUMA will be operating under an approved budget. The nature and extent of the Bureau’s oversight over LUMA’s costs will be different than the current scenario regarding FET Services.

17. In furtherance of its commitment with transparency with the public and with this Bureau, LUMA will continue to file with the Energy Bureau, FET Monthly Reports on costs and expenses with the breakdowns of the costs incurred by Department. The substance of said reports and the supporting information on invoices will also be submitted to the P3 Authority who, as mentioned in paragraph 11 *supra*, publishes the information on its website. Considering that

LUMA is required to submit the supporting documentation on FET Invoices to the P3 Authority, it is respectfully submitted that said reports to the P3 Authority comply with public policy interests in transparency and are consistent with the powers that the Legislative Assembly delegated to the P3 Authority with regards to PPPs.

18. The Bureau's February 17th Resolution and Order is unprecedented in this proceeding where, as stated, LUMA has continually filed FET Monthly Reports with the Bureau and has filed FET Monthly Reports and FET Invoices with the P3 Authority who discloses information on its website. LUMA respectfully requests that the Bureau consider the aforementioned and reconsider the February 17th Resolution and Order directing that LUMA provide supporting documentation on the FET Invoices on costs and expenses that have been submitted to the P3 Authority for approval.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **take notice** of the aforementioned and **reconsider and set aside** its February 17th Resolution and Order.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 1st day of March 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; Katuska Bolaños-Lugo, kbolanos@diazvaz.law; and Maraliz Vázquez mvazquez@diazvaz.law.

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