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

IN RE: APPROVAL OF INITIAL BUDGETS AS ANNUAL EXAMINATION BY THE PUERTO RICO ENERGY BUREAU AND UNDER SECTION 4.2(e) OF PUERTO RICO TRANSMISSION AND DISTRIBUTION SYSTEM OPERATION AND MAINTENANCE AGREEMENT, AND RELATED TERMS OF SERVICE	SUBJECT: Request for Examination and Approval of Initial Budgets and Related Terms of Service.

PETITION FOR APPROVAL OF INITIAL BUDGETS
AND RELATED TERMS OF SERVICE

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC ("ManagementCo"), and **LUMA Energy ServCo, LLC** ("ServCo"), (jointly referred to as the "Operator" or "LUMA"), and respectfully submit this Petition to the honorable Puerto Rico Energy Bureau (the "PREB," "Energy Bureau," or "Bureau"), requesting that Energy Bureau approve all components of the Initial Budgets prepared by LUMA, including certain terms of service discussed under caption VI.D. below, under Section 4.2(e) of the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement dated as of June 22, 2020, by and among the Puerto Rico Electric Power Authority ("PREPA" or "Owner"), the Puerto Rico Public-Private Partnerships Authority ("P3 Authority") and LUMA (the "OMA"):

I. Introduction

PREPA and the P3 Authority entered into the OMA with LUMA to (i) provide management, operation, maintenance, repair, restoration and replacement, and other related services for the transmission and distribution system ("T&D System"), in each case that are customary and appropriate for a utility transmission and distribution system service provider, and (ii) establish policies, programs and procedures with respect thereto ((i) and (ii), collectively, the "O&M Services"). *See* OMA Section 5.1.[1] The O&M Services are to be provided in accordance with the "Contract Standards,"[2] requiring compliance with Applicable Law[3], Prudent Utility Practice[4], and other standards, terms, conditions and requirements specified in the OMA (for purposes of this Petition, "Contract and Policy Standards"). Contract and Policy Standards necessarily require acting consistently with policy mandates and directives in Act 57-2014, as amended, known as the "Puerto Rico Energy Transformation and RELIEF Act" ("Act 57-2014"), Act 120-2018, as amended, known as the Electric Power System Transformation Act ("Act 120-2018") and Act 17-2019, known as the "Puerto Rico Energy Public Policy Act" ("Act 17-2019"), among others.

The O&M Services are to commence on a date referred to as the "Service Commencement Date," or the "Interim Period Service Commencement Date" if PREPA remains in Title III

[1] The OMA further provides that, except for those rights and responsibilities reserved for PREPA and the P3 Authority or otherwise expressly provided in the OMA, LUMA "shall (A) be entitled to exercise all of the rights and perform the responsibilities of [PREPA] in providing the O&M Services, and (B) have the autonomy and responsibility to operate and maintain the T&D System and establish the related plans, policies, procedures and programs with respect thereto as provided in [the OMA]." *Id*. Moreover, the OMA provides that LUMA shall function as agent of [PREPA] and PREPA "irrevocably authorizes [LUMA] to (i) represent [PREPA] before PREB with respect to any matter related to the performance of any O&M Services provided by [LUMA] under [the OMA]" and "(ii) prepare all related filings and other submissions before PREB" among other functions. OMA, Section 5.6.

[2] The OMA specifically defines "Contract Standards" as "the terms, conditions, methods, techniques, practices and standards imposed or required by: (i) Applicable Law; (ii) Prudent Utility Practice; (iii) applicable equipment manufacturer's specifications and reasonable recommendations; (iv) applicable insurance requirements under any insurance procured pursuant to this Agreement; (v) the Procurement Manuals, as applicable, and (vi) any other standard, term, condition or requirement specifically contracted in this Agreement to be observed by [LUMA]." *Id.* Section 1.1 at page 9.

[3] This term includes "any foreign, national, federal, state, Commonwealth, municipal or local law, constitution, treaty, convention, statute, ordinance, code, rule, regulation, common law, case law or other similar requirement enacted, adopted, promulgated or applied by any [governmental body][…]" in each case applicable to the parties to the OMA. *Id.,* Section 1.1 at page 3.

[4] "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] . . . ." *Id.* at page 26.

bankruptcy proceeding, and certain conditions precedent specified under the OMA are satisfied or waived (collectively, for purposes of this Petition, the "Commencement Date").[5] *See Id*., Sections 4.5, 4.7(b). Beginning on the Effective Date (that is, June 22, 2020) and until Commencement Date[6] (this period, the "Front-End Transition Period"), LUMA[7] is required to provide "Front-End Transition Services"[8] which are "intended to ensure an orderly transition of the responsibility for the management, operation, maintenance, repairs, restoration and replacement of the T&D System to [LUMA] by the . . . [Commencement Date], without disruption of customer service and business continuity […]" *Id.*, Sections 1.1 (definition of "Front-End Transition Period"), 4.1(a).[9]

Among other actions, during the Front-End Transition Period, LUMA[10] is required to prepare and submit to the P3 Authority proposed Initial Budgets for the P3 Authority's review, and after such review or comment process, submit the Initial Budgets to PREB. *See* OMA Section 4.2(e). Upon review of the Initial Budgets, PREB may then "approve, deny or propose modifications to such proposed Initial Budgets in accordance with Applicable Law." *Id.* The

[5]LUMA is assuming that PREPA will not exit the Title III Bankruptcy proceeding before June 1, 2021. Consistent with statements from the Executive Director of Financial Oversight and Management Board (FOMB) and PREPA Certified Fiscal Plan for FY2021, certified on June 29, 2020, the Initial Budgets assume that PREPA will exit Title III at December 31, 2021. *See e.g., "*Natalie Jaresko: "we are going to emerge from bankruptcy in 2021", PR Headline News, https://www.puertoricoheadlinenews.com/natalie-jaresko-we-are-going-to-emerge-from-bankruptcy-in-2021/ (last visited February 22, 2021). Consequently, LUMA anticipates providing the O&M Services during the Interim Period pursuant to the Supplemental Terms Agreement agreed between the OMA parties precisely for this contingency. If PREPA exits the Title III bankruptcy proceeding contemporaneously with all other conditions precedent to Service Commencement Date, then LUMA will begin providing O&M Services without the need for an "interim period." Mentions in this document (and in all other OMA required submittals to PREB), to "beginning of O&M Services," "start of operations," "start of operations and maintenance services," and other allusions of similar import, shall be understood to refer to the end of the Front-End Transition Period and LUMA's commencement of O&M Services regardless of whether it is in under an "interim period" or after full "Service Commencement Date."

[6] *See Id.*

[7] ManagementCo in particular.

[8] The Front-End Transition Services are defined in the OMA as services to "complete the transition and handover to [LUMA] of the operation, management and other rights and responsibilities with respect to the T&D System pursuant to [the OMA], including the services contemplated by the Front-End Transition Plan; provided that the Front-End Transition Services shall not be O&M Services." [8] OAM Section 1.1 (Emphasis ours).

[9] Although both ManagementCo and ServCo constitute the Operator under the OMA, after the Commencement Date, ServCo will provide the vast majority of the O&M Services while ManagementCo's role will be mainly providing oversight and management of ServCo.

[10] ManagementCo., in particular.

approval by this honorable Bureau of the Initial Budgets is a condition precedent to Commencement Date.

Pursuant to Section 4.2(e) of the OMA, LUMA prepared the Initial Budgets attached hereto as Exhibit 1 (including LUMA's proposed budget allocation for a Generation Budget as PREPA has not provided to LUMA a Generation Budget).

As required under the OMA, and after having concluded an iterative review process with the P3 Authority's advisors during the months of December 2020 and January 2021, LUMA submitted revised versions of the Initial Budgets to the P3 Authority on February 4, 2021 for the P3 Authority's final review and comments. The comments and suggestions of the P3 Authority's advisors and the P3 Authority were discussed and addressed and the outcome of that iterative process, which concluded on February 20, 2021, resulted in the Initial Budgets herein submitted to PREB.

LUMA is filing its Initial Budgets in compliance with Section 6.22(a)(2) of Act 57-2014, which dictates, among other matters, that electric power service companies file before PREB "[f]uture operating budgets during the period of time determined by PREB. . . ," and pursuant to paragraph 441 of the Final Resolution and Order dated March 31, 2017, where this honorable Bureau directed that budget reviews will be conducted between full rate cases. *See* Case No. CEPR-AP-2015-0001 ("2017 Rate Order") (dated March 31, 2017 and that came into effect on May 11, 2019). It is respectfully submitted that this Petition is being filed under a new case docket, because LUMA was unable to find a prior or active case docket for the Bureau's budget review.

LUMA provides in this Petition for review of the Initial Budgets, a summary of the main hallmarks of the Initial Budgets included as Exhibit 1. To be clear, LUMA is **<u>not</u>** seeking an increase or revision in the base rate,[11] overall revenue requirements, or a change in the current rate structure approved by the 2017 Rate Order, in connection with the Initial Budgets.

LUMA hereby requests that the Energy Bureau issue an order of approval of the Initial Budgets and an order to incorporate in the tariff approved by the Bureau (PREPA's Tariff Book), the Terms of Service that are included as Exhibit 2 to this Petition and discussed in caption VI.D. below.

II. Energy Bureau's Authority

As the main entity in charge of ensuring compliance with energy public policy and to carry out energy policy mandates, this honorable Bureau has authority to review this Petition pursuant to Act 57-2014 and Act 17-2019. Specifically, Act 57-2014 gives the Energy Bureau authority and regulatory oversight over electric services and electric service companies, such as PREPA and LUMA. *See* Act 57-2014, Sections 6.3 and 6.4. Among other powers, the Energy Bureau may establish public policy standards with respect to electric service companies, establish rates, regulate any transaction, action or omission in connection with the electric power grid and the electric power infrastructure, and exercise jurisdiction over certified electric power companies, persons connected to the grid or receiving energy services and persons that exercise control over the provision of electric power services. *See Id.*

The PREB's jurisdiction over this Petition also arises under Section 6.22 of Act 57-2014, which provides that electric power service companies shall submit operating budgets to this honorable Bureau. Also relevant is the 2017 Rate Order, pursuant to which this honorable Bureau

[11] Per PREB Regulation 8720, *New Regulation on Rate Filing Requirements for the Puerto Rico Electric Power Authority's First Rate Case*, approved on March 28, 2016, the term "base rate" means "the rates charged by PREPA for the provision of electric service pursuant to the Commission-approved tariff. Base rates shall not include those costs included in the fuel adjustment clause, the purchase power clause, the Transition Charge, or other pass-through adjustor mechanisms, such as those that may be established for municipal lighting or Contributions in Lieu of Taxes (CILT)."

reviews budgets for the years between full rate cases. *See* 2017 Rate Order, ¶441 (on annual budget examinations).

III. Coordinated Approach to FET Deliverables

a. Assess, Analyze and Plan

As part of Front-End Transition Period activities, LUMA has followed a three-step approach to developing the Initial Budgets and other deliverables under Sections 4.1 and 4.2 of the OMA (for purposes of this Petition, the "FET Deliverables"). This approach consists of: (1) assessing, (2) analyzing, and (3) planning.

In the assessment phase, LUMA conducted a broad, preliminary assessment (also referred to as "gap assessment") of the condition of the utility's physical assets and management practices, which included assessing PREPA's organizational health, asset condition, performance data, and systems operations. Exhibit 1, Section 1.4.1.

In the analysis phase, LUMA analyzed the information collected to compare it to industry standards, understood root causes and developed potential solutions. *Id*., Section 1.4.2. Initiatives were developed to meet one or more, as applicable, of the following objectives: (i) Remediate concerns identified through the gap assessment; (ii) carry out infrastructure recovery (repair, replacement, hardening) projects; (iii) achieve operational and customer satisfaction improvements; and (iv) meet regulatory imperatives (such as the Integrated Resources Plan) for transforming Puerto Rico's electricity system. *Id*. This process resulted in the development of over 600 initiatives. *Id*. These initiatives were consolidated into programs of similar, interdependent initiatives.

In the planning phase, LUMA used a comprehensive strategic framework for recovery and transformation (discussed in the next caption) to prioritize and sequence the programs to enhance value to customers within annual budget constraints, consistent with the public interest and Contract and Policy Standards. *Id*., Section 1.4.3. LUMA's strategic planning process began by synthesizing policy objectives, stakeholder needs, regulatory requirements and other Contract and Policy Standards into a comprehensive strategic framework to guide planning and decision-making across all of the FET Deliverables. The sources (policy objectives, plans, laws and regulation) reviewed by LUMA to develop these guiding principles included: Act 57-2014 and Act 17-2019; PREB's approved 2017 Rate Order, CEPR-AP-2015-0001; the Energy Bureau's final resolution and order on the Integrated Resources Plan; Case No. CEPR-AP-2018-0001; the COR3 Grid Modernization Plan for Puerto Rico; US DOE's Energy Resilience Solutions for the Puerto Rico Grid; FEMA's Public Assistance Policy Guide; the FEMA National Disaster Recovery Framework; and a Survey of Puerto Rico utility customers commissioned by ATCO and Quanta Services, LUMA's owners. *Id*.

As a result of this strategic planning process, LUMA established a mission aligned with public policy to guide the preparation of all of the FET Deliverables required by Sections 4.1 and 4.2 of the OMA and set goals to achieve that mission. *See Id*., Figure 1-4. The established mission is to **recover and transform the T&D System to deliver customer-centric, reliable, resilient, safe, and sustainable electricity at reasonable prices**. *Id*., Figure 1-5. The resulting primary goals set to achieve this mission are to: (a) **Prioritize safety** by reforming utility activities to support a strong safety culture focused on employee safety and the safety of the people of Puerto Rico; (b) **improve customer satisfaction** by transforming operations to deliver a positive customer experience and deliver reliable electricity **at reasonable prices**; (c) **rebuild and make the system more resilient**, by effectively deploying federal funding to restore the grid and improve the resiliency of vulnerable infrastructure; (d) introduce **operational excellence** by enabling employees to pursue it through new systems, processes and training; and (e) advance **sustainable energy transformation** by modernizing the grid and the utility to enable the sustainable energy transformation. *Id*.

b. Comprehensive Strategic Framework for Recovery and Transformation

LUMA used what has been denominated and referenced in the FET Deliverables as the "Recovery and Transformation Framework" to prioritize and sequence programs regardless of the FET Deliverable to which they pertain, to ensure that planning and budgeting was not undertaken separately and inconsistently for each FET Deliverable. *See* Exhibit 1, Section 1.4.3. LUMA deliberately designed the strategic goals of the framework to organize the policy targets already set by Puerto Rico for the electric sector.[12] This, to provide enhanced electric service to customers, as the utility service provider in Puerto Rico after Commencement Date and consistent with the public interest. Specifically, the prioritization and sequencing process was used to determine which investments identified in the gap assessments would be funded over the next three years, and in what order, to meet all goals within the available budget; that is, to maximize value while maintaining balance across all priority areas. *Id*. This prioritization and sequencing process consisted of qualitatively valuing each program's contribution to the established goals and scoring them. This scoring was then used to rate and identify an initial list of the highest priority

[12] "Consistent with the Energy Policy Act and other applicable law, the [Integrated Resources Plan] and the Electric Grid Modernization Plan for Puerto Rico (the "GMP") contemplate transforming the energy system through the incorporation of more renewables, micro-grids, and distributed energy sources, which will ultimately drive economic opportunities and customer well- being. The GMP was developed by the Central Office for Recovery and Reconstruction ("COR3") and the P3 Authority, in conjunction with PREPA, to provide a roadmap for the implementation of projects to transform the energy system through a detailed action plan tailored to Puerto Rico. The GMP adds granularity to the Government's vision to transform the electric system and sets the foundation for turning this vision into action with a view towards achieving a modernized, standardized, resilient, and distributed electric system in Puerto Rico, in accordance with the public policy set forth by Act 120 and the Energy Policy Act. The programs and initiatives set forth in the GMP are guided by the following five core pillars for permanent reconstruction set forth in Act 120 and the Energy Policy Act: customer-centricity, resiliency, reliability, affordability and sustainability…" *See Partnership Committee Report, Puerto Rico Public-Private Partnership for the Electric Power Transmission and Distribution System,* May 15, 2020, at page 24.

improvement programs. This scoring and rating prioritization provided a basis for a series of subsequent planning workshops, resulting in an iterative budgeting process to determine the most important programs for sequencing in the first three years of LUMA's operation. *See Id*. The aforementioned process gave rise to a set of programs designed to deliver value to customers in accordance with Contract and Policy Standards and within annual budget constraints. *See Id*.

These programs are organized in seven portfolios covering the areas of Customer Service, Transmission, Distribution, Substations, Control Center and Buildings, Enabling, and Support Services. Some of the programs within these portfolios cover initiatives included in the System Remediation Plan ("SRP"), while others cover non-SRP initiatives. *Id*. LUMA also looked carefully at the scope, timing and resources needed for daily utility operations to support LUMA's obligations and best serve its customers.

c. Integrated Approach to all FET Deliverables

The aforementioned integrated planning approach is reflected in the FET Deliverables that LUMA will also be filing with the Energy Bureau: the proposed System Operation Principles ("SOP"), Performance Metrics ("PMs") and SRP, in accordance with the OMA and Resolution and Orders issued under dockets No. NEPR-MI-2021-0001, NEPR-AP-2020-0025 and NEPR-MI-2020-0019, opened by this honorable Energy Bureau. Consequently, the Initial Budgets incorporate, in an integrated and consistent way, the activities that form part of the SRP, the PMs and the SOP, and reflect the quantified resources necessary to advance goals and reach the customer-centric, reliable, resilient and safe electric service that Puerto Ricans deserve and aspire to have, all within the current base rate of the 2017 Rate Order. We have included as a preface to Exhibit 1 a short summary presentation in Spanish (followed by a version in English) to facilitate communication with the public of these filings.

IV. The Initial Budgets and Public Policy

The Initial Budgets are structured and designed to follow the purposes and energy public policy mandates of Act 120-2018 that seek to advance the process of transforming the energy system in Puerto Rico to be "modern, sustainable, reliable, efficient, cost-effective, and resilient to the ravages of nature." Act 120-2018, Statement of Motives. In proposing an allocation of funds and prioritizing investment programs, LUMA also considered Act 17-2019's statement on the need for a "reliable and accessible" electric system that "promote[s] industrial, commercial and community development, improve[s] quality of life at [a] just and reasonable cost, and promotes economic development . . . ." Act 17-2019, Statement of Motives.

It must be emphasized that the above discussed mission and associated primary goals, as well as the Initial Budgets, substantially incorporate specific energy public policies under Act 57-2014, including:

- To guarantee that the "cost of electric power service in Puerto Rico be affordable, just, reasonable, and non-discriminatory for all consumers in Puerto Rico […]" Act 17-2019, Section 1.5(1)(a).
- "To ensure the integration of renewable energy into the Electrical System in a safe and reliable manner and at a reasonable cost […]" *Id.*, Section 1.5(8)(a).
- "To ensure the security and reliability of our electric power infrastructure by using modern technologies that promote inexpensive and efficient operations and allow for the integration and dissemination of renewable sources […]" *Id.*, Section 1.5(9)(b).
- "To design the infrastructure of the Electrical System to be more robust and resistant to weather events and other disasters […]" *Id.*, Section 1.5(9)(b).

- "To maintain the electric power infrastructure in optimal conditions to ensure reliability, resilience, and safety of the electric power service […]" *Id.*, Section 1.5(9)(e).
- "To ensure continuous improvements for the electric power grid in order to promote its resilience and diversification […]" *Id.*, Section 1.5(9)(f).
- "To guarantee every customer's right to receive a reliable, stable, and excellent power service at a cost that is accessible, just, and reasonable […]" *Id.*, Section 1.5(10)(a).

In addition, these goals advance the initial objective under Act 17-2019, in pertinent part, of promoting:

> the fastest and most efficient reconstruction and modernization, and revamping of the transmission and distribution system for the purpose of developing a robust and flexible system that can integrate new technologies, distributed generation, renewable energy sources, and energy efficiency mechanisms as well as provide consumers with alternatives in the energy sector, thereby maximizing available state and federal resources.

Id., Section 1.6(1).

The Initial Budgets have been designed to achieve important goals, including to advance early compliance with public policy, achieve further efficiencies and savings, prevent duplication of work, and fully utilize federal funds in reconstructions efforts at low costs, all to the benefit of customers and within the approved base rates.

With the proposed allocations, investment initiatives and programs, LUMA will improve the safety of its employees and the public, enhance customer experience and service, as well as improve reliability and utility services. LUMA will also complete significant remediation work and commence the modernization and transformation of the utility. To benefit the interests of the public, LUMA's planning resulted in a list of programs that represent a comprehensive expenditure plan of nearly $4.0 billion (both operational and capital) over the next three years. Over half of the proposed spending will be related to system recovery and resilience programs that will establish the foundation required to enable transformation. *See* Exhibit 1, Section 1.4.3.

V. Initial Budgets are within Approved Rates

The Initial Budgets and this Petition for approval thereof take into account the rate design approved by PREB in its 2017 Rate Order, which contemplates examining and approving budgets for the years between full rate cases. *See* 2017 Rate Order, ¶441 (on annual budget studies). Since LUMA is not requiring any increase in revenue or requesting a change in the existing rate structure, and has prepared the Initial Budgets within the revenue requirements already approved by the Bureau for PREPA in the 2017 Rate Order, LUMA understands that approval of the Initial Budgets need not trigger a new proceeding for a Rate Review or Rate Modification process under Section 6.25 of Act 57-2014.[13] *See* Table 3-4 in Section 3.2.2 for a comparison of the 2017 Rate Order's approved revenue with the LUMA's Initial Budget for Fiscal Year 2022 and forecasted Fiscal Years 2023-2024. Therefore, this budget examination process can be thorough but need not be overly complex.

The Initial Budgets presented in Exhibit 1 include a one-year budget (the initial year of operations by LUMA, Fiscal Year 2022) and two years of projected budgets (Fiscal Years 2023 and 2024). As further explained in caption VI. below, since LUMA is not operating the T&D System at this time, the Initial Budgets were created based on information obtained from PREPA

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[13] Section 6.25 is consistent with the general rule in U.S. public utility regulatory practice that a full rate case is not triggered unless a jurisdictional utility requests a change or increase in overall revenue requirements or rates. *See, e.g., Investigation of Procedural Filing Requirements for Decoupling Applications*, Order, No. NG-0059, 2009 WL 9545809, at *2 (Neb. P.S.C. Aug. 18, 2009) ("So long as any rate filing does not change the overall revenue requirements for the jurisdictional utility, such a filing would … not trigger a general rate case."); *Investigation by the Dept. of Telecommunications and Energy of the Propriety of the Rates and Charges Set Forth in the Tariff M.D.T.E.*, Order, No. 06-75, 2006 WL 4099851 (Mass. Dept. of Telecom. and Energy Oct. 31, 2006) (noting that only a "general increase in rates" will trigger "the full procedural requirements of a … rate case").

and using certain assumptions and LUMA's owners' experience in operating and managing other electric utilities. LUMA anticipates that it will have a more complete understanding of the T&D System costs and forecasts after it takes over operations and will present annual updates with the Bureau.

VI. Hallmarks of the Initial Budgets

Based on the integrated findings, assessments and plans that reflect LUMA's conclusion from its analysis of all the information available at the time of the filing, the Initial Budgets represent LUMA's judgment of reasonable costs to carry out the work outlined for Fiscal Year 2022 and forecasted for Fiscal Years 2023-2024.

A. Budgets Summary

The Initial Budgets include the Operating Budget[14] and the Capital Budget[15] for the initial Fiscal Year (year ending June 30, 2022) and forecast of the subsequent two Fiscal Years (years ending June 30, 2023 and 2024). *See* Exhibit 1, Section 2.1.2. Also included is an allocation for the Generation Budget subject to the 2017 Rate Order limit. *See id.,* Appendix F. The Initial Budgets include day-to-day operating activities as well as items within the SRP, PMs and SOP, during the first three years of LUMA's operation. *See id.*, Section 2.1.2.

The Initial Budgets for Fiscal Year 2022 consist of $625 million for T&D System operating expenses and $774 million in capital expenditures for the T&D System (including federal funding

[14] The Operating Budget includes the T&D Pass-Through Costs that are required to perform operation and maintenance services. *See* Exhibit 1, Figure 2-1 in Section 2.1.2; Section 2.3.1 and Schedule 5.1. Activities also include improvement programs which support the Recovery and Transformation Framework.

[15] The Capital Budgets are comprised of the Capital Budget - Federally Funded and the Capital Budget – Non-Federally Funded. *See* Exhibit 1, Figure 2-1 in Section 2.1.2, Section 2.1.3, Schedule 5.4 and Schedule 5.5. The Federally Funded Component of the Capital Budgets includes federally funded projects based on documents prepared for funding obligations under the Stafford Act and considering PREPA's plans to deploy federal funds, as such plans have been presented by PREPA to the Federal Emergency Management Agency (FEMA).The amounts provided are current estimates based on a reasonable judgement of the schedule of programs and projects that may be federally funded and are subject to approval by the appropriate federal agencies.

of $650 million and non-federal funding of $124 million). *Id.,* Table 2-2. The Generation Budget includes an allocation of $288 million (including operating and capital expenditures and GenCo Shared Services to be provided by LUMA pursuant to the Shared Services Agreement[16]). Finally, $146 million were allocated for other expenses, which include costs of Bad Debt[17], legacy PREPA costs, Title III costs (including costs of advisors to FOMB), and P3 Authority costs. *Id.*, Schedule 5.3.

A summary of the budget for Fiscal Year 2022 and forecasted for Fiscal Years 2023 and 2024 –Operating Budget, Capital Budgets and LUMA's allocation for the Generation Budget— is found at Section 2.3.1 and Table 2-2 of Exhibit 1. *See also id.,* Table 3-2 in Section 3.2 of Exhibit 1 for Fiscal Year 2022 budget and forecasted Fiscal Years 2023 and 2024, including Fuel & Purchased Power and Contribution in Lieu of Taxes ("CILT") and Subsidies.

The Initial Budgets reflect how the proposed allocations, investment initiatives and programs will improve the safety of LUMA's employees and the public, enhance customer experience and service, and improve reliability and utility services. LUMA will also complete significant remediation work and commence the modernization and transformation of the utility. LUMA will accomplish all of this work in compliance with public policy goals and mandates.

B. Key Assumptions in the Initial Budgets

As explained in Section 2.2 of Exhibit 1, LUMA based its estimates on a bottom-up exercise, using an activity-based budgeting approach to support the first three years of operations and limited to the approved base rate limit from the 2017 Rate Order. LUMA developed its Initial

[16] The Shared Services Agreement is established in the OMA as the agreement that "shall provide the terms and conditions pursuant to which Operator, as agent of Owner, shall provide the GenCo Shared Services to GenCo until the Legacy Generation Assets are retired or until certain of GenCo's operations, including the operating, administrative and/or maintenance functions related to the Legacy Generation Assets, are transferred to one or more private partners, the term of which agreement not to exceed three (3) years from its effective date (unless otherwise extended with the consent of Operator). OMA Section 4.5(s).
[17] "Bad Debt" reference is consistent with PREPA's certified 2020 Fiscal Plan. *See* Exhibit 1, Schedule 5.3, note 3.

Budgets on a cash basis and without debt servicing costs, consistent with the assumptions used for PREPA's 2020 certified Fiscal Plan. Future repayment of principal, interest and other costs of debt are to be determined through PREPA's Title III process. *See* Exhibit 1, Section 2.2. The Initial Budgets also assume that PREPA will not receive new debt financing until after Fiscal Year 2024. LUMA expects to update these assumptions as part of preparing future annual budget examinations based on the results of PREPA's Title III process and market conditions. The Initial Budgets also include the calculation of LUMA's fee based on the provisions of the OMA. *Id.* Table 2-1.

Certain key inputs and components of the Initial Budgets, such as forecasts for projected energy sales, CILT, subsidies, and fuel and purchased power, are consistent with methodologies followed by PREPA, and with recent fiscal plans, including the 2020 PREPA Fiscal Plan as certified by the FOMB on June 29, 2020. *See id.*, Section 2.2. LUMA informed its estimates based on PREPA's operating history, LUMA's experience, and on market estimates, including existing contracts, to the extent that PREPA made such information available to LUMA. LUMA relied on information provided by PREPA during the Front-End Transition Period and, unless specifically noted, such information is assumed correct and complete based on LUMA's reasonable diligence during such period.

The Initial Budgets contain reasonable assumptions about future conditions, including the total demand for electrical energy in Puerto Rico, which are subject to change and interpretation. Once LUMA commences operations, it will continue to review such methodologies and work with key stakeholders to update and improve these methodologies, using its professional and technical judgement, Prudent Utility Practice, and consistent with Contract and Policy Standards and requirements of the Energy Bureau.

LUMA's Initial Budgets assume that the Terms of Service are approved by the PREB. The request to approve the Terms of Service is included as Exhibit 2 to this Petition.

C. Utilization of Federal Funds for Recovery

To advance recovery efforts and improve resiliency, and in accordance with the PREB's public policy directives, LUMA has considered in the Initial Budgets various federally-funded projects. FEMA granted approximately $10.7 billion in public assistance funds for PREPA under Section 428 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Along with other mitigation funds available to PREPA, there is an estimated total of $14-16 billion in federal funds that will be available for rebuilding, improving and hardening Puerto Rico's electric utility infrastructure. LUMA has found that the near-term federally funded projects related to the T&D System included in PREPA's 10-year Plan, generally align with LUMA's federally funded projects for the same period, as both seek to address the damage caused by Hurricane Maria to critical infrastructure. LUMA views many of these activities—for example, reconstruction of severely damaged key substations, or repair and upgrade of the critical transmission system backbone— as foundational and enabling to the core recovery of the grid.

With regards to use of federal funds for restoration and rebuilding works and to comply with important public policy principles on efficient use of federal funds to benefit the public interest in Puerto Rico, LUMA is supported by Innovative Energy Management (IEM), a company with significant experience managing federal funds, having overseen more than $51 billion in disaster recovery programs and supported more than 300 U.S. state, local, and territorial jurisdictions. *See id.,* Section 1.1. IEM has provided program and project management support to some of the largest recovery programs in recent years in states and territories affected by hurricanes and flooding. LUMA will also draw on the resources and expertise of its two owners who in recent years have executed multi-billion-dollar capital utility programs and have helped restore utility services after major disasters in North America. LUMA will put in place and enforce policies and procedures to fully comply with all applicable requirements for federal funds, including enforcement of a transparent and competitive procurement process consistent with federal procurement rules and COR3 requirements.

D. Terms of Service

LUMA hereby requests that the Energy Bureau approve and incorporate in the current Tariff Book authorized by the PREB by Resolution and Order issued on May 28, 2019, in Case Number CEPR-AP-2015-0001; CEPR-AP-2018-0003 ("Tariff Book Resolution and Order") and per the directives of the 2017 Rate Order, certain terms of service applicable to PREPA --and to LUMA, as Operator of the T&D System--, in accordance with Section 4.1(g) of the OMA. This request arises under Sections 6.22, 6.3, and 6.4, Act 57-2014, as amended by Act 17-2019, involving the Bureau's authority over budgets and rates, and to determine rates riders. The Terms of Service do not involve a request to change the basic rate approved in the 2017 Rate Order. *See* Section V, *supra*. Rather, this is a request to include a provision or rule in the tariff approved by the Bureau. If approved, it will not have a direct impact on the financial operation of PREPA and thus, does not immediately require a reduction or an increase of the base rates. *See Bird v. Chesapeake & Potomac Tel. Co.,* 185 A.2d 917, 918 (D.C. 1962) (construing tariff provision approved by the Public Utilities Commission of the District of Columbia and holding that approval of limitation on the utility's liability did not involve a change in the base rate charged by the utility but was, instead, an approval of a proposed rule or regulation that indirectly affects the utility's financial operation).

The Terms of Service Petition is included as Exhibit 2, with a Memorandum of Law in support of the request for approval of such Terms of Service that benefit PREPA and the public interest. As explained in Exhibit 2, the Terms of Service are commonly approved and included in utility rates by regulators in the United States, consistent with Prudent Utility Practice. They advance important energy public policies that courts in the United States have recognized and enforced, because they help prevent increases in utility costs, ensure a fair and reasonable treatment of all customers, protect the utility from catastrophic losses (and potential adverse impacts to reliability), and mitigate the risks to the utility resulting from the obligation to provide services to all customers, regardless of the potential liability these may pose.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **approve** the Initial Budgets in its entirety, Exhibit 1, including, the Operating Budget, the Capital Budget, LUMA's allocation to the Generation Budget, and the Terms of Service included as Exhibit 2 to this Petition.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 24th day of February 2021.

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

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Exhibit 2

Request for Approval of Terms of Service and Memorandum of Law in Support Thereof

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

IN RE: APPROVAL OF INITIAL BUDGETS AS ANNUAL EXAMINATION BY THE PUERTO RICO ENERGY BUREAU AND UNDER SECTION 4.2(e) OF PUERTO RICO TRANSMISSION AND DISTRIBUTION SYSTEM OPERATION AND MAINTENANCE AGREEMENT, AND RELATED TERMS OF SERVICE	Subject: Request for Approval of Terms of Service and Memorandum of Law in Support.

REQUEST FOR APPROVAL OF TERMS OF SERVICE AND MEMORANDUM OF LAW IN SUPPORT THEREOF

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC ("ManagementCo"), a limited liability company organized under the laws of Puerto Rico, and **LUMA Energy ServCo, LLC** ("ServCo"), also a limited liability company organized under the laws of Puerto Rico (ManagementCo and ServCo, jointly referred to as the "Operator" or "LUMA"), through the undersigned counsel and respectfully submit this Request to the honorable Puerto Rico Energy Bureau (the "Energy Bureau" and/or "PREB") to approve in connection with the submission of the Initial Budgets, the terms of service applicable to all customer classes in PREPA's Tariff Book approved by the PREB by Resolution and Order issued on May 28, 2019, in Case Number CEPR-AP-2015-0001; CEPR-AP-2018-0003 ("Tariff Book Resolution and Order"):

I. Background

A. Energy Public Policy

The Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement dated June 22, 2020 (the "OMA") was executed as part of a Puerto Rico Electric Power Authority ("PREPA") Transaction pursuant to Act 120-2018, known as the Puerto Rico Electric

Power System Transformation Act, as amended ("Act 120-2018"), and Act 29-2009, as amended, known as the Puerto Rico Public Private Partnerships Act ("Act 29-2009").

Act 29-2009 declared as a public policy of the Government of Puerto Rico to "favor and promote" the establishment of public-private partnerships ("PPPs") for "the development and maintenance of infrastructure facilities" to, among other things, "improve the services rendered and the functions of the Government, to foster the creation of jobs, and to promote the socioeconomic development and competitiveness of Puerto Rico." Act 29-2009, Article 3. In accordance with this public policy, Act 29-2009 authorizes Government Entities,[1] to establish PPPs and enter into public-private partnership contracts ("P3 Contracts") in connection with any Function,[2] Service[3] or Facility[4] for which the Government Entity is responsible under its enabling act or special laws. *Id.*, Article 4.

Act 29-2009 also created the Public-Private Partnership Authority ("P3 Authority") as the entity in charge of implementing Act 29's public policy and supervising the performance and compliance of a PPP contractor with a P3 Contract, with the assistance of the participating Government Entity. *Id.*, Article 6(b) and Article 10(d).

Act 120-2018, in turn, was enacted to transform the energy system in Puerto Rico into a system that is "modern, sustainable, reliable, efficient, cost-effective, and resilient to the ravages of nature." *Id.*, Statement of Motives (unofficial translation). This initiative arose from the need to address the condition of the Puerto Rico electric system, which is described in Act 120-2018 as

[1] This term includes virtually all kinds of governmental entities, including public corporations. *See* Act 29-2009, Article 2 (l).

[2] Defined, in pertinent part, as "[a]ny present for future responsibility or operation of a Government Entity, expressly delegated to the same, by means of either its enabling act or any pertinent special laws…„" Act 29-2009, Article 2(o).

[3] Defined, in pertinent part, as "[a]ny service rendered or to be rendered by a Government Entity directed to safeguarding the interests or meeting the needs of citizens under the provisions of either its enabling act or other special laws…" *Id.*, Article 2(y).

[4] A term that includes any property, capital improvement or public use facility, constituting real or personal property, including the systems for the production, transmission or distribution of electricity. *See Id.*, Article 2(p).

"deficient and obsolete which results in sub-optimal service with frequent interruptions and high rates that punish the consumer [...]" and an "obstacle" to economic development opportunities. *Id.*

To that end, Act 120-2018 established processes to open the electric sector to private enterprises to participate in the energy transformation of Puerto Rico, specifically through the creation of PPPs under the framework of Act 29-2009, as modified with respect to PREPA's energy transformation by Act 120-2018.[5] *See Id.,* Statement of Motives and Section 3. Accordingly, 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 2(m), 3, 5(a) and11(dd).

Act 120-2018 further contemplated that the Legislative Assembly would approve an energy public policy and regulatory framework to govern the transformation of the electric system. *See Id.*, Statement of Motives and Section 9. Pursuant to this mandate, Act 17-2019, known as the Energy Public Policy Act (as amended, "Act 17-2019") was enacted, establishing the parameters for a "reliable and accessible' electric system that "promote[s] industrial, commercial and community development, improve[s] quality of life at [a] just and reasonable cost, and promotes economic development . . . ." Act 17-2019, Statement of Motives. In furtherance of these objectives, Act 17-2019 ordered PREPA to execute, delegate or transfer the operation, administration, distribution, commercialization and operation of the Electric System, including through the execution of one or more P3 Contracts, in accordance with Act 120-2018 and Act 29-2009, to transfer the functions of transmission and distribution – and established a deadline for that process. *Id.*, Articles 1.7 and 1.8(b).

[5] The provisions of Act 120-2018 prevail over any other inconsistent provision of Act 29-2009, Act 83 of May 2, 1941, known as the Electric Power Authority Act, Act 57-2014, or Act 4-2016, as amended, known as the Act for the Revitalization of Puerto Rico Electric Power Authority, or any other applicable law or regulation. Act 120-2018, Section 4.

Act 57-2014, known as the "Puerto Rico Energy Transformation and RELIEF Act" ("Act 57-2014"), created the PREB (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, such as those directed by Act 17-2019 and Act 120-2018. Act 57-2014 gives the PREB authority and regulatory rule over the electric services and electric service companies, such as PREPA and LUMA. *See* Act 57-2014, as amended, *e.g.,* Sections 6.3, 6.22, 6.23, 6.24. Among other powers, the Energy Bureau may establish public policy standards with respect to electric service companies, establish rates, regulate any transaction, action or omission in connection with the electric power grid and the electric power infrastructure, and exercise jurisdiction over certified electric power companies, persons connected to the grid or receiving energy services and persons that exercise control over the provision of electric power services. *See Id.* Pursuant to this authority, the PREB approved the registration of both LUMA entities[6] as electric service companies, and therefore, they are subject to PREB's regulatory powers.

Pursuant to the powers and other mandates of Act 57-2014, and considering the directives of Act 29-2009, and subsequently, Act 120-2018 and Act 17-2019, the PREB plays a fundamental role in the implementation of the OMA, both during the transition period prior to commencing LUMA's operation of the T&D System (as defined below), and throughout the term of the OMA, including, reviewing and authorizing certain deliverables under the OMA, such as the this terms of service Petition submitted in connection with the Initial Budgets.

As per the directives and public policy established in Acts 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. Prior to the execution of the OMA, as

[6] That is, ManagementCo and ServCo.

required by Act 120-2018, the P3 Authority submitted the proposed OMA to this honorable Energy Bureau 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, all of whom evaluated and approved it. By Resolution and Order in Case NEPR-AP-2020-0002, issued on June 17, 2020, this honorable PREB 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* Case NEPR-AP-2020-0002, Resolution and Order issued on 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").

B. The OMA

PREPA and the P3 Authority entered into the OMA with LUMA to (i) provide "management, operation, maintenance, repair, restoration and replacement and other related services with respect to PREPA's transmission and distribution system, as further specified in the OMA ("T&D System"), in each case that are customary and appropriate for a utility transmission and distribution system service provider, including the services specified in Article 5 and Annex I of the OMA; and (ii) "establish policies, programs and procedures with respect thereto" (the "O&M Services"). OMA, Section 5.1.

As discussed in the Initial Budgets Petition of which this Petition forms part, the O&M Services are to be provided in accordance with the "Contract Standards," a term that under the OMA includes the "terms, conditions, methods, techniques, practices and standards imposed or required" under Applicable Law[7] and Prudent Utility Practice,[8] among others (for purposes of this Petition, "Contract and Policy Standards"). *Id.*, Section 1.1.[9] Contract and Policy Standards necessarily require acting consistently with policy mandates and directives in Act 57-2014, Act 120-2018, and Act 17-2019, among others.

The O&M Services are to commence on a date referred to as the "Service Commencement Date," or the "Interim Period Service Commencement Date" if PREPA remains in Title III bankruptcy proceeding and certain conditions precedent specified under the OMA are satisfied or waived (collectively, for purposes of this Petition, the "Commencement Date"). [10] *See Id.*, Sections 4.5, 4.7(b), 5.1.

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[7] This term includes "any foreign, national, federal, state, Commonwealth, municipal or local law, constitution, treaty, convention, statute, ordinance, code, rule, regulation, common law, case law or other similar requirement enacted, adopted, promulgated or applied by any [governmental body]…" in each case applicable to the parties to the OMA. *Id.,* Section 1.1.

[8] "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] . . . ." *Id.* at page 26.

[9] The OMA further provides that, except for those rights and responsibilities reserved for PREPA and the P3 Authority or otherwise expressly provided in the OMA, LUMA "shall (A) be entitled to exercise all of the rights and perform the responsibilities of [PREPA] in providing the O&M Services, and (B) have the autonomy and responsibility to operate and maintain the T&D System and establish the related plans, policies, procedures and programs with respect thereto as provided in [the OMA]." *Id.* Moreover, the OMA provides that LUMA shall function as agent of [PREPA] and PREPA "irrevocably authorizes [LUMA] to (i) represent [PREPA] before PREB with respect to any matter related to the performance of any O&M Services provided by [LUMA] under [the OMA]" and "(ii) pr facilities and properties of the type covered by the [OMA] . . . ." *Id.* at page 26.

[10]LUMA is assuming that PREPA will not exit the Title III Bankruptcy proceeding before June 1, 2021. Consistent with statements from the Executive Director of Financial Oversight and Management Board (FOMB) and PREPA Certified Fiscal Plan for FY2021, certified on June 29, 2020, the Initial Budgets assume that PREPA will exit Title III at December 31, 2021. *See e.g., "*Natalie Jaresko: "we are going to emerge from bankruptcy in 2021", PR Headline News, https://www.puertoricoheadlinenews.com/natalie-jaresko-we-are-going-to-emerge-from-bankruptcy-in-2021/ (last visited February 22, 2021). Consequently, LUMA anticipates providing the O&M Services during the Interim Period pursuant to the Supplemental Terms Agreement agreed between the OMA parties precisely for this contingency. If PREPA exits the Title III bankruptcy proceeding contemporaneously with all other conditions precedent to Service Commencement Date, then LUMA will begin providing O&M Services without the need for an "interim period." Mentions in this document (and in all other OMA required submittals to PREB), referring to "beginning of O&M Services," "start of operations," "start of operations and maintenance services," and other allusions of similar import, shall be understood to refer to the end of the Front-End Transition Period and LUMA's commencement of O&M Services regardless of whether it is in under an "interim period" or after full "Service Commencement Date."

Beginning on the Effective Date (that is, June 22, 2020) and until Commencement Date[11] (this period, the "Front-End Transition Period"), LUMA is required to provide "Front-End Transition Services," which are services "intended to ensure an orderly transition of the responsibility for the management, operation, maintenance, repairs, restoration and replacement of the T&D System to [LUMA] by the […] [Commencement Date], without disruption of customer service and business continuity […]" See, *Id.*, Sections 1.1 (definition of "Front-End Transition Period") and 4.1(a).[12]

Among other actions, during the Front-End Transition Period[13], LUMA[14] is required to prepare and submit to the P3 Authority proposed Initial Budgets for the P3 Authority's review, and after such review or comment, submit the Initial Budgets to PREB. *See Id*., Section 4.2(e). Upon review of the Initial Budgets, the PREB may then "approve, deny or propose modifications to such proposed Initial Budgets in accordance with Applicable Law." *Id.* The approval of the Initial Budgets is a condition precedent to the Commencement Date.

II. Terms of Service

Section 4.1(g) of the OMA provides that "[i]n connection with the submission of the Initial Budgets" PREPA, ManagementCo and the P3 Authority agree to apply for inclusion of certain terms of services applicable to all customers to release PREPA, ManagementCo and ServCo from liability for losses in connection with the operation of the T&D System and the provision of power and electricity. Such terms of services requested to be approved shall read as follows:

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[11] *See Id*.

[12] Although both ManagementCo and ServCo constitute the Operator under the OMA, as previously mentioned, after the Commencement Date, ServCo will provide the vast majority of the O&M Services while ManagementCo's role will be mainly providing oversight and management of ServCo, including the establishment and maintenance of a Board of Directors and the administration of ManagementCo.

[13] The Front-End Transition Services are defined in the OMA as services to "complete the transition and handover to [LUMA] of the operation, management and other rights and responsibilities with respect to the T&D System pursuant to [the OMA], including the services contemplated by the Front-End Transition Plan; provided that the Front-End Transition Services shall not be O&M Services." *Id.*, Section 1.1 (Emphasis ours).

[14] In particular, ManagementCo.

> PREPA, its directors, officers, employees, agents and contractors (including LUMA Energy, LLC and LUMA Energy Servco, LLC) (the "Released Parties"), (i) shall not be liable to customers, or any person (natural or legal) receiving power or electricity for any losses arising in any way out of or in connection with the operation of the transmission and distribution system and the provision of power and electricity including any events of interrupted, irregular or defective electric service due to force majeure events, other causes beyond the Released Parties' control, or ordinary negligence, gross negligence or willful misconduct of the Released Parties or their respective employees, agents or contractors; (ii) and in all cases shall not be responsible for any loss of profits or revenues, special, exemplary, punitive, indirect, incidental or consequential damages, including loss of revenue, loss of use of equipment, cost of capital, cost of temporary equipment, overtime, business interruption, spoilage of goods, claims of customers of electric customers or other economic harms, in each case howsoever and whensoever arising, including where caused by any of the Released Parties' ordinary negligence, gross negligence or willful misconduct.

In accordance with the PREB's authority and jurisdiction and as per the reasons and legal principles discussed above and forthwith, LUMA is respectfully requesting that the PREB approve the terms of service indicated above pursuant to Section 4.1(g) and 4.5 (p) of the OMA (the "Terms of Service").

The PREB's jurisdiction and authority to address and grant this request arises under Act 57-2014, as amended, which, in part, includes the following on the PREB's jurisdiction:

> (b) Establish by regulation the public policy rules regarding electric service companies, **as well as any transaction, action or omission in connection with the electric power grid and the electric power infrastructure of Puerto Rico**, and implement such public policy rules …;
> (c) Establish and implement the **regulations and the necessary regulatory actions to guarantee** the capacity, reliability, safety, efficiency and **reasonability of rates of Puerto Rico's electrical system**…;
> (d) **Oversee the quality, efficiency and reliability of the electric power services** provided by any electric power company certified in Puerto Rico to ensure a robust network that addresses the needs of the Island;
> …
> (f) Formulate and implement strategies to achieve the objectives of [Act 57], including, but not limited to **attaining the goal of reducing and stabilizing energy costs permanently** …;
> …

> (n) Review and approve and, if applicable, modify the rates or fees charged by electric service companies or the transmission and distribution network Contractor in Puerto Rico in connection with any matter directly or indirectly related to the provision of electric power services;
> …
> (oo) Adopt rules, orders, and regulations needed to carry out its duties […]; [and]
> (pp) File any recourse, issue orders, and seek and grant **legal remedies that may be necessary to enforce the provisions of [Act 57]** […].

Act 57-2014, Section 6.3, as amended (emphasis added).

In addition, the PREB has primary and exclusive jurisdiction over the "approval of the rates and charges charged by electric companies … as well as the cases and disputes related to the rates that the energy companies charge to its [sic] residential, commercial, or industrial customers …"; and the cases and disputes over "… any person that is connected, or wishes to connect to the electric power grid or any person with a direct or indirect interest in these electric power services." *Id*., Articles 6.4 (a)(1) and (a)(5). Also, Section 6.22 of Act 57-2014, as amended, directs that electric power service companies shall file future operating budgets with the PREB.

In sum, the PREB has authority over matters affecting the Puerto Rico electric grid and services, as well as legislatively delegated powers related to tariffs and approval of operating budgets. Therefore, the PREB has jurisdiction and authority to approve the proposed Terms of Service to be incorporated in the current tariff book authorized per the Tariffs Book Resolution and Order and the directives of the Resolution and Order dated March 31, 2017, 2017 on Case No. CEPR-AP-2015-0001 that came into effect on May 11, 2019 ("2017 Rate Order").

As discussed in more detail below, the U.S. utilities industry is familiar with these types of inclusions in Terms of Service and their approval in utility tariffs, since they advance important policies for the benefit of the wider public interest, including to protect electric utility customers from higher electric rates or increases in rates, ensure a fair and reasonable treatment of all customers (not only some), protect the utility from catastrophic losses (and potential resulting adverse impacts to reliability), and mitigate the necessary result of the provision of services to all customers, regardless of the risk profile of any one of them. Additionally, the Terms of Service are consistent with Prudent Utility Practice, as explained further below. Moreover, this type of provision is supported by persuasive common law jurisprudence and is not contrary to Puerto Rico law.

Provisions limiting liability are often utilized in the utilities industry and have been adopted in multiple U.S. jurisdictions. Courts in various states have held that a utility's waiver of liability for gross negligence and willful misconduct (in addition to ordinary negligence) is reasonable and enforceable. *See Maryland Casualty Co. v. NSTAR Elec. Co.*, 471 Mass. 416, 422, 425, 429 (2015); *In re Illinois Bell Switching Station Litigation*, 234 Ill. App. 3d 457, 463-465 (1992) (enforcing "exculpatory language in the tariff" covering "gross negligence and willful misconduct"); *Stern v. General Telephone Co.*, 50 Cal. App. 3d 538, 542-543 (1975); *see also Zurich American Insurance Company v. Southern Conn. Gas Co.,* 442 F.Supp.3d 510 (D. Conn. 2020) (construing Connecticut law and applying the filed-rate doctrine to preclude insurer's negligence claims against utility and citing cases at note 4 on jurisdictions that follow the filed-rate doctrine as applied to several industries).

In *Maryland Casualty*, the Supreme Court of Massachusetts found that a "public utility's 'liability for damages may be limited by properly filed and approved tariffs.'" *Maryland Casualty Co. v. NSTAR Elec. Co.*, 471 Mass. 416, 421 (2015); *see also Alves v. Verizon*, No. 08-cv-3196, 2010 WL 2989988, at *4 (D.N.J. July 27, 2010) ("Verizon's potential liability is limited by the Schedules of Tariff that it filed, pursuant to regulatory mandate, with the New Jersey Board of Public Utility Commissioners."); *Bird v. Chesapeake & Potomac Tel. Co.*, 185 A.2d 917, 918-919 (D.C. 1962) (upholding limitation of liability provision in utility tariff). "Such tariffs have the force and effect of law, so long as they satisfy the basic requirement of reasonableness." *Maryland Casualty*, 471 Mass. at 421 (internal citations and quotation marks omitted).

The court in *Maryland Casualty* further explained that a public policy that prevents parties from contractually limiting their liability "for gross negligence or willful and wanton misconduct" is inapplicable to public utility tariffs. 471 Mass. at 422. The court held that the public policy prohibiting contractual limits on liability for gross negligence and willful misconduct is inapplicable to utility tariffs because "the extensive legislative regulation of [an electric company's] rates and practices takes the furnishing of electricity out of the realm of contract law." *Id.* at 425 (bracketed text original). "Instead, 'the process of utility rate making by a public regulatory body is the exercise of a legislative function,'" whereby state legislatures delegate to public utility commissions "the responsibility for regulating [electric] company practices." *Id.* at 425-425 (bracketed text original). Based on these distinctions, the court concluded "that the contract rule against releases for gross negligence or willful and wanton misconduct should not be applied in the tariff context." *Id.* at 425.

Importantly, in *Western Union Tel. Co. v. Priester*, 276 U.S. 252, 259-260 (1928), the U.S. Supreme Court concluded that the tariff system took the regulation of the telegraph industry out of the realm of contract law. Consequently, the Court stated that the general "public policy" that prevents an entity from contracting "away its liability for gross negligence" would not allow a plaintiff to escape the limitation of liability clause in a tariff simply by alleging "gross negligence" instead of ordinary negligence. *Id.*

Several courts have upheld limitations of liability provisions applicable to utility rates as a reasonable measure to maintain (support) cost-effective utility service while protecting consumers from avoidable increases in utility rates. Specifically, courts in the United States have held that, absent a limitation of liability, utilities would be forced to raise rates charged to consumers. See

Houston Lighting & Power Co. v. Auchan USA, Inc., 995 S.W. 2d 668, 673 (Tex. 1999).[15] The rationale for upholding these types of provisions is particularly well discussed in two state court cases.

The Texas Supreme Court, in a case where a supermarket claimed damages resulting from a power outage, upheld a tariff limiting the utility's liability for damages resulting from negligence under certain circumstances. In so holding the Texas Supreme Court explained:

> The [Public Utility] Commission concluded that such provisions were not unreasonable as a general proposition because they resulted in lower utility rates, fair and reasonable treatment of all classes of customers, and the protection of a utility from liability for catastrophic loss and potential financial distress.

Id. (citation omitted). The court further explained:

> Generally, the only electric utility customers who would suffer substantial economic damages would be commercial or industrial users. Losses paid to those commercial or industrial users could be passed on to smaller customers, including residential users, in the form of higher rates. This consideration tends to support the conclusion that tariffs that limit economic damages are not unreasonable, even when the damages suffered are substantial.

Id. (citation omitted). As additional justification for the limitation of liability, the court emphasized the highly regulated nature of electric utilities:

> An unregulated business can set its prices based on what the market will bear and can factor in potential or actual liability. When an electric utility's rate is set by the [Public Utility Commission], it cannot vary from that rate. And an electrical utility cannot pick and choose its customers on the basis of the potential liability that would be associated with a loss of power to a

15 *See also In re Illinois Bell Switching Station Litig*., 161 Ill.2d 233, 204 Ill. Dec. 216, 641 N.E.2d 440, 446 (1994); *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588, 590-91 (1992); *Computer Tool & Eng'g, Inc. v. Northern States Power Co*., 453 N.W.2d 569, 573 (Minn.Ct.App.1990); *Singer Co. v. Baltimore Gas & Elec. Co*., 79 Md. App. 461, 558 A.2d 419, 427 (1989); *Landrum v. Florida Power & Light Co*., 505 So.2d 552, 554 (Fla.Dist.Ct.App.1987); *Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co*., 99 N.M. 796, 664 P.2d 994, 998-99 (App.1983); *Allen v. General Tel. Co*., 20 Wash. App. 144, 578 P.2d 1333, 1337 (1978)*Lee v. Consolidated Edison Co*., 98 Misc.2d 304, 413 N.Y.S.2d 826, 828 (1978); *Behrend v. Bell Tel. Co.*, 242 Pa. Super. 47, 363 A.2d 1152, 1165 (1976), *vacated and remanded*, 473 Pa. 320, 374 A.2d 536 (1977), *aff'd on remand*, 257 Pa. Super. 35, 390 A.2d 233 (1978); *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc*., 130 Ga. App. 798, 204 S.E.2d 457, 460 (1974); *Montana ex rel. Mountain States Tel. & Tel. Co. v. District Court*, 160 Mont. 443, 503 P.2d 526, 528-29 (1972); *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal.App.2d 416, 246 P.2d 686, 688 (1952); *Wilkinson v. New England Tel. & Tel. Co*., 327 Mass. 132, 97 N.E.2d 413, 416 (1951).

> particular customer's business. … It must provide service to all regardless of the potential liability that would be associated with a loss of power to a particular customer's business.
>
> …
>
> The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, "its liability is and should be defined and limited." There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind.

Id. at 674-675.

In a case of alleged damages resulting from a termination of electricity services, the Florida District Court of Appeals upheld the validity and enforceability of a limitation of liability in a utility tariff and explained that:

> The justification for an electric company filing a tariff, as in the case with the Public Service Commission, is to regulate the rate practices for the services furnished. […] For example, it has been reasoned that "a broadened liability exposure must inevitably raise the cost and thereby the rates, of electric service." […] As stated by the United States Supreme Court, "[f]or all we know, it may be that the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the [utility] of the expense of insuring itself against liability for damage […] and is a reasonable rate so computed." *Southwestern Sugar & Molasses Co., v. River Terminals Corp.*, 360 U.S. 411, 418 (1959).

Landrum v. Florida Power & Light Co., 505 So. 2d 552, 554 (Fla. App. 3 Dist. 1987), review denied, 513 So. 2d 1061 (Fla. 1987) (several citations omitted).

Based on the cases discussed above, the relationship of an electric utility with its customers is not governed by the general principles of free negotiation and contracting that would apply between other parties. Rather, it should be considered a highly regulated legal framework defining a relationship with substantial contractual freedoms curtailed from the utility. As mentioned in the case of *Houston Lighting*, an electrical utility cannot select its customers. Once customers are eligible according to rules sanctioned by the regulator, the utility must provide service to all regardless of the potential liability that would be associated with each potential customer. Even when a customer violates terms of services, typically by non-payment or theft of electricity, the utility can disconnect the service but once paid, the customer is entitled to be reconnected. A customer cannot be denied service because it would constitute a monetary risk to provide the service to them in case of a future interruption of such service. Therefore, a utility strictly regulated in all operations and considerable curtailment of its rights and privileges is also justified to be limited as to its liabilities.

As in the case of the public utilities discussed above, PREPA is required by law to provide services, indiscriminately, to all customers, regardless of the potential risks to PREPA that the connection of these customers to the electrical system may pose. Specifically, under Act 17-2019, PREPA, or its successor in interest, is charged with the "primary responsibility for acting as provider of last resort (POLR) for any of the generation, transmission, distribution, commercialization, and operating functions of [Puerto Rico's electrical System]…." Act 17-2019, Section 1.7. Accordingly, Act 17-2019 establishes as a guiding principle of the Puerto Rico electrical system that the activities and functions related to it be governed by the principle of "impartiality"- that is, that "under the same conditions, consumers are treated equally **regardless of** their social condition and purchasing power, or **the technical conditions or characteristics of the service rendered**." *Id.*, Section 1.4(v) (emphasis added). Similarly, Act 17-2019 provides that the Puerto Rico electrical system is to be operated "openly rather than in a discriminatory manner and be subject to the regulations of [PREB]." *Id.*, Section 1.3. LUMA, as the entity to whom the services, functions and facility operations related to PREPA's T&D System have been delegated, will also be acting as a POLR, subject to the principle of impartiality and required to accept and provide services to all customers without discrimination. LUMA will not be able to pick and choose its customers to eliminate potential risks. LUMA's provision of service under the OMA is expressly conditioned on the recognition that "[PREPA's] provision of the Power and Electricity requirements of the Commonwealth constitutes an essential public service." *See* OMA, Section 3.7. The proposed Terms of Service would, therefore, serve the important function of mitigating this risk, thereby supporting PREPA's and LUMA's ability to provide impartial and non-discriminatory services as required under Act 17.

The cost of third-party claims and suits against the utility service provider can be a major cost to be borne by customers. Increased costs due to litigation may ultimately increase rates paid by customers. The well-settled practice among utilities, as confirmed in robust case law in the United States, is to recognize a regulator's authority to approve and incorporate in tariffs these type of terms to release liability, thus protecting the public interest in avoiding an increase in rates borne out of civil liability.

Relatedly, the proposed Terms of Service protect PREPA and LUMA from catastrophic losses. Catastrophic losses may occur in the event of service disruptions or malfunctions of, or damage to, the electrical system caused, for example, by atmospheric events, to which Puerto Rico is especially prone. Catastrophic losses can place the utility in fiscal jeopardy and adversely impact rate structures. The likelihood of catastrophic damages resulting in the occurrence of these types of situations is substantially higher in the case of the T&D System when compared to other utilities in the U.S. because of the T&D System's current state. In sum, the T&D System is more prone to suffer outages and service disruptions, among other service issues, than the typical utility in the United States. As a result, there is vulnerability to claims associated with these conditions, which could be substantial and adversely impact the T&D System's operational budget.

In light of the above, these Terms of Service are justified and they advance public interests because they help prevent increases in utility costs, ensure a predictable, fair and reasonable treatment of customers, protect the utility from catastrophic losses (and potential resulting adverse impacts to reliability), and mitigate the risks resulting from the obligation to provide services to all customers, regardless of the potential liability these may pose. These public interests are also consistent with Puerto Rico energy public policy goals under Act 17-2019 of "guarantee[ing] [that] the cost of electric power service in Puerto Rico [is] affordable, just, reasonable, and non-discriminatory for all consumers in Puerto Rico." *Id*., Section 1.5(1)(a). It similarly promotes the public policy under Act 57-2014 that electricity rates be "just and reasonable and consistent with sound fiscal and operational practices that provide for a reliable and adequate service at the lowest reasonable cost." *Id*.

Just like the utility commissions in the U.S. cases discussed above, the PREB is a utility regulator with legislatively delegated rate-making powers, as well as comprehensive powers over matters affecting the electric grid and services, including acts and omissions related to these. Therefore, consistent with the norms applicable to U.S. utilities pursuant to determinations by public utility regulators in the United States, PREB rates and related Terms of Service will be deemed to have the force and effect of law, provided these meet Act 57's requirements and criteria.

It must be emphasized that the proposed Terms of Service are not a "blank check" or "free pass" to LUMA. The Terms of Service will not alter the heavily regulated nature of LUMA's operations or PREB's oversight of these operations. LUMA will remain accountable to the PREB and its customers for compliance with the Puerto Rico energy public policy and regulatory framework as well as all legal and regulatory requirements applicable to electric service companies. For example, LUMA will continue to remain subject to the following actions or oversight from PREB under Act 57-2014, as applicable: (a) PREB's regulatory actions to guarantee the capacity, reliability, safety, efficiency and rate reasonableness of the electric system; (b) PREB's oversight of an energy service company's electric service's compliance with standards of quality, efficiency and reliability necessary to maintain a robust grid; and (c) PREB's actions or orders to implement the purposes of Act 57-2014 and require compliance with PREB rules, regulations, orders and determinations, including issue orders and seek and grant legal remedies. *See* Act 57-2014, Art. 6.3(c), (d), and (pp), as amended. In addition, under Act 57-2014, LUMA may be subject to complaints from affected persons with standing regarding alleged noncompliance with the energy public policy and applicable laws in effect. *Id*. Art. 6.4(a)(3) and 6.4(c). The PREB may also impose administrative penalties on electric service companies, including LUMA, for violations of Act 57-2104 and PREB's regulations and orders. *Id*., Art. 6.37.

Furthermore, under Act 17-2019, LUMA will be required to meet specified requirements and standards for the reconstruction and modernization of the T&D System to render it "robust, resilient and stable" and in accordance with the priorities established in Act 17-2019. *See* Act 17-2019, Section 1.15. LUMA is also subject to PREB's oversight with respect to the implementation of various provisions of the OMA, including the establishment of Performance Metrics, System Operation Principles and a System Remediation Plan, the latter of which includes the measures to render the T&D System compliant with Contract and Policy Standards. *See* OMA, Sections 4.2(f), 4.1(h) and 4.2(d)(iii).

The foregoing legal mechanisms to ensure accountability for compliance with applicable requirements governing electric services under Act 57-2014 and Act 17-2019 or other applicable laws, will not and should not be affected by the approval of this request. Therefore, incorporation of the proposed Terms of Service as part of the PREPA Tariffs Book and of the Tariff Book Resolution and Order, is reasonable and an important measure to avoid an impact on the budgets, ensure the consumers can continue to receive non-discriminatory services at reasonable, predictable, and affordable rates, and safeguard sound utility operations.

Based on the above, it is respectfully requested that this honorable Energy Bureau approve the Terms of Service applicable to all customer classes in PREPA's Tariff Book based on the language in Section 4.1(g) of the OMA:

> PREPA, its directors, officers, employees, agents and contractors (including "LUMA Energy, LLC and LUMA Energy Servco, LLC) (the "Released Parties"), (i) shall not be liable to customers, or any person (natural or legal) receiving power or electricity for any losses arising in any way out of or in connection with the operation of the transmission and distribution system and the provision of power and electricity including any events of interrupted, irregular or defective electric service due to force majeure events, other causes beyond the Released Parties' control, or ordinary negligence, gross negligence or willful misconduct of the Released Parties or their respective employees, agents or contractors; (ii) and in all cases shall not be responsible for any loss of profits or revenues, special, exemplary, punitive, indirect, incidental or consequential damages, including loss of revenue, loss of use of equipment, cost of capital, cost of temporary equipment, overtime, business interruption, spoilage of goods, claims of customers of electric customers or other economic harms, in each case howsoever and whensoever arising, including where caused by any of the Released Parties' ordinary negligence, gross negligence or willful misconduct.

WHEREFORE, LUMA respectfully requests that this honorable Energy Bureau **take note** of this Petition and Memorandum of Law and, as part of LUMA's Initial Budgets, **approve** the Terms of Service applicable to all customer classes in PREPA's Tariff Book.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 24th day of February 2021.

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

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