

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

IN RE: REVIEW OF LUMA'S TERMS OF
SERVICE (LIABILITY WAIVER)

CASE NO.: NEPR-MI-2021-0007

SUBJECT: Final Determination on LUMA's
Terms of Service Petition (Liability Waiver)

RESOLUTION AND ORDER

I. Introduction

(A) The Puerto Rico Electric System Transformation

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Puerto Rico suffers from an inherently deficient electric system, a condition that has been exacerbated after the impact of hurricanes Irma and María. In particular, the planning, design, and operation of an isolated island-based electricity system imposes on the Puerto Rico Electric Power Authority ("PREPA"), and Puerto Rico as a whole, significant challenges regarding power system stability and reliability. Act 120-2018¹ establishes the legal framework for the transformation of the electric power system in Puerto Rico.² It empowers PREPA to sell its assets related to electric power generation and transfer or delegate any of its operations, functions, or services.³

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Any agreement arising from Act 120-2018 shall be entered into under the legal and administrative framework established in Act 29-2009⁴, which regulates Public-Private Partnerships. Act 120-2018 establishes the process that applies to any transaction that establishes a Public-Private Partnership for any PREPA function, services, or facility. In addition, Act 120-2018 empowers PREPA and the Puerto Rico Public-Private Partnerships Authority ("P3A") to carry out the processes through which such transactions shall be executed.⁵

After conducting a competitive process in accordance with Act 120-2018 and Act 29-2009, the P3A selected a third-party operator for the PREPA Transmission and Distribution System ("T&D System"). Under the proposed transaction, the operation of PREPA's T&D

¹ Known as the "Puerto Rico Electric Power System Transformation Act", as amended ("Act 120-2018").

² See generally, *Statements of Motives*, Act-120-2018, pp 3-5.

³ *Id.*

⁴ Known as "Public-Private Partnership Act", as amended ("Act 29-2009").

⁵ *Id.*



System will be assumed by a private manager for a period of time, with ownership of the assets remaining at PREPA. Thereafter, on June 17, 2020, the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") issued a Certificate of Energy Compliance for the then proposed T&D System operation and management agreement.⁶

(B) The OMA

On June 22, 2020, PREPA, P3A, LUMA Energy, LLC⁷ as ManagementCo, and LUMA Energy ServCo, LLC⁸ as ServCo (collectively, "LUMA") entered into an Operation and Maintenance Agreement ("OMA") under which LUMA will manage the T&D System. Pursuant to the OMA, in general, LUMA shall be responsible to provide the following services ("O&M Services"):

all electric transmission, distribution, load serving and related activities for the safe and reliable operation and maintenance of the T&D System, subject to the terms and conditions of the main body of the Agreement, including (1) expansions and replacements to meet the Contract Standards, including fleet, asset management, asset acquisition/procurement, IT infrastructure, as further provided in this document and preparation and implementation of required components of the Integrated Resource Plan, while prioritizing expansion and replacement projects that improve the safe, reliable and economic dispatch of the T&D System's connected generating units; (2) management and performance of construction of improvements thereto, including compliance with approved FEMA scope of work for projects that are eligible for Federal Funding and required maintenance; (3) delivery of electricity to customers, including the implementation of the activities set forth in Sections II.A and II.B of this Annex I (Scope of Services); (4) billing and collections implementation and optimization; (5) maintenance and improvement of public lighting system; (6) maintenance of fiber optic cable structure infrastructure, as set forth in lease agreement between Owner and PREPA Networks, LLC, a wholly-owned subsidiary of Owner incorporated in April 2004 to execute the Optical Telecommunications Infrastructure Lease Agreement for dedicated provision of local wholesale telecommunication services (for the avoidance of doubt, the Parties acknowledge and agree that, except as specified in this item (6), Operator shall have no other responsibility relating to PREPA Networks, LLC); (7) compliance with interconnection of renewables in accordance with Applicable Law; (8) management of the System Operation Principles to meet safe and

⁶ See *Resolution and Order (Certificate of Energy Compliance)* dated June 17, 2020, *In re Certificate of Energy Compliance*, Case No.: NEPR-AP-2020-0002 ("Certificate of Energy Compliance").

⁷ See *In re: Request for Certification LUMA Energy, LLC*, Case No. NEPR-CT-2020-0008.

⁸ See *In re: Request for Certification LUMA Energy ServCo, LLC*, Case No. NEPR-CT-2020-0007.



*reliable system operations in accordance with Prudent Utility Practices and the System Operation Principles; and (9) recordkeeping and reporting in accordance with Applicable Law or Prudent Utility Practices.*⁹

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It is expected that the comprehensive O&M Services provided by LUMA will benefit PREPA by (i) transforming the T&D System into a modern, sustainable, reliable, efficient, cost-effective, and resilient electric system consistent with prudent utility practices to increase electric service quality; (ii) enabling delivery of low-cost electricity to ratepayers of Puerto Rico; (iii) increasing T&D System resiliency and reliability; (iv) deploying new technologies; and (iv) implementing industry best practices and operational excellence through managerial continuity and long-term planning.¹⁰ Therefore, the execution of the OMA constitutes a significant milestone to further the transformation of the Puerto Rico electric power utility that is mandated under Act 120-2018. Likewise, the implementation of the OMA under carefully designed and executed regulatory procedures will assure the success of this significant milestone of the transformation of the electric power system, to benefit the people of Puerto Rico.

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Under the OMA, LUMA must prepare and submit proposed Initial Budgets¹¹ during the Front-End Transition Period¹², for the Energy Bureau to “approve, deny or propose modifications to such proposed Initial Budgets in accordance with Applicable Law.”¹³ In connection with the submission of the Initial Budgets to the Energy Bureau, the parties to the OMA agreed to apply to include in the associated tariff or current terms of service, a waiver of PREPA and LUMA’s liability with respect to customers or any person receiving power and electricity for any losses arising in any way out of or in connection with the operation of the T&D System and the provision of power and electricity.¹⁴ The parties included in the OMA the proposed liability waiver language, which will be evaluated by the Energy Bureau for its approval, modification or denial. The Energy Bureau has no obligation to approve the proposed liability waiver.

The Energy Bureau deems that, as with the Initial Budgets (Section 4(e) of the OMA), it shall review, and approve, deny, or proposed modifications to the terms of service in

⁹ See OMA, Annex I, at p. I-1. The detailed Scope of Services is included in Annex I of the OMA.

¹⁰ See *Partnership Committee Report, Puerto Rico Public-Private Partnership for the Electric Power Transmission and Distribution System*, dated May 15, 2020 (“Report”), p. 27, included as Exhibit 1 to *Puerto Rico Public-Private Partnerships Authority's Request for Issuance of Certificate of Energy Compliance and Request for Confidential Treatment of Documents Submitted to PREB*, dated May 18, 2020, *In re Certificate of Energy Compliance*, Case No.: NEPR-AP-2020-0002.

¹¹ As defined in Section 1.1 of the OMA.

¹² As defined in Section 1.1 of the OMA.

¹³ Section 4.2(e) of OMA.

¹⁴ Section 4.1(g) of the OMA.



accordance the Applicable Law. This interpretation regarding the evaluation of the Terms of Service is consistent with Section 20.17 of the OMA which states that:

[n]otwithstanding anything to the contrary herein, no provision of this Agreement shall be interpreted, construed or deemed to limit, restrict, supersede, supplant or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the T&D System, Owner or Operator.

The Energy Bureau's interpretation is consistent with the Certificate of Energy Compliance which states:

*[a]s stated before, the scope of the Energy Bureau's evaluation of the Preliminary Contract is limited to the determination of compliance with the Puerto Rico's energy public policy and the current regulatory framework. Although the Energy Bureau provided certain feedback to the P3 Authority during the competitive solicitation process, the Preliminary Contract, results from an independent negotiation conducted by the P3 Authority. **The Energy Bureau is not a party to the Preliminary Contract. Thus, no obligation and/or duty may be imposed to the Energy Bureau under the Preliminary Contract (as modified).*** (Emphasis added).

*Considering the foregoing, the Energy Bureau further clarifies that the issuance of the **Energy Compliance Certificate** regarding the **Preliminary Contract** (as modified):*

- (1) *Shall not be construed, in any way whatsoever, as to impair, restrict, relinquish or abridge the scope of the Energy Bureau's: (1) administrative powers; (2) statutory and regulatory jurisdiction and/or authority; (3) statutory and regulatory oversight and enforcement powers; (4) rights; (5) duties; and (6) obligations, all in accordance with the applicable laws and regulations.*
- (2) *Shall not be construed, in any way whatsoever, as a waiver and/or release of any applicable statutory or regulatory requirement nor any related regulatory action applicable to the T&D System, the Operator, PREPA (or the successor owner of the T&D System).*
- (3) ***Anything in the Preliminary Contract (as modified) contrary to the provisions of Section [III](C)(1) and [III](C)(2) above, or otherwise contrary to the law, shall be deemed unenforceable.*** (Emphasis in the original).

It must be clear that the Energy Bureau is not compelled to approve the terms of service as established in Section 4(g) of the OMA. Instead, upon evaluation of a proposal by LUMA, the Energy Bureau shall review, and approve, deny, or propose modifications to any



proposed terms of service, consistent with the applicable legal and regulatory framework. As further discussed in this Resolution and Order, after a careful evaluation, the Energy Bureau **REJECTS** the proposed terms of service and instead, approves modified terms of service consistent with the public policy established for the transformation of the Puerto Rico electric system and with the public interest.¹⁵

II. Procedural Background

On February 24, 2021, LUMA filed a document titled *Petition for Approval of Initial Budgets and Related Terms of Service* ("Initial Budgets Petition").¹⁶ As part of the Initial Budgets Petition, LUMA filed, for the Energy Bureau's review and approval, (i) a document titled *Initial Budgets: First 3 Year of Recovery & Transformation, February 23, 2021* and identified as Exhibit 1 ("Initial Budgets"), and (ii) a document titled *Request for Approval of Terms of Service and Memorandum of Law in Support Thereof*, identified as Exhibit 2 ("Petition").¹⁷ In the Initial Budgets Petition, LUMA requested the Energy Bureau to approve the Initial Budgets and the Terms of Service.¹⁸

On April 5, 2021, the Energy Bureau issued a Resolution and Order ("April 5 Resolution"). In the April 5 Resolution the Energy Bureau determined that it was more appropriate to evaluate the Terms of Service in a separate proceeding.¹⁹ On April 22, 2021, LUMA filed a document titled *Informative Motion and Request for Issuance of Procedural Calendar* ("April 22 Motion").²⁰ In the April 22 Motion LUMA requested the Energy Bureau to issue a procedural calendar to allow LUMA to present testimonial, expert and/or other evidence, in support of the proposed Terms of Service.²¹

On May 4, 2021, the Energy Bureau issued a Resolution and Order ("May 4 Resolution") in Case No. NEPR-MI-2021-0007, pursuant to which it opened the instant case to evaluate the Terms of Service. Accordingly, the Energy Bureau's Clerk incorporated as part of the administrative record of the instant case the Initial Budgets Petition, including the

¹⁵ See Annex A to this Resolution and Order.

¹⁶ See In Re: Review of LUMA's Initial Budgets, Case No. NEPR-MI-2021-0004.

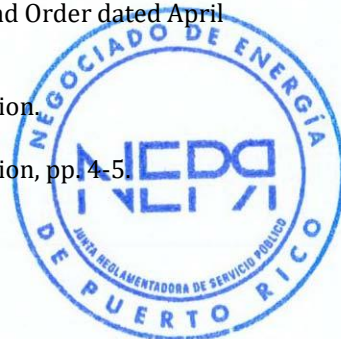
¹⁷ *Id.*

¹⁸ See In Re: Review of LUMA's Initial Budgets, Case No. NEPR-MI-2021-0004, February 24 Petition, p. 18.

¹⁹ See In Re: Review of LUMA's Initial Budgets, Case No. NEPR-MI-2021-0004, Resolution and Order dated April 5, 2021, p. 2, footnote #6.

²⁰ See In Re: Review of LUMA's Initial Budgets, Case No. NEPR-MI-2021-0004, April 22 Motion.

²¹ See In Re: Review of LUMA's Initial Budgets, Case No. NEPR-MI-2021-0004, April 22 Motion, pp. 4-5.



Terms of Service Petition.²² The Energy Bureau's Clerk also included the April 22 Motion as part of the administrative record of the instant case.

On the May 4 Resolution, the Energy Bureau determined that the Petition was incomplete and ordered LUMA to provide additional analysis, discussion, and supplemental information necessary for the evaluation the proposed Terms of Service.²³ In the May 4 Resolution, the Energy Bureau also established a Procedural Calendar, as requested in the April 22 Motion ("Procedural Calendar"). Pursuant to the Procedural Calendar (i) LUMA was required to submit the information identified in Attachment A of the May 4 Resolution, by May 10, 2021; (ii) LUMA was required to file a summary of the Petition in the Spanish Language, also by May 10, 2021; (iii) the Energy Bureau would issue its determination on the completeness of the Proposed Liability Waiver Petition, on May 12, 2021; (iv) LUMA would file its presentation for the Virtual Technical Conference ("Technical Conference"), by May 14, 2021; (v) the Energy Bureau scheduled the Technical Conference for May 18, 2021, from 8:30 am to 12:00 pm; (vi) LUMA was required to file any revised and/or additional information required by the Energy Bureau, by May 22, 2021; (vii) the Energy Bureau would hold a Virtual Public Hearing on May 25, 2021, from 9:00 am to 5:30 pm²⁴; and (viii) the due date for filing of comments by the general public would be May 26, 2021.^{25, 26}

In compliance with the May 4 Resolution, on May 7, 2021, LUMA filed a document titled *Motion Submitting Spanish-Language Translation of Terms of Service Petition in Compliance with Order*. As part of such document, LUMA filed, for the Energy Bureau's review and approval, a document titled *Solicitud de Aprobación de Términos de Servicio y Memorando de Derecho en Apoyo de la Misma*, identified as Exhibit 1 ("Translated Terms of

²² The Energy Bureau clarified that Exhibit #1 of the February 24 Petition is not part of the record of the captioned case.

²³ See May 4 Resolution, Attachment A.

²⁴ Accordingly, on May 12, 2021, the Energy Bureau published a public notice titled *Notice Concerning Public Hearings, Review of LUMA's Terms of Service* ("Public Notice"). The Public Notice was published in *Primera Hora* newspaper and informed that the Energy Bureau would hold a Virtual Public Hearing regarding the Terms of Service on May 25, 2021, from 9:00 am to 5:30 pm ("Public Hearing"). See *Notice Concerning Public Hearings, Review of LUMA's Terms of Service*, *Primera Hora*, May 12, 2021. It also informed about the general public's opportunity to file comments on the proposed Terms of Service. The Public Notice further stated that the Public Hearing as well as the Technical Hearing would be streamed via the Energy Bureau's YouTube channel. Moreover, the Public Notice informed that the public may submit written comments and suggestions regarding the proposed Terms of Service on or before May 26, 2021. Finally, the Public Notice stated that LUMA's Terms of Service Petition process under Case No. NEPR-MI-2021-0007, was available for public scrutiny at (i) the Energy Bureau's Clerk Office, for which the address and hours of operation were included; and (ii) the Energy Bureau's website, for which the link was provided. The Energy Bureau also published a Public Notice on its website.

²⁵ May 4 Resolution, p. 3.

²⁶ *Id.*, p. 4.



Service Petition”).²⁷ On that same day, LUMA filed a document titled *Urgent Request for Brief Extension of Time to File LUMA’s Responses to Attachment A of May 4th Resolution and Order* (“May 7 Motion”). In the May 7 Motion, LUMA requested the Energy Bureau to extend the time for filing the information identified in Attachment A of the May 4 Resolution, until May 11, 2021, at 3:00 pm.²⁸

Without an adjudication issued by the Energy Bureau regarding the May 7 Motion, on May 11, 2021, LUMA filed a document titled *Motion Submitting Responses to Attachment A of May 4th Resolution and Order* (“May 11 Motion”). As part of the May 11 Motion, LUMA filed, for the Energy Bureau’s review and approval, its *Responses to Requests for Information*, identified as Exhibit 1.²⁹ Exhibit 1 is composed of several documents, identified as RFI-LUMA-MI-21-0007-210504-PREB-001 through RFI-LUMA-MI-21-0007-210504-PREB-007.³⁰ The document identified as RFI-LUMA-MI-21-0007-210504-PREB-001 has four (4) attachments, identified as (i) RFI-LUMA-MI-21-0007-210504-PREB-001-Att1, titled *Puerto Rico Electrical Power Authority Insurance Program Structure 2018-2019*; (ii) RFI-LUMA-MI-21-0007-210504-PREB-001-Att2, titled *Puerto Rico Electrical Power Authority Insurance Program Structure 2019-2020*; (iii) RFI-LUMA-MI-21-0007-210504-PREB-001-Att3, titled *Casos identificados como reclamaciones activas y cerradas registradas desde el 2009 al presente*; and (iv) RFI-LUMA-MI-21-0007-210504-PREB-001-Att4, which contains a list of PREPA’s active claims.³¹ LUMA attached to RFI-LUMA-MI-21-0007-210504-PREB-005 a document identified as RFI-LUMA-MI-21-0007-210504-PREB-005, titled *Puerto Rico Electric Power Authority Risk Management Office Claims & Contracts Amount Comparative Dashboard for Fiscal Periods 2016-2017, 2017-2018, 2018-2019, 2019-2020 & Jul-2020 to Apr 30, 2021*.³²

In the May 11 Motion, LUMA informed the Energy Bureau that on May 14, 2021, it would submit (i) the pre-filed testimony of its representative, Mr. Mario Hurtado, Vice President, Regulatory LUMA, and (ii) the pre-filed testimony and expert report of an independent expert witness on Terms of Service, Mr. Branko Terzic, in lieu of a Power Point presentation.³³ In the May 11 Motion, LUMA requested the Energy Bureau to deem that it complied with providing the information identified in the Attachment A of the May 4 Resolution.³⁴

²⁷Translated Liability Waiver Petition.

²⁸ May 7 Motion, p. 5.

²⁹ May 11 Motion.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³May 11 Motion, p. 2.

³⁴ *Id.*



On May 14, 2021, LUMA filed a document titled *Motion Submitting Pre-Filed Testimonies in Lieu of Presentation for the Virtual Technical Conference* ("May 14 Motion"). As part of the May 14 Motion, LUMA filed (i) a document titled *Pre-Filed Testimony Mario Hurtado Vice President Regulatory, LUMA Energy LLC*, identified as Exhibit 1 ("Hurtado's Testimony"); and (ii) a document titled *Branko Terzic Expert Report and Testimony On behalf of LUMA Energy LLC and LUMA Energy ServCo LLC*, identified as Exhibit 2 ("Terzic's Testimony"). The Terzic's Testimony further contains (i) a document titled *Curriculum Vitae of Branko Terzic*, identified as Exhibit 1 and (ii) a document titled *List of Previous Testimonies of Branko Terzic*, identified as Exhibit 2.

In sum, Hurtado's Testimony asserts that (i) the Proposed Liability Waiver protects ratepayers from higher rates, protects the public interest and is an essential part to remediate the T&D System; (ii) PREPA's Terms of Service are not consistent with Prudent Utility Practice³⁵ and would not permit LUMA to meet the Contract Standards³⁶; (iii) LUMA will remain accountable to the Energy Bureau in accordance with Applicable Law, and is will comply with the provisions of the OMA; and (iv) LUMA's programs include internal controls, policies, procedures and other measures to protect customers from risks arising out of the T&D System.³⁷

Terzic's Testimony asserts that limitations on liability (i) are the most common regulatory policy for electric utilities in the United States and Canada; (ii) are in the public interest benefitting the greatest number of PREPA customers since they help prevent increases in utility costs, ensure a predictable, fair and reasonable treatment of customers and protect the utility from catastrophic losses, among others; and (iii) are part of a package of regulatory policies and requirements designed to incent efficiency, improve operations and reduce costs to PREPA customers.³⁸

In the May 14 Motion, LUMA requested the Energy Bureau to deem that it complied with providing its presentation regarding the Technical Conference, as required in the May 4 Resolution.³⁹

On May 18, 2021, the Energy Bureau held the Technical Conference to discuss the Petition with LUMA's and PREPA's personnel and/or consultants.⁴⁰ During the Technical Conference, Mr. Mario Hurtado, Vice President of Regulatory for LUMA; Mr. Kalen Kostyk,

³⁵ As defined in Section 1.1 of the OMA.

³⁶ As defined in Section 1.1 of the OMA.

³⁷ See May 14 Motion, Hurtado's Testimony.

³⁸ See May 14 Motion, Terzic's Testimony.

³⁹ See, May 14 Motion, p. 2.

⁴⁰ See, Technical Conference, https://www.youtube.com/watch?v=gID43co8_ws (last visited May 26, 2021).



Manager of Accounting for LUMA; and Mr. John Stone, Director of Risk Management, LUMA, testified and answered the Energy Bureau's questions regarding the Petition on behalf of LUMA.⁴¹ Mr. Branko Terzic, as an independent expert witness, also testified and answered the Energy Bureau's questions in relation to the Petition.⁴² In sum, LUMA and Mr. Branko Terzic testified in support of approving the Proposed Liability Waiver.⁴³ Their testimonies favored the inclusion of a waiver of liability arising out of the ordinary negligence, gross negligence or willful misconduct of PREPA, LUMA, or their respective employees, agents or contractors, as provided in Section 4.1(g) of the OMA.

Also on May 18, 2021, attorney Katiushka Bolaños-Lugo filed a document titled *Notice of Appearance and Request for Notice*, in which she requested the Energy Bureau to take notice of her appearance on behalf of PREPA, and that all notice given or required to be given in the present case be served upon her.⁴⁴ On May 21, 2021, the Independent Consumer Protection Office ("OIPC", for its Spanish acronym) filed a document titled *Escrito de Intervención de la OIPC* ("Petition for Intervention"). In the Petition for Intervention, OIPC states that it has standing to participate in the present case as intervenor, pursuant to Act 57-2014.⁴⁵ Consequently the OIPC requests the Energy Bureau to permit its intervention.⁴⁶ The OIPC further argues that Section 4.1(g) of the OMA is contrary to Puerto Rico Law and to consumers' rights to claim damages arising out of LUMA's service.⁴⁷

On May 22, 2021, LUMA submitted a document titled *Motion Submitting Additional Information and Responses to Requests Issued During Technical Conference*, in compliance with the May 4 Resolution, as well as with Energy Bureau's requests and bench orders issued during the Technical Conference ("May 22 Motion"). As part of the May 22 Motion, LUMA filed two (2) documents identified as (i) TC-RFI-LUMA-MI-21-0007-21-0518-PREB-001, Attachment 1, which contains a table titled *Sample of Current Utility Tariffs in Certain U.S. States, Canadian Provinces and Caribbean Islands*; and (ii) TC-RFI-LUMA-MI-21-0007-21-0518-PREB-001 Attachment 2, which contains British Columbia Hydro and Power Authority's Electric Tariff, effective April 1, 2017.⁴⁸

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *Notice of Appearance and Request for Notice*, p. 1.

⁴⁵ See Petition for Intervention, pp. 3-5.

⁴⁶ *Id.*

⁴⁷ See Petition for Intervention, p. 5.

⁴⁸ See May 22 Motion.



On the May 22 Motion, LUMA also included a discussion regarding the Petition, which included (i) examples of utility liability waivers in the United States, Canada and the Caribbean; (ii) legal and factual arguments in favor of the inclusion of gross negligence and willful misconduct in the Proposed Liability Waiver, including an argument that Puerto Rico Law does not distinguish between degrees or types of negligence; (iii) a discussion about LUMA's potential liability for gross negligence, noting, among other things, that the *Civil Code of Puerto Rico* of 2020⁴⁹ allows compensation for punitive damages⁵⁰; and (iv) a discussion about the alleged need for the Proposed Liability Waiver, including the reasons stated in Hurtado's Testimony and Terzic's Testimony, as well as PREPA's and the T&D System's current state.⁵¹ LUMA also clarified that column "Q" of the document identified as RFI-LUMA-MI-21-0007-210504-PREB-001-Att3, filed as part of the May 11 Motion, only contains PREPA's paid extrajudicial claims since 2009.⁵² Thus, RFI-LUMA-MI-21-0007-210504-PREB-001-Att3 does not include all of the payments of judgments issued in civil third-party suits against PREPA, nor does it display the full scope of liabilities to which ratepayers will be exposed in the future.⁵³ In the May 22 Motion LUMA requests the Energy Bureau to deem that it timely complied with the portion of the May 4 Resolution that orders LUMA to file additional information, as well as with the bench orders issued in the Technical Conference.⁵⁴ It also reiterates LUMA's request to approve the Proposed Liability Waiver.⁵⁵

On May 24, 2021, the OIPC filed a document titled *Comentarios de la Oficina Independiente de Protección al Consumidor en Relación con la Solicitud de Aprobación de Términos de Servicio ("Liability Waiver") Radicada por LUMA* ("OIPC's Written Comments"). The OIPC argues, among other things, that (i) liability waivers are not favored by Puerto Rico Law; (ii) the Proposed Liability Waiver is enforceable only with respect to LUMA, PREPA and the P3A, and that rights must be adequately waived; (iii) the service contract of PREPA with its customers is an adhesion contract, which, in Puerto Rico, is interpreted in a restrictive manner; (iv) PREPA does not have a waiver of liability; (v) the Proposed Liability Waiver contravenes Puerto Rico Tort Law, pursuant to which a person can file a claim arising out of the negligence of another; (vi) LUMA failed to state that the cited jurisdictions that have approved similar waivers of liability possess Tort Law similar to Puerto Rico; (vii) LUMA failed to explain how the Proposed Liability Waiver serves the public interest; (viii) the sums paid by PREPA as consequence of claims filed against it, differ from the billionaire economic impact that LUMA argues it can suffer; (ix) LUMA's performance metrics will be affected in

⁴⁹ Act 55-2020.

⁵⁰ Specifically, Article 1538.

⁵¹ See May 22 Motion, pp. 2-18.

⁵² See May 22 Motion, p. 18.

⁵³ See May 22 Motion, pp. 18-19.

⁵⁴ *Id.*

⁵⁵ *Id.*



an fictional positive way as a result of the lack of remedies consumer will have.⁵⁶ The OIPC opposes to the approval of the proposed Terms of Service, since (i) it is contrary to Puerto Rico Law and, thus, illegal; (ii) it affects consumers' rights; (iii) it is contrary to the public interest; and (iv) has no justification to the extent it includes an absolute waiver of liability.⁵⁷

On May 25, 2021, the Energy Bureau held the Public Hearing, to receive oral comments from the general public regarding the proposed Terms of Service.⁵⁸ During the Public Hearing, attorney Hannia Rivera Díaz, Director of the OIPC; and Pedro Vázquez Meléndez, legal advisor of OIPC, testified and answered the Energy Bureau's questions regarding the Petition on behalf of the OIPC.⁵⁹ The OIPC reiterated its opposition to the approval of the Terms of Service, as written based on the same arguments included the OIPC Written Comments.⁶⁰ Nevertheless, OIPC's Director testified that they may be amenable to concur with an alternative language more prone to protect the interest of all the customers.

⁶¹ Mr. Hipólito González, a PREPA customer, also testified during the Public Hearing, expressing his opposition to the approval of the proposed Terms of Service. ⁶² He argued that PREPA's customers have limited opportunities to claim and recover damages from PREPA.⁶³ He added that as the operator of the T&D System LUMA should be held accountable for damages caused to the customers.⁶⁴

Also, on May 25, 2021, Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico ("ICSE") filed a document titled *Motion Requesting Extension of Time to File Comments* ("May 25 Motion"). In the May 25 Motion, the ICSE requests further time for intervenors, as well as for PREPA and LUMA, and other stakeholders to comment on the proposed Terms of Service.⁶⁵ Specifically, it requests fourteen (14) days to file its position.⁶⁶

⁵⁶ See OIPC's Written Comments, pp. 6-17.

⁵⁷ See OIPC's Written Comments, pp. 6, 17.

⁵⁸ See Public Hearing, <https://www.youtube.com/watch?v=6pQk5kg0odM> (last visit May 26, 2021).

⁵⁹ *Id.*

⁶⁰ See Public Hearing, at minutes 12:09 to 1:16.

⁶¹ See *Id.*

⁶² See *Id.*, at minutes 1:17 to 1:20.

⁶³ See *Id.*

⁶⁴ See *Id.*

⁶⁵ See May 25 Motion, p. 1.

⁶⁶ See May 25 Motion, p. 2.



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As part of the written comments received on May 26, 2021, Unión de Trabajadores de la Industria Eléctrica y de Riego, Inc. (“UTIER”) filed a document titled *Moción para Presentar Comentarios sobre Solicitud de Exención de Responsabilidad por Actuaciones de LUMA Energy y Otros* (“UTIER’s Comments”). UTIER states, that (i) the OMA cannot contravene the provisions of the *Civil Code of Puerto Rico* of 1930⁶⁷ and that the Energy Bureau nor the OMA can legislate or amend the laws; (ii) ratepayers can file claims against any part that causes damages; (iii) no consumer is part of the OMA and, thus, it can only affect its parties and not third parties that have not waived their rights; (iv) if LUMA is not subject to Puerto Rico Tort Law, there will be no incentive or obligation to act in a prudent and reasonable way; (v) LUMA has not presented legal arguments that justify its Proposed Liability Waiver; (vi) absent a legal basis, the Energy Bureau must deny the Proposed Liability Waiver Petition; and (vii) there is no reasonable relation between the rates and the Proposed Liability Waiver, LUMA’s alleged reduction would cost the welfare of the people of Puerto Rico, and LUMA’s performance metrics could be influenced, since the people would not present claims.⁶⁸ UTIER requests the Energy Bureau to deny the Proposed Liability Waiver Petition.⁶⁹

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Between May 24 and May 27, 2021, the Energy Bureau received approximately eight hundred and eighty-three (883) written comments from the general public regarding the proposed Terms of Service. The commenters stated that, as clients and consumers of PREPA, they reject the proposed Terms of Service. They demanded that their right to claim negligence and deception be enforced against LUMA. They also expressed that the OMA is not appropriate, and it must be canceled, because, among other things, it will prevent the achievement of the renewable energy goals using solar systems on rooftops, will result in higher utility bills and will perpetuate the use of fossil fuels. Essentially all the comments received from public are boiler plate type, including the same language.

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On May 26, 2021, the Institute for Energy Economics and Financial Analysis (“IEEFA”) and CAMBIO submitted a document titled *IEEFA and CAMBIO Comments on Proposed Liability Waiver* (“IEEFA Comments”). In the IEEFA Comments, both organizations requested the Energy Bureau to reject the Proposed Liability Waiver since, according to them, it would protect LUMA, PREPA, the P3A and their employees, agents or contractors from any liability for losses related to the operation of the T&D System, including acts of negligence, gross negligence or willful misconduct.⁷⁰ They argue that the Proposed Liability Waiver is broader than standard waivers in the private utility industry of the United States, and that, even though LUMA offers BC Hydro’s tariff as an example of a waiver that includes gross negligence, such an example is distinguishable as it pertains to a clause negotiated by a public corporation owned by the government of British Columbia, Canada, under Canadian

⁶⁷ Superseded by the *Civil Code of Puerto Rico* of 2020, Act 55-2021.

⁶⁸ See UTIER’s Comments.

⁶⁹ *Id.*

⁷⁰ See IEEFA Comments, p. 1.



law, which is not applicable in Puerto Rico's situation.⁷¹ Furthermore, it is stated that BC Hydro's tariff does not protect the utility, its representatives or agents from liability arising from willful misconduct.⁷² Moreover, the IEEFA Comments noted that the concession arrangement between the Long Island Power Authority and PSEG provides that there shall be no limitation on PSEG's liability for any "Loss-and-Expense" resulting from its gross negligence or willful misconduct.⁷³ Consequently, the IEEFA Comments assert that Puerto Rico electrical customers should retain a right to hold LUMA accountable for injuries or damages arising from its gross negligence or willful misconduct, and that the condition of the T&D System does not relate to liability resulting from such conduct.⁷⁴

On May 27, 2021, LUMA filed a document titled *Response in Opposition to ICSE's Motion Requesting an Extension of Time to File Comments* ("May 27 Motion"). In the May 27 Motion, LUMA states that the May 25 Motion is untimely, fails to provide a reasonable justification or just cause for failing to file its comments within the established deadline, and requests an unduly long extension of time.⁷⁵ LUMA further argues that, although it appreciates the importance of allowing stakeholders to comment on the proceedings before the Energy Bureau, the Procedural Calendar was set on May 4, 2021, and has been available on the Energy Bureau's website, as well as the Petition, which was filed on February 24, 2021.⁷⁶ Thus, LUMA asserts that an opportunity to participate was adequately afforded, but ICSE did not timely appear for the Public Hearing nor did it file its written comments.⁷⁷ Consequently, LUMA argues that the May 25 Motion (i) is inconsistent with the Procedural Calendar; (ii) would impinge on the Energy Bureau's time to issue a determination on the present case; and (iii) interferes with LUMA's commencement time since, pursuant with Section 4.5(p) of the OMA, approval of a liability waiver consistent with the language of Section 4.1(g) is a condition precedent to service commencement.⁷⁸ In view of the above, LUMA requests the Energy Bureau to deny the May 25 Motion.⁷⁹

On May 28, 2021, the Energy Bureau issued a Resolution and Order denying OIPC's Petition for Intervention ("May 28 Resolution"). Although the OIPC was not recognized as an intervenor, the Energy Bureau authorized OIPC's ample participation. The OIPC may, (a)

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See IEEFA Comments, p. 2.

⁷⁵ See May 28 Resolution, p. 4.

⁷⁶ *Id.*

⁷⁷ See May 27 Motion, p. 3.

⁷⁸ *Id.*

⁷⁹ See May 27 Motion, p. 4.



submit written comments, suggestions or any document it may deem necessary or useful; (b) provide testimony during hearings; (c) ask questions to witnesses; and (d) access to all documents in the record of the case, provided that with regard to documents marked as confidential, it shall meet the requirements established by the Energy Bureau for such purposes. The Energy Bureau also ordered LUMA to prospectively notify the OIPC any document presented in this case and also ordered the Secretary of the Energy Bureau to include the OIPC in all notifications issued.⁸⁰

On May 31, 2021, the Energy Bureau issued a Resolution and Order denying ICSE's petition for time extension to file additional comments.

III. LUMA's Terms of Service (Liability Waiver) Petition

A. The Proposed Liability Waiver

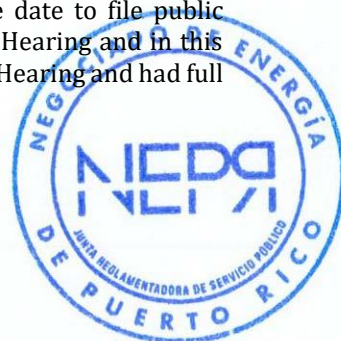
The liability waiver proposed by LUMA in the Petition provides, in full:

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.⁸¹

The first step in evaluating the Proposed Liability Waiver is to understand what it entails. The Energy Bureau must point out that the language of the Proposed Liability Waiver has been misconstrued by many, including LUMA's representatives. Moreover, certain documents⁸² and explanations provided in support of the Petition may have (perhaps

⁸⁰ The May 28 Resolution was issued after the date of the Public Hearing and the due date to file public comments. However, the record shows that the OIPC actively participated in the Public Hearing and in this case in general. That is, the OIPC provided written comments, testimony during the Public Hearing and had full access to record of the case because no document has been designated as confidential.

⁸¹ Herein referred to as the "Proposed Liability Waiver". See Petition, p. 18.



unintentionally) increased the confusion, suggesting that the Proposed Liability Waiver is broader than what its plain text reveals. In construing the Proposed Liability Waiver, the Energy Bureau shall pay attention, among others, to the following: (a) the released parties⁸³; (b) the releasing parties⁸⁴; (c) the events triggering release⁸⁵; (d) the standard of care acceptable from the released parties⁸⁶; and (e) the extent of the release granted.⁸⁷ Once the scope of the Proposed Liability Waiver is established, the Energy Bureau shall determine other important matters such as: (a) its authority to entertain the Petition, (b) the appropriate procedure to manage the Petition, (c) the applicable legal framework; (d) the evaluation of the merits of the Petition; and (e) the proper remedy.

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The parties to be released by the Proposed Liability Waiver are PREPA, its officers, employees, agents, and contractors, including LUMA. The releasing parties are, (i) PREPA's customers, or (ii) any person receiving power or electricity from PREPA. A *person receiving power from PREPA* is a *user*, that is, a person who receives and uses power and electricity from PREPA at a certain location and whose consumption is recorded and invoiced in the name of another person.⁸⁸ The liability release occurs in the context of the supply and receipt of electricity or power from PREPA to a customer or a *user*. Therefore, if the foregoing relationship (PREPA-Customer (or user)) is not present, the liability waiver is inapplicable. For example, a claim for damages due to a traffic accident involving a PREPA's motor vehicle would not be barred by the liability waiver. Note that the claim would not be within the scope of the Proposed Liability Waiver because the event triggering the claim is not related to the supply of electricity or power to the claiming party. Likewise, most claims for electrocution, personal and/or property damages against PREPA would be outside the relationship PREPA-Customer (or user), therefore, those claims neither would be covered by the Proposed Liability Waiver.

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⁸² See, for example, the following documents accompanying the May 11 Motion: RFI-LUMA-MI-21-0007-210504-PREB-001-Att3, titled *Casos identificados como reclamaciones activas y cerradas registradas desde el 2009 al presente*; and RFI-LUMA-MI-21-0007-210504-PREB-001-Att4, which contains a list of PREPA's active claims.

⁸³ This entails to determine, who will be released of its obligation to respond for a claim asserted by another person.

⁸⁴ This entails to determine, who will be strip out of right to claim for the acts of other persons.

⁸⁵ This entails, to determine, the specific events or circumstances to which the liability release would apply.

⁸⁶ This entails, to determine, the standard of care that will be permitted from the person who will be released of its obligation to otherwise respond for its acts.

⁸⁷ This entails, to determine, the extent of the release provided.

⁸⁸ See Section II(XX) of *Reglamento de Términos y Condiciones Generales para el Suministro de Energía Eléctrica* ("Regulation 7982"). A *user*, for example, may be a tenant in an office building who pays his electricity consumption to the owner of the building as part of his monthly rent. The tenant receives electricity and power from PREPA, but it does not have an account register in his name. The owner of the building is the direct PREPA customer, with an account register in his name.



The events or circumstances triggering the applicability of the Proposed Liability Waiver can be summarized as follows:

Events 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 (but not limited to) the following:⁸⁹

- (a) events of interrupted, irregular, or defective electric service due to:
 - (1) force majeure events or,
 - (2) other causes beyond the Released Parties' control
- (b) events caused due to ordinary negligence, gross negligence or willful misconduct of the Released Parties or their respective employees, agents, or contractors.

These events triggering the release evaluated in isolation, disconnected from the identity of the *releasing parties*, may suggest that the Proposed Liability Waiver is broader than it is. Take for example, the case of a PREPA's truck driver in route to maintain a T&D System substation which causes damages to a pedestrian for his negligence. There is no doubt that it is an "event[]" 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".⁹⁰ However, the pedestrian is not a customer or person receiving power or electricity from PREPA at the time of the event. The pedestrian is not a *releasing party* within the context of the Proposed Liability Waiver, thus, his potential claim against PREPA would not be barred by the Proposed Liability Waiver.

Concerning the standard of care acceptable from the Released Parties for their acts, it is clear here that LUMA seeks not be held liable for events caused due to ordinary negligence, gross negligence, or willful misconduct. If PREPA and/or LUMA, in the context of the supply and receipt of electricity or power to a customer or a *user* incurs in ordinary negligence, gross negligence or willful misconduct, LUMA proposes not to be held liable.

The second part of the Proposed Liability Waiver states that in all cases [of customers or any person receiving power or electricity], howsoever and whensoever arising, the Released Parties shall not be responsible for:

⁸⁹ Ordinarily, "including" indicates that the specified list that follows is illustrative, not exclusive. See Puerto Rico Maritime Shipping Auth v. I.C.C., 645 F.2d 1102, 1113 (D.C. Cir. 1981) and Certified Color Mfg. Ass'n v. Mathews, 543 F.2d 284, 296 (D.C. Cir. 1976).

⁹⁰ PREPA's employee is engaging in an activity related to the maintenance of the T&D System.



any loss of profits or revenues, special, exemplary, punitive, indirect, incidental, or consequential damages, including [without limitation]⁹¹:

(1) loss of revenue, (2) loss of use of equipment, (3) cost of capital, (4) cost of temporary equipment, (5) overtime, (6) business interruption, (7) spoilage of goods, (8) claims of customers of electric customers or (9) other economic harms.

Jim
The foregoing provision is not a limitation of liability, but a list of potential forms of special damages that the *releasing parties*, for whatever reason, are not entitled to recover from PREPA and/or LUMA. Therefore, if for whatever reason a customer, or any person receiving power or electricity is entitled to recover damages from PREPA and/or LUMA such damages shall not encompass the special damages (any loss of profits or revenues, special, exemplary, punitive, indirect, incidental, or consequential damage) expressly excluded. That leaves the claimant recovering only general (direct) damages. This provision must also be interpreted in the context of the supply and receipt of electricity or power from PREPA to a customer or a *user*. It provides that if PREPA and/or LUMA is found liable to the customer or the *user*, the type of damages listed shall not be recovered.

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In their appearances before the Energy Bureau, LUMA's representatives seem to ascribe to the Proposed Liability Waiver a broader effect than what the Energy Bureau considers from its plain language and context, as discussed before.⁹² The OIPC⁹³ and UTIER⁹⁴ also read the Proposed Liability Waiver as having a far-reaching effect, in detriment of the rights of PREPA's customers and even non costumers.⁹⁵

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We can summarize that the Energy Bureau has before its consideration a petition to modify PREPA's terms of service, in order to: (a) limit the scope of liability of PREPA (including, LUMA and other related parties)⁹⁶ to customers and persons receiving electricity and power from PREPA for certain events arising out of as a result of the operation and

⁹¹ See note 89.

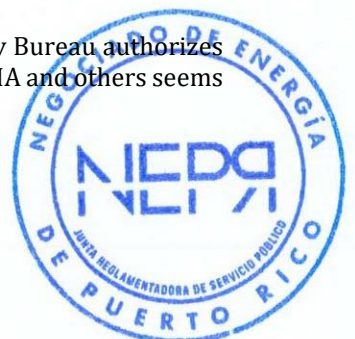
⁹² Consider, in general, Hurtado's testimony and LUMA's counselor explanations during the Technical Hearing, the May 22 Motion (pp. 10-14), as well as the exhibits included with the May 11 Motion identified as: RFI-LUMA-MI-21-0007-210504-PREB-001-Att3, titled *Casos identificados como reclamaciones activas y cerradas registradas desde el 2009 al presente*; and RFI-LUMA-MI-21-0007-210504-PREB-001-Att4, which contains a list of PREPA's active claims. Note that a significant number of the claims (judicial and non-judicial) described in these attachments are well outside of even an inclusive reading of the Proposed Liability Waiver.

⁹³ See, in general, OIPC Written Comments, pp. 10, 14-16, and OIPC representatives' testimony during the Public Hearing.

⁹⁴ See UTIER Comments, p. 3.

⁹⁵ As discussed below, for the sake of clarity, and to protect the public interest, the Energy Bureau authorizes Modified Terms of Service which in part, clarifies and limit the broad applicability that LUMA and others seems to ascribe to the Proposed Liability Waiver.

⁹⁶ The Released Parties.



maintenance of the T&D System, and, (b) to limit the type of damages that customers and persons receiving electricity or power from PREPA can recover from LUMA and/or PREPA.⁹⁷

B. Scope of LUMA's Petition

The Energy Bureau approved PREPA's current tariff ("Permanent Tariff") pursuant to a tariff revision procedure under Case No. CEPR-AP-2015-0001 ("Permanent Tariff Revision Process").⁹⁸ As part of the Permanent Tariff Revision Process, the Energy Bureau approved PREPA's Tariff Book.⁹⁹ The Permanent Tariff approved by the Energy Bureau entered into effect on May 1, 2019.¹⁰⁰

In the Petition, LUMA requests the Energy Bureau to approve and incorporate in PREPA's Tariff Book¹⁰¹, in accordance with the 2017 Rate Order, certain terms of service applicable to PREPA and LUMA, pursuant to Section 4.1(g) of the OMA.¹⁰² LUMA asserts that the request to include the Proposed Terms of Service in PREPA's Tariff Book does not entail a change in the basic rate approved in the 2017 Rate Order, because such approval will not have a direct impact on the financial operation of PREPA and does not immediately require a reduction or an increase of the base rates.¹⁰³ Moreover, it asserts that its Initial Budgets¹⁰⁴ assume that the Energy Bureau approves the Proposed Liability Waiver.¹⁰⁵

In the Petition, LUMA discusses its request regarding the Energy Bureau's approval of the Proposed Liability Waiver as applicable to all customer classes in PREPA's Tariff

⁹⁷ Notwithstanding our general interpretation of the Proposed Liability Waiver and, as further discussed below, in the evaluation and determination regarding the Petition, we are mindful of the interpretation given by others to the language of the Proposed Liability Waiver.

⁹⁸ Final Resolution and Order dated January 10, 2017, and Final Resolution dated March 8, 2017, in case captioned In Re: Puerto Rico Electric Power Authority Rate Review, Case No. CEPR-AP-2015-0001 (collectively, "2017 Rate Order").

⁹⁹ See Resolution and Order dated May 8, 2019 and Motion in Compliance of Order dated May 22, 2019, both in the case captioned In Re: Puerto Rico Electric Power Authority Rate Review, Case No. CEPR-AP-2015-0001 and Caso No.: NEPR-AP-2018-0003.

¹⁰⁰ Resolution and Order, In Re: Puerto Rico Electric Power Authority Rate Review, Case No. CEPR-AP-2015-0001 dated May 31, 2017. Although the current tariff was approved pursuant the Resolution and Order dated May 31, 2017, it was not put into effect until May 1, 2019.

¹⁰¹ See Case No. CEPR-AP-2015-0001 and Case No.: CEPR-AP-2018-0003 (PREPA's Book of Tariffs").

¹⁰² See February 24 Motion, p. 17.

¹⁰³ *Id.*

¹⁰⁴ The Initial Budgets are being analyzed separately by the Energy Bureau. See In re: Review of LUMA's Initial Budgets, Case No. NEPR-MI-2021-0004.

¹⁰⁵ See, February 24 Motion pp. 15-16.



Book.¹⁰⁶ Specifically, LUMA requests the Energy Bureau to approve the Proposed Liability Waiver pursuant to Sections 4.1(g) and 4.5(p) of the OMA.¹⁰⁷ LUMA recognizes that its request to approve the Proposed Liability Waiver is within the Energy Bureau's exclusive jurisdiction and authority, and that the United States' utilities industry is familiar with this type of inclusions in terms of service, as well as their approval in utility tariffs, since they are consistent with Prudent Utility Practice¹⁰⁸, and advance important policies, including (i) protecting customers from increases in costs; (ii) a fair and reasonable treatment of all customers; (iii) protecting the utility from catastrophic losses and impacts to reliability; (iv) and mitigating the risks to the utility relating to the potential liability it may pose the obligation to provide services to all customers.¹⁰⁹

In support of the Proposed Liability Waiver, LUMA cites case law from other jurisdictions regarding the approval and enforcement by state regulators of tariffs that include limitations on utilities' liability.¹¹⁰ Moreover, LUMA argues that such case law¹¹¹ favors the inclusion of liability waivers that limit the utilities' ordinary negligence, as well as its gross negligence and willful misconduct.¹¹² It contends, that the certain public policies that prevents parties from contractually limiting their liability for gross negligence or willful misconduct are inapplicable to public utility tariffs, because extensive regulation of an electric service company's rates and practices takes such service out of the realm of contract law¹¹³ and, particularly, because the rate-making process is a legislative function, delegated to public service commission's regulating electric service companies.¹¹⁴

LUMA further argues that, absent a limitation of an electric service company, the company would be forced to raise its rates.¹¹⁵ Some of the cited cases suggest that such raise would come as a result from the claims of industrial or commercial customers, which are

¹⁰⁶ See Petition, p. 1.

¹⁰⁷ See Petition, p. 8.

¹⁰⁸ As defined in Section 1.1 of the OMA.

¹⁰⁹ See February 24 Motion, p. 18; Petition, p. 9.

¹¹⁰ See Petition, p. 10.

¹¹¹ Not all cases cited by LUMA interpret limitations of liability pertaining electric service companies.

¹¹² See Petition, pp. 10-11; Maryland Casualty Co. v. NSTAR Elec. Co., 471 Mass. 416, 421 (2015); Alves v. Verizon, No. 08-cv-3196, 2010 WL 2989988, at 4 (D.N.J. July 27, 2010); Bird v. Chesapeake & Potomac Tel. Co., 185 A.2d 917, 918-919 (D.C. 1962).

¹¹³ See Petition p. 11, citing Maryland Casualty Co. v. NSTAR Elec Co., *supra* at 422.

¹¹⁴ *Id.*

¹¹⁵ See cases cited in Petition, pp. 11-13.



generally the customers who would suffer substantial damages.¹¹⁶ Consequently, and since public utilities are strictly regulated as to their rights and privileges like the inability to choose its customers, they should also be strictly regulated and limited with respect to their liability.¹¹⁷ LUMA asserts that pursuant to Act 17-2019¹¹⁸ PREPA or its successor is responsible 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, and must provide electric service to all customers impartially, in an open and non-discriminatory manner.¹¹⁹ Thus, LUMA argues that, as the entity to whom the T&D System's operation has been delegated, it is subject to such provisions and will not be able to choose its customers in order to eliminate potential risks.¹²⁰ In that sense, it argues that the Proposed Liability Waiver supports impartial and non-discriminatory service as required by Act 17-2019.¹²¹

Another argument LUMA rises in favor of the Proposed Liability Waiver is that it protects PREPA and LUMA from catastrophic losses which can be caused, among other reasons, by atmospheric events, and which can place the utility in fiscal jeopardy and impact the rate structure.¹²² LUMA argues that the probability of such catastrophic losses as a result of atmospheric events is higher in Puerto Rico than with respect to a typical utility in the United States, which creates a vulnerability to claims.¹²³

LUMA argues that the Proposed Liability Waiver advances public interests consistent with Puerto Rico energy public policy goals under Section 1.5(1)(a) of Act 17-2019, guaranteeing that the cost of electric power service in Puerto Rico is affordable, just, reasonable, and non-discriminatory for all consumers in Puerto Rico.¹²⁴ LUMA states it also advances public policy under Act 57-2014, pursuant to which rates must be just and

¹¹⁶ See Petition, p. 12.

¹¹⁷ *Id.*, pp. 12-13.

¹¹⁸ Known as the "Puerto Rico Energy Public Policy Act", specifically, Sections 1.3, 1.4(v) and 1.7.

¹¹⁹ See Petition, p. 14.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Petition, p. 15.

¹²³ *Id.*

¹²⁴ See Petition, p. 16.



reasonable, and consistent with sound fiscal and operational practices to further a reliable and adequate service at the lowest reasonable cost.¹²⁵

LUMA states that as a regulator, the Energy Bureau's decision on the matter has the force and effect of law.¹²⁶ It also asserts that Energy Bureau's approval will not alter its regulatory power over LUMA's operations.¹²⁷ For example, it asserts that LUMA will remain subject to the Energy Bureau's (i) actions to guarantee the capacity, reliability, safety, efficiency and rate reasonableness of the electric system; (ii) 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 (iii) actions or orders to enforce Act 57-2014 and require compliance with its rules, regulations, orders and determinations, including issuing orders and seek and grant legal remedies, in accordance with Sections 6.3(c), (d), and (pp) of such statute.¹²⁸ LUMA further argues that it will remain subject to complaints regarding noncompliance with energy public policy and applicable law, under Sections 6.4(a)(3) and 6.4(c) of Act 57-2014, as well as penalties from the Energy Bureau under Section 6.37.¹²⁹ Furthermore, LUMA states it will be required by Section 1.15 of Act 17-2019 to meet specified requirements for the reconstruction of the T&D System.¹³⁰ LUMA expresses it will also be subject to the provisions of the OMA¹³¹, such as Performance Metrics, System Operation Principles and a System Remediation Plan.¹³²

In the May 22 Motion, LUMA reiterated its request regarding the approval of the Proposed Liability Waiver. In addition, LUMA further discusses how utility tariffs in certain jurisdictions of the United States, Canada and the Caribbean have included liability waivers regarding negligent acts or omissions, gross negligence, willful misconduct limited to direct damages, or no liability for damages including consequential damages in connection with defective services, outages or interruptions without distinction on degrees of negligence.¹³³ Specifically, LUMA included the pertinent text of twenty (20) utility tariffs that include limitations of liability. Citing the Terzic's Testimony, LUMA states that each tariff, including

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Petition, pp. 16-17.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See OMA, Sections 4.1 and 4.2.

¹³² See Petition, p. 17.

¹³³ See May 22 Motion, pp. 3-4.



those with limitations of liability, responds to particularities such as (i) state law; (ii) court decisions; (iii) utility regulatory experience; (iv) recent history after catastrophes; (v) the public and political significance of outages; (vi) frequency and responses to outages due to extreme weather events and non-weather related events; (vii) regulatory actions providing incentives for reliability and resilience; and (viii) the history of rate increases and comparative rate levels to other regions.¹³⁴

In the May 22 Motion, LUMA also discusses its legal and factual justifications to include gross negligence and willful misconduct. LUMA argues that, considering the conditions of the T&D System, it is reasonable to include a limitation of liability that covers three (3) degrees of negligence.¹³⁵ It reiterates that the Proposed Liability Waiver will not exempt LUMA from all responsibilities, since it is obligated to meet contractual requirements, it will remain accountable to the Energy Bureau and its customers for compliance with the Puerto Rico energy Public Policy, and it has demonstrated higher liability caps and a willingness greater than other proponents to stand behind contractual commitments and protect the people of Puerto Rico, as noted in the Partnership Committee Report.¹³⁶

LUMA argues that neither, Article 1802¹³⁷ of the repealed *Civil Code of Puerto Rico* of 1930, nor Article 1536¹³⁸ the *Civil Code of Puerto Rico* of 2020, distinguish between degrees of negligence and, thus, all degrees of negligence should be included to avoid artful pleading from annulling or undercutting the Proposed Liability Waiver.¹³⁹ LUMA also argues that the Puerto Rico Supreme Court has not adopted degrees of negligence when interpreting the acts or omissions that give rise to civil liability due to fault or negligence.¹⁴⁰ It adds, that, as a consequence, the interpretation of the provisions of the *Civil Code of Puerto Rico* pertaining to general liability for negligence, include gross or inexcusable neglect and lesser neglect.¹⁴¹ Nevertheless, LUMA cites case law to argue that, when adjudicating claims for ordinary negligence courts apply the “prudent person” standard, and that, as the Puerto Rico Supreme Court has interpreted, “gross negligence” involves a higher degree of disregard to the risk

¹³⁴ See May 22 Motion, p. 3.

¹³⁵ See May 22 Motion, pp. 4-5.

¹³⁶ See May 22 Motion, pp. 5-6.

¹³⁷ PR Laws Ann. title 31 § 5141.

¹³⁸ PR Laws Ann. title 31 § 10801.

¹³⁹ See May 22 Motion, p. 6.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*



and heightened lack of due care and diligence in relation to foreseeable risks.¹⁴² Moreover, LUMA cites the Puerto Rico Court of Appeals to adopt its definition on “wanton negligence or misconduct”, which is an act or failure to act when there is a duty to do so, in reckless disregard of the rights of another and with a consciousness that injury is a probable consequence of such act or omission.¹⁴³ It states, however, that even though willful misconduct involves such consciousness, it does not encompass the intent to cause harm, but rather, negligent conduct.¹⁴⁴

LUMA further argues that the Proposed Liability Waiver is aligned with the statutory liability waiver in Section 6 of Act 114-2007¹⁴⁵ in relation to connections of renewables to the T&D System, which does not distinguish between degrees of negligence.¹⁴⁶ Furthermore, LUMA states that Act No. 45 of April 18, 1935¹⁴⁷ permits no claims for damages from insured employees, unless the employer causes them intentionally.¹⁴⁸

In view of the above, LUMA asserts that the reasonable measure is to approve the Proposed Liability Waiver, which includes all degrees of negligent conduct. LUMA also argues that even though the Puerto Rico Supreme Court has rarely determined that acts or omission constitute gross negligence, Article 1538 of the *Civil Code of Puerto Rico* of 2020, incorporated the concept of punitive damages when the act or omission constitutes a criminal offense, is executed intentionally or with severe disregard for the life, security and property of others.¹⁴⁹ Considering the aforementioned provision, LUMA argues that it is to be expected that there will be heightened exposure for payments arising from judgements for damages claims that will be borne by ratepayers.¹⁵⁰

LUMA argues there is a need for the Proposed Liability Waiver, since the record of the present proceeding, including Case No. NEPR-MI-2021-0004 and Case No. NEPR-MI-2020-0019 establish the inefficiency, unreliability and unreasonable cost of electric services in

¹⁴² See May 22 Motion, pp. 6-7.

¹⁴³ See May 22 Motion, p. 7.

¹⁴⁴ *Id.*

¹⁴⁵ Known as *Public Policy on Net Metering*, as amended.

¹⁴⁶ PR Laws Ann. title 22 § 1016.

¹⁴⁷ Known as the *System of Compensation for Work Accidents Act*, as amended.

¹⁴⁸ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion p. 7.

¹⁴⁹ PR Laws Ann. title 22 § 10803.

¹⁵⁰ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion p. 12.



Puerto Rico, as recognized in Act 17-2019.¹⁵¹ Thus, in accordance with the Terzic's Testimony and the Hurtado's Testimony, a more restrictive waiver of liability is supported due to the multiple negative circumstances, including the repairs that need to be made to the T&D System due to decades of neglect.¹⁵² LUMA asserts that PREPA's performance is below industry standards.¹⁵³ LUMA also cites the April 22 Resolution, in which the Energy Bureau stated its concerns regarding PREPA's data on reliability and customer service performance.¹⁵⁴ In the proposed System Remediation Plan, filed in Case No. NEPR-MI-2020-0019, LUMA explained that it identified more than one thousand (1,000) gaps in PREPA's performance, which shows low maturity levels across PREPA's organization, as well as poor health in assets that LUMA will use.¹⁵⁵ LUMA, therefore, identified that the areas of systems and processes as well as physical assets are the two (2) main deficiencies probative of the reasonableness of the Proposed Liability Waiver.¹⁵⁶

Given the conditions of PREPA's system, LUMA argues that the following are expected conditions of the remediate state: (i) the organization has identified the means to address the major elements and some work in progressing on implementation; (ii) basic performance can be measured; (iii) performance is minimally adequate; (iv) processes are documented and defined; (v) issue identification is performed; and (vi) the organization is competitively sub-par.¹⁵⁷

Considering PREPA's organization and the critical state of its assets, LUMA asserts it would be unreasonable for the Energy Bureau to base its determination on a textual comparison of liability waivers in the United States and Canada.¹⁵⁸ LUMA states that the Energy Bureau should also consider the duty of care imposed by Puerto Rico statutes and

¹⁵¹ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion pp. 12-13.

¹⁵² *Id.*

¹⁵³ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion p. 14.

¹⁵⁴ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion p. 15.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion pp. 16-17.

¹⁵⁸ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion p. 17.



case law to electric service companies.¹⁵⁹ Thus, a more restrictive waiver of liability is reasonable and justified.¹⁶⁰

IV. Analysis and Evaluation

A. Procedural Matters

(i) PREPA's Current Terms of Service and Liability Waiver

Currently, the terms and conditions for the supply of power by PREPA are specified in Regulation 7982, in effect since January 14, 2011. Through the adoption of Act 57-2014, the evaluation of PREPA's tariff was delegated to the Energy Bureau, and in January 2017 the Energy Bureau approved PREPA's current tariff. Thereafter, the Energy Bureau approved the PREPA's Book of Tariff. However, PREPA's Book of Tariff does not include all the applicable terms of service, instead, most of the terms of service are included in Regulation 7982.

In the Petition, as well as in the written comments presented by the OIPC and UTIER, it is stated that PREPA does not currently enjoy a liability waiver in its terms of service. However, such proposition is not accurate. A form of liability waiver is included in Section XV of Regulation 7982. In the pertinent part, Section XV of Regulation 7982 provides that:

*[PREPA's] objective is to provide an efficient and reliable service to the People of Puerto Rico. However, [PREPA] may be forced to interrupt the electricity supply without prior notification due to force majeure. It may also be forced to suspend the service due to repairs or maintenance work, in which case the affected customers are notified in advance. Such interruptions do not constitute a breach of the Electric Power Supply Contract by the Authority, **so neither [PREPA], nor any of its employees, officers or directors, are responsible for any damage, loss or cause of action produced for such reasons.***

(Emphasis Added).

Likewise, Section 2 (V) of Regulation 7982 defines *force majeure* as:

[e]vents totally beyond the control of [PREPA] or acts of nature, such as: storms, electrical storms, lightning, earthquakes, tornadoes, floods, among others. It also includes, but is not limited to: dangerous situations, fires, explosions, interruptions of service due to actions or omissions of any other public authority or natural or legal person, including sabotage activities and strikes.

¹⁵⁹ See In Re: Review of LUMA's Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 22 Motion pp. 17-18.

¹⁶⁰ *Id.*



In turn, section 2(Z) of Regulation 7982 states that a dangerous situation is an *imminent risk of damage to life or property*.

In accordance with the cited sections of Regulation 7982, PREPA currently enjoys a liability waiver. It should be noted that the *force majeure* aspect is broadly defined to include those aspects related to situations when imminent damage may occur, among other things, damages to the and *property*. We understand that such *property* encompasses both, PREPA's property, as well as the property of third parties. The liability waiver also includes those circumstances in which service interruptions are caused by acts of other public authorities or third parties.¹⁶¹

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The Energy Bureau is entrusted with ample powers to, (a) establish and implement the necessary regulatory actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of electricity rates of Puerto Rico, (b) oversee the quality and reliability of the electric power services provided by the electric service companies, including PREPA, and (c) to attain the goal of reducing and stabilizing energy costs permanently, and control volatility in the price of electricity in Puerto Rico. As discuss below in more detail, these powers allow the Energy Bureau to modify PREPA's terms of service (PREPA's Book of Tariff) without the need to adopt a regulation and/or or carry out rate review procedure.

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(ii) Energy Bureau Authority to Approve Rates and Terms of Service

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The Energy Bureau's jurisdiction to evaluate and approve the Proposed Liability Waiver arises under its power to approve the rates and the regulations¹⁶² that are necessary to ensure that the rates are reasonable, including the approval of terms of service that "pursue the goal of reducing and stabilizing energy costs permanently, and controlling volatility in the price of electricity in Puerto Rico".¹⁶³ Specifically, the Energy Bureau has

¹⁶¹ The Proposed Liability Waiver is certainly broader than the current liability waiver included in Regulation 7982. However, the existing provision clearly recognizes that PREPA is not bound to provide an uninterrupted supply of electricity and power, and that there are circumstances under which PREPA, its employees, officers and/or directors will be released from liability.

¹⁶² Section 6.4 of Act 57-2014 provides that the Energy Bureau shall have primary and exclusive jurisdiction over the following affairs:

- (1) *[t]he approval of rates and charges charged by energy companies or independent power producers in connection with any electric power service, in accordance with the provisions of Section 6.25 of this Act, as well as in cases and disputes related to the rates that the energy companies charge to its residential, commercial, or industrial customers, and any case or dispute related to the rates or charges imposed by any independent power producer.*

See Section 6.4(a)(1) of Act 57-2014.

¹⁶³ See Section 6.4(f) of Act 57-2014.



primary and exclusive jurisdiction over the approval of rates and charges established by electric companies in connection with any electric power service.¹⁶⁴

In particular, pursuant to Act 57-2014, the Energy Bureau has the power and duty to:

(b) Establish by regulations the public policy rules regarding electric power 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 regulations and the necessary regulatory actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of electricity rates of Puerto Rico...;

(d) Oversee the quality and reliability of the electric power services provided by PREPA and any other electric power company certified in Puerto Rico;

(f) Formulate and implement strategies to achieve the objectives of [Act 57-2014] this chapter, including, but not limited to, attaining the goal of reducing and stabilizing energy costs permanently, and controlling volatility in the price of electricity in Puerto Rico;

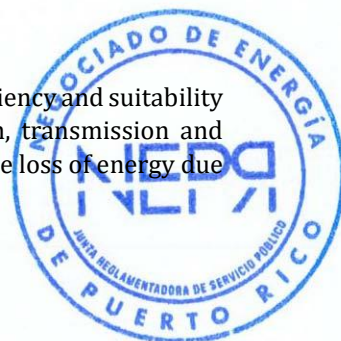
(v) Establish reliability standards for the electric power grid of Puerto Rico in accordance with the parameters recognized by governmental and nongovernmental organizations specialized in electric power service, and oversee compliance therewith.

Section 6.25 of Act 57-2014 provides that the Energy Bureau shall follow the process established in Act 57-2014 to review and approve the electric power service companies' proposed rate reviews. The Energy Bureau shall ensure that all rates are just and reasonable and consistent with sound fiscal and operational practices that provide for a reliable and adequate service at the lowest reasonable cost.

During any rate review process, the burden of proof shall lie on the requesting electric power service company to show that the proposed rate is just and reasonable, consistent with sound fiscal and operational practices that provide for a safe and adequate service at the lowest reasonable cost. The requesting electric power service company shall submit all the information requested by the Energy Bureau, as well as the information established in Act 57-2014.¹⁶⁵ Consistent with Act 57-2014, the Energy Bureau adopted Regulation

¹⁶⁴ See Section 6.4(a)(1) of Act 57-2014.

¹⁶⁵ Specifically, the petitioner shall provide information concerning: (a) the efficiency, sufficiency and suitability of the facilities and the service; (b) direct and indirect costs related to the generation, transmission and distribution of energy, including marginal costs, stranded costs and costs attributable to the loss of energy due



8720¹⁶⁶, which provides a detailed procedure applicable to the evaluation of rate review cases. Both, Act 57-2014 and Regulation 8720, require a great deal of information related to the financial operation the electric service company during a rate review case. That is, in part, because the financial condition of the electric company is evaluated in order to determine the income requirement and determine the applicable rates.¹⁶⁷ On the other hand, courts have recognized that the validity of the approval of terms of a liability waiver by public service commissions, notwithstanding that it had not been approved pursuant to the ratemaking procedures.¹⁶⁸ Nevertheless, this exception, has been recognized to apply only when the proposed modification only indirectly and to a minor degree affects the financial operation of the utility.¹⁶⁹

As we discussed before, the LUMA's request to include the Proposed Liability Waiver in PREPA's Book of Tariff does not entail a change in the basic rate approved in the 2017 Rate Order, because such approval will not have a direct impact on the financial operation of PREPA and does not immediately require a reduction or an increase of the base rates.¹⁷⁰ Neither it will require modifications to the revenue allocation or rate design.¹⁷¹ Moreover, the potential impact of Proposed Liability of Waiver in reducing reasonable costs for claims will be shown in coming years, insofar as immediately, pending claims will continue their

to theft or inefficiency; (c) debt service costs; (d) costs related to fuel adjustment; (e) the company's capacity to improve the service provided and its facilities; (f) information concerning the conservation of energy and the efficient use of alternative energy resources and compliance with the renewable portfolio standard; (g) data related to the effect of special laws, subsidies and contributions; (g) citizen participation. See Article 6.25(b) (1-9) of Act 57-2014.

¹⁶⁶ Known as the "New Regulation on Rate Filing Requirements for the Puerto Rico Electric Power Authority's First Rate Case" ("Regulation 8720").

¹⁶⁷ The Energy Bureau shall approve a rate that: (i) allows the electrical service companies to recover all operating and maintenance costs, capital investments, financing costs, statutory costs, as well as any other cost lawfully incurred in the provision of electric power services and that, except for statutory costs, have been determined by the Energy Bureau to be prudent, reasonable, and consistent with the sound fiscal and operating practices which help provide a reliable service at the lowest possible cost; (ii) covers the costs of the contribution in lieu of taxes and other contributions and statutory subsidies; (iii) allows electric power companies to perform maintenance works and prudent capital investments as are necessary to provide electric power service in accordance with the parameters and quality standards established by the Energy Bureau. See Article 6.25(b) of Act 57-2014.

¹⁶⁸ See Professional Answering Service, Inc. c. Chesapeake and Potomac Telephone Co., 565 A.2d 55 (D.C. Court of App., 1989); Bird v. C & P Tel. Co., 185 A.2d 917 (D.C.Mun.App.1962).

¹⁶⁹ *Id.*

¹⁷⁰ See May 11 Motion, Exhibit 1, p. 3.

¹⁷¹ *Id.*



course and some will be pending for longer because they have been stayed due to PREPA's Title III proceedings.¹⁷²

The Energy Bureau **DETERMINES** that the Proposed Liability Waiver in this case does not require a full rate review, insofar as it does not result in major impact on the financial operation PREPA. A less comprehensive procedure such as the one provided by the Energy Bureau in the instant case is sufficient. The Energy Bureau underscores the fact that, the proceeding in this case allowed ample participation from the public as well as the OIPC. Moreover, adequate public notice was provided.¹⁷³

B. Substantive Matters

(i) Legal Framework

Public utility companies differ from conventional companies in many aspects due to the nature of their industry as a *quasi*-public good and their highly regulated industries. While a conventional company can reject customers, who bring a higher risk, a public utility has an obligation to serve all. The inability to choose its clients poses a higher risk for the public utility company than conventional companies, who may control their own risk more efficiently. See Houston Lighting & Power Co. v. Auchman USA, Inc., 995 S.W. 2d 668, 673-675 (Tex. 1999).¹⁷⁴ In the long run, this risk borne by the public utilities has an upward trend effect on the rates or may have a ruinous effect on the public company's operations. See Bulbman, Inc. v. Nevada Bell, 825 P.2d at 590 ("...[B]road liability exposure faced by utilities would create tremendous upward pressure on utility service rates.")

Liability limits attempt to enable public utility companies to provide reasonable rates and to prevent catastrophic losses that may thwart or impede the provision of the service. Ultimately, the limitation of liability is a decision to favor the public interest balancing lower rates and preventing the financial impact of failures due to negligence. See Transmission

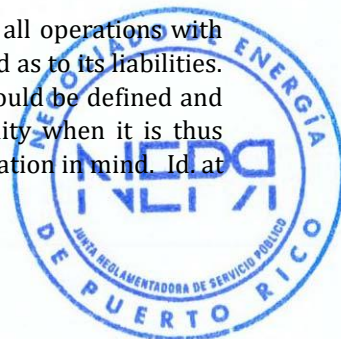
¹⁷² *Id.*

¹⁷³ See note 24, *supra*.

¹⁷⁴ 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 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



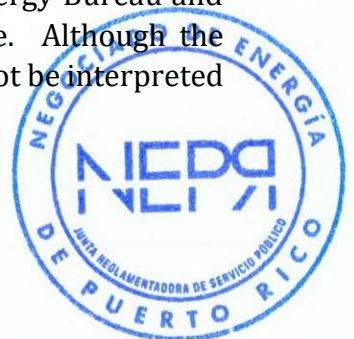
Access Policy Study Grp. V. FERC, 225 F.3d 667, 727 (D.C. Cir. 2000) (“Courts upheld these limitations on the public policy grounds that they balanced lower rates for all customers against the burden of limited recovery for some, and that the technological complexity of modern utility systems and resulting potential for service failures unrelated to human errors justified liability limitations.”); Abraham v. NY Tel. Co., 380 N.Y.S.2d 969 (1976) (A broadened liability exposure must inevitably raise the costs, and thereby the rates. The absence of a liability waiver would have a catastrophic impact on the rates to be charged the public at large.) See also, Houston Lighting & Power Co. v. Auchman USA, Inc., 995 S.W. 2d 668 (Tex. 1999); Landrum v. Florida Power & Light Co., 505 So. 2d 552, 554 (Fla. App. 3 Dist. 1987), 505 So. 2d 552, 554 (Fla. App. 3 Dist. 1987).

Jim
The reasoning sustaining the approval of a waiver of liability is intertwined with the economic analysis and public interest in providing the public utility service at a reasonable cost. Therefore, to grant a waiver of liability to a public utility company, it is essential to consider the economic and financial impact on the public utility company, any impact on the rates in the long run and any impact on the provision of services, all of which encompass the public interest.

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For over a century, the jurisprudence and regulatory system in the United States has recognized that waivers of liability are lawful and appropriate for the public utility industries. See Western Union Tel. Co. v. Priester, 276 US 252 (1928). Public utilities are a highly regulated industry; **therefore, the limitations of liability fall out of the realm of contract law.** Id. at 259. These liability waivers are part of the regulatory scheme applicable to public utilities and their legality and interpretation obeys to these regulations and principles, not to contract law. See Maryland Casualty Co. v. NSTAR Elec. Co., 471 Mass. 416, 425-427 (2015.) The regulatory scheme for the adoption of liability waivers for public utilities differs significantly from the nature of contract law. Among other things, the liability waivers for public utilities may not be altered by either party. Also, they “[demand] a degree of judicial deference not warranted in the contractual context.” Id. at 426.

The Energy Bureau has pursuant Act 57-2014, as amended, the powers and duties regarding the liability waiver as well as the approval of just and reasonable rates. See Act 57-2014, Section 6.3, as amended. Therefore, our decision about the liability waiver must weigh our duty to foster, to the extent possible, financial, and operational conditions that will sustain reasonable rates. The public interest in the energy sector consists of providing the electricity at reasonable rates since it will benefit the majority of the ratepayers.

Another important factor related to the approval of liability waivers is accountability. For public utilities companies, accountability is enforced in various ways. Among those, are the regulatory standards established by a regulatory body such as the Energy Bureau and the customer compensation for service interruption or defective service. Although the approval of a waiver of liability limits the customer compensation, it shall not be interpreted as leaving a public utility company unaccountable.



As part of the transformation of the electric system in Puerto Rico, the Energy Bureau has been creating, and enhancing, since its creation a thorough and rigorous regulatory framework to regulate the performance of energy companies in Puerto Rico, including LUMA. For example, Case No. NEPR-MI-2020-0019 (focused towards the implementation of a System Remediation Plan (“SRP”)) and Case No. NEPR-MI-2019-0007 (regulating the performance metrics) are two proceedings where reliability standards will be enforced.

The effectiveness of the reliability standards and the regulatory framework enforced by the Energy Bureau is far greater than any effectiveness that may be accomplished by individual customers who seek compensation. For instance, the Energy Bureau’s regulatory framework sets quality standards specifically and directly addressing safety and reliability. These have direct and preventive effects which are seldom, if not impossible to achieve by a customer compensation scheme.

(ii) Evaluation

During these proceedings, LUMA has stated multiple arguments in support of the approval of its Proposed Liability Waiver. Such arguments have been set forth by LUMA in (i) LUMA’s Waiver Petition; (ii) the May 11 Motion; (iii) the May 14 Motion, containing the Hurtado’s Testimony and the Terzic’s Testimony; (iv) the Technical Conference; and (v) the May 22 Motion.

First, as a justification for its Liability Waiver Petition, LUMA asserted that the United States’ utility industry is familiar with limitations of liability arising from ordinary negligence, gross negligence or willful misconduct.¹⁷⁵ LUMA also argues that waivers of liability advance important policies for the wider public interests, such as keeping reasonable rates, preventing catastrophic losses, and mitigating the necessary result of the provision of services to all customers, regardless of the risk profile of any of them.¹⁷⁶

In Exhibit 1 of the May 11 Motion, LUMA states that “[a]bsent the Terms of Service, PREPA and LUMA, and ultimately the ratepayers, would bear the costs of payments of individual claims by customers, including the cost of defending claims that may be unfounded, frivolous or meritless.”¹⁷⁷ LUMA also asserts that “[t]he proposed Terms of Service do not have direct legal or procedural implications on the 2017 Final Rate Order issued in Case No. CEPR-2015-0001.”¹⁷⁸ Consequently, “[t]here is no need to alter the 2017

¹⁷⁵ See Petition, p. 10.

¹⁷⁶ See In Re: Review of LUMA’s Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 11 Motion, Exhibit 1, p. 2.

¹⁷⁷ *Id.* p. 3.

¹⁷⁸ *Id.*



Final Rate Order due to the Terms of Service.”¹⁷⁹ Furthermore, LUMA argues that if the Proposed Liability Waiver is approved, an order to include it in PREPA’s Book of Tariffs for all customer classes does not immediately require a reduction or an increase of the base rates.¹⁸⁰ Moreover, “[t]he Terms of Service are consistent with the Bureau’s determinations in the 2017 Final Rate Order at page 168, paragraph 3, on the need to adopt mechanisms and issue determinations that ensure a safe and reliable electric service at reasonable prices.”¹⁸¹

Regarding the Proposed Liability Waiver’s impact on LUMA’s proposed insurance cost and coverage regarding the operation of the T&D System, LUMA stated that “[t]he Terms of Service should eventually improve LUMA’s insurance costs and coverage for the operation of the T&D System”, since “including the Terms of Service, in sync with Prudent Utility Practice, LUMA should be able to better negotiate insurance costs and coverage for the upcoming years and make the T&D System operation more efficient.”¹⁸²

Additionally, most of the meritorious claims filed against PREPA are below the \$1,000,000 occurrence deductible, and therefore, PREPA has to pay them.¹⁸³ LUMA states that most of those claims would be covered by the Proposed Liability Waiver, which would ease costs of compensation not covered by the current insurance.¹⁸⁴ It further asserts that “[a] catastrophic loss for class action or widespread claims is a risk that by its nature is extremely difficult to predict or quantify, and would easily overwhelm the limited protection afforded by insurance coverage. Mitigation of this risk is in accordance with practices in multiple other US utility jurisdictions.”¹⁸⁵ Thus, the Proposed Liability Waiver may be broadly in relation to the types of liabilities covered.¹⁸⁶ Moreover, LUMA argues that it will probably be perceived as a wealthy entity and, in consequence, it is reasonable to expect an increase in claims.¹⁸⁷

In Exhibit 1 of the May 11 Motion, LUMA states that many of the programs proposed in the Initial Budgets, some of which are also Programs within LUMA’s System Remediation Plan, will establish “internal controls, policies, procedures or other measures to protect

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* p. 5.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* p. 6.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* p. 8.



customers from risks related to the T&D System operation and maintenance that could result in the potential liability that the Terms of Service seek to address.”¹⁸⁸ We recognize that there are several administrative proceedings before the Energy Bureau with relation to the OMA which encompass another example of how the Energy Bureau will hold LUMA accountable for its actions. Amongst those are the following: In Re: Proposed Initial Budgets and Terms of Service, Case No. NEPR-MI-2021-0004; In Re: System Operating Principles, Case No. NEPR-MI-2021-0001; In Re: System Remediation Plan, Case No. NEPR-MI-2020-0019; In Re: Performance Metrics, Case No. NEPR-AP-2020-0025. These proceedings are designed to establish and implement the necessary actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of the tariffs in Puerto Rico’s electric system, thus counterbalancing the limitation on liability that may be granted to LUMA and PREPA.

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In discussing the implications of the approval of the Proposed Liability Waiver among PREPA’s customers classes, LUMA argued that the inclusion of the Proposed Liability Waiver “is a standard approach for most utilities and is more just for the ratepayers as they are not expected to absorb consequential and other losses for which PREPA clients may have their own insurance.”¹⁸⁹ It also stated that the relationship between an electric utility and its customers is not governed by the general principles of free negotiation and contracting that would apply between other parties, therefore, “substantial contractual freedoms are curtailed.”¹⁹⁰

Jim
TH
As part of the May 14 Motion, LUMA submitted the Hurtado’s Testimony and the Terzic’s Testimony, in compliance with the Procedural Calendar set forth in the May 4 Resolution¹⁹¹ Mr. Hurtado testified that he has over 25 years of experience in the development and management of large electric utility and energy businesses throughout the United States and Latin America. Mr. Hurtado further declared that limitations of economic liability of electric utilities are standard for United States utilities.¹⁹² Both, LUMA’s Waiver Petition and Hurtado’s Testimony assert that limitations of liability protect utilities from catastrophic losses.¹⁹³ Specifically, Hurtado’s testimony highlighted that “the risk of occurrence of major catastrophic events that could affect the utility’s ability to render services and expose LUMA as operator, and PREPA, as asset owner, to substantial claims for relief that could threaten the ability to provide an essential service.”¹⁹⁴

¹⁸⁸ *Id.* p. 9

¹⁸⁹ *Id.* p. 41.

¹⁹⁰ *Id.*

¹⁹¹ See May 14 Motion, Exhibit 1.

¹⁹² See, Hurtado’s Testimony, lines 87-90.

¹⁹³ See Petition p. 10; Hurtado’s Testimony, lines 91-101.

¹⁹⁴ See, Hurtado’s Testimony, lines 91-94



Mr. Hurtado informed that currently PREPA is liable for claims for damages directly which are mostly paid from its revenues based on customer rates.¹⁹⁵ According to Mr. Hurtado, “[t]he proposed Terms of Service were adopted to ensure that PREPA and LUMA do not incur in liabilities arising from individual customer civil claims for compensation that will lead to increased costs that will be reflected in customer rates or could render the utility unable to operate.”¹⁹⁶

Moreover, in Hurtado’s Testimony, he argues that the current Terms of Service “expose customers to avoidable increases in rates, impede PREPA’s ability to provide cost-effective services and expose PREPA to claims for catastrophic losses whose payment will only lead to financial distress.”¹⁹⁷ Additionally, “[t]he 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.”¹⁹⁸ Consequently, “[t]he 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.”¹⁹⁹ Overall, Mr. Hurtado asserted the desirability of the Proposed Liability Waiver as it would save LUMA, PREPA and customers considerable resources, money and time spent dealing with claims for compensation and damages.²⁰⁰

With the May 14 Motion, LUMA also submitted the Terzic's Testimony.²⁰¹ Mr. Terzic declared that “[a] Term of Service provision which include limits on the economic liability of electric utilities due to service interruptions, deficient, irregular or imperfect service, within filed rates is universal in the US for both Investor Owned Utilities (IOUs) and Public Power electric utilities such as PREPA.”²⁰² Terzic's Testimony supported the idea that limitations of liability favor the public interest, since utilities are able to provide service at reasonable rates

¹⁹⁵ *Id.* lines 103-105.

¹⁹⁶ *Id.* lines 95-98.

¹⁹⁷ *Id.* lines 107-111.

¹⁹⁸ *Id.* lines 135-138.

¹⁹⁹ *Id.* lines 138-141.

²⁰⁰ *Id.* lines 99-101.

²⁰¹ See In Re: Review of LUMA’s Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 14 Motion, Exhibit 2.

²⁰² See In Re: Review of LUMA’s Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, Terzic's Testimony, lines 133-136.



benefiting all consumers, instead of a compensation that will benefit a few but will be paid by all ratepayers.²⁰³ Mr. Terzic pointed out that, to his understanding, “the history of the current system has failed to produce public benefits of improved electric services in terms of lower outage occurrence or frequency.”²⁰⁴ Furthermore, Mr. Terzic noted that the concept of public interest for public utilities is consistent with two features: (1) utility customers have a highly reliable service paying a reasonable and just price, and (2) the public utility is financially viable but not highly profitable.²⁰⁵

It is unrealistic to expect that an electric utility company will have no service interruptions. Another unrealistic expectation is that the compensation to consumers for those interruptions of service will not be paid ultimately by all the ratepayers. Therefore, to address both situations in the interest of the majority of the ratepayers (public interest), a waiver of liability is granted for loss due to service interruptions caused by the ordinary negligence of the electric utility company. The Energy Bureau's decision is rendered with the consideration that rigorous reliability requirements to promote accountability and quality have been implemented.

Furthermore, Terzic's Testimony is consistent with the aforementioned jurisprudence supporting the waiver of liabilities in two related aspects. First, in absence of a liability waiver, the risk borne by the public utility company will hinder its financial stability and consequently increase the rates. The liability waiver, on the contrary, will support PREPA's financial stability and allow savings that may be invested in improving its operations. See, Terzic's Testimony, lines 216-223 (“The omission of volatile or hard to estimate liability payments will support the financial stability of PREPA.”) The reduction in the risk will allow the reallocation of resources for improvements and contribute to set the course for the transformation of the electric system and PREPA's financial stability.

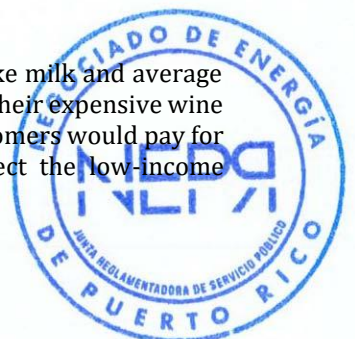
Second, “[p]assing along increased costs to all consumers as electric utility ratepayers would disproportionately affect low-income households who spend a larger percentage of their income on electricity service than high income households.” See, Terzic's Testimony, lines 246-249. For example, under a customer compensation scheme, the public utility company would have to pay for the losses suffered by consumers for a service interruption and pass on those costs to the ratepayers. While the losses for some customers would be considered a minimal cost, for others would be a significant amount.²⁰⁶ In the aggregate, the

²⁰³ *Id.* lines 172-178.

²⁰⁴ *Id.* lines 179-188.

²⁰⁵ *Id.* lines 191-215.

²⁰⁶ For example, while some customers would claim the loss of an average food basket like milk and average meats, others who are wealthier would claim the loss of their filet mignon, lobster or even their expensive wine collection. Eventually, the rates paid by all customers would rise and the low-income customers would pay for the luxurious items of others. The increase in the rates will disproportionately affect the low-income



public utility company, which has the obligation to serve all, would have a liability that would jeopardize its operations. Likewise, for example, a claim by an industrial customer for the loss of business interruption, machines, or materials due to a power outage may have a catastrophic impact on the public utility company's finances.²⁰⁷ Ultimately, all the ratepayers, including low-income households who constitute the vast majority, would end up paying for one customer's loss through increased rates over long periods of time. Hence, the adoption of liability waivers is consistent with the public interest and ultimately favors the low-income households.

Although a waiver of liability for public utilities is not subject to the law and regulations particular to contract law, we will consider the Puerto Rico Supreme Court's holding defining and distinguishing the concepts of negligence, gross negligence, willful misconduct and *dolo* to enlighten our determination.

The Puerto Rico Supreme Court defined the concepts of "ordinary negligence", "gross negligence" and "willful misconduct". With regards to "ordinary negligence", or simply "negligence", the Supreme Court has held that it constitutes the lack of due care, which at the same time consists in the failure to anticipate and foresee the rational consequences of an act, or of the omission of an act, that a prudent person would have foreseen in the same circumstances.²⁰⁸ On the other hand, the Supreme Court has held that "gross negligence" consists of complete lack of care or so small a degree of diligence that justifies the belief that a person acted with complete indifference for the interest and wellbeing of another.²⁰⁹ Thus, as interpreted by the Supreme Court, there exists a distinction between negligence and gross negligence.

With respect to the concept of "willful misconduct", the Supreme Court explained that in the United States such a concept is generally defined as an offense committed intentionally or with reckless disregard of its consequences.²¹⁰ The Supreme Court distinguished willful misconduct from gross negligence by holding that not even the most gross negligence

households because they spend a higher percentage of their income on electricity service than high-income households. This circumstance may be further exacerbated if all customers share, for example, exorbitant losses that may endure by commercial and industrial operations.

²⁰⁷ "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." *Houston Lighting*, at 673.

²⁰⁸ Ramos v. Carlo, 85 D.P.R. 353, 358-359 (1962).

²⁰⁹ Elías Vega v. Chenet, 147 D.P.R. 507, 521 (1999).

²¹⁰ Canales Delgado v. Pan American World Airways, Inc., 112 D.P.R. 329, 341 (1982).



constitutes a reckless disregard.²¹¹ Therefore, the Supreme Court construed willful misconduct as an equivalent to what is known in Puerto Rico Civil Law as *dolo*.²¹² The concept of *dolo* has been defined by the Supreme Court as the conscious and voluntary refusal to fulfill an obligation, knowing that such refusal constitutes an unjust act.²¹³ Consistent with the Court, the *Civil Code of Puerto Rico* of 2020 provides that the concept consists of the deliberate and bad faith breach of an obligation.²¹⁴

Regarding the waiver of liability arising from negligence in private contractual relationships, the Supreme Court has held that such a waiver is not favored by Puerto Rico Law.²¹⁵ Thus, for a person to be exonerated from the consequences of its own negligence, the language used in the waiver must indicate it in a clear and explicit manner.²¹⁶ However, the waiver shall not be contrary to the law, public interest, public order or to the detriment of a third party.²¹⁷ Pursuant to both, the repealed *Civil Code of Puerto Rico* of 1930 and the *Civil Code of Puerto Rico* of 2020, the liability arising from *dolo* is equally enforceable in all obligations, and the waiver of the action to make it effective is null.²¹⁸ Consequently, in Puerto Rico, the parties to a contract cannot agree to waive liability arising from willful misconduct.

The Energy Bureau will also consider PREPA's enabling act for guidance regarding the standard of conduct expected from PREPA, and its directors, officers, agents, and employees. Regarding PREPA's conduct, Section 4(g) of Act 83 of May 2, 1941 ("Act 83-1941")²¹⁹ provides that, the members of PREPA's Board of Directors, officers, agents or employees shall not be held liable for any action executed in good faith in the performance of their functions and responsibilities under the provisions Act 83-1941, provided, however, that their conduct does not constitute a crime, willful misconduct (*dolo*) or gross negligence.²²⁰ Section 4(g) further establishes that such directors, officers, agents or

²¹¹ *Id.*

²¹² *Id.*

²¹³ Mayagüez Hilton Corp. v. Betancourt, et al. 156 D.P.R. 234, 252 (2002).

²¹⁴ Article 1164 of Law 55-2020.

²¹⁵ Chico Ramos et al. v. Editorial Ponce, Inc. et al., 101 D.P.R. 759, 778 (1973).

²¹⁶ *Id.*

²¹⁷ *Id.*; PR Laws Ann. title 31 § 4; Article 14 of Law 55-2020.

²¹⁸ *Id.*; PR Laws Ann. title 31 § 3019.

²¹⁹ Known as the *Puerto Rico Electric Power Authority Act*, as amended.

²²⁰ PR Laws Ann. title 22 § 194(g).



employees will be compensated for the costs incurred related to any claim for which they enjoy the aforementioned immunity.²²¹

Therefore, the immunity and compensation of PREPA, its directors, officers, agents and employees are subject to not incurring in willful misconduct or gross negligence, among others. Act 83-1941 provides a clear legislative mandate setting limits for the release of responsibilities which serve as guidance for our analysis and determination.

Some jurisdictions in the United States exclude from the liability waiver applicable to public utility companies' gross negligence and willful misconduct. The adoption of a liability waiver in some respects responds to an increased risk of liability for acts that may occur frequently. The high probability of incurring in a negligent act makes the risk higher and less controllable. On the other end, gross negligence and willful misconduct involve a high threshold by its definition is less probable to occur. In this case, LUMA filed clear and convincing evidence that a waiver of liability is compelling. "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."²²²

After a thorough analysis of the waiver of liability provisions sanctioned under public utility laws, and with conscientious considerations of the broad legal scheme in Puerto Rico, including the fact waivers of liability are not favored by Puerto Rico Law and, the limitations on the waivers of liability currently enacted in favor of PREPA, its directors, officers, employees and agents, pursuant to Act 83-1941, the Energy Bureau concludes that the inclusion of gross negligence and willful misconduct in the Proposed Liability Waiver is unwarranted.²²³ Therefore, the Energy Bureau **REJECTS** the inclusion of gross negligence and willful misconduct as part of the Proposed Liability Waiver. We further resolve, as discussed in Section III (A), that the language of the Proposed Liability Waiver may be confusing and ambiguous for some. Nevertheless, we are convinced that it is in the public interest to adopt some of the provisions of the Proposed Liability Waiver. Therefore, we **REJECT** the Proposed Liability Waiver as drafted and, in its stead, **APPROVE** the Modified Terms of Service included Annex A of this Resolution and Order.

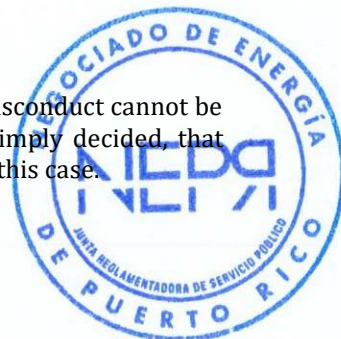
V. Conclusion

For all the reasons stated before the Energy Bureau:

²²¹ *Id.*

²²² See Petition, at p. 16.

²²³ Our determination should not be construed to mean that gross negligence or willful misconduct cannot be incorporated in a liability waiver for an electric service company in Puerto Rico. We simply decided, that considering the totality of the circumstances, such broad liability waiver is not justified in this case.



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- (a) **REJECTS** the Proposed Terms of Service (Proposed Liability Waiver) and in its stead, **APPROVES** Modified Terms of Service, which are included in Annex A of this Resolution and Order. The Modified Terms of Service shall be incorporated and made part of the Puerto Rico Electric Power Authority Book of Tariffs approved on May 28, 2019²²⁴ and will enter into effect on June 1st, 2021. The Modified Terms of Service shall modify and complement the terms of service included in Regulation 7982. In the event of any conflict or issue of interpretation between the Modified Terms of Service and Regulation 7982, the Modified Terms of service shall prevail over Regulation 7982.
- (b) **ORDERS** LUMA to submit to the Energy Bureau, no later than five (5) days from the notification date of this Resolution and Order, a certified translation of the Modified Terms of Service for its review and approval. In the event of any conflict or issue of interpretation between the approved Spanish version of Modified Terms of Service and the English version of the Modified Terms of Service, the English version shall prevail over the Spanish version. The effective date of the Modified Terms of Service shall not be affected by the process of approval of the Spanish version of the Modified Terms of Service.
- (c) **ORDERS** LUMA to file before the Energy Bureau, not later than **June 30, 2022**, an updated report describing: (1) all pending judicial and extrajudicial claims from customers and/or persons receiving electricity and power from PREPA, for events arising out of as a result of the operation and maintenance of the T&D System; (2) all the amounts disbursed to pay judicial and/or extrajudicial claims from customers and/or persons receiving electricity and power from PREPA, for events arising out of as a result of the operation and maintenance of the T&D System, for the period covered between June 1, 2021 and May 31, 2022.
- (d) **ORDERS** LUMA, in a period not exceeding one (1) year from the date of the notification of this Resolution and Order, to develop and implement a customer's outreach program to educate its customers about reasonable measures they may implement to protect their person and property from unexpected and inevitable interruptions to the electricity supply. On or before **June 30, 2022**, LUMA shall submit to the Energy Bureau, a summary of the customer's outreach program, as well as a progress report pertaining to its implementation.

²²⁴ See *In re Puerto Rico Electric Power Authority Rate Review*, Case No. CEPR-AP-2015-0001 and Case No. NEPR-AP-2018-0003.



- (e) The Modified Terms of Service approved, may be reviewed as part of the next PREPA's rate case, or before, if the Energy Bureau deems it necessary and appropriate.

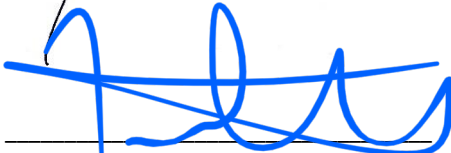
Be notified and published.



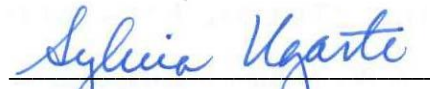
Edison Avilés Deliz
Chairman



Lillian Mateo Santos
Associate Commissioner



Ferdinand A. Ramos Soegaard
Associate Commissioner

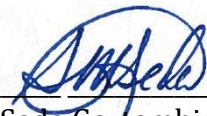


Sylvia B. Ugarte Araujo
Associate Commissioner

CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on May 31, 2021. Associate Commissioner Ángel R. Rivera de la Cruz concurred in part and dissented in part with a written opinion. I also certify that on May 31, 2021 a copy of this Resolution and Order was notified by electronic mail to the following: kbolanos@diazvaz.law, jmarrero@diazvaz.law, hrivera@jrsp.pr.gov, contratistas@jrsp.pr.gov and margarita.mercado@us.dlapiper.com I also certify that today, May 31, 2021, I have proceeded with the filing of the Resolution and Order issued by the Puerto Rico Energy Bureau.

For the record, I sign this in San Juan, Puerto Rico, today May 31, 2021.



Sonia Seda Gaztambide
Clerk



Approved by:

Puerto Rico Energy Bureau
Puerto Rico Public Service Regulatory Board
Effective Date: June 1st, 2021
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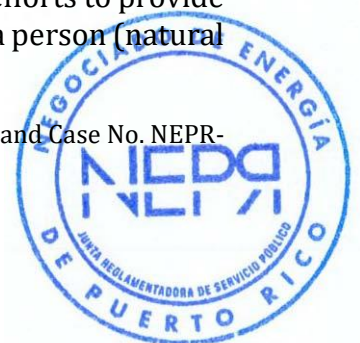
Modified Terms of Service

Effective on **June 1st, 2021**, the following terms of service shall be incorporated and made part of the Puerto Rico Electric Power Authority Tariff Book approved on May 28, 2019.¹ These terms of service shall modify and complement the terms of service included in the Puerto Rico Electric Power Authority Regulation No. 7982, dated January 14, 2010, known as *Reglamento de Términos y Condiciones Generales para el Suministro de Energía Eléctrica* ("Regulation 7982"). In the event of any conflict or issue of interpretation between the following terms of service and Regulation 7982, these terms of service shall prevail over Regulation 7982.

Modified Terms of Service

1. It is recognized that certain components of the Puerto Rico Electric Power Authority's ("PREPA") electric power system (including, the Transmission and Distribution System ("T&D System"), as well as the Generation Facilities) currently do not meet the standards of performance generally accepted in the electric utility industry. The whole system needs significant repairs, improvements, and modernization to achieve acceptable standards of service. Furthermore, certain components of the T&D System and the manner in which the T&D System is operated do not currently meet acceptable standards of performance, including the fact that certain general operating and administrative practices may not comply with acceptable industry standards and practices. Therefore, a period of review, planning, remediation, reconstruction, repair, and replacement will be required to enable LUMA Energy, LLC, LUMA Energy Servco, LLC (together, "LUMA") and PREPA to operate the electric system according to acceptable standards. In light of the foregoing, PREPA and LUMA, with the cooperation of other governmental entities developed a plan, taking into account expected funds availability, particularly from the Federal Emergency Management Agency (FEMA), to remediate, repair, reconstruct, replace and stabilize such equipment, systems, practices and services, as needed, to enable LUMA to perform the operation and maintenance services contracted in compliance with the applicable standards as soon as reasonably possible and at a reasonable cost to PREPA ("System Remediation Plan"). The System Remediation Plan shall be review and approved by the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau").
2. Taking in consideration the circumstances described in the preceding paragraph, and other generally known, PREPA and LUMA shall make all reasonable efforts to provide an efficient and reliable service to its customers and users. A user is a person (natural

¹ See *In re Puerto Rico Electric Power Authority Rate Review*, Case No. CEPR-AP-2015-0001 and Case No. NEPR-AP-2018-0003.



Approved by:

Puerto Rico Energy Bureau

Puerto Rico Public Service Regulatory Board

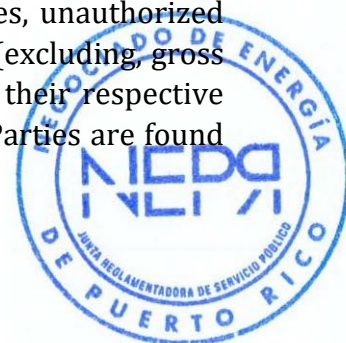
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or legal) who receives and uses power and electricity at a certain location and whose consumption is recorded and invoiced in the name of another person.

3. PREPA and LUMA shall make all reasonable efforts to maintain continuity of service, but PREPA and LUMA cannot guarantee an uninterrupted electricity supply to its customers and users.
4. Without liability of any kind to PREPA and/or LUMA, PREPA and/or LUMA shall have the right to disconnect or otherwise curtail, interrupt or reduce service to customers and users: (a) whenever PREPA and/or LUMA reasonably determines it is necessary to facilitate construction, installation, maintenance, repairs, replacement or inspection of any of PREPA's facilities, or to permit the connection or disconnection of other customers; (b) to maintain the safety and reliability of PREPA's electric system (including without limitation, transmission, distribution and generation facilities); or (c) due to any other reason attributable to third parties or related to dangerous or hazardous circumstances, including without limitation, emergencies, forced outages, potential overloading of PREPA's transmission and/or distribution system, sabotage, strikes, unauthorized acts by employees or Force Majeure. Notwithstanding the foregoing, PREPA and/or LUMA shall use reasonable efforts to minimize any scheduled curtailment, interruption, or reduction to the extent reasonably practicable under the circumstances, to provide the customer (and not to the user, because is not a registered customer) with prior notification of any such curtailment, interruption, or reduction to the extent reasonably practicable, and to resume the customer's service connection as promptly as reasonably practicable.
5. Notwithstanding anything to the contrary in these Modified Terms of Service and Regulation 7982, PREPA, its directors, officers, employees, agents and contractors (including LUMA Energy, LLC, LUMA Energy Servco, LLC, their directors, officers, employees, agents and contractors) (the "Released Parties") shall not be liable contractually or extra-contractually, to customers, or any user receiving power or electricity from PREPA and/or LUMA for any losses arising in any way out of or in connection with the operation of the T&D System and the provision of power and electricity including any events of interrupted, irregular or defective electric service due to Force Majeure events or from pre-existing deteriorated electric system conditions, other causes beyond the control of the Released Parties, unauthorized acts by employees, sabotage, strikes or due to ordinary negligence (excluding, gross negligence, willful misconduct or *dolo*) of the Released Parties or their respective employees, agents or contractors. In any event that the Released Parties are found



Approved by:

Puerto Rico Energy Bureau

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responsible howsoever and whensoever in connection with the provision of service to customers or users receiving power or electricity from PREPA and/or LUMA, customers or users shall only recover direct damages (including direct physical loss, injury or damage to a customer or customer's property). For the foregoing and without otherwise restricting the generality thereof, "direct physical loss, injury or damage" shall not include 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.

6. Notwithstanding anything to the contrary contained in these Modified Terms of Service, PREPA and LUMA will remain fully accountable and liable to the Energy Bureau for compliance with the Puerto Rico energy public policy as well as all legal and regulatory requirements applicable to electric service companies, and, particularly to LUMA as operator of the T&D System. Nothing in these Modified Terms of Service shall have the effect of releasing or waiving PREPA and/or LUMA from any penalty, fine or obligation imposed by the Energy Bureau for whatever reason whatsoever.



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

**IN RE: REVIEW OF LUMA'S TERMS OF
SERVICE (LIABILITY WAIVER)**

CASE NO.: NEPR-MI-2021-0007

SUBJECT: Final Determination on LUMA's
Terms of Service Petition (Liability Waiver).

**Associate Commissioner Ángel R. Rivera de la Cruz, concurring in part and dissenting
in part**

Today, the majority of the Puerto Rico Energy Bureau ("Energy Bureau") issued a Resolution and Order in the instant case, through which, among other things, rejected LUMA's¹ Proposed Liability Waiver, as described in LUMA's Liability Waiver Petition.² In addition, instead of the Proposed Liability Waiver, the majority of the Energy Bur approved Modified Terms of Service, as described in Annex A of today's Resolution and Order. Although I concur with the majority's decision to reject the Proposed Liability Waiver, I disagree with the approved Modified Terms of Service. Therefore, for the reasons expressed herein, I concur in part and dissent in part.

* * *

Limiting utilities liability is a common practice associated with the provision of electric service in practically every jurisdiction in the United States and Canada.³ The difference among the jurisdiction is the degree of protection granted to the utility. To that effect, liability limits ranges from a utility that has no liability protection, such as the Puerto

¹ LUMA Energy, LLC as ManagementCo, and LUMA Energy Servco, LLC as ServCo, collectively, "LUMA".

² *Petition for Approval of Initial Budgets and Related Terms of Service, In Re: Review of LUMA's Initial Budgets*, Case No. NEPR-MI-2021-0004, February 24, 2021 ("February 24 Motion"). The February 24 Motion contained as Exhibit 2 a document titled *Request for Approval of Terms of Service and Memorandum of Law in Support Thereof* ("Liability Waiver Petition"). The referenced Exhibit 2 constituted LUMA's request for a Liability Waiver. On May 4, 2021, the Energy Bureau issued a Resolution and Order through which, among other things, initiated the instant case. *Resolution and Order, In Re: Review of LUMA's Terms of Service (Liability Waiver)*, Case No. NEPR-MI-2021-0007, May 4, 2021 ("May 4 Resolution"). In the May 4 Resolution, the Energy Bureau ordered the Energy Bureau's Secretary to include as part of the administrative record of the instant case, the February 24 Motion, which would constitute LUMA's Liability Waiver Petition for the purposes of the instant case. *Id.*, p. 2.

³ See *Motion Submitting Additional Information and Responses to Requests Issued During Technical Conference* ("May 22 Motion"), *In Re: review of LUMA's Terms off Service (Liability Waiver)*, Case No. NEPR-MI-2021-0007, Response: TC-RFI-LUMA-MI-21-0007-210518-PREB-0001, May 22, 2021.



Rico Electric Power Authority (“PREPA”), to a utility that has very restrictive language (*i.e.* more protection).⁴

In its Liability Waiver Petition, LUMA requested the Energy Bureau to approve Terms of Service (*i.e.* a Liability Waiver) applicable to **all customers classes** in PREPA’s Tariff Book to read as follows:

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.**⁵

In its Liability Waiver Petition, LUMA claimed that provisions limiting liability, like the one it requested, are often used in the utility industry and have been adopted in multiple U.S. jurisdictions.⁶ Moreover, LUMA asserted there is case law through which courts have held that a utility’s waiver of liability for gross negligence and willful misconduct is reasonable and enforceable.⁷ In support of its argument, LUMA cites the case *Maryland Casualty Company v. NSTAR Electric Company*.⁸ However, this case is not analogous to the instant case.

In essence, *Maryland Casualty Company*, raised the question as to whether a tariff filed with and approved by the Department of Public Utilities (“DPU”) **may limit a public utility**

⁴ May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 59:48 – 1:01:19.

⁵ Liability Waiver Petition, p. 18. Emphasis supplied.

⁶ *Id.*, p. 10.


⁷ *Id.*

⁸ *Maryland Casualty Company v. NSTAR Electric Company*, 471 Mass. 416 (2015).



from liability to nonresidential customers for special, indirect, or consequential damages resulting from the utility's gross negligence. The challenged "Limitation of Liability" clause provided, in full:

Unless there is negligence on the part of the Company, the Company shall not be liable for damage to the person or property of the Customer or any other persons resulting from the use of electricity or the presence of the Company's appliances and equipment on the Customer's premises. **In any event, for non-residential Customers served under general service rates,** the Company shall not be liable in contract, in tort (including negligence and [G. L. c.] 93A), strict liability or otherwise for any special, indirect, or consequential damages whatsoever including, but not limited to, loss of profits or revenue, loss of use of equipment, cost of capital, cost of temporary equipment, overtime, business interruption, spoilage of goods, claims of Customers of the Customer or other economic harm.⁹

 In *Maryland Casualty Company*, the court pointed out that, the "Limitation of Liability" clause "applies to all claims by nonresidential customers seeking to recover "special, indirect, or consequential damages," **without regard to distinctions between the degrees of culpability**".¹⁰ For that reason, the court declined to make such a distinction.

Moreover, the court pointed out that the "Limitation of Liability" **"does not categorically exempt NSTAR from liability for negligence, much less gross negligence. On the contrary, the provision specifically contemplates liability for negligence, to both residential and nonresidential customers alike."**¹¹ To that effect, the court observed, that "[t]he portion of the "Limitation of Liability" clause that the plaintiffs challenged **merely exempted the defendant from liability for a particular type of damages ("special, indirect, or consequential damages") asserted by a particular class of customers (nonresidential customers served under general service rates)**".¹²

In addition, the court affirmed "[t]here are compelling reasons why the DPU could approve of such a limitation, **even where it fails to make a distinction between ordinary negligence and gross negligence.** As scholars have noted, consequential damages, such as damages for lost profits or business interruption, are at once extremely difficult to predict and potentially immense in magnitude."¹³ Under those circumstances, the court concluded that the Limitation of Liability clause was reasonable.

⁹ *Id.*, at 419 - 420. Emphasis supplied.

¹⁰ *Id.*, at 427. Emphasis supplied, quotation marks in the original.

¹¹ *Id.*, at 428. Emphasis supplied.

¹² *Id.* Emphasis supplied, quotation marks in the original.

¹³ *Id.*, at 428 - 429. Emphasis supplied.



Notwithstanding the above, contrary to LUMA's assertion, the court in *Maryland Casualty Company* did not specifically determine that a utility's waiver of liability for gross negligence and willful misconduct is reasonable and enforceable. The court merely stated that, since the challenged provision did not make a distinction between negligence, gross negligence and willful misconduct, it declined to enter into such discussion.

Moreover, to that effect the court specifically held, "we have no occasion to address whether a broader limitation of liability tariff provision — **one that, for instance, fully immunized a public utility from liability for damages resulting from its gross negligence or willful and wanton misconduct, rather than merely immunizing it from claims for a particular type of damages, or one that encompassed claims for fraud — would, if it were to survive DPU scrutiny, satisfy the basic requirement of reasonableness.**"¹⁴ As such, the court determined that the challenged language, which had a limited scope, was reasonable, whereas it declined to extend such determination to a broader liability limitation.

As established above, in *Maryland Casualty Company*, the utility was still liable for negligence to both, residential and non-residential customers. The protection against negligent behavior was limited to non-residential customers served under general service rate and only for special, indirect, or consequential damages.

Contrary to *Maryland Casualty Company*, in the instant case, LUMA petitions for the requested Liability Waiver to apply to **all customer classes in PREPA's Tariff Book**. In addition, rather than requesting the gross negligence and willful misconduct protection for a particular type of damages, LUMA requests that PREPA, its directors, officers, employees, agents, and contractors, including LUMA, should not be liable 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. LUMA also requested 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.

The Liability Waiver language in LUMA's proposal is much broader than the narrow language challenged in *Maryland Casualty Company*. LUMA also seeks for such language to apply to all customers rather than a specific class of customers, as was the case in *Maryland*

¹⁴ *Id.*, at 429. Emphasis supplied.



Casualty Company. As such, the controversy in *Maryland Casualty Company* can be differentiated from the circumstances of this case.

Furthermore, LUMA's Liability Waiver Petition closely resembles that of a fully immunized public utility, as described by the court in *Maryland Casualty Company*. To that effect, LUMA witness, Mr. Branko Terzic, expressed that the requested Liability Waiver was on the "more restrictive" side (*i.e.* on the high end) of the industry range described above.¹⁵ Since the court on that occasion expressed that it did not have the opportunity to determine if such broader limitation of liability tariff provision would satisfy the basic requirement of reasonableness, the rationale of *Maryland Casualty Company* cannot be applied to LUMA's Liability Waiver Petition.

On the other hand, when asked if he had knowledge of any other utility or jurisdiction that contained similar language as the one requested by LUMA in its Liability Waiver Petition, LUMA witness, Mr. Branko Terzic, expressed that he could identify British Columbia Hydro and Power Authority ("BC Hydro") and the *Maryland Casualty Company* case.¹⁶ To that effect, Mr. Terzic confirmed that the BC Hydro Tariff contained such provisions.¹⁷

Notwithstanding the above, with respect to BC Hydro's liability, its terms of service establishes:

BC Hydro will endeavour [sic] to provide a regular and uninterrupted supply of Electricity but does not guarantee a constant supply of Electricity or the maintenance of unvaried frequency or voltage and will not be responsible or liable for any loss, injury, damage or expense caused by or resulting from any interruption, termination, failure or defect in the provision of Electricity, whether caused by the negligence of BC Hydro, or its representatives or agents or otherwise, **except to the extent that the loss, injury, damage or expense results directly from the wilful [sic] misconduct of BC Hydro or its representatives or agents**, provided, however, that neither BC Hydro, nor any of its representatives or agents is responsible for **any loss of profit, loss of revenue or other economic loss, even if the loss arises directly from the wilful [sic] misconduct of BC Hydro or its representatives or agents**.¹⁸

¹⁵ May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 1:01:59 – 1:02:28.

¹⁶ May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 49:07 – 49:35.

¹⁷ May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 50:22 – 50:34.

¹⁸ *Motion Submitting Additional Information and Responses to Requests Issued During Technical Conference*, In Re: review of LUMA's Terms off Service (Liability Waiver), Case No. NEPR-MI-2021-0007, Response: TC-RFI-LUMA-MI-21-0007-210518-PREB-0001, British Columbia Hydro and Power Authority Electric Tariff, Section 9.5, p. 9-2.



Contrary to the Proposed Liability Waiver, the BC Hydro's terms of service do not protect the utility from claims regarding loss, injury, damage, or expense that result directly from willful misconduct. With respect to willful misconduct, the BC Hydro's terms of service only protects the utility from claims regarding loss of profit, loss of revenue, or other economic loss.

The language in BC Hydro's terms of service is much narrower than the language included in the proposed Liability Waiver. It only protects the utility against very specific damages that are economic in nature (*i.e.* loss of profit, loss of revenue or other economic loss).

In contrast, the proposed Liability Waiver seeks to protect PREPA and LUMA from a myriad of claims, including 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 their control, or ordinary negligence, gross negligence or willful misconduct, as well as 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 ordinary negligence, gross negligence or willful misconduct.

Although the BC Hydro's terms of service contain protection from certain claims arising from willful misconduct, such protection is very limited. Therefore, such language cannot be considered similar to that of the proposed Liability Waiver.

During his testimony at the May 18, 2021 Technical Conference, Mr. Branko Terzic expressed that it is not common to have protection against acts of gross negligence and willful misconduct.¹⁹ However, he also expressed that a regulator should not premise its decision upon what is common, but rather what is appropriate, factually developed and what its policy is.²⁰ Moreover, Mr. Terzic also stated that, with regards to liability waivers, each jurisdiction has its own unique history and that interpretations vary among courts of different jurisdictions.²¹ However, upon questioning, Mr. Terzic expressed he was not aware of the circumstances under which the BC Hydro liability waiver was approved.²²

Without knowing or understanding the circumstance upon which the BC Hydro liability waiver was approved, it is difficult to compare it to our own or to use it as an

¹⁹ May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 1:05:36 – 1:07:53.

²⁰ May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 1:05:48 – 1:06:33.

²¹ May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 56:32 – 56:47.

²² May 18, 2021 Technical Conference, testimony of Mr. Branko Terzic, at 56:06 – 56:30.



applicable example in our jurisdiction. To that effect, BC Hydro was the only example LUMA provided that contained a liability restriction due to willful misconduct.²³ We have not found any other example in which a utility was protected for gross negligence and/or willful misconduct.²⁴

Regarding the inclusion of protection for gross negligence and willful misconduct, LUMA argues that the Puerto Rico Supreme Court has not adopted degrees of negligence in its interpretation of the types of acts or omissions that give rise to civil liability due to fault or negligence.²⁵ Although I agree with LUMA that the Puerto Rico Supreme Court is yet to adopt degrees of negligence, it does mean that they are not applicable in specific circumstances such as the provisions of Article 1538 of the 2020 Puerto Rico Civil Code²⁶ or in matters related to liability waivers, such as the one LUMA proposes.

As LUMA stated, Article 1538 of the 2020 Puerto Rico Civil Code introduced in Puerto Rico the concept of punitive damages payable where the culpable or negligent act or omission constitutes a crime, **are intentional** or show clear disregard for the life, security and property of others.²⁷ Until the adoption of the 2020 Puerto Rico Civil Code, civil liability for fault or negligence was governed by Article 1802 of the 1930 Puerto Rico Civil Code²⁸.

As LUMA correctly expressed, Article 1802 of the 1930 Puerto Rico Civil Code, analogous to Article 1536 of the 2020 Puerto Rico Civil Code²⁹, does not distinguish between degrees of negligence. However, from the standpoint of a claim based upon Article 1802 of the 1930 Puerto Rico Civil Code and Article 1536 of the 2020 Puerto Rico Civil Code, the plaintiff only need to prove negligence as one of the elements of her case, **regardless of the degree**. Until now, the Puerto Rico Supreme Court has analyzed the concept of negligence as it applies to claims arising from Article 1802 of the 1930 Puerto Rico Civil Code and Article 1536 of the 2020 Puerto Rico Civil Code. Therefore, it is not surprising that the Puerto Rico Supreme Court has not faced an issue in which it had to determine or establish degrees of negligence.

The fact that the Puerto Rico Supreme Court has not faced the issue of degrees of negligence, does not imply that this will continue to be the case. To that effect, we could not find a case in which the Puerto Rico Supreme Court faced an issue of degrees of negligence

²³ See May 22 Motion, Response: TC-RFI-LUMA-MI-21-0007-210518-PREB-0001.

²⁴ See *Id.*

²⁵ May 22 Motion, at p. 6.

²⁶ 31 LPRA § 10803.

²⁷ *Id.*, at n. 3.

²⁸ 31 LPRA § 5141.

²⁹ 31 LPRA § 10801.



arising from language similar to the proposed Liability Waiver. We also could not find a case in which the Puerto Rico Supreme Court bars the distinctions between the degrees of negligence. The fact that there is no precedent in our jurisdiction in which the Supreme Court instituted a distinction between degrees of negligence, does not imply that such distinction cannot be established in the concept of a liability waiver, especially since the Court has not prohibited such action.

Liability waivers are designed to provide protection against certain claims. They are mechanisms that limit the instances in which an injured party is able to file a claim in court. Therefore, from the standpoint of approving limitations on liability, the distinction between the degrees of negligence, which is directly related to the level of protection, is fundamental.

LUMA's argument regarding the inclusion of the "gross negligence" and "willful misconduct" language in the proposed Liability Waiver seems contradictory. On one hand, LUMA argues that the Puerto Rico Supreme Court has not adopted degrees of negligence in its interpretation of the types of acts or omissions that give rise to civil liability due to fault or negligence.³⁰ According to LUMA, current interpretation of the Puerto Rico Civil Code that imposes general civil liability for negligent and culpable acts or omissions, negligence encompasses a broad range of conduct and omissions, including gross or inexcusable neglect and lesser neglect, provided that the consequences are foreseeable or predictable.³¹

On the other hand, LUMA argues that, for clarity and uniformity in adopting and implementing the Terms of Service, all forms of negligence should be included in the Terms of Service "to avoid that artful pleading annuls or undercuts the liability waiver and to protect PREPA, customers and LUMA from bearing the costs of managing and defending claims for negligence that should be covered by the proposed Terms of Service."³²

Reality is that, when approving limits on liability, regulators make a distinction between degrees of negligence in order to establish the level of utility protection that is consistent with the specific circumstances and the public policy of their jurisdictions.³³ As such, establishing the reasonable level of liability protection based upon the appropriate

³⁰ May 22 Motion, at p. 6.

³¹ *Id.*

³² *Id.*

³³ See May 22 Motion, Response: TC-RFI-LUMA-MI-21-0007-210518-PREB-0001.



degree of negligence is a standard regulatory practice, and as such, it is within the regulatory powers granted to the Energy Bureau through Act 57-2014³⁴ and Act 17-2019^{35,36}

The *Black's Law Dictionary* defines "gross negligence" as "[a] lack of **even slight diligence or care**" and "[a] **conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.**"³⁷ According to *Black's*, the difference between *gross negligence* and *ordinary negligence* is one of degree and not of quality.³⁸ Gross negligence is traditionally said to be **the omission of even such diligence as habitually careless and inattentive people do actually exercise in avoiding danger to their own person or property.**³⁹

Similarly, the *Black's Law Dictionary* defines "willful misconduct" as "[m]isconduct committed voluntarily and intentionally."⁴⁰ *Black's* also defines "willful and wanton misconduct" as "[c]onduct committed with an intentional or reckless disregard for the safety of others, as by failing to exercise ordinary care to prevent a known danger or to discover a danger."⁴¹

In its pre-filed written testimony, LUMA witness, Mr. Branko Terzic, expressed that "a more restrictive limitation of liability can be supported in this instance due to a number of unique and negative circumstances."⁴² I disagree.

³⁴ *The Puerto Rico Energy Transformation and RELIEF Act*, as amended.

³⁵ *The Puerto Rico Energy Public Policy Act*.

³⁶ See Article 6.3(c) of Act 57-2014, the Energy Bureau will have the power to implement the necessary regulatory actions to, among others, ensure the efficiency and reasonability of the electric system rates; Article 6.33(rr) of Act 57-2014, besides the enumerated powers in Act 57-2014, the Energy Bureau will have all appropriate and necessary additional implicit and incidental powers to execute all enumerated powers and to achieve the goals of Act 57-2014; Article 1.5(1)(a) of Act 17-2017, the Energy Bureau will be responsible to, among other things, guarantee that the rates are just and reasonable and consistent with the best fiscal and operational practices in order to provide reliable service, at the lowest reasonable cost; Article 1.5(3)(a) of Act 17-2019, the Energy Bureau will have ample powers to guarantee compliance with the public energy policy, the provisions and mandates of Act 17-2019 and to ensure just and reasonable costs that are affordable, easy to understand and clearly comparable and transparent through the revision of the rates.

³⁷ *Gross negligence*, *Black's Law Dictionary* (11th ed. 2019). Emphasis provided.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Willful misconduct*, *Black's Law Dictionary* (11th ed. 2019).

⁴¹ *Willful and wanton misconduct*, *Black's Law Dictionary* (11th ed. 2019).

⁴² *Motion Submitting Pre-Filed Testimonies in Lieu of Presentation or the Virtual Technical Conference* ("May 14 Motion"), *In Re: review of LUMA's Terms off Service (Liability Waiver)*, Case No. NEPR-MI-2021-0007, Exhibit 2, LL. 263 – 264, May 14, 2021.



According to Mr. Terzic, “[u]nder the OMA, LUMA Energy steps into manage and operate a large and complex electric system which it did not design, build, operate, train the workforce, or maintain with its own crews. Thus, claims of economic losses in the future will most likely be the result of accumulated problems inherent in the existing electric system LUMA will contract to operate and improve in the future.”⁴³ Although there is consensus on the current state of disrepair of the Puerto Rico electric system, the concept of negligence, including gross negligence and willful misconduct, relates to a human factor, which will be under LUMA’s control, and not to the state of the electric system.

One of the main elements of gross negligence is that the act or omission in reckless disregard of a legal duty and of the consequences to another party is conscious and voluntary. It also represents a lack of slight diligence or care. With regards to willful misconduct, the act is committed voluntarily and intentionally, in reckless disregard for the safety of others. These elements represent human conduct and are not related to the state of the electric system.

On the other hand, contrary to BC Hydro and NSTAR in the case *Maryland Casualty Company*, LUMA is not requesting a liability limit on a discrete number of instances applicable to certain customer classes. As stated before, LUMA requests a limit on its liability for a broad number of circumstances applicable to all customer classes.

To that effect, LUMA’s request is two-fold. First, LUMA asks for a liability limit on general category that includes 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. The second part of the proposed Liability Waiver concentrates mainly on economic aspects that are consistent with commercial and industrial activities, rather than residential ones.⁴⁴

It is important to note that, currently PREPA does not have any liability protection. As I stated in my concurring opinion of May 4, 2021 in the instant case, LUMA’s Liability Waiver request represents a substantial shift in the rights of PREPA customers.⁴⁵ To that effect, we must note that, in the last ten years the total claims against PREPA were

⁴³ *Id.*, LL. 264 – 269.

⁴⁴ To that effect, LUMA requests a liability limit “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.”

⁴⁵ Resolution and Order, In Re: review of LUMA’s Terms of Service (Liability Waiver), Case No. NEPR-MI-2021-0007, May 4, 2021, Associate Commissioner Ángel R. Rivera de la Cruz, concurring.



approximately \$460 million, whereas over the same time period PREPA has paid a total amount of \$988,220.34.⁴⁶

During the May 18 Technical Conference, LUMA witness, Mr. Mario Hurtado, expressed that the historical claims was not a major concern; the primary concern was rather the forward-looking risk of unbounded loss.⁴⁷ Although he accepted that the rate impact of the historical claims and the resources PREPA invested in managing them was small, Mr. Hurtado expressed that the rate impact looking forward could be quite large.⁴⁸

To that effect, Mr. Hurtado expressed that, taking into consideration the heightened risk from events because of climate change, and that in the past, utilities has been subject to multi-billion dollars and class action lawsuits due to catastrophic tropical events, it would be reasonable to assume that if these types of events were to befall on PREPA, it might affect PREPA's and LUMA's ability to operate the system.⁴⁹ According to Mr. Hurtado, this represents a reasonable risk.⁵⁰ I disagree.

The most catastrophic weather event in recent Puerto Rico history was the passing of Hurricanes Irma and Maria in September, 2017. Even under the dire circumstances and considerable losses Puerto Rico experienced during that time, the number of claims against PREPA, and the amounts associated with them, are not even close to the multi-billion dollar and class action lawsuits Mr. Hurtado described in his testimony.

Under these circumstances, the proposed Liability Waiver is not reasonable. Notwithstanding, as stated before, approving limits on liability are common regulatory practice. To that effect, utilities should not be liable for damages or losses arising from situations that are out of their control. However, they should be liable for their own misconduct or negligence in the discharge of their duties, with the exception of certain special cases in which damages are difficult to predict and potentially immense in magnitude. Examples of this are loss of profit, loss of revenue and other economic losses, as they pertain to commercial and industrial customers.⁵¹ Notwithstanding, even in these special cases, the utility should be liable if the damages arise or result from its own gross negligence or willful misconduct.

⁴⁶ *Motion Submitting Responses to Attachment A of May 4th Resolution and Order* ("May 11 Motion"), *In Re: review of LUMA's Terms of Service (Liability Waiver)*, Case No. NEPR-MI-2021-0007, Exhibit 1, Response: RFI-LUMA-MI-21-0007-2105-04-PREB-0001, "RFI-LUMA-MI-21-0007-210504-PREB-001-Att3.xlsx", May 11, 2021. These amounts represent the sum of Columns P and Q, respectively, of file "RFI-LUMA-MI-21-0007-210504-PREB-001-Att3.xlsx".

⁴⁷ May 18, 2021 Technical Conference, testimony of Mr. Mario Hurtado, at 1:52:20 – 1:52:33.

⁴⁸ May 18, 2021 Technical Conference, testimony of Mr. Mario Hurtado, at 1:53:32 – 1:54:19.

⁴⁹ May 18, 2021 Technical Conference, testimony of Mr. Mario Hurtado, at 1:54:26 – 1:55:54.

⁵⁰ *Id.*

⁵¹ *See Maryland Casualty Company v. NSTAR Electric Company*, at 428 – 429.



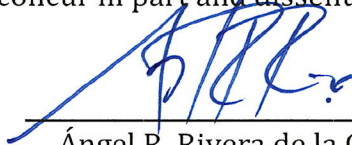
As such, I concur with the majority of the Energy Bureau regarding rejecting LUMA's Proposed Liability Waiver. However, I would have adopted the following Modified Terms of Service, which satisfy the basic requirement of reasonableness:

Unless there is negligence on the part of PREPA, its directors, officers, employees, agents, and contractors (including LUMA Energy, LLC and LUMA Energy Servco, LLC) (the "Released Parties"), the Released Parties shall not be liable to any customer or person (natural or legal) for any loss, injury, damage or expense arising out of, or in any way connected with, the provision or supply of electricity, resulting from any stoppage, interruption, variation or diminution of service, fluctuation, termination, failure or defect, including any events of interrupted, irregular, defective electric service due to force majeure events, or any other cause beyond the Released Parties' control.

In any event, for commercial and industrial customers, the Released Parties shall not be liable for any loss of profit, loss of revenue or other economic loss, resulting from the negligent acts or omissions of the Released Parties, except to the extent that such damages arise, or result from, the gross negligence or willful misconduct of the Released Parties.

These provisions shall not be interpreted, construed, or deemed to limit, restrict, or affect in any way, the authority and regulatory powers granted to the Energy Bureau under applicable law.

For all of the above, I concur in part and dissent in part.


Ángel R. Rivera de la Cruz
Associate Commissioner

In San Juan, Puerto Rico, on May 31, 2021.

