

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

IN RE:

THE PERFORMANCE TARGETS FOR
LUMA ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

SUBJECT: Compliance with Request for
Information of June 2, 2021.

**MOTION IN COMPLIANCE WITH REQUEST FOR INFORMATION OF JUNE 2,
2021, AND SUBMITTING EXECUTED COPY OF LIMITED WAIVER**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC (“ManagementCo”)¹, and **LUMA Energy ServCo, LLC** (“ServCo”)², (jointly referred to as “LUMA”), through the undersigned legal counsel and respectfully submit the following:

1. LUMA hereby respectfully complies with the request for information issued by this honorable Puerto Rico Energy Bureau (“Energy Bureau”) in a Resolution and Order dated June 2, 2021 (“June 2nd Request for Information”), whereby the Energy Bureau directed LUMA to file on or before June 4, 2021 at noon, a copy of the waiver executed by the parties to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (“OMA”).

2. On June 22, 2020, LUMA, the Puerto Rico Electric Power Authority (“PREPA”) and the Puerto Rico Public-Private Partnerships Authority (“P3 Authority”) (jointly, “the Parties”) entered into the OMA pursuant to which LUMA shall “(i) provide management, operation, maintenance, repair, restoration and replacement, and other related services for the transmission and distribution system (“T&D System”), in each case that are customary and appropriate for a

¹ Register No. 439372.

² Register No. 439373.

utility transmission and distribution system service provider, and (ii) establish policies, programs and procedures with respect thereto ((i) and (ii), collectively), the “O&M Services”)” *See* OMA Section 5.1.³

3. The Puerto Rico Transmission and Distribution System Supplemental Terms Agreement (“Supplemental Terms Agreement”), is an integral part of the OMA (together with the OMA, “the Transaction Documents”). *See* Supplemental Terms Agreement, Section 2.1.

4. Pursuant to the Transaction Documents, O&M Services were to commence on a date referred to as the “Service Commencement Date,” or the “Interim Period Service Commencement Date” if PREPA remained in Title III bankruptcy proceeding, and certain conditions precedent specified in the OMA were satisfied or waived by the Parties. *See* OMA Sections 4.5 and 4.7(b); *see also* Supplemental Terms Agreement, Sections 2.2 and 2.3.

5. On May 31, 2021, this Energy Bureau approved several Front-End Transition filings that were conditions precedent to commencement of operations and that LUMA submitted during the month of February 2021, for consideration by the Energy Bureau pursuant to Sections 4.1 and 4.2 of the OMA.

6. As part of Case Number NEPR-MI-2021-0004, this Energy Bureau approved LUMA’s proposed Initial Budgets, including a budget for Fiscal Year 2022. LUMA’s budget was

³ The OMA further provides that, except for those rights and responsibilities reserved for PREPA and the P3 Authority or otherwise expressly provided in the OMA, LUMA “shall (A) be entitled to exercise all of the rights and perform the responsibilities of [PREPA] in providing the O&M Services, and (B) have the autonomy and responsibility to operate and maintain the T&D System and establish the related plans, policies, procedures and programs with respect thereto as provided in [the OMA].” *Id.* Moreover, the OMA provides that LUMA shall function as agent of [PREPA] and PREPA “irrevocably authorizes [LUMA] to (i) represent [PREPA] before [the Energy Bureau] with respect to any matter related to the performance of any O&M Services provided by [LUMA] under [the OMA]” and “(ii) prepare all related filings and other submissions before [the Energy Bureau,]” among other functions. OMA, Section 5.6.

deemed reasonable and is aligned with the fiscal plan for PREPA for Fiscal Year 2022 as certified on May 28, 2021 by the Financial Oversight and Management Board for Puerto Rico.

7. The Energy Bureau also approved an addition to the terms of service and to PREPA's Book of Tariffs with a limited waiver of liability for PREPA and LUMA under certain conditions against civil claims that will protect customers from potential large increases in rates. *See* Resolution and Order issued on May 31, 2021, Case No. NEPR-MI-2021-0007.

8. Finally, this Energy Bureau conditionally approved a set of System Operation Principles for LUMA to manage the dispatch of generation sources reliably and at the lowest economic cost considering the operating conditions of the bulk power system. *See* Resolution and Order issued on May 31, 2021, Case No. NEPR-MI-2021-0001.

9. On June 1, 2021, the Parties executed a limited waiver in connection with the Transaction Documents ("Limited Waiver"). The Parties stipulated that they had "worked diligently since the Effective Date of the [OMA] to carry out the Front-End Transition and, in accordance with its obligations under the [OMA], [LUMA] . . . executed the Front-End Transition Plan and completed the Handover Checklist, to ensure an orderly transition of the responsibility for the management, operation, maintenance, repair, restoration and replacement of the T&D System to [LUMA] prior to the Target Service Commencement Date⁴ of May 8, 2021 or as soon as practicable thereafter." *See* Exhibit 1, Limited Waiver, Preliminary Matters, item B.

10. As the Limited Waiver shows, the P3 Authority and PREPA determined that "it is in the interest of the People of Puerto Rico to enable [LUMA] to timely commence the vital work of recovering and transforming the T&D System, . . . for the Parties to agree to waive certain documentary conditions precedent set forth in the Transaction Documents to Operator's

⁴The OMA defines "Target Service Commencement Date" as "the date that is 320 days after the Effective Date in the event the Effective Date is after February 16, 2020," which is May 8, 2021.

commencement of O&M Services . . . [,]” and that had not yet been satisfied despite the efforts of the Parties. *Id.*, items C and D. LUMA agreed that it is prepared to provide O&M Services pursuant to the Supplemental Terms Agreement. *Id.*

11. Commencement of operations on June 1, 2021 allows LUMA to implement the Emergency Response Plan (“ERP”) developed during the Front-End Transition Period and that was submitted to this Energy Bureau in Case No. NEPR-MI-2019-006 and to other government bodies. *See Id.*, Preliminary Statements, Item C. Along with the training and preparation that LUMA personnel received during the Front-End Transition Period, Puerto Rico is in a better position to respond to a major storm with LUMA being able to implement the ERP, if necessary.

12. The Parties further stipulated in the Limited Waiver that the documentary conditions precedents that had not been satisfied, “do not impede [LUMA] from providing O&M Services pursuant to the Supplemental Terms Agreement.” *Id.*, item C.

13. Given that on or before June 1, 2021 PREPA did not exit Title III and considering that most of the conditions precedents set in the OMA were met⁵ and select conditions precedents were waived, the Interim Service Commencement Date occurred on June 1, 2021. *Id.* item E, and Sections 4(a) and 5. Thus, the Parties entered the Interim Period.⁶

14. For the limited purpose of entering the Interim Period, select conditions precedents were waived including, the condition precedent “set forth in Section 4.5(h) of the [OMA] related to the approval by [the Energy Bureau] of the Performance Metrics,” that LUMA filed on February

⁵ Subsequent to the execution of the Limited Waiver, conditions in Section 4 (c) of the Limited Waiver were satisfied and LUMA confirmed that the Service Accounts were funded as required.

⁶ Pursuant to the Supplemental Terms Agreement, the Interim Period is the term in which the “th[e] Supplemental Agreement shall be in effect[,] from the Supplemental Agreement Effective Date [June 1, 2021] through the earlier of (a) the Service Commencement Date and (b) the Interim Period Termination Date (such period of time, the “Interim Period”), unless earlier terminated in accordance with the terms [of the Supplemental Terms Agreement].” *See* Supplemental Terms Agreement, Section 2.4.

25, 2021 in this proceeding. *See* Exhibit 1 Limited Waiver, Section 1(b). Said condition precedent “must be satisfied prior to and as a condition to the Service Commencement Date.” *Id.*

15. The Parties stipulated and included as Exhibit B to the Limited Waiver, Gridco-Genco Guidelines to aid LUMA as Operator of the T&D System and PREPA as Owner and operator of the generation assets, to cooperate in complying with the System Operation Principles.

16. Selected portions of Exhibit C to the Limited Waiver are being submitted today under seal of confidentiality, as they contain sensitive commercial information protected under Act 80-2011 and Rule 513 of the Puerto Rico Rules of Evidence. Under separate cover and expediently, within the next ten days, as allowed by Section A.2 of the Energy Bureau’s Policy on Management of Confidential Information,” CEPR-MI-2016-0009, of August 31, 2016 as amended by the Resolution dated September 16, 2016, LUMA will be submitting a memorandum of law in support of its request to file selected portions of Exhibit C to the Limited Waiver under seal of confidentiality

WHEREFORE, LUMA respectfully requests that the Energy Bureau **take notice** of the aforementioned, **accept** the filing of the Limited Waiver included as Exhibit 1 to this Motion and **deem** that LUMA timely complied with the June 2nd Request for Information.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 4th day of June 2021.

I hereby certify that I filed this motion using the electronic filing system of this Energy Bureau and that I will send an electronic copy of this motion to the attorneys for PREPA, Joannely Marrero-Cruz, jmarrero@diazvaz.law; and Katuska Bolaños-Lugo, kbolanos@diazvaz.law, the Office of the Independent Consumer Protection Office, Lcda. Hannia Rivera Diaz, hrivera@jrsp.pr.gov, and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy (“ICSE”), Fernando Agrait, agraitfe@agraitlawpr.com.



DLA Piper (Puerto Rico) LLC
500 Calle de la Tanca, Suite 401
San Juan, PR 00901-1969
Tel. 787-945-9107
Fax 939-697-6147
/s/ Margarita Mercado Echegaray
Margarita Mercado Echegaray
RUA NÚM. 16,266
margarita.mercado@us.dlapiper.com

LIMITED WAIVER in connection with the T&D O&M Agreement and the Supplemental Terms Agreement (each as defined below), dated as of June 1, 2021 (this “Waiver”), by and among (i) Puerto Rico Electric Power Authority (“Owner”), (ii) the Puerto Rico Public-Private Partnerships Authority (“Administrator”), (iii) LUMA Energy, LLC (“ManagementCo”) and LUMA Energy ServCo, LLC (“ServCo” and, together with ManagementCo, “Operator” and, together with Owner, Administrator and ManagementCo, the “Parties”). Capitalized terms used and not otherwise defined herein shall have the meanings assigned to them in the T&D O&M Agreement or the Supplemental Terms Agreement, as applicable.

PRELIMINARY STATEMENTS

A. Reference is made to: (1) that certain Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement dated as of June 22, 2020 (as amended, modified or supplemented from time to time in accordance with its terms, the “T&D O&M Agreement”) by and among the Parties, pursuant to the terms of which Operator will take over the management, operation, maintenance, repair, restoration and replacement of the T&D System; and (2) that certain Puerto Rico Transmission and Distribution System Supplemental Terms Agreement dated as of June 22, 2020 (as amended, modified or supplemented from time to time in accordance with its terms, the “Supplemental Terms Agreement” and, together with the T&D O&M Agreement the “Transaction Documents”) by and among the Parties, which Supplemental Terms Agreement constitutes an integral part of the T&D O&M Agreement and automatically becomes effective, pursuant to its terms, upon the occurrence of certain conditions.

B. The Parties have worked diligently since the Effective Date of the T&D O&M Agreement to carry out the Front-End Transition and, in accordance with its obligations under the T&D O&M Agreement, Operator has executed the Front-End Transition Plan and completed the Handover Checklist, to ensure an orderly transition of the responsibility for the management, operation, maintenance, repair, restoration and replacement of the T&D System to Operator prior to the Target Service Commencement Date of May 8, 2021 or as soon as practicable thereafter.

C. Notwithstanding the efforts of the Parties, certain of the documentary conditions precedent to the commencement of the O&M Services have not been satisfied prior to the date hereof, however, the Parties have agreed that (i) such conditions do not impede Operator from providing such services pursuant to the Supplemental Terms Agreement and (ii) the Interim Period Service Commencement Date will be the date hereof in order to enable Operator to begin implementing its emergency response plan for the T&D System at the beginning of the Atlantic hurricane season.

D. Therefore, Administrator and Owner have determined that it is in the interest of the people of Puerto Rico, to enable Operator to timely commence the vital work of recovering and transforming the T&D System, for which Operator was selected and engaged pursuant to the T&D O&M Agreement, and to avoid unnecessary costs to ratepayers, for the Parties to agree to waive certain documentary conditions precedent set forth in the Transaction Documents to Operator’s commencement of O&M Services, which Operator agrees it is prepared to provide pursuant to the terms of the Supplemental Terms Agreement.

E. Given that the Title III Exit has not occurred, after giving effect to this Waiver and Administrator's certificate to Operator pursuant to Section 2.3 of the Supplemental Terms Agreement to be delivered on the date hereof, both the Supplemental Agreement Effective Date and the Interim Period Service Commencement Date will be June 1, 2021.

F. The Parties will continue to work diligently to ensure that each Service Commencement Date Condition waived pursuant to this Waiver for purposes of entering into the Interim Period is satisfied during the Interim Period such that the Service Commencement Date may be achieved, thereby concluding the Interim Period and commencing the 15-year term of the T&D O&M Agreement.

NOW, THEREFORE, in consideration of the premises and agreements, provisions and covenants herein contained, the undersigned parties agree as follows:

SECTION 1. *Waiver of Service Commencement Date Conditions by Administrator and ManagementCo.* In accordance with Section 4.5 of the T&D O&M Agreement, ManagementCo and Administrator waive, on the terms set forth below:

(a) the condition precedent set forth in Section 4.5(d) of the T&D O&M Agreement providing for the finalization of all of the documents and instruments identified in Article IV of the T&D O&M Agreement, to the extent that Sections 4.1(e) and 4.1(f) of the T&D O&M Agreement require ManagementCo to finalize each of the Federal Funding Procurement Manual and the Non-Federal Funding Procurement Manual, it being understood that Operator prepared a consolidated procurement manual, as required by Administrator and the Central Office for Recovery and Reconstruction ("COR3"), that was approved by Administrator and COR3 pursuant to the requirements of the T&D O&M Agreement;

(b) the condition precedent set forth in Section 4.5(h) of the T&D O&M Agreement related to the approval by PREB of the Performance Metrics, it being understood that (i) prior to and until such time as the PREB issues a resolution and order approving the Performance Metrics, for purposes of the Interim Period the Performance Metrics shall be those approved by Administrator and subsequently filed by Operator with the PREB in docket number NEPR-AP-2020-0025 on February 25, 2021, and (ii) such condition precedent must be satisfied prior to and as a condition to the Service Commencement Date;

(c) the condition precedent set forth in Section 4.5(k) of the T&D O&M Agreement related to the approval by PREB of the System Remediation Plan, it being understood that (i) prior to and until such time as the PREB issues a resolution and order approving the System Remediation Plan, for purposes of the Interim Period the System Remediation Plan shall be the plan filed by Operator with the PREB in docket number NEPR-MI-2020-0019 on February 24, 2021, and (ii) such condition precedent must be satisfied prior to and as a condition to the Service Commencement Date;

(d) the condition precedent set forth in Section 4.5(q) of the T&D O&M Agreement related to the finalization of a final plan for the reorganization of Owner into GenCo and GridCo (the "PREPA Reorganization") and effectiveness of the GridCo-GenCo PPOA, it being understood that:

i. a final plan for PREPA Reorganization shall be approved by the applicable Governmental Bodies and implemented pursuant to the plan of reorganization set forth in Exhibit A attached hereto prior to and as a condition to the Service Commencement Date; and

ii. the GridCo-GenCo PPOA shall become effective upon the completion of the PREPA Reorganization and receipt of any approvals required under Applicable Law prior to and as a condition to the Service Commencement Date, it being further understood that prior to the effectiveness of the GridCo-GenCo PPOA Owner and Operator shall abide by the guidelines set forth in Exhibit B attached hereto; and

(e) the condition precedent set forth in Section 4.5(u) of the T&D O&M Agreement related to the execution of the FOMB Protocol Agreement by each of Owner, Administrator, Operator and the FOMB, it being understood that the FOMB Protocol Agreement will be executed by Operator and the FOMB, for itself and as representative of Owner under PROMESA.

SECTION 2. *Waiver of Service Commencement Date Conditions by Administrator.* In accordance with Section 4.5 of the T&D O&M Agreement, Administrator partially waives, on the terms set forth below:

(a) the condition precedent set forth in Section 4.5(a) of the T&D O&M Agreement providing for the fulfillment of all of the ManagementCo Service Commencement Date Conditions, to the extent that Operator has not procured, due in part to market conditions, the specific policies of Required Insurance set forth in Exhibit C attached hereto as required by Section 4.2(d) of the T&D O&M Agreement, it being understood that such condition precedent must be satisfied within the timeframe set forth for each such Required Insurance in Exhibit C, if a timeframe is stated in Exhibit C; and

(b) the condition precedent set forth in Section 4.5(a) of the T&D O&M Agreement providing for the fulfillment of all of the ManagementCo Service Commencement Date Conditions, to the extent that Operator is unable to make the certification required by Section 4.2(m) of Operator's representations set forth in Section 19.2(e) of the T&D O&M Agreement as a result of the ongoing judicial proceedings set forth in Exhibit D attached hereto, as applicable, it being understood that such condition precedent must be satisfied prior to and as a condition to the Service Commencement Date.

SECTION 3. *Waiver of Service Commencement Date Conditions by ManagementCo.* ManagementCo partially waives the condition precedent set forth in Section 4.5(b) of the T&D O&M Agreement providing for the fulfillment of all of the Owner Service Commencement Date Conditions, to the extent that Owner is unable to make the certification required by Section 4.3(a) of Owner's representations set forth in Section 19.1(e) of the T&D O&M Agreement as a result of the ongoing judicial proceedings set forth in Exhibit D attached hereto, as applicable, it being understood that such condition precedent must be satisfied prior to and as a condition to the Service Commencement Date.

SECTION 4. *Interim Period Service Commencement Date Conditions Precedent.*

(a) In accordance with Section 10.4 of the Supplemental Terms Agreement, ManagementCo and Administrator waive the requirement under Section 2.3 of the Supplemental Terms Agreement that Administrator deliver a certificate to Operator at least three Business Days prior to the Interim Period Service Commencement Date, it being understood that Administrator shall deliver such certificate on or before the date of this Waiver.

(b) Operator confirms that the order granted by the Title III Court, a copy of which is attached hereto as Exhibit E (the “Administrative Expense Order”), is reasonably acceptable to Operator for purposes of Section 2.3(b) of the Supplemental Terms Agreement. In accordance with Section 10.4 of the Supplemental Terms Agreement, ManagementCo and Administrator waive, for purposes of the Interim Period, the condition precedent set forth in Section 2.3(b) of the Supplemental Terms Agreement that the Administrative Expense Order be final and non-appealable.

(c) In accordance with Section 10.4 of the Supplemental Terms Agreement, ManagementCo and Administrator waive the requirement set forth in Section 4.7 of the Supplemental Terms Agreement that all Service Accounts (other than the Contingency Reserve Account) shall have been funded not less than 10 Business Days prior to the Interim Period Service Commencement Date, it being understood that: (i) Administrator and Owner shall irrevocably and unconditionally authorize and instruct the Puerto Rico Fiscal Agency and Financial Advisory Authority and the Puerto Rico Treasury Department (with a copy to Operator) to fund, at or before 9:00 a.m. AST on the date of this Waiver, all Service Accounts (other than the Contingency Reserve Account) in immediately available funds in the amounts required by the Transaction Documents; (ii) evidence of such funding (by way of Federal Reference Number or equivalent) shall be provided to the Parties hereto, as soon as available, on the date of this Waiver; (iii) all Service Accounts (other than the Contingency Reserve Account) must be funded in immediately available funds in the amounts required by the Transaction Documents, within 2 Business Days after the date of this Waiver; and (iv) the Contingency Reserve Account must be funded in immediately available funds in the amounts required by the Transaction Documents, on or before the 10th Business Day after the Interim Period Service Commencement Date.

SECTION 5. *Effect of Limited Waivers; Interim Period Service Commencement Date.*

The Parties agree that: (a) after giving effect to this Waiver, the Supplemental Agreement Effective Date is June 1, 2021; (b) after giving effect to this Waiver and Administrator’s certificate to Operator pursuant to Section 2.3 of the Supplemental Terms Agreement to be delivered on the date hereof, the Interim Period Service Commencement Date is June 1, 2021; and (c) the waivers set forth herein are for the limited purpose of entering into the Interim Period, and the Service Commencement Date has not occurred and continues to be subject to the satisfaction or subsequent waiver of all Service Commencement Date Conditions, as set forth in Section 6.1 of the Supplemental Terms Agreement.

SECTION 6. *Conditions to Effectiveness.* This Waiver shall become effective only upon Administrator’s receipt of counterparts to this Waiver duly executed by the Parties.

SECTION 7. ***Amendment or Modification.*** This Waiver may not be amended or modified except by written instrument signed by all the Parties. Each such instrument shall be reduced to writing and shall be designated on its face an “Amendment” or an “Addendum” to this Waiver.

SECTION 8. ***Conditional and Limited Waivers.*** The limited waivers set forth in Section 1 (*Waiver of Service Commencement Date Conditions by Administrator and ManagementCo*), Section 2 (*Waiver of Service Commencement Date Conditions by Administrator*) and Section 3 (*Waiver of Service Commencement Date Conditions by ManagementCo*) of this Waiver shall be conditional and effective only in the specific instances described herein and nothing herein shall be construed to limit or bar any rights or remedies of the Parties, except to the extent of the waiver of those certain Service Commencement Date Conditions set forth herein. For the avoidance of doubt and without limiting the generality of the foregoing, the Parties agree that, other than as expressly contemplated in this Waiver, no change, amendment, covenant, waiver or consent with respect to the terms and provisions of any of the Transaction Documents is intended or contemplated hereby (which terms and provisions remain unchanged and in full force and effect other than as expressly set forth herein).

SECTION 9. ***Governing Law.*** This Waiver and all matters, claims, controversies, disputes, suits, actions or proceedings arising out of, or relating to, this Waiver and the negotiation, execution or performance of this Waiver, including all rights of the Parties (whether sounding in contract, tort, common or statutory law, equity or otherwise) in connection therewith, shall be interpreted, construed and governed by and in accordance with, and enforced pursuant to, the internal laws of the Commonwealth (excluding any conflict of laws, rule or principle which might refer such interpretation to the laws of another jurisdiction), except where the federal supremacy clause requires otherwise.

SECTION 10. ***Counterparts.*** This Waiver may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which, when taken together, shall be deemed to be one and the same agreement or document. A signed copy of this Waiver transmitted by email or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original executed copy of this Waiver for all purposes.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties hereto have caused this Waiver to be duly executed and delivered as of the day and year first above written.

PUERTO RICO ELECTRIC POWER AUTHORITY

By: _____ Efran Paredes Maisonet
Name: _____
Title: _____ CEO

PUERTO RICO PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY, solely in its capacity as ADMINISTRATOR

By: _____
Name: _____
Title: _____

LUMA ENERGY, LLC

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

LUMA ENERGY SERVCO, LLC

By: _____
Name: _____
Title: _____


By: _____
Name: _____
Title: _____

**PUERTO RICO PUBLIC-PRIVATE PARTNERSHIPS
AUTHORITY, solely in its capacity as
ADMINISTRATOR**

By:


Name:


Title:




Fermin E. Fontánes Gómez
Executive Director

LUMA ENERGY, LLC

By: 
Name: Darren Miller
Title: Chief Financial Officer

By: 
Wayne Stensby (May 28, 2021 17:56 EDT)
Name: Wayne Stensby
Title: President & CEO

LUMA ENERGY SERVCO, LLC

By: 
Name: Darren Miller
Title: Chief Financial Officer


By: 
Wayne Stensby (May 28, 2021 17:56 EDT)
Name: Wayne Stensby
Title: President & CEO

EXHIBIT A

PLAN OF REORGANIZATION

The email below was sent by Owner to the Financial Oversight and Management Board for Puerto Rico on May 7, 2021.

Good evening fiscal plan working group:

Attached is the revised draft for FY22 PREPA fiscal plan (the “Proposed PREPA Fiscal Plan”), which is being resubmitted following the receipt of FOMB’s Notice of Violation (NOV) letter dated May 3, 2021 and addressing comments contained therein under section III (i.e. Detailed discussion of required revisions to PREPA’s Proposed Plan) as follows. The attached is being submitted by PREPA subject to the comments and clarifications below, and with the intent of continued work and collaboration amongst the FOMB and PREPA teams leading to the certification of the PREPA Fiscal Plan.

A. Transition to private operator and reorganization

1. Employee Transition – as set forth in the Proposed PREPA Fiscal Plan, PREPA and AAFAF recently agreed on establishing a voluntary transition program (VTP) for certain PREPA employees. PREPA will submit the VTP details to FOMB for incorporation into the Fiscal Plan to be certified after the AAFAF Board authorizes the proposed VTP.
2. Operating Reserve Accounts – a section with discussion and supporting exhibit has been added to Chapter 3
3. Reorganization – PREPA is committed to achieving the full reorganization envisioned in the Proposed Fiscal Plan. To that end, PREPA has been working closely with the P3A and its advisors on charting a path forward that complies with the 2021 Commonwealth Certified Fiscal Plan, as well as the 2020 PREPA Certified Fiscal Plan.

As a first step, and as set forth in the Proposed Fiscal Plan, PREPA and P3A consider that, weighing the legal complexities and intricacies of the T3 process, it is best to first establish the GenCo subsidiary to legally segregate the generation assets from the T&D assets, which is consistent with the 2021 Commonwealth Certified Fiscal Plan. LUMA is intimately involved in the process to ensure that the adequate operational framework is in place for Service Commencement Date and beyond.

Setting up the GridCo subsidiary involves a host of complexities that would most likely distract LUMA as it commences operations and embarks on the process to transform the T&D System. To that end, PREPA and P3A are evaluating the steps necessary for the establishment of a new subsidiary to hold the T&D assets. The process to establish the GridCo subsidiary is significantly more complex than setting up GenCo, given that, among other things, (1) transferring the T&D assets and the associated revenues and contracts to a subsidiary may have an impact on Title III proceedings, and (2) there are existing gaps in property titles, records and inventories necessary to responsibly undertake the transfer of all

T&D assets. PREPA proposes to develop a work plan to set up GridCo in close collaboration with LUMA, P3A and FOMB to ensure alignment and a smooth transition that does not impact LUMA's operations or the pending Title III proceedings.

PREPA understands that this two-step approach is entirely consistent with the 2021 Central Government Fiscal Plan, as certified by the FOMB on April 23, 2021, which gives way to PREPA remaining as owner of the T&D Assets (See Exhibit 60 of the 2021 Commonwealth Certified Fiscal Plan, which states that GridCo "refers to PREPA, in its capacity as owner of the T&D assets").

[...]

We look forward to continuing working collaboratively towards achieving the certification of the PREPA Fiscal Plan. Please let us know when you would like to set up a working session to discuss the Proposed Fiscal Plan, and accompanying workbook.

Cordially,

Romano

EXHIBIT B

GRIDCO-GENCO GUIDELINES

1. Subject to paragraph 2 below, PREPA¹ shall continue to operate, maintain and manage the Legacy Generation Assets, including necessary fuel procurement and transportation, based on current procedures and practices.
2. PREPA shall take such actions as may be necessary to allow LUMA² to perform its duties, obligations and responsibilities as Operator of the T&D System³ pursuant to the Transmission and Distribution System Operation and Maintenance Agreement (the “T&D O&M Agreement”), including Section 5.13(d) therein and the System Operation Principles,⁴ in each case, as they relate to the Legacy Generation Assets, including:
 - a. complying with LUMA’s dispatch of the Legacy Generation Assets and making available to LUMA all electricity and ancillary services therefrom in accordance with the System Operation Principles;
 - b. providing LUMA with timely data and information and access thereto with respect to PREPA’s operation and maintenance of the Legacy Generation Assets, including: (i) such data and information as may be needed for LUMA to manage dispatch operations pursuant to the T&D O&M Agreement and the System Operation Principles and (ii) providing a certificate from an authorized senior executive certifying to LUMA that all fuel costs used to support the quarterly fuel purchase adjustment charge (FCA) submitted to PREB are true and correct to the best of his/her knowledge;
 - c. providing LUMA with access, upon prior notification, to the Legacy Generation Assets, including their premises, as may be needed by LUMA in connection with the demarcation of the T&D System facilities and equipment physically located within or adjacent to the Legacy Generation Assets; and
 - d. providing LUMA with timely and reasonable updates with respect to the requirements for adequate availability of necessary generation resources that can be called upon by LUMA to provide electric service and reactive power as needed to serve the needs of the customers of the Commonwealth of Puerto Rico, all in accordance with the System Operation Principles, including reporting of information that is currently provided, including availability status from daily communications with the Legacy Generation Asset plants, and performance data as

¹ All references to PREPA herein refer to PREPA in its capacity as owner and operator of the Legacy Generation Assets.

² All references to LUMA herein refer to LUMA in its capacity as Operator under the T&D O&M Agreement.

³ All capitalized terms used but not defined herein have the meanings specified in the T&D O&M Agreement.

⁴ System Operation Principles means those System Operation Principles as delivered to PREB on February 25th and as may be supplemented as part of the PREB proceeding, and once approved by PREB, such approved System Operation Principles.

currently provided via the PI System and other data source, and timely notification when any circumstances affect changes to this information.

3. LUMA shall provide PREPA with reasonable estimates with respect to the requirements for adequate availability of necessary generation resources that can be called upon by LUMA to provide electric service and reactive power as needed to serve the needs of the customers of the Commonwealth of Puerto Rico, all in accordance with the System Operation Principles.
4. PREPA, LUMA and Administrator shall cooperate on negotiating and finalizing (i) the terms of the Gridco-Genco Operating Agreement, including any and all schedules, exhibits and annexes thereto and (ii) a generation interconnection agreement and plant level agreement⁵ with respect to the Legacy Generation Assets, in each case, within one hundred twenty (120) days after the Interim Period Service Commencement Date and submit to PREB within ten (10) days thereafter.
5. PREPA and LUMA shall cooperate:
 - a. as necessary to ensure that (i) PREPA personnel do not physically interfere with or harass LUMA personnel or its contractors in the performance of LUMA's duties, obligations and responsibilities as Operator of the T&D System pursuant to the T&D O&M Agreement and the System Operation Principles, (ii) LUMA personnel do not physically interfere with or harass PREPA personnel or its contractors in the performance of PREPA's duties, obligations and responsibilities as owner and operator of the Legacy Generation Assets pursuant to the System Operation Principles and (iii) the proper authorities are notified of any attempts by third parties to physically interfere with LUMA's performance of its duties, obligations and responsibilities as Operator of the T&D System pursuant to the T&D O&M Agreement and the System Operation Principles;
 - b. in all matters relating to (i) the interconnection points between the T&D System and the Legacy Generation Assets and (ii) common facilities;
 - c. with respect to matters pertaining to outage management (planned and unplanned) and emergency response in accordance with the System Operation Principles;
 - d. to identify the activities, roles and responsibilities of the parties that will apply with respect to the T&D System facilities and equipment physically located within or adjacent to the Legacy Generation Assets;

⁵ The plant level agreement will provide for the parties thereto to comply with the requirements of (i) the Agreed Operating Procedures established pursuant to the T&D O&M Agreement and (ii) the generator capability procedures (i.e., the procedures by which PREPA and, once the future operators are in place, such future operators on behalf of PREPA, will provide accurate information regarding the Legacy Generation Assets' performance capabilities that is verifiable based on standard tests), both of which will be attached thereto.

- e. by notifying the other party by no later than June 1, 2021, of one or more persons designated as the point of contact for all communications between the parties, including, without limitation, a person designated as the point of contact for all communications with respect to emergency response matters;
 - f. resolve any disagreements relating to the relationship between LUMA as Operator of the T&D System and PREPA in its capacity as generation operator; and
 - g. in matters relating to compliance with Puerto Rico energy public policy, statutory and regulatory mandates, including but not limited to, areas such as reserve margins and resource adequacy, including compliance with applicable provisions of the “Puerto Rico Energy Transformation and RELIEF Act” (“Act 57-2014”), as amended, as it relates to LUMA’s duties thereunder, the “Puerto Rico Energy Public Policy Act” (“Act 17-2019”) and the Integrated Resource Plan and Modified Action Plan, adopted by the Puerto Rico Energy Bureau, Case No. CEPR-AP-2018-0001.
6. PREPA shall continue to be responsible for managing, procuring, nominating, scheduling and coordinating the transportation and delivery of all the fuel requirements of each of the Legacy Generation Assets (all charges in connection with the foregoing, the “Fuel Charges”). PREPA shall provide LUMA with monthly invoices relating to such Fuel Charges. LUMA shall be responsible for the payment of amounts due pursuant to such invoices, only to the extent funds are available for such Fuel Charges in accordance with the T&D O&M Agreement. PREPA shall provide LUMA with timely quarterly fuel reports as agreed to by the Parties to support the submission by LUMA to PREB as well as the underlying data and information on which the fuel reports are based and any additional information requested by PREB.
7. PREPA shall provide LUMA with invoices on a monthly basis that include all generation related expenses, including documented payroll. LUMA shall be responsible for the payment of amounts due pursuant to such invoices in accordance with the T&D O&M Agreement.
8. PREPA and LUMA shall perform all the items herein in accordance with the terms and conditions of the T&D O&M Agreement to the extent applicable.

EXHIBIT C

PENDING REQUIRED INSURANCE

OUTSTANDING OWNER INSURANCE COVERAGE	OPERATOR'S PLAN ON HOW TO OBTAIN	[REDACTED]
Cyber insurance required by Section I.D. of Annex XII to the T&D O&M Agreement.	[REDACTED]	[REDACTED]
Builders' risk insurance required by Section 1.J. of Annex XII to the T&D O&M Agreement.	[REDACTED]	[REDACTED]

OUTSTANDING OPERATOR INSURANCE COVERAGE	OPERATOR'S PLAN ON HOW TO OBTAIN	TIMEFRAME TO COMPLETION
Professional liability insurance required by Section 2.C. of Annex XII to the T&D O&M Agreement.	[REDACTED]	[REDACTED]

NON-COMPLIANT INSURANCE COVERAGE	OPERATOR'S PLAN ON HOW TO OBTAIN	TIMEFRAME TO COMPLETION
Pollution legal liability insurance required by Section 1.E. of Annex XII to the T&D O&M Agreement	Coverage is bound and in effect as of the date hereof, but certificate of insurance may not be available to be delivered immediately.	June 4, 2021
Protective liability insurance required by Section 1.K. of Annex XII to the T&D O&M Agreement.	Operator does not intend to pursue this coverage as it is duplicative and not required for the business.	N/A - requirement to obtain this insurance coverage is permanently waived because it is duplicative and not required for Owner's business.
Directors and officers liability insurance required by Section 1.L. of Annex XII to the T&D O&M Agreement.	[REDACTED]	[REDACTED]

NON-COMPLIANT INSURANCE COVERAGE	OPERATOR'S PLAN ON HOW TO OBTAIN	TIMEFRAME TO COMPLETION
	[REDACTED]	[REDACTED]
Business travel accident insurance required by Section I.M. of Annex XII to the T&D O&M Agreement.	[REDACTED]	[REDACTED]
Fiduciary liability insurance required by Section 2.B. of Annex XII to the T&D O&M Agreement.	[REDACTED]	[REDACTED]

EXHIBIT D

PENDING LITIGATION

- A. Affecting the representations and warranties of ManagementCo pursuant to Section 19.2(e) of the T&D O&M Agreement:
1. *In Re: Certificate of Energy Compliance*, Cases no. CC-2020-579 and no. 2020-592, before the Supreme Court of Puerto Rico.
 2. *In re: The Financial Oversight and Management Board of Puerto Rico*, Case:17-04780-LTS.
 3. *UTIER et al v. Pedro Pierluisi, in his official capacity as Governor of Puerto Rico, et al.*, Adv. Proc. No. 21-00041.
 4. *SREAE et al v. Pedro Pierluisi, in his official capacity as Governor of Puerto Rico, et al.*, Adv. Proc. No. 21-00049.
- B. Affecting the representations and warranties of Owner pursuant to Section 19.1(e) of the T&D O&M Agreement:
1. *In Re: Certificate of Energy Compliance*, Cases no. CC-2020-579 and no. 2020-592, before the Supreme Court of Puerto Rico.
 2. *In re: The Financial Oversight and Management Board of Puerto Rico*, Case:17-04780-LTS.
 3. *UTIER et al v. Pedro Pierluisi, in his official capacity as Governor of Puerto Rico, et al.*, Adv. Proc. No. 21-00041.
 4. *SREAE et al v. Pedro Pierluisi, in his official capacity as Governor of Puerto Rico, et al.*, Adv. Proc. No. 21-00049.
 5. *Acevedo Serrano, et. al., v. Autoridad de Energía Eléctrica, et al.*, Civil No. SJ2021CV03043.

EXHIBIT E

ORDER GRANTING ADMINISTRATIVE EXPENSE TREATMENT

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

-----X

In re:

PROMESA
Title III

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

No. 17 BK 3283-LTS

THE COMMONWEALTH OF PUERTO RICO
et al.,

(Jointly Administered)

Debtors.¹

-----X

In re:

PROMESA
Title III

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

No. 17 BK 4780-LTS

PUERTO RICO ELECTRIC POWER
AUTHORITY,

Debtor.

-----X

¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (the “Commonwealth”) (Bankruptcy Case No. 17-BK-3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17-BK-3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17-BK-3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“ERS”) (Bankruptcy Case No. 17-BK-3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority (“PREPA”) (Bankruptcy Case No. 17-BK-4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority (“PBA”) (Bankruptcy Case No. 19-BK-5523-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

MEMORANDUM ORDER GRANTING GOVERNMENT PARTIES' MOTION FOR ORDER ALLOWING ADMINISTRATIVE EXPENSE CLAIM FOR AMOUNTS TO BE PAID TO LUMA ENERGY BY PREPA DURING INTERIM PERIOD UNDER SUPPLEMENTAL AGREEMENT AND THE T&D CONTRACT

Before the Court is the *Government Parties' Motion for Order Allowing Administrative Expense Claim for Amounts to Be Paid to LUMA Energy by PREPA During Interim Period Under Supplemental Agreement and the T&D Contract* (Docket Entry No. 2417 in Case No. 17-4780 and Docket Entry No. 16241 in Case No. 17-3283, the "Motion").² Through the Motion, the Financial Oversight and Management Board for Puerto Rico (the "Oversight Board"), the Puerto Rico Fiscal Agency and Financial Advisory Authority ("AAFAF"), and the Puerto Rico Electric Power Authority ("PREPA" and, collectively with the Oversight Board and AAFAF, the "Government Parties") seek entry of an order allowing an administrative claim in favor of LUMA Energy, LLC and LUMA Energy ServCo, LLC (together, "LUMA Energy") for certain accrued and unpaid amounts required to be paid by PREPA to LUMA Energy under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (Docket Entry No. 2053-4, the "T&D Contract"), dated June 22, 2020, and the supplemental agreement thereto (the "Supplemental Agreement"), entered into by and among PREPA, the Puerto Rico Public-Private Partnerships Authority, and LUMA Energy.

The Court heard oral argument with respect to the Motion on April 28, 2021, and has considered carefully all of the submissions and arguments made in connection with the Motion.³ The Court has subject matter jurisdiction of this contested matter pursuant to section

² Unless otherwise specified, all docket entry references in the remainder of this Memorandum Order are to entries in Case No. 17-4780.

³ In addition to the Motion, the Court has reviewed (i) the *Limited Objection of Whitefish Energy Holdings, LLC to Government Parties' Motion for Order Allowing Administrative Claims for Amounts to Be Paid to LUMA Energy by PREPA During*

306(a) of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), 48 U.S.C. § 2166. For the following reasons, the Motion is granted.

BACKGROUND

The Court hereby incorporates by reference the factual summary set forth in the *Memorandum Opinion Granting in Part and Denying in Part PREPA’s Motion for Entry of an Order Allowing Administrative Expense Claim for Compensation for Front-End Transition Services Under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with LUMA Energy* (Docket Entry No. 2258, the “Front-End Administrative Expense Opinion”). See In re Fin. Oversight & Mgmt. Bd. for P.R., 621 B.R. 289 (D.P.R. 2020) (“LUMA Energy”). The following additional facts are drawn from the Government Parties’ submissions in support of the Motion and are undisputed, unless otherwise indicated.

Interim Period Under Supplemental Agreement and the T&D Contract (Docket Entry No. 2436); (ii) *UTIER’s Objection to the Government Parties’ Motion for Order Allowing Administrative Expense Claim for Amounts to Be Paid to LUMA Energy by PREPA During Interim Period Under Supplemental Agreement and the T&D Contract* (Docket Entry No. 2435, the “UTIER Objection”); (iii) *SREAE’s Objection to the Government Parties’ Motion for Order Allowing Administrative Expense Claim for Amounts to Be Paid to LUMA Energy by PREPA During Interim Period Under Supplemental Agreement and the T&D Contract* (Docket Entry No. 2437); (iv) *Cobra Acquisitions LLC’s Objection to Government Parties’ Motion for Order Allowing Administrative Expense Claim for Amounts to Be Paid to LUMA Energy by PREPA During Interim Period Under Supplemental Agreement and the T&D Contract* (Docket Entry No. 2438); (v) the *Renewed Limited Objection of Official Committee of Unsecured Creditors to Government Parties’ Motion for Order Allowing Administrative Expense Claim for Amounts to Be Paid to LUMA Energy by PREPA During Interim Period Under Supplemental Agreement and T&D Contract* (Docket Entry No. 2439); and (vi) the *Omnibus Reply in Support of Government Parties’ Motion for Order Allowing Administrative Expense Claim for Amounts to Be Paid to LUMA Energy by PREPA During Interim Period Under Supplemental Agreement and T&D Contract* (Docket Entry No. 2458).

LUMA Energy’s anticipated performance of operational and management services (the “O&M Services”) with respect to PREPA’s transmission and distribution system (the “T&D System”) is a cornerstone of the T&D Contract. (See Mot. ¶¶ 28-29.) One of the original preconditions for LUMA Energy’s commencement of the O&M Services was the requirement that PREPA obtain necessary Title III Court approvals, which include confirmation of a plan of adjustment for PREPA. (Mot. ¶ 31 (citing T&D Contract § 4.5(o)).) Because, in negotiating the T&D Contract, the Oversight Board believed that PREPA might not be able to confirm and consummate a plan of adjustment by the time LUMA Energy is otherwise prepared to commence the O&M Services, the Oversight Board requested amendments to the T&D Contract, which were included in the Supplemental Agreement. (Id. ¶¶ 32-33.) Specifically, the Supplemental Agreement provides for the commencement of the O&M Services if all other conditions precedent to the “Service Commencement Date,” other than PREPA’s exit from Title III and delivery of a certain tax opinion and reliance letter, are satisfied or waived (the “Interim Service Commencement Date”). (Id. ¶¶ 34 (citing Supplemental Agreement §§ 2.2 & 2.3).) The Interim Service Commencement Date begins a period (the “Interim Period”) during which the Supplemental Agreement is in effect, and LUMA Energy will assume full control of the T&D System until the earlier of (i) the date on which a plan of adjustment for PREPA is confirmed and (ii) the “Interim Period Termination Date,” which, unless extended by agreement of the parties, will occur eighteen months after the Interim Service Commencement Date if no such plan of adjustment has been confirmed. (Id. (citing Supplemental Agreement § 7.1).)

The Supplemental Agreement requires, as a prerequisite to the Interim Service Commencement, that the Title III Court have entered a final and non-appealable order granting administrative expense treatment for any accrued and unpaid amounts required to be paid under

the T&D Contract and the Supplemental Agreement during the Interim Period (the “Interim Obligations”). (Id. ¶ 35 (citing Supplemental Agreement § 2.3(b).) The Interim Obligations consist primarily of: (i) an “Interim Period Service Fee” of \$115 million annually, payable in monthly installments, (ii) PREPA’s indemnification obligations running in favor of LUMA Energy and its affiliates during the Interim Period, and (iii) a \$115 million “Termination Fee,” payable upon the occurrence of the Interim Period Termination Date. (Id. ¶ 36 (citing Supplemental Agreement §§ 3.3 & 7.2(c) and T&D Contract § 18.2).)

Relevant Procedural History

On July 7, 2020, the Government Parties filed *PREPA’s Motion for Entry of an Order Allowing Administrative Expense Claim for Compensation for Front-End Transition Services Under Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with LUMA Energy* (Docket Entry No. 2053, the “Front-End Administrative Expense Motion”), which sought an order allowing an administrative expense claim for certain fees associated with the transfer of operation and maintenance of the T&D System to LUMA Energy. Several parties filed objections to the Front-End Administrative Expense Motion, including Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. (“UTIER”), Sistema de Retiro de los Empleados de la Autoridad de Energía Eléctrica (“SREAEE” and, together with UTIER, the “Union Entities”), the Official Committee of Unsecured Creditors (the “UCC”), Cobra Acquisitions, LLC (“Cobra”), and Whitefish Energy Holdings, LLC (“Whitefish”).

On October 19, 2020, the Court issued the Front-End Administrative Expense Opinion. The Court held that (i) the Front-End Administrative Expense Motion was ripe for consideration, (ii) operating expenses of PREPA are eligible for administrative expense priority

under section 503(b)(1)(A) of the Bankruptcy Code based on the text and structure of PROMESA, and (iii) the “Front-End Transition Service Fees,” except for late fees, qualified for administrative expense priority. LUMA Energy, 621 B.R. 289. The Court declined to address the UCC’s arguments concerning the Supplemental Agreement, noting that such arguments were largely irrelevant to the Front-End Administrative Expense Motion and that the UCC would have the opportunity to raise its arguments in the context of future motion practice. Id. at 302. The Union Entities appealed certain rulings in the Front-End Administrative Expense Opinion to the United States Court of Appeals for the First Circuit, and briefing of that matter is ongoing.

DISCUSSION

The Government Parties now seek an order pursuant to sections 503(b) and 507(a)(2) of the Bankruptcy Code allowing an administrative expense claim in favor of LUMA Energy for the Interim Obligations.⁴ Relying on section 503(b)(1)(A) of the Bankruptcy Code, the Government Parties assert that the Interim Obligations qualify for administrative expense priority because the O&M Services are beneficial to PREPA. The Union Entities object to the Motion, arguing that (i) the Motion is unripe for adjudication, (ii) administrative expense priority treatment is unavailable in Title III cases, and (iii) the Interim Obligations do not qualify as administrative expenses under section 503(b)(1)(A). The UCC has filed a limited objection to the Motion, which takes issue with certain specific aspects of the Supplemental Agreement. Cobra and Whitefish, both of which have sought allowance of their own administrative expense claims against PREPA in separate contested matters, object to the Motion only insofar as the

⁴ Sections 503 and 507(a)(2) of the Bankruptcy Code are made applicable in these Title III cases by section 301(a) of PROMESA. See 48 U.S.C. § 2161(a).

relief sought therein would result in what they deem inequitable treatment of their own claims against PREPA.

Ripeness

The Court begins by addressing the Union Entities' argument that the Motion is unripe for adjudication. Ripeness "has roots in both the Article III case or controversy requirement and in prudential considerations." Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (internal quotation marks and citation omitted). The doctrine "seeks to prevent the adjudication of claims relating to contingent future events that may not occur as anticipated, or indeed may not occur at all." Id. (internal quotation marks and citation omitted). "[A] claim is ripe only if the party bringing suit can show both that the issues raised are fit for judicial decision at the time the suit is filed and that the party bringing suit will suffer hardship if 'court consideration' is withheld." Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey, 844 F.3d 318, 326 (1st Cir. 2016) (citation omitted). "The burden to prove ripeness is on the party seeking jurisdiction." Id. (citation omitted).

In the Front-End Administrative Expense Opinion, this Court concluded that the Government Parties had met their burden of showing that the Front-End Administrative Expense Motion was ripe for adjudication notwithstanding pending challenges to the Puerto Rico Energy Bureau's ("PREB") issuance of an Energy Compliance Certificate with respect to the T&D Contract. LUMA Energy, 621 B.R. at 298. The Court reasoned that the T&D Contract was in effect at the time the Front-End Administrative Expense Motion had been filed, and the T&D Contract's terms required the Government Parties to seek the relief requested therein. Id. Although it was "possible that PREB's decision could be reversed at a later date, that

contingency [did] not render unripe a request for administrative expense priority treatment for amounts that are currently accruing and payable under an operative contract.” Id. The Court also determined that PREPA “would be harmed if the [Front-End Administrative Expense] Motion were not adjudicated” promptly, because such a delay “would trigger LUMA Energy’s right to terminate the T&D Contract, which, if exercised, would indisputably hinder the transformation of PREPA’s T&D System.” Id.

Here, the Motion is ripe for judicial review for similar reasons. The administrative expense treatment sought by the Government Parties pertains to obligations arising under a binding contract under which both PREPA and LUMA Energy are currently performing. That contract requires the Government Parties to seek administrative expense status for the Interim Obligations as a precondition to LUMA Energy’s performance of the O&M Services, which is LUMA Energy’s central role under the T&D Contract and which will be performed in furtherance of a transformation of Puerto Rico’s power utility that is mandated under Puerto Rico law. The Motion is thus fit for review. Likewise, a failure to adjudicate the Motion would harm PREPA by delaying, if not preventing, performance by LUMA Energy of the O&M Services and create a severe impediment to PREPA’s transformation—a “direct and immediate dilemma” for PREPA. Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 9 (1st Cir. 2012) (citation omitted); cf. LUMA Energy, 621 B.R. at 298.

The Union Entities identify several reasons why, in their view, the validity of the T&D Contract is contingent on future events, thereby rendering the Motion unripe. Their arguments are unpersuasive. As the Government Parties point out, the First Circuit has made clear that the “possibility of future mootness” is not the “type of contingency that would create a lack of ripeness.” Town of Barnstable v. O’Connor, 786 F.3d 130, 143 (1st Cir. 2015). It

follows that the mere potential future invalidity of the T&D Contract cannot serve as a basis to conclude that the Motion is not currently fit for review. For this reason, the Union Entities misplace their reliance on the pending challenges to PREB's approval of the T&D Contract, any unsatisfied conditions to the commencement of the Interim Period, any possible legislative action concerning the T&D Contract, and the Union Entities' pending appeal of the Court's Front-End Administrative Expense Opinion, as bases for challenging the Motion's ripeness.

Nor does the Union Entities' pending appeal of the Front-End Administrative Expense Opinion otherwise divest this Court of jurisdiction of the Motion. "The test for determining if a pending appeal divests a lower court of jurisdiction is whether the subject matter presented in the appeal is so 'closely related' to the issues raised in the motion that the entry of the order 'impermissibly interfere[s]' with the appellant's rights in its appeal." Mission Product Holdings, Inc. v. Schleicher & Stebbins Hotels, L.L.C. (In re Old Cold, LLC), 602 B.R. 798, 823 (B.A.P. 1st Cir. 2019) (quoting In re Whispering Pines Ests., Inc., 369 B.R. 752, 759 (B.A.P. 1st Cir. 2007)), aff'd, 976 F.3d 107 (1st Cir. 2020). Here, although both the Front-End Administrative Expense Motion and the Motion relate to the same contract and turn on similar legal principles, they seek administrative expense treatment for payments associated with entirely different services: the Front-End Transition Services, on the one hand, and the O&M Services performed during the Interim Period, on the other hand. Each motion requires an independent assessment under section 503(b) of the Bankruptcy Code as to whether the amounts in question qualify for administrative expense priority. Although the First Circuit's ruling will undoubtedly address certain legal issues that are pertinent to the Motion, nothing about the Court's adjudication of the Motion now would affect in any way, much less impermissibly

interfere with, the Union Entities' rights in its appeal.

Accordingly, the Court rejects the Union Entities' arguments and concludes that the Motion is ripe for adjudication.

Section 503(b)(1)(A) of the Bankruptcy Code

The Court turns next to whether the Interim Obligations qualify as administrative expenses under section 503(b)(1)(A) of the Bankruptcy Code. That section provides, in relevant part, that “(a) [a]n entity may . . . file a request for payment of an administrative expense” and, “(b) [a]fter notice and a hearing, there shall be allowed administrative expenses . . . including— (1)(A) the actual, necessary costs and expenses of preserving the estate[.]” 11 U.S.C.A. § 503 (Westlaw through PL 117-11 with the exception of PL 116-283). Section 301(a) of PROMESA, 48 U.S.C. § 2161(a), expressly incorporates section 507(a)(2) of the Bankruptcy Code, 11 U.S.C. § 507(a)(2), which gives priority to administrative expenses that are allowed under section 503(b) of the Bankruptcy Code, and section 301(c)(5) of PROMESA provides that “[t]he term ‘property of the estate’, when used in a section of [the Bankruptcy Code] made applicable in a case under this subchapter by subsection (a), means property of the debtor.” 48 U.S.C.A. § 2161(c)(5) (Westlaw through PL 117-11 with the exception of PL 116-283). In the First Circuit, “a request for priority payment of an administrative expense pursuant to Bankruptcy Code § 503(a) may qualify if (1) the right to payment arose from a postpetition transaction with the debtor estate, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the right to payment was beneficial to the estate of the debtor.” Woburn Assocs. v. Kahn (In re Hemingway Transp., Inc.), 954 F.2d 1, 5 (1st Cir. 1992) (citations omitted). “The burden of proving entitlement to priority payment as an administrative expense . . . rests with the

party requesting it” id. (citations omitted), and the Court has broad discretion in determining whether to grant a request for such priority treatment, see In re Jeans.com, 491 B.R. 16, 23 (Bankr. D.P.R. 2013) (citation omitted).

As they did in opposition to the Front-End Administrative Expense Motion (relying on the same authorities), the Union Entities argue here that there can be no administrative expense priority for the necessary costs and expenses of preserving a Title III debtor because no bankruptcy estate exists in a Title III case. In the Front-End Administrative Expense Opinion, the Court squarely rejected this argument and concluded that the “text and structure of PROMESA compel the conclusion that operating expenses are eligible for administrative expense priority under section 503(b)(1)(A) of the Bankruptcy Code.” LUMA Energy, 621 B.R. at 299. No basis to depart from the Court’s prior ruling regarding this issue having been raised, the Court rejects the Union Entities’ arguments for the reasons set forth in the Front-End Administrative Expense Opinion.

The Union Entities further argue that the Government Parties have failed to demonstrate that the Interim Obligations are necessary costs of preserving PREPA because they do not provide any benefits to PREPA or its creditors. The UCC makes a similar argument as to the Termination Fee only. In the Front-End Administrative Expense Opinion, the Court concluded that the Government Parties had “satisfied their burden of demonstrating that the Front-End Transition Obligations other than any Late Fees associated therewith . . . are, to the extent incurred and payable under the T&D Contract, reasonable and necessary expenses of preserving PREPA under section 503(b)(1)(A).” Id. at 303. The primary rationale underlying that conclusion was that the Government Parties had proffered sufficient evidence, through the *Declaration of Omar J. Marrero in Support of PREPA's Motion for Entry of an Order Allowing*

Administrative Expense Claim for Compensation for Front-End Transition Services Under Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement with LUMA Energy (Docket Entry No. 2053-2, the “Marrero Declaration”) “to support a determination by this Court that the Front-End Transition Service costs that are properly incurred and payable under the T&D Contract will benefit PREPA.” LUMA Energy, 621 B.R. at 301. The Court further observed that, “[i]n light of the restrictions on judicial authority and the scope of PROMESA that are imposed by sections 303 and 305 of the statute, Oversight Board and debtor consent are also relevant considerations.” Id.

Here, the Government Parties have satisfied their burden with respect any Interim Obligations that are actually incurred. They have proffered evidence of their determination that the O&M Services 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 in order 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.” (Marrero Decl. ¶ 12.) Moreover, the Government Parties have, for purposes of this motion practice, adequately supported their conclusion that LUMA Energy is well qualified to assist PREPA in accomplishing these objectives. (Id. ¶¶ 13-14.)

The Union Entities contend that the Government Parties are wrong for numerous reasons, primarily by attacking the propriety of the T&D Contract as a whole and its underlying goals. For example, relying heavily on the *Declaration of Mr. Héctor Rosario-Hernández in Support of SREAEE’ Objection to the Government Parties’ Motion for Order Allowing*

Administrative Expense Claim for Amounts to Be Paid to LUMA Energy by PREPA During Interim Period Under Supplemental Agreement and the T&D Contract (Docket Entry No. 2437-2, the “Rosario Declaration”), the Union Entities argue that the T&D Contract will increase PREPA’s deficit, increase energy costs in Puerto Rico, jeopardize PREPA’s receipt of federal funds, and invite conflicts of interest in connection with contract awards for capital improvement projects. (See UTIER Obj. ¶¶ 84-98 (citing Rosario Decl. ¶¶ 10-12, 22-27, 32, 34, 41).) Like the arguments raised in their objection to the Front-End Administrative Expense Motion, however, the Union Entities’ grievances primarily implicate “energy policy and governmental structural issues that are not pertinent to” the determination before the Court, LUMA Energy, 621 B.R. at 301, and are largely irrelevant to the more narrow question at issue here: whether the Interim Obligations benefit PREPA. The Government Parties have made the reasonable determination that they do and, as the Court has previously observed, “PROMESA affords the Government Parties substantial discretion and autonomy in establishing government policy, and expressly precludes the Court from interfering with such efforts.” Id. (citing 48 U.S.C. §§ 2163, 2165). Thus, even accepting as true the assertions made in the Rosario Declaration, the differences in views expressed therein as to the merits of the T&D Contract and energy policy issues are insufficient to overcome the Government Parties’ proffers as to pertinent matters actually considered, particularly in light of Government Parties’ role under PROMESA and their consent to PREPA’s payment of the Interim Obligations.

The UCC contends that the Termination Fee component of the Interim Obligations cannot qualify as an administrative expense because it is expressly characterized as “liquidated damages” in the T&D Contract, and that the Termination Fee is not akin to typical break-up fees in the bankruptcy context, which are generally entitled to administrative expense

priority status because such fees are designed to encourage bidders or creditors to participate in transactions and thus provide value to the estate. The UCC asserts that the Termination Fee is a true penalty and provides no tangible benefit to PREPA. Additionally, the UCC compares the Termination Fee to the late fees that the Court previously found had not been shown to qualify for administrative expense treatment, at least at the time the Front-End Administrative Expense Motion was filed.

The Court concludes that the Government Parties have met their burden of demonstrating that the Termination Fee qualifies for administrative expense treatment. As a preliminary matter, the fact that the Government Parties agreed to the Termination Fee after the bidding process was completed does not foreclose it from benefiting PREPA. Here, again recognizing that Oversight Board and debtor consent are relevant considerations for purposes of the Court's section 503(b)(1)(A) analysis in the Title III context—and that “PROMESA affords the Government Parties substantial discretion and autonomy in establishing government policy, and expressly precludes the Court from interfering with such efforts,” LUMA Energy, 621 B.R. at 301—the Government Parties have made an adequate showing that inclusion of the Termination Fee provision to incentivize LUMA Energy to commence the O&M Services during PREPA's Title III case was beneficial to PREPA in that it enabled the Government Parties to commence a fundamental transformation of an integral component of the Commonwealth's infrastructure before the Title III restructuring is accomplished, thereby furthering the interests of not only PREPA but also of the people of Puerto Rico who rely on its services. The Termination Fee was part of the overall economic package that the Oversight Board found beneficial to PREPA because it enabled PREPA's transformation to begin prior to confirmation. The Court is persuaded that, unlike the liquidated damages provisions in cases cited by the UCC, which

were “not correlated to an actual transactional cost or expense incurred by the negotiating bidder,” In re Hupp Industries, Inc., 140 B.R. 191, 196 (Bankr. N.D. Ohio 1992), the Termination Fee accounts for the financial and reputational risks assumed by LUMA Energy, which is actually engaged in work under the contract, associated with termination of the parties’ relationship earlier than anticipated. In being related to costs of services under the T&D Contract, the Termination Fee essentially makes the pre-confirmation services more expensive if the parties do not carry out the full 15-year term of the contract; that is, the accrued Interim Obligations including the Termination Fee will have been paid in aid of a short-term term project beneficial to the debtor if the agreement is terminated prematurely, whereas the baseline contract price assumes continuation of the arrangement throughout the contract term. In benefiting the estate by securing pre-confirmation commencement of the transformation, the Supplemental Agreement, including the Termination Fee, advances PREPA’s long-term prospects and thus benefits the debtor and its stakeholders. In this context, the Termination Fee provision is reasonable. The UCC’s challenges to the Termination Fee provision are therefore unavailing.

The UCC also objects to what it characterizes as LUMA Energy’s “consent right” over a PREPA plan of adjustment during the Interim Period. Because the Motion does not seek approval of the T&D Contract or Supplemental Agreement in their entirety, that issue is not within the scope of issues before the Court, and the UCC’s objection with respect to this aspect of the arrangement is overruled. Whitefish’s, Cobra’s, and Union Entities’ arguments regarding the effects that granting the Motion will have on their individual interests are similarly irrelevant to the inquiry before the Court and, as such, are rejected for substantially the reasons set forth in the Front-End Administrative Expense Opinion. See LUMA Energy, 621 B.R. at 302-03.

Accordingly, the Court concludes that the Government Parties have satisfied their burden of showing that any Interim Obligations actually incurred are entitled to administrative expense priority under section 503(b)(1)(A) of the Bankruptcy Code. In light of this conclusion, the Court need not address the Government Parties' alternative arguments as to why the Interim Obligations are entitled to administrative expense priority treatment.

CONCLUSION

For the foregoing reasons, the Motion is granted. This Memorandum Order resolves Docket Entry No. 2417 in Case No. 17-4780 and Docket Entry No. 16241 in Case No. 17-3283.

Dated: May 3, 2021

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge