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

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| IN RE: REVIEW OF LUMA's TERMS OF SERVICE (LIABILITY WAIVER) | CASE NO. NEPR-MI-2021-0007 SUBJECT: LIABILITY WAIVER |
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**INSTITUTO DE COMPETITIVIDAD Y SOSTENIBILIDAD ECONOMICA (ICSE)
MOTION FOR RECONSIDERATION**

TO THE ENERGY BUREAU:

Now comes Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico (ICSE) represented by appearing counsel and respectfully alleges and prays:

Introduction

LUMA/PREPA has requested from PREB an absolute immunity for negligence, gross negligence, and willfull misconduct. PREB has granted a partial immunity limited to plain negligence.

PREB should reconsider and deny the requested immunity in full.

PREB has no legal authority to grant immunity, which must be legislated; the immunity is contrary to the Constitution; and the doctrines of the Supreme Court of Puerto Rico on responsibility and standard of care.

The immunity imposes an impossible burden on consumers, particularly on poorer consumers, and imposes on them the full brunt of damages caused by LUMA/PREPA.

Also, the immunity is contrary to the legal norms in effect for PREPA throughout its 80 years of existence.

Finally, the immunity eliminates the incentives for LUMA/PREPA to conduct its work and business with a high degree of responsibility. Neither LUMA/PREPA nor the PREB, have any evidence in the record of the economic effect of the lack of immunity that has been conferred to PREPA/LUMA.

Let's analyze in detail:

1. LUMA Energy LLC (LUMA) filed a Term of Services proposal which specifically claims and requests a liability waiver in the most absolute terms. The pretention is to have LUMA excused of one hundred percent of its potential damages' responsibilities, no matter how negligent, how grossly negligent, or how willful LUMA's misconduct is. There would be no legal responsibility imposed on LUMA for damages caused. The practical consequences of LUMA's claim would be to have, whoever suffers damages due to LUMA's negligence, gross negligence, or willful misconduct suffer and absorb the damage and economic loss. This means the sufferer will not be compensated, be it a manufacturing plant, a hospital, a school, a family, a business...

2. The specific term of service liability waiver requested is:

"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. The first issue raised by LUMA's request for a full, absolute immunity of responsibility for any level of negligence, is one of jurisdiction or legal authority. The terms of service proposed is based on PREB's power to establish rates and relates to the impact of LUMA's responsibility for damage costs, on LUMA's operating costs and the resulting rate."

3. The PREB on May 31, 2021, granted a limited immunity for negligence, not for gross negligence nor for willful misconduct. The problem the PREB's resolution poses is that in Puerto Rico the responsibility for damages, both contractual and extra-contractual, is strictly substantive law determined by legislation. See Civil Code of 2020 Articles 1167 and 1168. Only the Legislature can create exemptions or immunities. LUMA is asking the PREB to "legislate" an immunity that only the legislature can create.

4. The PREB analyzes "the immunity" from two flawed perspectives:

First, it confuses granting "immunity" to LUMA/PREPA with the nonexistence of damages. Damages don't disappear with the immunity. The damages suffered still exist, the sole issue of immunity is who carries or suffers the damage.

The absurd argument used by LUMA is that immunity equals lower rates, and as such helps "poorer clients".

But the question is: what happens with the poorer clients who suffer damages without the right to any compensation? More probable than not, the "rich" clients have insurance and other means to remedy the damage. The poorer clients have none.

5. Administrative law in Puerto Rico is pellucidly clear that administrative entities, like PREB, must decide based exclusively on the evidence on the record. See Fernández,

Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme sec. 4.2 Forum, 2da ed.

PREB “buys into” the LUMA allegations on cost of insurance, cost of paying damages, increase costs, etc., without any evidence on the record.

There is no evidence and no analysis of how much “paying for damages” have cost PREPA for 80 years, how this cost has been embedded in today’s existing rates, and how this is going to change with the immunity.

It is interesting that PREB and, prior to PREB, the Energy Commission on the strong worded criticisms for PREPA’s collapse made no expression at all on the damage’s immunity issue and its impact on PREPA’s finances.

6. Even worse, PREB’s order says that PREPA has an existing immunity. This alleged immunity is not so.

It only applies to “Force Majeure” or in grid maintenance, (where it has to shut the grid down) and no damages will be paid. Of course, the reason is because there is no negligence: it is not because there is an indemnity. If there is no negligence there is no tort action.

7. The second flawed premise is that this is a “rate issue” not a “contract issue”. The question is: “says who”?

The Civil Code—which is the substantive law in Puerto Rico that defines, and “controls” contract issues— does not distinguish “rate” contracts from other type of contracts.

Here we have a contract between LUMA/PREPA and its clients. As such it is subject to contract law. LUMA’s claim that PREB has jurisdiction to grant immunity, does

not grant PREB jurisdiction. The law is the law. A contract is a contract and rate-consumer contracts are not exempted from contract law. PREB cannot pick and choose to what contracts the law applies.

PREB certainly does not have the authority to create and grant an immunity, only the Legislature does.

Act 104 of June 29, 1955, known as "Lawsuits and Reclamations against the State Act", specifically legislates in which contexts shall the government of Puerto Rico be liable to its citizens. It limits by law the recovery in remedies (\$75,000 for damages to a person or private property and \$150,000 if there are multiple causes of action or multiple plaintiffs), These limits do not apply to Public Corporations like PREPA, much less to LUMA. Article 2 of the aforementioned law establishes that the government is liable for every and any damage caused negligently or intentionally by actions of its employees, agents, and/or public officials. The standard of negligence this law prescribes is found on Article 10 which amended Article 1803 of the former Civil Code of 1930. See *also Meléndez v. E.L.A.*, 81 DPR 824 (1960). Former Article 1803 equated the State's responsibility with the standard of conduct expected from any civilian (the "reasonable and prudent person" standard). This standard applies to LUMA/PREPA. Article 1540 of the new Civil Code, codified the same underlying principles established in Article 1803 of the old Civil Code. The new Article 1540 reads in its pertinent part: "public and private employers are liable for damages caused by its employees in performance of the duties they've been employed for". Applicable law on this precise topic has suffered no changes of substance except for the one of choice of words. Our conclusion fundamentals itself in the intrinsic equitable interest desired and our case

law precedents on the doctrine of vicarious liability. See Marti Santiago v. Pueblo Supermarket, 88 DPR 229 (1963); Martínez v. Comunidad M. Fajardo, 90 DPR 461 (1964); Baralt v. E.L.A., 83 DPR 277 (1961); Vélez Colón v. Iglesia Católica, 105 DPR 114 (1976); and Sánchez Soto V. E.L.A., 128 DPR 497 (1991).

If we characterize LUMA as an agent of PREPA and if such characterization is accurate, the standard of care to be expected from LUMA in carrying out the T&D contract would be the same one expected from PREPA. Any harm or damage that arises by negligent acts or omissions by LUMA would hold LUMA and PREPA liable. See Martínez v. Chase Manhattan Bank, 108 DPR 515 (1979) and Márquez Vega V. Martínez Rosado, 116 DPR 397 (1985).

The second interpretation and the least favorable to LUMA's contention is that it be treated exclusively as a private employer or independent contractor. As we have also discussed, Article 1540 of Civil Code 2020 regulates this type of entity: LUMA would be liable for any harm caused by its employees by the same standard and extent a private citizen would be liable. In such scenario, PREPA would also be liable if such interpretation stood given our Supreme Court's holding in Barrientos v. Gob. de la Capital, 97 DPR 552 (1969): "An employer is liable for damages that he had to anticipate at the time of hiring, and cannot avoid responsibility passing it on to the contractor". See also López V. Gobierno Mun. de Cataño 131 DPR 694 (1992) clearing up the extent of liability of an employer by actions or omissions of an independent contractor.

The question is: Why give LUMA, what even PREPA does not enjoy? What is the public interest protected for changing close to 80 years of PREPA being responsible for the damages it causes, and giving LUMA an absolute immunity?

8. The other issue is that absolutely nothing in the PREB's law authorizes the PREB to exempt an entity of responsibility established by substantive law or to grant immunities. Simply stated, PREB has no authority in law to grant LUMA's request. LUMA is forced to go to the Legislature to seek such a privilege. The absolute lack of PREB's authority or jurisdiction to determine immunities should be enough to deny the terms of service requested, not only modify it. PREB, an administrative agency, has no delegated power to create new legal immunities.
9. It is not correct, as LUMA states, that Puerto Rico's jurisprudence has not established standards for gross negligence or willfully misconduct. The PREB's Resolution and Order of May 31, 2021 so recognizes it. See *In Re: Review Of Luma's Terms Of Service (Liability Waiver)*, at page 36. Not only it has been defined, but it has been incorporated and accepted in Article 1538 of the New Civil Code which includes punitive damages for torts arising out of willful misconduct, crass negligence, and crimes. Puerto Rico's tendency is moving towards more, not less responsibility for damages; and LUMA pretends to be excluded from this legal framework.

But even if there were no definition of gross negligence or willful misconduct, the Bureau should remember US Supreme Court Justice Judge Potter Stewart words concerning pornography in the case of Jacobellis v. Ohio, 378 U.S. 184 (1964): "I don't know how to define pornography, but I know when I see it". We all know what causes damages, what is acting in a grossly negligent manner, what is acting with willful

misconduct and disregard for the consequences. We know when we see it, just like Justice Stewart.

10. As stated, LUMA's proposed terms of service is contrary to another important local norm, which has been consistent for more than 50 years. When the risk and the potential of damage are higher, the standard of conduct must also be higher. See Ba-rrientos v. Gob. de la Capital, 97 DPR 552 (1969) and Matos v. P.R. Ry., Lt. & P. Co., 58 DPR 160, 164 (1941).
11. A liability waiver of the absolute nature LUMA desires would also be unconstitutional. In Torres v. Castillo Alicea, 111 DPR 792 (1981), it was held that the limit in compensation in Article 2 of Act 104-1955 was arbitrary, that it did not respond to the economic realities of the moment, and that it violated the principle of equality and fair treatment in the application of laws. See Article II, Section 7 of the Constitution of the Commonwealth of Puerto Rico. Back to this date, the limit of compensation was \$15,000 to an individual cause of action and \$30,000 when the damage was suffered by multiple people or if there were multiple causes of actions. So how can LUMA limit compensations to *nothing*? It is apparent that such liability waiver would not survive constitutional scrutiny in any court of law.
12. LUMA's argument concerning the state of PREPA's grid is also a false argument. The legal norms of "prudent and reasonable person" are appropriate for its flexibility to adapt to different situations. In this case the standard for LUMA will be how a reasonable and prudent person would behave in the situation of PREPA's disastrous grid. On the other hand, the precarious conditions of our power grid are evident. As such, the desire to administrate such a deficient system with the intent of economic

exploitation, is a risk that LUMA must have taken into account and incorporate to its business plan. It is unconscionable to now claim, as LUMA does, that they be exempt of potential damages for assuming a risk they have or should have knowledge of. Publio Díaz v. E.L.A., 106 DPR 854 (1978) supports our contention.

It is well-established law by our Supreme Court's case law what is the standard of care expected from a public utilities' corporation. We must remember Ramos v. Autoridad de Fuentes Fluviales, 86 DPR 603, (1962). In this case, the Court emphasized that given the inherently dangerous nature of electricity, people in charge of *generating and distributing electricity* (just like LUMA) must exercise the highest degree of care. 86 DPR 603, 609 (1962). This does not mean we should not take into consideration the obvious importance of the public policy for a more efficient power grid: the case also addresses this issue. The reasonable and prudent person standard is flexible enough to accommodate LUMA's preoccupations and further the public policies of Act 17-2019. Given the social benefit brought by the accessibility of electricity, such benefits cannot be defeated by an absolute standard of care. *Id.* 610

The case law of other jurisdictions that LUMA has presented to the PREB are not binding in Puerto Rico. We have adopted a heightened degree of care that can only be abandoned in our legal system by the Supreme Court since it is of their own creation or by the Legislature who possesses the highest democratic power in our system of government.

13. Another absurd argument in support of the immunity is that LUMA is "supervised" by the P3 Authority. First, there is no evidence on record that the P3 Authority will evaluate the performance of LUMA concerning field work or contracts with

consumers. There is also no evidence on record that the P3 Authority has the technical capacity to do performance supervision and even if it would, there is no legislated primary jurisdiction on P3 Authority, nor on PREB, on determinations concerning damages and negligence.

14. In the same line, LUMA's contention that the waiver liability is indispensable to advance the interests of Act 17-2019 is not supported. As stated, the only evidence LUMA provides on this matter is the testimony of Mr. Branko Terzic. No further evidence suggests a true and probable conclusion that absent the liability waiver, financial losses shall arise due to damages suffered by users. LUMA did not provide evidence quantifying the hypothetical losses LUMA will incur due to the also hypothetical damages that the general public will suffer; and that, as a consequence, these will ultimately impede the viability of the electric utility service. In absence of such evidence in the record, PREB is barred to adjudicate in favor of the immunity. See Section 3.1(a)(2)(D) of Act 38-2017; Com. de Seguros v. A.E.E.L.A., 171 DPR 514, 524-525 (2007); and Álamo Romero v. Administración de Corrección, 175 DPR 314, 329 (2009).
15. LUMA also calls the PREB's attention to the fact that it has to comply with the PREPA contract as if this in itself would justify the immunity claimed. LUMA fails to mention to PREB Article 18 of its contract which gives LUMA wide indemnity and release of responsibility, *vis-a-vis* PREPA.
16. In Puerto Rico for a contract to be valid the contract has to comply with law, moral, and public order. See Article 1232 Civil Code 2020. LUMA's claims for an exemption and immunity without legislated approval is contrary to law and to public order. We

hold it is also not moral since the most economically vulnerable citizens of Puerto Rico are the ones that shall suffer the harshest consequences given their economic limitations.

17. Torts, damages, extracontractual responsibility for damages, is in reality a system to adjudicate and distribute risks and damages. It is more economically efficient to socialize (distribute) the risk and cost of damages than impose them entirely on a single party. This is the whole idea of insurance. It is better and more efficient to have LUMA distribute and socialize the cost through the rates, as PREPA has done for 80 years.

The opposite, what LUMA wants, is more inefficient in economic and moral terms, that is to have the consumer carry the damage alone, the one who suffers the damage and is not compensated. The imposition of responsibility for damages also, is a legal framework for promoting or deterring certain conduct. Giving LUMA an absolute immunity is not a way to promote correct performance. It eliminates the “deterrence” that our tort law promotes.

18. The applicable legal norm is that the compensation extends to both economic (emergent and loss of revenue) and moral (physical suffering and mental anguish) damages. See Cintrón Adorno v. Gómez, 147 DPR 576, 600 (1999). The Supreme Court has recognized that moral damages are compensable and has openly rejected the Common Law rule barring such type of compensation. See Infante v. Leith 85 DPR 26 (1962), Rivera v. Rossj, 64 DPR 718, 724 (1945); and Vázquez v. Pueblo, 76 DPR 594,601 (1954). The PREB has immunized LUMA without any support to why we should reject a norm with deep roots in Puerto Rico’s tort law. The empty argument

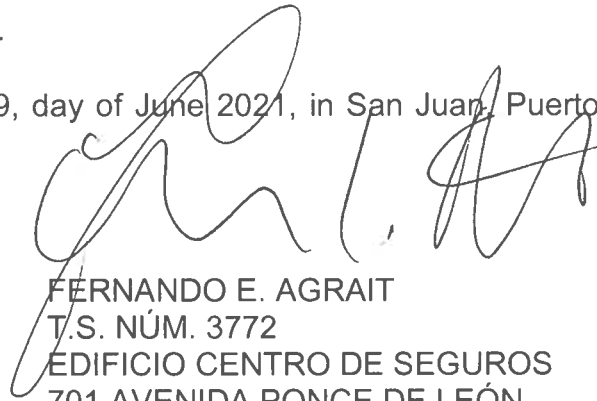
repeatedly advanced by LUMA that it is in the public interest to limit liability in these cases and because it participates in the business of supplying electric services, is also defeated by our precedent. In Rodríguez Cancel v. A.E.E., 116 DPR 443 (1985), a minor suffered both physical and mental disabilities because of negligent actions by PREPA. The Supreme Court not only awarded compensation to the minor based on his mental suffering, but also to his family members. This case did not mention anything to imply that the award should have been different because of PREPA's important services to the general public. That would have been inconsequential since as we have discussed before, the standard expected from energy utility corporations is of the same caliber than that expected from an ordinary private person. Rodríguez Cancel v. A.E.E. even goes beyond the award for moral damages. The Court also awarded a modality of loss of revenue ("lucro cesante", in Spanish) for the impaired income-generating potential ("menoscabo del potencial de generar ingresos", in Spanish).

19. Finally, for the punitive damages the PREB and LUMA exclude, there exists no justification. As the plain language of Article 1538 of Civil Code 2020 holds, the discretionary power to award this type of punitive compensation in cases of damages arising out of willful misconduct, gross negligence, and crimes, resides in the hands of the Courts.

WHEREFORE it is respectfully requested to reconsider its determination and reject LUMA's request for terms of services liability waiver.

I hereby certify that, on this same date, we have filed this motion to: kbo-lanos@diaz.vaz.law; jmarrero@diaz.vaz.law, margarita.mercado@us.dlapiper.com, hri-vera@oipc.pr.gov, contratistas@oipc.pr.gov.

RESPECTFULLY SUBMITTED this 9, day of June 2021, in San Juan, Puerto Rico.



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