

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

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| NEPR Received: Jun 29, 2021 11:20 PM |
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IN RE:

THE PERFORMANCE OF THE PUERTO
RICO ELECTRIC POWER
AUTHORITY

CASE NO.: NEPR-MI-2019-0007

SUBJECT: Reconsideration of Resolution and Order
on Imposition of Fine.

**REQUEST FOR RECONSIDERATION OF RESOLUTION AND ORDER OF JUNE 15,
2021 IMPOSING FINE**

TO THE PUERTO RICO ENERGY BUREAU:

COME NOW, LUMA ENERGY, LLC as Management Co., and **LUMA ENERGY
SERVCO, LLC** (collectively, **LUMA**), through the undersigned legal counsel and respectfully
state and request the following:

I. Introduction

LUMA hereby respectfully requests reconsideration of the Resolution and Order issued on June 15, 2021, whereby this Puerto Rico Energy Bureau (“Energy Bureau”) denied LUMA’s request filed on June 11, 2021, entitled “Urgent Request for Brief Extension of Time until June 16, 2021, To File Motion for Clarifications and/or Partial Reconsideration of Resolution and Order of May 21, 2021, (“LUMA’s Urgent Request for Brief Extension of Time”), and imposed a fine of \$500.00 per day starting on June 12, 2021, for every day or part thereof, until LUMA filed a submission authorized by the Energy Bureau in this proceeding for Clarifications and/or Partial Reconsideration of Resolution and Order of May 21, 2021 (“June 15th Resolution and Order Imposing Fine”).

As will be explained, LUMA filed the Urgent Request for Extension prior to expiration of the deadline set by the Energy Bureau for Clarifications or Reconsideration of the May 21st Resolution and Order. With said filing, LUMA did not disobey an order from the Energy Bureau but instead identified special circumstances that precluded LUMA from filing the submission on the deadline of June 11, 2021. LUMA respectfully posits and argues that imposition of the monetary daily fine is not supported by Act 57-2014, as amended and should be reconsidered.

It is respectfully submitted that the June 15th Resolution and Order Imposing Fine does not reasonably consider the procedural history of this proceeding nor the special circumstances that justified LUMA's Urgent Request for Extension of Time. It is important to note that LUMA was able to file the Motion for Clarifications and/or Reconsideration of the May 21st Resolution and Order within the period of the requested extension, that is, on June 16, 2021. This demonstrates LUMA's ability to meet the deadline proposed in the request for extension of time and that the extension was responsibly tailored to the additional time that was reasonably needed to complete the filing. Additionally, LUMA's June 16th Motion for Clarifications and/or Partial Reconsideration contained several complexities involving comments, requests for clarifications and reconsideration on technical data on the historic performance of the Puerto Rico Electric Power Authority ("PREPA") that the Energy Bureau compiled since the second half of the year 2019, and addressed a novel Resolution and Order that spans fifteen (15) substantive pages and thirty-three (33) pages with line items on performance metrics, whereby the Energy Bureau, for the first time, set performance benchmarks and baselines for PREPA. On reconsideration, this honorable Energy Bureau should consider the technical and complex nature of the submission that LUMA was preparing, to conclude that a brief extension of three business days was justified.

Additionally, the record in this proceeding shows timely and fulsome compliance by LUMA with the orders issued by the Energy Bureau and does not support a finding of neglect or disregard of the directives of the Energy Bureau. LUMA respectfully requests that the Energy Bureau reconsider the June 15th Resolution and Order Imposing Fine.

II. Procedural Background

This honorable Energy Bureau initiated proceedings in this case to set performance baselines and compliance benchmarks for Puerto Rico's electric system. *See* Resolution and Order dated December 23, 2020. Since January, 2021, LUMA has actively participated in this proceeding and filed five substantive submissions with this Energy Bureau, *see* LUMA's Motion Submitting Comments on Performance Metrics Data Presented on January 19, 2021 by the Energy Bureau and Submitting Proposed Performance Metrics and Baselines, filed on January 29, 2020 and including Exhibits 1 through 3; Motion Resubmitting LUMA's Comments on Performance Metrics Data Presented on January 19, 2021 by the Energy Bureau and Submitting Proposed Performance Metrics and Baselines filed on February 5, 2021, as partially amended on February 8, 2021; Motion Submitting LUMA's Reply to Comments, filed on February 19, 2021; Motion Submitting Sur-Reply and Comments on the Information Presented at the Technical Conference of February 22, 2021, filed on March 1, 2021; and Motion for Partial Reconsideration of Resolution and Order of April 8, 2021, filed on April 28, 2021. LUMA also participated in the technical conferences held on January 19, 2021 and February 22, 2021.

After a series of procedural events, on May 21, 2021 this honorable issued a Resolution and Order adopting principles for establishing performance metric benchmarks; establishing four categories of performance metrics applicable to the Puerto Rico Electric Power Authority

(PREPA); and setting initial benchmark values for several metrics that are subject to reporting requirements (“May 21st Resolution and Order”). *See* May 21st Resolution and Order at pages 3-14.

On June 4, 2021, this honorable Bureau directed that LUMA would have until June 11, 2021, to file a request for clarification or reconsideration of the May 21st Resolution and Order. *See* Resolution and Order of June 4, 2021. On June 11, 2021, LUMA filed the Urgent Request for Brief Extension of Time to submit clarifications to the May 21st Resolution and Order. LUMA requested an extension until June 16, 2021. In the Urgent Request for Brief Extension of Time, LUMA explained the following:

- The urgent request for additional time was necessary for LUMA to be able to complete analysis on data and information obtained as recently as June 11, 2021, that would be included in its request for clarification and comments of the May 21st Resolution and Order;
- LUMA personnel had been working diligently to finalize the submissions but would not be able to conclude its analysis and comments by June 11, 2021, since within the prior forty-eight (48) hours LUMA had been managing two major incidents, which resulted in additional work and disrupted working conditions. The unanticipated incidents had delayed efforts to conclude the filing and prevented LUMA from completing the planned submission;
- As of the close of business day June 10, 2021, LUMA understood in good faith that it would be able to meet the June 11th deadline but in the afternoon of June 11, 2021, the LUMA team reached the conclusion that given the new data received and

the continued actions required due to the recent incidents and disruptions, it would not be feasible to complete the filing of the request for clarification or reconsideration of the May 21st Resolution and Order; and

- LUMA intended to present the filing on June 11th and was not envisioning an extension until close of business of June 11, 2021, but the extension was needed due to last minute developments and circumstances that ensued during the night of June 10, 2021 and on June 11, 2021 that prevented LUMA from completing the filing within the original deadline.

On June 15, 2021, this honorable Energy Bureau denied the request for extension and imposed a daily sanction of \$500 per day starting June 12, 2021, until LUMA files its requests for clarifications.

LUMA hereby requests reconsideration of the June 15th Resolution and Order Imposing Fine.

II. Applicable Standard

Section 6.36 of Act 57-2014, as amended by Act 17-2019, endows the Energy Bureau with authority to “impose administrative fines for violations of this Act, or the regulations and orders issued thereunder, committed by any person or electric power company subject to its jurisdiction, of up to a maximum of twenty-five thousand dollars (\$25,000) per day.” 22 LPRA §154jj (2021, Spanish-Language Codification).

Decisions by administrative agencies imposing fines shall not exceed statutory authorization nor amount to a clear abuse of discretion. *See Comisionado de Seguros v. Antilles Ins. Co.*, 145 DPR 226, 233-34 (1998); *Assoc. Ins. Agencies, Inc. v. Com. Seg. PR*, 144 DPR 425,

439-41 (1997); *See also e.g. ECP v. OCS*, 2020 TSPR 112 (stating the general rule that decisions by administrative agencies should be reasonable and based on the administrative record); *Graciani Rodríguez v. Garage Isla Verde*, 202 DPR 117, 126-27 (2019).

The determination to impose a fine entails exercise of discretion and a concomitant avoidance of arbitrary actions. In the administrative law context, the Puerto Rico Supreme Court has held that the exercise of discretion by an administrative agency must be rooted in reasonableness and in accordance with applicable law. *See e.g., Ramírez v. Policía de PR*, 158 DPR 320, 339 (2003). Discretion, in turn, has been defined as a form of reasonableness applied to judicial discernment to reach a just conclusion. *See e.g., Banco Popular de PR v. Mun. de Aguadilla*, 144 DPR 651 657-58 (1997); *Pueblo v. Ortega Santiago*, 125 DPR 203, 211 (1990).

III. Discussion

It is respectfully submitted that the Energy Bureau's June 15th Resolution and Order Imposing Fine of \$500 per day or fraction thereof, retroactively starting on June 12, 2021 and to end when LUMA filed its Motion for Clarifications and/or Partial Reconsideration, should be reconsidered and/or that the Energy Bureau should grant LUMA relief from said order.

First, LUMA's Urgent Request for Extension of Time does not constitute a failure to comply with an order of this honorable Energy Bureau as required by Section 6.36 of Act 57-2014 as precondition to imposition of a fine. LUMA acknowledges that, for example, in Case No. NEPR-AP-2020-0025 the Bureau advised that filings of requests for extensions would be considered based on just cause. *See* Resolution and Order of June 4, 2021 (Case No. NEPR-AP-2020-0025). However, in said order issued in a different proceeding, the Energy Bureau did not define the scope of the just cause requirement nor provide guidance on the timing for a regulated

entity or electric power service company such as LUMA to file a request for extension of time based on exceptional or unforeseen circumstances that arise on or near the date of the filing. Relatedly, the Energy Bureau has not issued directives of general and consistent applicability that may reasonably serve as basis for imposition of sanctions when a regulated entity requests an extension of time on the day of deadline. Importantly, in this proceeding, the Energy Bureau has not issued directives apprising LUMA and stakeholders of the timing to file requests for extensions of time, the scope of a just cause requirement, or the circumstances in which the Bureau may impose a fine for filing a request for an extension of a deadline on or near the due date.

In these circumstances, it is respectfully submitted that it is not reasonable to conclude that LUMA violated an order or regulation that could justify imposition of a fine. Additionally, LUMA was not afforded fair warning that filing an Urgent Request for Extension of Time due to extraordinary events, could reasonably or as a matter of law, lead to imposition of a fine (with retroactive reach) for each day beyond the deadline that the filing was not submitted with the Energy Bureau. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2417-18 (2019) (holding that “an agency’s reading of a rule must reflect ‘fair and considered judgment’ . . . And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates “unfair surprise” to regulated parties . . .”).

In light of the aforementioned, LUMA respectfully submits that the order for imposition of sanction is not supported by law and results in unfair procedural and substantive treatment and abuse of discretion.

Secondly, it is respectfully submitted that the June 15th Order Imposing Fine does not give proper weight to the exceptional circumstances that justified LUMA’s Urgent Request for Brief

Extension of Time. As detailed in Section II *supra*, LUMA explained in the Urgent Request for Brief Extension of Time that since the prior day, June 10, 2021, it had been dealing with two exceptional occurrences. These were the June 10th Incident at the Monacillo substation, *see* Incident Summary, filed of June 14, 2021, Case No. NEPR-IN-2021-0002, and a Distributed Denial of Service attack on the Mi Luma customer portal and mobile application. This Energy Bureau may take administrative notice of the fact that the June 10th Incident in Monacillo lead to power outages in Puerto Rico and required urgent attention by LUMA and its personnel. *Id.* On June 14, 2021, LUMA filed a report before this Energy Bureau on the June 10th incident which shows the timing of the incident that involved multiple explosions, a fire and power outages that demanded immediate attention by LUMA and its personnel. *Id.*

The June 10th incident affected LUMA's operations as its personnel did not have access to their offices on June 11, 2021. It is respectfully submitted that the explanations that LUMA provided in the Urgent Request for Extension of Time and the disruptions to LUMA's ability to complete the filing provide justified and exceptional circumstances for an extension of time to file LUMA's Request for Clarifications or Reconsideration of the May 21st Resolution and Order. *See O.E.G. v. Rivera, Cintrón*, 153 DPR 184 (2001) (deeming a power outage in the northern region of Puerto Rico an exceptional circumstance that afforded just cause to extend judicial terms that may only be extended for just cause).

Respectfully, in the Urgent Request for Brief Extension of Time, LUMA included developed explanations for the need for the extension based on exceptional circumstances. LUMA did not file a boiler plate request for extension of time nor was the request related to neglect. To the contrary, LUMA explained that it had been working to meet the June 11th deadline and that the

decision on the need for an extension was made on June 11th due in part to two incidents and further justified because LUMA had received and identified additional information that it would include in this submission. LUMA did not act with disdain or disregard to importance of filing its submission of Clarifications and Reconsideration of the May 21st Resolution and Order.

A review of LUMA's Motion for Clarifications and/or Partial Reconsideration and the **four** exhibits submitted with the same filed on June 16, 2021 reveal that LUMA provided detailed analysis and assessment on the Energy Bureau's May 21st Resolution and Order on benchmarks and baselines. The filing is probative of LUMA's responsible and active participation in this proceeding and evinces that the additional time was necessary to finalize the fulsome filing of a technical nature that was submitted on June 16, 2021. The June 16th filing shows that the analysis, data and comments that LUMA prepared required time, consideration and effort for completion and that the request for brief extension of time was reasonably tailored and in good faith.

It is respectfully submitted that the timing of LUMA's Urgent Request for Extension of Time was justified under the aforementioned circumstances and that it is legal error and unreasonable to deem that LUMA did not timely file a request to extend the June 11th deadline to request Clarifications or Reconsideration of the May 21st Resolution and Order and/or that the requested extension was not grounded in just cause.

Respectfully, LUMA submits that the Urgent Request for Brief Extension of Time was properly supported by just cause and filed in good faith without any purpose or notice that LUMA would be disobeying an order: (1) LUMA referenced the specific factual circumstances that prevented it from filing its Requests for Clarifications or Reconsideration of the May 21st Resolution and Order; and (2) LUMA requested the extension of time prior to expiration of the

deadline and as soon as it determined that it would not be able to file the submission within the deadline due to special and extraordinary circumstances. *See e.g. Rojas v. Axtmayer*, 150 DPR 560, 565 (2000) (stating in the context of construing just cause to extend a term after it has expired, that the party moving for an extension after the term has lapsed must provide detailed explanations for the delay that should place the adjudicator in position to determine that there is a reasonable excuse for the delay and that the delay is due to special circumstances).

Relatedly, the records of this honorable Energy Bureau, of which the Energy Bureau may take official notice, reveal that during the weeks of June 7th and June 14th, LUMA worked on several submission, submitted several filings and participated in hearings before the Energy Bureau:

- i. Request for Clarification or Amendment of May 31st Resolution and Order on Initial Budgets, NEPR-MI-2021-0004 filed on June 8, 2021;
- ii. Participation in Interconnection Compliance hearing NEPR-MI-2019-0016 (June 8th)
- iii. Annual reconciliations and proposed CILTA, SUBA-NHH and SUBA-HH rider factors, filed June 10, 2021;
- iv. Amended Annual reconciliations and proposed CILTA, SUBA-NHH and SUBA-HH rider factors, filed June 11, 2021, NEPR-MI-2020-0001;
- v. Motion Submitting Report on Luminaries, Case No. NEPR-MI-2020-0001 filed on June 11, 2021;

- vi. Submission of Presentation for Technical Conference scheduled for June 15, 2021 on Demand Response, Case No. NEPR-MI-2021-0006 filed on June 11, 2021;
- vii. Motion in Compliance with Order in Case In Re: Interrupción de Servicio Eléctrico del 20 de junio de 2021, Caso Núm. NEPR-IN-2021-0002, filed on June 14, 2021;
- viii. Participation in Technical Conference held on June 15, 2021 on Demand Response, Case No. NEPR-MI-2021-0006;
- ix. Motion in Compliance with order issued on June 8, 2021 on list of projects to be submitted to FEMA and/or COR3, Case No. NEPR-MI-2021-002, filed on June 15, 2021; and
- x. Quarterly reconciliations and proposed factors for FCA, PPCA and FOS riders, filed on June 16, 2021, NEPR-MI-2020-0001.

The aforementioned shows that LUMA has worked diligently to comply with the orders of this Energy Bureau even in the midst of exceptional events that disrupted its operations on June 10th. The Urgent Request for Extension of Time was rooted in exceptional circumstances; not in a pattern or intent to disobey orders.

WHEREFORE, LUMA respectfully requests this Honorable Bureau **take notice** of the aforementioned, **reconsider** the June 15th Resolution and Order Imposing Fine, and **release** LUMA from the order directing payment of a daily fine of \$500 that accrued on June 12, 2021.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 29th 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.



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