

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

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**IN RE:** INTERCONNECTION PROGRESS  
REPORTS BY THE PUERTO RICO  
ELECTRIC PORWER AUTHORITY

**CASE NO.:** NEPR-MI-2019-0016

**SUBJECT:** Motion to Show Cause

**MOTION TO SHOW CAUSE IN RESPONSE TO AUGUST 6, 2021 ORDER**

**TO THE HONORABLE PUERTO RICO ENERGY BUREAU:**

COME NOW LUMA Energy, LLC and LUMA Energy Servco, LLC (collectively known as “LUMA”), through the undersigned legal counsel, and respectfully state and request the following:

**I. Background**

On August 6, 2021, the Puerto Rico Energy Bureau of the Public Service Regulatory Board (the “Energy Bureau”) issued a Resolution and Order directing LUMA to provide a report on the status of requests for interconnection of distributed energy systems, along with any relevant supporting documents and a presentation on this matter, by August 13, 2021. LUMA’s representatives would have to appear in a Compliance Hearing to be held on August 16, 2021, in which the presentation will be discussed and LUMA would explain its plan to address the backlog of pending interconnection requests within 60 days (by October 5, 2021) and avoid delays in the attention of new requests.

The Resolution and Order also requires LUMA to show cause as to why it should not be sanctioned with a daily administrative fine of \$1,000 for allegedly not complying with Article 9 of the Puerto Rico Net Metering Program Act, Act 114-2007, as amended (“Act 114”), 22 PR Laws Ann. §1019, which states the public policy on interconnections. This, in relation to the

backlog that LUMA inherited from the Puerto Rico Electric Power Authority (“PREPA”) when it became the operator of PREPA’s Transmission and Distribution System (“T&D”), on June 1<sup>st</sup>, 2021; particularly, regarding 3,190 interconnection requests that were pending during the trimester of February to April 2021.

Prior to June 2021, PREPA administered the interconnections program and, due to several reasons -which were exacerbated due to Hurricane Maria and the COVID-19 pandemic-, operated with a backlog for years. The present proceeding was instituted by the Energy Bureau to supervise such operation. As part of this proceeding, on November 20, 2020, PREPA was ordered to file a quarterly status report on interconnections each 13<sup>th</sup> day of February, May, August and November. Previously, PREPA filed similar reports periodically.

On June 8, 2021, days after taking over the T&D operation, LUMA appeared before the Energy Bureau to explain how the transition of the interconnections would be managed. LUMA was ordered to continue filing the quarterly reports. However, LUMA was not provided with a timeframe to complete the pending interconnections and was not required to reduce or eliminate the backlog for a particular date. Similarly, LUMA was not advised about an interpretation of Act 114 that would require completing pending and new interconnection requests within an inflexible period and that not complying with such period would entail sanctions. Nevertheless, LUMA has put all its efforts to reduce the backlog and handle interconnection requests as expeditiously as possible.

LUMA has been scarcely two months in charge of the interconnections and has accomplished significant improvements to reduce a backlog of around 7,000 cases. As part of its modifications to expedite procedures, LUMA has transitioned from a regionalized structure to a centralized structure with standardized procedures. LUMA has also accelerated the studies stage

of the interconnection procedure by eliminating sequential revisions in cases that do not require additional technical review. Meanwhile, the net metering procedures and necessary changes of meters are being handled outside of the Portal simultaneously with the validation and studies processes of the interconnection procedure. These modifications are accompanied by employee training and transparent communications with clients.

## **II. Sanctions Against LUMA Are Not Justified**

### **A. The August 6<sup>th</sup> Order ignores the procedure established for cases involving violations of the energy public policy.**

Once an administrative agency adopts a regulatory rule, it is obliged to strictly observe it, since it operates as a limit to its discretion. *Com. Vec. Pro-Mej., Inc. v. J.P.*, 147 DPR 750, 764–765 (1999). Administrative agencies cannot ignore their own rules and base their actions on a higher interpretative authority due to their expertise. Agencies' interpretations of their own regulations must be based on reason and affinity with their enabling laws. *López Leyro v. E.L.A.*, 173 DPR 15 (2008).

Adjudicative and Non-Compliance proceedings before this Energy Bureau are regulated by the Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings, Regulation No. 8543 of the Energy Commission of Puerto Rico (hereinafter, “Regulation 8543”). This Regulation applies to all notices of noncompliance and investigations addressed before or by the Energy Bureau. *See* Section 1.04, Regulation 8543. Pursuant to the Regulation, the Energy Bureau may issue a Notice of Noncompliance if it learns that a person has incurred, is or may be incurring in a violation of the energy public policy set forth in Act No. 57-2014. *See* Section 14.01. The Notice of Noncompliance shall be issued by summoning the person. *Id.*

The Notice of Noncompliance shall state the alleged breach, according to public information or the information that forms part of the administrative record, as well as the facts that give rise to the Notice of Noncompliance. *See* Section 14.02, Regulation 8543. The Notice of Noncompliance shall inform the person of his/her right to address the Energy Bureau to examine the information and documentation in the administrative record. *Id.* As part of the proceedings, the person can submit witnesses and testimonies. *See* Section 14.04, Regulation 8543.

After providing the notified party an opportunity to be heard, if the Energy Bureau determines that said party has engaged in one or more of the breaches alleged in the notice, it may impose the appropriate remedy, in accordance with the law, or with the remedies set forth in Sections 10.01 thru 10.03. *See* Section 14.05, Regulation 8543. If the notified party fails to comply with any of the Energy Bureau's orders issued during a Notice of Noncompliance proceeding, the Energy Bureau may impose any fine or sanction it deems appropriate, including fines and penalties set forth in Section 12.02 of the Regulation. *See* Section 14.06, Regulation 8543.

The procedures established in Regulation 8543 should be followed in order to impose a fine for noncompliance with the public policy of interconnection of distributed generators and microgrids, which is part of the energy public policy. Article 1.14 of Act 17-2019, Energy Public Policy Act of Puerto Rico, allows the Energy Bureau to impose a daily fine of \$1,000 to PREPA, its successor or contractor operating the T&D for not complying with the interconnections public policy. However, these fines cannot be imposed without due and proper notice of the alleged non-compliance nor absent a procedure in which the guarantees required in every administrative proceeding are afforded and in which the legal basis for the fine is well established.

In connection with a fine, the Energy Bureau has not followed here the procedures established in its own Regulation and Act No. 57-2014,<sup>1</sup> as amended, thus violating the right to legal due process to which LUMA is entitled. The Resolution and Order requires LUMA to show cause as to why it should not be sanctioned with a daily administrative fine of \$1,000 for not complying with Article 9 of Act 114, which sets forth the public policy on interconnections. Regulation 8543 precisely establishes a proceeding for instances where a violation of the energy public policy is alleged, including interconnections. The party responsible for the alleged breach has the right to be summoned, to receive notice of the alleged breach and the facts that give rise to it, to examine the administrative record, and to submit witnesses and testimonies.

Contrary to the requirements imposed by Regulation 8543, LUMA has not been summoned, has not received proper notice of the alleged breach and was not given the opportunity to identify witnesses and offer their testimonies. Surprisingly, this Energy Bureau has included a noncompliance allegation in the regulatory proceeding set forth to submit the interconnection progress reports, which was not envisioned as a proceeding to rule on compliance of any operator with legal requirements on interconnections nor to establish any type of liability or remedy in that regard. The actions of the Energy Bureau violate LUMA's due process because it is subjecting LUMA to a *de facto* noncompliance allegation without providing the procedural guarantees of the proceeding already in place pursuant to Regulation 8543.

It is respectfully stated that this Energy Bureau's order requiring LUMA to show cause as to why it should not be sanctioned with a daily administrative fine of \$1,000 for not complying with Article 9 of Act 114, should be set aside. In the alternative, and as a minimum, LUMA

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<sup>1</sup> Act No. 57-2014 establishes the powers, duties, and jurisdiction of the Energy Bureau. See Articles 6.3 and 6.4, 22 PR Laws Ann. § 1054b-1054c. This Energy Bureau has jurisdiction to hear cases or controversies regarding requests for interconnection of distributed energy systems brought by customers.

contends that it has the right to examine the administrative record and submit witnesses with their testimonies and documentary evidence prior to having to show cause on why it should not be fined for PREPA's backlog and prior to a determination of whether this Energy Bureau should proceed with the imposition of an administrative fine. These are equivalent to the guarantees extended by Regulation 8543 in a noncompliance proceeding and is the least this Energy Bureau can do in order to observe the law.<sup>2</sup>

**B. This Energy Bureau changed the interpretation of Act 114, to announce the possibility to impose retroactive liability on LUMA for longstanding conduct that the Energy Bureau had never addressed before through imposition of sanctions on PREPA.**

A court may not defer to a new interpretation, that creates “unfair surprise” to regulated parties. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007). That disruption of expectations may occur when an agency substitutes one view of a rule for another. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019). The U.S. Supreme Court has refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never addressed. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-156 (2012). The lack of “fair warning” outweighs the reasons to apply. *Id.* An agency should not change an interpretation in a proceeding where doing so would impose “new liability ... on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements” or in a case involving “fines or damages”. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

Article 9 of Act 114 states the public policy on interconnections. The extent of this provision has not been clearly interpreted before, neither by the Supreme Court of Puerto Rico nor by this Energy Bureau. In fact, there are two adjudicative proceedings pending before the

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<sup>2</sup> However, LUMA reserves the right to raises defenses and allegations in connection with the validity of the procedure set forth in Regulation 8543.

consideration of this forum in which the parties are disputing the legal interpretation of said provision.

The Energy Bureau's August 6<sup>th</sup> order to show cause carries a pre-determination on the interpretation of Act 114. Said interpretation not only comes as a surprise but is also improper given that such interpretation interferes with two adjudicative proceedings pending before this Energy Bureau where the main controversy is precisely the interpretation of Act 114 on the timeframe to effectuate interconnections. In proceedings *Maximo Solar Industries, Inc. v. AEE, LUMA*, NEPR-QR-2020-0029 and *Windmar PV Energy Inc. v. AEE, LUMA*, NEPR-QR-2020-0061, which were recently consolidated and are in the stage of answer to amended claims, claimants have moved the Energy Bureau to determine whether PREPA has been in non-compliance with Act 114 in relation to interconnection proceedings and how the periods established in Act 114 are interpreted regarding the time that LUMA has to complete the processing of the requests for interconnections and net metering: particularly if the interconnections are automatic within the periods suggested by the law, despite the mandate also included in Act 114 conditioning interconnections which states that interconnections lie: "provided that the technical features of the distributed generator to be interconnected and the existing conditions of the electric power grid thus allow." Section 9, Act 114-2007, 22 PR Laws Ann. §1019. LUMA is a party to those proceedings and has and will raise legal and factual defenses in response to claimant's allegations.

The only available precedent on interpretation of Act 114 is the longstanding conduct of this Energy Bureau in reacting to PREPA's continuous reports informing of the backlog in the requests for interconnection that has not included the imposition of penalties or sanctions on PREPA.

For years, PREPA consistently reported a backlog in the requests for interconnections of distributed energy systems. Every year since 2019, PREPA informed this Energy Bureau of the backlog. In the November 2019 Progress Report, PREPA informed of 2,127 pending requests for interconnections. *See* PREPA's Motion Submitting Interconnection Progress Report filed on November 15, 2019, at p. 2. In the August 2020 Progress Report PREPA informed of 2,148 pending requests for interconnections. *See* PREPA's Motion in Compliance with Order filed on August 7, 2020. And in the February 2021 Progress Report, PREPA informed that the backlog consisted of 3,194 requests for interconnections. *See* PREPA's Motion Submitting Interconnection Progress Report filed on February 16, 2021, at p. 3. However, the public docket does not show that in any of those instances the Energy Bureau imposed a sanction or fine on PREPA for non-compliance with Act 114, even though the backlog of pending requests for interconnections continued to increase.

Sanctioning LUMA for requests for interconnections that were filed before LUMA started operations would be a retroactive penalty. Even more, these sanctions would be arbitrary given the fact that PREPA has been appearing in this case and informing about the backlog since 2019 and the Energy Bureau has not imposed an administrative sanction for non-compliance with Act 114 such as the one that the Energy Bureau announced that it may levy against LUMA. As the public docket of this case shows, the only two times in which sanctions were imposed or threatened to be imposed on PREPA, the penalties were due to not having timely filed the status reports.<sup>3</sup>

Requiring that LUMA simultaneously processes old and new petitions in a rigid period based on a legal interpretation that had not been announced before and that is under consideration

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<sup>3</sup> On November 4, 2019, the Energy Bureau imposed a \$5,000 fine against PREPA for failing to file the interconnection progress status report and not appearing at a scheduled technical conference. On July 21, 2020, the Energy Bureau issued a Resolution ordering PREPA to show cause as to why a \$5,000 fine should not be imposed due to PREPA's failure to file the status report due on May 15, 2020.



in pending adjudicative cases before the Energy Bureau, under penalty of administrative fines, is unjustified and would affect LUMA's workplan. Although LUMA's adjustments in the procedures to expedite processing of the requests have been successful and a significant reduction in the backlog has been achieved, completing all interconnection requests by October 5, 2021 is extremely ambitious. LUMA plans to methodically reduce the number of cases in sequential order, in order to be reasonable with those clients who have had waited the longest since they submitted their requests to PREPA.

By presupposing that LUMA is not complying with Article 9 of Act 114, this Energy Bureau has changed the interpretation it has given to Act 114 throughout the past years. LUMA was not given "fair warning" of this new interpretation. More importantly, LUMA has relied in good faith on this Energy Bureau's past treatment regarding PREPA's filings, lack of ruling that all interconnections should be processed in a rigid time period, and on the fact that during the June 8<sup>th</sup> compliance hearing, the Energy Bureau did not even suggest that it would issue an order such as the one that it did on August 6, 2021, close to two months after the first compliance hearing in which LUMA appeared and almost on the eve of LUMA filing the August 13<sup>th</sup> report on interconnections which will be the first status report that LUMA will file with the Energy Bureau on interconnections. Unfairly, LUMA was advised about the possibility of imposition of a fine as sanction for inheriting a backlog from PREPA, without having the opportunity of submitting an interconnection progress report informing of the efforts to diminish the backlog. Thus, the determination of this Energy Bureau is contrary to the norms outlined by the US Supreme Court regarding administrative interpretations. The imposition of an administrative fine based in the change of interpretation of an administrative norm is not supported by applicable law.

**C. The imposition of a fine against LUMA for PREPA's backlog is arbitrary and violates due process.**

The due process doctrine and constitutional mandate offers protection against administrative arbitrariness. *Henríquez v. Consejo Educación Superior*, 120 DPR 194, 202 (1987). Although the right to due process in the administrative sphere does not have the rigidity it has in the criminal sphere, it requires a fair and equitable process that guarantees and respects the dignity of the individuals concerned. *López y otros v. Asoc. de Taxis de Cayey*, 142 DPR 109 (1996). Due process guarantees include: the right to a hearing, timely and adequate notice, the right to be heard, to confront witnesses, to present oral and written evidence in his favor, the presence of an impartial adjudicator and that the decision be based on the record. *Henriquez*, 120 DPR at 202. The administrative decision must be informed, with knowledge and understanding of the evidence. *A.D.C.V. v. Tribunal Superior*, 101 DPR 875, 883 (1974).

Decisions by administrative agencies imposing fines shall not exceed statutory authorization nor amount to a clear abuse of discretion. *See Comisionado de Seguros v. Antillas 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).

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).

Regulation 8543 authorizes the Energy Bureau to impose fines in very specific situations. First, as part of a remedy in a final decision in an adjudicative process even if the moving party has not requested it. *See* Section 10.01(A)(3)-(4). Second, for noncompliance with the provisions of Act No. 57-2014, of the Regulations, of any law subject to the jurisdiction of the Energy Bureau or with the Energy Bureau's orders or resolutions. *See* Section 12.02.

The Resolution and Order requires LUMA to show cause as to why it should not be sanctioned with a daily administrative fine of \$1,000 for not complying with Article 9 of Act 114. Still, this Energy Bureau has not issued a reasoned and substantiated determination as to in which manner LUMA is in noncompliance with Article 9 of Act 114. The order to show cause has the effect of imposing *a priori* liability against LUMA. Further, it contradicts this Energy Bureau's Resolution and Order, which also requires LUMA to submit a plan or strategy explaining its plan on how it is going to address the backlog of pending interconnection requests within 60 days and avoid delays in the attention of new requests. There is no doubt that the potential daily administrative fine would not be rooted in the principles of reasonableness as is not based in any administrative record, is arbitrary and amounts to a clear abuse of discretion.

As mentioned before, Regulation 8543 only allows this Energy Bureau to impose administrative fines in very specific circumstances those of which are detailed in the text of the Regulation. The instances listed therein require as a minimum a final decision in an adjudicative proceeding or a determination of noncompliance after proper notice and the opportunity to be heard and submit testimonies has been provided. Such has not been the case for LUMA. As such, the potential administrative fine, as announced, exceeds this Energy Bureau's statutory authorization, violates LUMA's right to due process and should be set aside.

**WHEREFORE**, LUMA very respectfully requests the Energy Bureau to deem LUMA in compliance with the August 6, 2021 Order and desist on the intention of imposing administrative fines on LUMA in relation to pending interconnections.

**WE HEREBY CERTIFY** that this motion was filed using the electronic filing system of this Energy Bureau and that electronic copies of this motion will be delivered to attorneys Joannely Marrero Cruz, jmarrero@diazvaz.law; Katuska Bolaños, kbolanos@diazvaz.law; Rafael Edgardo González, rgonzalez@diazvaz.law; Hannia B. Rivera, hrivera@jrsp.pr.gov, contratistas@jrsp.pr.gov; PJ Wilson, info@sesapr.org; Javier Rúa Jovet, javrua@sesapr.org.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, on August 13, 2021.



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