

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

NEPR Received: Dec 27, 2021 5:04 PM
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IN RE: IN RE: PUERTO RICO ELECTRIC
POWER AUTHORITY PERMANENT
RATE

CASE NO.: NEPR-MI-2020-0001

SUBJECT: Motion in Compliance with
Bench Order to Show Cause

MOTION IN COMPLIANCE WITH BENCH ORDER TO SHOW CAUSE

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW LUMA Energy Servco, LLC (“LUMA”), through the undersigned legal counsel, and respectfully states and requests the following:

I. Background

Per a Resolution and Order issued by this Puerto Rico Energy Bureau (“Energy Bureau”) on September 17, 2021, a technical conference was held in this proceeding on September 22, 2021, to discuss LUMA’s *Motion Submitting FCA and PPCA Quarterly Reconciliations and Proposed Factors and Request for Confidential Treatment* filed on September 16, 2021, involving proposed Fuel Charge Adjustment (“FCA”) and Purchased Power Charge Adjustment (“PPCA”) reconciliations for the months of June, July, and August, 2021, and the factors for the FCA, PPCA and FOS riders to be applied from October 1, 2021, until December 31, 2021 (“September 16th Submission”). During the technical conference, the Energy Bureau issued several bench orders, including one directing LUMA to inform whether the Puerto Rico Electric Power Authority’s (“PREPA”) insurance program may include coverage for the forced outages at PREPA, including use of the peaker units due to outages, from June through August 2021. The PREPA insurance program is currently managed and administered by LUMA. Under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement effective June 22, 2020, LUMA

has responsibility over the insurance covering assets and activities related to the Transmission and Distribution System (“T&D System”). In addition, LUMA currently manages insurance covering assets and activities relating to other PREPA activities, under the Shared Services Agreement between LUMA and PREPA, effective May 31, 2021.

On September 28, 2021, LUMA filed with this Energy Bureau a confidential first response on insurance coverage.

On September 30, 2021, this Energy Bureau issued a Resolution and Order setting FCA and PPCA factors. In the relevant part, this Energy Bureau directed that by December 15, 2021, LUMA shall file its final analysis on insurance coverage. Thereafter, in a Resolution and Order dated October 26, 2021, this Energy Bureau ordered that by December 10, 2021, LUMA should file a final response with analysis on potential insurance coverage related to recent outage events (“October 26th Resolution and Order”).

In compliance with the October 26th Resolution and Order, on December 10, 2021, submitted, under seal of confidentiality, its analysis on potential insurance coverage for recent outage events (“December 10th Submission on Insurance Claims”). The December 10th Submission on Insurance Claims included LUMA’s analysis based on the information that LUMA received from PREPA, regarding the nature of recent outages, including damages to property. The December 10th Submission on Insurance Claims, which was filed under seal of confidentiality, provides a summary of the PREPA insurance program, including coverage provisions and applicable deductibles. LUMA also commented on the information that it received from PREPA on the outages and provided electronic copies of the incident report forms as fulfilled by PREPA. Finally, LUMA explained that upon a careful analysis of the information available on the outages, the information then available to LUMA was insufficient to conclusively determine coverage of

deductible applicability and that it currently appeared that none of the outages seemed to meet the applicable deductible per occurrence for property coverage or breach any other deductibles under the policy. In the interest of avoiding a premature end to this important and fact-based analysis, LUMA also suggested next and additional steps to further pursue the possibility of filing insurance claims, which requires obtaining additional information from PREPA.

On December 22, 2021, this Energy Bureau held a Technical Conference to discuss LUMA's *Motion Submitting Quarterly Reconciliations and FCA, PPCA, and FOS Calculated Factors and Request for Confidential Treatment*, filed on December 16, 2021. Per a Resolution and Order issued on December 17, 2021, one of the topics that would be discussed in the Technical Conference of December 22, 2021, was "the status of claims to insurance companies and the possible amounts of the claims, if any." See December 17th Resolution and Order at page 3. However, in the December 17th Resolution and Order, this Energy Bureau did not apprise LUMA that the December 10th Submission on Insurance Claims was incomplete or non-compliant.

LUMA officers appeared at the December 22nd Technical Conference prepared to explain the December 10th Submission on Insurance Claims and matters related to the status of potential claims and claims amounts, as directed in the December 17th Resolution and Order.

During the December 22nd Technical Conference, this Energy Bureau issued a bench order granting both LUMA and PREPA five natural days –two business days given the Christmas Holiday and weekend–, until Monday, December 27, 2021, to show cause why a fine of \$5,000 should not be imposed for non-compliance with the October 26th Resolution and Order to file a final response on potential insurance claims to cover incremental fuel costs for recent load shed events. *Vía* the voice of Chairman Avilés-Deliz, this Energy Bureau, recognized that on December 10, 2021, LUMA had filed a document on insurance claims but interpreted the submission as a

“history of claims.” Furthermore, this Energy Bureau indicated that it did not currently have a final position in connection with potential insurance claims.

In compliance with this Energy Bureau’s bench order of December 22, 2021, LUMA respectfully states that its December 10th Submission on Insurance Claims included its position on potential insurance claims with the information that LUMA received from PREPA by the December 10th deadline. In good faith, LUMA understood that it had complied with this Energy Bureau’s order and in earnest provided its analysis with the information that was available to LUMA regarding generation outages.

LUMA respectfully submits that it did not disobey nor show wanton neglect to an order issued by this Energy Bureau. Rather, LUMA engaged in a considered effort to request generation outage data for PREPA, which included preparing an incident report form that PREPA was to fulfill to provide LUMA the details of the generation outages. In preparation for the December 10th Submission on Insurance Claims, LUMA evaluated the data that it received from PREPA and consulted with its insurance broker to then provide this Energy Bureau LUMA’s analysis, as had been requested. The December 10th Submission on Insurance Claims shows that LUMA conducted considered efforts to submit the requested analysis on insurance claims in compliance with the October 26th Resolution and Order. In these circumstances, the Energy Bureau should not impose on LUMA a fine for non-compliance with an order.

As a procedural matter, LUMA respectfully states that the Energy Bureau’s bench order to show cause does not satisfy the requirements of Energy Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings, Regulation No. 8543 of the Energy Commission of Puerto Rico (hereinafter, “Regulation 8543”), to impose fines. This, because a formal notice on the basis for such non-compliance or explanation on why LUMA’s December

10th Motion fails to satisfy said the October 26th Resolution and Order, was not issued. Thus, at this juncture, an imposition of a fine would not comply with due process requirements.

II. Authority and Grounds to Impose Fines

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 is 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. 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*, 205 DPR 268 (2020) (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 the 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).

Adjudicative and Non-Compliance proceedings before this Energy Bureau are regulated by Regulation 8543. This Regulation applies to all notices of non-compliance 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.

III. Sanctions Against LUMA Are Not Justified

A. LUMA Complied with the October 26th Resolution and Order on Insurance Claims.

To submit its analysis regarding potential insurance claims to cover costs and damages associated with recent generation-related outages, LUMA engaged both internal and external resources to obtain and evaluate information produced by PREPA on the causes of the outages and any damages, as well as to assess potential policy coverage and the viability of filing claims under available insurance policies. LUMA reviewed the information on outages and property damages that it received from PREPA and submitted its analysis to this Energy Bureau on December 10, 2021. LUMA considered that its analysis was final in the sense that it concluded LUMA's review of the information received from PREPA.

It must be noted that LUMA actively took steps since the October 2021 to obtain outage information from PREPA and timely concluded its analysis with the information that PREPA produced. To show the data that was considered for the analysis in compliance with the October 26th Resolution and Order, LUMA submitted to this Energy Bureau, under seal of confidentiality, the incident report forms that LUMA prepared and that, at LUMA's request, PREPA personnel completed. LUMA also identified the type of information that is still needed to determine the exact coverage under the policy that may apply to each individual outage case. In filing the December 10th Submission on Insurance Claims, LUMA understood that it complied with the order issued by this Energy Bureau and that belief was bolstered upon receipt of the December 17th Order, that instructed LUMA to prepare to provide an update on the status of insurance claims at the December 22nd Technical Conference. Respectfully, LUMA was surprised with the statements made by Commissioners during the December 22nd Technical Conference and the interpretation that LUMA's analysis on potential insurance claims, based on the information that was made

available to LUMA on or close to December 10, 2021, may be construed legally or reasonably, as LUMA having failed to comply with an order issued by this Energy Bureau.

As Operator of the T&D System, LUMA is not tasked with overseeing PREPA's operations and administration of generation assets. Thus, LUMA cannot be penalized for shortcomings in data produced by PREPA. As stated in the December 10th Submission on Insurance Claims, LUMA will continue to work with PREPA to determine if additional information on individual outage events may render viable one or more insurance claims to cover damages or incremental fuel costs due to recent outage events.

In furtherance of the public interest and that of ratepayers, LUMA's December 10th Submission on Insurance Claims was designed to comply with the order issued by this Energy Bureau, not to put an end at a premature juncture to all alternatives to determine if insurance claims may be filed. In retrospect, LUMA appreciates that it may have been wise to employ more precise language to convey the reasons why it understood that it is in the public interest to obtain additional data from PREPA and further engage with PREPA before a decision is made whether to file claims under applicable insurance policies. LUMA respectfully submits, however, that it complied with the October 26th Resolution and Order and that the record does not sustain a finding of non-compliance or neglect by LUMA of an order by this Energy Bureau. A final determination to file an insurance claim or initiate some form of legal action on behalf of PREPA is dependent on different elements that include the availability of information, as well as judgment and discernment, and even filing an initial claim with the insurer. Thus, LUMA understands that a set timeline to make a final determination and end business and operational analyses on behalf of PREPA and to benefit ratepayers, runs counter to public interests and to LUMA's processes as Operator of the T&D System.

LUMA appreciates the Energy Bureau's authority over matters related to rates and to guarantee that rates are reasonable. *See* Section 6.3 (c) and (n), Act 57-2014 as amended by Act 17-2019. Respectfully, however, said authority does not reasonably extend to binding LUMA and PREPA to pre-determined processes to evaluate and determine if a claim to insurance carriers may be lodged or to set the time to file those claims, without consideration of internal processes and judgment according to best utility, administrative and operational practices. Respecting this Energy Bureau's authority and in furtherance of LUMA's practice and intent to comply with the orders issued by this Energy Bureau, LUMA will continue to provide, confidentially, its analysis on potential insurance claims and will file by January 10, 2022, its analysis with the information that is gathered and discussed with PREPA in the coming days.

LUMA respectfully requests that this Energy Bureau abstain from imposing a fine and consider that with the December 10th Submission on Insurance Claims, LUMA complied with the October 26th Resolution and Order. The need for additional analyses on potential insurance claims does not reasonably or, as a matter of law, deride the order of this Energy Bureau. Rather, it furthers the purposes of the October 26th Resolution and Order to exhaust available avenues of relief to recoup incremental fuel costs or damages due to recent outages.

B. Procedurally, the Record is not Ripe for Imposing a Fine.

Although the Energy Bureau stated verbally in the December 22nd Technical Conference that LUMA had not complied with the October 26th Resolution and Order, a formal notice on the basis for such non-compliance or explanation on why LUMA's December 10th Motion fails to satisfy said Order, was not issued. Importantly, neither the October 26th Resolution and Order nor the verbal bench order of December 22nd provide guidance on what a final determination on insurance claims entails or should contain. A fair warning on the hallmarks of an alleged non-

compliance with the October 26th Resolution and Order or what the Energy Bureau deems should be a final position on potential insurance claims has not been issued to date. As such, the potential administrative fine, as announced without a developed explanation on the alleged non-compliance, violates LUMA's right to due process and would constitute an abuse of discretion.

WHEREFORE, LUMA very respectfully requests that the Energy Bureau **deem** LUMA in compliance with the October 26th Resolution and Order and **desist** on the intention of imposing administrative fines on LUMA.

I 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 attorney Katuska Bolaños, kbolanos@diazvaz.law for PREPA. This motion will also be sent to the Independent Consumer Protection Office, *via* Hannia B. Rivera, hrivera@jrsp.pr.gov and contratistas@jrsp.pr.gov.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on December 27, 2021.



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