

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

**NEPR**

**Received:**

**Feb 17, 2022**

**10:46 PM**

**IN RE:**

THE PERFORMANCE TARGETS FOR  
LUMA ENERGY SERVCO, LLC

**CASE NO.:** NEPR-AP-2020-0025

**SUBJECT:** LUMA's Response in Opposition and Objection to December 22, 2021 Resolution and Order and Request to Vacate or Grant LUMA Relief from the December 22, 2021 Resolution and Order

**LUMA'S RESPONSE IN OPPOSITION AND OBJECTION TO DECEMBER 22, 2021,  
RESOLUTION AND ORDER AND REQUEST TO VACATE OR GRANT LUMA  
RELIEF FROM THE DECEMBER 22, 2021 RESOLUTION AND ORDER ON  
ADDITIONAL METRICS**

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

COME NOW LUMA Energy, LLC ("ManagementCo"), and LUMA Energy ServCo, LLC ("ServCo"), (jointly "LUMA"), and respectfully state and request the following:

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

The Puerto Rico Electric Power Authority ("PREPA") and the Puerto Rico Public-Private Partnerships Authority ("P3 Authority") entered into the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* ("T&D OMA") with LUMA to (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 is customary and appropriate for a utility transmission and distribution system service provider, and (ii) establish policies, programs, and procedures with respect thereto. *See*, OMA Section 5.1. Pursuant to Section 4.2(f) of the T&D OMA, ManagementCo was required to prepare a "revised Annex IX of the T&D OMA including (i) proposed baseline, target and minimum performance

levels for certain Performance Metrics [as the term is defined in the T&D OMA]; (ii) Key Performance Metrics; (iii) Major Outage Event Performance Metrics, together with an explanation of the basis for each” and submit them to the P3 Authority for review and comment. Once the review and comment phase was completed with the P3 Authority, the revised Annex IX would be submitted to this Energy Bureau for review and approval. *See, Id.* The T&D OMA contemplated three main Performance Categories: (i) Customer Satisfaction; (ii) Technical, Safety and Regulatory; and (iii) Financial Performance. *See*, Table 1 of Annex IX of the T&D OMA. Table 2 of Annex IX of the T&D OMA further specified the Performance Metrics included in each of those categories.

As part of the foregoing process of review and approval of the revised Annex IX, on December 23, 2020, the Puerto Rico Energy Bureau (the “Energy Bureau”) commenced this proceeding by issuing a Resolution and Order setting forth the legal and regulatory framework pursuant to which it would conduct the evaluation and establishment of the performance targets and Performance Incentive Mechanisms (“PIMs”) that would further the compliance and implementation of the public policy and objectives established through Act 57-2014, known as the *Puerto Rico Energy Transformation and RELIEF Act* and Act 17-2019, known as the *Puerto Rico Energy Public Policy Act* (“December 23 Resolution and Order”). Through the December 23 Resolution and Order, this Energy Bureau also published the public interest principles that, along with the targets and minimum compliance benchmarks for the Puerto Rico electric system established in Case No. NEPR-MI-2019-0007, should guide LUMA in making its request for the establishment of the PIMs. On January 14, 2021, LUMA appeared before the Energy Bureau for

a technical conference where LUMA offered an overview of the performance metrics targets that it would file in the month of February 2021.<sup>1</sup>

On February 25, 2021, LUMA filed its *Submittal and Request for Approval of Revised Annex IX to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (OMA)*, whereby it submitted a revised Annex IX pursuant to the December 23 Resolution and Order (the “February 25<sup>th</sup> Submittal and Request”). The revised Annex IX filed with the February 25<sup>th</sup> Submittal and Request was the product of the efforts and consultations conducted by LUMA during eight months, from July through February 2020, in compliance with the contractual obligations required as a part of the Front-End Transition Period which included the establishment of a planning team with PREPA and the P3 Authority. Section 4.2(f) of the T&D OMA. The revised Annex IX filed by LUMA with the Energy Bureau on February 25, 2021, was also the result of the process pursuant to Section 4.2(f) of the T&D OMA, which lasted approximately two additional months, according to which the P3 Authority commented on LUMA’s proposed Performance Metrics Targets and proposed revised Annex IX. In the February 25<sup>th</sup> Submittal and Request, LUMA explained that the submission complied with the December 23 Resolution and Order.

On April 8, 2021, this Energy Bureau issued a Resolution and Order establishing the procedural calendar that would govern this proceeding. The procedural calendar was subsequently amended on May 14, July 13, August 9, 2021, October 20, 2021, December 22, 2021, and January 14, 2022.

On August 18, 2021, in compliance with a Resolution and Order issued by the Energy Bureau on July 2, 2021, as amended *nunc pro tunc* on July 13, 2021 to correct the calendar, and

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<sup>1</sup> See *Motion in Compliance with Order Submitting LUMA’s Presentation Given on January 14, 2021 at the Pre-Filing Technical Conference*, filed on January 14, 2021, Case NEPR-AP-2020-0025.

on August 9, 2021 to extend the filing deadline, LUMA filed a revised *Submittal of Request for Approval of Revised Annex IX to the OMA* (the “Revised Performance Metrics Targets Request”), which included as Exhibit I, a revised Annex IX of the T&D OMA (“revised Annex IX” or revised Annex IX of the T&D OMA”).<sup>2</sup> LUMA also submitted the pre-filed direct testimonies of eight witnesses in support of its Revised Performance Metrics Targets Request.

Through its Revised Performance Metrics Targets Request, LUMA requested that this Energy Bureau accept the revised Annex IX to the T&D OMA and LUMA’s Revised Performance Metrics Targets; approve the revised Annex IX to the T&D OMA as filed; set the Performance Metrics and targets to apply for an initial period of three years of operations; and allow the periodic review of the performance baseline metrics and targets in accordance with the T&D OMA and Energy Bureau *Regulation for Performance Incentive Mechanisms*, Regulation No. 9137 dated December 17, 2019 (“Regulation No. 9137”). *See* Revised Performance Metrics Targets Request at page 31. LUMA also raised concerns with regards to the significant gaps in PREPA’s processes and data collection, which posed a challenge to the setting of realistic baselines and targets for the proposed metrics. *See*, Revised Performance Metrics Targets Request at pages 20-21. The proposed Performance Metrics included in the revised Annex IX are grouped in three major categories established according to the T&D OMA. *See*, Annex IX of the T&D OMA.

After considering LUMA’s Revised Performance Metrics Targets Request, on August 25, 2021, the Energy Bureau issued a Resolution and Order, which, among other topics, included a Determination of Completeness. Specifically, the Energy Bureau expressed at the time:

Upon review of the documents related to the August 18 Revised Request, the Pre-Filed Testimonies Motion, the August 20 Motion, and the August 23 Motion (collectively, “Revised Filing”), the Energy Bureau **DETERMINES** that the information filed by *LUMA complies with the minimum requirements*

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<sup>2</sup> The revised version of Annex IX was prepared to consider and incorporate baselines as per the developments in Case No. NEPR-MI-2019-0007.

*established by the Energy Bureau to continue its evaluation as part of the instant case.*

(Emphasis added).

The Energy Bureau also stated that its Determination of Completeness should not be construed as an acceptance or approval of LUMA's proposal nor as a determination that the proposal is consistent with the Energy Bureau's orders and directives contained in the May 21, 2021 Resolution and Order in Case No. NEPR-MI-2019-0007. *See*, Resolution and Order dated August 25, 2021.

The issuance of the Determination of Completeness allowed the instant proceeding to continue to the discovery stage as per the procedural calendar established by the Energy Bureau. To date, the Energy Bureau, the intervening parties, and LUMA have engaged in discovery by issuing and responding to written interrogatories and requests for the production of documents and information. Specifically, LUMA has responded to eight requirements for information from the Energy Bureau totaling 244 requests and questions some of which included sub-sections with additional questions, four from the Local Environmental and Civil Organizations ("LECO") totaling 112 questions, some of which included sub-sections with additional questions, and one discovery request made by the Independent Consumer Protection Office ("ICPO") comprised of 30 interrogatories.

In accordance with the Determination of Completeness, LUMA conducted and responded to discovery related to the three main categories of performance metrics included in the revised Annex IX: (i) Customer Services; (ii) Technical, Safety and Regulatory; and (iii) Financial Performance. Notwithstanding the fact that the revised Annex IX is the document that gives rise to this proceeding and, as such, the cardinal document defining its scope, the Energy Bureau and

some of the intervening parties conducted discovery on other categories of performance metrics, extraneous to those included in the revised Annex IX.

Specifically, through its *Fifth and Sixth Requirements for Information* to LUMA, the Energy Bureau inquired about net metering and LUMA's plan to address the backlog inherited from PREPA on approvals of applications for interconnections of distributed energy resources which is a matter addressed in a separate proceeding, Case No. NEPR-MI-2019-0006 and vegetation management, which is also addressed in a separate proceeding before this Energy Bureau on LUMA's Vegetation Management Plan, Case No. NEPR-MI-2019-0005. Similarly, through its *Second Request for Information*, LECO requested information related to current performance, including the management of interconnection procedures for net metering after June 1, 2021, among other topics extraneous to the revised Annex IX.

LUMA objected to the aforementioned interrogatories and requests for production of documents on the basis that they are unrelated to the performance metrics included in the revised Annex IX, exceeded the scope of the subject matter of this proceeding, and are not reasonably calculated to lead to the discovery of admissible evidence. LUMA also objected to such requests on the basis that they called for the production of irrelevant documents and/or information.

In two Resolutions and Orders, one dated October 7, 2021, and the other November 4, 2021, this Energy Bureau determined that the information related to the objected requests was discoverable as part of the subject matter of the instant case and, therefore, ordered LUMA to respond to the questions that LUMA objected regarding the Energy Bureau's *Fifth and Sixth Requirements for Information* and LECO's *Second Request for Information*. Accordingly, LUMA supplemented its responses to those interrogatories, raising objections and reservations of rights, including that LUMA does not acquiesce to the admissibility of the discovery responses as

evidence on the merits and without waiving its right to further challenge the Energy Bureau's determination before the pertinent forums.

On November 17, 2021, ICPO and LECO submitted the pre-filed testimonies of their proposed witnesses, which included proposals to add additional performance metrics as part of the revised Annex IX. Particularly, LECO expert Agustín Irizarry ("Mr. Irizarry") proposed that the Energy Bureau consider additional performance metrics on the integration of renewable energy, energy efficiency, and demand response, *see* Mr. Irizarry testimony of November 16, 2021, pages 23-25, Table 5, and enhancing vegetation management, *see id.*, page 35, Table 8. Relatedly, ICPO witness, Mr. Gerardo Cosme ("Mr. Cosme"), proposed that the Energy Bureau adopt in this proceeding performance metrics on utility-scale renewable energy generation, *see* G. Cosme testimony of November 17, 2021, pages 6-8.

From November 18 through December 28, 2021, LUMA conducted discovery on the written testimonies filed by intervenors and, until February 7, 2022, was in the process of exhausting meet and confer efforts with regards to the intervenors' responses to the same. LUMA is currently evaluating the need to file motions to compel in connection with the responses filed by intervenors. More importantly, LUMA will file today, rebuttal testimonies addressing certain aspects of the intervenors' witnesses' testimonies, including the proposals filed by Mr. Irizarry and Mr. Cosme, for consideration of additional metrics.

Notwithstanding the fact that LUMA was conducting discovery to formulate its rebuttal witnesses' testimonies, on December 22, 2021, the Energy Bureau entered a Resolution and Order whereby it concluded, without the benefit or consideration of LUMA submitting rebuttal testimonies, that additional performance-based incentive metrics must be evaluated as part of this

proceeding (“December 22 Resolution and Order”).<sup>3</sup> To that end, the Energy Bureau identified three additional areas of performance metrics: (i) Interconnection of Distributed Energy Resources; (ii) Energy Efficiency and Demand Response; and (iii) Vegetation Management. The Energy Bureau issued its decision based on LUMA’s responses to written discovery and other filings that are not specifically identified in the December 22 Resolution and Order. Furthermore, the Energy Bureau considered information outside the confines of this adjudicative proceeding. It took notice of comments submitted by LUMA in connection with the draft regulation on Energy Efficiency, NEPR-MI-2021-0005, and data on vegetation-related outages filed by LUMA in Case NEPR-MI-2019-0007 which, prior to the December 22 Resolution and Order, had not been made part of the evidence introduced in the record in this proceeding, nor was LUMA afforded prior notice of the Energy Bureau’s intent to include the aforementioned filings in this proceeding to issue an interlocutory order to LUMA.

In the December 22 Resolution and Order, the Energy Bureau ordered LUMA to file a revised Annex IX to the T&D OMA, including targets and supporting metrics for (i) Interconnection; (ii) Energy Efficiency/Demand Response; and (iii) Vegetation Management. The Energy Bureau ordered that LUMA provide supplemental or revised direct pre-filed testimonies for the new metrics and targets. The Energy Bureau also allowed additional discovery by the intervenors and LUMA on the three additional metrics and amended the procedural calendar to provide for such discovery.

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<sup>3</sup> Particularly, the Energy Bureau stated the following on page 2 of the December 22 Resolution and Order:

The Energy Bureau conducted a thorough and detailed review of the filings, including the ROI’s [Requests of Information] and the responses provided by the parties. Based on that review, the Energy Bureau concluded that additional performance-based incentive metrics must be evaluated as part of this procedure. Therefore, the Energy Bureau is ordering LUMA to do so.



As will be explained, the Energy Bureau's December 22 Resolution and Order runs contrary to LUMA's due process rights in the present proceeding. By issuing the December 22 Resolution and Order, this Energy Bureau effectively adjudicated controversies without affording LUMA the opportunity to be heard as to whether the inclusion of the additional performance metrics in this proceeding is proper considering the contractual provisions of the T&D OMA, including its Annex IX, the status of the proceedings and the evidence on record to date.

## II. DISCUSSION

### *a. As the regulated party, LUMA is entitled to a just and equitable proceeding pursuant to applicable laws and regulations.*

As the regulated party in this proceeding, LUMA is afforded the basic protections required by the due process clause of the Constitution of the Commonwealth of Puerto Rico. P.R. Const. Art. 1, sec. 7. In its procedural vein, the right to due process establishes the minimum guarantees that a governmental agency shall provide to a party whose life, property, or liberty may be affected by governmental action. *See, Rivera Rodríguez & Co. v. Stowell Taylor*, 133 DPR 881, 887-88 (1993). In making its determination on whether a proceeding is fundamentally fair, it is necessary first to identify a protected interest and, once that condition is satisfied, establish what process is due. *See, Rivera Santiago v. Sec. de Hacienda*, 119 DPR 265, 274 (1987).

Upon adopting the Puerto Rico Uniform Administrative Procedure Act, Act 38-2017 ("LPAU" for its Spanish acronym), the Legislative Assembly extended certain minimum due process guarantees to the adjudicative proceedings conducted by administrative agencies in Puerto Rico. *See, Gutiérrez Vázquez v. Hernández et al.*, 172 DPR 232, 245 (2007). The administrative process must be fair and equitable. *See, Torres v. Junta de Ingenieros*, 161 DPR 696, 713 (2004). In concrete terms, Section 3.1 of the LPAU establishes that when an agency must formally adjudicate a controversy, the agency in question must guarantee the promoted party "(i) ***the right***

*to timely notice of the charges or complaints or claims against one of the parties*; (ii) the right to introduce evidence; (iii) *the right to an impartial adjudication*; and (iv) *the right to have the decision based on the record of the case.*” Section 3.1 of the LPAU, 3 LPRA § 9641. (Emphasis added).

In accordance with the LPAU, this Energy Bureau adopted the *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Procedures*, Regulation No. 8543 dated December 18, 2014 (“Regulation 8543”), which codifies the rights afforded to the parties to an adjudicative proceeding before the agency, including the right to adequate notice of the claims against a party. *See*, Regulation No. 8543 at §2.03.

***b. The Energy Bureau’s determination to add three additional performance metrics to the ongoing administrative proceeding violates LUMA’s due process rights and is, therefore, null and void.***

***i. The December 22 Resolution and Order that required LUMA to amend its Revised Performance Metric Targets Request was entered without providing LUMA the opportunity to state its position in relation thereto.***

As stated above, the Energy Bureau issued the premature determination to add three areas of performance metrics that are not included in the Revised Annex IX to the T&D OMA, which was previously determined as complete by the Energy Bureau, and consider the same as part of this ongoing administrative proceeding. At the time that the Energy Bureau adjudicated that additional metrics should be included in LUMA’s Performance Metrics Targets Request, proceedings were already at an advanced stage in which written discovery had already been exchanged and LUMA was working on the rebuttal testimonies pursuant to the procedural calendar.

The Energy Bureau issued its determination prior to affording LUMA the opportunity to address through rebuttal testimonies and during an evidentiary hearing, the intervenors’ proposal

for the inclusion of additional metrics. Indeed, the December 22 Resolution and Order was entered after LUMA had requested and had been granted the opportunity to submit rebuttal testimonies. As such, the Energy Bureau's determination was made in contravention to LUMA's due process rights as it adjudicated controversies raised by intervenors through pre-filed testimonies but without affording LUMA the opportunity to be heard in connection thereto. Although the Energy Bureau did not explicitly quote portions of the pre-filed testimonies of intervenors, it stated on page 2 of the December 22 Resolution and Order, that its determination was issued after considering the filings in this proceeding. As of December 22, 2021, filings in this proceeding included the pre-filed testimonies of intervenors who recommended that the Energy Bureau consider and adopt performance metrics on interconnections, energy efficiency and vegetation management.

Importantly, the Energy Bureau used requests for information issued to LUMA by the Energy Bureau and the parties, as well as LUMA's responses thereof, that were not yet a part of the evidentiary record,<sup>4</sup> to issue a ruling that upends this entire proceeding, reverses *sua sponte* the Energy Bureau's prior determination that LUMA's Revised Performance Targets Request was complete, and requires an amendment to Annex IX to the T&D OMA to include performance metrics that the Government of Puerto Rico and the parties to the T&D OMA did not include in the T&D OMA and were not incorporated in the revised Annex IX. Given that at the time the December 22 Resolution and Order was issued: (1) the Energy Bureau had issued a ruling of

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<sup>4</sup> LUMA is aware that LECO included certain discovery responses as attachments to the written testimony of Mr. Irizarry. Mr. Irizarry, however, did not include any substantive discussion or individualized comments or recommendations based on the discovery responses that were attached to his pre-filed testimony. Furthermore, several of the responses to interrogatories attached to Mr. Irizarry's testimony are not related to the additional metrics and the Energy Bureau did not consider them in the December 22 Resolution and Order. Thus, they are irrelevant to the present motion. LUMA expressly reserves the right to file a separate developed objection to the admissibility into evidence of the responses to the discovery requests that Mr. Irizarry included as attachments to his pre-filed testimony.

completeness of LUMA’s Revised Performance Metrics Targets Request; (2) twelve months had transpired since the Energy Bureau initiated this proceeding and throughout those months, it did not issue an order directing that particular or additional metrics would be considered in this docket; (3) discovery was ongoing; (4) LUMA had not filed rebuttal testimonies; and (5) discovery responses had not been formally admitted to the record as evidence,<sup>5</sup> the Energy Bureau’s use of discovery responses to issue an interlocutory ruling to add performance metrics to this proceeding and requiring that LUMA amend its pleading –revised Annex IX to the T&D OMA,–runs counter to cardinal elements of due process of law and amounts to a premature and arbitrary ruling.

It should also be noted that since at least June 22, 2020, when the T&D OMA was executed and made public, the Energy Bureau had knowledge of the performance metrics included in the draft Annex IX, and since February 2021, this Energy Bureau had knowledge of the performance metrics included in the proposed Annex IX as it was filed with the Energy Bureau. The Energy Bureau then received a revised Annex IX of the T&D OMA in August 2021 and LUMA’s pre-filed direct testimonies in support of the proposed performance metrics targets and revised Annex IX of the T&D OMA. Thereafter, LUMA reasonably relied on the Energy Bureau’s ruling of August 25, 2021, that the Revised Performance Metrics Targets Request was complete. The December 22 Resolution and Order thus amounts to an arbitrary change in position by this Energy Bureau that, as explained in this motion, infringes upon LUMA’s rights to procedural due process.

The additional metrics also exceed the scope of the present proceeding dictated by the revised Annex IX and the terms of the T&D OMA in accordance with applicable law and public policies. In other words, the purpose of this proceeding is to consider and approve the performance targets and metrics that are included in the revised Annex IX. It is important to stress that prior to

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<sup>5</sup> See *id.*

LUMA's submission of the revised Annex IX, the Energy Bureau did not request that LUMA include additional metrics to be considered in this proceeding. Moreover, on August 25, 2021, the Energy Bureau determined that LUMA's Revised Performance Metrics Targets Request complied with the minimum requirements necessary to proceed with the rest of the procedural phases of the case. Relying on said Determination of Completeness, LUMA responded to discovery requests and was conducting discovery, based on the performance metrics included in the revised Annex IX. LUMA timely objected to the discovery requests unrelated to the categories of performance metrics that fall outside the scope of Revised Performance Metrics Targets Request. In the December 22 Resolution and Order this Energy Bureau, however, examined the discovery exchanged and determined to add the additional performance metrics to the ongoing case, thus effectively amending the scope of the proceeding without prior notice and depriving LUMA of an opportunity to substantiate its position in response to the pre-filed testimonies of Mr. Irizarry and Mr. Cosme who, as stated above, proposed that the Energy Bureau adopt additional metrics on the very same performance areas that the Energy Bureau added to this proceeding through the December 22 Resolution and Order.

The Energy Bureau's ruling to add three additional performance metrics is particularly troubling given that on December 9, 2021, LUMA filed a request for the Energy Bureau to disclose if it intends to employ any consultant or witness at the evidentiary hearing and provide the following: (1) their names; (2) if they have performed any analyses or studies on LUMA's or the intervenors' witnesses' testimonies that the Energy Bureau will submit for the record in this proceeding; and (3) if they plan to summon- witnesses or submit evidence at the hearing. *See LUMA's Request for the Energy Bureau to Disclose Those Consultants that or Witnesses and Evidence it Intends to Employ at the Evidentiary Hearing and Petition to Allow LUMA to Conduct*

*Discovery*, filed on December 9, 2021 (“LUMA’s December 9<sup>th</sup> Motion”). In said request, LUMA purported to protect its procedural due process rights to be aware of any additional evidence that the Energy Bureau would consider or offer in this proceeding, to confront the same. The Energy Bureau, however, did not and has not yet adjudicated LUMA’s December 9<sup>th</sup> Motion. Instead, the Energy Bureau issued an interlocutory ruling that for all intended purposes considered evidence on adjudicative facts and granted some of the relief sought by intervenors, without prior notice to LUMA or opportunity to conduct discovery on the Energy Bureau’s intent to consider adding metrics in this proceeding.

***ii. The determination by the Energy Bureau to consider responses to discovery in issuing the December 22 Resolution and Order is an arbitrary ruling that violates LUMA’s rights to procedural due process.***

Insofar as the Energy Bureau considered the discovery exchanged in this case upon issuing the December 22 Resolution and Order, such discovery was improperly treated for all practical purposes as admissible evidence without affording LUMA an opportunity to lodge objections regarding admissibility of the evidence and to present arguments regarding its probative value. The Energy Bureau’s action to consider discovery responses in the December 22 Resolution and Order is equivalent to admitting evidence into the record prior to the evidentiary hearing, thus rendering the evidentiary hearing ineffectual and depriving LUMA of an opportunity to be heard in an evidentiary hearing or otherwise on matters related to the admissibility of evidence and its probative weight.

The Energy Bureau’s *sua sponte* consideration of LUMA’s responses to discovery requests and two filings submitted by LUMA in independent and separate regulatory proceedings is particularly unreasonable and rises to the level of legal error for several reasons. First, the ruling

on admissibility of LUMA's discovery responses to the Energy Bureau's Fifth and Sixth Requirements for Information were issued on the heels of a prior *sua sponte* ruling by the Energy Bureau that compelled LUMA to respond to certain discovery requests issued by the Energy Bureau, the final adjudicator in this proceeding, and that was issued without first affording LUMA any notice that a process had been initiated to consider an order to compel LUMA to answer certain discovery requests. Second, the December 22 Resolution and Order deemed admissible discovery responses that LUMA produced pursuant to two orders to compel but with specific reservations of rights, expressly questioning their relevance in this proceeding and reserving the right to object to their admissibility as evidence in this proceeding. However, in issuing the December 22 Resolution and Order, the Energy Bureau did not address LUMA's objections and arguments nor did it allow a process for LUMA to state its position on the admissibility as evidence of the discovery responses. Instead, the Energy Bureau considered several of LUMA's responses to discovery requests to rule that LUMA must add performance metrics targets to the revised Annex IX. Third, the Energy Bureau took administrative notice of documents submitted by LUMA in separate and independent regulatory proceedings but did not provide LUMA an opportunity to be heard on the determination to take administrative notice. We will discuss each of these three errors, in turn, to show that the December 22 Resolution and Order was issued in contravention to basic due process guarantees and is therefore, null and void.

***1. Consideration by the Energy Bureau of Supplemental Responses to the Energy Bureau's Fifth and Sixth Requests for Information that LUMA submitted per an order to compel that was issued in violation of LUMA's rights to due process of law.***

On pages 2 through 4 of the December 22 Resolution and Order, the Energy Bureau relied on several of LUMA's responses to the Energy Bureau's Fifth Requirement for Information on

interconnections, RFI-LUMA-AP-2020-0025-PREB-R5-04OCT21-002-007, 0012 and 0013 and one response to the Energy Bureau's Sixth Requirement for Information on vegetation management, RFI-LUM-AP-2020-0025-PREB-R6-04OCT21-011. LUMA answered those requests after the Energy Bureau issued a Resolution and Order on October 7, 2021 ("October 7<sup>th</sup> Resolution and Order") that directed LUMA to answer several interrogatories and requests for information that had been issued by Energy Bureau personnel on interconnections. As stated in "LUMA's Supplemental Responses to PREB's Fifth Requirement of Information in Compliance with October 7<sup>th</sup> Resolution and order and Reservation of Rights," ("Supplemental Responses to PREB's Fifth ROI") and LUMA's Supplemental Responses to PREB's Sixth Requirement of Information in Compliance with October 7<sup>th</sup> Resolution and order and Reservation of Rights," ("Supplemental Responses to PREB's Sixth ROI"), LUMA was compelled to answer discovery requests issued by the Energy Bureau on interconnections and vegetation management, despite LUMA's timely objections in discovery that those subject matters are not covered by the pre-filed testimonies submitted on August 18, 2021 nor by LUMA's Revised Performance Metrics Targets Request. In the October 7<sup>th</sup> Resolution and Order to compel, the Energy Bureau determined that LUMA should answer those discovery requests. However, prior to the October 7<sup>th</sup> Resolution and Order, LUMA did not receive notice that a request had been submitted to the Energy Bureau to compel LUMA to amend or supplement answers to responses provided in the Fifth and Sixth Requirements of Information issued by the Energy Bureau. Furthermore, LUMA was not served with a request to meet and confer with the personnel of the Energy Bureau who issued the Fifth and Sixth Discovery Requests. Thus, the Energy Bureau, who is the adjudicator in this proceeding made a discovery ruling on LUMA's objections to the relevancy of certain requests for information issued by its own personnel, without prior notice to LUMA or opportunity to be heard.



Moreover, in issuing the October 7<sup>th</sup> Resolution and Order to compel discovery, the Energy Bureau did not advise LUMA of the procedural rules that allow the Energy Bureau to *sua sponte* and absent a motion to compel, adjudge the sufficiency of responses to discovery requests issued by its own personnel. Although Regulation 8543 allows the Energy Bureau to issue requests for documents, it does not state the procedures that will be followed to address a party's objections to any such requests nor does it provide procedural guidance or guarantees on how discovery disputes involving requirements for information issued by Energy Bureau personnel, will be handled.<sup>6</sup>

The December 22 Resolution and Order that considered on the merits those responses to the Energy Bureau's Fifth and Sixth Requirements for Information on the subject matters of interconnections and vegetation management, compounds the procedural due process injury that LUMA suffered at the discovery stage when it was compelled to respond to several discovery requests by the Energy Bureau on interconnections and vegetation management without being afforded the opportunity to be heard on the sufficiency of its initial discovery responses and the merits of the objections that it had timely raised.

***2. The December 22 Resolution and Order did not address LUMA's objections and reservation of rights on the relevance and admissibility of several of LUMA's Responses to Discovery Requests.***

On pages 2 through 5 of the December 22 Resolution and Order, the Energy Bureau considered LUMA's responses to several discovery requests on the subject matters of interconnections, vegetation management and the possibility of adding performance metrics on

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<sup>6</sup> Section 8.03 (F) of Regulation 8543 provides that a party who issued an interrogatory may object an answer to an interrogatory via a written motion. (“[a] party serving an interrogatory may object the answers on motion to the Commission, which shall include a transcript, verbatim, of the question and answer concerned, as well as the grounds for objecting.”). Regulation 8543, however, is silent whether the Energy Bureau is considered a party that may object to a response to a discovery request.

Energy Efficiency and Demand Response. To wit, the Energy Bureau relied on LUMA's responses to questions 1 through 3 of LECO's Second Requirement for Information, RFI-LUMA-AP-2020-0025-LECO-R2-13SEPT21-001 through 003, on the topic of interconnections that were submitted by LUMA on November 10, 2021, in compliance with an order to compel issued by the Energy Bureau on November 4, 2021. *See* LUMA's Supplemental Responses and Objections to the Second and Fourth Discovery Requests by LECO in Compliance with November 4<sup>th</sup> Resolution and Order and Reservation of Rights ("November 10<sup>th</sup> Supplemental Responses and Reservation of Rights"). In the General Objections of the November 10<sup>th</sup> Supplemental Responses and Reservation of Rights, LUMA expressly stated that it did not waive objections to the admissibility and relevance of the responses that it was compelled to provide and that it reserved the right to request future remedies. In its responses to RFI-LUMA-AP-2020-0025-LECO-R2-13SEPT21-001 through 003, LUMA reserved the right to object to the admissibility of data regarding the particulars of the procedures on interconnections of distributed energy resources which is the subject matter of Case No. NEPR-MI-2019-0016 (Informes de Progreso de Interconexión) and that it did not agree with the Energy Bureau's determination in the November 4<sup>th</sup> Resolution and Order that the information on interconnection processes is subject to discovery in this proceeding. Moreover, LUMA argued that the information in the responses is not relevant to these proceedings and could not be used to set performance metrics targets on LUMA's performance in reducing the backlog on interconnections requests. LUMA also reserved the right to request remedies. That is, LUMA clearly raised a controversy regarding the admissibility into evidence of those responses to discovery requests that it was compelled to produce for discovery purposes. However, in the December 22 Resolution and Order, the Energy Bureau considered those responses to LECO's Second Requirement of Information without further notice or process

and did not provide any opportunity for LUMA to present arguments or state its objections prior to a ruling that effectively admitted the responses into evidence in this proceeding to issue an order that affects LUMA's rights as the moving party in this proceeding.

In the December 22 Resolution and Order the Energy Bureau also deemed admissible LUMA's responses to several of the discovery requests issued by the Energy Bureau in its Fifth Request for Information, RFI-LUMA-AP-2020-0025-PREB-R5-04OCT21-002-007, 0012 and 0013 on interconnections. This, despite the fact that in its Supplemental Responses to PREB's Fifth ROI, particularly, in the responses to RFI-LUMA-AP-2020-0025-PREB-R5-04OCT21-001 through 007, 0012, and 0013, LUMA reserved the right to object to the admissibility of data regarding procedures on interconnections of distributed energy resources which is the subject matter of Case No. NEPR-MI-2019-0016 (Informes de Progreso de Interconexión) and stated that it does not agree with the Energy Bureau's determination in the October 7th Resolution and Order that the information on interconnection processes is subject to discovery in this proceeding. LUMA also argued that the requested information on interconnections procedures is irrelevant and ultimately inadmissible in this proceeding where the Energy Bureau is called upon to consider LUMA's Revised Performance Metrics Targets filing. Furthermore, LUMA reserved the right to request remedies. In the December 22 Resolution and Order, however, the Energy Bureau did not consider LUMA's objections nor granted LUMA the opportunity to present arguments on the admissibility and weight of the discovery responses. Instead, the Energy Bureau considered LUMA's responses to issue a ruling that additional metrics must be included in revised Annex IX of the OMA.

Similarly, on page 4 of the December 22 Resolution and Order, the Energy Bureau considered LUMA's responses to several of the requests issued by the Energy Bureau in the Sixth

Requirement for Information on the topic of vegetation management, RFI-LUM-AP-2020-0025-PREB-R6-04OCT21-001, 009, 010 and 011. This, despite the fact that LUMA included a general objection and reservation of rights in its response, stating that its responses did not constitute and admission that the responses were or could be admissible evidence in this proceeding. Furthermore, in connection with RFI-LUM-AP-2020-0025-PREB-R6-04OCT21-011, when LUMA was compelled by the Energy Bureau to submit a supplemental response, LUMA once again reserved the right to raise objections to the admissibility of the information that it was compelled to produce in this proceeding on LUMA's Vegetation Management Plan. *See* LUMA's Supplemental Responses to PREB's Sixth ROI. LUMA also stated that it does not agree with the Energy Bureau's determination in the October 7th Resolution and Order that the information on interconnection processes is subject to discovery in this proceeding and that the requested information on LUMA's Vegetation Management Plan is irrelevant and ultimately inadmissible in this proceeding where the Energy Bureau is called upon to consider LUMA's Revised Performance Metrics Targets filing. Furthermore, LUMA reserved the right to request remedies. In the December 22 Resolution and Order, however, the Energy Bureau did not consider LUMA's objections nor granted LUMA the opportunity to present arguments on the admissibility of the discovery responses. Instead, the Energy Bureau considered LUMA's responses to issue a ruling that additional metrics must be included in revised Annex IX of the T&D OMA.

Finally, on page 3 of the December 22 Resolution and Order, the Energy Bureau considered LUMA's Response to RFI-LUMA-AP-2020-0025-PREB-R5-04OCT21-0015 on additional metrics regarding energy efficiency and demand response. In the "Responses and Objections to Fifth Requirement for Information by PREB" of October 14, 2021, LUMA objected to this request for information because it is beyond the scope of LUMA's Revised Performance Metrics Targets

Request and thus, sought irrelevant information. Without waving said objection, LUMA stated in response to a hypothetical question --question 15(a) which read “Will LUMA incorporate additional Performance Metrics related to energy efficiency and demand response during the initial three-year period of operation? --, that it did “not anticipate to incorporate additional Performance Metrics related to energy efficiency and demand response during the initial three-year period of operation. These are not contemplated or agreed to in the executed T&D OMA.” In the December 22 Resolution and Order, the Energy Bureau considered a portion of LUMA’s response on whether it would incorporate additional metrics but did not take notice of the preceding objection. It was an abuse of discretion to fail to address the objection and, more importantly, to issue an order to add metrics on Energy Efficiency and Demand Response, without granting LUMA any notice that this discovery response would be deemed admissible or any opportunity to raise its objections and state its position on the probative weight, if any, of LUMA’s response in connection with a determination that LUMA must add performance metrics targets on Energy Efficiency and Demand Response to the revised Annex IX.

In sum, in considering the aforementioned responses to discovery requests to issue the December 22 Resolution and Order, the Energy Bureau did not observe applicable due process guarantees pursuant to which, administrative agencies must afford the parties to an adjudicative proceeding, an opportunity to be heard and a fair and equitable process and adjudication. The Energy Bureau abused its discretion in dereliction of LUMA’s rights to procedural due process.

It is respectfully submitted that answers to discovery requests are not automatically admissible evidence. The Energy Bureau’s determination to pass judgment over the aforementioned information and documentation submitted by LUMA during discovery, and prior to the evidentiary hearing, raises concerns about the fairness of the proceeding. Since the Energy

Bureau needed to review all of the evidence, including evidence submitted in the rebuttal phase and the evidence to be submitted in the evidentiary hearing, to make the determination on whether to include additional metrics as part of the proceeding, it is respectfully submitted that the Energy Bureau was required by due process considerations to allow LUMA to file rebuttal testimonies and wait until the conclusion of the evidentiary hearing to be in a position to make a decision on the issue. *See ECP Incorporated v. OCS*, 205 DPR 268, 281-282 (2020) (stating the general rule that decisions by administrative agencies should be reasonable and based on the administrative record). The Energy Bureau abused its discretion when it directed LUMA to amend its Revised Performance Metrics Targets Request and compelled LUMA to design and propose performance metrics that LUMA has not adopted nor endorsed, as LUMA itself stated in the objections and reservations of rights included in LUMA's responses to discovery requests.

***3. Taking of Administrative Notice without prior notice to LUMA or opportunity to be heard.***

LUMA opposes the Energy Bureau's determination on pages 3 through 4 of the December 22 Resolution and Order to consider, without prior notice to LUMA or opportunity to be heard, comments that LUMA submitted in a separate and independent proceeding regarding a draft Regulation on Energy Efficiency, Case No. NEPR-MI-2021-0005 and data on vegetation-related outages filed by LUMA in Case NEPR-MI-2019-0007. *De facto*, the Energy Bureau took administrative notice of discrete filings in separate proceedings to adjudicate a matter subject to controversy in this proceeding, that is, the propriety of adding performance metrics on Energy Efficiency and Demand Response and Vegetation Management.

Courts and administrative agencies in Puerto Rico may take judicial or administrative notice of an adjudicative fact without the need to present formal evidence to establish the fact's truthfulness. *See UPR v. Laborde*, 180 DPR 253, 276-277 (2010); *Jordi v. San Geronimo Caribe*

*Project, Inc.*, KLRA201000101, 2010 WL 4628914 at \*12-13 (TA July 16, 2010). Specifically, the LPAU allows an administrative law judge to take official notice of all the facts that can be admitted by judicial notice in the Puerto Rico Courts. Section 3.13 of the LPAU, 3 LPRA § 9653(d). The LPAU subordinates its official notice disposition to that of the Puerto Rico Rules of Evidence, Rule 201. *Comisionado de Seguros de Puerto Rico v. Integrand Assurance Co.*, KLRA0300307, 2003 WL 23317682 at \*2 (TA October 8, 2003). This means that for an agency to take administrative notice of a fact, it shall consider Rule 201 of the Puerto Rico Rules of Evidence (“Rule 201”) and its interpretative jurisprudence. 32 LPRA Ap. V, R. 201.

Rule 201 allows courts to take judicial notice of an adjudicative fact. *Id.* Importantly, Rule 201 entitles the parties to be heard on the propriety of taking judicial notice. *Id.*; *see UPR*, 180 DPR at 277 (stating that an affected party may offer evidence to oppose judicial notice). Rule 201 also entitles the affected party to be heard after taking judicial notice. 32 LPRA Ap. V, R. 201.<sup>7</sup>

The mechanism of taking administrative notice is an exception to the bedrock rule in an administrative procedure that the decision of an administrative agency must be supported on the administrative record. *López v. Asoc. de Taxis de Cayey*, 142 DPR 109 at \*2 (1996). This mechanism, however, does not substitute the process of presentation of evidence in an evidentiary hearing, and thus, its use is not unrestricted. *Sabol v. Departamento de Desarrollo Económico y Comercio*, KLRA201900583, 2020 WL 5411593 at \*7 (TA June 29, 2020).

The power to take administrative notice is limited, and the agencies must: (1) specify the fact and provide the source from which it took the information; and (2) provide an affected party

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<sup>7</sup> Section 9.03 of Regulation 8543 allows the Energy Bureau to *sua sponte* or upon a party’s request, take administrative notice of “those facts and circumstances of public interest that are generally known, or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Id.* Section 2.01 of Regulation No. 8543 states that, in adversary proceedings, the Rules of Evidence may apply to supplement the dispositions of Regulation 8543 per the Energy Bureau’s discretion.

an opportunity to oppose or provide additional information of the fact that was admitted by judicial notice. *Id.* (quoting Demetrio Fernández Quiñónez, *Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme*, at pages 170-71); see also *Oficina de Seguridad v. Puerto Rico Telephone Company, Inc.*, KLRA200300597, KLRA200300719, 2004 WL 2419142 at \*9 (TA September 20, 2004) (holding that Administrative Law Judge abused its discretion by failing to provide the affected party an opportunity to oppose the administrative notice and by not citing to the source of information).

The determination to take administrative notice of comments filed by LUMA in Case No. NEPR-MI-2021-0005 and data on vegetation-related outages filed by LUMA in Case NEPR-MI-2019-0007, runs counter to three bedrock procedural due process guarantees: timely opportunity to be heard on evidence that will be considered by an adjudicator, present evidence, and have an administrative agency issue a final decision that is based on the administrative record. Thus, LUMA respectfully submits that the December 22 Resolution and Order is null and void and the Energy Bureau should vacate the order and grant LUMA relief from that portion of the Resolution and Order that requires LUMA to amend Annex IX to the T&D OMA to add three categories of performance metrics.

***iii. Rebuttal testimonies along with the evidence to be submitted during the evidentiary hearing are crucial to any determination on additional performance metrics.***

On February 1 and 17, 2022, LUMA filed the rebuttal testimonies of Mr. Brent Bolzenius, LUMA's rebuttal witness to address the proposal by expert witness for LECO, Mr. Irizarry, on an Enhanced Vegetation Management performance metric, and Mr. Lee Wood, LUMA's rebuttal witness for the performance metrics proposed by intervenors LECO and ICPO on Energy Efficiency/Demand Response and Interconnections. In their testimonies, both witnesses explain



why those metrics should not be implemented, much less considered for evaluation at this time. As expounded below, there are factual and practical reasons that merit the Energy Bureau to reassess the necessity for those performance metrics and controversies that must be adjudicated at the evidentiary hearing.

Mr. Bolzenius testified that an Enhanced Vegetation Management incentive metric is not necessary. *See* Rebuttal Testimony by Brent Bolzenius filed on February 1, 2022, lines 60-61. He testified that adding an enhanced vegetation management incentive metric would be duplicative with other technical metrics, such as SAIDI and SAIFI. *See id.*, lines 63-65. Mr. Bolzenius explained that those existing technical metrics will show any reduction of outages to customers while including the results of a utility's vegetation management program. *Id.*, lines 61-63. He also stated that drawing a direct correlation between vegetation management and reduction of voltage fluctuations is not entirely correct. *See id.*, lines 107-117. Moreover, Mr. Bolzenius testified that tracking one unit or metric as proposed by Mr. Irizarry, an expert witness for LECO, will not directly correlate to the success of a whole vegetation management program. *Id.*, lines 88-91; 108-109. Other equally important factors include safety, customers, outage events and frequency, tree density, schedules, and specific vegetation types. *Id.*, lines 88-91. Tracking miles alone can focus on the most negligible amounts of required vegetation to capture "miles" while not targeting work on areas of greater vegetation densities and the most significant impact despite being associated with lower amounts of miles. *Id.*, lines 94-97.

As for the additional metrics on Energy Efficiency/Demand Response and Interconnections, Mr. Wood testified in disagreement with implementing those metrics. Mr. Wood testified that in the proceeding *In Re: Regulation for Energy Efficiency*, Case No. NEPR-MI-2021-0005, the Energy Bureau has delayed implementing performance metrics for Energy Efficiency

and Demand Response until the 3-Year Planning period begins. *See* Rebuttal Testimony by Lee Wood filed on February 17, 2022, lines 261-265, 356-364. LUMA is required to propose appropriate performance metrics for Energy Efficiency and Demand Response through the 3-Year Planning process. *Id.*, lines 358-362. Thus, further discussion of these metrics should be conducted during that planning process. In addition, Mr. Wood testified that LUMA cannot directly affect and measure progress towards energy reduction targets until a consistent funding source or cost-recovery mechanism is established for Energy Efficiency and Demand Response incentive and/or financing programs. *Id.*, lines 365-367. The Energy Bureau's proposed Energy Efficiency /Demand Response Baseline and Potential Study will be a crucial first step in establishing achievable energy reduction targets that reflect market conditions in Puerto Rico. *Id.*, lines 367-370. Given the technical nature of establishing these programs and associated performance metrics, LUMA suggests that performance targets be determined within those ongoing proceedings. *Id.*, lines 370-372.

Regarding the Interconnections performance metric, Mr. Wood testified that the Energy Bureau has accepted LUMA's plan for resolving the backlog as a reasonable approach to solving this situation, which LUMA was not responsible for creating. *Id.*, lines 314-316. LUMA has resolved approximately 95% of the cases in the backlog. *Id.*, lines 316-317. Given this performance record, there is no reason to suggest that an incentive or a penalty is necessary to compel LUMA to address this problem, which is being actively addressed. LUMA currently foresees a backlog resolution in March 2022, thus making any proposed incentive or penalty moot. *Id.*, lines 321-322.

Additionally, LUMA's expert witness, Mr. Branko Terzic, submitted expert testimony recommending that, at this time, the Energy Bureau does not approve additional metrics. For example, addressing the recommendations of LECO expert, Mr. Irizarry, that additional metrics

be considered, Mr. Terzic testified that “I believe that the right procedure would be to include those in a concurrent rate case so that the appropriate financial resources could be applied where improving metrics requires additional capital investment or operating costs.” See Pre-Filed Expert Rebuttal of Mr. B. Terzic, filed February 17, 2021, lines 305-308; see also lines 536-538. Regarding the alternative metrics proposed by intervenors LECO and ICPO, Mr. Terzic also recommended that the “PREB take these under consideration for future PREPA proceedings as they may have necessary budget implications.” *Id.* lines 606-609. Finally, Mr. Terzic stated: “I recommend that the PREB give the greatest weight to the [Performance Incentive Mechanisms PIMs] submitted for approval [by LUMA]. Those PIM[s] reflect the priorities identified by studies used by PREB and [the P3 Authority] based on those areas of PREPA operations most in need of attention to bring the PREPA closer to 20th century electric service available elsewhere.” *Id.* lines 619-622.

The aforementioned rebuttal testimonies serve to establish the prejudicial position in which LUMA has been placed, whereby the Energy Bureau issued a premature ruling that additional metrics must be considered in this proceeding, without granting LUMA an opportunity to be heard, prior to LUMA having filed rebuttal testimonies, and before the evidentiary hearing was conducted. LUMA reiterates its position that the December 22 Resolution and Order is null and void and should be vacated for material violations of procedural due process as discussed in detail in this Motion. Furthermore, LUMA does not waive its right to raise any arguments or defenses at the evidentiary hearing or file a petition and memorandum of law discussing on the merits why additional metrics should not be considered at this time or in this proceeding.

***iv. The December 22 Resolution and Order required LUMA to add metrics to the revised Annex IX to the T&D OMA within an abbreviated procedural calendar which adds to the unfairness of the proceeding.***

As discussed in the factual background of this Motion, the revised Annex IX was the result of a process that extended for more than eight months and included a process to develop metrics to be included in the revised Annex IX and a phase of consultation with and approval by the P3 Authority. Notwithstanding, through its December 22 Resolution and Order, the Energy Bureau unilaterally included additional performance metrics, thus dispensing with the operational and consultation process that preceded the proposal of the metrics included as part of the revised Annex IX. Moreover, while the performance metrics and targets submitted with the revised Annex IX took at least eight months to develop, the Energy Bureau provided only two months for the consideration and development of three additional metrics. Such abbreviated timeline is unfair, arbitrary and unreasonable.

As anticipated in *LUMA's Request for this Energy Bureau to Modify the Procedural Calendar Set Forth in the Resolution and Order of December 22, 2021* filed on January 7, 2022, it is fundamentally unfair and unreasonable to require the submission of additional performance metrics that LUMA did not develop during the Front-End Transition Period nor consulted with the P3 Authority on Interconnection, Energy Efficiency/Demand Response, and Vegetation Management, with corresponding written witnesses' testimonies, all within a period of two months, that was set initially in the middle of the Holiday Season and when LUMA was immersed in discovery and subsequent rebuttal. The abbreviated time-frame that the Energy Bureau has afforded to add performance metrics targets, without prior notice nor providing adequate time for LUMA to evaluate and analyze, is another example of the unfairness of this proceeding which amounts to a violation of LUMA's procedural rights.

The December 22 Resolution and Order is particularly unfair because the performance metrics and categories included in LUMA's Revised Performance Metrics Targets Request and

the Revised Annex IX to the T&D OMA track the goals and priorities set by the Government of Puerto Rico during the selection of a private operator for the T&D System. As explained in the Partnership Committee Report, Puerto Rico Public-Private Partnership for the Electric Power Transmission and Distribution System, pages 6-7. There, for example, the Partnership Committee indicated that “LUMA essentially accepted the Government’s approach to the Performance Metrics included in the RFP, which were designed to ensure that the Operator achieves certain benchmark standards of performance in respect of the T&D System for the benefit of its customers and the people of Puerto Rico.”<sup>8</sup>

Moreover, it is important to stress that the Energy Bureau had provided comments to the draft T&D OMA and later issued an Energy Compliance Certificate in its Resolution and Order dated June 17, 2020 in Case No. NEPR-AP-2020-0002. To wit, the Energy Bureau was kept informed of the developments in the P3 Authority procurement process and adoption of the T&D OMA –and the draft Annex IX to the T&D OMA<sup>9</sup> and issued the Energy Compliance Certificate in its Resolution and Order dated June 17, 2020<sup>10</sup> Furthermore, as has been explained in this

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<sup>8</sup> <https://www.p3.pr.gov/wp-content/uploads/2020/06/20-0520-02-partnership-committee-report-r18.pdf>.

<sup>9</sup> As expressed in the Partnership Committee Report for the Puerto Rico Public-Private Partnership for the Electric Power Transmission and Distribution System dated May 15, 2020: “throughout the procurement process, the P3 Authority was in communication with the PREB to keep it abreast of developments and facilitate its review of the O&M Agreement to determine its compliance with the energy public policy and the regulatory framework” The Partnership Committee Report was one of the documents considered by the Energy Bureau upon entering the Resolution and Order (Energy Compliance Certificate) in Case No. NEPR-AP-2020-0002.

<sup>10</sup> See also Resolution and Order dated June 17, 2020 in Case No. NEPR-AP-2020-0002 at pages 4-5 (“Section 8(c) of Act 120-2018, provides that once the P3 Authority establishes the Functions, Services, Facilities, or PREPA Assets for which PREPA Transactions shall be conducted under Act 120-2018 and Act 29-2009, the Energy Bureau shall provide the technical, expert, financial, and human resources assistance as the P3 Authority requests in order to ensure that each PREPA Transaction is successful. Accordingly, pursuant to a memorandum of understanding signed on November 15, 2018 by the P3 Authority, the Puerto Rico Fiscal Agency and Financial Advisory Authority (“PRFAFAA”), and Energy Bureau, the P3 Authority and PRFAFAA shared with the Energy Bureau certain information related to the proposed PREPA Transaction. Specifically, the P3 Authority provided the Energy Bureau the opportunity to review and provide comments on various drafts of the then proposed operation and maintenance

motion, LUMA's proposal on performance metrics targets has been on record since February 25, 2021. Thus, the determination that LUMA should add performance metrics is unduly late and thus, unfair.

The Energy Bureau's determination to consider responses to discovery issued by LUMA in this proceeding as well as filings submitted by LUMA in separate and independent regulatory proceedings, to include three additional metrics that are not contemplated in the revised Annex IX of the T&D OMA negotiated and approved by the P3 Authority during the Front-End Transition Period, is inherently unfair. As stated, the December 22 Resolution and Order unreasonably reverses the Energy Bureau's prior determination of Completeness of LUMA's Revised Performance Metrics Targets Request. The Energy Bureau's determination is, therefore, arbitrary and constitutes an abuse of discretion. As such, it should be reconsidered or annulled by this forum. *See e.g., Ramírez v. Policía de P.R.*, 158 DPR 320, 339 (2002) (stating that the exercise of discretion by an administrative agency must be rooted in reasonableness and in accordance with applicable law).

***v. The December 22 Resolution and Order is null and void because it violates LUMA's due process rights.***

As discussed above, the right to due process is the bedrock of procedural rights in our jurisdiction and encompasses a myriad of circumstances. *See, Rafael Hernández Colón, Práctica Jurídica de Puerto Rico, Derecho Procesal Civil*, §4807, at page 457 (2017). Decisions made by adjudicative forums in violation thereto are null and ineffectual. *See, Rivera Torres v. Díaz López*, 2021 TSPR 96 at \*11 (2021) (expressing that a court may relief a party from a judgment when – among other reasons– such judgment is null and establishing that a judgment is null when it has

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agreement. Therefore, the Preliminary Contract consider [sic] certain comments and suggestions of the Energy Bureau" (footnotes omitted)).

been entered in violation of due process rights); *see also*, *García Colón v. Suc. González*, 178 DPR 527, 543 (2010) (“a judgment is null when it has been entered without jurisdiction or in violation of due process”); *see also* *OCS v. Lone Star Ins. Procedures Inc.*, KLRA 2005-0327, 2006 WL 548659 (TA PR January 31, 2006) (recognizing circumstances in which a resolution issued by an administrative agency that does not guarantee procedural due process rights may be arbitrary and null). It is also well established in our jurisdiction that what is null never existed nor had any effect. *See*, *Montañez v. Policía de Puerto Rico*, 150 DPR, 917, 921 (2000). In other words, nullity equals non-existence.<sup>11</sup>

The foregoing inevitably leads to the conclusion that the December 22 Resolution and Order is null because it was entered in violation of LUMA’s procedural rights. Specifically, the December 22 Resolution and Order’s practical effect is to expand the scope of this proceeding at a late stage, in contravention to the T&D OMA, and without guaranteeing LUMA its due process rights to prior notice and opportunity to be heard. It is also a premature ruling on admissibility of information exchanged during discovery and a premature adjudication of controversies raised by intervenors on the reasonableness of adding performance metrics, that was improperly issued based on an incomplete administrative record and without having received all of the evidence that in this proceeding includes written rebuttal testimonies and the evidence to be admitted during the evidentiary hearing on the merits. The December 22 Resolution and Order is fundamentally unfair and arbitrary and thus, null and void. The Energy Bureau should vacate the December 22 Resolution and Order or grant LUMA relief from its effects.

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<sup>11</sup> Accordingly, the Puerto Rico Rules of Civil Procedure recognize the nullity of a judgment as one of the basis to grant relief of such judgment. *See*, Rule 49.2(d) of Civil Procedure. P.R. Laws Ann. tit. 32, § Ap. V, Rule 49.2(d). Moreover, when a judgment is null, the adjudicative forums do not have discretion to deny the request for relief of judgment. *Id.*

**WHEREFORE**, LUMA respectfully requests that this Honorable Energy Bureau **take notice** of the aforementioned and **vacate or grant LUMA relief** from that portion of the December 22 Resolution and Order that requires LUMA to add three additional performance metrics areas to the revised Annex IX to the T&D OMA and to file a further amended Annex IX to the T&D OMA.

**RESPECTFULLY SUBMITTED.**

We hereby certify that we 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](mailto:jmarrero@diazvaz.law); and Katuska Bolaños-Lugo, [kbolanos@diazvaz.law](mailto:kbolanos@diazvaz.law), the Office of the Independent Consumer Protection Office, Hannia Rivera Diaz, [hrivera@jrsp.pr.gov](mailto:hrivera@jrsp.pr.gov), and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy (“ICSE”), Fernando Agrait, [agraitfe@agraitlawpr.com](mailto:agraitfe@agraitlawpr.com), counsel for the Colegio de Ingenieros y Agrimensores de Puerto Rico (“CIAPR”), Rhonda Castillo, [rhoncat@netscape.net](mailto:rhoncat@netscape.net), and counsels for Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climática, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., CAMBIO, Sierra Club and its Puerto Rico Chapter, and Unión de Trabajadores de la Industria Eléctrica y Riego (jointly, Puerto Rico Local and Environmental Organizations), [larroyo@earthjustice.org](mailto:larroyo@earthjustice.org), [rstgo2@gmail.com](mailto:rstgo2@gmail.com), [notificaciones@bufete-emmanueli.com](mailto:notificaciones@bufete-emmanueli.com), [pedrosaade5@gmail.com](mailto:pedrosaade5@gmail.com), [jessica@bufete-emmanueli.com](mailto:jessica@bufete-emmanueli.com); [rolando@bufete-emmanueli.com](mailto:rolando@bufete-emmanueli.com), [rmurthy@earthjustice.org](mailto:rmurthy@earthjustice.org), [flcaseupdates@earthjustice.org](mailto:flcaseupdates@earthjustice.org).

In San Juan, Puerto Rico, this 17<sup>th</sup> day of February 2022.



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