

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

NEPR

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IN RE:

THE PERFORMANCE TARGETS FOR
LUMA ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

SUBJECT: Motion to Strike Portions of Expert
Testimony of José Alameda

**MOTION TO STRIKE PORTIONS OF THE EXPERT TESTIMONY
OF JOSÉ ALAMEDA-LOZADA**

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:

1. On November 17, 2021, intervenor LECO filed a *Motion to Submit Expert Testimony* whereby, in what is relevant to this motion, it submitted the testimony of José I. Alameda-Lozada, Ph.D. Mr. Alameda’s *curriculum vitae* was included with his pre-filed testimony as Exhibit I.

2. On page 2, lines 18-25 and pages 3-4, and page 5, lines 1-3, of his pre-filed testimony, Mr. Alameda details his qualifications and work experience in Economics. The *curriculum vitae* provides additional information on Mr. Alameda’s professional and educational background.

3. On page 5, lines 6-19 of his pre-filed testimony, Mr. Alameda summarizes the scope of his testimony and his key findings in connection with the present case. With regards to the scope of his testimony, Mr. Alameda testified that he was asked “to evaluate the possibilities of different scenarios or models of rewards and penalties to be established by the Puerto Rico

Energy Bureau (“PREB”) based on LUMA’s performance.” Mr. Alameda then goes on to describe two schemes that, in his opinion, would “pursue better standards of performance”. *Id.*, lines 8-10.

4. LUMA moves to strike portions of the testimony of Mr. Alameda that exceed the area of his expertise on Economics and the scope of his testimony as defined by him at page 5, lines 6-19 of the pre-filed testimony.

5. Despite establishing that the scope of his testimony would be limited to the possibilities, scenarios and models of rewards and penalties to be established to evaluate LUMA’s performance, Mr. Alameda testified about other topics that clearly are outside the scope of his testimony and area of expertise on Economics. Specifically, on page 21, lines 21-26; page 22, lines 1-2; page 22, lines 12-15; and page 23, lines 1-7, Mr. Alameda included statements regarding alleged “concerns” about LUMA, LUMA’s contract and LUMA’s performance to date.

6. As a threshold matter, LUMA objects the question presented on page 21, lines 21-22 because it is a compound question. Indeed, the question includes three questions in one (LUMA, LUMA’s contract, and LUMA’s performance to date). The question also called for and elicited a narrative response on matters that are not admissible because they are not rooted in the preceding portions of the testimony, nor based on Mr. Alameda’s expertise as an economist. No foundation was laid in the testimony to render admissible the witness’s response.

7. In his response to the question at page 21, lines 21-22 Mr. Alameda begun by espousing his understanding of what certain non-profit organizations have expressed with regards to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (the “T&D OMA”). *See*, page 21, lines 23-26; page 22, lines 1-2. Mr. Alameda, however, did not explain the basis of his expressions. Nor has Mr. Alameda established that he is an authorized representative of any of the non-profit organizations that he mentions in his response (Colegio de

Ingenieros y Agrimensores, Colegio de Abogados y Abogadas, and Centro para la Nueva Economía). Therefore, he is not qualified to render expert testimony on the positions that those organizations may have taken in particular contexts or circumstances that are not at issue in this proceeding and are thus, irrelevant and inadmissible. The response should be stricken from the record.

8. In response to the question on page 21, lines 21-22, Mr. Alameda testified about matters that are not relevant to this proceeding and fall outside the scope of the witness' knowledge and expertise as an economist. To wit, in responding to the same question on page 21, lines 21-22, Mr. Alameda opined in very broad terms on Pass-Through Expenditures under the T&D OMA stating that the T&D OMA allegedly lacks limits on operational expenditures and also on the alleged impact of the T&D OMA in labor protections and employee benefits. *See* Alameda testimony on page 21, lines 21-26; page 22, lines 1-2; and page 23, lines 1-7.

9. This response should be stricken from the record for several reasons. First, the matters of Pass-Through Expenditures, LUMA's operational expenditures, labor protections and employee benefits under the T&D OMA, **are not** in controversy in this proceeding where the Energy Bureau is called upon to consider LUMA's Revised Performance Metrics Targets Request of September 24, 2021 and the Revised Annex IX to the T&D OMA. Second, in his testimony, Mr. Alameda did not lay the foundation to offer an opinion on Pass-Through and operational expenditures and labor protections and employee benefits under the T&D OMA. Finally, the Energy Bureau does not enjoy authority in this proceeding over the subject matter of employee rights under the T&D OMA.

10. Furthermore, it is respectfully submitted that Mr. Alameda has not established that he possesses specialized knowledge, skills, experience, training or instruction to allow him to be

qualified as an expert on the T&D OMA, LUMA's performance as the operator of Puerto Rico's T&D System, LUMA's operational expenditures, and labor protections and employee benefits generally or in connection with the T&D OMA. Nor did Mr. Alameda establish that he possesses technical or specialized skills on those subjects or that his alleged expertise on those matters is needed to enable the Energy Bureau to adjudicate controversies in this proceeding.

11. Pursuant to Puerto Rico Rule of Evidence 703, “[a]ny person is qualified to testify as an expert witness if [he/she] possesses sufficient knowledge, skill, experience, training, or education to qualify him/her as an expert in the subject matter as to which [he/she] will testify. If *there is an objection regarding said specialized knowledge, skill, experience, training, or education, the same shall be established before the witness may testify as an expert.*” 32 LPR Ap. VI. R. 703 (translation provided) (emphasis added).

12. Puerto Rico Rule of Evidence 702 provides that when scientific, technical or specialized knowledge may assist the trier of fact to understand the evidence or adjudicate a factual controversy, a person qualified as an expert per Rule 703 of Evidence may provide opinion testimony or otherwise. 32 LPR Ap. VI. R. 702.¹ The admissibility of said testimony will be determined by the trier of fact applying the criteria set forth in Puerto Rico Rule of Evidence 403. *Id.* In turn, the analysis on admissibility of expert testimony under Rule of Evidence 403 entails evaluation of whether the probative value of the evidence is substantially outweighed by several factors that include danger of one or more of the following: unfair prejudice, confusing the issues,

¹ As per Section 2.01 of *the Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings*, Regulation No. 8543 of the Puerto Rico Energy Bureau, the Rules of Evidence may apply, in a supplemental manner to any [adjudicative proceeding] before the Energy Bureau when, in the exercise of its discretion to handle cases before it, the Energy Bureau determines it by way of an order.” LUMA hereby requests that the Energy Bureau apply the principles and rules set forth in Rules of Evidence 403, 702, and 703.

misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. 32 LPRA Ap. VI. R. 403.

13. For purposes of establishing the admissibility of expert testimony, the probative value of the testimony shall be determined considering the criteria set forth by Rule 702 of Evidence. Pursuant to Rule 702, the probative value of an expert's testimony will depend on "(a) whether the testimony has an adequate basis on sufficient facts or information; (b) whether the testimony is a result of reliable methods and principles; (c) whether the expert witness applied the principles and methods to the facts of the case in a reliable manner; (d) whether the testimony is based on principles generally accepted by the scientific community; (e) the witnesses' qualifications and credentials; (f) the witness' impartiality." 32 LPRA Ap. VI. (Translation ours).

14. Therefore, pursuant to the Rules of Evidence, the Energy Bureau has discretion to limit or exclude an expert witness' testimony taking into consideration factors such as (i) the risk of undue prejudice; (ii) the risk of confusion; (iii) the unnecessary delay of the proceedings; and (iv) the unnecessary introduction of cumulative evidence *vis á vis* its probative value. *See*, Rule 403 of Evidence, 32 LPRA Ap. VI; *See also*, *Pueblo v. Rivera Nazario*, 141 DPR 865, 893(1996) (stating that Rule 403 of Evidence establishes a principle of discretionary exclusion of pertinent evidence based on the weighing of its probative value *vis á vis* the Rule's factors).

15. The testimony rendered by Mr. Alameda on page 21, lines 21-26; page 22, lines 1-2; page 22, lines 12-15; and page 23, lines 1-7 is clearly inadmissible as expert testimony, in light of Rule 703 of Evidence, given that Mr. Alameda did not establish in his testimony that he possesses sufficient knowledge, skill, experience, training, or education to qualify him as an expert to provide opinion testimony on the subject matters of whether: a contract is one sided or not; the T&D OMA provides adequate limits on LUMA's operational expenditures; and the T&D OMA

eliminated labor protections or compensation. On the contrary, the identified portions of Mr. Alameda's testimony fall outside the areas of his professional expertise and constitute factual determinations or legal interpretations that the expert witness is not in a position to make as an expert. *See*, Rebuttal testimony of Mr. Juan Lara, at page 22, lines 446-457. To that end, Mr. Juan Lara, LUMA's rebuttal expert witness opines that "[t]hese are matters of fact or of legal interpretation which lie outside my domain or professional expertise." *See*, Rebuttal testimony of Mr. Juan Lara, at page 22, lines 456-457. The aforementioned portions of the testimony by Mr. Alameda should thus be deemed inadmissible and the Energy Bureau should strike them from the record.

16. The testimony also lacks adequate basis in facts or information. Mr. Alameda is not the authorized representative of the non-profit organizations that he mentions at page 21, lines 21-26 and page 22, lines 1-2, nor did he establish any facts or information to support the opinions by those third parties on whether the T&D OMA is a one-sided contract. Mr. Alameda also failed to establish the foundation to opine on the Pass-Through Expenditures provided for in the T&D OMA and the status of labor protections after the execution of the T&D OMA. *See*, Alameda testimony at page 22, lines 12-15; and page 23, lines 1-7. Additionally, those statements are irrelevant to this proceeding. As a result, those portions of Mr. Alameda's testimony are inadmissible and should be stricken from the record per Rules of Evidence 702 and 703.

17. Mr. Alameda has rendered testimony that is clearly outside the scope of his analysis and expertise in connection with the present case, which was limited "to evaluate the possibilities of different scenarios or models of rewards and penalties to be established by the Puerto Rico Energy Bureau ("PREB") based on LUMA's performance." Consequently, the

aforementioned portions of Mr. Alameda’s testimony should be stricken from the record. They are unduly prejudicial and create confusion as to the subject matter of this proceeding.

18. Pursuant to Rules 403, 702 and 703 of Evidence, LUMA respectfully requests that this Energy Bureau strike those portions of Mr. Alameda’s testimony on page 21, lines 21-26; page 22, lines 1-2 and 12-14 and page 23, lines 1-7.

WHEREFORE, LUMA respectfully requests that this Energy Bureau strike from the record page 21, lines 21-26; page 22, lines 1-2 and 12-14; and page 23, lines 1-7 of Mr. Alameda’s testimony.

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; and Katuska Bolaños-Lugo, kbolanos@diazvaz.law, the Office of the Independent Consumer Protection Office, Hannia Rivera Diaz, hrivera@jrsp.pr.gov, and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy (“ICSE”), Fernando Agrait, agraitfe@agraitlawpr.com, counsel for the Colegio de Ingenieros y Agrimensores de Puerto Rico (“CIAPR”), Rhonda Castillo, rhoncat@netscape.net, and counsels for Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climatica, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalicion 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, rstgo2@gmail.com, notificaciones@bufete-emmanuelli.com, pedrosaade5@gmail.com, jessica@bufete-emmanuelli.com; rolando@bufete-emmanuelli.com, rmurthy@earthjustice.org, flcaseupdates@earthjustice.org.

In San Juan, Puerto Rico, this 17th day of February 2022.



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