

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

**IN RE: THE UNBUNDLING OF THE ASSETS  
OF THE PUERTO RICO ELECTRIC POWER  
AUTHORITY**

**CASE NO.: NEPR-AP-2018-0004**

**SUBJECT: Official Notice**

**RESOLUTION AND ORDER**

**I. Relevant Background**

On December 23, 2020, the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") issued a Resolution and Order ("December 23 Order") commencing a formal adjudicative process in this proceeding. The Energy Bureau also required the Puerto Rico Electric Power Authority ("PREPA") to file certain analysis and one or more proposed wheeling tariffs that met high-level requirements.<sup>1</sup> After several procedural instances, LUMA<sup>2</sup> was recognized as a party in the instant proceeding and was ordered to coordinate with PREPA all items required to complete the case.<sup>3</sup> Moreover, various entities have been recognized as intervenors in this proceeding.<sup>4</sup> The parties conducted discovery and evidentiary hearings were held on July 19 and 20, 2021. The parties submitted briefs on August 10, 2021. LUMA filed a reply brief on August 20, 2021.

The final determination in this adjudicative proceeding is still pending. In the meantime, the Energy Bureau anticipates that, as part of its final determination it will take official notice of certain facts contained in various documents that are part of the administrative files of several dockets. Consequently, on January 5, 2022, the Energy Bureau issued a Resolution ("January 5 Resolution") through which it informed that it will be taking official notice of the twelve (12) Resolutions and Orders, containing information regarding the fuel cost adjustment ("FCA") rider, purchased power cost adjustment ("PPCA") rider, as well as the reconciliation amounts related to those riders ("Reconciliation Resolutions"). The Reconciliation Resolutions and the facts subject of official notice were described in the January 5 Resolution.<sup>5</sup> In the January 5 Resolution the Energy Bureau also announced its intention to take official notice of: (i) the IRP Final Order<sup>6</sup>; (ii) a two-page excerpt containing PREPA's projected fuel and purchase power costs<sup>7</sup>; and (iii) two historic fuel prices data sets

<sup>1</sup> December 23 Resolution, Section IV, pp 4-7.

<sup>2</sup> LUMA Energy, LLC as Management Co. and LUMA Energy ServCo, LLC as ServCo (collectively, "LUMA").

<sup>3</sup> *Resolution and Order, In Re: The unbundling of the Assets of the Puerto Rico Electric Power Authority, Case No. NEPR-AP-2018-0004*, June 10, 2021. On June 22, 2020, PREPA, the Puerto Rico Public-Private Partnerships Authority, and LUMA entered into an Operation and Maintenance Agreement and a Transmission and Distribution System Supplemental Terms Agreement ("OMA") pursuant to which PREPA transferred operational control of its transmission and distribution system to LUMA. On June 1, 2021, LUMA commenced operations pursuant to the OMA.

<sup>4</sup> Intervention was granted to the Independent Consumer Protection Office, the Puerto Rico Manufacturer's Association Inc., EcoEléctrica L.P. and, Cooperativa Hidroeléctrica de la Montaña (collectively "Intervenors"). See Resolution dated January 21, 2021, Resolution and Order dated February 25, 2021, and Resolution and Order dated February 25, 2021.

<sup>5</sup> January 5 Resolution, pp. 3-4.

<sup>6</sup> *Final Resolution and Order on the Puerto Rico Electric Power Authority's Integrated Resource Plan, In re. Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*, Case No. CEPR-AP-2018-0005, August 24, 2020 ("IRP Final Order") January 5 Resolution, pp. 4-5.

<sup>7</sup> *Attachment 3 - Projected Fuel and Purchased Power Expenses* ("Projected Expenses Data Summary") included as part of a motion filed by PREPA on March 16, 2021 ("March 16 Motion") in Case No. NEPR-MI-2020-0001, *In re. Permanent Rate of the Puerto Rico Electric Power Authority*.



("EIA Historic Fuel Price Data") published by the United State Energy Information Administration ("EIA").<sup>8</sup>

On January 25, 2022, LUMA filed a document titled *LUMA's Response and Opposition to Resolution and Order of January 5, 2022, on Taking Administrative Notice and Submission of Clarification and Additional Information* ("January 25 Motion"). Through the January 25 Motion, LUMA raises procedural objections to the Energy Bureau's determination to take official notice and opposed that determination.

LUMA argues that the determination to take official notice is belated, since it was issued after the evidentiary record in this proceeding closed after the conclusion of the evidentiary hearing.<sup>9</sup> LUMA further states that the aforementioned determination constitutes a procedurally inequitable ruling. According to LUMA, the Energy Bureau introduced new information for the record for which LUMA and intervenors were not provided proper notice, nor were afforded an opportunity to be heard or to submit evidence on the facts and matters to which the Energy Bureau took official notice.<sup>10</sup> LUMA argues that the January 25 Motion "runs counter to three bedrock procedural due process guarantees: timely opportunity to be heard on evidence that will be considered by an adjudicator, present or submit evidence, and have an administrative agency issue a final decision that is based on the administrative record."<sup>11</sup>

LUMA also asserts that the Energy Bureau's determination to take official notice of (i) its official records in the form of resolutions and orders in proceedings CEPR-AP-2015-0001, NEPR-AP-2018-0003 and NEPR-MI-2020-0001; (ii) an Exhibit to a filing by PREPA in Case No. NEPR-MI-2020-0001; and (iii) the Resolution and Order on the Approved Integrated Resource Plan, Case No. CEPR-AP-2018-0001, is not supported by applicable jurisprudence on taking official notice, since administrative agencies may take administrative notice of their official records as long as they are related to previous litigation by the same parties.<sup>12</sup> LUMA asserts that such resolutions and orders and PREPA's submission in Case NEPR-MI-2020-0001, are part of independent Energy Bureau regulatory proceedings in which intervenors to the instant case were not accumulated as parties nor did they intervene as parties.<sup>13</sup>

In addition, LUMA objects the January 5 Resolution, asserting that: (i) the Energy Bureau did not identify the facts and supporting data that it will consider from the twelve (12) resolutions and orders that were introduced in the record of this proceeding;<sup>14</sup> (ii) the Energy Bureau did not identify the specific facts within the Final IRP Order that are relevant to this proceeding or admissible *via* taking of official notice as an exception to the requirements to submit evidence for the record during an evidentiary hearing;<sup>15</sup> (iii) certain information and clarifications are necessary for the Energy Bureau to take notice of the Projected Expenses Data Summary, therefore, the Energy Bureau must consider the explanations provided in Exhibit 1 of the January 25 Motion;<sup>16</sup> and (iv) the Energy Bureau did not provide any support for the proposition that the historic fuel price data published by

<sup>8</sup> January 5 Resolution, pp. 5-6.

<sup>9</sup> January 25 Motion, p. 12.

<sup>10</sup> *Id.*, pp. 12-13.

<sup>11</sup> *Id.*, p. 14.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, pp. 15-17.

<sup>15</sup> *Id.*, pp. 17-19.

<sup>16</sup> *Id.*, pp. 19-20.



the EIA provides a reasonable understanding of how fuel prices may impact the FCA and PPCA going forward.<sup>17</sup>

## II. Analysis and Discussion

### A. Relevant Legal Standard

Act 57-2014 provides that the adjudicative proceedings conducted before the Energy Bureau are subject to the applicable provisions of Act 38-2017<sup>18</sup>, unless otherwise stated in Act 57-2014.<sup>19</sup> Pursuant to Act 38-2017, adjudicative cases are not governed by the rules of evidence.<sup>20</sup> However, the fundamental principles of evidence may be used to achieve a speedy, fair, and economical solution of the procedure.<sup>21</sup>

Act 38-2017 provides that the official presiding over a hearing may take official notice of everything that could be the subject of judicial notice in the courts of justice.<sup>22</sup> Likewise, Regulation 8543<sup>23</sup> provides that the Energy Bureau may take official notice, *motu proprio* or upon request, **on 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.**

Rule 201 of Evidence establishes that a court make take judicial notice of adjudicative facts that are not subject to reasonable dispute, and which can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.<sup>24</sup> Rule 201 also provides that the court may take judicial notice at any stage of the proceeding, including on appeal.<sup>25</sup> On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.<sup>26</sup>

### B. Evaluation and Determination

The instant case is adjudicative in nature, therefore, governed by the provisions of Act 38-2017 and Regulation 8543. The Rules of Evidence do not apply, although the Energy Bureau may use general principles of the rules of Evidence to achieve a speedy, fair, and economical solution of the procedure.

LUMA argues that the Energy Bureau's determination of taking official notice is belated, since it was issued after the evidentiary record in this proceeding closed, upon conclusion of the evidentiary hearing. LUMA argument counters against its own predicaments. Particularly those related to the applicability of Rule 201 of Evidence. The court may take

<sup>17</sup> *Id.*, pp. 20-22.

<sup>18</sup> Act 38-2017, as amended, known as the Administrative Procedure Act of the Government of Puerto Rico ("Act 38-2017").

<sup>19</sup> Article 6.5(c) of Act 57-2014 provides that the Energy Bureau shall make its determinations by the majority of the commissioners, in according to the provisions of Law 38-2017. In turn, Article 6.20 of Act 57-2014 provides that all processes for which the act does not provide particular provisions, shall be governed by Act 38-2017, including the adjudicative procedures.

<sup>20</sup> Section 3.13(e) of Act 38-2017.

<sup>21</sup> *Id.*

<sup>22</sup> Section 3.13(d) of Act 38-2017.

<sup>23</sup> Section 9.03(A) of *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings*, Regulation No. 8543 of December 18, 2014 ("Regulation 8543").

<sup>24</sup> 32 LPRA Ap. VI, R. 201

<sup>25</sup> Rule of Evidence 201(e), 32 LPRA Ap. VI, R. 201(e).

<sup>26</sup> Rule of Evidence 201(d), 32 LPRA Ap. VI, R. 201(d).



judicial notice at any stage of the proceeding, including on appeal.<sup>27</sup> Therefore, the stage at which the Energy Bureau proposes to take official notice is appropriate.

LUMA also argues that the Energy Bureau did not provide proper notice to the parties, nor afforded them an opportunity to be heard or submit evidence on the facts and matters as to which the Energy Bureau took official notice. Rule 201(D) of Evidence provides that the parties shall have the right to be heard on whether it is appropriate to take judicial notice. Rule 201(D) further states, that if a party has not been timely notified by the court or by the party interested, the affected party may request the opportunity to be heard after judicial notice has been taken.

The January 25 Motion constitutes a request to be heard with respect to the official notice sought by the Energy Bureau. More than that, in the January 25 Motion LUMA expressed its position regarding the propriety of taking official notice and the nature of the fact to be noticed. Therefore, the Energy Bureau acted within the principles established in Rule 201 of Evidence. That is, if official notice is taken without proper notice, the interested party may request to be heard.

The arguments presented by LUMA, through the January 25 Motion, shall benefit of all the parties. Therefore, the Energy Bureau **DETERMINES** that all parties in this case, including LUMA, shall have ten (10) days to file their positions on the propriety of taking official notice, or upon the certainty of the matter to be noticed.

LUMA asserts that the Energy Bureau's determination to take official notice of its records in the form of resolutions and orders in various proceedings, is not supported by applicable case law, since administrative agencies may take administrative notice of their official records as long as they are related to previous litigation by the same parties. LUMA asserts that the Reconciliation Resolutions, the IRP Final Order, and the Projected Expenses Data Summary, are part of independent Energy Bureau regulatory proceedings in which the intervenors to the instant case were not accumulated as parties nor did they intervene as parties.

As stated before, the Energy Bureau may take official notice of adjudicative facts **if they are not subject to reasonable dispute and can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned**. In this case, it is not subject to reasonable dispute that, on a certain date, the Energy Bureau issued a resolution and order establishing FCA and PPCA adjustment factors. Moreover, PREPA and LUMA have applied such factors as part of the charges PREPA and LUMA billed its customers during the applicable periods for each factor. Their validity and accuracy cannot be reasonably questioned.

The fact that the intervenors did not participate in that proceeding, does not raise a dispute as to the propriety of taking official notice of the approved FCA and PPCA factors. As such, LUMA's argument is unwarranted.<sup>28</sup>

Moreover, LUMA argues that the Energy Bureau did not identify the facts and supporting data that it will consider from the Reconciliation Resolutions, that are relevant to this proceeding. With respect to the Reconciliation Resolutions, in the January 5 Resolution the Energy Bureau expressed that I would take official notice of the FCA and PPCA riders, as well as the reconciliation amounts related to those riders. These amounts are readily obtainable from the Reconciliation Resolutions. Nevertheless, for the sake of clarity, the Energy Bureau **DETERMINES** that it proposes to take official notice of the information included in Attachment A of this Resolution and Order, pertaining to the Reconciliation Resolutions. Specifically (and when applicable) the Energy Bureau proposes to take administrative notice of the following information regarding the Reconciliation Resolutions:

<sup>27</sup> Rule of Evidence 201(e), 32 LPR Ap. VI, R. 201(e).

<sup>28</sup> Note that in this case, LUMA acts as agent of PREPA pursuant to obligations assumed under the OMA. Therefore, LUMA may be considered as party in those cases.



- (a) Reconciliation Resolution issuance date<sup>29</sup>
- (b) Beginning month of the period covered in the Reconciliation Resolution<sup>30</sup>
- (c) Ending month of the period covered in the Reconciliation Resolution<sup>31</sup>
- (d) Projected Fuel Costs (\$) <sup>32</sup>
- (e) Fuel Reconciliation Amounts (\$) <sup>33</sup>
- (f) Projected fuel cost reimbursements by FEMA (\$) <sup>34</sup>
- (g) Projected purchase power price costs (\$) <sup>35</sup>
- (h) Purchase power reconciliation amounts (\$) <sup>36</sup>
- (i) Estimated retail sales (kWh) <sup>37</sup>
- (j) FCA storm recovery adjustment from July 1, 2019 to March 31, 2020 (\$/kWh) <sup>38</sup>
- (k) PPCA storm recovery adjustment from July 1, 2019 to March 31, 2020 (\$/kWh) <sup>39</sup>
- (l) FCA final approved factors (\$/kWh) <sup>40</sup>
- (m) PPCA final approved factors (\$/kWh) <sup>41</sup>

Regarding the Projected Expenses Data Summary, LUMA requests the Energy Bureau to consider the explanations provided in Exhibit 1 of the January 25 Motion. Based on the previously discussed principles of taking official notice, the Energy Bureau **GRANTS** LUMA's petition.

Concerning the EIA Historic Fuel Price Data, LUMA asserts that the Energy Bureau did not provide any support for the proposition that the historic fuel price data published by the EIA provides a reasonable understanding of how fuel prices may impact the FCA and PPCA going forward. LUMA's argument is not related to the criteria used to determine if it is appropriate to take official notice of certain facts, rather it goes to the probative value of the evidence or, perhaps, the reasonableness of the use of these facts. Since EIA Historic Fuel Price Data is not subject to reasonable dispute, and it can be accurately and readily determined from

<sup>29</sup> Attachment A, Line 2.

<sup>30</sup> Attachment A, Line 3.

<sup>31</sup> Attachment A, Line 4.

<sup>32</sup> Attachment A, Line 7.

<sup>33</sup> Attachment A, Lines 8, 9, and 10.

<sup>34</sup> Attachment A, Line 11.

<sup>35</sup> Attachment A, Line 14.

<sup>36</sup> Attachment A, Lines 15, 16, and 17.

<sup>37</sup> Attachment A, Line 20.

<sup>38</sup> Attachment A, Line 24.

<sup>39</sup> Attachment A, Line 25.

<sup>40</sup> Attachment A, Line 28.

<sup>41</sup> Attachment A, Line 29.



sources whose accuracy cannot be reasonably questioned, the data is amenable of official notice.

Finally, LUMA argues that the Energy Bureau did not identify the facts and supporting data that it will consider from the IRP Final Order that are relevant to this proceeding. After a thorough review, the Energy Bureau **DETERMINES** that, at this time, it is not necessary to take official notice of any adjudicative fact included in the IRP Final Order. The Energy Bureau expects to apply in this case the policy framework included in the IRP Final Order. However, those are not adjudicative facts amenable of administrative notice.

### III. Conclusion

For all of the above, the Energy Bureau **DETERMINES** that it is appropriate to take official notice of (i) the specific facts included in the Reconciliation Resolutions, as described in **Attachment A** to this Resolution and Order; (ii) the Projected Expenses Data Summary, and (iii) the EIA Historic Fuel Price Data.

The Energy Bureau further **DETERMINES** that, at this time, it is not necessary to take official notice of any adjudicative fact included in the IRP Final Order. All the parties shall have ten (10) days, from the notification date of this Resolution and Order, to file their position on the propriety of taking official notice of the forgoing facts, or upon the certainty of the matters to be noticed.

Be it notified and published.



Edison Avilés Deliz  
Chairman



Ángel R. Rivera de la Cruz  
Associate Commissioner



Lillian Mateo Santos  
Associate Commissioner



Ferdinand A. Ramos Soegaard  
Associate Commissioner



Sylvia B. Ugarte Araujo  
Associate Commissioner

### CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on February 25, 2022. I also certify that on February 25, 2022 a copy of this Resolution and Order was notified by electronic mail to: margarita.mercado@us.dlapiper.com; kbolanos@diazvaz.law, jmarrero@diazvaz.law, contratistas@jrsp.pr.gov, hriviera@jrsp.pr.gov, manuelgabrielfernandez@gmail.com, ramonluisnieves@rlnlegal.com; ccf@tcm.law and agraitfe@agraitlawpr.com. I also certify that today, February 25, 2022, I have proceeded with the filing of the Resolution and Order issued by the Puerto Rico Energy Bureau.

For the record, I sign this in San Juan, Puerto Rico, today February 25, 2022.

  
Sonia Seda Gaztambide  
Clerk  


Attachment A

L2	PREB Resolution and Order Date	April 25, 2019	June 28, 2019	September 27, 2019	December 27, 2019	March 27, 2020	May 30, 2020	June 28, 2020	September 29, 2020	December 31, 2020	March 31, 2021	June 29, 2021	September 30, 2021
L3	Beginning Date	May-19	Jul-19	Oct-19	Jan-20	Apr-20	Jun-20	Jul-20	Oct-20	Jan-21	Apr-21	Jul-21	Oct-21
L4	End Date	Jun-19	Sep-19	Dec-19	Mar-20	Jun-20	Jun-20	Sep-20	Dec-20	Mar-21	Jun-21	Sep-21	Dec-21
L5	Fuel Costs (\$)												
L6	Projected Fuel Costs	\$219,313,199.38	\$291,324,369.00	\$272,250,012.68	\$287,467,927.28	\$319,087,383.48	\$88,168,000.00	\$238,547,808.40	None determined	\$286,035,333.40	\$380,681,057.83	\$423,573,197.50	\$476,702,706.42
L8	Total Reconciliation Amount	Not applicable	\$38,748,739.00	\$121,659,335.54	\$96,914,233.10	\$86,056,028.53	Not presented in order	-\$5,943,837.35	None determined	\$18,920,160.67	\$7,933,794.10	\$49,188,298.21	\$20,739,172.19
L9	Reconciliation Value #1						\$29,769,913.00						
L10	Reconciliation Value #2						\$16,403,779.99						
L11	Projected FEMA Reimbursement						-\$52,567,982.00						
L12	Purchased Power Costs (\$)												
L13	Projected Purchased Power Costs	\$123,054,304.70	\$196,816,751.00	\$194,406,407.14	\$180,391,610.35	\$202,216,750.23	\$61,701,000.00	\$193,169,065.72	\$197,432,173.90	\$140,014,216.90	\$138,955,141.10	\$146,880,027.89	\$132,417,847.96
L14	Total Reconciliation Amount	Not applicable	\$6,672,782.00	-\$2,717,693.29	-\$26,161,839.79	-\$20,080,452.48	Not presented in order	\$2,230,755.46	-\$6,651,786.95	-\$40,025,928.03	-\$18,419,940.84	\$4,551,730.93	-\$11,138,697.67
L16	Reconciliation Value #1						-\$6,946,560.00						
L17	Reconciliation Value #2						\$10,744,202.69						
L18													
L19													
L20	Estimated Retail Sales (kWh)	2,632,092,302	4,235,224,541	4,032,066,119	3,680,183,433	4,000,873,801	1,396,600,000	4,203,180,265	4,118,746,412	3,687,715,868	4,071,139,453	4,450,063,657	4,213,303,688
L21													
L22	Storm Recovery Adjustment from July 1, 2019 to March 31, 2020 (\$/kWh)												
L23	FCA adjustment		-\$0.000302	-\$0.000302	-\$0.000302	-\$0.000302							
L24	PPCA adjustment		\$0.004034	\$0.004034	\$0.004034	\$0.004034							
L25	Final Approved Factors (\$/kWh)												
L26	FCA	\$0.083323	\$0.077633	\$0.097392	\$0.104144	\$0.101264	\$0.058552	\$0.055340	None determined	\$0.082695	\$0.095456	\$0.106237	\$0.118065
L28	PPCA	\$0.046752	\$0.052081	\$0.051575	\$0.045942	\$0.045524	\$0.048899	\$0.046489	\$0.046320	\$0.027114	\$0.029607	\$0.034029	\$0.028785
L29													

