

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

NEPR

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IN RE: PERFORMANCE METRICS
TARGETS FOR LUMA ENERGY SERVCO,
LLC

CASE NO. NEPR-AP-2020-0025

SUBJECT: LUMA's Response to
LECO's *Reply to LUMA's Response in
Opposition to the December 22, 2021
Resolution and Order on Additional
Metrics*

LUMA'S RESPONSE TO LECO'S *REPLY TO LUMA'S RESPONSE IN
OPPOSITON TO 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 states and request the following:

I. Background:

On February 17, 2022, LUMA filed its *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 Objection") objecting to and requesting relief from the Puerto Rico Energy Bureau's ("Energy Bureau") December 22, 2021 Resolution and Order whereby the Energy Bureau ordered LUMA to include three additional performance metrics categories as part of the revised Annex IX to the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* ("T&D OMA") which approval is the object of the present proceeding ("December 22 Resolution and Order"). In other words, through the December 22 Resolution and Order, the Energy Bureau added three additional categories of performance metrics as a part of this proceeding. In doing so, the Energy Bureau, however, did not afford

LUMA the opportunity to express its position as to those additional categories which makes the December 22 Resolution and Order an arbitrary exercise of the agency's authority.

As discussed in LUMA's Objection, the entry of the December 22 Resolution and Order was arbitrary and in violation of LUMA's due process rights for several reasons. Specifically, upon entering the December 22 Resolution and Order, the Energy Bureau incorrectly relied on several supplemental responses to discovery propounded by the Energy Bureau and by intervenor Local Environmental and Civil Organizations ("LECO") that LUMA was ordered to provide without being afforded the prior opportunity to be heard in relation to the objections that LUMA had timely raised. *See*, pages 15-17 of LUMA's Objection. In its Objection, LUMA also discussed that upon entering the December 22 Resolution and Order, the Energy Bureau unfairly admitted as evidence those responses to discovery requests. *Id.* at pages 17-22. In addition, the Energy Bureau did not **first** allow LUMA to file rebuttal testimonies with regards to the information and documentation in the record from which the Energy Bureau drew its conclusion to include additional categories of performance metrics in this proceeding. Nor did the Energy Bureau wait until the conclusion of the evidentiary hearing with the benefit of the full record, to issue a determination whether additional categories of performance metrics are warranted. *Id.*

The December 22 Resolution and Order also constituted an improper exercise of the Energy Bureau's ability to take administrative notice of filings made in other regulatory proceedings as it did not provide LUMA a proper opportunity to be heard. *Id.* at pages 22-24. Additionally, as LUMA set forth in its Objection, the Energy Bureau established an abbreviated procedural calendar for LUMA to add the new metrics to the revised Annex IX to the T&D OMA which only underlines the unfair and impractical nature of the December 22 Order and Resolution. *Id.* at pages 27-30.

On March 14, 2022, LECO filed its *Reply to LUMA's Response in Opposition to the December 22, 2021 Resolution and Order on Additional Metrics* ("Reply") setting forth its arguments in opposition to LUMA's Objection. In essence, LECO averred that the Energy Bureau has authority to require the inclusion of additional performance metrics categories in this proceeding, that the Determination of Completeness entered by the Energy Bureau on August 25, 2021 does not prohibit the Energy Bureau from requiring consideration of additional performance metrics categories, that the December 22 Resolution and Order ensures due process rights to all parties in this proceeding and that LUMA's Objection constitutes a tardy motion for reconsideration.

LECO's arguments are meritless. As a threshold procedural matter, LUMA's Objection is not a motion for reconsideration because the motion does not seek reconsideration of a final or partial resolution or order entered by the Energy Bureau but of an interlocutory determination. In addition, granting the opportunity to conduct discovery as to the additional performance metrics categories does not cure the December 22 Resolution and Order's defects arising from the fact that it was entered in violation of LUMA's due process rights. As such, LUMA restates its request for this Energy Bureau to vacate the December 22 Resolution and Order or otherwise grant LUMA relief from that portion of the December 22 Resolution and Order that requires LUMA to add three additional performance metrics categories to the revised Annex IX to the T&D OMA.

II. Discussion:

a. LUMA's Objection does not constitute an untimely motion for reconsideration but a request for relief from an interlocutory order entered in violation of its right to due process.

In its Reply, LECO alleges that LUMA's Objection is an untimely motion for reconsideration. To that end, LECO suggests, without further discussion, that the December 22

Resolution and Order constitutes a partial resolution and order from which LUMA should have sought reconsideration within 20 days of the notice of its entry pursuant to Section 3.15 of the Puerto Rico Uniform Administrative Procedure Act (“LPAU” by its Spanish acronym), Act 38-2017, 3 PR Laws Annot. §9655 and pursuant to Section 8.1 of the Regulation for Performance Incentive Mechanisms, Regulation 9137 of the Energy Bureau.

LECO’s argument is misplaced because, as will be discussed in detail below, the December 22 Resolution and Order does not constitute a partial or final resolution and order from which reconsideration could have been sought. As such, LUMA’s Objection does not constitute a motion for reconsideration.

In its pertinent part, Section 3.15 of the LPAU, establishes that “the party affected by a partial or final resolution or order may, within 20 days from the date of the filing of its notice on the record, file a motion for reconsideration of the resolution or order.” 3 PR Laws Annot. §9655. An order or resolution is defined by the LPAU “as any decision or agency action of particular application that adjudicates rights or obligations of one or more specific persons, or that imposes administrative penalties or sanctions excluding executive orders entered by the Governor.” *Id* at §9603(g). Only final administrative resolutions or orders may be the subject of judicial review as only final orders or resolutions put an end to the adjudicative process. *See*, Section 4.2 of the LPAU, 3 PR Laws Annot. §9672; *see also*, *Comisionado de Seguros v. Universal*, 167 DPR 21, 29 (2006) (expressing that the Legislative Assembly limited judicial review to final resolutions and orders that dispose of an adjudicative case before the administrative agency and has adjudicative effects over the parties). A partial resolution or order, on the other hand, is defined as “an action whereby an agency adjudicates a right or obligation that does not put an end to a whole controversy but to a specific aspect of the same.” 3 PR Laws Annot. §9603(h). Finally, an

interlocutory order means that which disposes of a procedural controversy in an adjudicative proceeding. *Id.* at §9603(i). Interlocutory orders are not subject to review. *See*, Section 4.2 of the LPAU, 3 PR Laws Annot. §9672.

It is clear that the December 22 Resolution and Order may not be considered a final or a partial resolution and order as it neither puts an end to a controversy in the case nor much less adjudicate the rights and obligations of any of the parties in this case. Indeed, since LUMA was not provided the opportunity to set forth its position as to the potential inclusion of additional performance metrics categories as part of this proceeding, a controversy did not ensue as to this particular issue which may be considered resolved through the December 22 Resolution and Order. On the contrary, As discussed in detail in LUMA's Objection (which arguments are incorporated herein by reference), the Energy Bureau reached the decision of including the additional metrics categories based on discovery responses exchanged in this proceeding and without affording LUMA the right to be heard with regards to its timely objections to such discovery nor of submitting rebuttal testimony in relation thereto. Therefore, the December 22 Resolution and Order is not a final resolution and order that puts an end to the captioned proceeding nor "does . . . [it]put an end to a specific aspect of a controversy" in order for it to be considered a final or a partial resolution or order susceptible of being reconsidered pursuant to Section 3.15 of the LPAU.

Moreover, upon entering the December 22 Resolution and Order, the Energy Bureau did not include any of the required warnings to a party affected by a final order regarding its right to seek reconsideration or judicial review with an expression of the time periods applicable to each. *See*, Section 3.14 of the LPAU, 3 PR Laws Annot. §9654. Thus, the December 22 Resolution and Order has no indication of it being a final order subject to the terms for reconsideration set forth by Section 3.15 of the LPAU. Moreover, even if it contained any overtones of finality –which it

does not—the lack of warnings would render the notification of the resolution and order ineffectual and, therefore, the terms to seek reconsideration or judicial review would not begin to accrue. *See, Puerto Rico Eco Park, Inc. v. Mun. de Yauco*, 202 DPR 525, 542 (2019).

It bears noting that on page 9 of its Reply, LECO admits that the December 22 Resolution and Order is not a final decision when expressing that “only at the end of the entire procedures will PREB order a final resolution on the matter. PREB has not decided anything regarding these additional metrics, just as PREB has not decided anything regarding the metrics in LUMA’s draft Annex IX.” Thus, LECO admits that the December 22 Resolution and Order is not the type of order that triggers the formal process of reconsideration.

LECO’s argument pursuant to Section 8.1 of Regulation 9137 likewise fails. Section 8.1 of Regulation 9137 provides that “any person not satisfied with a decision made by the Energy Bureau under this Regulation may file, within the term of twenty (20) days from the date copy of the notice of such de decision is filed by the Energy Bureau’s Clerk, a request for reconsideration...”. Regulation 9137, however, does not define the term “decision” and, thus, we look to Regulation 8543 on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings of the Energy Bureau for guidance.¹ Section 11.04 of Regulation 8543 establishes, that a party

dissatisfied with the Commission’s *final* decision may file a motion for reconsideration before the Commission, which shall state in detail the grounds supporting the petition and the remedy that, according to the petitioner, the Commission should have granted. The request for review shall be filed and served in accordance with the terms and provisions set forth in Act No. 170 of August 12, 1988, as amended, known as the Uniform Administrative Procedure Act.

(Emphasis added).

¹ Regulation 8543 applies to “all adjudicative proceedings, notices of noncompliance and investigations addressed before or by the Energy Commission of Puerto Rico.” Section 1.04 of Regulation 8543. As such, it applies to the present adjudicative proceeding.

LECO's Reply conveniently ignores the above cited disposition according to which only final decisions by the Energy Bureau can be subject to a request for reconsideration. The December 22 Resolution and Order may not be considered a final Resolution and Order under any circumstance as it does not "adjudicate[] rights or obligations of one or more specific persons, or ...imposes administrative penalties or sanctions..." as defined by Section 1.3 of the LPAU.²

Therefore, nothing precludes the Energy Bureau from considering and ruling upon LUMA's Objection as it is not an untimely motion for reconsideration.

b. Providing for discovery to be carried on the additional performance metrics categories does not cure the violation of LUMA's due process rights.

LECO avers that the December 22 Resolution and Order does not violate LUMA's due process right because the Energy Bureau provided an opportunity for the parties to carry out discovery for the additional performance metrics categories, after the December 22 Resolution and Order was issued. LECO's argument, however, disregards that as per LUMA's Objection, the infringement upon its due process rights occurred upon the entry of the December 22 Resolution and Order. That is, the entry of the Resolution and Order without adequate basis in the administrative record nor affording LUMA the opportunity to express its position *prior* to ordering that LUMA include additional categories of performance metrics in the revised Annex IX to the T&D OMA violates LUMA's procedural rights to be heard and to participate in a just and equitable adjudicative proceeding. By including additional categories of performance metrics in this proceeding without granting LUMA the opportunity to express its position thereto in advance, the

² Alternatively, if this Energy Bureau understands that the December 22 Resolution and Order has even the overtone of a final resolution or order, then consistent with the general principle of interpretation codified at Section 1.05 of Regulation 8543 to interpret the Regulation in a manner that secures a *just* determination of all proceedings, LUMA's Objection should be considered as a motion for relief from a resolution as per Section 11.02 of Regulation 8543 pursuant to which the Energy Bureau may relieve a party from complying with a resolution for any reason that justifies relief.² As such, the Objection would not be subject to the 20 day period applicable to motions for reconsideration and the Energy Bureau is in position to consider and rule upon it.

Energy Bureau effectively curtailed LUMA's due process rights in the exercise of its adjudicative authority. The defect in the order arises from the manner in which it was entered. Providing the opportunity to conduct discovery on the order that was improperly entered does not cure the defects of the order.

Moreover, LUMA's Objection is based on the Energy Bureau's failing to afford LUMA the opportunity to be heard with regards to the inclusion of additional performance metrics categories in this proceeding; not waiting for LUMA's rebuttal testimonies prior to entering the December 22 Resolution and Order or the celebration of the administrative hearing in the case; and issuing its determination on the basis of discovery responses, thus converting them in admissible evidence for all practical purposes. None of those defects are cured by providing for discovery to be conducted after the Energy Bureau issued a decision and order that LUMA should include additional performance metrics categories in its revised Annex IX to the T&D OMA. Therefore, LECO's argument in this regard also fails.

c. The rest of LECO's arguments misconstrue LUMA's Objection and are therefore, inapposite.

LECO misconstrues LUMA's Objection by arguing that the Energy Bureau has the necessary authority to enter the December 22 Resolution and Order and that the entry of the Determination of Completeness does not limit such authority. LUMA's Objection is based on due process considerations which require that LUMA be provided with the opportunity to be heard prior to the entry of the Resolution and Order because as the regulated party it is entitled to a just and equitable proceeding. *See*, Section 3.1 of the LPAU, 3 PR Laws Annot. §9641 and Section 2.03 of Regulation 8543. *See also, Torres v. Junta de Ingenieros*, 161 DPR 696, 713 (2004). As such, the December 22 Resolution and Order is null and void and should be vacated, regardless of

whether under the law, applicable regulations and the T&D OMA, the Energy Bureau has authority to consider and approve performance metrics applicable to electric power utilities.

WHEREFORE, LUMA respectfully reiterates its request for the December 22 Resolution and Order to be vacated or that LUMA be otherwise granted relief from that portion of the December 22 Resolution and Order that requires LUMA to add three additional performance metrics categories or areas to the revised Annex IX to the T&D OMA and to file a revised 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; 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 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, rstgo2@gmail.com, notificaciones@bufete-emmanuelli.com, pedrosaade5@gmail.com, jessica@bufete-emmanuelli.com; rolando@bufete-emmanuelli.com, lvez@earthjustice.com, rmurthy@earthjustice.org.

In San Juan, Puerto Rico, this 24th day of March 2022.



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