

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

NEPR

Received:

Mar 14, 2022

6:52 PM

IN RE: PERFORMANCE TARGETS FOR  
LUMA ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

SUBJECT: REPLY TO LUMA'S  
OPPOSITION TO PREB'S  
RESOLUTION AND ORDER ON  
ADDITIONAL METRICS

**REPLY TO LUMA'S RESPONSE IN OPPOSITION TO THE DECEMBER 22, 2021  
RESOLUTION AND ORDER ON ADDITIONAL METRICS**

**TO THE PUERTO RICO ENERGY BUREAU:**

COME NOW, Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc.  
- Enlace Latino de Acción Climática, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., CAMBIO, and Sierra Club and its Puerto Rico chapter, and Unión de Trabajadores de la Industria Eléctrica y Riego (collectively, "LECO"), and respectfully state the following:

1. On December 23, 2020, the Puerto Rico Energy Bureau (the "Energy Bureau" or "PREB") issued a *Resolution and Order* to begin this proceeding and thereby start the evaluation and establishment of the performance targets and Performance Incentive Mechanisms ("PIMs"). Subsequently, on February 25, 2021, LUMA filed a *Submittal and Request for Approval of Revised Annex IX to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (OMA)* as well as a revised Annex IX.

2. On April 8, 2021, the Energy Bureau issued a *Resolution and Order* outlining the procedural calendar that this proceeding would follow. Subsequent Resolution and Orders that amended the procedural calendar were issued by the Energy Bureau on May 14, July 13, August 9, October 20, December 22, 2021, and January 14, 2022.
3. On August 18, 2021, LUMA filed a revised *Submittal of Request for Approval of Revised Annex IX to the OMA* (or the “Revised Performance Metrics Targets Requested” that included a revised Annex IX to the TD&OMA). LUMA concurrently submitted the testimonies of eight witnesses to support the proposed Revised Performance Metrics Targets Requested.
4. On August 25, 2021, the Energy Bureau issued a Resolution and Order that included a Determination of Completeness that found LUMA to be in compliance with “the minimum requirements established by PREB to continue its evaluation.”
5. On December 22, 2021, the Energy Bureau issued a Resolution and Order (“December 22 Resolution and Order”) that established that additional performance-based incentive metrics must be considered and evaluated going forward in this proceeding. The additional performance-based incentive metrics announced were: (i) Interconnection of Distributed Energy Resources; (ii) Energy Efficiency and Demand Response; and (iii) Vegetation Management. The December 22, 2021 Order required LUMA to file, by January 18, 2022, a revised draft Annex IX including targets and supporting

metrics for these three categories, along with testimony concerning the additional metrics. PREB directed LUMA to submit further pre-filed testimonies regarding the new metrics. Furthermore, PREB authorized Intervenors and LUMA to conduct additional discovery on the new metrics and amended the procedural calendar to reflect this new discovery period.

6. On January 7, 2022, LUMA submitted a request for PREB to extend the deadline for LUMA's filings required by the December 22, 2021, Order.
7. On January 14, 2022, PREB amended the procedural calendar, extending LUMA's deadline to file a revised Annex IX, and testimony on the additional metrics, to February 17, 2022.
8. On February 17, 2022, LUMA did not file (and thus has waived its right to file) a revised Annex IX with the additional metrics, and testimony with LUMA's position on the additional metrics. Instead, LUMA filed a document styled as *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* with the Energy Bureau (February 17, 2022, Motion). For the reasons detailed below, PREB should reject the relief requested in LUMA's February 17, 2022, filing.

**I. THE PREB HAS THE AUTHORITY TO REQUIRE CONSIDERATION OF ADDITIONAL METRICS**

On December 23, 2020, PREB issued a Resolution and Order in which it laid out PREB's authority over the performance incentive mechanisms for LUMA. It states as follows: "the Energy Bureau of Puerto Rico Public Service Regulatory Board ('Energy Bureau') has jurisdiction over Puerto Rico Electric Power Authority ('PREPA') and all other electric service companies"<sup>1</sup>. This authority is given by law, thanks to Act 57-2019 on the listed powers and duties in Section 6.3 (j) to "Establish performance-based incentives and penalty mechanisms"<sup>2</sup>. Also, by the powers granted in Section 6.4, which states that:

- (b) The Energy Bureau shall have general jurisdiction over the following matters:
  - (1) The Energy Bureau shall have regulatory, investigative, and adjudicative jurisdiction over PREPA and any other certified electric power company providing services within the Government of Puerto Rico.<sup>3</sup>

Section 1.5(3) of Act 17-2019 also reiterates PREB's authority over the issue at hand:

- (a) The Energy Bureau shall be the independent entity in charge of regulating the energy market in Puerto Rico. The Bureau shall have extensive powers and duties, as well as the financial and technical resources and trained personnel necessary to ensure compliance with public energy policy, the provisions and mandates of this Law, and to ensure fair and reasonable, affordable costs, easy to understand and clearly comparable and transparent by monitoring and reviewing rates;
- (b) The Bureau shall exercise high scrutiny over the maintenance of the electrical network and require periodic reports that describe the status of the

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<sup>1</sup> In Re: Performance Targets for LUMA Energy Service, LLC, Resolution and Order, at 1, NEPR-AP-2020-0025, (Dec, 22, 2021) <https://energia.pr.gov/wp-content/uploads/sites/7/2021/12/20211222-Resolution-and-Order-Additional-Performance-Targets.pdf>.

<sup>2</sup> Puerto Rico Energy Transformation and RELIEF Act, Act-57-2019; 22 LPR § 1054b (j).

<sup>3</sup> 22 LPR § 1054c (b)(1).

maintenance of the electrical network, as well as the plans prepared to meet said needs.

(c) The Bureau shall use, when warranted, alternative mechanisms to rate regulation based on service costs ("cost-based regulation") for compliance and implementation of the metrics and objectives established in this Law.

(d) When deemed appropriate, in rate regulation processes, **the Bureau shall establish incentive and penalty mechanisms based on performance metrics for electric service companies** and faithful compliance with Bureau orders.<sup>4</sup>

Moreover, Law 17-2019 expressly amends Law 57-2014 so that:

It is necessary to encourage energy companies to invest in a cost-effective manner in infrastructure, technology, incorporation of distributed generation, renewable energy sources and services that result in better benefits for the electrical system and consumers. **To this end, the Energy Bureau will establish [...] those mechanisms that provide incentives and penalties that consider the performance and compliance of the electric service companies with the execution metrics that constitute the energy public policy.**<sup>5</sup>

Under the authority of these laws, PREB reached the well-supported conclusion that Performance Incentive Mechanisms on (i) Interconnection of Distributed Energy Resources; (ii) Energy Efficiency and Demand Response; and (iii) Vegetation Management would help achieve public energy policy, and result in better benefits for the electrical system and consumers. Act 57-2014, Law 17-2019, and Regulation 9137 define the scope of this proceeding, and those laws authorize and support PREB's conclusion.

LUMA's argument is silent as to those laws, and instead repeatedly insists that PREB's authority is limited to merely "consider and approve the performance

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<sup>4</sup> Puerto Rico Energy Public Policy Act, Act Num. 17-2019, 29 L.P.R.A. § 1141d (Emphasis Added).

<sup>5</sup> Act 17-2019 Art.5.21 adding Art.6.25B to Act 57-2014.

targets and metrics that are included in the revised [draft] Annex IX.”<sup>6</sup> At the very inception of this proceeding, PREB stated that the T&D OMA, and LUMA’s **draft** Annex IX, are not binding upon PREB.<sup>7</sup> Contracts (and draft contract clauses) cannot go above the law. Such has been recognized by the Supreme Court of Puerto Rico on *Luan Invest. Corp. v. Rexach Const. Co.*:

It is a principle firmly rooted in our system of law that “[t]he contracting parties may establish such covenants, clauses, and conditions as they deem convenient, provided that **they are not contrary to the laws, morals, or public order.** Art. 1207 of the Civil Code, 31 L.P.R.A. sec. 3372. Under this tenor, in *Hernández v. Méndez & Assoc. Dev. Corp.*, 105 D.P.R. 149 (1976), we reiterated that **the freedom of private contracting is not unrestricted: the law, morals, and public order are its restraints.**<sup>8</sup>

The T&D OMA also recognizes this on its Section 20.17:

Notwithstanding anything to the contrary herein, no provision of this Agreement shall be interpreted, construed, or **deemed to limit, restrict, supersede, supplant or otherwise affect, in each case in any way, the rights, responsibilities, or authority granted to PREB under Applicable Law** with respect to the T&D System, Owner or Operator.<sup>9</sup>

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<sup>6</sup> See 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, at 12, In Re: Performance Targets for LUMA Energy Servco Motion, NEPR- AP-2020-0025, Feb. 17, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/02/LUMAs-Response-in-Opposition-tand-Objection-to-December-22-2021.pdf>.

See also LUMA’s Response in Opposition and Objection to December 22, 2021 Resolution and Order and Request to Vacate or Grant LUMA Relief form the December 22, 2021 Resolution and Order on Additional Metrics, at 5: “[...] the revised [draft] Annex IX is the [...] cardinal document defining its scope[...].”

<sup>7</sup> In Re: Performance Targets for LUMA Energy Servco, LLC, Resolution and Order, at 5, NEPR-AP-2020-0025, (Dec, 23, 2020), <https://energia.pr.gov/wp-content/uploads/sites/7/2020/12/20201223-AP20200025-Resolution-and-Order.pdf>.

<sup>8</sup> 152 D.P.R. 652, 659 (2000) (Emphasis added).

<sup>9</sup> Puerto Rico Transmission and Distribution System Operation and Management Agreement (June 22, 2020), Section 20.17 at 158. (Emphasis added).

In sum, PREB has broad authority to require consideration of Performance Incentive Mechanisms on any metric that would serve the public interest and further public energy policy.

II. THE CERTIFICATION THAT LUMA MET “MINIMUM REQUIREMENTS” DOES NOT PROHIBIT THE PREB FROM REQUIRING CONSIDERATION OF NEW METRICS

On August 25, 2021, the PREB issued a Resolution and Order in which by which the PREB stated that the information filed by LUMA on the August 18, August 20, and August 23 Motions up until that part of the procedure “complies with the minimum requirement established by the Energy Bureau to continue its evaluations as part of the instant case.”<sup>10</sup>

PREB’s determination merely moved this proceeding to the next phase, where intervenors submitted testimony regarding LUMA’s metrics as well as metrics not considered, and all parties conducted discovery. LUMA is construing the determination exactly as PREB warned LUMA **not** to do:

Today’s determination, i.e., that the information filed by LUMA complies with the minimum requirements to continue its evaluation as part of the instant case, **should not** be construed as an acceptance or approval of such proposal. . . Moreover, today’s determination **should not, and does not**, create the expectation that such a proposal will be approved as part of this proceeding.<sup>11</sup>

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<sup>10</sup> In RE: Performance Targets for LUMA Energy Servco, LLC, Resolution and Order, at 4, NEPR-AP-2020-0025, (Aug.25, 2021), <https://energia.pr.gov/wp-content/uploads/sites/7/2021/08/20210825-AP20200025-Resolution-and-Order.pdf>.

<sup>11</sup> *Id.* at 5.

The PREB never established that the initial list of metrics was an exclusive list because the purpose of establishing Performance Incentive Metrics obeys a need to fulfill “principles beneficial to the public interest<sup>12</sup>” of which PREB instructed LUMA on its December 23, 2020 Resolution.<sup>13</sup> Let us not forget that Law 17-2019 expressly amends Law 57-2014 so that it provides:

It is necessary to encourage energy companies to invest in a cost-effective manner in infrastructure, technology, incorporation of distributed generation, renewable energy sources and services that result in better benefits for the electrical system and consumers. **To this end, the Energy Bureau will establish [...] those mechanisms that provide incentives and penalties that consider the performance and compliance of the electric service companies with the execution metrics that constitute the energy public policy.**<sup>14</sup>

In that direction, the PREB approved the Regulation for Performance Incentive Mechanisms<sup>15</sup> which reiterates PREB’s power to enforce PIM’s:

The Energy Bureau has the power and duty to “Establish performance-based incentives and penalty mechanisms” for Electric Power Service Companies “As well as mechanisms that ensure strict compliance with the Orders of the Energy Bureau”. Among the mechanisms available to the Energy Bureau to

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<sup>12</sup> *Supra* note 7.

<sup>13</sup> “The request for the establishment of PIMs required under Section 4.2(f) of the OMA shall be aligned with principles beneficial to the public interest, including but not limited to, the following: 1. Go Above and Beyond: Target or Levels for which an incentive may be proposed shall be subject to and dependent on performance above and beyond the minimum required compliance levels. 2. Further the Earlier Compliance with Public Policy: Targets or Levels for which an incentive may be proposed, shall encompass the accelerated implementation of public policy such as the renewable energy portfolio, demand response, energy efficiency, and other similar mandates. 3. Further Efficiencies and Savings: As applicable, Targets or Levels for which an incentive may be proposed, shall pursue the highest level of efficiencies and savings. 4. Impact areas with significant performance issues: Targets or Levels for which an incentive may be proposed, shall positively impact or address areas of unsatisfactory performance with a direct impact on electric service users. 5. Benefits for the Public Interest: Target or Levels for which an incentive may be proposed, shall result in a clear benefit for the public interest and the ratepayers. 6. Incentives Rewards Difficult Task: Target or Levels for which an incentive may be proposed, shall be tied to difficult tasks, and not too easy to fix areas.” *Id.* at pp.5-6.

<sup>14</sup> Act 17-2019 Art.5.21 adding Art.6.25B to Act 57-2014.

<sup>15</sup> PREB, Regulation for Performance Incentive Mechanisms, Num.9137, (Dec. 13, 2019), <https://energia.pr.gov/wp-content/uploads/sites/7/2020/02/9137-Regulation-for-Performance-Incentive-Mechanisms.pdf>.



use is performance-based regulation, which includes the use of Performance Incentive Mechanisms.<sup>16</sup>

As part of the nature of any administrative process -for it is an ongoing process- 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. PREB has the authority to assign penalties or incentives in any or all of those categories, when Law 17-2019, Regulation 9137 and PREB's December 23, 2020 Resolution and Order have granted the PREB the power to do so.

### **III. PREB'S REQUEST OF NEW METRICS ENSURES DUE PROCESS RIGHTS TO ALL PARTIES**

Puerto Rico's Supreme Court has established that all adjudicative procedures must observe the minimum requirements for due process. In that sense, it has specified that all parties must have (1) the opportunity to be heard; (2) the right to cross examine; and (3) the right to examine evidence presented by the adverse party. *San Gerónimo Caribe Project v. A.R.P.E.*, 174 DPR 640, 660 (2008); See also *Salva Santiago v. Torres Padro*, 171 DPR 332 (2007); *Rafael Rosario v. Depto. Familia*, 157 DPR 306, 330 (2002). Furthermore, the LPAU has also incorporated due process guarantees, requiring the (1) right to a timely notice of charges or complaints; (b) right to present evidence; (3) right to impartial adjudication, and (4) right to have the

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<sup>16</sup> *Id.* Art. 2

decision based on the record. *San Gerónimo Caribe Project v. A.R.P.E.*, 174 DPR 640, 660 (2008);

Upon issuing its December 22 Resolution and Order in which the PREB requested three additional metrics, PREB also amended the procedural calendar to allow **both** LUMA and Intervenors the opportunity to conduct discovery on matters related to the three additional metrics.<sup>17</sup> Thus allowing LUMA to carry out discovery on intervenor’s testimony and address their opposition to the requirement of new metrics. By allowing this discovery the PREB ensured that both parties have the opportunity to be heard and examine discovery on the additional metrics. Furthermore, pursuant to the LPAU’s requirements the PREB have both parties a chance to present evidence by conducting discovery. The due process of all parties in the case at hand has been guaranteed by the PREB.

#### **IV. LUMA’S FILING SHOULD BE REJECTED AS AN OUT-OF-TIME MOTION FOR RECONSIDERATION**

It is clear from the procedural tract laid above that after the PREB’s December 22 Resolution and Order LUMA did not file a reconsideration with the PREB within the twenty days required by section 8.1 of the PREB’s Regulation 9137, Regulation for Performance Incentive Mechanisms (“Regulation 9137”), which states 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

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<sup>17</sup> “The intervenors may conduct additional discovery and provide revised testimony limited to matters relating to Interconnection, Energy Efficiency/ Demand Response, and Vegetation Management. LUMA may also conduct limited additional discovery only on testimony submitted by the Intervenors on matters related to Interconnection, Energy Efficiency/ Demand Response, and Vegetation Management.” *Supra* note 1 at 5.

copy of the notice of such decision filed by the Energy Bureau’s Clerk, a request for reconsideration before the Energy Bureau wherein the petitioner sets forth in detail the grounds that support the request and the decision that, in the opinion of the petitioner, the Energy Bureau should reconsider.”<sup>18</sup>

Furthermore, pursuant to section 3.15 of the Puerto Rico Uniform Administrative Procedure Act (“LPAU” for its Spanish acronym), Act 38-2017, a party that is adversely affected by a **partial** or final resolution or order is allowed to request reconsideration within twenty days of the resolution or order’s notification. The Puerto Rico Uniform Administrative Procedure Act also states that the Agency will consider the motion for reconsideration within fifteen days of being filed.<sup>19</sup>

LUMA chose **not** to file a timely motion for reconsideration, and instead filed a motion sixteen days after the December 22, 2021 Order, only asking PREB to extend the deadlines of that Order.<sup>20</sup> LUMA was well aware of the consequences for failure

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<sup>18</sup> Moreover, Section 11.01 of Regulation 8543, Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings provides that dissatisfied parties may file a motion for reconsideration in accordance with the terms and provisions of the Puerto Rico Uniform Administrative Procedure Act, specifically: “Any 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 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 the 12 of August of 1988, as amended, known as the Uniform Administrative Procedure Act.” PREB, Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings, Num. 8543, <https://energia.pr.gov/wp-content/uploads/sites/7/2015/09/RE-8543-EN1.pdf>.

<sup>19</sup> “The party adversely affected by a partial or final resolution or order may, within the term of twenty (20) days from the file date in the records of the notification of the resolution or order, file a motion to reconsider the ruling or order. The agency within fifteen (15) days after the filing of said motion shall consider it. [...]” Law 38-2017, 3 LPRA § 9655.

<sup>20</sup> LUMA’s Request for this Energy Bureau to modify the Procedural Calendar Set Forth in the Resolution and Order of December 22,2021, In Re: Performance Metrics Targets for LUMA Energy Servco, LLC, NEPR-AP-2020-0025, Jan. 7, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/01/Lumas-Request-to-Modify-the-Procedural-Calendar-set-Forth-in-the-Resolution-and-Order-of-December-22-2021-NEPR-AP-2020-0025.pdf>.

to file a timely Motion for Reconsideration, as it has requested Reconsiderations in other cases before PREB.<sup>21</sup> Moreover, LUMA has expressly recognized that this proceeding is being conducted under Regulation 9137.<sup>22</sup> Under the deadline in that regulation, LUMA's Motion was more than a month **late**. PREB is prevented from considering this motion because it was filed outside of the deadline set by regulation and statute.

Furthermore, LUMA's filing of an out-of-time Motion for Reconsideration offers no justification, this can be considered as carelessness or more specifically what the Supreme Court of Puerto Rico has labeled "laches". The Supreme Court has clearly expressed that a party that feel wronged "should inquire about their rights." *Garcia v. A.D.T.*, 108 DPR 53, 59 (1978). Meaning that they cannot let an excessive amount of time pass and then file a motion for Reconsideration. The doctrine of laches

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<sup>21</sup> *See*: Motion for Partial Reconsideration of Resolution and Order of April 8, 2021, Motion Submitting Information in Support Thereof, and Requests for Clarifications, In Re: The Performance of the Puerto Rico Electric Power Authority, NEPR-MI-2019-0007, Apr. 28, 2021, <https://energia.pr.gov/wp-content/uploads/sites/7/2021/04/Motion-for-Partial-Reconsideration-of-Resolution-and-Order-of-April-8-2021-Motion-Submitting-Information-in-Support-Thereof-and-Request-for-Clarifications-NEPR-MI-2019-0007.pdf>.

*See also*: Motion for Clarifications and/or Partial Reconsideration of resolution and Order of May 21, 2021, In Re: The Performance of the Puerto Rico Electric Power Authority, NEPR-MI-2019-0007, June 16, 2021, <https://energia.pr.gov/wp-content/uploads/sites/7/2021/06/Motion-for-Clarifications-and-or-Partial-Reconsideration-of-Resolution-and-Order-of-May-212021-NEPR-MI-2019-0007.pdf>.

<sup>22</sup> "Given the interrelation that the Energy Bureau *motu proprio* established between this "MI" proceeding and LUMA's Performance Metrics Targets proceeding, Case No. NEPR- AP-2020-00025 which is adjudicative in nature and conducted pursuant to Bureau Regulation 9137, *Regulation for Performance Incentive Mechanisms* ("Regulation No. 9137"), LUMA appreciates the opportunity to request clarification and/or reconsideration for the May 21<sup>st</sup> Resolution and Order." Motion for Partial Reconsideration of Resolution and Order of April 8, 2021, Motion Submitting Information in Support Thereof, and Requests for Clarifications, at 6, In Re: The Performance of the Puerto Rico Electric Power Authority, NEPR-MI-2019-0007, Apr. 28, 2021, <https://energia.pr.gov/wp-content/uploads/sites/7/2021/04/Motion-for-Partial-Reconsideration-of-Resolution-and-Order-of-April-8-2021-Motion-Submitting-Information-in-Support-Thereof-and-Request-for-Clarifications-NEPR-MI-2019-0007.pdf>.

applies upon evaluation of (1) justification; (2) delay incurred; (3) damage caused; and (4) effect on private or public interests. *Colon Torres v. AAA*, 143 DPR 119, 125 (1997) citing *Rivera v. Depto. De Servicios Sociales*, 132 DPR 240, 247 (1993) and *Garcia v. A.D.T*, 108 DPR 53 (1978). LUMA has failed to provide any justification for the delay incurred which as mentioned earlier, exceeds a month since PREB notified its December 22 Resolution and Order.

## V. CONCLUSION

LUMA's February 17<sup>th</sup> filing attempts to set a dangerous precedent which undermines PREB's authority to establish metrics as granted by acts 57-2019 and 17-2019 and encourages parties to disregard the procedures set by the LPAU. Considering the information discussed above LECO respectfully requests that the PREB deny the relief requested in LUMA's February 17<sup>th</sup> filing and move forward with consideration of Performance Incentive Mechanisms for (i) Interconnection of Distributed Energy Resources; (ii) Energy Efficiency and Demand Response; and (iii) Vegetation Management.

Respectfully submitted. In San Juan Puerto Rico, March 14, 2022.

/s/ Laura Arroyo

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## CERTIFICATION OF SERVICE

I hereby certify that on March 14, 2022, I served this Response to the following parties:

- Puerto Rico Energy Bureau: secretaria@energia.pr.gov; secretaria@jrsp.pr.gov; legal@jrsp.pr.gov and atorres@jrsp.pr.gov
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