

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

NEPR Received: Mar 24, 2022 11:39 PM

IN RE:

THE PERFORMANCE TARGETS FOR
LUMA ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

**SUBJECT: Reply to Response to LUMA's Motion to
Strike Portions of Expert Testimony of José Alameda**

**REPLY TO RESPONSE TO LUMA'S
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:

I. Background

1. On November 17, 2021, intervenor *Local and Civil Environmental Organizations* (“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 February 17, 2022, LUMA filed a *Motion to Strike Portions of the Expert Testimony of José Alameda-Lozada* (“Motion to Strike”). LUMA moved 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, as 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.” 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 outside the scope of his testimony and area of expertise on Economics.

3. As explained in the Motion to Strike, Mr. Alameda opined in very broad terms on Pass-Through and Operational Expenditures under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement ("T&D OMA"), on operational expenditures under the T&D OMA and 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. However, Pass-Through 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. Moreover, in his testimony, Mr. Alameda did not lay the foundation to offer an opinion on Pass-Through expenditures, labor protections, and employee benefits under the T&D OMA.

4. Given that 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 ("Regulation 8543"), states that 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 requested that the Energy Bureau apply the principles and rules set forth in Rules of Evidence 403, 702, and 703. Specifically, LUMA moved this Energy Bureau to rule 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 the T&D OMA is one-sided or not; the T&D OMA Pass-Through

Expenditures and limits on LUMA's operational expenditures; and whether the T&D OMA eliminated labor protections or compensation. LUMA established that 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, on page 22, lines 446-457.

5. On March 9, 2022, LECO filed a *Response to LUMA's Motion to Strike Portions of Expert Testimony of José Alameda* ("Response to Motion to Strike"). LECO argued that LUMA's motion failed because it is based on the Puerto Rico Rules of Evidence rather than Regulation No. 8543, which lays out the standards governing this Energy Bureau's adjudicative proceeding. LECO alleged without any developed argumentation or reference to regulatory principles, that any policy consideration present in the Puerto Rico Rules of Evidence is absent in a proceeding before the Energy Bureau.

6. In the Response to Motion to Strike, LECO also argued that Mr. Alameda may rely on publications or comments by certain labor and non-profit organizations that he has not authored to support his claims on page 21 of his pre-filed testimony. *See* Response to Motion to Strike at page 3. In footnote 7, LECO clarified that Mr. Alameda may speak on behalf of UTIER as his client. Furthermore, LECO stated in a conclusory fashion, that Mr. Alameda is "more than qualified to testify on the economic effects of LUMA's contract provisions regarding operating expenditures and labor, because he has decades of experience observing and writing about such economic effects." *Id.* at page 6.

7. LUMA hereby respectfully replies to several of LECO's incorrect contentions and requests that this Energy Bureau disregard and strike from the record several statements included in the Response to Motion to Strike that improperly add references to sources not quoted by Mr.

Alameda in his pre-filed direct testimony and that amount to an attempt to belatedly and through counsel for LECO, amend and supplement the testimony of Mr. Alameda.

II. Discussion

8. This Energy Bureau should reject LECO's misguided argument regarding an impediment to apply evidentiary rules and principles to guide the admissibility of expert testimony in this administrative proceeding. LECO errs in suggesting that expert testimonies in adjudicative proceedings do not need to meet settled thresholds and accepted evidentiary principles to qualify the expert and to render his testimony admissible.

9. As LUMA established in the Motion to Strike, Section 2.01 of Regulation 8543 allows the Energy Bureau to consider evidentiary rules and principles in assessing the admissibility of expert testimony. This is also consistent with Section 3.13(e) of the Administrative Procedure Act of the Government of Puerto Rico ("LPAU" by its Spanish acronym), 3 PR Laws Annot §9653 (2021), which states that administrative agencies may apply evidentiary principles. Importantly, LECO ignores prior decisions by the Puerto Rico Court of Appeals that have applied Rules of Evidence regarding expert testimony in the context of administrative adjudicative proceedings. *See Basmeson Díaz v. Casas Mi Edén*, KLRA 201999339, 2020 WL 4499456 (TA March 13, 2020); *Arroyo Berríos v. Berríos Rodríguez*, KLRA200901153, 2011 WL7396171 at *15-16 (TA Dec. 23, 2011); *Iguina Pérez v. Applied Development Corp.*, KLRA 2007-00022, 2007 WL 4774664, at *5 (TA Nov. 28, 2007). Considerations of justice counsel in favor of using settled and proven principles and rules of evidence to, for the reasons set forth on LUMA's Motion to Strike, strike portions of the testimony of Mr. Alameda.

10. As explained in the Motion to Strike, Mr. Alameda and LECO did not establish that Mr. Alameda possesses specialized knowledge, skills, experience, training or instruction to allow

him to be qualified as an expert on the T&D OMA, Pass-Through Expenditures under the T&D OMA and their connection to 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. Thus, either applying the relevant Rules of Evidence that serve important gatekeeping functions before admitting expert testimony, or considering the general principles set forth in those rules to ensure fairness in admitting and considering expert testimony, this honorable Energy Bureau should strike Mr. Alameda's testimony on page 21, lines 21-26; page 22, lines 1-2 and 12-14 and page 23, lines 1-7.

11. LECO's proposition that this Energy Bureau should not consider relevant provisions of the Rules of Evidence would be tantamount to conducting an adjudicative process where any witness could claim to be an expert on a myriad of topics and provide opinion testimony, without need to establish that he/she is qualified to provide opinion testimony on particular subject matters nor providing sufficient information to support those opinions.

12. Although LECO opposes that this Energy Bureau consider settled evidentiary rules and principles to rule on the admissibility of an expert testimony, it did not include any principled legal argumentation that could even suggest that application of Rules 403, 702 and 703 of Evidence or the principles embodied in those rules, is incompatible with the nature of this adjudicative proceeding where LECO decided to request that this Energy Bureau qualify Mr. Alameda as an expert witness. LECO cannot purport to request to submit expert testimony while at the same time deprive the Energy Bureau of its discretion to ensure that the proposed expert complies with bedrock principles applicable to expert testimonies. Those bedrock principles are enshrined in the

Rules of Evidence and should be considered in this proceeding to ensure an expedient, just and economical resolution of this proceeding. *See* Section 3.13(e) of the LPAU, 3 PR Laws Annot §9653.

13. While LECO quarrels with the application of evidentiary rules and principles on expert testimony to gauge the admissibility of portions of the testimony of Mr. Alameda, it also acknowledges *de facto*, that the very same principles that LUMA invoked in the Motion to Strike, apply to this proceeding. To wit, in the Response to Motion to Strike, LECO attempts to argue that Mr. Alameda possesses sufficient expertise to render the expert opinion testimony that LUMA has argued should be stricken from the record. Thus, LECO's Response to Motion to Strike validates LUMA's position that Mr. Alameda's expert testimony is subject to evidentiary rules and principles which state that an expert must provide sufficient basis on his particular knowledge, skill, experience, training, or education to qualify him as an expert to provide opinion testimony on particular subject matters and that the expert must possess said knowledge, skill, experience, training, or education to render admissible his testimony as an expert witness.

14. Next, in the Response to Motion to Strike, LECO stated in a conclusory fashion, that Mr. Alameda is "more than qualified to testify on the economic effects of LUMA's contract provisions regarding operating expenditures and labor, because he has decades of experience observing and writing about such economic effects." *Id.* at page 6. As examples, of Mr. Alameda's experience, LECO mentioned a paper that Mr. Alameda published for UTIER evaluating the possible impacts of a reduction in a union member's marginal benefits and an analysis published in 2018 on the privatization of the Puerto Rico electric grid. *Id.* Those publications do not establish that Mr. Alameda has particular knowledge on whether the T&D OMA is a one-sided contract, 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.

15. LECO claims generally that Mr. Alameda may opine on the financial effects of the T&D OMA. However, that is not the operative question; the question is whether Mr. Alameda's opinions on the aforementioned topics that pertain to the T&D OMA are admissible. The answer is no. Although counsel for LECO tried in the Response to Motion to Strike to couch Mr. Alameda's opinions on pages 21 and 22 of his pre-filed testimony as involving the financial effects of the T&D OMA, that is not what Mr. Alameda testified. Rather, he issued conclusory opinions on the T&D OMA being one-sided, construing Pass-Through Expenses and labor protections in the T&D OMA. Those opinions do not involve the economic effects of the T&D OMA.

16. In its Response to Motion to Strike, LECO improperly referenced materials that **are not cited in the testimony of Mr. Alameda** and included arguments and statements that Mr. Alameda did not expound in his sworn testimony. Those portions of the Response to the Motion to Strike should not be considered and must be excluded from the record.

17. On page 6, footnotes 3, 5 and 6, LECO references publications with statements by several organizations. These include statements by Unión de Trabajadores la Industria Eléctrica y Riego de Puerto Rico (UTIER), Colegio de Ingenieros y Agrimensores y Centro para la Nueva Economía. According to LECO, Mr. Alameda "mentioned or cited" those statements in his testimony. **That is incorrect.** In his pre-filed testimony, Mr. Alameda did not mention or cite the articles and publications that LECO references on page 6, footnotes 3, 5, and 6 of the Response to Motion to Strike. Additionally, even if Mr. Alameda relied on those publications as a basis for his testimony, the publications themselves are not automatically admissible to prove the veracity of the statements contained therein, as they constitute hearsay, this Energy Bureau would first need to

assess the grounds to admit the evidence and its reliability, and LECO has not established that it is the type of evidence that a prudent and reasonable person would rely on in connection with the subject matter. *See Otero v. Toyota*, 163 DPR 716, 734 (2005) (stating that administrative agencies may rely on hearsay evidence, even it is contradicted by other evidence, if the hearsay evidence is the type of evidence upon which a prudent and reasonable person relies on to conduct his/her business activities); *Espada López v. Braulio Agosto Motors LLC*, KLRA 20150806, 2015 WL 96888119 (TA Nov. 6, 2015) (stating that in connection with hearsay evidence, an administrative agency should evaluate the grounds for admissibility, its probative value and its reliability); see *also UPR v. Laborde*, 180 DPR 253, 279 (2010) (stating that as a general rule, newspaper articles are not admissible to prove the veracity of what is stated therein because they are hearsay evidence). Thus, this Energy Bureau should disregard those portions of LECO's Response to Motion to Strike that quote articles and publications that Mr. Alameda did not reference in his testimony and deem that the articles cannot be considered in assessing the admissibility of Mr. Alameda's testimony on page 21, lines 21-26; page 22, lines 1-2; page 22, lines 12-15; and page 23, lines 1-7. This Energy Bureau should also conclude that mere mention of articles and publications by a witness or by LECO in a motion, does not render admissible the articles to establish the veracity of the statements included therein.

18. Similarly, this Energy Bureau should disregard the arguments included on pages 5 and 6 of the Response to Motion to Strike, that are plagued with legal argumentation without basis on the pre-filed testimony of Mr. Alameda. These are statements regarding LUMA's workforce, an alleged decline in service and an alleged reduction in employment protections.¹ Those

¹ Particularly, this Energy Bureau should disregard the following statements by LECO in the Response to Motion to Strike:

statements and the supporting sources cited therein, constitute mere arguments by counsel for LECO that are not included in the pre-filed testimony of Mr. Alameda. Thus, they cannot be considered in connection with the question on the admissibility of portions of the testimony of Mr. Alameda.

19. This Energy Bureau should similarly strike from the record and disregard LECO's reference to a response to a discovery request that was issued by another witness, Mr. Agustín Irizarry, LUMA-LECO-IRIZARRY-ROI-01-59, and which discovery response and the information included therein, were not cited in the pre-filed testimony of Mr. Alameda.

20. LECO has improperly attempted to introduce additional argumentation and evidence that it neglected to introduce timely through the testimony of Mr. Alameda. A procedural motion signed by counsel such as LECO's Response to Motion to Strike, is not a proper nor opportune conduit to introduce arguments or evidence that Mr. Alameda did not include specifically in the pre-filed testimony that he submitted under oath.

21. Furthermore, in the Response to Motion to Strike, LECO did not address, much less refute, LUMA's argument that the opinions stated 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 of his pre-filed testimony are outside the scope of Mr. Alameda's testimony which, as Mr. Alameda stated on page 5, lines 6-19 of his pre-filed testimony, is "to evaluate the possibilities of different scenarios or models of rewards and

LUMA's workforce lacks the required number of personnel and the necessary experience to operate the T&D system reliably, due to the company's decisions not to honor the collective bargaining agreement and to cut employee benefits from its budget. LECO's response to LUMA-LECO-IRIZARRY-ROI-01-59 includes numerous news articles describing the decline in service since LUMA's takeover.¹³ As those articles explain, LUMA's unilateral cost-cutting measures to eliminate labor protections affect LUMA's budget, the safety of LUMA's workers, the safety of the public, and the reliability of the grid. All of those issues are directly relevant to metrics and Performance Incentive Mechanisms being discussed in this proceeding.

In sum, LUMA's operating expenditures and LUMA's cuts in budgeting for labor protections are both relevant to this proceeding

penalties to be established by the Puerto Rico Energy Bureau (“PREB”) based on LUMA’s performance.”

22. Finally, in footnote 7 of the Response to Motion to Strike footnote, LECO states that Mr. Alameda may speak on behalf of UTIER and describes UTIER as being a client of Mr. Alameda. That explanation by LECO is contrary to what Mr. Alameda stated in his pre-filed testimony: that he is an expert for LECO, an organization or coalition of several organizations.

WHEREFORE, LUMA respectfully reiterates its request 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 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.org, rmurthy@earthjustice.org.

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



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