

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

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**IN RE:**

THE PERFORMANCE TARGETS FOR  
LUMA ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

**SUBJECT: Motion to Strike Portion of Supplemental  
Expert Testimony of Agustín Irizarry-Rivera**

**MOTION TO STRIKE PORTION OF THE SUPPLEMENTAL EXPERT TESTIMONY  
OF AGUSTÍN IRIZARRY-RIVERA**

**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 December 22, 2021, the Puerto Rico Energy Bureau (“Energy Bureau”) issued a Resolution and Order determining that additional performance metrics should be evaluated in further detail for potential inclusion in this proceeding. The additional performance metric areas to be examined were Interconnection, Energy Efficiency/Demand Response, and Vegetation Management (“December 22<sup>nd</sup> Order”). In addition, the Energy Bureau amended the procedural calendar to incorporate a timeframe to allow intervenors to submit supplemental testimonies limited to matters related to Interconnection, Energy Efficiency/Demand Response, and Vegetation Management.

2. On January 14, 2022, the Energy Bureau issued a Resolution and Order amending the procedural calendar in this instant proceeding (“January 14<sup>th</sup> Resolution and Order”). It granted intervenors until March 22, 2022, to submit supplemental written testimonies limited to the additional performance metrics. The Energy Bureau also ordered LUMA to submit its witnesses’

supplemental rebuttal testimonies on the additional performance metrics on or before April 27, 2022.

3. LUMA objected to the Honorable Bureau’s determination to include additional metrics through a motion filed on February 17, 2022. Through its objection, LUMA established that the inclusion of new metrics runs contrary to the scope of this proceeding which is defined by the revised Annex IX to the T&D OMA. LUMA further established that including the new metrics at a stage of the proceeding —where discovery had already concluded— is contrary to its right to due process as defined by the Puerto Rico Uniform Administrative Procedure Act, 3 PR Laws Annot. sec. 9641, and applicable regulations. *See*, Article II of the *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Procedures* of Regulation No. 8543 dated December 18, 2014. LUMA’s Objection is pending this honorable Bureau’s consideration.

4. On March 22, 2022, the Local Environmental and Civil Organizations (“LECO”) filed a *Motion to Submit Expert Testimony* whereby it submitted the supplemental testimony of Mr. Agustín Irizarry-Rivera.

5. As part of his pre-filed supplemental testimony, Mr. Irizarry summarizes his testimony’s scope and findings in connection with the present case. Regarding the scope of his testimony, Mr. Irizarry testified that he was asked “to assess the three additional categories of metrics that the Puerto Rico Energy Bureau (“PREB” or “Energy Bureau”) has set forth in this proceeding: interconnection of distributed solar & storage, energy efficiency & demand response, and vegetation management.” *See* Irizarry testimony on page 2, lines 19-24.

6. LUMA moves to strike portions of the testimony of Mr. Irizarry that exceed the scope of his testimony as defined by him on page 2, lines 19-24 of the pre-filed supplemental

testimony as impertinent pursuant to Rules 401 and 402 of Evidence. Moreover, the testimony should also be excluded under Rules 403, 702, and 703 of Evidence.<sup>1</sup>

7. Rule 402 of Evidence establishes the general principle that evidence lacking pertinence is inadmissible. Pertinent evidence is defined by Rule 401 as that which tends to make the existence of a material fact more or less probable. 32 PR Laws Annot. Ap. VI, R. 703 (translation provided).

8. 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 P.R. Laws Annot. Ap. VI, R. 703 (translation provided) (emphasis added).

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

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<sup>1</sup> 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.

confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. 32 PR Laws Annot. Ap. VI, R. 403.

10. 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 P.R. Laws Annot. Ap. VI. (translation ours) (emphasis added).

11. Therefore, pursuant to the Rules of Evidence, the Energy Bureau has the 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 P.R. Laws Ann. Ap. VI.

12. Despite establishing that the scope of his testimony would be limited to the "interconnection of distributed solar & storage, energy efficiency & demand response, and vegetation management," Mr. Irizarry testified about other matters outside the scope of his testimony and the December 22<sup>nd</sup> Order. On page 12, lines 1-11, Mr. Irizarry included a statement recommending the Energy Bureau set metrics on customers' access to information. Specifically, he proposed metrics on the number of customers able to access daily and hourly usage data and the percent of customers with access to hourly or sub-hourly usage data. Mr. Irizarry claims that

customers with information about energy usage can take advantage of demand response but provides no objective basis or reference to information that can reasonably be linked to his assertion. This response should be stricken from the record for several reasons.

13. First, Irizarry's statement clearly falls outside the scope of the December 22<sup>nd</sup> Order and the matters under consideration in the instant case. It should be noted that, on the December 22<sup>nd</sup> Order, the Energy Bureau limited any supplemental testimony to be filed by intervenors on the additional metric areas to be evaluated for further consideration, namely Interconnection, Energy Efficiency/Demand Response, and Vegetation Management. Mr. Irizarry's proposed new metric runs afoul of the December 22<sup>nd</sup> Order by failing to be circumscribed to those metrics and is, therefore, outside the scope of this proceeding. The foregoing is sufficient to strike it from the record as impertinent pursuant to Rules 401 and 402 of Evidence.

14. Mr. Irizarry attempts to establish a relationship between that additional metric and demand response. However, Mr. Irizarry fails to provide any basis to demonstrate that such a metric offers anything other than an additional and redundant input into the Energy Efficiency/Demand Response performance metric area. He also fails to provide the objective basis of support to establish the relationship between that additional metric and demand response.

15. Moreover, Mr. Irizarry had the opportunity to propound this new metric when he submitted his pre-filed direct testimony. However, he opted not to do so and now attempts to amend his direct pre-filed testimony via this supplemental testimony. LUMA contends that Mr. Irizarry's proposal for a new metric is not only impertinent to the issues to be addressed as required by the Energy Bureau's December 22<sup>nd</sup> Order, but causes unnecessary delay in the proceedings

and constitutes an unnecessary introduction of cumulative evidence. Therefore, it should be stricken for being substantively and procedurally inappropriate.

16. Second, in his testimony, Mr. Irizarry did not lay the foundation to offer an opinion on establishing an additional metric on customers' access to information. Mr. Irizarry does not offer the data or publication that form the basis for such a recommendation. Thus, he has deprived this forum of the objective basis by which his proposal could be adequately considered and its reliability assessed. That is, Mr. Irizarry's opinion on the metric of customers' access to information lacks a foundational basis and is not supported by research or data. This failure, in itself, is enough to serve as the basis to strike such testimony pursuant to Rules 403 and 702 of Evidence.

17. Moreover, Mr. Irizarry's supplemental testimony describes the metrics he proposes for Energy Efficiency/Demand Response and Vegetation Management and, only when about to close, includes the recommendation for a new metric to be considered by the Energy Bureau. In his discussion on Energy Efficiency/Demand Response, Mr. Irizarry does not advance any topic in relation to customers or customers' access to information. If such a metric were so interrelated to Energy Efficiency/Demand Response, it would be logical that its discussion was an integral part of those additional metrics to be evaluated.

18. Finally, not only is Mr. Irizarry's proposed new metric impertinent to the issues at hand, but its addition to the docket, at this stage, would be unduly prejudicial as it has not been the object of discovery on this proceeding up to this advanced stage, in which limited discovery has been authorized on three specific additional metrics. As such, it is untimely and threatens to delay the proceedings as it opens the door for further additional discovery to be conducted in relation thereto without a reasonable expectation that such discovery provides the Energy Bureau with

pertinent information to assist in making a final determination on setting LUMA's performance targets. The generality of the new metric set forth by Mr. Irizarry is, for the same reasons, prone to create confusion, as is it not based on any other factual basis or testimony that may establish its purpose.

19. In light of the foregoing, LUMA respectfully requests that this Energy Bureau strike the portion of Mr. Irizarry's supplemental testimony on page 12, lines 1-11.

**WHEREFORE**, LUMA respectfully requests that this Energy Bureau strike from the record page 12, lines 1-11 of Mr. Irizarry's supplemental 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](mailto:jmarrero@diazvaz.law); and Katuska Bolaños-Lugo, [kbolanos@diazvaz.law](mailto:kbolanos@diazvaz.law), the Office of the Independent Consumer Protection Office, Hannia Rivera Diaz, [hrivera@jrsp.pr.gov](mailto:hrivera@jrsp.pr.gov), and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy ("ICSE"), Fernando Agrait, [agraitfe@agraitlawpr.com](mailto:agraitfe@agraitlawpr.com), counsel for the Colegio de Ingenieros y Agrimensores de Puerto Rico ("CIAPR"), Rhonda Castillo, [rhoncat@netscape.net](mailto: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](mailto:larroyo@earthjustice.org), [lvelez@earthjustice.org](mailto:lvelez@earthjustice.org), [rmurthy@earthjustice.org](mailto:rmurthy@earthjustice.org), [rstgo2@gmail.com](mailto:rstgo2@gmail.com), [notificaciones@bufete-emmanuelli.com](mailto:notificaciones@bufete-emmanuelli.com), [pedrosaade5@gmail.com](mailto:pedrosaade5@gmail.com), [jessica@bufete-emmanuelli.com](mailto:jessica@bufete-emmanuelli.com); [rolando@bufete-emmanuelli.com](mailto:rolando@bufete-emmanuelli.com).

In San Juan, Puerto Rico, this 11<sup>th</sup> day of May, 2022.



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