

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

NEPR

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IN RE: PERFORMANCE TARGETS FOR
LUMA ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

SUBJECT: LUMA'S MOTION TO
STRIKE PORTION OF EXPERT
TESTIMONY OF AGUSTÍN
IRIZARRY-RIVERA.

**RESPONSE TO LUMA'S MOTION TO STRIKE PORTION OF THE EXPERT
TESTIMONY OF AGUSTÍN IRIZARRY-RIVERA.**

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"), to
respectfully request that the Energy Bureau deny LUMA's *Motion to Strike Portions
of the Expert Testimony of Agustín Irizarry-Rivera*. In support of the request, LECO
states as follows:

On November 16, 2021, LECO filed the Direct Testimony of Dr. Agustín
Irizarry-Rivera. That Direct Testimony included extensive discussion of energy

efficiency within the context of a performance-based mechanism to be imposed on LUMA.¹

On December 23, 2021, the Energy Bureau issued a Resolution and Order stating that three additional areas must be evaluated in further detail, with regard to performance incentive metric targets for LUMA: energy efficiency, demand response, and vegetation management. LECO notes that LUMA's motion mischaracterizes this Order, falsely claiming that it was limited to "three specific additional metrics".² Rather, the December 23rd Order authorized evaluation of three **areas** for additional metrics. LUMA's Motion to Strike is fundamentally flawed by LUMA's misrepresentation of the directives in the December 23rd Order.

On March 22, 2022, intervenor LECO filed *Supplemental Expert Testimony from Dr. Agustin Irizarry-Rivera*, with Dr. Irizarry's recommendations for additional metrics in the three categories set forth by PREB. On May 11, 2022, LUMA filed a *Motion to Strike Portion of the Expert Testimony of Agustin Irizarry-Rivera*. LUMA's motion concerns Dr. Irizarry's response to the question: "Do you also recommend that PREB set metrics on customers' access to information?"³

¹ LECO's Motion to Submit Expert Testimony, Irizarry's Testimony, at pp. 3, 14, 15, 20, 21, 23, 26, 36, 37, 43, 44, *In Re: Performance Targets for LUMA Energy Servco, LLC*, NER-AP-2020-0025, <https://energia.pr.gov/wp-content/uploads/sites/7/2021/11/Motion-to-Submit-Expert-Testimony-NEPR-AP-2020-0025.pdf>. November 17, 2021

² LUMA's Motion to Strike Portion of the Supplemental Expert Testimony of Agustín Irizarry- Rivera, at para. 18, *In Re: Performance Targets for LUMA Energy Servco, LLC*, NER-AP-2020-0025, May 11, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/05/Motion-to-Strike-Portion-of-the-Supplemental-Expert-Testimony-of-Agustin-Irizarry-Rivera-NEPR-AP-2020-0025.pdf>.

³ LECO's Motion to Submit Expert Testimony, Irizarry Supplemental Testimony, at p.21, of Supplemental Testimony, *In Re: Performance Targets for LUMA Energy Servco, LLC*, NER-AP-2020-0025, March 22, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/03/Motion-to-Submit-Expert-Testimony-Dr.-Agustin-Irizarry-NEPR-AP-2020-0025.pdf>, [Hereinafter, "Irizarry's Testimony"].

None of the reasons that LUMA presents to strike parts of Dr. Irizarry's answer are valid. As detailed further below, Dr. Irizarry is well qualified to answer the question, from the perspective of an engineer with decades of experience observing and overseeing Puerto Rico's electric grid. As noted in his November 16, 2021, Direct Testimony, Dr. Irizarry has served as a consultant on energy efficiency projects for Puerto Rico municipalities and for Energy Bureau proceedings.⁴ Because of his expertise in energy efficiency, Dr. Irizarry is well aware of the connection between customer access to information and energy efficiency, which is widely recognized throughout the energy industry. This is the foundational basis and the support for Dr. Irizarry's recommendation on this point. As detailed below, both the Puerto Rico Legislature and the Energy Bureau have also recognized the critical role of customer access to information in energy efficiency programs. PREB must allow the full answer into the record and require LUMA to take all steps necessary to

⁴ See Dr. Irizarry's CV, attached to his Direct Testimony: (03/20 – 05/21) Consultant – Engineering services. Define and study scenarios prioritizing energy efficiency and distributed sustainable energy sources, to be considered as alternatives to the plan of action proposed by PREPA in the Integrated Resource Plan (IRP). Guide and support other consultants in the execution of this study for CAMBIO PR Inc.

(07/15 – 12/16) Consultant - Engineering services (assist in the definition of projects, pre-design, drafting of "Request for Proposals", evaluation of proposals and definition of performance criteria) in energy efficiency and photovoltaic systems, Municipio Autónomo de Bayamón.

A.A. Irizarry-Rivera. "Intelligent Power Routers for Distributed Coordination in Electric Energy Processing Networks: First Year Progress Report", Electric Power Networks Efficiency and Security (EPNES) Workshop, sponsored by the National Science Foundation (NSF), Orlando, Florida, October 23-24, 2003.

A.A. Irizarry-Rivera. "Intelligent Power Routers for Distributed Coordination in Electric Energy Processing Networks: Second Year Progress Report", Electric Power Networks Efficiency and Security (EPNES) Workshop, sponsored by the National Science Foundation (NSF), Mayagüez, Puerto Rico, July 12-14, 2004.

maximize energy efficiency and demand response. This includes allowing customers with better access to information about their own energy usage.

Dr. Irizarry's answer first states that "...a critical aspect of energy efficiency and demand response is giving customers more information about their energy use. Customers with granular info about energy use are more able to identify energy inefficiency and times where they can take advantage of demand response."⁵ The connections among customer access to information, energy efficiency, and demand response are widely recognized throughout the energy industry. For example, please see the very first paragraphs of the 2015 Report on the Value of Customer Data Access, commissioned by the National Association of Regulatory Utility Commissioners:

Over the last decade, many utilities and customers have gained access to daily and hourly customer usage information because of advanced metering infrastructure (AMI). These data provide greater granularity on consumption and load curves, helping utilities to manage their operations better. Customers are empowered with unprecedented data connectivity. Customers can now better understand their energy consumption and review their usage patterns. **The proliferation of electricity usage information has opened new options for energy efficiency and demand response programs** and enabled residential customer services that were available only to large commercial or industrial customers previously. **Access to data allows customers to evaluate available options and make informed decisions, which in turn empowers them to embrace a new role as active and engaged market participants.**

Utilities benefit from information availability and evolving technologies. With access to customer data, many utilities have achieved significant cost reduction and operational benefits. These benefits stem

⁵ LECO's Motion to Submit Expert Testimony, Irizarry Supplemental Testimony, at p.12 of Supplemental Testimony, *In Re*: Performance Targets for LUMA Energy Servco, LLC, NER-AP-2020-0025, March 22, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/03/Motion-to-Submit-Expert-Testimony-Dr.-Agustin-Irizarry-NEPR-AP-2020-0025.pdf>.

from understanding customer consumption patterns, improving the accuracy of load curves to help meet capacity requirements efficiently, and continuing to leverage customer data to capitalize on operational improvements. Some examples of these benefits include reduced labor cost on meter operations, reduced costs due to theft of electricity, improvements in call center operations when handling high-bill inquiries or transferring services, improved programs to handle load capacity events, **and reduced costs in managing energy conservation programs.**⁶

The American Council for an Energy-Efficiency Economy also recognizes the key role of customer access to information in energy efficiency programs:

Accessible energy usage data can unlock energy savings in several ways. Easily accessible data can help residents and businesses achieve savings by better managing energy use in homes, large buildings, and entire communities.

...

When residents and building owners have easy, consistent access to interval data, they can take advantage of energy market price signals and better use energy management tools and technologies, increasing their opportunities for energy savings. ... Tools such as Green Button offer a consistent platform for delivering these data, although utilities might not implement Green Button without a directive from regulators.⁷

The ACEEE cites examples of customer access to information in Arizona, California, District of Columbia, Massachusetts, Minnesota, Illinois, and New York.⁸

LUMA's refusal to see the connection between customer access to information and energy efficiency casts doubt on LUMA's ability or willingness to properly run an energy efficiency program. As Dr. Irizarry testified, failures to maximize the benefits

⁶ National Association of Regulatory Utility Commissioners, Value of Customer Data Access: Market Trends, Challenges, and Opportunities, at pg. 5, NARUC, (April 2015), (emphasis added) <https://pubs.naruc.org/pub/536E2D7C-2354-D714-5129-435231D889E0>.

⁷ Energy Usage Data Access: A Getting-Started Guide for Regulators, ACEE, (February 16, 2017), <https://www.aceee.org/toolkit/2017/02/energy-usage-data-access-getting-started-guide-regulators>.

⁸ *Id.*

of the program should subject LUMA to penalties. The Legislature and the Energy Bureau **have** recognized the importance of customer access to information, and **both** made customer access to information a key factor to be implemented as part of a performance-based mechanism:

In developing such performance-based incentives and penalties, the Energy Bureau shall take into account the following criteria, among others: [...] (d) customers’ access to the electric power companies’ information systems including, but not limited to, public access to information about the aggregated customer energy and individual consumers’ access to the information about their electric power consumption; [...]⁹

Law 17-2019 Section 1.10(i) further emphasizes LUMA’s obligation to “provide documents and information as requested by the customers...” including “documents where such information is organized and shown so that it may be more easily handled and understood by persons without expertise in the disciplines addressed shall be published and made available to customers”. Through Section 1.10, the Puerto Rico Legislature requires LUMA to maintain a website which allows customers to “examine the consumption history [and] verify the usage pattern...” LUMA does not appear to be complying with these obligations. In his Rebuttal Testimony, LUMA witness Don Cortez acknowledged that LUMA was only providing customer energy use information on a monthly and quarterly basis – a far cry from the hourly and sub-

⁹ Puerto Rico Energy Public Policy Act, Act Num. 17-2019, 29 L.P.R.A added Art.6.25B to Act 57-2014.

See also PREB’s Regulation for Performance Incentive Mechanisms, S. 1.2, Num.9137, (Dec. 13, 2019), <https://energia.pr.gov/wp-content/uploads/sites/7/2020/02/9137-Regulation-for-Performance-Incentive-Mechanisms.pdf>.

hourly data that an energy efficiency program would need.¹⁰ In response to Discovery Question RFI-LUMA-AP-2020-0025-LECO-R5-10MAR22-035, LUMA acknowledged that neither the lumapr website nor the MiLUMA app has the capability to allow individual customers to download information on energy use or outages in their locations.

LUMA's failures on customer access to information are troubling because the Energy Bureau emphasized the connection between customer information and energy efficiency in the Proposed Regulation on Energy Efficiency, Case 2021-MI-2021-0005. See Section 4.06(C)(4), discussing "processes for sharing access to customer information necessary to support the operation of such programs." See also Section 7.01(D)(4) pointing out that access to customer data is necessary "for the effective operation of each vendor's EE program or programs or EM&V related to such programs..."

Dr. Irizarry's recommendation, then to incorporate customer access to information into a performance-based mechanism for LUMA on energy efficiency, has a foundational basis in, and is supported by, requirements for LUMA's performance-based mechanism imposed by the Legislature and the Energy Bureau. Dr. Irizarry's recommendation is further supported by and based on the widely recognized connection between customer access to information and energy efficiency – it is due

¹⁰ LUMA's Motion Submitting Additional Rebuttal Testimonies to the Honorable Puerto Rico Energy Bureau, at lines 564-566, *In Re: Performance Targets for LUMA Energy Servco, LLC*, NER-AP-2020-0025, Feb.17, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/02/Lumas-Motion-Submitting-Additional-Rebuttal-Testimonies-NEPR-AP-2020-0025.pdf>.

to this connection that the Energy Bureau has already incorporated customer access to information in its proposed Energy Efficiency Regulations. Dr. Irizarry sets forth two possible metrics to measure LUMA's performance on customer access to information:

- number of customers able to access daily and hourly usage data
- percent of customers with access to hourly or sub-hourly usage data¹¹

Dr. Irizarry is well qualified to discuss customer access to information, and the connection between customer information and energy efficiency, due his prior work in this area and his decades of experience analyzing Puerto Rico's energy grid.

In addition to the substantive reasons laid out above, LUMA's Motion fails procedurally because LUMA continues to ignore Regulation 8543, which lays out the standards that govern PREB adjudicative proceedings. Instead, LUMA continues to point to the Rules of Evidence, despite acknowledging (in a footnote) that under Regulation 8543, Chapter II, Article II, Section 2.01, those Rules do not apply to administrative proceedings such as these, with narrow exceptions where the agency exercises discretion and issues a supplemental order.¹² It is known that the rules of evidence are not to be strictly enforced in administrative proceedings. *Torres*

¹¹ LECO's Motion to Submit Expert Testimony, Irizarry Supplemental Testimony, at p.12 of Supplemental Testimony, *In Re: Performance Targets for LUMA Energy Servco, LLC*, NER-AP-2020-0025, March 22, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/03/Motion-to-Submit-Expert-Testimony-Dr.-Agustin-Irizarry-NEPR-AP-2020-0025.pdf>.

¹² LUMA's Motion to Strike Portion of the Supplemental Expert Testimony of Agustín Irizarry- Rivera, at p. 1, *In Re: Performance Targets for LUMA Energy Servco, LLC*, NER-AP-2020-0025, May 11, 2022, <https://energia.pr.gov/wp-content/uploads/sites/7/2022/05/Motion-to-Strike-Portion-of-the-Supplemental-Expert-Testimony-of-Agustin-Irizarry-Rivera-NEPR-AP-2020-0025.pdf>.

Santiago v Depto. Justicia, 181 DPR 969, 1005 (2011). The Supreme Court of Puerto Rico has recognized that “[t]he informal and flexible nature, which distinguishes administrative proceedings, allows the judge of facts to know all the pertinent information to elucidate the dispute before him...”, without the need to subject the process to the rigid molds of said rules...” *J.R.T. v. Aut. De Comunicaciones*, 110 DPR 879, 884 (1981). LECO’s March 9th Reply to LUMA’s Motion to Strike Portions of Expert Testimony of Jose Alameda set forth a detailed argument on this point, thus LECO will not restate said argument.

LUMA’s response to that reply pointed to three cases from the Puerto Rico Court of Appeals.¹³ All are distinguishable, for four reasons. First, LECO must note that these cases do not involve PREB or Regulation 8543, but rather the Department of Consumer Affairs and Regulation 8034. Second, all three cases analyze whether a witness can be qualified as an expert pursuant to Rule 703 of Evidence.¹⁴ LUMA’s argument is based mostly on Rules 401, 402, 403, and 702 and only mentions Rule 703 in passing. Dr. Irizarry’s qualifications as an expert are beyond dispute, have not been challenged by LUMA or any other party, and are not at issue in the present case. Third, LECO must also note that none of these cases included any analysis on whether the Rules of Evidence were applicable, in their particular context or any other. Without knowing the underlying facts of the case, it cannot be assumed that these courts would support applying Rule of Evidence 703, or any other Rule of

¹⁴ *Iguina Pérez v. Applied Development Corp.*, KLRA2007-0002, 2007 WL4774664, (TA PR November 28, 2007) cites the old Rules of Evidence, but the controversy is the same.

Evidence in other contexts. Finally, all three cases mentioned by LUMA are judgements issued by the Puerto Rico Court of Appeals rather than the Supreme Court of Puerto Rico. The rule of law in Puerto Rico establishes that rulings from the Court of Appeals are only of a persuasive nature and are thus not binding to other courts or administrative forums.¹⁵ Only opinions issued by the Supreme Court of Puerto Rico can have a binding effect.

To the extent these cases are applicable here, they actually support LECO's position. *Iguina Pérez v. Applied Development Corp.*, KLRA2007-0002, 2007 WL4774664, at 5, (TA PR November 28, 2007) supports PREB's consideration of Dr. Irizarry's recommendation on customer access to information, as it clearly states that expert testimonies are presumed correct. This case also states that administrative forums have ample discretion in the appreciation of expert testimony and can even adopt their own criteria in the appreciation or evaluation of the same: which is precisely what PREB did through promulgation of Regulation 8543, the regulation which LUMA's motion ignores.¹⁶

Basmeson Diaz. V. Casas Mi Eden, Inc, KLRA201900330, 2020 WL4499456 at 25, (TA PR March 13, 2020), also supports PREB's consideration of Dr. Irizarry's recommendation on customer access to information. There, the court sustained the

¹⁵ See Rule 11(D), Rules of the Court of Appeals, *In Re Regulation of the Court of Appeals*, Resolution ER-2004-10, Approved July 21, 2004, as amended, 4 LPRA Ap. XXII-B) which states: "The judgments and resolutions of the Court of Appeals shall be substantiated, may be published and may be **cited with a persuasive character**." [Emphasis added].

¹⁶ *Iguina Pérez v. Applied Development Corp.*, KLRA2007-0002, 2007 WL4774664, at *5, (TA PR November 28, 2007)

agency's decision that an expert witness with engineering education but without a professional engineering license could testify as an engineering expert. By contrast, Dr. Irizarry is a professional engineer with decades of experience in this specific field, who has testified as an expert before this very Energy Bureau.

In sum, Dr. Irizarry's recommendation to implement metrics on customer access to information is well-supported by his expertise and experience, as well as recognition by the Puerto Rico Legislature and the Energy Bureau that customer access to information is closely connected to energy efficiency. The Energy Bureau should therefore deny LUMA's Motion to Strike.

[Signature block in next page]

Respectfully submitted. In San Juan Puerto Rico, May 23, 2022.

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CERTIFICATION OF SERVICE

I hereby certify that on May 23, 2022, I served this Response to the following parties:

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