

**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: Reply to the Response to LUMA's Motion to Strike Portion of Supplemental Expert Testimony of Agustín Irizarry-Rivera

**REPLY TO THE RESPONSE TO LUMA'S 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 22nd 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 14th 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, 2022.¹ Through its objection, LUMA established that the inclusion of new metrics runs contrary to the scope of this proceeding 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. 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 extent 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.

5. On May 11, 2022, LUMA filed a *Motion to Strike Portion of Supplemental Expert Testimony of Agustín Irizarry-Rivera* before the Energy Bureau. Therein, LUMA moved to strike portions of Mr. Irizarry's supplemental testimony that exceed the scope of his testimony as

¹ The arguments made in that motion are adopted herein.

impertinent pursuant to Rules 401 and 402 of Evidence. Moreover, the testimony warranted to be excluded under Rules 403, 702, and 703 of Evidence because Mr. Irizarry testified about other matters outside the scope of his testimony and the December 22nd Order, specifically proposing an additional metric at this advanced stage of the proceedings. Also, he failed to provide any basis to demonstrate that such an additional metric offers anything other than an additional and redundant input into the Energy Efficiency/Demand Response performance metric area. Further, Mr. Irizarry did not provide the source data or publication that form the basis of the recommendation of this new metric. Finally, adding a new metric at this stage would be unduly prejudicial as it has not been the object of discovery in this proceeding.

6. On May 23, 2022, LECO filed a *Response to LUMA's Motion to Strike Portion of Supplemental Expert Testimony of Agustín Irizarry-Rivera*. First, LECO avers that the Puerto Rico Rules of Evidence are not to be strictly enforced in administrative proceedings. Second, LECO claims that the connection between customer access to information, energy efficiency, and demand response is widely recognized throughout the energy industry. Finally, LECO alleges that Mr. Irizarry is qualified to testify on the additional metric that he now proposed.

7. LECO fails to counterargue the fact that Mr. Irizarry is proposing a new metric that is outside the scope of the December 22nd Order through his pre-filed supplemental testimony. Although the Puerto Rico Rules of Evidence (“Rules of Evidence”) are not to be strictly applied to administrative proceedings, Mr. Irizarry’s proposed new metric runs afoul of the December 22nd Order by failing to be circumscribed to the metrics ordered there and is, therefore, outside of the scope of this proceeding. The Energy Bureau does not need to enter a ruling under the Rules of Evidence to dictate that the proposed new metrics exceed the mandate of the December 22nd Order. It is sufficient for this Energy Bureau to determine that Mr. Irizarry’s proposed new metric through

the pre-filed supplemental testimony oversteps the mandate set forth by the Energy Bureau in the December 22nd Order and, consequently, to strike such testimony from the record of this proceeding.²

8. Additionally, and notwithstanding the above, the Rules of Evidence certainly provide an appropriate framework that might serve as guidance to the Energy Bureau upon deciding on the fairness of allowing the disputed testimony. Section 3.13(e) of the Puerto Rico Uniform Administrative Procedure Act, which governs adjudicative administrative proceedings, establishes that the fundamental principles of evidence may be used to achieve a speedy, fair, and economical resolution of the proceeding. 3 LPRA § 9653(e). The aforementioned provision is compatible with the norm that the goal of all adjudicative proceedings, whether judicial or administrative, is the search for truth and justice for the parties. *Pérez Rodríguez v. P.R. Park Systems, Inc.*, 119 DPR 634 (1987). As such, the Energy Bureau can adopt fundamental principles of evidence, such as the necessity that the evidence presented is pertinent to the controversy at issue and require that the testimony is based on reliable data or research in the discharge of its adjudicative prerogatives.

9. As discussed previously, on the December 22nd 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. However, Mr. Irizarry proposed new 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. Even though Mr. Irizarry attempts to establish a relationship between those

²Section 2.01 of Regulation 8543 of this Energy Bureau —which regulates the current proceeding— specifically provides for the applicability of the Rules of Evidence by this Energy Bureau. Further, Article VIII (Discovery) contemplates the disclosure of the production of pertinent evidence such as the basis of an expert opinion.

additional metrics and demand response, his proposal is in evident contradiction with the limited directive of the December 22nd Order. In addition, Mr. Irizarry once again failed to escape the fact that he did not provide the objective basis to establish the relationship between that additional metric and demand response and/or energy efficiency when he submitted his supplemental testimony.

10. For example, Mr. Irizarry did not lay the foundation to offer an opinion on establishing an additional metric on customers' access to information. When Mr. Irizarry submitted his supplemental testimony, he did not provide the data or publication that formed the basis for such a recommendation. Nor did Mr. Irizarry explain how his contended expertise has qualified him to testify on this additional metric. Therefore, Mr. Irizarry's opinion on the metric of customers' access to information lacks a foundational basis and is not supported by research or data. It is a general principle of evidence that the probative value of the expert witness' testimony depends, among others, on whether the testimony is based on sufficient facts or information. *S.L.G. v. Mini-Warehouse*, 179 DPR 322 (2010). Also, it is a common principle that the special knowledge, skill, experience, training, or instruction of a person who is an expert witness may be proved by any admissible evidence, including his own testimony. *Dye-Tex Puerto Rico, Inc. v. Royal Ins. Co. of Puerto Rico, Inc.*, 150 DPR 658 (2000). As such, Mr. Irizarry's testimony on the metric of customers' access to information lacks probative value since it is short of facts and information that support the metric. Moreover, Mr. Irizarry's special knowledge or experience on the metric of customers' access to information is missing from his testimony, barring him from being qualified as an expert on the proposed metric.

11. Now, through the *Response to LUMA's Motion to Strike Portion of Supplemental Expert Testimony of Agustín Irizarry-Rivera*, LECO's counsel tries to cure Mr. Irizarry's omission

by citing and discussing sources on the alleged connection between customer access to information, energy efficiency, and demand response. LECO is improperly seeking to enter evidence into the record and amend Mr. Irizarry's supplemental testimony through a motion signed by its counsel. LECO's attempt to overcome the deficiencies of Mr. Irizarry's testimony at this stage and through motion is an admission of the testimony's lack of adequate basis. It should be sufficient for this Energy Bureau to strike the portions of such testimony that make reference to an additional metric as contrary to the fair and equitable adjudication of this proceeding.³

12. Contrary to LECO's allegations, LUMA's reasons for requesting the Energy Bureau to strike a portion of Mr. Irizarry's supplemental testimony are unrelated to any inability or unwillingness to run an energy efficiency program properly. LUMA's reasons have already been discussed in detail before, primarily that Mr. Irizarry testified about other matters outside the scope of his testimony and the December 22nd Order. It is even more worrisome that Mr. Irizarry did not provide an independent, scientific, or technical basis or data to support the new metric he proposes at this late stage of the proceeding. LECO's argument is just an attempt to deflect Mr. Irizarry's supplemental testimony deficiencies.

13. While LECO tries to refute LUMA's contention that Mr. Irizarry did not provide any foundational basis for his proposed new metric, it does not succeed. LECO only seems to argue that Mr. Irizarry is well qualified to testify on this new metric due to his prior work in this area and decades of experience analyzing Puerto Rico's energy grid. However, the experience LECO cites from Mr. Irizarry's expertise does not reflect how that professional experience and

³ As an interested party in this proceeding, LUMA is entitled to a fair and equitable adjudication pursuant to the constitutional due process clause of the Constitution of the Commonwealth of Puerto Rico. *See*, Const. Art. 1, sec. 7. *See also*, *Torres v. Junta de Ingenieros*, 161 DPR 696, 713 (2004). The foregoing includes the right for the decision to be based on the record of the case. Section 3.1 of the Law of Administrative Procedure, Law 38-2017, 3 LPRA §9641.

publications directly correlate to the additional metric he is now proposing. For example, LECO does not point out which specific professional experience Mr. Irizarry has that can cure the lack of a foundational basis for his testimony. Despite Mr. Irizarry's testimony referencing his experience with Puerto Rico's electrical system, the lack of an objective basis on which to rest Mr. Irizarry's testimony makes it impossible for the Energy Bureau—or LUMA—to ascertain its validity as the basis to sustain Mr. Irizarry's contention. LECO's effort to bring forth an explanation for Mr. Irizarry's purported qualifications as a way to sustain his testimony is substantively not enough to sustain its admissibility into the record. The fact that LECO presents this sole argument as the basis for the admission of said testimony through a motion signed by counsel is simply tardy and improper.

14. Finally, LUMA reiterates that adding a new metric at this stage would be unduly prejudicial as it has not been the object of discovery in this proceeding. The introduction of a metric at such a late juncture is not only an effort to introduce evidence by surprise, whether by Mr. Irizarry's testimony or the information referenced in the LECO's Opposition but has deprived the Energy Bureau of the opportunity to evaluate the basis for Mr. Irizarry's opinion objectively, the reliability of the source material referenced, or if the analysis that led to Mr. Irizarry's conclusions are sound in the context of the proposed metric to be measured. Allowing the introduction of testimony in support of a new metric undermines LUMA's right to having a due process, which permeates every administrative adjudicative proceeding in our jurisdiction, including before the Energy Bureau.

WHEREFORE, LUMA respectfully requests and reiterates its petition that this Energy Bureau strike from the record on 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; 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, agrairfe@agrailawpr.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 Climatica, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalicion 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, lvez@earthjustice.org, rmurthy@earthjustice.org, rstgo2@gmail.com, notificaciones@bufete-emmanuelli.com, pedrosaade5@gmail.com., jessica@bufete-emmanuelli.com; rolando@bufete-emmanuelli.com.

In San Juan, Puerto Rico, on this 23rd day of June 2022.



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