

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: LECO'S REQUEST FOR
THE IMPOSITION OF PENALTIES
IN LUMA'S PERFORMANCE-
BASED MECHANISM

**LECO'S REPLY TO LUMA'S OPPOSITION TO LECO'S REQUEST FOR THE
IMPOSITION OF PENALTIES IN LUMA'S PERFORMANCE-BASED
MECHANISM**

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:

I. PREB has ample legal authority to impose penalties.

LUMA argues that "...the adoption of a penalty as part of an incentive
mechanism is discretionary."¹ LECO agrees - Law 17-2019, Regulation 9137, and
PREB's December 23rd, 2020, Order do give PREB discretion and authority to adopt

¹ LUMA's Opp'n to LECO's Mot. Requesting Imposition of Penalties in LUMA's Performance-Based Mechanism
11, June 23, 2022.

penalties where appropriate.² Having already acknowledged PREB’s authority and discretion to impose penalties, LUMA mischaracterizes Regulation 9137 Section 7.2(B)(2).³ That section allows PREB to penalize LUMA for violations of law, but LUMA ignores sections 7.2(B)(1) and 7.3(A)(2)(b), which clearly also allow penalties for performance-based failures, even when laws were not broken.

These laws and rules were all known to LUMA at the time it negotiated its contract – so when LUMA signed the T&D OMA, the company was well aware of the possibility that PREB would use its authority to include penalties as part of a Performance-Based Mechanism. If LUMA failed to “consider[] or contemplate[]” these penalties “during the initial contract negotiation”⁴, that is a problem of LUMA’s own making, and the cost cannot be imposed on Puerto Rican electricity customers.

II. PREB has ample factual basis to impose penalties.

When creating a performance-based mechanism for LUMA, PREB must of course considered LUMA’s performance to date. Since LUMA’s June 2021 takeover, Puerto Ricans have observed a marked increase in outages, and appliance damage from those outages.

A study by the Institute for Energy Economics and Financial Analysis carried out in August 2021, concluded that voltage fluctuations had increased within LUMA’s

² *Puerto Rico Energy Act*, Act 17-2019, 22 LPRA § 1141d.; 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>;

LUMA’s Opp’n to LECO’s Mot. Requesting Imposition of Penalties in LUMA’s Performance-Based Mechanism 5, June 23, 2022.

³ *Id.* at 11.

⁴ *Id.* at 13.

first two months.⁵ One citizen, “Ashlee Vega, who lives in northwestern Puerto Rico, said the power fluctuations this month were so imperceptible that it took her several hours to realize her appliances were not working right. The new refrigerator she had bought in February — to replace an old one that gave out after enduring years of volatile electrical surges — was fried.”⁶ The increase in voltage fluctuations is so palpable that it prompted the Senate of Puerto Rico to seek amendments to Act 57-2014 in order to allow the Independent Consumer’s Protection Office (ICPO), to file claims before LUMA on behalf of its clients, for possible damages to electro domestic appliances caused by voltage fluctuations.⁷ The Chamber of Representatives also filed a Measure requesting that LUMA to follow up on complaints filed by citizens who have lost electrical appliances due to the blackout of April 6th, 2022.⁸

⁵ Cathy Kunkel & Tom Sanzillo, Puerto Rico Grid Privatization Flaws Highlighted in First Two Months of Operation: LUMA contract has led to delays, damages, and poor services for Puerto Rico customers, Institute for Energy Economics and Financial Analysis, August 2021, https://ieefa.org/wp-content/uploads/2021/08/Puerto-Rico-Grid-Privatization-Flaws-Highlighted-in-First-Two-Months-of-Operation_August-2021.pdf; LECO’s Mot. to Submit Expert Test. Ll. 13,17,25, Nov. 17, 2021.

⁶ Patricia Mazzei, Why Don’t We Have Electricity?: Outages Plague Puerto Rico, N.Y. Times, (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/us/puerto-rico-electricity-protest.html>; *see also* Nicole Acevedo & Gabe Gutierrez, As Puerto Rico’s Power Crisis Worsens, Lawmakers Probing Outages seek Answers, CBS News, (Oct. 13, 2021), <https://www.nbcnews.com/news/latino/puerto-ricos-power-crisis-worsens-lawmakers-probing-outages-see-answe-rcna2920>.

⁷ P. del S. 0845 of April 18, 2022, 3rd Ord. Sess., 19th Leg. Assem.

⁸ Presentan resolución para seguir reclamos por enseres dañados por el apagón, Primera HORA, (Apr. 9, 2022, 3:47 PM), <https://www.primerahora.com/noticias/gobierno-politica/notas/presentan-resolucion-para-seguir-reclamos-por-enseres-danados-por-el-apagon/>; Legisladora invita a reclamar a LUMA por los enseres dañados por el apagón y se compromete a dar seguimiento, Univision Puerto Rico (Apr. 10, 2022, 10:34 AM), <https://www.univision.com/local/puerto-rico-wlii/como-reclamar-a-luma-por-enseres-danados-apagon>.

Last week, another substation problem in a substation operated by LUMA in Caguas caused outages for 42,000 customers.⁹ And just on July 12, two separate explosions at a LUMA substations in Jayuya and Santa Isabel caused more outages.¹⁰

LUMA urges PREB to ignore its performance to date and even asks for evidence of its failures to be “stricken from the record”¹¹, but PREB has already said that LUMA's ongoing performance is a factor to consider in designing the performance-based mechanism.¹² All of LUMA's performance failures are fair game in this proceeding.¹³

III. Any section of the T&D OMA that limits PREB's authority to impose penalties is illegal and can be considered null and void.

LUMA points to sections of the T&D OMA which it argues preclude penalties.¹⁴ If sections of the OMA improperly limit governmental authority, those sections are illegal and therefore null and void under the T&D OMA's Severability Clause. LUMA

⁹ Carlos Tolentino Rosario, LUMA Energy dice desconocer qué provocó la salida en cadena de 10 subestaciones en la región de Caguas, El Nuevo Día (Jul. 7, 2022, 8:25 AM), <https://www.elnuevodia.com/noticias/locales/notas/luma-energy-dice-desconocer-que-provoco-la-salida-en-cadena-de-10-subestaciones-en-la-region-de-caguas/>.

¹⁰ Carlos Tolentino Rosario, Explosión en la subestación de LUMA Energy en Jayuya deja sin luz a todo el municipio, El Nuevo Día (Jul. 12, 2022, 7:30 AM), <https://www.elnuevodia.com/noticias/locales/notas/explosion-en-la-subestacion-de-luma-energy-en-jayuya-deja-sin-luz-a-todo-el-municipio/>; Cybernews, Portavoz de LUMA dice que en Santa Isabel no hubo una explosión en subestación, sino “una chispa.” Telemundo Puerto Rico, (Jul. 13, 2022, 11:38 AM), <https://www.telemundopr.com/noticias/puerto-rico/portavoz-de-luma-dice-que-en-santa-isabel-no-hubo-una-explosion-en-subestacion-sino-una-chispa/2358901/>.

¹¹ LUMA's Opp'n to LECO's Mot. Requesting Imposition of Penalties in LUMA's Performance-Based Mechanism 14-15, June 23, 2022.

¹² In Re: The Performance of the Puerto Rico Electric Power Authority, Resolution and Order, at 15, NEPR-MI-2019-0007, (May 21, 2021) (“...review of ... performance is also an ongoing process...”), <https://energia.pr.gov/wp-content/uploads/sites/7/2021/05/Resolution-and-Order-NEPR-MI-2019-0007.pdf>.

¹³ See attachment X for an illustration of LUMA's major outages. Gerardo E. Alvarado León, Resurgen las críticas de poco mantenimiento de la red eléctrica tras incidentes en subestaciones de LUMA Energy, El Nuevo Día (Jul. 14, 2022, 11:40 PM), <https://www.elnuevodia.com/noticias/gobierno/notas/resurgen-las-criticas-de-poco-mantenimiento-de-la-red-electrica-tras-incidentes-en-subestaciones-de-luma-energy/>.

¹⁴ LUMA's Opp'n to LECO's Mot. Requesting Imposition of Penalties in LUMA's Performance-Based Mechanism 2-5, 7-8, 12, June 23, 2022.

states that its draft proposed “Annex IX clearly establishes a performance mechanism that does not include penalties.”¹⁵ This is incorrect and irrelevant – an incomplete draft, which LUMA itself has revised and redlined several times since the contract was signed, does not establish anything. And under Act 17-2019 and Regulation 9137, LUMA’s proposed performance metrics do not take effect until and unless PREB approves them.

IV. LUMA has been afforded ample due process on the issue of penalties.

LUMA's response seems to imply that LECO's June 2022 motion was the first mention of penalties in this case. That is obviously not true. Since November 2021, LECO has set forth thorough facts and expert opinions supporting imposition of penalties, and LUMA had ample opportunity to conduct discovery, submit rebuttal testimony¹⁶, and will have the opportunity to cross-examine LECO witnesses on their testimony that PREB must impose penalties as part of the LUMA’s performance-based mechanism. LUMA does have the right to due process on this issue and PREB has provided all the due process that LUMA is entitled to.

Through this whole process PREB has (1) allowed both parties the right to introduce evidence; (2) impartial adjudication and (3) the right to have the decision based on the record of this case. This is consonant with section 3.1. of the LPAU and with the Supreme Court of Puerto Rico’s ruling that all parties must have (1) the

¹⁵ Id. p. 13

¹⁶ Cortez Rebuttal Test. 10:194-11:199, Feb. 17, 2022; Wood Rebuttal Test. 21:424-22:454; Terzic Rebuttal Test. 18:341-22:440, 27:547-27:552.

opportunity to be heard; (2) the right to cross examine; and (3) the right to examine evidence. *San Gerónimo Caribe Project v. ARPE*, 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).

Conclusion

For the reasons detailed above, in LECO's May 26th Motion, and in the Testimony of LECO's expert witnesses, LECO respectfully requests that PREB impose penalties as part of LUMA's performance-based mechanism.

Respectfully submitted. In San Juan, Puerto Rico, July 15, 2022.

/s/ Raghu Murthy

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CERTIFICATION OF SERVICE

I hereby certify that on July 15, 2022, I served this reply to the following parties:

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ATTACHMENT 1

Mala racha en las subestaciones

El consorcio LUMA Energy tiene investigaciones en curso sobre las causas de estos incidentes.



1. San Juan

10 de junio de 2021

Evento: Explosión e incendio en Monacillos por problemas con los sistemas de protección

Clientes afectados: 900,000

2. Guayanilla

6 de abril de 2022

Evento: Apagón general tras avería en el patio de interruptores de la central Costa Sur

Clientes afectados: 1.5 millones

3. Humacao

18 de mayo de 2022

Evento: Explosión e incendio en subestación por falla de un conductor aéreo

Clientes afectados: 12,000

4. Caguas

7 de julio de 2022

Evento: Diez subestaciones fuera de servicio por "contaminación de aves"

Clientes afectados: 42,000

5. Jayuya

12 de julio de 2022

Evento: Explosión e incendio en la única subestación del municipio

Clientes afectados: 6,500

6. Santa Isabel

12 de julio de 2022

Evento: Subestación fuera de servicio por "una chispa" durante un mantenimiento

Clientes afectados: 6,000