

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

IN RE: PERFORMANCE TARGETS FOR LUMA
ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

SUBJECT: LUMA's Response in Opposition and Objection to December 22, 2021 Resolution and Order and Request to Vacate or Grant LUMA Relief from December 22, 2021 Resolution and Order on Additional Metrics.

RESOLUTION AND ORDER

I. Relevant Background

The Puerto Rico Public-Private Partnerships Authority ("P3 Authority") conducted a process in accordance with Act 120-2018¹ and Act 29-2009² to select a third-party to operate the Puerto Rico Electric Power Authority's ("PREPA") Transmission and Distribution System ("T&D System").³ After selecting a preferred proponent, the P3 Authority requested the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") to issue a Certificate of Energy Compliance regarding a preliminary operation and management agreement to be entered with the preferred proponent.⁴ On June 17, 2020, the Energy Bureau issued a Certificate of Energy Compliance for the Preliminary Contract.⁵

On June 22, 2020, LUMA,⁶ PREPA and the P3 Authority entered into an *Operation and Maintenance Agreement* under which PREPA delegated to LUMA the operation and maintenance functions of the T&D System ("T&D OMA"). Upon the effective date of the T&D OMA (June 22, 2020) LUMA commenced to provide the front-end transition period services. On June 1, 2021, LUMA took over the operation and maintenance of the T&D System.

As a certified electric service company and operator of the T&D System pursuant to the OMA, LUMA is subject to compliance with performance-based incentive mechanisms. On December 23, 2020, the Energy Bureau issued a Resolution and Order ("December 23 Resolution") commencing the instant adjudicative proceeding to establish performance-based incentive mechanisms for LUMA. Among other things, the December 23 Resolution laid out the Energy Bureau's authority over performance incentive mechanisms for LUMA.

¹ Known as the "Puerto Rico Electric Power System Transformation Act", as amended ("Act 120-2018").

² Known as "Public-Private Partnership Act", as amended ("Act 29-2009").

³ See, in general, document titled *Puerto Rico Public-Private Partnerships Authority's Request for Issuance of Certificate of Energy Compliance and Request for Confidential Treatment of Documents Submitted to PREB* ("Petition") filed by the P3 Authority on May 18, 2020, *In re Certificate of Energy Compliance*, Case No.: NEPR-AP-2020-0002 ("Petition"). As part of the Petition, the P3 Authority included as Exhibit #2 a document titled *PUERTO RICO TRANSMISSION AND DISTRIBUTION SYSTEM OPERATION AND MAINTENANCE AGREEMENT* dated as of [--], 2020, by and among THE PUERTO RICO ELECTRIC POWER AUTHORITY as Owner, THE PUERTO RICO PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY as Administrator, [REDACTED-CONFIDENTIAL] as ManagementCo, and [REDACTED-CONFIDENTIAL] as ServCo ("Preliminary Contract").

⁴ *Id.*

⁵ *Resolution and Order (Certificate of Energy Compliance)* dated June 17, 2020, *In re Certificate of Energy Compliance*, Case No.: NEPR-AP-2020-0002 ("June 17 Resolution").

⁶ LUMA Energy, LLC as ManagementCo., and LUMA Energy ServCo, LLC as ServCo. (collectively, "LUMA"). LUMA Energy, LLC and LUMA Energy ServCo, LLC have been certified by the Energy Bureau as electric service companies in cases *In Re: Request for Certification LUMA Energy, LLC*, Case No. NEPR-CT-2020-0008 and *In Re: Request for Certification LUMA Energy ServCo, LLC*, Case No. NEPR-CT-2020-0007, respectively.



On February 25, 2021, LUMA filed a document titled *Submittal and Request for Approval of Revised Annex IX to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement ("OMA")*, pursuant to Section 4.2(f) of the OMA ("February 25 Request"). The February 25 Request includes a high-level description of the proposed performance incentive framework for LUMA along with its arguments supporting the proposal. On August 18, 2021, LUMA filed a document titled *LUMA's Submittal of Request for Approval of Revised Annex IX to the OMA* ("Revised February 25 Request"), through which it presented its new proposal.

After various procedural incidents, on August 25, 2021, the Energy Bureau issued a Resolution and Order ("August 25 Resolution") through which it determined that the Revised February 25 Request complied with the minimum requirements established by the Energy Bureau to continue its evaluation as part of the instant case.

On December 22, 2021, the Energy Bureau issued a Resolution and Order ("December 22 Resolution"). Through the December 22 Resolution, the Energy Bureau determined that the establishment of performance targets for Interconnection, Energy Efficiency/Demand Response, and Vegetation Management will encourage LUMA to undertake the work needed for implementing important goals of the Puerto Rico energy public policy. Therefore, the Energy Bureau ordered LUMA to: (i) no later than January 18, 2022, file a revised Annex IX to the OMA, including targets and supporting metrics for Interconnection, Energy Efficiency/Demand Response, and Vegetation Management; and (ii) on or before January 18, 2022, provide a supplemental or revised direct pre-filed testimony for targets and supporting metrics for the performance metric targets described in the December 22 Resolution. The Energy Bureau amended the procedural calendar.

On January 7, 2022, LUMA filed a document titled *LUMA's Request for this Energy Bureau to Modify the Procedural Calendar Set Forth in the Resolution and Order of December 22, 2021* ("January 7 Motion"). Through the January 7 Motion, LUMA requested the Energy Bureau to: (i) amend the procedural calendar to grant LUMA until February 17, 2022, for its submission on new metrics; (ii) extend the deadline to submit rebuttal testimonies until February 1, 2022; (iii) re-schedule the evidentiary hearing for May 16-20, 2022; (iv) and that all precedent and subsequent procedural events be extended as illustrated in LUMA's proposed procedural calendar.

On January 14, 2022, the Energy Bureau issued a Resolution and Order ("January 17 Resolution"). Through the January 17 Resolution, the Energy Bureau amended the procedural calendar and set February 17, 2022, as the due date for LUMA to comply with the December 22 Resolution regarding its submission on new metrics and the filing of a supplemental written testimony limited to additional performance targets.

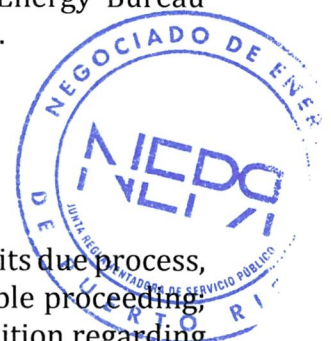
On February 17, 2022, LUMA filed a document titled *LUMA's Response in Opposition and Objection to December 22, 2021 Resolution and Order and Request to Vacate or Grant LUMA Relief from the December 22, 2021 Resolution and Order on Additional Metrics* ("February 17 Motion"). Through the February 17 Motion, LUMA requests the Energy Bureau to "vacate or grant LUMA relief from that portion of the [December 22 Resolution] that requires LUMA to add three additional performance metrics areas to the revised Annex IX to the [OMA] and to file a further amended Annex IX to the [OMA]."⁷ LUMA argues that the Energy Bureau violated its due process through the issuance of the December 22 Resolution.

II. Analysis and Discussion

A. LUMA's Due Process Arguments

In the February 17 Motion, LUMA asserts that the Energy Bureau has violated its due process, and argues that: (i) as the regulated party, it is entitled to a just and equitable proceeding; (ii) the Energy Bureau did not provide LUMA the opportunity to state its position regarding the amendment of its Revised February 25 Request; (iii) the Energy Bureau's determination to consider responses to discovery in issuing the December 22 Resolution is an arbitrary

⁷ February 17 Motion, p. 32.



ruling; (iv) rebuttal testimonies and the evidence to be submitted during the evidentiary hearing are crucial to any determination on additional performance metrics; (v) the December 22 Resolution required LUMA to add metrics to the revised Annex IX to the OMA within an abbreviated procedural calendar; and (vi) since the December 22 Resolution violates its due process, it is null and void.

LUMA bases its due process arguments on the notion that the December 22 Resolution has the effect of a partial or final decision on the present case. Thus, LUMA's assertions presuppose that the Energy Bureau has adjudicated to some extent the issues under its consideration. However, such an assumption is incorrect. The Energy Bureau has not adjudicated the issues related to this case, therefore, LUMA's due process arguments are misplaced. Since there has been no adjudication, and that the February 17 Motion has been denied, the Energy Bureau **DEEMS** it is unnecessary to discuss such arguments.

Notwithstanding the above, given LUMA's assertions, it is appropriate to reiterate that the Energy Bureau has the authority to establish performance metrics for the certified electric service companies. As the entity entrusted with the responsibility of regulating electric service companies, the Energy Bureau is bound by law to direct proceedings aimed at improving the electric service and advancing Puerto Rico's energy public policy.

Under Section 6.4 of Act 57-2014,⁸ the Energy Bureau has regulatory, investigative, and adjudicative jurisdiction over all certified electric power companies providing services within the Government of Puerto Rico. As part of such jurisdiction, the Energy Bureau has the power and duty to establish performance-based incentives and penalty mechanisms.⁹

As discussed in the December 23 Resolution, the authority is further detailed in Act 17-2019.¹⁰ For example, Article 1.5(3) (c) and (d) of Act 17-2019 provide that the Energy Bureau has the authority to use alternative mechanisms to cost-based regulation for compliance and implementation of the objectives established by law. Such mechanisms include incentives and penalties based on performance metrics of electric service companies and strict compliance with the Energy Bureau's orders.¹¹

The Energy Bureau has the power and duty to establish additional performance metrics. Therefore, contrary to LUMA's arguments, the Energy Bureau is executing its powers over a certified electric service company. The December 22 Resolution is not to be construed as a partial or final decision on this case. Rather, exercising the Energy Bureau's statutory authority and obligation.

B. Scope of the T&D OMA Regarding Performance Metrics

In the February 17 Motion, LUMA suggests that, according to the T&D OMA, the Energy Bureau does not have the authority to modify the proposed performance standards. The suggestion is incorrect. As part of the process for issuing the Certificate of Energy Compliance, in the June 17 Resolution the Energy Bureau stressed that its participation in reviewing the Preliminary Contract for compliance with the energy public policy and the regulatory framework converts it in a party to the Preliminary Contract.¹² It was determined that no obligation and/or duty may be imposed to the Energy Bureau under the Preliminary Contract.¹³

⁸ *Puerto Rico Energy Transformation and RELIEF Act*, as amended ("Act 57-2014").

⁹ *Id.*, sec. 6.3(j). *See*, also, sec. 6.25B.

¹⁰ *Puerto Rico Energy Public Policy Act* ("Act 17-2019").

¹¹ *Id.*


¹² June 17 Resolution, p. 9.

¹³ *Id.*



The Energy Bureau is charged with the public responsibility to enforce the T&D OMA, and in the performance of its duty, the Energy Bureau necessarily mostly resort to the terms of the T&D OMA. However, this does not mean that the Energy Bureau becomes in any sense a party to the T&D OMA, bound by the mutual obligations between the parties themselves. The reciprocal promises between the contracting parties are inapplicable to the Energy Bureau's duty to enforce the T&D OMA and assure compliance with the energy public policy and regulatory framework.

The Energy Bureau further emphasized that the Preliminary Contract:

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- (1) *Shall not be construed, in any way whatsoever, as to impair, restrict, relinquish, or abridge the scope of the Energy Bureau's: (1) administrative powers; (2) statutory and regulatory jurisdiction and/or authority; (3) statutory and regulatory oversight and enforcement powers; (4) rights; (5) duties; and (6) obligations, all in accordance with the applicable laws and regulations.*
 - (2) *Shall not be construed, in any way whatsoever, as a waiver and/or release of any applicable statutory or regulatory requirement nor any related regulatory action applicable to the T&D System, the Operator, PREPA (or the successor owner of the T&D System).*
 - (3) *Anything in the Preliminary Contract (as modified) contrary to the provisions of Section IV[(B)](1) and IV[(B)](2) above, or otherwise contrary to the law, shall be deemed unenforceable.¹⁴*

Likewise, Section 20.17 of the T&D OMA recognizes that the T&D OMA does not limit or restrict the rights, responsibilities, or authority granted to Energy Bureau regarding regulatory matters under its jurisdiction. Specifically, Section 20.17 of the T&D OMA provides that:

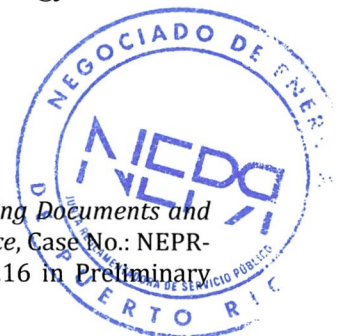
notwithstanding anything to the contrary herein, no provision of this Agreement shall be interpreted, construed, or deemed to limit, restrict, supersede, supplant, or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the T&D System, Owner or Operator.

Section 20.17 of the T&D OMA does not come out of nowhere. First, Section 5(f) of Act 120-2018 provides that *any contract related to a PREPA Transaction shall include a clause enforcing full compliance with the energy policy and the regulatory framework, except for those excluded by this Act [Act 120-2018] or those expressly authorized by the Legislative Assembly.* Thus, adding Section 20.17 to the T&D OMA was mandatory. Second, during the hearing held before the Energy Bureau as part of the evaluation of the Preliminary Contract, the Commissioners were concerned with certain provisions of the Preliminary Contract, which may be construed as limiting the powers, duties, authority, and obligations of the Energy Bureau regarding approvals and oversight activities under its regulatory authority.¹⁵ As a result, and at the request of the Energy Bureau, the P3 Authority modified to Preliminary Contract to add Section 20.17.¹⁶ Thereafter, based on the recognition of the rights, responsibilities and authority granted to the Energy Bureau established in Section 20.17 of the Preliminary Contract (now Section 20.17 of the T&D OMA), as well as the additional safeguards in the July 17 Resolution, the Certificate of Energy Compliance was approved. Hence, contrary to LUMA's suggestion, regarding regulatory matters, the Energy Bureau is

¹⁴ *Id.* at pp. 9-10.

¹⁵ June 17 Resolution, pp. 2-3.

¹⁶ See document titled *Puerto Rico Public-Private Partnerships Authority's Motion Submitting Documents and Requesting Confidential Treatment* dated June 17, 2020, *In re Certificate of Energy Compliance*, Case No.: NEPR-AP-2020-0002. Note that Section 20.17 of the T&D OMA was designated as Section 20.16 in Preliminary Contract.



not bound or limited by the T&D OMA. Notably, the Energy Bureau is not bound by the *Illustrative Performance Metrics* in Annex IX of the T&D OMA.

Under the T&D OMA, LUMA's compensation consists of a fixed fee for providing operation and maintenance services ("Fixed Fee") and a variable incentive fee ("Incentive Fee") based on LUMA exceeding certain performance metrics.¹⁷ That is, LUMA must meet or exceed the performance metrics to earn the Incentive Fee.¹⁸ To be legally enforceable, the performance metrics applicable to LUMA under the T&D OMA must be approved by the Energy Bureau. Therefore, if the Energy Bureau denies LUMA's proposed performance metrics, LUMA will not be able to earn the Incentive Fee. Likewise, under the T&D OMA, LUMA recognized and accepted that the Energy Bureau may request modifications to LUMA's proposed performance metrics.¹⁹ Thus, if LUMA fails to modify the proposed performance metrics, the Energy Bureau may deny the submitted proposed performance metrics and LUMA will not be able to earn the Incentive Fee.

The Energy Bureau recognizes that a key consideration for the modification of proposed performance metrics under the T&D OMA is not reducing the likelihood of LUMA's earning the Incentive Fee.²⁰ That is not the case here. The Energy Bureau is not providing the specific targets and supporting metrics, but instead is allowing LUMA to do so. In the December 23 Resolution, the establishment of performance categories for Interconnection, Energy Efficiency/Demand Response, and Vegetation Management *will encourage LUMA to undertake the work that is needed for the implementation of important goals of the Puerto Rico energy public policy*. The Energy Bureau ordered LUMA to submit a revised Annex IX to the T&D OMA including those performance categories. LUMA is compelled to evaluate the identified performance categories and develop and submit for review and approval the associated targets and performance metrics.

III. Conclusion

The Energy Bureau **DENIES** the February 17 Motion. Additionally, considering that LUMA expressed its dissatisfaction on the last day of the sixty (60) day term granted for it to submit information required by the Energy Bureau through the December 22 Resolution, knowing that such action would have clear consequences on the amended procedural calendar, the Energy Bureau **DEEMS** that LUMA's actions are frivolous, constitute a clear showing of bad faith and are aimed at delaying the proceedings.

Given the fact that there has been no adjudication of the present case, and that the February 17 Motion has been denied, the Energy Bureau **DEEMS** it is unnecessary to discuss LUMA's due process arguments in detail. Such arguments are misplaced since, through the December 22 Resolution, the Energy Bureau exercised its statutory authority and obligation. Contrary to LUMA's assertions, the Energy Bureau has not issued a partial or final resolution regarding this case.

For all the above, the Energy Bureau **ORDERS** that, within twenty (20) days of the notification of the present Resolution and Order, LUMA must: (i) file a revised Annex IX to the OMA, including targets and supporting metrics for Interconnection, Energy Efficiency/Demand Response, and Vegetation Management; and (ii) provide a supplemental or revised direct pre-filed testimony for targets and supporting metrics for the performance metric targets described in the December 22 Resolution.

¹⁷ Section 7.1, T&D OMA.

¹⁸ Section 7.1(c), T&D OMA.

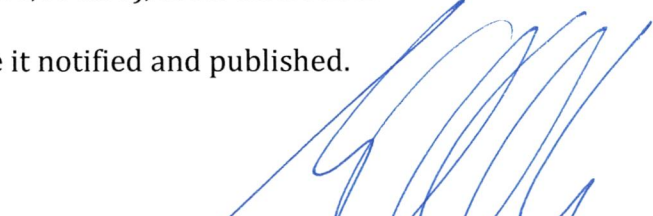
¹⁹ Sections 4.2(f) and 7.1(d), T&D OMA. The Energy Bureau points out that, even if the T&D OMA had not recognized the Energy Bureau's authority to require modifications to LUMA's performance metrics, the Energy Bureau, in accordance with the authority granted by law, could do so. See, for example, the December 23 Resolution, pp. 1-3.

²⁰ Section 7.1(d), T&D OMA.

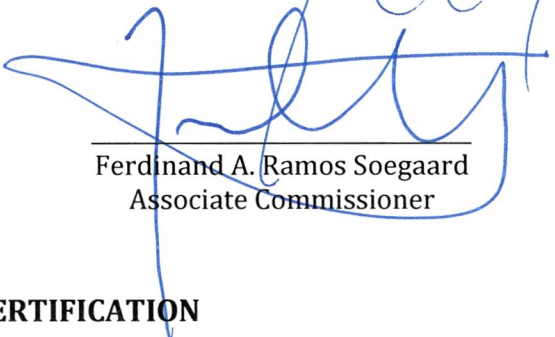


The Energy Bureau **WARNS** LUMA that, if it fails to comply with its order, it may impose a fine not less than five hundred dollars (\$500.00) nor over five thousand dollars (\$5,000.00), at the discretion of the Energy Bureau. Upon repetition, the Energy Bureau may impose a fine not less than ten thousand dollars (\$10,000.00) nor over twenty thousand dollars (\$20,000.00), at its discretion.

Be it notified and published.



Edison Avilés Deliz
Chairman



Ferdinand A. Ramos Soegaard
Associate Commissioner



Lillian Mateo Santos
Associate Commissioner



Sylvia Ugarte Araujo
Associate Commissioner

CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on August 1st, 2022. I also certify that on August 1st, 2022 a copy of this Resolution and Order was notified by electronic mail to margarita.mercado@us.dlapiper.com, yahaira.delarosa@dlapiper.com, jmarrero@diazvaz.law, kbolanos@diazvaz.law, hrivera@jrsp.pr.gov, contratistas@jrsp.pr.gov, agraitfe@agraitlawpr.com, rstgo2@gmail.com, pedrosaade5@gmail.com, flcaseupdates@earthjustice.org, rolando@bufete-emmanuelli.com, notificaciones@bufete-emmanuelli.com, jessica@bufete-emmanuelli.com, rhoncat@netscape.net, lvelez@earthjustice.org; rmurthy@earthjustice.org and I have proceeded with the filing of the Resolution and Order issued by the Puerto Rico Energy Bureau.

For the record, I sign this in San Juan, Puerto Rico, today August 1st, 2022.



Sonia Seda Gaztambide
Clerk

