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

IN RE: THE UNBUNDLING OF THE ASSETS OF THE PUERTO RICO ELECTRIC POWER AUTHORITY	**CASE NO.:** NEPR-AP-2018-0004 **SUBJECT:** LUMA's Motion for Reconsideration of Final Resolution and Order of March 24, 2022

RESOLUTION AND ORDER

I. Relevant Procedural Background

On March 24, 2022, the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") issued a Final Resolution and Order in the instant case ("Final Resolution") through which it established the formula for the wheeling credit. The Energy Bureau stated that such formula would be the sum of the full Fuel Charge Adjustment ("FCA") and full Purchased Power Charge Adjustment ("PPCA").[1] The Energy Bureau also ordered LUMA[2] to file a formal version of the wheeling customer rider within seven (7) days after the notification of the Final Resolution, including a description of and rationale for any changes proposed from the draft version provided as Attachment A to the Final Resolution.[3]

On March 30, 2022, LUMA filed a document titled *Urgent Request for Extension of Time to Submit Wheeling Customer Rider and Proposed Changes to Same* ("March 30 Motion"). Through the March 30 Motion, LUMA requested the Energy Bureau to grant until April 21, 2022 for LUMA to address the portion of the Final Resolution that requires filing the Proposed Rider.[4] Further, LUMA asserted that, even though the deadline for moving for reconsideration was April 13, 2022, it required until April 21, 2022, to review the Final Resolution and the draft customer rider to determine if it would propose changes to the draft rider and to draft an explanation and rationale for any proposed changes.[5]

On April 8, 2022, the Energy Bureau issued a Resolution ("April 8 Resolution") through which it granted LUMA until April 21, 2022, to file the Proposed Rider.[6] However, the Energy Bureau clarified that if LUMA was requesting a time extension to move for reconsideration, such request was denied.[7]

On April 13, 2022, LUMA filed a document titled *Motion for Reconsideration of Final Resolution and Order of March 24, 2022* ("Request for Reconsideration"). Through its Request for Reconsideration, LUMA questions certain portions of the Final Resolution, regarding: (i) the Unbundling Framework proposed by the Puerto Rico Electric Power Authority ("PREPA") and LUMA; (ii) the Marginal Cost of Service Study filed by PREPA and LUMA; (iii) the elements of the Wheeling Tariff; (iii) the obligations of the Provider of Last Resort; (iv) the balancing charges; (v) the findings on generation eligibility; and (vi) the consideration of Regulation 9351, which was enacted on December 22, 2021. LUMA argues that several statements, conclusions, and findings in the Final Resolution are not properly supported by

[1] *See* Final Resolution, pp. 16-18.

[2] LUMA Energy, LLC as ManagementCo., and LUMA Energy ServCo, LLC as ServCo. (collectively, "LUMA").

[3] *See*, Final Resolution, p. 18. LUMA's proposed rider along with the explanation and rationale for any proposed changes is hereinafter collectively referred to as the "Proposed Rider".

[4] March 30 Motion, p. 3.

[5] *Id.*, pp. 2-3.

[6] April 22 Resolution, p. 2.

[7] *Id.*

the administrative record nor by substantial evidence in the administrative record, and therefore, should be reconsidered.[8]

On April 20, 2022, LUMA filed a document titled *Request for Stay of Portions of Final Resolution and Order of March 24, 2022, Pending Final Adjudication and Request for Additional Remedies* ("April 20 Motion"). In the April 20 Motion, LUMA asserts that the evidence in the administrative record supports the reconsideration of various aspects and that the Request for Reconsideration puts forth weighty arguments with a high likelihood of success.[9] Through the April 20 Motion, LUMA requests that the Energy Bureau: (i) stay several orders in the Final Resolution until the Request for Reconsideration is adjudicated; (ii) reschedule the matters pertaining to such orders; and (iii) clarifies a portion of the Final Resolution. LUMA also proposes that the Energy Bureau opens a separate proceeding for certain implementation matters regarding the instant case.

On April 22, 2022, the Energy Bureau issued a Resolution and Order ("April 22 Resolution") through which it accepted for evaluation the Request for Reconsideration.

On July 11, 2022, the Energy Bureau issued a Resolution through which it determined there existed just cause to extend the ninety-day term established by Section 3.15 of Act 38-2017[10] to address the Request for Reconsideration. Therefore, the Energy Bureau extended such term by an additional thirty (30) days, as provided by Section 3.15. The Energy Bureau stated that it would issue its final determination on LUMA's Request for Reconsideration on or before August 11, 2022.

II. Analysis

A. Proposed Unbundling Framework

LUMA argues that the Energy Bureau's alleged refusal to adopt the unbundling framework proposed by Guidehouse through Mrs. Margot Everett's direct testimony,[11] which was proposed for adoption in *LUMA's Final Brief*,[12] ("Proposed Unbundling Framework") is not supported by substantial evidence in the administrative record,[13] and should be reconsidered.[14] Particularly, LUMA states that the Energy Bureau improperly rejected the Proposed Unbundling Framework.[15] However, the Energy Bureau did not reject the Proposed Unbundling Framework. Instead, the Energy Bureau adopted a simpler framework for the Final Resolution[16] and discussed how certain other issues will be more relevant going

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[8] *Id.*, p. 14.

[9] April 20 Motion, pp. 2-3, ¶2- ¶4.

[10] Known as *Administrative Procedure Act of the Government of Puerto Rico* ("Act 38-2017").

[11] *In Re: The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, *Motion in Compliance with Resolution and Order Entered on May 13, 2021*, filed on May 17, 2021 ("May 17 Motion"), Exhibit A, Direct Testimony of Mrs. Margot Everett (the "Everett Testimony"), p. 6, lines 112-120, and Exhibit C, pp. 6-10.

[12] *In Re: The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, *LUMA's Final Brief*, August 10, 2021 ("LUMA's Final Brief"), pp. 12-14.

[13] Throughout the Request for Reconsideration LUMA avers that multiple determinations, findings and statements made by the Energy Bureau in the Final Resolution are not supported by substantial evidence on the administrative record. That assertion is incorrect. However, the Energy Bureau will not discuss such argument in detail since it is not an argument that needs to be expressly addressed at this stage of the proceedings. Nevertheless, through this Resolution and Order the Energy Bureau further discusses the bases of the determinations included in the Final Resolution.

[14] *Id.*, pp. 18-22.

[15] Request for Reconsideration, pp. 18-22.

[16] Final Resolution, p. 2.

forward.[17] The Request for Reconsideration does not address there are many ways to unbundle rates, some of which are simpler and some of which are more complex. As discussed on pages 11 through 12 of the Final Resolution, existing rates provide a reasonable starting point for unbundling. The Request for Reconsideration does not address these basic propositions, and thus, provides no convincing argument for starting with a more complex framework now.

While LUMA insists that the Proposed Unbundling Framework must be accepted, the Request for Reconsideration appears to concede that many portions of the Proposed Unbundling Framework cannot be implemented at the present time and are designed to set up future action.[18] However, the Energy Bureau has been clear that many aspects of the overall electric regulatory structure in Puerto Rico will continue to evolve over time and expects that unbundling and wheeling should continue to evolve.[19] As will be discussed, there are other venues and proceedings where it will be more appropriate to determine certain issues raised in the Request for Reconsideration. The Energy Bureau is not compelled to set out an unbundling framework right now that determines precisely how and when each issue will be addressed. The Energy Bureau will continue to exercise its expertise to address the relevant issues at the appropriate time with a sufficient process, including the participation of and feedback from LUMA and other stakeholders.

B. Marginal Cost of Service Study

LUMA also seeks reconsideration of the Energy Bureau's decision to reject the Marginal Cost of Service Study filed by PREPA and LUMA, and prepared by their consultant Guidehouse ("MCOSS"),[20] and to establish the wheeling rate or credit since the Energy Bureau allegedly did not consider the totality of the evidence in the record.[21] LUMA asserts that such a determination is an arbitrary change in the Energy Bureau's position on what was needed to unbundle rates and adopt an energy wheeling credit, without an explanation based on substantial evidence on the record.[22] Relatedly, LUMA requests reconsideration of certain statements and findings in connection with the aforementioned determinations.[23]

LUMA correctly states that the Energy Bureau found conceptual and implementation problems with the MCOSS which made it insufficiently reliable to be used in this proceeding.[24] While LUMA is correct that previous Energy Bureau orders identified the importance of marginal costs, the Request for Reconsideration mischaracterizes what the Energy Bureau asked for in previous orders. The relevant Energy Bureau orders[25] required an Unbundled Cost of Service Study but did not require a *marginal* cost of service study. The

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[17] *Id.*, pp. 8, 11-14.

[18] *See*, for example, Request for Reconsideration, p. 21.

[19] *See*, *The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, Resolution and Order issued on December 23, 2020 ("December 23 Resolution").

[20] Everett Testimony, Exhibit B; *See*, also, *See*, *The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, *Motion Submitting Exhibits Admitted Into Evidence on July 19, 2021 and Revised Tables of Cost-of-Service Study*, July 21, 2021 ("July 21 Motion").

[21] Request for Reconsideration, pp. 22-30.

[22] *Id.*, p. 23.

[23] *Id.*, pp. 18-30.

[24] *Id.*, p. 25.

[25] *See*, for example, *The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, Resolution and Order issued on December 23, 2020, and Resolution and Order issued on February 5, 2021.

Resource Insight Report filed on September 4, 2020, relied primarily on an Embedded Cost of Service Study, which has several distinctions from a Marginal Cost of Service Study.[26]

The arguments presented by LUMA on page 24 of the Request for Reconsideration are irrelevant. The Energy Bureau need not order corrections or provide substantive feedback during the course of an adjudicative proceeding. It is up to the parties, in particular the proponents of analysis, to persuade the Energy Bureau that their methods are rigorous and sound. The Energy Bureau has the power and the duty to make an informed decision and had no obligation at any earlier point to make a definitive determination. The Energy Bureau is not compelled to file testimony but is entitled to use its expert judgement in review of the full record to make a decision in the public interest.

From pages 26 through 31 of the Request for Reconsideration, LUMA attempts to rebut the substantive issues noted by the Energy Bureau with Guidehouse' s analysis, including longer quotations from Mrs. Everett on key topics. However, these longer quotations ultimately support the primary conclusions reached by the Energy Bureau on the MCOSS. The assertions made by Mrs. Everett about the integrated resource planning process[27] are an incorrect characterization of the policy in Puerto Rico as laid out in prior orders by the Energy Bureau, even if her statements may be true in other jurisdictions. The Energy Bureau need not accept incorrect statements about its own policies as a justification for a specific method of analysis. This issue was identified in the discovery process and was the subject of discussion during the hearings, as demonstrated by the quoted portions of the transcript. LUMA advanced its argument in briefing.[28] With this full and fair opportunity to address the issue, the Energy Bureau found these statements were inaccurate representations of the integrated resource planning policy in Puerto Rico and nothing in the Request for Reconsideration persuades the contrary.

On page 28 of the Request for Reconsideration, LUMA again mischaracterizes what the Energy Bureau required regarding a cost-of-service study. The relevant orders specified little about the nature of that study and allowed the proponents of that study to shape it. The proponents of this analysis made many choices that led to filing the May 17 Motion.[29] Ultimately, the Energy Bureau has not been persuaded those choices were sound for the reasons presented in the Final Resolution.

Last, the substantive dispute presented by LUMA regarding the validity of marginal cost estimates in the MCOSS for generation capacity, transmission, and distribution did not materially affect the wheeling credit and broader structure. As clearly stated in the Final Resolution, the Energy Bureau found that "there is not sufficient evidence in the record to establish specific charges or credits to wheeling customers for anything related to transmission costs, distribution costs, generation capacity costs, or ancillary services."[30] To provide an example, the Energy Bureau did not include a credit to compensate wheeling customers for reduced generation capacity costs and the Final Resolution does not include a mechanism for reducing the resource adequacy requirements for the provider of last resort, as discussed further below. The proper method of analysis for generation capacity costs should be the subject of future proceedings and the Energy Bureau's finding in the Final Resolution indicates that better principles and methods should be properly debated and vetted.

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[26] *See, The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, Order issued on September 4, 2020, Appendix A.

[27] Request for Reconsideration, pp. 26-27.

[28] LUMA's Final Brief, p. 19.

[29] *See, The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, *Motion in Compliance with Resolution and Order Entered on May 13, 2021*, May 17, 2021 ("May 17 Motion").

[30] Final Resolution, p. 13.

C. Elements of the Wheeling Tariff

Through pages 31 to 38 of the Request for Reconsideration, LUMA requests reconsideration of several elements adopted by the Energy Bureau as a part of the wheeling tariff. In many respects, these elements were included as a part of the "default" tariff in the December 23 Resolution. Specifically, LUMA requests reconsideration of the following issues: (i) the determination that the wheeling credit should be set at the sum of the full FCA and the full PPCA; (ii) the determination that no adjustment should be made to account for reconciliation factors; and (iii) the determination that the wheeling tariff structure should not include a "true up" mechanism.

The structure of the adjudicative portion of this proceeding allowed PREPA and LUMA, in conjunction with their consultant Guidehouse, to put forward one or more additional proposals, termed "alternatives," to compare the default and any alternatives proposed, and to provide evidence to support those comparisons. In some instances, the Energy Bureau has found an element of the alternative proposal to be reasonable and adopted it, such as the service dates for a customer returning to the provider of last resort, as described on page 23 of Exhibit D to the Everett Testimony. In addition, the Energy Bureau, has been persuaded that it is not appropriate at this time to include a credit for avoided generation capacity costs in the wheeling tariff.

In the case of the wheeling credit, the Energy Bureau has found that the method proposed by Guidehouse and LUMA for calculation of the wheeling credit, and the evidence supporting that method, was severely lacking. Nothing in the Request for Reconsideration changes the Energy Bureau's finding.

Further, while the Energy Bureau did not emphasize this in the Final Resolution, the original marginal energy cost estimate of 5.1 cents per kWh used in the May 17 Motion[31] was based on a significant mathematical error. In response to specific information requests from the Energy Bureau regarding this calculation, the error was ultimately corrected in the July 21 Motion. While analytical errors do occur occasionally even with the best methods, the Energy Bureau believes that the error shows something more substantial. This method does not have a reasonable foundation and, as a capacity-weighting metric, does not have an established relationship to marginal energy costs. Guidehouse did not check the results of their method with the available information they had on marginal energy costs (e.g., quarterly filings for the adjustment factors). This made it difficult for Guidehouse to test the reasonableness of their results. The analytical check that Guidehouse did use, adding up the components again in the bottom row of Table 2-12,[32] was meaningless because the totals would always add up again to the original number, whether or not the specific calculation was done correctly. Under the appropriate procedures for administrative notice, the Energy Bureau introduced evidence regarding marginal energy cost projections from the quarterly adjustment filings into this proceeding and performed an actual test of the relationship between the credit level and reasonable marginal energy costs.[33] Ultimately, this constitutes substantial evidence of the reasonableness of the chosen credit level and the Energy Bureau is not persuaded by the reiteration of LUMA's prior arguments. If the relationship between marginal and average energy costs changes substantially in the future, the Energy Bureau has the tools to adjust wheeling credits and related policies appropriately.

PREPA and LUMA introduced no evidence regarding the reconciliation factors into the record, instead raising the issue in a qualitative way. The Energy Bureau took it upon itself to introduce the full history of reconciliation factors into the record through administrative notice to properly consider this argument and did so in the Final Resolution.[34] As LUMA acknowledges, ultimately there is no guarantee how the inclusion or exclusion of the reconciliation factors will affect wheeling customers and non-participating customers. The

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[31] Everett Testimony, Exhibit B, tables E-2 and 2-12.

[32] July 21 Motion, Exhibit 1, Exhibit A, p. 10, Table 2-12.

[33] Final Resolution, pp. 14-16.

[34] *Id.*, pp. 16-17.

Energy Bureau believes it has made a reasonable decision based on the evidence in the record to use the simpler approach at the present time and have one set of adjustment factors used for all customers and removed as a credit for wheeling customers.

LUMA argues that a proposed true up mechanism is necessary to protect non-participating customers. The Energy Bureau believes that the balancing charges, discussed further below, should protect non-participating ratepayers from the major categories of potential costs to non-participating customers. The Energy Bureau does not believe that PREPA or LUMA introduced persuasive evidence into the record that other costs will be specifically incurred due to new generation for wheeling customers for ancillary services. Certain incremental costs due to new generation for wheeling customers can and should be addressed in the either the interconnection rules and procedures or the wheeling services agreements. As the electric system evolves in Puerto Rico, charges and compensation mechanisms for all generators may become more granular and specific.

D. Provider of Last Resort Obligations

LUMA appears to request the reconsideration of the service dates for customers returning to the provider of last resort ("POLR"). However, the proposal adopted by the Energy Bureau was a recommendation put forth through Exhibit D to the Everett Testimony.[35] Nevertheless, the more substantive issue raised on pages 38 to 40 of the Request for Reconsideration is whether a returning customer should be placed onto a special rate, particularly to account for incremental generation capacity costs.

The Energy Bureau has not directed LUMA or any other entity to reduce any procurements or limit any other action designed to ensure resource adequacy as a result of the addition of new generation to serve wheeling customers. Wheeling customers are not being provided with any compensation for lowering resource adequacy requirements, such as a generation capacity credit. The wheeling credit has been designed to incorporate only generation energy benefits. The appropriateness of this approach is clearly reflected on page 39 of the Request for Reconsideration, where LUMA states that "Mrs. Everett testified that there are two opportunities for a solution: 'One is to rely solely on an energy credit…'". The Energy Bureau has chosen this first option by relying solely on an energy credit and it is unreasonable for LUMA to argue that the second option must be adopted instead.

Usually, even if the retail electricity supplier defaults, the physical generation asset will likely remain operational and provisions to encourage or ensure continued contributions to the electric system by that asset could be considered in future phases of this proceeding or other processes, such as interconnection requirements.

E. Balancing Charges

On pages 40 to 45 of the Request for Reconsideration, LUMA presents arguments against the hourly energy balancing structure determined by the Energy Bureau and in favor of LUMA's preferred version of an annual imbalance charge and an additional set of true-up charges. No arguments have been quantified and the Energy Bureau does not find the reiteration of qualitative assertions to be persuasive. Many issues raised by LUMA result from *all* generation and are not specific to new generation for wheeling. Several of these issues may occur at some unknown time or may never come to pass. Absent workable methods for calculating these costs and charging them fairly to all parties, a specific mechanism for charging them solely to participants in wheeling would likely be unduly discriminatory.

First, regarding hourly balancing charges, LUMA raises two (2) contentions.[36] Regarding the first one, which pertains to the Aurora Model, the Energy Bureau need not detail the precise level of accuracy before that modeling would be sound for this application. However, this Aurora modeling is now many years old and its relevance for forecasting of hourly dispatch prices will only decrease with time, particularly on an issue where so much is determined by

[35] Everett Testimony, Exhibit D, p. 23., row labeled "service dates".

[36] Request for Reconsideration, pp. 41-43.

fluctuations in the price of oil fuels. In relation to LUMA's second contention, the determination of a credit at 95% of the hourly dispatch price was intended to provide a clear benefit to non-participating ratepayers in every hour where wheeling generation exceeded load and losses from wheeling customers. LUMA does not propose another alternative or even specify whether a lower percentage would be more reasonable. Such a generic argument is not persuasive to the Energy Bureau.

Second, regarding the annual imbalance charge, the Energy Bureau did not intend to suggest that this mechanism encourages hourly matching of generation and load, contrary to the uncited assertion of the Request for Reconsideration.[37] As the name suggests, the annual imbalance charge encourages matching of generation and load (plus losses) over the course of the year. The hourly balancing charge is intended to encourage matching every hour and, if the hourly balancing charges do not encourage matching, the wheeling participants only benefit if they are providing excess generation at high priced times and taking in extra energy at low priced times, which should also result in a benefit to nonparticipating customers. It appears from the Request for Reconsideration that LUMA may be confusing the purpose and operation of the two (2) different charges, which have overlapping but distinct purposes. Finally, the statements by the Energy Bureau in the Final Resolution about the likely consequences of the hourly balancing charges and annual imbalance charge are not matters that need detailed evidence in the record but are rather the straightforward result of how the Energy Bureau has determined those two mechanisms should work.

Throughout this section of the Request for Reconsideration, LUMA reiterates the need to do additional tracking of costs, often in support of their assertion that a true-up charge (or charges) will be necessary. The precise list of costs referred to by LUMA is not necessarily always consistent, but includes congestion, ancillary services generally, or any number of more specific ancillary services such as reactive power, ramping, and even "capacity, load shifting, generation shifting."[38] If some of these issues are regarding resource adequacy, they have been reasonably addressed in the definition of the wheeling credit and the above discussion regarding the POLR. However, the Energy Bureau finds any additional arguments presented here to be misguided. First, issues regarding congestion in the delivery of power will rarely be caused specifically by a single generation unit but will more likely be caused by the joint operation of many different generation units simultaneously. A congestion issue could be resolved by backing down any of the generation units causing the problem. Unless every single generation unit causing the issue is participating in wheeling, then singling out wheeling generation for causing those costs would be inappropriate. Similarly, the need for additional ramping for specific units or to add new units to provide ramping services will likely not be due to a specific generation unit but will be due to the combined characteristics of all operating generation. Finally, the need for reactive power, frequency regulation, or voltage control results from all load and generation on the system and cannot reasonably be attributed to generation participating in wheeling. More generally, absent a specific quantified study showing that generation participating in wheeling is causing, or is likely to cause, one of the system issues identified by LUMA the Energy Bureau does not see a new reason to create additional administrative or pricing mechanisms.

F. Findings on Generation Eligibility

Regarding generation eligibility, LUMA presents two (2) separate issues through the Request for Reconsideration: (i) that generation eligibility was not noticed in this proceeding; and (ii) that technical aspects of interconnection were not noticed or addressed in this proceeding.[39] The Energy Bureau finds that both of these arguments are incorrect and overlooks several places in the relevant orders and LUMA's own filings where these issues were raised.

[37] *Id.*, p. 43.

[38] *Id.*, p. 45.

[39] *Id.*, p. 46

First, while the particular phrasing of "generation eligibility" used in the Final Resolution may not have been used, the issue was raised in LUMA's Final Brief[40] and Exhibit C to the Everett Testimony.[41] The Energy Bureau agreed with LUMA's position that the issues presented by customer self-supply are too complex for this stage of the wheeling and unbundling proceedings and the ruling on this issue by the Energy Bureau in the Final Resolution adopts LUMA's position that customer self-supply will not currently be eligible to participate in wheeling.

Second, the Final Resolution made no substantive decisions regarding the technical aspects of interconnection, merely finding that if a generator complies with the other relevant interconnection rules, requirements, and procedures, that will be sufficient from a technical perspective for eligibility to participate in wheeling. The appropriate interconnection requirements for generators participating in wheeling was raised in the December 23 Resolution[42] among other places, but ultimately the Energy Bureau addressed no specifics in the Final Resolution. Other related requirements for generators and retail electricity suppliers may be considered during the development of the wheeling services agreement.

G. Applicability of Regulation 9351

On pages 48-50 of the Request for Reconsideration, LUMA questions the consideration of Regulation 9351[43] in the Final Resolution since the Energy Bureau allegedly enacted such regulation four (4) months after the record closed.[44] LUMA also states it has been unable to corroborate that Regulation 9351 was approved in conformity with Act 38-2017. However, LUMA argues that, even if Regulation 9351 was valid and binding, it is legal error and a violation of due process to apply it in the Final Resolution without having granted LUMA and intervenors a prior opportunity to assess its weight and repercussions in connection with the Proposed Unbundling Framework and proposals on unbundled tariffs and a wheeling credit that PREPA had to file on May, 2021.[45]

About LUMA's argument that it was unable to corroborate that Regulation 9351 was approved in conformity with Act 38-2017, it must be clarified that the Energy Bureau enacted such regulation pursuant to the rulemaking procedure established by Chapter II of Act 38-2017. As part of such procedure, on December 22, 2021, the Energy Bureau submitted Regulation 9351 to the Puerto Rico Department of State ("Department of State"). That day, the Department of State issued a communication confirming that Regulation 9351 had been properly filed. The Department of State, however, did not publish Regulation 9351. Nevertheless, Regulation 9351 was provided through the Energy Bureau's and the Department of State's websites. The Energy Bureau re-filed Regulation 9351 in order for the Department of State to comply with Section 2.8 (d) of Act 38-2017.[46] The Department of State approved the rule on April 20, 2022 and published it accordingly as Regulation 9374.

The Energy Bureau deems that it is unnecessary to further discuss the publication or validity of Regulation 9351. Section 2.7 (b) of Act 38-2017 provides a specific term to file a nullity action to challenge rules or regulations that fail to comply with the Act's requirements.[47] In accordance with Section 2.7 (b), any action to challenge the validity of a rule or regulation for non-compliance with Act 38-2017 must be initiated in the Court of Appeals of Puerto Rico within thirty (30) days following the effective date of the rule or regulation. Section 2.7 also

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[40] LUMA's Final Brief, pp. 23-24.

[41] Everett Testimony, pp. 26-27.

[42] *See*, December 23 Resolution, p. 7.

[43] Known as *Regulation on Electric Energy Wheeling* ("Regulation 9351").

[44] Request for Reconsideration, p. 48.

[45] *Id.*, p. 49.

[46] 3 L.P.R.A. § 9618 (d).

[47] 3 L.P.R.A. § 9617 (b).

provides that even filing such nullity action will not stay the validity of the regulation unless the law under which it is adopted expressly provides otherwise. Further, Section 2.8 (a) of Act 38-2017 establishes that a regulation becomes effective thirty (30) days after it is filed with the Department of State.[48]

Pursuant to the above, if LUMA wanted to challenge the validity of Regulation 9351 for lack of publication, it had to do so during the thirty-day term after the rule's effective date. However, the term elapsed and Regulation 9351's validity was not challenged by LUMA nor by any other person or entity. Therefore, LUMA's argument that it has not been able to corroborate that Regulation 9351 was enacted in accordance with Act 38-2017 is moot. LUMA had the opportunity to challenge Regulation 9351 through the filing of a nullity action, but it chose to set forth its arguments through the Request for Reconsideration.

LUMA was aware of the Energy Bureau's intent to enact Regulation 9351 well before this case's record closed. On LUMA's Final Brief, LUMA stated that it "note[d] there [were] numerous other ongoing proceedings that could potentially impact the values of the unbundled tariff and the structure of a uniform services agreement. These include but are not limited to, Case No. CEPR-MI-2018-0010 on the Regulation of Electric Energy Wheeling (Rule 9138) [...]."[49] LUMA added that "[a]t a minimum, the rules related to retail wheeling should be finalized prior to the establishment and finalization of a retail wheeling tariff and a uniform services agreement, especially as they will set forth the obligations for the POLR."[50] Therefore, LUMA not only knew about the Energy Bureau's efforts to amend the existing *Regulation on Electric Energy Wheeling* ("Regulation 9138"), but LUMA also expressed its conformity with the promulgation of a new rule before the establishment and finalization of a retail wheeling tariff and a uniform services agreement.

LUMA's Final Brief cited Case No. CEPR-MI-2018-0010 as the specific proceeding through which the Energy Bureau intended to adopt Regulation 9351. This is because LUMA participated in such proceeding before filing LUMA's Final Brief. On June 4, 2021, LUMA and PREPA filed in Case No. CEPR-MI-2018-0010 a *Joint Motion Submitting Comments to Proposed Amendment to Regulation on Electric Energy Wheeling* ("LUMA and PREPA Comments") through which they submitted comments in relation to the adoption of Regulation 9351. LUMA and PREPA Comments were filed after the Energy Bureau issued a Resolution in Case No. CEPR-MI-2018-0010 through which it indicated that it had published a public notice in the *Primera Hora* newspaper related to the amendment of Regulation 9138 and that the general public had the opportunity to present its comments until June 4, 2021.[51] Thus, LUMA acted in reaction to such notification, which was issued for the general public.[52]

Concerning the above, even if Regulation 9351 did not comply with the publication requirement of Act 38-2017, LUMA's participation and acknowledgements show that LUMA had actual and timely notice of its provisions. Regulation 9351's provisions applied to LUMA. This conclusion is supported by Federal Law. On that regard, Section 552 of the APA[53] provides that a person may not have to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof."[54] That is, even if a rule or regulation has not been published, a person with actual and timely notice of its provisions is bound by them.

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[48] 3 L.P.R.A. § 9618 (a).

[49] LUMA's Final Brief, p. 26.

[50] *Id.*, pp. 26-27.

[51] *See, In re: Regulation on Wheeling*, Case No. CEPR-MI-2018-0010, Resolution issued on May 5, 2021 ("May 5 Resolution").

[52] The Energy Bureau hereby takes official notice of the LUMA and PREPA Comments and the May 5 Resolution.

[53] The United States *Administrative Procedure Act* ("APA").

[54] 5 USC § 552 (a) (1).

The United States courts have held the validity and application of rules and regulations not published. If a party had actual and timely notice of its provisions, it cannot argue that the rule is invalid or that it cannot be applied for lack of publication. For example, in U.S. v. Aarons, 310 F.2d 341 (2nd Cir. 1962) the Second Circuit held that certain opponents to a Coast Guard nuclear project (the "Opponents") were bound by a "special notice" ("Special Notice") issued by such organism, although the Special Notice was not published in the Federal Register.[55] This, since the Coast Guard itself sent the Opponents a copy of the Special Notice.[56] Notwithstanding such notification, Opponents intervened with the Coast Guard's project and were criminally prosecuted.[57] Although the Court indicated that the Special Notice should have been published, it determined that the absence of publication did not exempt the Opponents from complying with it. The Court held that "[i]t would be rather anomalous that although publication in the Federal Register would not have sufficed to create criminal liability in the absence of actual knowledge, lack of publication should be fatal when actual knowledge exists."[58] Likewise, it indicated that "[a]lthough even those deeply sympathetic with the purpose of these statutes may be surprised to encounter them in this context, appellants are right in saying that publication was required; they are wrong, however, in contending that failure to publish immunizes them from prosecution despite their actual knowledge."[59]

A similar situation occurred in Timber Access Industries Company, Inc. v. U.S., 553 F.2d 1250 (1977) regarding applying the *Forest Service Manual*, which had not been published in the Federal Register. In this case, Timber Access Industries Company, Inc. ("Timber") had entered into two (2) contracts with the United States Forest Service to purchase timber.[60] The contracts were extended several times.[61] On one occasion, Timber disagreed with a price increase.[62] The contracts established that the "standard method" would be used to re-determine the sale price of timber, although such phrase was not defined in the contracts.[63] Rather, it was defined in the *Forest Service Manual*.[64]

When the issue reached the United States Court of Claims, the Court reasoned that, although the definition of the phrase "standard method" arose from a regulation not published, it had been notified to Timber since the phrase was included in the text of the contracts that Timber signed.[65] The Court indicated that said phrase, as defined in the *Forest Service Manual*, was known to the industry and should also have been known to Timber, since it was part of its contract. The Court stated "[s]ince the Forest Service is limited to only the use of the standard

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[55] The publication requirement established by Section 2.8 (d) of Act 38-2017 is equivalent with the requirement included in Section 552 of the APA, pursuant to which administrative agencies shall separately state and currently publish in the Federal Register for the guidance of the public, among other things: (i) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (ii) each amendment, revision, or repeal of the foregoing. 5 USC § 552 (a).

[56] *Id.*, p. 343.

[57] *Id.*

[58] *Id.*, p. 346.

[59] *Id.*, p. 345.

[60] *Id.*, p. 651.

[61] *Id.*

[62] *Id.*, p. 652.

[63] *Id.*, p. 656.

[64] *Id.*, p. 655.

[65] *Id.*, p. 655.

method; it seems naive that [Timber] would read the contract without inquiring as to the meaning of this obviously important term."[66]

A more recent case regarding the validity of regulations not published is U.S. v. Ventura-Meléndez, 321 F.3d 230 (1st Cir. 2003). In this case, the Ventura-Meléndez brothers and other people (the "Trespassers") entered an area in the Municipality of Vieques, Puerto Rico, which was restricted by certain regulation, since it constituted a United States Navy camp. However, such regulation had not been published. Upon entering the restricted area, the Trespassers were arrested. In Court, the Trespassers argued that (i) the regulation was invalid because it had not been published; and (ii) even if the regulation was valid, they did not receive adequate notice of it.[67]

Regarding the first argument of the Trespassers, the First Circuit ruled that "actual notice may at times supersede constructive notice through publication."[68] Therefore, the Court stated that it could not determine that the regulation was invalid because it had not been published before its application to the Trespassers ("[b]ecause the rule's promulgation did not violate the APA, the fact that the rule was not published until after the Trespassers' arrest for violating the temporary security zone does not disabuse the rule of its status as a 'lawful regulation'").[69] Regarding the second argument, the Court stated that, before the Trespassers crossed the restricted area they were warned by the Coast Guard that the passage was prohibited, and therefore, they were certainly notified.[70]

The cited case law shows that, although agencies have the obligation to publish their regulations, the parties aware of said regulations because of prior notification are bound by their provisions. The Energy Bureau had the right to apply Regulation 9351 in the instant case. LUMA and every other party to this case were bound by Regulation 9351's provisions at the date of issuance of the Final Resolution.

The application or Regulation 9351 does not violate the parties' due process by any means. As part of the general public, every party to this proceeding had the opportunity to assess Regulation 9351's weight and repercussions in the instant case, if any. However, LUMA manifested its conformity with the promulgation of a new rule before the establishment and finalization of a retail wheeling tariff and a uniform services agreement.[71] LUMA had the opportunity to assess Regulation 9351's weight and repercussions in the instant case, including that its application would allegedly violate LUMA's due process. Nevertheless, LUMA chose not to. LUMA never objected the enactment of Regulation 9351. Rather, LUMA waited until issuing the Final Resolution to challenge the validity of Regulation 9351 for lack of publication, for which it had thirty (30) days after its effective date. Not even through the Request for Reconsideration does LUMA argue how it is affected by the enactment or application of Regulation 9351. LUMA's arguments are misplaced and do not warrant further discussion.[72]

III. Additional Matters

Through the Request for Reconsideration, LUMA also states that the Energy Bureau requested stakeholder comments by April 25, 2022 and scheduled a technical conference for May 17, 2022. Regarding this, LUMA argues that the time frame proposed by the Energy

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[66] *Id.*, pp. 656-657.

[67] *Id.*, pp. 232-233.

[68] *Id.*, p. 232.

[69] *Id.*

[70] *Id.* pp. 233-234.

[71] LUMA's Final Brief, pp. 26-27.

[72] The foregoing analysis is also applicable to Regulation 9374, which contains the same provisions as Regulation 9351. That is, the thirty-day term to file a nullity action to challenge the validity of Regulation 9374 for non-compliance with the provisions of Act 38-2017 elapsed.

Bureau to consider the Standard Wheeling Agreement is unreasonable, since it does not provide the Energy Bureau with sufficient time to consider motions for reconsideration filed on or before April 13, 2022 regarding the Final Resolution.[73]

LUMA further states that, given the proceedings relating to the Standard Wheeling Agreement were allegedly "dormant" from August 2021, it will need to reassess the resources available to conduct further proceedings on a Wheeling Services Agreement. Therefore, it requested the Energy Bureau to stay such proceedings or extend the deadlines until June 2022, after proceedings in Case No. NEPR-MI-2021-0004, regarding LUMA's Annual Budgets, conclude and the Energy Bureau approves LUMA Budgets for Fiscal Year 2023.[74]

The Energy Bureau deems that the foregoing arguments are moot, considering that the dates have elapsed. No other party to the instant case moved for reconsideration regarding the Final Resolution. Nevertheless, the Energy Bureau deems it appropriate to reschedule a technical conference and set a new deadline for stakeholders to provide their comments on the relevant issues for a wheeling services agreement as laid out in Attachment B to the Final Resolution. The Energy Bureau is aware that Circon Energy, LLC ("Circon Energy") and the Independent Consumer Protection Office ("ICPO") filed their comments on April 25, 2022.[75] Therefore, Circon Energy and/or ICPO may submit additional comments which shall be filed on or before the deadline set through this Resolution and Order.

IV. Conclusion

The Energy Bureau **DENIES** the Request for Reconsideration. The Energy Bureau **ORDERS** LUMA to submit a formal version of the wheeling customer rider along with a description and rationale for any proposed changes from the draft version provided as Attachment A to the Final Resolution, within seven (7) days from the notification of this Resolution and Order.

Further, the Energy Bureau **GRANTS** twenty (20) days from the notification of this Resolution and Order for stakeholders to submit their comments on the relevant issues for a wheeling services agreement as laid out in Attachment B to the Final Resolution. The Energy Bureau also **CLARIFIES** that question 2 of Attachment B to the Final Resolution refers to pages 18-20 of the Final Resolution.

The Energy Bureau **SCHEDULES** a virtual technical conference to discuss the relevant issues for a wheeling services agreement on September 23, 2022, from 10 a.m. – 3:00 p.m.

The Energy Bureau **WARNS** LUMA that, if it fails to comply with the present Resolution and 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.

Any affected party may file a petition for review before the Court of Appeals within a term of thirty (30) days form the notification date of this Resolution and Order. This in accordance with Section 11.03 of Regulation 8543, and the applicable provisions of the LPAU and the Court of Appeals Regulation.

Be it notified and published.

NEGOCIADO DE ENERGÍA DE PUERTO RICO
NEPR
JUNTA REGLAMENTADORA DE SERVICIO PÚBLICO

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[73] *Id.*, p. 47.

[74] *Id.*

[75] *See, The Unbundling of the Assets of the Puerto Rico Electric Power Authority*, Case No. NEPR-AP-2018-0004, *Comments and Responses of Circon Energy LLC to the Questions for Stakeholder Comment Regarding Wheeling Services Agreement and Application Form*; and *Independent Consumer Protection Office's Comments to Attachment B to the Energy Bureau's March 24, 2022, Final Resolution and Order.*

Edison Avilés Deliz
Chairman

Lillian Mateo Santos
Associate Commissioner

Ferdinand A. Ramos Soegaard
Associate Commissioner

Sylvia B. 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 10, 2022. I also certify that on August 10, 2022 a copy of this Resolution was notified by electronic mail to Yahaira.delarosa@us.dlapiper.com; margarita.mercado@us.dlapiper.com; kbolanos@diazvaz.law, jmarrero@diazvaz.law, contratistas@jrsp.pr.gov, hrivera@jrsp.pr.gov, manuelgabrielfernandez@gmail.com, ramonluisnieves@rlnlegal.com; ccf@tcm.law and agraitfe@agraitlawpr.com. I also certify that today, August 10, 2022, I have proceeded with the filing of the Resolution issued by the Puerto Rico Energy Bureau.

For the record, I sign this in San Juan, Puerto Rico, today August 10, 2022.

Sonia Seda Gaztambide
Clerk

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