

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

NEPR

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IN RE: REVIEW OF LUMA'S INITIAL
BUDGETS

CASE NO. NEPR-MI-2021-0004

**SUBJECT: Motion in Compliance with Order to
Show Cause and Request for Reconsideration**

**MOTION IN COMPLIANCE WITH ORDER TO SHOW CAUSE AND REQUEST FOR
RECONSIDERATION**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW **LUMA Energy, LLC** ("ManagementCo"), and **LUMA Energy ServCo, LLC** ("ServCo"), (jointly referred to as "LUMA"), and respectfully state and request the following:

I. Introduction

LUMA is committed to working with the Puerto Rico Energy Bureau ("Energy Bureau") and, as the evidence in the administrative record in this proceeding clearly shows, LUMA has reported consistently regarding budget and expenses. LUMA complied with the requirements that this honorable Energy Bureau established for FY2022 in connection with the approved Initial Budgets for FY2022 ("FY2022 Budgets"). LUMA filed quarterly reports on financial activities and spending, as well as an annual report. To be very clear, LUMA completed Fiscal Year 2022 within budget, and has remained on budget. As a result, LUMA has never requested a rate increase since taking over operations of the Puerto Rico Transmission and Distribution System ("T&D System"). The record also establishes that LUMA's overall spending in FY2022 was within the approved aggregate Operating and Non-Federally Funded Capital budgets for FY2022 and this spending did not cause nor did LUMA request an increase to the existing base rate. LUMA

remained fiscally responsible while providing customers with the service and value they deserve. that Moreover, LUMA's spending was compliant with public policy to operate the utility prudently while at the same time LUMA pursued the approved plans to remediate and transform Puerto Rico's electric system. In sum, the record shows adherence to the orders of this Energy Bureau and reasonable spending to benefit customers and ratepayers and in compliance with energy public policy.

On December 14, 2022 ("December 14th Order"), this Energy Bureau denied LUMA's motion to reconsider a prior Resolution and Order of November 11, 2022 ("November 11th Order"). See LUMA's *Motion Submitting Fiscal Year 2022 Budget Amendment* of November 2, 2022 ("November Budget Amendment Request"). In the December 14th Order, this Energy Bureau rejected LUMA's November Budget Amendment Request whereby LUMA requested to reallocate a surplus in LUMA's Operating Budget to the Non-Federally Funded Capital Budget line items, and which amendment maintains spending within the overall FY2022 Budget and does not require a revision of the base rates. In the December 14th Order, this Energy Bureau also issued an order for LUMA to explain why a fine should not be imposed for allegedly failing to comply, in connection with the FY2022 Budgets, with certain requirements on the timing and circumstances to submit a request to amend an approved budget, that this Energy Bureau set for the first time in an Order issued on August 2, 2022 and notified on August 3, 2022 ("August 3rd Order"); that is, after FY2022 ended.

LUMA respectfully states that imposition of a fine to LUMA and denial of the November Budget Amendment Request based on regulatory rules and limitations adopted in the August 3rd Order and that this Energy Bureau further developed in the December 14th Order, would be an arbitrary and capricious determination that penalizes LUMA for actions undertaken at a time when

this Energy Bureau **had not adopted rules or limitations on the timing, circumstances and justifications for LUMA to move for an amendment of an approved budget.** *Ex post facto* imposition of regulatory limitations on LUMA’s ability to conduct business, operate the T&D System, invest in capital projects and achieve important milestones to remediate the T&D System as required by the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (“T&D OMA”) and public policy, is contrary to due process requirements of fair notice, reasonable reliance and respect for settled expectations. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); *see also De Niz Robles v. Lynch*, 803 F.3d 1165, 1173-75 (9th Cir. 2015) (Gorsuch) (holding that presumption of prospectivity applies to agency rulemaking actions that set new policy and stating that due process and equal protection concerns apply to retroactive agency action).

Because the August 3rd Order was issued **after the close of FY2022**, it was not fair nor reasonable for LUMA to construe that the August 3rd Order set forth rules that would apply retroactively to LUMA’s spending in FY2022 nor serve as a basis for imposition of a fine regarding spending in FY2022. Because LUMA’s spending for FY2022 preceded the August 3rd Order and considering that prior to August 3rd, this Energy Bureau had not imposed any directives on the process to request an amendment to the approved FY2022 Budgets, this Energy Bureau should not impose a fine or sanction on LUMA in connection with the November Budget Amendment. A sanction would be an undue retroactive punishment to LUMA that infringes LUMA’s due process

right to prior notice of applicable regulatory requirements and rules. For those same reasons, this Energy Bureau should approve the November Budget Amendment Request.

As LUMA will explain in this Motion, LUMA filed the November Budget Amendment Request after it conducted year-end accounting process that is standard practice and identified the need to reallocate funds from the Operating Budget to the Capital Non-Federally Funded Budget. Prior to concluding year-end processes, LUMA was not reasonably in a position to determine whether it was necessary to request a further amendment to the FY2022 Budgets to conform them to actual spending. LUMA thus requests that this Energy Bureau vacate the denial of the November Budget Amendment Request and decline to impose a fine in connection therewith.

LUMA maintains that given the timing of the August 3rd Order, LUMA acted reasonably to devote as many resources as were allowed under the overall FY2022 Budgets, towards the approved programs for the remediation and reconstruction of the electric grid. LUMA spent the approved funds reasonably given the information that it had at the time, prior to receiving the Energy Bureau's August 3rd Order.

II. Background

On February 24, 2021, LUMA filed before the Energy Bureau of the Public Service Regulatory Board (“Energy Bureau”) its *Petition for Approval of Initial Budgets and Related Terms of Service* (the “Petition for Approval”) under Act 57-2014, as amended, and pursuant to the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* of June 22, 2020 (the “T&D OMA”). The Initial Budgets included the Operating Budget and the Capital Budget, as well as a proposed allocation for PREPA’s Generation Budget. “The Operating Budget include[d] the T&D Pass-Through Costs that are required to perform operation and maintenance services. Activities also include improvement programs which support the Recovery

and Transformation Framework.” *See id*, note 14 (internal citations omitted). The Capital Budget, in turn, included the Federally Funded and the Non-Federally Funded, Capital Budgets. As explained in the Petition for Approval:

[t]he Federally Funded Component of the Capital Budgets include[d] federally funded projects based on documents prepared for funding obligations under the Stafford Act and considering PREPA’s plans to deploy federal funds, as such plans ha[d] been presented by PREPA to the Federal Emergency Management Agency (FEMA). The amounts provided [were then] current estimates based on a reasonable judgement of the schedule of programs and projects that may be federally funded and are subject to approval by the appropriate federal agencies.

Id., note 15. The Non-Federally Funded Capital Budget is funded from PREPA’s revenues and, along with the Operating Budget, subject to limits set in the 2017 Rate Order for the PREPA Base Rate.

The Petition for Approval and the proposed Initial Budgets were filed based on the information available and known to LUMA at the time of the filing and on the assumptions of the 2020 PREPA Fiscal Plan certified by the Financial Oversight and Management Board for Puerto Rico (“FOMB”). As explained in the Petition for Approval, “since LUMA [was] not operating the T&D System . . . the Initial Budgets were created based on the information obtained from PREPA and using certain assumptions and LUMA’s [subject matter experts with] . . . experience[] in operating and managing other electric utilities.” *See* Petition for Approval, at pages 12-13.

On May 31, 2021, this honorable Energy Bureau issued and published a Resolution and Order approving LUMA’s Initial Budgets (“May 31st Resolution and Order”). To wit, this Energy Bureau approved LUMA’s Initial Budget, comprised of the Operating Budget and the Capital Budget (Federally and Non-Federally Funded), and PREPA’s Generation Budget.

In the May 31st Resolution and Order, the Energy Bureau listed “requirements for LUMA to fulfill during the Interim Period and going forward” for annual and quarterly reporting on the

Initial Budgets T&D System spending amounts and federal funding activity. *See* May 31st Resolution and Order, Section IV, paragraphs 1 through 3 thereof, respectively, pages 36-37. Regarding expenses, this Energy Bureau determined that “LUMA shall maintain detailed accounting of annual expenses for FY2022 and FY2023 and account for the use of funds within the budget for that timeframe.” *See id.*, at ¶1, page 36. “LUMA is to explain annually any differences between accounts expenses and approved budgets and request approval for cost recovery of any uncollected funds.” *Id.* In the May 31st Resolution and Order, however, this Energy Bureau did not include requirements for filing requests to amend the FY2022 Budgets, nor directives that LUMA shall anticipate the need to amend the FY2022 Budgets or to reallocate funds.

The record of this proceeding shows that LUMA filed quarterly reports with this Energy Bureau and an annual report that explained differences between account expenses and approved budgets. *See* November 15, 2021 (“Q1 Report”); February 15, 2022 (“Q2 Report”), May 16, 2022 (“Q3 Report”), and September 8, 2022 (“Q4 Report with preliminary results”) (jointly, “the Quarterly Reports”) and October 29, 2022 (“Annual Report”).

In FY2022, LUMA petitioned this Energy Bureau to approve three amendments to the approved Initial Budgets. To wit, on July 16, 2021, LUMA requested a modification of the Approved Budget for FY2022 to reflect updated assumptions resulting from the development of the annual fiscal plan and certification process by the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA) in the Title III proceeding during Spring 2021 (“July 2021 Budget Modification Request”). The July Budget Modification Request reflected an updated load and revenue forecast with more recent consumption data, updated macro-economic data and

assumptions including PREPA's timing of Title III exit. As will be detailed below, this Energy Bureau adjudicated the July 2021 Budget Modification Request, on August 3, 2022.

On June 6, 2022, LUMA filed a second request to amend the approved Initial Budgets. This, through a motion entitled: *Motion Submitting Fiscal Year 2022 Budget Amendment* (the "June 2022 Amendment Request"). With the June 2022 Amendment Request, LUMA submitted a Revised Budget Amendment for Fiscal Year 2022 to maintain a budget that accurately reflected changes in LUMA's executed and remaining planned expenditures for FY2022. As expressed at the time, the revised amendment included modifications to reflect the updated 2021 Fiscal Plan assumptions in line with the July 16, 2021 application and a reallocation of \$47 million from the Capital – Non-Federally Funded Budget to the Operating Budget. The budget amendment proposed a reallocation to reflect higher than anticipated operating expenditures and lower than expected non-federally funded capital expenditures for FY2022. *See, Exhibit I of the Motion Submitting Fiscal Year 2022 Budget Amendment.*

On August 3, 2022, more than one year after LUMA submitted the July 2021 Budget Modification Request, and fifty-eight (58) days after LUMA submitted the June 2022 Amendment Request, the Energy Bureau notified a Resolution and Order approving the July 2021 Budget Modification Request and the June 22, 2022 Amendment (the August 3rd Order). That is, the Energy Bureau adjudicated and approved LUMA's July 2021 Budget Modification Request and the June 2022 Amendment Request more than one month after FY2022 ended. To wit, throughout FY2022, LUMA did not have assurances that those requests, particularly, the June 2022 Amendment Request, were to be approved by this Energy Bureau.

In the August 3rd Order, this Energy Bureau construed Section 7.3(e) of the T&D OMA and stated an "expectation . . . that LUMA shall notify the Energy Bureau, promptly, upon

becoming aware that the T&D Pass Through expenditures are expected to exceed the budget for that Contact Year.” *See* August 3rd Order at pages 5-6. Regarding the reallocation of \$47 million from the Capital Budget, Non-Federally Funded Budget to the Operating Budget, this Energy Bureau found reasonable that at the time of submitting the Initial Budgets and during the Front End Transition Period, LUMA did not discover information relevant to anticipate the need of increased funds for training and safety and the need to perform foundational activities to further federally-funded work and seek FEMA approval, in addition to an inherited backlog on federally-funded work. *See id.* at page 7.¹

At page 7 of the August 3rd Order, this Energy Bureau stated, for the first time, that “any future reallocation or redistribution of funds amongst budget programs or line items shall be timely anticipated and requested before the Energy Bureau.” This Energy Bureau also stated that “unexpected, delayed, or complex work cannot be a generic excuse for delayed work.” *Id.* at page 8.

On August 12, 2022, LUMA filed a “Request to Align the Filing of Quarterly Report for Fourth Quarter of Each Fiscal Year (“Q4 Report”) with Year-End Reporting under the T&D OMA” (“Request for Alignment”), whereby it moved this Energy Bureau to align reporting with LUMA’s year-end report.² In what is pertinent, LUMA proposed to align a Q4 Report with a year-end report to be filed 120 days after the end of the fiscal year consistent with the reporting requirement for financial information under the T&D OMA, Annex I, Section VI(B), paragraph 4,

¹ This Energy Bureau held that: “In view of the inability of LUMA to fully discover the extent of the training and onboarding that would be required, the extent of unfulfilled work orders and the minimal work executed to facilitate federal funding before LUMA assumed operations as Operator, the Energy Bureau has no objection to the specified reallocation of funds among Improvement Portfolios to further these important goals.” *See* August 3rd Order at page 7.

² The Request for Alignment was submitted to the Energy Bureau via electronic mail as the electronic filing system was not working on the evening of Friday, August 12, 2022. As per the Clerk’s directive, LUMA filed it through the electronic portal on August 15, 2022.

which requires that LUMA submit interim and unaudited financial statements within one hundred and twenty days after the end of each fiscal year.

On October 28, 2022, and pursuant to Section 7.3(e) of the T&D OMA, LUMA provided notice to the Energy Bureau via transmittal (LUMA-PREB-T-00046) to inform them that LUMA would be filing a FY2022 Budget Amendment. LUMA explained that through the year-end financial close, LUMA became aware that a reallocation of budget was required between the Capital – Non-Federally Funded and Operating Budgets. *See Motion for Reconsideration of Resolution and Order of November 11, 2022, on LUMA’s Fiscal year 2022 Budget Amendment*, at pages 2-3. The notice also outlined that LUMA’s spend for FY2022 remained within the 2017 Rate Order and overall FY2022 budget limits (“October 28th Budget Amendment Notice”). On November 2, 2022, LUMA submitted the November Budget Amendment Petition. LUMA requested that the FY2022 Budget be amended to reallocate a surplus of \$21 million in LUMA’s Operating Budget to the Non-Federally Funded Capital Budget line items. The modification was a result of LUMA’s year-end closing adjustments and financial reviews. As the November Budget Amendment Petition shows, LUMA proposed to align the actual spending to budgets for FY2022 as follows:

	Approved May '21 FY2022	Approved August '22 FY2022	Proposed: November '22 FY2022
T&D Operating Budget	525	572	551
Capital Budget – Non-Federally Funded	124	77	98
Total	649	649	649

On November 11, 2022, this Energy Bureau issued a Resolution and Order with the title “Determination on LUMA’s Fiscal Year 2022 Budget Amendment Petition” (“November 11th Order”), whereby this Energy Bureau denied LUMA’s November Budget Amendment Petition. *See November 11th Order at page 6.* On page 5 of the November 11th Order, this Energy Bureau

referenced that LUMA should timely anticipate and inform the Energy Bureau of the need to reallocate funds among budget programs or line items. Further, the Energy Bureau stated that the November Budget Amendment Petition was filed 123 days after the close of FY2022. The Energy Bureau recognized that the November Budget Amendment Request “does not result in increased customer base rates and does not result in an increase to LUMA’s aggregate expenditures. As such, a rate review proceeding is not needed.” *Id.* at page 5.

On November 23, 2022, LUMA requested reconsideration of the November 11th Order and moved this Energy Bureau to approve the November Budget Amendment Petition, which, as this Energy Bureau recognized in the November 11th Order, seeks to reallocate \$21 million from the Operating Budget for FY2022 (Approved on August 3, 2022) to the Non-Federally Funded Capital Budget, and complies with the 2017 Rate Order as required by Section 7.3(a) of the T&D OMA.

In the December 14th Order, this Energy Bureau denied LUMA’s Motion for Reconsideration. This Energy Bureau construed Section 7.3(e) of the T&D OMA as requiring “that LUMA shall notify the Energy Bureau, promptly, upon becoming aware that the T&D Pass Through expenditures are expected to exceed the budget for that Contact Year.” *See* December 14th Order at page 3. This Energy Bureau interpreted Section 7.3(e) of the T&D OMA to set the following rules:

- LUMA cannot spend money contrary to the approved budget, and then obtain a retroactive modification, which would otherwise seem to suggest that LUMA fully complied with the applicable budget limitations.
- Budget amendment requests must be received when expenditures are expected to exceed the approved budget and, in all cases, before the expense is incurred.
- The same principles shall be applicable to LUMA's requests to reallocate or redistribute funds amongst budget programs or line items which exceeds the parameters provided in Section 7.3(c) of the T&D OMA to reallocate, accelerate or postpone expenditures “or address changed operational or commercial circumstances or new legal or regulatory requirements and (y) in such a manner

that the reallocations do not exceed five percent (5%) of the Budget in which such reallocations are made or the expenditures are not postponed for a period longer than one (1) year.”

The Energy Bureau also declined to accept LUMA’s explanations on year-end financial processes stating that “LUMA must not view the end of the year financials as enabling funds to be allocated without adequate forethought after being expended. The Energy Bureau expects the budget process to be the result of careful program and expenditure planning and therefore that an amendment could be reasonably anticipated in accordance with prudent accounting during the fiscal year.” *Id.* at page 3. Furthermore, for the first time, this Energy Bureau stated that Amendment requests can be reasonably based on projections and/or estimates and explained that “they need to be approved prior to making the expenditure to effectively prevent expenditures that may not be aligned with, among other things, public policy compliance and/or advancement or the provision of reliable service.” *Id.* Finally, this Energy Bureau explained that “[t]he close of the fiscal year and the Annual Report with the final numbers will show the performance in terms of adherence to the budget approved (including timely approved amendments) but shall not be used as basis for retroactive amendments.” *Id.* at pages 3-4.

In the December 14th Order, this Energy Bureau granted LUMA ten (10) business days³ to show cause why it should not be fined up to \$25,000 per day for:

(i) exceeding the expenses of the Non-Federally Funded Capital Budget for approved FY22 Budget in an amount of \$21 million, without first obtaining the Energy Bureau's approval, and (ii) for failing to comply with the August 3 Order, which establishes that: (a) the window for justifications of budget modifications based on lack of actual information was closed and that unexpected, delayed, or complex work cannot be a generic excuse for delayed work, and (b) any future reallocation or redistribution of funds amongst budget programs or line items shall be timely anticipated and the corresponding budget amendment timely requested before the Energy Bureau.

³ Given the legal holidays observed by this Energy Bureau on December 23, 26 and 30, 2022 and January 2, 2023 the time period to answer the Order to Show Cause expires on January 3, 2023.

III. Applicable Standard to Imposition of Fines

Section 6.36 of Act 57-2014, as amended by Act 17-2019, endows the Energy Bureau with authority to “impose administrative fines for violations of this Act, or the regulations and orders issued thereunder, committed by any person or electric power company subject to its jurisdiction, of up to a maximum of twenty-five thousand dollars (\$25,000) per day.” 22 LPRC §154jj (2021, Spanish-Language Codification).

Decisions by administrative agencies imposing fines shall not exceed statutory authorization, must be supported by substantial evidence in the administrative record and cannot amount to a clear abuse of discretion. *See Comisionado de Seguros v. Antilles Ins. Co.*, 145 DPR 226, 233-34 (1998); *Assoc. Ins. Agencies, Inc. v. Com. Seg. PR*, 144 DPR 425, 439-41 (1997); *See also e.g. ECP v. OCS*, 2020 TSPR 112 (stating the general rule that decisions by administrative agencies should be reasonable and based on the administrative record); *see also Graciani Rodríguez v. Garage Isla Verde*, 202 DPR 117, 126-27 (2019).

In the administrative law context, the Puerto Rico Supreme Court has held that the exercise of discretion by an administrative agency must be rooted in reasonableness and in accordance with applicable law. *See e.g., Ramírez v. Policía de PR*, 158 DPR 320, 339 (2003). Discretion, in turn, has been defined as a form of reasonableness applied to judicial discernment to reach a just conclusion. *See e.g., Banco Popular de PR v. Mun. de Aguadilla*, 144 DPR 651 657-58 (1997); *Pueblo v. Ortega Santiago*, 125 DPR 203, 211 (1990).

IV. Discussion

A. LUMA complied with the Energy Bureau’s orders regarding the FY2022 Budgets. Due process bars application of the requirements set by this Energy Bureau in the August 3rd Order and December 14th Orders, to LUMA’s FY2022 spending.

The December 14th order to show cause states that LUMA should explain why it should not be subject to a fine for (i) exceeding the limit of the Operating Budget by \$21 million approved on August 3, 2022, without first obtaining the approval of the Energy Bureau, that is, for incurring in expenses without prior leave from the Energy Bureau to amend the FY2022 Budgets as required in the August 3rd Order; and (ii) violating two provisions of the August 3rd Order: (a) a statement that by August 3, 2022, the window for justifications of budget modifications based on lack of actual information was closed and that unexpected, delayed, or complex work cannot be a generic excuse for delayed work, and (b) a determination that future reallocation or redistribution of funds amongst budget programs or line items shall be timely anticipated and the corresponding budget amendment timely requested before the Energy Bureau. As a matter of law and reasonably, the August 3rd Order cannot apply retroactively to spending and budgetary actions by LUMA during FY2022 which ended on July 31, 2022. The August 3rd Order announced and established new interpretative rules regarding the timing and circumstances in which LUMA should request, and may obtain, an amendment to an approved annual budget. However, as will be shown, throughout FY2022, LUMA complied with the requirements set by this Energy Bureau in the May 31st Order in connection with the FY2022 Budgets. Throughout FY2022, LUMA did not have timely, fair, or reasonable notice of the rules and requirements that this Energy Bureau announced in the August 3rd Order. Thus, there is no basis to conclude that LUMA violated an order by this Energy Bureau that could warrant the imposition of a fine. It is not fair nor reasonable to levy a fine on LUMA for noncompliance with rules that this Energy Bureau established after FY2022 ended.

Due process in the administrative sphere requires a fair and equitable process that guarantees and respects the dignity of the individuals concerned. *López y otros v. Asoc. de Taxis de Cayey*, 142 DPR 109 (1996). The requirements of due process offer protection to regulated

parties against administrative arbitrariness. *Henríquez v. Consejo Educación Superior*, 120 DPR 194, 202 (1987). Furthermore, substantive due process precludes state action that unreasonably or arbitrarily interferes with property and liberty interests. *See* Sec. 7, Art. II, Constitution of Puerto Rico; *see e.g. Rivera Rodríguez & Co. v. Lee Stowell, etc.*, 133 DPR 881, 887–888 (1993)

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of the conduct that is forbidden or required.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The fair notice requirement furthers two due process concerns: “first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *Id.*; *see also Asoc. Fcias. Com v. Depto. De Salud*, 156 DPR 105, 136 (2002) (holding that agencies cannot act arbitrarily when they change their regulations or adopt new rules). Due process concerns have been applied to an agency’s exercise of delegated legislative authority to protect regulated parties and entities from agency interpretations and rules that apply to conduct or actions that took place before the interpretation or rule was announced or that amount to unfair surprise to the regulated party. *See Health Ins. Ass’n of America v. Shalala*, 23 F.3d 412, 422-424 (D.C. Cir. 1994) (declining to afford deference to interpretative rules that would have been applied retroactively to transactions that occurred before the agency adopted the interpretative rules); *Asoc. Fcias. Com* 156 DPR at 136 (stating that the requirement that agencies adopt proper regulations avoids arbitrary decisions and ensures that agencies comply with due process of law requirements regarding notice to the public of the law and explaining that absent standards that govern the exercise of the discretion that the law delegates to an administrative agency, arbitrary and discriminatory applications of the law are possible).

In one case, the United States Supreme Court rejected an agency interpretation that would have imposed retroactive liability “on [a regulated party] for conduct that occurred well before the [agency] interpretation was announced.” *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012). The Supreme Court explained that “[t]o defer to the agency’s interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” *Id.* at page 156 (citations omitted).

Relatedly, agency rulemaking actions are presumed to be prospective. *See De Niz Robles*, 803 F.3d 1165 at 1171-72 (holding that the presumption of prospectivity applies to agency rulemaking actions, even where agencies issue rules in adjudicative proceedings, as long as the agency action bears the hallmarks of rulemaking that issue delegated legislative policy decisions.).⁴ Unless the enabling statute expressly endows an agency with statutory authority to adopt retroactive rules, agencies cannot adopt retroactive rules that unsettle good faith expectations. *Bowen*, 488 U.S. at 208 (“a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); *see also De Niz Robles*, 803 F.3d at 1172 (“The presumption of prospectivity attaches to Congress’s own work unless it plainly indicates an intention to act retroactively. That same presumption, we think, should attach when Congress’s delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive

⁴ Given that this Energy Bureau issued its determination in the August 3rd Order in the context of a regulatory proceeding and has not conducted an adjudicative proceeding per Regulation 8543 on Adjudicative, Notice of Non Compliance, Rate Review and Investigation Proceedings, LUMA considers that the directives on budget amendment and processes, are in the nature of rulemaking or per the exercise of rulemaking or interpretative rulemaking authority.

application.”); *Lima-Rivera v. UHS of Puerto Rico, Inc.*, 476 F.Supp.2d 92, 98 (D. PR. 2007) (“Generally, ‘the law disfavors retroactivity, and courts should not give administrative rules retroactive effect in the absence of an express statutory grant of retroactive rulemaking power by Congress. This general ban on retroactive rulemaking applies with the same force whether the agency issues a ‘legislative rule’ pursuant to a specific statutory directive or an ‘interpretive rule’ construing the meaning of authorizing legislation.”) (internal citations and quotation marks omitted).

Regarding the requirement to afford fair warning to regulated parties, the United States Supreme Court has held that a court may not defer to a new interpretation, that creates “unfair surprise” to regulated parties. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (holding that “an agency’s reading of a rule must reflect ‘fair and considered judgment’ . . . And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates “unfair surprise” to regulated parties”); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

The record of this proceeding shows that the August 3rd Order was issued after FY2022 ended and thus, after LUMA incurred in expenses that required year-end reallocation of funds. Throughout FY2022, the regulatory requirements that this Energy Bureau set in connection with the approved FY2022 Budgets, are those set in the May 31st Order. The May 31st Order established quarterly and annual reporting requirements that LUMA met; but is silent on the timing to move to amend the approved Budgets for FY2022, and does not outline the criteria or standards that would cabin the Energy Bureau’s discretion in assessing the reasonableness of a proposed budget amendment. That is, the May 31st Order does not provide guidance or sufficient notice to LUMA of applicable limitations, temporal, procedural or substantive to submit and request approvals of

amendments to the FY2022 Budgets per the T&D OMA, or to reallocate funds between budgets according to actual spending and operational realities after June 1, 2021.

Besides the May 31st Order, in FY2022 LUMA did not have other regulatory guidance to reasonably apprise it of when and under which circumstances it should request that the Energy Bureau approve an amendment to the FY2022 Budgets. Prior to FY2022, this Energy Bureau had not conducted an annual budget examination nor supervised implementation of PREPA's budgets. The Final Rate Order, Case CEPR-AP-2015-0001, issued on January 10, 2017, and amended on March 8, 2017, sets forth the requirement to file a proposed budget for review and ensure that planned spending is prudent in accordance with the revenue requirement, but does not establish a requirement for PREPA to request an amendment to an approved budget nor states that the Energy Bureau would monitor or manage a budget after the annual budget examination process concludes. In fact, in the Final Rate Order of 2017, this Energy Bureau set an annual process to approve a proposed budget; not a process to manage or supervise an approved budget nor approvals of amendments to budgets before spending is incurred. Finally, as of today, this Energy Bureau has not enacted a formal regulation with procedural or substantive guarantees and guidance to LUMA on the Energy Bureau's authority to monitor, manage or oversee an approved budget nor to rule proceedings to amend an approved budget. Simply put, throughout FY2022, this Energy Bureau did not approve any rules to state its authority or regulatory requirements over amendments to an approved budget that could serve as a reasonable and constitutional basis to deny LUMA's November Budget Amendment Request or to impose a fine of \$25,000 on LUMA.

The August 3rd Order is the first document where this Energy Bureau laid out its "expectations" on the timing for LUMA to move to amend the FY2022 approved Budgets and where this Energy Bureau first announced the requirement that LUMA shall move for an

amendment to an approved budget before incurring in expenses that require reallocation of funds. It would be arbitrary and deprive LUMA of due process of law to impose a fine on LUMA and maintain a denial of the December Budget Amendment Request, in circumstances where this Energy Bureau did not establish, through approved rules, its authority and the manner through which it may or will monitor and manage annual budgets.

To compound the aforementioned due process injury to LUMA, the August 3rd Order does not provide sufficient guidance to LUMA for future requests to amend an approved budget. For example, this Energy Bureau states that LUMA shall timely anticipate future reallocation or redistribution of funds amongst budget programs or line items, but does not provide principled guidance on what it means by “timely” nor consider operational realities that affect LUMA’s ability to anticipate reallocations of funds that may require a budget amendment. The August 3rd Order is unduly vague and thus, lends itself to arbitrary and even discriminatory actions in violation of due process.

LUMA respects the Energy Bureau’s delegated authority to ensure that rates are reasonable and to protect customers from bearing the burden of imprudent expenses that may require an increase to the base rate. LUMA also appreciates the Energy Bureau’s authority to regulate, oversee, and enforce public policy on energy pursuant to Act 57-2014, as amended, and Act 19-2017. However, the Energy Bureau’s authority over rates and energy public policy, does not invalidate LUMA’s right to fair and reasonable notice of adoption of the interpretative rules and regulatory requirements that it must follow, including in connection with implementation of an approved annual budget and the Energy Bureau’s supervision of expenses throughout a fiscal year. Acts 57-2014 and 17-2019 do not grant the Energy Bureau express authority to retroactively

apply new interpretative rules to impose administrative fines for conduct or activities that occurred before the Energy Bureau announced the rules and requirements for budget amendments.

The record of this proceeding shows that throughout FY2022, LUMA complied with the May 31st Order, which outlined the requirements set forth by this Energy Bureau in connection with the FY2022 Budgets and, as explained, included quarterly and annual reporting requirements that LUMA met. There is thus no basis to conclude that LUMA violated an order by this Energy Bureau. Thus, there is no legal or just basis to levy a fine on LUMA.

LUMA should not be penalized for, nor bear the denial of a request to amend the FY2022 Budgets, based on rules and requirements regarding budget amendments that had not been adopted or announced during FY2022; between July 1, 2021 and May 31, 2022 when LUMA implemented the FY2022 Budget and incurred expenses in connection therewith. Because the requirements stated in the August 3rd Order should not apply to FY2022, this Energy Bureau should reconsider the December 14th Order that relies on said order to deny the November Budget Amendment Request. This Energy Bureau should, instead, approve the November Budget Amendment Request.

B. LUMA filed the November Budget Amendment Request when it reliably identified the need to reallocate funds from the Operating Budget to the Capital Non-Federally Funded Budget.

LUMA appreciates that in the August 3rd and December 14th orders, this Energy Bureau sought to streamline annual budgetary processes to ensure that LUMA's spending is prudent, in accordance with the applicable revenue requirement, and does not require an increase of the base rate charged to customers. However, this Energy Bureau should not impose a fine on LUMA in connection with the timing of the filing of the November Budget Amendment Request and should reconsider its denial of the November Budget Amendment Request.

After filing the June 2022 Amendment Request to reallocate of \$47 million from the Non-Federally Funded Capital Budget to the Operating Budget, LUMA was not in a position to reliably identify that a further reversal of a portion of that reallocation between the Operating Budget and the Capital Budget Non-Federally Funded, would be required in November. From June 6, 2022, until the close of FY2022, LUMA's best estimates on current spending and numbers for the Fourth Quarter, was what was stated in the June 2022 Amendment Request: a reallocation of \$47 million which would increase the approved Operating Budget from \$525 million to \$572 million and reduce the Non-Federally Funded Capital Budget from \$774 million to \$728 million. That proposal was submitted to this Energy Bureau on June 6, 2022 and approved on August 3, 2022. At the close of FY2022, LUMA did not have more reliable numbers to identify whether, at year-end, the reallocation proposed in the June 2022 Amendment Request would need an adjustment. As will be explained below, LUMA's inherited financial systems, which largely involve manual processes, as well as the fact that vendors often delay submission of invoices, require that LUMA rely on estimates that are subject to change and force LUMA to rely heavily on year-end adjustments that affect spending across all quarters in the fiscal year.

As LUMA has explained in this proceeding, budgets are based on projections made by LUMA and its personnel with the information that is available at the time that the budget is designed and adopted and using their expertise. Budget preparation processes involve forecasting activities and assumptions made using information and conditions occurring at the time that the budgets are prepared and with the expertise and experience of subject-matter experts. *See* LUMA's Annual Budgets, Section 2.2 (Key Assumptions and Basis of Annual Budgets) and Submission of Annual Budgets for Fiscal Years 2023 Through 2025, Section VI ("Key Assumptions in the Annual Budgets"). Similarly, LUMA's capabilities to track spending and determine if a budget

amendment may be necessary month to month or quarter to quarter, are heavily dependent on estimates. That is why, after LUMA submitted the June 2022 Amendment, it could not obtain other reliable numbers to estimate whether a further relocation of funds would be needed or determine the final allocation between budgets.

LUMA's June 2022 Amendment Request was the result of quarter end processes whereby LUMA attempts to obtain the information and report results as accurately as possible with the time allowed to submit quarterly reports and in accordance with current capabilities. However, some adjustments to numbers are recorded subsequently. To make a final determination on actual spending in FY2022, LUMA needed the year-end financial data for FY2022. This required that LUMA compile information from multiple financial systems, conduct requisite internal administrative review of financial information, and examine variances.

It is important for this Energy Bureau to consider the differences between quarter-end and year-end processes. When each quarter of the fiscal year closes LUMA performs processes to provide the best numbers "at a point in time," which means that per standard accounting practices, they are subject to adjustments in a later quarter or after year-end processes are conducted. Since the fiscal year remains "open," revisions can be recorded in future quarters. At quarter-end, only significant accounts in the general ledger are reconciled and numbers are reviewed internally for reasonability. Furthermore, LUMA relies on estimates. Conversely, at year-end, LUMA aims to achieve materially correct numbers on which it may rely for audit purposes. Within year-end processes, LUMA conducts higher verification with more supporting documentation.

At the end of a fiscal year, the financial records are closed. All accounts in the general ledger are reconciled. This includes updating accrued amounts with invoiced amounts and performing closing activities which may result in posting certain transactions to different accounts

within the budget. Closing activities include items such as: reconciliation of subledger and general ledger accounts, validation and recording of accruals for completed work that has not yet been invoiced by vendors; reconciliation and adjustment of clearing accounts; review of costs to ensure proper capitalization; and conducting additional checks and verification.

Upon concluding these year-end processes, LUMA obtains materially correct numbers that reliably allow LUMA to determine if year-end reallocations of funds are needed. One such example is the reallocation that was identified in the November Budget Amendment Petition, whereby the overall budget remains unchanged, but the allocation of certain budgets changed at year-end.

LUMA's ability to estimate if reallocations of funds between budgets, programs or line items are needed or whether expenses will exceed an approved budget, is constrained by current systems and capabilities. As this Energy Bureau recognized in approving the System Remediation Plan ("SRP"), several components of the T&D System require remediation to allow LUMA to meet performance standards per industry practices. These constraints are also recognized in the T&D OMA, whereby the parties agreed that:

(A) certain components of the T&D System and the manner in which the T&D System is operated do not currently meet the standards of performance required under this Agreement, including the fact that certain matters related to the T&D System or T&D System Sites and certain general operating and administrative practices may not comply with Contract Standards, and (B) a period of review, planning, remediation, repair and replacement will be required to enable Operator to achieve the Contract Standards.

T&D OMA, Section 4.1(d); *see also* Resolution and Order of June 23, 2021, Case NEPR-MI-2020-0019, at page 3 (referencing Section 4.1(d) of the T&D OMA); page 12.

As LUMA explained in its submission of the SRP, it conducted a Gap Assessment of different components of PREPA's operations to understand PREPA's processes, controls,

communications, and safety protocols, technologies, and tools, and to assess the current organization's capabilities across general management and specific business functions." *See* Resolution and Order of June 23, 2021, Case NEPR-MI-2020-0019, at page 10. In the GAP Assessment that was submitted to this Energy Bureau for consideration in connection with LUMA's SRP, LUMA reviewed major departments, including Financial Management. *Id.* at page 11. The result of that assessment regarding Financial Management for financial reporting processes revealed departmental gaps and yielded a rating of "2 aware" which per the applicable scoring criteria of 1, being the lowest and 5 the highest, means the following:

- the organization has a basic understanding of the need to address these elements and is in the process of deciding how/starting to apply them
- Preliminary documentation of processes being compiled
- Performance is unmeasured
- Little organizational effort to identify issues.

See GAP Assessment, at page 500 (scoring for financial reporting processes) and page 10 (rating criteria), RFI-LUMA-MI-20-0019-210406-PREB-001 Attachment 1, filed on April 16, 2021; *see also* Resolution and Order of June 23, 2021, Case NEPR-MI-2020-0019, at page 11.

LUMA also informed this Energy Bureau of important gaps regarding budgeting and cost reporting. *See* Gap Assessment, RFI-LUMA-MI-20-0019-210406-PREB-001 Attachment 1, pages 467-69. For example, regarding actual expenditures as a percentage of budgeted,⁵ LUMA identified that "Lack of a detailed budget profiled does not allow for Budget to Actual variance and explanation to occur regularly to identify divergences and take correction actions." *Id.* at page 467. Regarding unit cost/productivity management,⁶ LUMA identified that "[c]onsultants are highly relied upon to verify, finalize and complete budgeting details. This limits PREPA control

⁵ "Examines ability to operate within budget; ensures expenditures are within department's control; examines evidence of activity-based budgeting; examines process used to develop the annual budget."

⁶ "Seeks evidence that productivity is high priority, is routinely monitored, and improvements are continuously made."

of planned activities and results in unexpected budgeting changes that occur outside of PREPA's budgeting process." *Id.*

LUMA also identified important gaps pertaining to process efficiency and effectiveness.

See id., at pages 473-75. For example:

- Lack of a formal assessment of the Internal Control Framework – no reasonable assurance regarding the achievement of objectives relating to operations, reporting, and compliance. Ability to effectively and efficiently develop systems of internal control that adapt to changing business and operating environments, mitigate risks to acceptable levels and support sound decision making and governance of the organization.
- There is a need to develop better internal knowledge, capabilities for implementation of key transactions, reconciliations, validation, physical inspection and disclosures steps, and enforcement practices of applicable policies and procedures to enable employees to identify deviations and root causes, assess the impact and to define corrective actions in key areas such as cash, procurement, capital assets, revenue & account receivables, accruals and inventory.
- Some processes are not automated. Rather, they depend on manual effort, which reduces efficiency, increases cost and increases the potential for greater error.

As this Energy Bureau has recognized, LUMA developed the SRP “as a focused effort to implement specific programs to remediate the gaps and deficiencies found in its gap assessment and its review of other work and studies . . .” *Id.* at 12. One of the priorities of LUMA's comprehensive approach towards system remediation within annual budget constraints. is to “[i]ntroduce operational excellence by enabling employees to pursue it through new systems, processes, and training.” *Id.* at page 13. Among the needed new systems and processes are those related to financial reporting and controls.

Regarding Critical Financial Systems LUMA stated in the SRP, that “Gap assessments have identified several gaps that impact the ability to produce accurate and timely financial results.

Such financial results are required to meet an independent audit or management certification standard, provide data to support key business decisions, automate processes to lessen manual risk of fraud and error and track and report on enterprise risks.” Current financial systems are highly manual, which means that they are time consuming and, more importantly, require greater quality review. All reporting processes are manual and financial systems lack integration and automation.” See SRP, Critical Financial Systems Programs, Case NEPR-MI-2020-0019 at page 280. One example of gaps in processes that affect LUMA’s ability to track and estimate costs to determine if expenses will exceed the allocation of an approved budget is that:

Total hours worked by employees are recorded using biometrics; however, the time tracking or costing component is disconnected from that data. This means that timecard data which is manually collected could have variances from the actual biometric time. To ensure that any variances do not cause an overall misstatement, the actual timecard data is calculated into percentages that is applied to actual pay. This is a significant gap where there is a requirement to cost actual hours worked that are traceable to a timecard such as FEMA-funded or non-federally funded capital projects.

Id.

Furthermore, as this Energy Bureau is aware, the SRP program on Critical Financial Controls, is key to allow LUMA to reach a remediated state where financial processes meet contract standards and allow LUMA to improve budgeting and spending to a degree that will allow it to track spending, anticipate when spending may exceed the allotted sums for a budget and potentially, request to amend approved budgets. As stated in the approved SRP, the Critical Financial Controls program:

focuses on two key areas, internal control and internal audit. These two areas will build skills and capabilities in financial reporting and audit; and will update and enforce industry standard policies and procedures that comply with the latest laws and regulations. Internal Controls will address various internal control items, including obtaining and reviewing service organization controls for major vendors, the implementation of key transaction controls, reconciliations, validation, physical inspections, documentation evidencing

performance of control tasks, disclosures, enforcement of applicable policies and procedures for employees to identify deviations, the establishment of a formal plan for communications with the audit committee and the revamp of the internal audit department.

See SRP, Case NEPR-MI-2020-0019, at pages 241-42 and 273. As explained in LUMA's *Motion Submitting Proposed Modifications to System Remediation Plan and Request for Confidential Treatment*, filed on April 14, 2022, Case NEPR-MI-2020-0019, at pages 9 and 115, the current timeline to achieve remediated states is Q4 of FY 2024.

In sum, LUMA's Gap Assessment and SRP show that LUMA inherited financial systems and processes with significant gaps. To remediate those gaps, LUMA proposed, and this Energy Bureau approved, investments in remediation programs that require resources and, importantly, time beyond FY2022. Thus, it would be unreasonable, arbitrary and unjust, to penalize LUMA, without due consideration of the fact that, as informed and stated in the SRP, LUMA had to work in FY2022 with constraints imposed by the inherited financial systems and controls. A fine would be contrary to the Energy Bureau's approval of the SRP which, as stated, includes two programs to remediate financial processes, systems and controls.

Even if, prospectively, this Energy Bureau requires that LUMA rely on estimates to request amendments to approved budgets when expenses may exceed the limits of an approved budget, those estimates may prove unreliable in a subsequent quarter or at the end of the fiscal year. Throughout FY2022, LUMA recorded accruals and estimates on expenses which affected the accuracy of the estimates. Year-end processes are necessary to accurately account for actual costs.

LUMA is cognizant of the importance of improving financial systems to conform them to industry standards and generate improved estimates of aggregate spending *vis à vis* budget limits. However, in FY2022 (and until Critical Financial Systems and Critical Financial Controls

programs reach remediated state), LUMA did not have the ability to ascertain at an earlier point in time, and prior to end of the fiscal year, the final allocation of expenses between the Capital Budget and the Operating Budget and between the Non-Federally Funded and the Federally Funded Capital Budgets. In the Request for Alignment filed on August 12, 2022, LUMA informed this Energy Bureau of the importance of concluding year-end processes to obtain year-end financial results.

LUMA respectfully submits that the record of this proceeding does not support a determination that LUMA should be subject to a fine in connection with the proposed reallocation of funds and the November Budget Amendment Request. Given inherited operational constraints, the need to reallocate funds between the Operating and Non-Federally Funded Budgets was identified after LUMA conducted year-end process. LUMA should not be penalized based on a requirement to ascertain actual expenses earlier in a fiscal year, where the record shows that year-end processes were necessary to place LUMA in a position to obtain materially correct numbers regarding FY2022 spending and given the gaps that LUMA identified in the SRP and when the Energy Bureau approved the FY2022 Budgets. LUMA will continue to report on the improvements to financial systems, processes and controls identified in the SRP to better track and report spending per quarter and enhance LUMA's ability to estimate future spending.

C. The Directive Setting a “Cut-Off” Date for the Energy Bureau to accept budget amendments due to data that was not available to LUMA when the Initial Budgets were prepared, is contrary to the May 31st Order and thus, arbitrary.

Both in the August 3rd Order and the December 14th Order, this Energy Bureau stated that “the window for justifications based on lack of actual information is closed.” Said statement is contrary to the findings of the May 31st Order whereby this Energy Bureau approved the FY2022 Budgets and expressly recognized that LUMA built the Initial Budgets relying on

historical data that LUMA presumed correct, *see* May 31st Order at page 13, and, more importantly, acknowledged that the FY2022 Budgets were prepared with limited data. *See id.* Furthermore, the Energy Bureau’s statement does not consider that, as explained in Section IV. B above, in FY2022 LUMA operated with constraints imposed by the inherited financial systems, processes and controls and is working through implementation of the SRP to remediate those gaps.

In the May 31st Order, this Energy Bureau determined that “much of the Initial Budget development was based on limited data about the asset condition of the underlying T&D system. The Energy Bureau recognizes that upon Service Commencement, LUMA will have improved visibility of the state of the power system and will be better positioned to address data quality and data deficiencies identified in the Gap Assessment.” *Id.* at page 20. Further, this Energy Bureau stated in the May 31st Order that, “subsequent budget filings will build upon progress made in repairing the system, and upon improved data available through LUMA’s actions, expenditures, and remediation programs.” *Id.* That is, this Energy Bureau has previously recognized that after LUMA commenced operations of the T&D system, it would be in a position to address deficiencies in data to develop more accurate proposed budgets. It is thus reasonable that data limitations and constraints should also be considered when the Energy Bureau evaluates actual spending and evaluates proposals to amend the FY2022 Budgets.

Given the aforementioned statements included in the May 31st Order, LUMA did not have any type of notice that this Energy Bureau could decline to consider that actual spending in FY2022 could be influenced by data limitations or new data obtained after LUMA gained control of the T&D system. To the contrary, as stated, this Energy Bureau recognized in the May 31st Order, data constraints affect LUMA’s budget and spending estimates.

Respectfully, it would be arbitrary and unreasonable to levy a fine on LUMA and deny a budget amendment in circumstances where deviations from spending estimates arise from circumstances that this Energy Bureau recognized when it approved the FY2022 Budgets and that impacted spending in FY2022. Particularly, given that the approved SRP plainly established the need for remediation of gaps in financial systems, processes and controls.

D. The determination on delayed work does not support the imposition of a fine.

In the August 3rd Order, this Energy Bureau addressed spending variances for programs in the Distribution, Substation and Enabling portfolios that were due to unexpected, delayed, or complex work, in many instances related to federal funding. *See* August 3rd Order at page 8. This Energy Bureau cautioned that “unexpected, delayed, or complex work cannot be a generic excuse for delayed work,” but determined that “in view of LUMA’s assertions that no variance [was] expected in achieving program milestones, the Energy Bureau ACCEPTS LUMA’s contention that the specified Portfolios are appropriate from which to transfer funds.” *Id.* at pages 8-9. Thereafter, in the December 14th Order, this Energy Bureau directed that LUMA show cause why a fine should not be imposed for failing to comply with the statement of the August 3rd Order that unexpected, delayed, or complex work cannot be a generic excuse for delayed work.”

In addition to the argument stated above that the August 3rd Order should not be applied retroactively, LUMA respectfully posits that it is unreasonable to fine LUMA for adjustments in spending that are due to operational realities that arose in FY2022 and may arise in the future such as unexpected, delayed, or complex work. The determination on delayed work does not provide any guidance to LUMA to conform its future conduct. It unduly exposes LUMA to liability and constrains LUMA’s ability to meet contractual

obligations under the T&D OMA without regulatory criteria to cabin this Energy Bureau's authority.

To the extent that in the August 3rd Order, this Energy Bureau was concerned with delays dealing with work involving the Distribution, Substation and Enabling Portfolios, it is informed that a significant portion of the spending in Q4 which led to the reallocation of \$21 million from the Operatin Budget to the Non-Federally Funded Capital Budget, was related to those three portfolios. LUMA understands that the additional spending in non-federally funded work allowed it to advance work in those three portfolios.

LUMA is mindful of this Energy Bureau's authority to ensure that LUMA remediates the T&D System in accordance with Applicable Law and public policy. LUMA respectfully posits, however, that a statement that unexpected or complex work cannot justify delays in LUMA's efforts, is legally insufficient to impose a fine on LUMA for changes in spending estimates during FY2022.

E. The administrative record shows that LUMA's spending was within the limits of the 2017 Rate Order and in accordance with public policy.

The November Budget Amendment Request shows that LUMA's FY2022 overall spending was within the approved aggregate expenses for FY2022. LUMA's spending did not require that this Energy Bureau open a rate case nor is it necessary to pass additional costs to customers. To wit, LUMA spent reasonably within the current rate structure and rates will not be increased.

With budgetary restrictions and following the existing rate structure, in FY2022 LUMA reached important milestones in the implementation of investment and improvement programs to operate the T&D System in a safe and reliable manner in accordance with industry standards while at the same time LUMA remediates the fragile and dilapidated T&D System. For example, LUMA

enhanced the reliability of the T&D System; improved resiliency by, for example, replacing approximately 3,000 broken and failing utility poles; improved worker safety by reducing injuries and providing on-job training; connected rooftop solar and distributed generators at an unprecedented pace to further Puerto Rico's renewable energy transformation in compliance with public policy; established the LUMA College of Technical Training and graduated the next generation of skilled workforce; enhanced customer services by creating new tools and resources for customers; and implemented a multi-risk Emergency Response Plan. *See* Annual Report, Case NEPR-MI-2021-0004, filed on October 29, 2022. Furthermore, LUMA advanced 188 federally funded reconstruction and capital improvement projects with the Federal Emergency Management Agency that represent billions of dollars in investments. LUMA also complied with its obligations under Section 5.3 of the T&D to provide billing and collection services. *Id.* Among others, LUMA processed payments totaling over \$3.5 billion throughout Fiscal Year 2022 and provided services to 2 million customers through LUMA's customer service centers. *Id.*

LUMA's Annual Report, filed on October 29, 2022, details LUMA's spending and compliance with milestones and activities according to improvement portfolios and programs. Although the first fiscal year and LUMA's first year of operation brought challenges related to the T&D System that had suffered years of neglect, LUMA made measurable progress in accordance with the approved FY2022 Budgets and the SRP. The progress detailed in the Annual Report shows that LUMA spent reasonably and in accordance with the priorities rooted in public policy, that were set out in the FY2022 Budgets and the SRP. These includes enhancing reliability, expanding renewables, improving safety, enhancing resiliency, improving customer service and advancing federally-funded projects.

The administrative record refutes any and all concerns regarding imprudent spending that could harm customers and ratepayers. LUMA appreciates that in setting the annual budget review process, this Energy Bureau sought to avoid prior practices that could have exposed customers to the burden of shouldering the costs of imprudent spending. That scenario is not even remotely present in LUMA's FY2022 spending. Throughout FY2022, LUMA kept this Energy Bureau and customers informed each quarter on the status of its spending and provided explanations on the progress of its activities and spending programs. As stated, LUMA's quarterly and annual spending was faithful to the approved revenue requirements and aggregate spending limits. In these circumstances, it would be arbitrary and capricious to impose a fine in connection with LUMA's management of the approved FY2022 Budgets.

V. Requests for Reconsideration

For the reasons stated above, which are incorporated by reference in this request, LUMA respectfully requests that this Energy Bureau reconsider its determination to deny the November Budget Amendment Request based on a retroactive application of the determination that LUMA must file a request to amend an approved budget before it incurs in expenses that may exceed the limits of a particular budget. As explained, LUMA's current financial reporting systems limit its ability to revise budget and spending estimates throughout the fiscal year. If this Energy Bureau maintains the directives of the August 3rd and December 14th Orders, it will impose a requirement that is not tailored to LUMA's operational realities and will risk unwilling non-compliance by LUMA.

For the reasons stated in sub-sections IV-C and IV-D above, which are incorporated by reference, LUMA also requests reconsideration of those portions of the August 3rd and December 14th Orders where this Energy Bureau stated that the "the window for justifications of budget

modifications based on lack of actual information was closed and that unexpected, delayed, or complex work cannot be a generic excuse for delayed work.”

Finally, for the reasons stated in this Motion, LUMA requests that this Energy Bureau approve the November Budget Amendment Request. As explained, the directives of the August 3rd Order upon which this Energy Bureau relied in the December 14th Order to deny the November Budget Amendment Request, cannot be applied retroactively to LUMA’s spending in FY2022. Additionally, as shown, the November Budget Amendment Request was filed when LUMA obtained correct year-end spending numbers which showed that, in addition to the June 2022 Budget Amendment Request that was approved on August 3, 2022, a reallocation of funds between budgets was necessary and thus, a further amendment to the FY2022 Budgets was needed to align the approved amended budgets with actual spending.

WHEREFORE, LUMA respectfully requests that the honorable Energy Bureau **take notice** of the aforementioned for all purposes; **decline** to impose a fine on LUMA; **reconsider** the December 14th Order; and **approve** the November Budget Amendment Petition.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 3rd day of January, 2023.

We hereby certify that this motion was filed using the electronic filing system of this Energy Bureau. We also certify that copy of this motion will be notified to the Puerto Rico Electric Power Authority, through its attorneys of record: jmarrero@diazvaz.law and kbolanos@diazvaz.law.



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