

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

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IN RE:

ENERGY EFFICIENCY AND DEMAND
RESPONSE TRANSITION PERIOD PLAN

CASE NO.: NEPR-MI-2022-0001

SUBJECT:

Motion for Reconsideration of Resolution
and Order of February 16, 2023, and Request
to Vacate Deadlines

**MOTION FOR RECONSIDERATION OF RESOLUTION AND ORDER OF
FEBRUARY 16, 2023, AND REQUEST TO VACATE DEADLINES**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

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

I. Introduction

LUMA hereby requests that this Honorable Puerto Rico Energy Bureau (“Energy Bureau”) reconsider the Resolution and Order issued in this proceeding on February 16, 2023, entitled “Determination of LUMA’s June 21, 2022, Proposed Transition Period Plan (“Proposed TPP”) (“February 16th Resolution and Order”). For several reasons, the Energy Bureau’s determination to adopt activity-based performance metrics, impose deadlines for compliance and establish compliance requirements through validation methods, is arbitrary and capricious and was issued in violation of applicable regulations and LUMA’s right to due process.

First, in issuing the determination on pages 19 through 23 of the February 16th Resolution and Order to adopt “ten (10) activity-based metrics and associated deadlines and allocations to be adopted by LUMA,” *see id.* page 20, as well as validation methods, *see id.* pages 21-23, this Energy Bureau did not follow its regulations on performance incentive mechanisms, to wit, the Regulation

for Performance Incentive Mechanisms, Regulation 9137 (“Regulation 9137”)¹ and the Regulation for Energy Efficiency (“EE Regulation”)².

Regulation 9137 sets forth the initial and annual proceedings that this Energy Bureau shall follow to approve and review performance metrics, targets, and performance incentive mechanisms and requires that this Energy Bureau issue an “Order of Intent” with proposed metrics. Relatedly, and in the context of the establishment of targets regarding Energy Efficiency (“EE”), Sections 2.02 and 4.02(E)(1) and (2) of the EE Regulation require that the Energy Bureau conduct proceedings specifically designed to consider metrics and targets to apply to LUMA, as a successor of the Puerto Rico Electric Power Authority (“PREPA”) that has a contractually mandated performance metrics. However, in the current regulatory proceeding that was initiated to consider LUMA’s Proposed Transition Period Plan (“Proposed TPP”) on EE and Demand Response (“DR”), the Energy Bureau did not conduct those proceedings set forth in its own regulations. Such failure by the Energy Bureau to follow its own regulations amounts to an arbitrary and capricious exercise of its authority that renders the activity-based performance metrics established by the Energy Bureau on its February 16th Resolution and Order null and void.

Second, as will be shown, nothing in the record of this proceeding supports a determination to impose activity-based performance metrics on LUMA. To the contrary, the weight of the record is against the adoption of metrics and targets. The record also shows that a proposal on specific activity-based performance metrics was not submitted by LUMA, stakeholders or this Energy Bureau in this proceeding.

¹ Regulation No. 9137, December 13, 2019

² The EE Regulation was at the time assigned the number 9354 by the Puerto Rico State Department. Regulation number 9354 was subsequently annulled, and the EE Regulation was resubmitted to the State Department and approved by the Puerto Rico Department of State on March 25, 2022, being assigned number 9367.

Third, the Energy Bureau’s adoption of activity-based performance metrics with deadlines associated with certain activities, and the requirements imposed on LUMA to show compliance through validation methods, infringe upon LUMA’s right to due process. The record in this case reveals that the Energy Bureau did not provide LUMA or stakeholders, an opportunity, to discuss the different performance metrics that could have been developed to measure the performance of the activities and actions that conform the Proposed TPP. Likewise, the record is devoid of a substantive discussion to set baselines and activity-based targets as required by the applicable regulation. Furthermore, there is no evidence of input or discussion on the record regarding the “validation” of metrics or activities tied to the development and implementation of the TPP. Finally, LUMA **was not apprised prior to issuance of the February 16th Resolution and Order**, that this Energy Bureau would adopt specified activity-based metrics that would apply to LUMA’s ability to earn the incentive-based fee pursuant to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (“T&D OMA”).

Fourth, the determination included in the February 16th Resolution and Order to adopt performance metrics that LUMA must meet and that will be used to determine LUMA’s ability to earn a contractual incentive, interferes with LUMA’s substantive and procedural rights in connection with processes to establish performance metrics to apply to performance incentive mechanisms. More importantly, it interferes with LUMA’s rights as a party in the ongoing proceedings in Case *In re Performance Metrics Targets for LUMA Energy ServCo, LLC*, NEPR-AP-2020-0025, where an adjudicative process has been conducted since December 2020 and LUMA was required by this Energy Bureau to submit a Revised Annex IX to the T&D OMA to include proposed performance metrics targets on EE and DR. LUMA’s proposal on performance metrics targets pursuant to the T&D OMA filed in Case NEPR-AP-2020-0025, which includes

proposed metrics on EE and DR, is supported by pre-filed testimonies, was subject to discovery, and considered recently in an evidentiary hearing. The evidentiary hearing in Case NEPR-AP-2020-0025 ended on February 10, 2023 and the public submitted comments in public hearings held on February 16th and 17th, 2023. The parties are set to submit final briefs to discuss the evidence submitted in the evidentiary hearings and a final determination by this Energy Bureau is pending, all in accordance with due process guarantees afforded to LUMA pursuant the Administrative Procedures Act of the Government of Puerto Rico, Act No. 38-2017, 3 LPRA §§ 9601-9713 (“LPAU,” per its Spanish Language acronym). However, in said proceeding on LUMA’s Performance Metrics Targets, which was ongoing while this Energy Bureau adopted the EE Regulation and considered LUMA’s Proposed TPP, this Energy Bureau did not issue an order proposing activity-based performance metrics on EE and DR that would be subject to targets or metrics tied to financial incentives, nor did the Energy Bureau submit a proposal on specific activity-based performance metrics. Relatedly, neither in this proceeding nor in Case NEPR-AP-2020-0025, was LUMA informed that the Energy Bureau would adopt specific activity-based metrics that LUMA should add to the Revised Annex IX to the T&D OMA.

LUMA is committed to implementing the approved TPP and discussing with this Energy Bureau the measurement of progress against milestones and timeframes for its implementation. It is respectfully submitted, however, that the Energy Bureau’s determination to impose activity-based performance metrics and attendant deadlines and validating methods, is an arbitrary determination that was issued in violation of the Energy Bureau’s approved regulations on the topic of approval performance incentive mechanisms and of LUMA’s right to due process of law. This Energy Bureau compounded its arbitrary determination by imposing deadlines for compliance with activities to implement the TPP that are not reasonable. This, even though in its submissions

regarding the Proposed TPP, LUMA advised this Energy Bureau of the factors and circumstances that can and may affect LUMA's ability to engage in activities to implement the Proposed TPP.

II. Relevant Background

1. On December 10, 2020, the honorable Energy Bureau adopted the Regulation for Demand Response ("DR Regulation")³ requiring, among others, that PREPA or its successor, LUMA, file with the Energy Bureau a Three-Year Demand Response Plan ("Three-Year DR Plan") by a specified date. *See* DR Regulation, Section 3.02(C)(1)(a).

2. On April 21, 2021, the Energy Bureau issued a Resolution and Order commencing the proceeding in docket NEPR-MI-2021-0006, *In Re: Demand Response Plan Review, Implementation and Monitoring* and ordering PREPA and LUMA to attend a Technical Conference and provide responses to certain questions included in an Attachment A ("April 21st Attachment A") to begin the discussion related to the Three-Year DR Plan. Neither this Resolution and Order nor its Attachment A make any reference to the subject of performance targets.

3. On April 30, 2021, PREPA and LUMA submitted their responses to the April 21st Attachment A. *See Joint Motion in Compliance with Resolution and Order Entered on April 21, 2021*, filed by PREPA and LUMA of that date.

4. On June 15, 2021, the Energy Bureau held a Technical Conference at which LUMA proposed a phased and integrated EE and DR program development approach. *See Motion Submitting Revised Presentation for Technical Conference Scheduled for June 15, 2021*, filed on June 14, 2021. This presentation did not make any reference to the subject of performance targets. *See id.* Exhibit A.

³ DR Regulation, December 21, 2020, Regulation 9246.

5. On January 21, 2022, the Energy Bureau published the Regulation for Energy Efficiency (“EE Regulation”), requiring, among others, that PREPA or its successor, LUMA, file with the Energy Bureau a plan to implement “quick start” EE programs during a two-year transition period (“Transition Period Plan”) by a specified date. *See* EE Regulation, Section 2.01.

6. On February 1, 2022, the Energy Bureau issued a Resolution and Order in which it expanded the scope of the NEPR-MI-2021-0006 proceeding to include EE alongside DR, established a new deadline to submit both the Three-Year DR Plan and the EE Transition Period Plan of June 6, 2022, and scheduled a Technical Workshop to discuss, among others, LUMA’s plans for the development and launch of quick-start EE and DR programs and other types of activities to undertake during the Transition Period (“February 1st Resolution and Order”). The February 1st Resolution and Order includes a template developed by the Energy Bureau for the EE Transition Period Plan covering various subjects, including, among others, the inclusion of a “Summary description of proposed performance targets for the portfolio” in the overview section (*see* February 1st Resolution and Order, Appendix A, page 2), and that the program management section include the “development of program metrics” (*see id.* at page 3) and “provide implementation schedules with milestones and describe ‘early warning systems’ that will be utilized to indicate progress towards achieving performance targets and whether they are likely to be met” (*see id.*).

7. On March 9, 2022, the Energy Bureau held a Workshop at which LUMA proposed filing a proposed integrated EE and DR Transition Period Plan by the June 2022 deadline (*see* LUMA’s *Motion to Submit LUMA’s Presentation for Workshop Scheduled for March 9, 2022*, filed on March 8, 2022 and its Exhibit 1). During this Workshop, the Energy Bureau consultants also made a presentation, in which they did not discuss performance targets. *See* Presentation titled

“Workshop: Energy Efficiency and Demand Response Planning, Docket NEPR-MI-2021-0006” dated March 9, 2022, included on such date in the docket of that case.

8. On June 21, 2022, LUMA filed with the Energy Bureau its proposed EE and DR Transition Period Plan. *See Motion Submitting Proposed EE/DR Transition Period Plan* of that date and its *Exhibit 1* (this Exhibit 1, the “Proposed TPP”). With respect to performance targets, the TPP stated the following:

The Transition Period is an opportunity to learn more about EE and DR markets and program implementation and how to effectively overcome barriers to EE adoption in Puerto Rico. Through testing a range of programs across its customer base, LUMA will track program performance and learnings but will not seek additional revenues for achieving performance targets. **LUMA is proposing to defer the identification of performance targets for the delivery of the TPP due to the uncertainty in the timing of when programs can be implemented.**

See Proposed TPP at page 19 (emphasis added).

9. On June 28, 2022, the Energy Bureau issued a Resolution and Order initiating the instant proceeding for the review of the Proposed TPP, reaffirming that a Workshop would be held on June 29, 2022, and providing until July 13, 2022, for the public to provide comments to the Proposed TPP. In this Resolution and Order the Energy Bureau did not mention the subject of performance targets.

10. On June 29, 2022, the Energy Bureau held a Workshop at which LUMA presented a summary of the Proposed TPP. *See Motion Submitting LUMA’s Presentation in Anticipation of Technical Workshop of June 29, 2022*, of that date filed in case NEPR-MI-2021-0006. LUMA’s Presentation did not discuss or propose any performance targets.

11. On July 13, 2022, VEIC submitted their comments on the Proposed TPP. *See Letter from Emily Levin, Director, Strategic Market Development of VEIC, addressed to Mr. Edison Avilés-Deliz, Chairman of the Energy Bureau, Re: Comments on Proposed EE/DR Transition*

Period Plan Case No.: NEPR-MI-2021-0006 Regulation for Energy Efficiency, July 13, 2022. VEIC did not provide any comments on the subject of performance targets. On that same date, the Solar and Energy Storage Association of Puerto Rico (“SESA-PR”) also submitted their comments on the Proposed TPP. *See* Letter from Patrick J. Wilson, President of SESA-PR, addressed to Mr. Edison Avilés-Deliz, Chairman of the Energy Bureau, *Re: Comments by SESA on proposed EE and DR Transition Period Plan*, Docket No. NEPR-MI-2022-0001, July 13, 2022. SESA also did not provide any comments on the subject of performance targets.

12. On September 29, 2022, the Energy Bureau issued a Resolution and Order (“September 29th Order”) scheduling a Technical Conference regarding the Proposed TPP for November 4, 2022, informing that it would be issuing questions to the public and LUMA regarding the Proposed TPP to be addressed before the Technical Conference, and establishing a deadline of November 14, 2022, to submit reply comments following the Technical Conference. In the September 29th Order, the Energy Bureau also indicates that:

The Regulation for Energy Efficiency, along with the Energy Bureau's Order of February 1, 2022, in proceeding NEPR-MI-2021-0006, requires that LUMA begin implementation of its Proposed TPP on or before October 1, 2022, unless otherwise ordered by the Energy Bureau. Today's order does not change that instruction, and LUMA should proceed to implement its Proposed TPP until otherwise ordered by the Energy Bureau. **The Energy Bureau is aware that the early phases of the Proposed TPP include the identification and contracting of an implementation contractor, along with the start of education and outreach activities.** The Energy Bureau's examination of, and potential requirement of amendments to, the Proposed TPP will primarily address activities to be undertaken after the Energy Bureau's final order on the TPP, which is expected to be issued in the late fall of 2022.

September 29th Order at p. 1 (emphasis added). In this Resolution and Order the Energy Bureau does not mention the subject of performance targets.

13. On October 12, 2022, the Energy Bureau issued a Resolution and Order (“October 12th Order”) requesting responses by October 28, 2022 to two sets of requests for information

related to the Proposed TPP- one directed at all stakeholders and LUMA, included in an Appendix A to the October 12th Order (“Appendix A”) and the other directed only at LUMA, included in an Appendix B to the October 12th Order (“Appendix B”). In the October 12th Resolution and Order the Energy Bureau identified seven areas in which it indicated it would like to focus its review and potential amendments to the Proposed TPP, including the subject of “Performance metrics, targets, and incentives” indicating the following:

The EE Regulation requires annual reporting with data on costs, energy savings, and participation. Also, the EE Regulation requires that "PREPA shall propose, and the Energy Bureau shall approve, reject, or modify, performance targets and associated payments for the Transition Period Plan that measure performance of utility actions. These activity-based targets could include establishing programs covering particular sectors or end uses, stakeholder engagement activities, and market development, education, and capacity-building actions. For the Transition Period Plan, PREPA may not propose payments for achievement of performance targets that are based on the outcomes of those actions (such as measured energy saved by energy efficiency programs)." (Section 2.02(B)). For the EE programs, LUMA proposed as metrics to track and report on quarterly costs, energy and peak demand savings, and participants by program, sector, and segment. For the DR programs, LUMA proposed to track, and report enrolled customers and load, average impacts per event, annual impacts and impacts as a percent of enrolled load, and average event response. In addition, LUMA proposed education and outreach metrics including the number of events and posts and/or website traffic. LUMA did not propose targets in its Proposed TPP, other than what must be achieved by the EE Regulation. LUMA also did not propose performance incentives. (Pages 71-74).

October 12th Order at page 2.

14. Appendix A includes the following Question 14 on performance targets:

As for performance targets, the Energy Bureau is considering developing a list of activities and associated timing. Rewards and penalties can be administered based on whether the activities were completed as described and on time.

- a. What activities should be included? What timeframes are reasonable for each activity?
- b. How much should each activity be worth (in terms of the reward/penalty)? If respondents choose not to recommend specific dollar values, recommendations on relative weights would be welcome.
- c. How much should all activities be worth (in terms of the total pool of potential rewards/penalties)?

- d. How should the total pool of potential rewards/penalties be established (as a fixed dollar amount, percent of total EE budget, percent of the available incentive funds in LUMA's contract, etc.)?
- e. Should there be penalties as well as rewards?
- f. Should a bonus incentive be offered for exceeding expectations? If so, how would the Energy Bureau establish that LUMA had exceeded expectations?

Id. Appendix A at page 6.

15. On October 28, 2022, the Southern Alliance for Clean Energy (“SACE”) provided their comments to the questions posed by the Energy Bureau in the October 12th Order. *See* Letter from SACE addressed to Mr. Edison Avilés-Deliz, Chairman of the Energy Bureau, *Re: Comments of the Southern Alliance for Clean Energy on proposed EE and DR Transition Period Plan, Docket No. MEPR-MI-2022-0001*, October 28, 2022 (“SACE Comments”). Regarding Question 14 of Appendix A, SACE indicated the following:

If performance incentives are implemented for the TPP at all, they should be kept very simple and relate specifically to the proposed two-year energy savings targets and basic metrics around establishing core operational capabilities on which future programs will rely. **Development of more detailed performance incentive policies and metrics could be discussed through technical workshops and comments for implementation following the TPP.**

Id. at page 6 (emphasis added).

16. Also on October 28, 2022, the Independent Consumer Protection Office (“ICPO”) submitted their comments to Appendix A. *See Independent Consumer Protection Office’s Comments to Appendix A of the Energy Bureau’s October 12, 2022, Resolution and Order* of that date (“ICPO’s Comments”). Regarding Question 14 of Appendix A on performance metrics, they indicate that:

- a. What activities should be included? What timeframes are reasonable for each activity?
 - 1. Time of process completion and acceptance for a rate payer application to each EE or DR program measure, i.e., Residential Rebate Program, Commercial Rebate Program, etc.
 - 2. EE & DR Program Plan milestone completion.

b. How much should each activity be worth (in terms of the reward/penalty)? If respondents choose not to recommend specific dollar values, recommendations on relative weights would be welcome.

Among the previous two performance targets, number 2 will measure higher than number 1.

c. How much should all activities be worth (in terms of the total pool of potential rewards/penalties)?

d. How should the total pool of potential rewards/penalties be established (as a fixed dollar amount, percent of total EE budget, percent of the available incentive funds in LUMA's contract, etc.)?

e. Should there be penalties as well as rewards?

Yes indeed, as current regulations state.

f. Should a bonus incentive be offered for exceeding expectations? If so, how would the Energy Bureau establish that LUMA had exceeded expectations?

It depends on the exceeded expectations we are talking about. If there is more ratepayer participation driven by higher utility rates, we consider it not appropriate.

However, if ratepayer participation is higher despite lower utility rates attained by EE&DR and other efficiencies from LUMA, it will be appropriate.

Id. at pages 13-14.

17. On November 2, 2022, the Energy Bureau issued a Resolution and Order extending the deadline to submit responses to Appendix B until November 4, 2022, and to submit responses to Appendix A until November 9, 2022, scheduling a Technical Conference for November 16, 2022, and establishing a new deadline to submit Reply Comments of November 30, 2022.

18. On November 4, 2022, the Energy Bureau held a workshop to discuss the questions in Appendix A. In this workshop, the Energy Bureau consultants gave a Presentation on the Proposed TPP in which they discussed the Proposed TPP and the various questions in Appendix A. *See* Presentation titled “Technical Workshop: LUMA Transition Period Plan, Docket NEPR-MI-2022-0001, dated November 4, 2022, included in the docket of this proceeding on that date (the “November 4th Presentation”). Regarding performance targets, the November 4th Presentation listed the questions in Appendix A on the subject (*see* November 4th Presentation, slide 27) and included the following additional information:

- LUMA did not propose targets in its filed TPP

- The Energy Bureau is developing a list of activities and associated timing
- Rewards and penalties can be administered based on whether the activities were completed as described and on time

See id., slide 28. When showing the slides of the November 4th Presentation on these subjects during the workshop, the Energy Bureau consultant leading the workshop, Mr. Asa Hopkins, essentially verbally indicated that: (i) this subject is among matters not explicitly spelled out in the Proposed TPP and needed to be developed in some fashion before the Energy Bureau can issue an order; (ii) LUMA did not include proposed targets in the Proposed TPP; (iii) the regulation requires that performance targets be activity-based rather than energy-savings-based, given the uncertainty of what program uptake would be; (iv) the Energy Bureau is considering the appropriate activities and timing- such as for launching the program on time, program tracking and reporting- so that the programs are doing the kinds of things they should do to be successful; (v) participants are invited to provide their thoughts about particular activities to include and the time frame that would be reasonably expected to undertake them; (vi) thoughts from participants on the financial side of things are also invited; this information is to be integrated in and inform the Energy Bureau's proceedings on performance targets which is ongoing; and (vii) the participants are invited to provide their thoughts on particular kinds of performance not only for tracking but specifically tying these to the performance structure for LUMA. *See* <https://www.youtube.com/watch?v=tmP7z8hAEZE>, from 2:03:57 to 2:13:25. Only one participant, Ms. Emily Levin from VEIC, provided verbal comments on the subject of performance targets, essentially indicating that: (i) they would encourage the Energy Bureau to keep a focus on the fact that this is a transition period, the goal of which is to get started and support learning, which means that it will inevitably not move perfectly; the whole point is to learn along the way and improve; (ii) she had not envisioned in their prior comments that rewards and penalties would be a major part of the transition period, but that it would be an appropriate part of the full-scale

programs; (iii) anything done with respect to rewards and penalties should be with an eye to encouraging the systems and tracking of metrics that will build capacity for a full scale programs and not be overly large or structured in a way that could discourage learning and just getting started with things. *See id.* **Neither the Energy Bureau nor any of the participants offered concrete proposals for the performance targets or associated incentives.**

19. On November 4, 2022, LUMA also submitted to the Energy Bureau its responses to Appendix B. *See Motion to Submit Responses to Requests for Information in Appendix B of Resolution and Order of October 12, 2022*, of that date. In these responses, LUMA indicated the following in response to Question 5 in Appendix B on performance metrics⁴:

As stated in the filed Transition Period Plan, LUMA will prepare detailed Annual Reports including achievements and lessons learned, progress towards implementation, final annual energy and demand savings by program and sector and program costs. If the decision is made to report additional progress at some point, LUMA suggests this is added to the Annual Report. The Transition Period Plan is an opportunity to learn more about EE and DR markets and program implementation and how to effectively overcome barriers to EE adoption in Puerto Rico. Through testing a range of programs across its customer base, LUMA will track program performance and learnings.

LUMA does not have an existing database or funding for a new database to develop and track these metrics.

Currently, LUMA only reports on progress regarding the performance of the T&D System as part of Docket NEPR-MI-2019-0007. There, LUMA provides information and data on metrics established for the performance of PREPA generation and on the T&D System performance based on the Energy Bureau's established metrics for PREPA's performance.

⁴ Question 5 was:

Regarding performance metrics, the Energy Bureau is considering requiring an expansion of the reported metrics to include estimates of (1) customer energy savings as a percent of usage, (2) bill savings, (3) participation rates by geography, and (4) GHG emission reductions.

- a. Are there any concerns with these potential metrics?
- b. Are there any metrics missing that need to be added?
- c. Is there a resilience/reliability impact metric that LUMA should report?

See Appendix A at page 6.

Additionally, LUMA has proposed the approval of Performance Metrics to measure its performance under Docket NEPR-AP-2020-0025 which is still under consideration by the Energy Bureau and where no final decision on the metrics that will measure LUMA's performance has been made to date. As a matter of fact, on October 28, 2022, LUMA will present additional metrics as required by the PREB on their December 22, 2021, Resolution and Order which ordered LUMA to propose metrics on Distributed Energy Resources, Vegetation Management, Energy Efficiency and Demand Response.

See id. Exhibit 1 at page 6.

20. Also on November 4, 2022, the Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico ("ICSE"). *See ICSE Comments to PREB Questions* of that date ("ICSE Comments"). ICSE provided the following comments in connection with to Question 14 of Appendix A regarding performance targets:

With respect to question 14 of Appendix A to the PREB's Resolution and Order, ICSE recommends focusing on the benefits that will result from installed DER measures in kW and kWh terms. Appropriate rewards and penalties can then be more clearly applied as appropriate. ICSE suggests that six-month and annual reports on DER measure savings be provided to best determine progress, adjustments, and thus next steps. To determine the short-term value of DER programs, measurement and verification of kW and kWh savings should be valued based on specific benefits from: (i) reduced loads on generation, transmission, and generation in \$/kW-year terms; and (ii) reduced energy (kWh) usage that corresponds to reduced monetary value of the extant fossil fuel inventory. The latter should reflect the direct market value of deferred fossil fuel use, i.e., the inventory-accounting value of avoided fossil fuel use. These two steps would determine the deferred value of the DER program in the short term. After one year, the long-run values for avoided capacity and energy should be defined, with reference to actual DER measure savings from measurement and verification efforts. A system of rewards and penalties for LUMA's roles in the DER program can also be instituted. No reward and penalty system, however, should take precedence over the most rapid, expedient approach to implementing DERs for customers in the short-term.

See id. at page 7.

21. On November 9, 2022, LUMA submitted to the Energy Bureau its responses to Appendix A. *See Motion to Submit Responses to Requests for Information in Appendix A of*

Resolution and Order of October 12, 2002, of that date. LUMA indicated the following in response to Question 14 of Appendix A regarding performance targets:

The Energy Bureau poses the questions of penalties and rewards and how should they be established and administered. **LUMA believes that as discussed in the EE/DR TPP Technical Workshop, this period is one of transition where learning and progress should be supported and is not the right time to implement penalties and rewards.** In the referenced Technical Workshop and addressing this question, Emily Levin from VEIC encouraged the Energy Bureau to keep a focus on the fact that this is a transition period, and the main goal of that period is to get started and to support learning and that is going to mean inevitably things aren't going to move perfectly and that the point is to learn along the way and improve. Emily Levin informs that rewards and penalties are an appropriate part of the full-scale programs that will hopefully launch in a couple of years but not as a part of the transition period. LUMA echoes this statement and continues to be committed to learning and improving as the programs grow and the public's knowledge expands.

Id. at page 15 (emphasis added). LUMA also indicated the following in response to Question 13 of Appendix A regarding performance targets:

Stakeholders have recognized that during the transition period the focus should be to encourage the systems and the tracking of progress that will build capacity toward the full-scale programs and not on the expansion of metrics. As implemented, the programs will inform and drive the decisions on how to effectively measure the results.

As stated in the filed Transition Period Plan, LUMA will prepare detailed Annual Reports including achievements and lessons learned, progress towards implementation, final annual energy and demand savings by program and sector and program costs. If the decision is made to report progress on additional indicators at some point, LUMA suggests this is added to the Annual Report. The Transition Period Plan is an opportunity to learn more about EE and DR markets and program implementation and how to effectively overcome barriers to EE adoption in Puerto Rico. Through testing a range of programs across its customer base, LUMA will track program performance and learnings.

Currently, LUMA reports on progress regarding the performance of the T&D System as part of Docket NEPR-MI-2019-0007. There LUMA provides information and data on metrics established for the performance of PREPA generation and on the T&D System performance based on the Energy Bureau's established metrics for PREPA's performance.

Additionally, LUMA has proposed the approval of Performance Metrics to measure its performance under Docket NEPR-AP-2020-0025 which is still under consideration by the Energy Bureau and where no final decision on the metrics that will measure LUMA's performance has been made to date. On October 28, 2022, LUMA presented additional metrics as required by the PREB on their December 22, 2021, Resolution and Order which ordered LUMA to propose metrics on Distributed Energy Resources, Vegetation Management, Energy Efficiency and Demand Response.

Id. at page 14.

22. Also on November 9, 2022, VEIC, Tesla, Inc., Sunnova, and SESA each separately submitted comments related to the Proposed TPP. *See* Letter from Emily Levin, Director, Strategic Market Development of VEIC, to Mr. Edison Avilés Deliz, Chairman of the Energy Bureau, *Re: Response to Appendix A of October 12, 2022 Resolution & Order Case No.: NEPR-MI-2022-0001*, November 9, 2022 (“VEIC’s November 9th Comments”); Letter from Jordan Graham, Sr. Energy Policy Advisor of Tesla, Inc, to Mr. Edison Avilés Deliz, Chairman of the Energy Bureau, *Re: Docket No. NEPR-MI-2021-0006 – Comments on Proposed EE/DR Transition Period Plan*, November 9, 2022; Letter from McCrea Dunton, Sr. Director of Energy and Grid Services of Sunnova Energy Corporation to Mr. Edison Avilés Deliz, Chairman of the Energy Bureau, *Re: Comments to LUMA’s Transition Period Plan*, November 9, 2022; and Letter from Javier Rúa-Jovet, Chief Policy Officer of SESA, to Mr. Edison Avilés Deliz, Chairman of the Energy Bureau, *Re: Answers to Questions by PREB to Stakeholders, including SESA on proposed EE and DR Transition Period Plan Docket No. NEPR-MI-2022-0001*, November 9, 2022. Only VEIC provided comments to Question 14 of Appendix A on performance targets, indicating the following:

LUMA notes in Section 2.7 of its TPP that “the Transition Period is an opportunity to learn more about EE and DR markets and program implementation and how to effectively overcome barriers to EE adoption in Puerto Rico.” For that reason, LUMA proposed to defer performance targets and incentives during the Transition Period. VEIC agrees with this reasoning and recommends against instituting any

system of performance incentives and penalties that could discourage experimentation and learning. Furthermore, the major program offered during the Transition Period will be Education and Outreach, the impact of which can be difficult to measure. Instead, we encourage initiating binding performance targets, incentives, and penalties in the Three-Year Plan starting in 2024, following the TPP and informed by the Market Baseline and Potential Studies. If performance incentives are offered at all during the Transition Period, we agree with Southern Alliance for Clean Energy that they should “relate specifically to the proposed two-year energy savings targets and basic metrics around establishing core operational capabilities on which future programs will rely” (SACE Comments, October 28, 2022).

See VEIC’s November 9th Comments at page 9.

23. On November 16, 2022, the Energy Bureau held a Technical Workshop (“November 16th Workshop”) regarding the EE and DR Proposed TPP in which the Energy Bureau’s consultants gave a presentation regarding the Proposed TPP and the questions in Appendix A. *See* Power Point Presentation titled “Technical Workshop: LUMA Transition Period Plan Docket NEPR MI-2022-0001” dated November 16, 2022, filed in the referenced docket on that date (the “November 16th Presentation”). During the Technical Workshop, the Energy Bureau consultants highlighted certain issues or questions which it requested LUMA address in its Reply Comments. On the subject of performance targets, the Energy Bureau’s November 16th Presentation included the following:

EE Regulation, Section 2.02(B) states:

- In accordance with Section 4.02(E)(1)-(2) of this Regulation, PREPA shall propose, and the Energy Bureau shall approve, reject, or modify, performance targets and associated payments for the Transition Period Plan that measure performance of utility actions.
- These activity-based targets could include establishing programs covering particular sectors or end uses, stakeholder engagement activities, and market development, education, and capacity- building actions.
- For the Transition Period Plan, PREPA may not propose payments for achievement of performance targets that are based on the outcomes of those actions (such as measured energy saved by energy efficiency programs).

See id., slide13. In addition, the November 16th Presentation included questions on what the critical activities for LUMA to complete should be, providing some examples of activities, and asking for further details on recommendations for these activities, reasonable timeframes and amounts to complete them, and weight to be assigned to each. *See id.*, slides 14-17. *See id.*, slides 14-17.⁵ During the workshop, while showing the slides of the November 16th Presentation on these subjects, the Energy Bureau consultant leading the workshop, Mr. Asa Hopkins, essentially verbally indicated that: LUMA had not included in the Proposed TPP performance targets; that, for that reason, the Energy Bureau could have rejected the Proposed TPP as incomplete “in

⁵ The text in these slides is as follows:

Slide 15:

NEW – What are the critical activities for LUMA to complete?

- Program Milestones (OIPC, LUMA)
- Implementation Contract
- Application Intake, Validation, and Payment Systems
- Marketing Materials (incl. EE website, media release, news articles)
- Billing System Updates/EE Rate Rider Filing
- Outreach to Local Contractors/Customers
- Applications Processed
- Rebates Processed
- Active DR events dispatched

Please provide further details on your recommendations.

Slide 16:

NEW – What are the critical activities for LUMA to complete? (cont’d)

- Time of process completion and acceptance for a rate payer application to each EE or DR program measure (OIPC) Performance Targets

Please provide further details on your recommendations.

Slide 17:

NEW –What amounts are reasonable for accomplishing these activities?

- % of total pool allocated to LUMA performance incentives
- Fixed dollar amount per item
- Different weights for different items, to indicate importance Performance Targets

Please provide further details on your recommendations.

violation of the regulation” but it had not done so trusting that they would be able to work through this process with a back and forth with LUMA; encouraged participants to help fill this gap so the Energy Bureau could move forward with this piece in accordance with the regulation; and welcomed thoughts on the percentage of incentive performance money that would be allocated to the targets. *See*, <https://www.youtube.com/watch?v=s2IG0SqtQT4>, from 2:32:49 to 2:35:53. Only one participant, Mr. Gerardo Cosme, ICPO’s consultant, provided comments, indicating that they see the transitional plan as a learning period that should go full scale as soon as possible and that the tool of the metrics would be applied in a more formal matter later on as the program progresses. *See id.* In sum, **neither the Energy Bureau nor any of the participants offered concrete proposals for performance targets or associated incentives.**

24. On November 23, 2022, LUMA requested the Energy Bureau a brief extension to submit its Reply Comments to the Energy Bureau. *See Motion to Request Extension to Submit Reply Comments Required in Orders of October 12, 2022 and November 2, 2022*, filed on November 23, 2022.

25. On December 2, 2022, LUMA submitted to the Energy Bureau its Reply Comments. *See Motion to Submit Reply Comments Required in Orders of October 12, 2022 and November 2, 2022*, of that date. In its Reply Comments, LUMA indicates the following regarding the subject of performance targets: “The Energy Bureau Consultants urged LUMA to provide details on performance targets for the Transition Period Plan. LUMA incorporates by reference its response to Appendix B filed on November 4, 2022, under Question 5.” *Id.* Exhibit 1 at page

26. On February 16, 2023, this Energy Bureau issued a Resolution and Order (the “February 16th Resolution and Order”) in which IT “consider[ed], amend[ded] and approve[d]” the Proposed TPP. *See* February 16th Resolution and Order at page 1.

27. In the February 16th Resolution and Order, the Energy Bureau concludes that the Proposed TPP “represents a reasonable and appropriate launch of EE and DR programs in Puerto Rico and approves all components of LUMA's Proposed TPP that are not specifically addressed” in the February 16th Resolution and Order. *See id.* at page 5. The sections of the Proposed TPP where the Energy Bureau requires changes include: i) Program Administration, ii) Program Design, iii) Reporting, iv) Performance Incentives, and v) Funding. *See id.*

28. In the February 16th Resolution and Order, the “Energy Bureau urges LUMA to complete its contracting with a qualified implementation contractor as soon as possible to enable rapid transition toward the details of program design and launch” (*id.* at page 7) and establishes the deadlines of April 1, 2023 for filing the EE Rider (*see id.* at pages 27 and 30), July 1, 2023 for the EE Rider to enter into effect (*see id.* at page 27)⁶, December 2, 2023 for filing the draft FY2025-2027 Three-Year Plan (*see id.* at page 27), and December 2023 to conduct a stakeholder meeting to discuss the Three-Year Plan and the FY2023 Annual Report (*see id.* at page 18).

29. In addition, the Energy Bureau establishes Performance Incentives Metrics for various activities related to the Proposed TPP tied to specified deadlines, which include some of the activities and deadlines described above. *See id.* at page 20. Specifically, the Energy Bureau requires LUMA to adopt ten activity-based metrics and associated deadlines and allocations set forth in Table 2, titled “Transition Period Performance Incentive Metrics” (“Table 2”). *See id.* at pages 20-21. Table 2 provides, the following tasks and deadlines: contracting the EE and DR program implementer (which is stated as “14 days after Order Issuance, whichever occurs later), launching the EE and DR program marketing (April 1, 2023), filing of the EE rate rider (April 1,

⁶ In this regard, the Energy Bureau also indicates that the process for implementing the EE Rider is not contingent on the achievement of LUMA's milestones for program launch and that the EE Rider must enter into effect no later than July 1, 2023, in order to maintain program funding.

2023), enrolling customers in emergency DR programs (April 15, 2023), demonstrating capability to call emergency DR program events (May 15, 2023), processing EE incentive applications (two deadlines are provided: July 1, 2023 or within 30 days of rider approval, whichever occurs later and August 1, 2023 or within 60 days of rider approval, whichever occurs later), filing the annual report (October 28, 2023), holding of a stakeholder meeting to discuss the FY2025-FY2027 Three-Year Plan (December 2023) and filing of the FY2025-FY2027 Three-Year Plan (March 1, 2024). *See id.* at page 21.

30. Regarding these Performance Incentives Metrics, the Energy Bureau explains that (a) each metric carries the same weight; (b) the quality completion of each metric by the deadline will entitle LUMA to earn 10 points for a total of 100 points across the 10 metrics; and (c) “completion of each metric represents 10 percent of the total incentive pool for EE and DR, which will be established in Docket NEPR-AP-2020- 0025.” *See id.* at page 20. The Energy Bureau orders LUMA to file the required validation support for each performance metric and establishes the validation methods. *See id.* at pages 22-23.

31. The Energy Bureau also establishes in the February 16 Resolution and Order requirements and deadlines relating to reporting. The Energy Bureau orders LUMA to deliver quarterly and annual reports on a fiscal year schedule; align report filing dates for FY2023 and FY2024; produce annual reports within 120 days following the end of the program year as required by the EE Regulation; and adopt the updated reporting schedule as shown in Table 1, titled “Transition Period Report and Filing Schedule” (“Table 1”). *See id.* at page 18.⁷

⁷ Table 1 establishes the following deadlines: FY2023 Q4 Report (August 29, 2023), FY2023 Annual Report (October 28, 2023), FY2024 Q1 Report (November 29, 2023) Draft FY2025-FY2027 Three Year Plan (December 2, 2023), Stakeholder meeting to discuss 2023 Annual Report and Draft Three Year Plan (December 2023), FY2025-FY2027 Three Year Plan (March 1, 2024), FY2024 Q2 Report (March 29, 2024), FY2024 Q3 Report (May 29, 2024), FY 2024 Q4 Report (August 29, 2024), and FY2024 Annual Report (October 28, 2024). *See id.*

III. Request to Reconsider Adoption of Transition Period Performance Incentive Metrics, Deadlines and Validation Methods.

This request for reconsideration is filed pursuant to Section 10.01 of the EE Regulation which provides that:

Any person who is not satisfied with a decision made by the Energy Bureau under this Regulation may file, within the term of twenty (20) days from the date copy of the notice of such decision is filed by the Energy Bureau's Clerk, a request for reconsideration before the Energy Bureau wherein the petitioner sets forth in detail the grounds that support the request and the decisions that, in the opinion of the petitioner, the Energy Bureau should reconsider

This request also arises under Section 9.01 of the DR Regulation and Section 11.01 of Regulation 8543, Regulation on Adjudicative, Notice of Noncompliance and Rate Review and Investigation Proceedings.⁸

A. The Energy Bureau did not follow its own regulations in adopting performance incentive metrics on EE and DR.

A settled principle of administrative law provides that once an administrative agency approves a regulation, it is bound to follow the same. *See e.g., Ayala Hernández v. Consejo Titulares*, 190 DPR 547, 568 (2014). Once the administrative agency disobeys a legal mandate, the presumption of correctness that attaches to its determinations, abates. *See Trigo Margarida v. Junta de Directores*, 187 DPR 384, 394 (2012); *see also Assoc. Ins. Agencies, Inc. v. Com. Seg. P.R.*, 144 DPR 425, 436 (1997) (an interpretation that is contrary to applicable law cannot prevail). Here, there are two relevant regulations approved by this Energy Bureau that set forth procedures to approve performance incentive mechanisms, including one regulation that establishes procedures to adopt performance targets for EE and DR. In issuing the February 16th Resolution and Order and adopting what this Energy Bureau labeled as “Transition Period Performance

⁸ This provision references the Puerto Rico Administrative Procedures Act, which is currently Act 38, and which establishes this 20-day term in its Section 3.15. *See* 3 LPRA §9655.

Incentive Metrics” described as activity-based metrics and including deadlines for compliance, allocations and validation methods, the Energy Bureau did not institute nor conduct the procedures set forth in those approved and binding regulations.

In connection with performance incentive mechanisms, this Energy Bureau adopted Regulation 9137 which, in Article 3, provides that the Energy Bureau shall conduct an initial proceeding to implement performance incentive mechanisms for electric power companies. In said proceeding, the Energy Bureau will establish metrics, targets and financial incentives. *See* Regulation 9237, Section 3.1. After the initial proceeding, the Energy Bureau will conduct annual proceedings to “make any adjustments to the performance incentive mechanisms, and determine whether to establish, eliminate, or modify any metric, target or financial incentive.” *See id.* In turn, in Regulation 9137, a “metric” is defined as “a quantifiable indicator which can be used and tracked over time to evaluate an entity's performance.” *Id.* Section 1.7 (10). A “target” “refers to the goal that may be associated with a Metric and against which, if it is so associated, a Company's performance shall be evaluated.” *Id.*, Section 1.7(21). Finally, a “financial incentive” “refers to the financial reward or penalty that may be attached to a Target and which, if it is attached, is applied to a given Electric Power Service Company, for meeting or failing to meet such Target. The Financial Incentive shall be expressed as an incentive fee paid in nominal U. S. dollars.” *Id.* Section 1.7(8).

Pursuant to Regulation 9137, to conduct the initial proceeding:

The Energy Bureau shall issue an Order of Intent proposing (1) the Metrics for reporting purposes, (2) the Metrics that will be subject to Targets and (3) the Metrics that will be subject to Financial Incentives. The Order of Intent shall also propose the Companies or types of Companies that will be required to report on their performance for the first Reporting Period. The Order of Intent shall also set forth a schedule for public comments and reply comments by Interested Parties and may include specific areas for which the Energy Bureau is seeking comment.

Id. Section 3.2 (A) (emphasis added).

Regulation 9137 further provides that in the initial proceeding, the Energy Bureau “shall address the comments of the Interested Parties. In the Order, the Energy Bureau will specify (1) the Metrics for reporting purposes, (2) the Metrics that will be subject to Targets, and (3) the Metrics that will be subject to Financial Incentives. The Energy Bureau will also specify the Companies or types of Companies that will be required to report on their performance for the first Reporting Period.” *Id.* Section 3.2 (B).

As the record of this proceeding demonstrates, prior to issuing the February 16th Resolution and Order, this Energy Bureau did not initiate the type of proceeding required under Regulation 9137 to adopt an initial set of performance incentive mechanisms to apply to LUMA in connection with EE and DR. **To wit, the Energy Bureau did not issue an “Order of Intent” proposing the metrics that will be subject to Targets and the Metrics that will be subject to Financial Incentives.**

On June 28, 2022, this Energy Bureau initiated proceedings to consider LUMA’s Proposed TPP, which order does not include a proposal on performance incentive mechanisms and requested stakeholders to present comments on LUMA’s proposed TPP. Thereafter, the Energy Bureau issued questions in Appendix A, including Question 14 which states that the Energy Bureau was “considering developing a list of activities and associated timing. Rewards and penalties can be administered based on whether the activities were completed as described and on time.” *See* Appendix A, page 6. In Appendix A, however, this Energy Bureau did not include an “Order of Intent,” nor did it propose any metrics, targets or performance incentive mechanisms, much less the metrics, deadlines, allocations and validation methods that the Energy Bureau adopted in the February 16th Resolution and Order. The November 4th and November 16th Presentations given

by the Energy Bureau consultants discussed the topic of metrics, but do not include a concrete proposal for consideration by LUMA and stakeholders. Although in the November 16th Presentation, several activities were mentioned, these were evidently set out as examples in connection with an invitation for the participants to provide suggestions on activities and neither in this presentation nor verbally did the Energy Bureau consultants indicate that these were being proposed by the Energy Bureau. In fact, activities listed in the November 4th Presentation are not identical to those proposed in the February 16th Resolution and Order. Those proceedings conducted in this docket do not meet the requirements of Regulation 9137 to consider and adopt performance incentive mechanisms, which requires a concrete proposal by this Energy Bureau to be considered in an initial proceeding.

The Energy Bureau compounded the aforementioned failure to follow its own regulation with another violation of Regulation 9137. Although the Energy Bureau labeled the performance incentive mechanisms adopted in the February 16th Resolution and Order as “metrics,” it did not adopt quantifiable indicators that can be used and tracked over time to evaluate an entity’s performance, as required by Regulation 9137. To the contrary, the Energy Bureau identified tasks that LUMA will undertake to implement the TPP, and added deadlines, a description of the tasks to be completed, a description of how LUMA may show compliance (labeled “validation methods”), and then assigned points to those tasks. Those tasks, incorrectly couched as “metrics”, are not subject to quantification to track performance in connection with the proposed EE and DR programs. They cannot be considered well-defined indicators of performance that may be quantified to track performance over time.⁹ The Transition Period Performance Incentive Metrics included in Table 2 of the February 16th Resolution and Order, do not comply with the definition

⁹ It bears noting that the February 16th Resolution and Order includes validation methods; a mechanism that is not contemplated nor defined in Regulation 9137.

of “metrics” set forth in Regulation 9137. Consequently, the tasks outlined in Table 2 of the February 16th Resolution and Order cannot be used as metrics to set targets or incentive payments applicable to LUMA.

Secondly, in adopting Transition Period Performance Incentive Metrics this Energy Bureau did not follow the EE Regulation. To wit, the EE Regulation, which establishes the requirements for the TPP and provides for the adoption of activity-based **targets**, requires that this Energy Bureau conduct appropriate proceedings to adopt targets applicable to a PREPA successor entity that has performance metrics set in a contract, such as LUMA, and to consider the entity’s compensation package as a whole. Specifically, Section 2.02 of the EE Regulation states the following:

In accordance with Section 4.02(E)(1)-(2) of this Regulation, PREPA shall propose, and the Energy Bureau shall approve, reject, or modify, performance targets and associated payments for the Transition Period Plan that measure performance of utility actions. These activity-based targets could include establishing programs covering particular sectors or end uses, stakeholder engagement activities, and market development, education, and capacity-building actions. For the Transition Period Plan, PREPA may not propose payments for achievement of performance targets that are based on the outcomes of those actions (such as measured energy saved by energy efficiency programs).

EE Regulation, Section 2.02.

As seen, Section 2.02 references Section 4.02 (E) 1-2 of the EE Regulation on adoption of performance incentives. In turn, Section 4.02 (E) 1-2 of the EE Regulation provides that:

If PREPA's successor is an entity subject to a contract that includes performance metrics, the performance incentive process and requirements shall be incorporated into the overall incentive package of PREPA's successor.

- 1) **The performance targets and the amount of performance payment to which a PREPA successor entity is entitled with respect to Energy Efficiency shall be determined by the Energy Bureau in the proceeding designed for such purposes.** The Energy Bureau shall set performance targets in that proceeding which are consistent with the approved Three-Year EE Plan.

- 2) The Energy Bureau may make, by Order or Resolution, appropriate changes in the process for establishing EE performance metrics and incentives so that **PREPA's successor's incentive package can be considered as a whole in the appropriate proceeding.**

(Emphasis added).

Pursuant to the afore-cited provision of the EE Regulation, performance targets applicable to LUMA must be determined in the proceeding designed for that purpose. And, as seen, Regulation 9137 rules proceedings to adopt performance incentive mechanisms. By design of this Energy Bureau, however, this proceeding is not one that arises under Regulation 9137 to approve performance metrics or targets, as this proceeding was convened to consider the Proposed TPP. The only ongoing proceeding on LUMA's performance metrics targets is the separate and independent adjudicative proceeding; Case NEPR-AP-2020-0025. Moreover, the EE Regulation recommends that the incentive package for a PREPA successor entity such as LUMA, **should be considered as a whole in the appropriate proceeding.** In the February 16th Resolution and Order, the Energy Bureau surprisingly transformed this proceeding that was opened to consider LUMA's Proposed TPP, to adopt performance incentive metrics that **were not proposed by LUMA in this or any other proceeding, but that nonetheless will affect LUMA's ability to earn the incentive fee set forth in the T&D OMA.**

Contrary to what the EE Regulation provides, the Energy Bureau bifurcated proceedings to consider LUMA's incentive package rather than presenting or requiring such a proposal in the appropriate proceeding, Case NEPR-AP-2020-0025 or another proceeding conducted pursuant to Regulation 9137.

In conclusion, per Regulation 9137 and the EE Regulation, the Energy Bureau must conduct appropriate proceedings to adopt performance incentive mechanisms and targets for entities such as LUMA. For LUMA, that means that its performance incentive mechanisms,

including those for EE and DR, must be considered and set in Case NEPR-AP-2020-0025. cSince it is **uncontested that neither in this proceeding nor in Case NEPR-AP-2020-0025 did this Energy Bureau file for the record a proposal on activity-based metrics and validating methods related to EE and DR, the Energy Bureau acted arbitrarily and in excess of its regulatory authority, in adopting performance incentive metrics to be applied to the LUMA's proposed incentive pools that are under consideration in Case NEPR-AP-2020-0025.**

Failure to follow a binding regulation is unreasonable, arbitrary and a dereliction of the duty to follow binding regulations that have the force of law. In these circumstances, that portion of the February 16th Resolution and Order that imposed performance incentive metrics, deadlines, and validation methods on LUMA, pages 19 through 23, described as activity-based performance metrics and labeled as Transition Period Performance Incentive Metrics, is null and void and must be vacated.

B. The determination to adopt activity-based performance metrics, deadlines and validation methods is not supported by the administrative record.

As stated above, in the February 16th Resolution and Order, this Energy Bureau established Performance Incentives Metrics for ten (10) activities related to the Proposed TPP with specified deadlines. This Energy Bureau also adopted allocations of points and determined that the metrics will determine LUMA's ability to earn the incentive fee set forth in the T&D OMA in as much as the metrics will constitute 10% of the EE and DR incentive pool¹⁰ that will be set in the ongoing

¹⁰ It is important to note that the February 16th Resolution and Order incorrectly suggests that in Case NEPR-AP-2020-0025, LUMA proposed an incentive pool on EE and DR. In the Revised Annex IX to the T&D OMA that LUMA submitted on October 28, 2022, more than two months before this Energy Bureau issued the February 16th Resolution and Order, LUMA proposed three metrics on EE and DR that will be added to the incentive pool on Technical, Safety and Regulator Metrics. Thus, LUMA's proposal in Case NEPR-AP-2020-0025 does not include a separate incentive pool on EE and DR.

adjudicative proceeding Case No. NEPR-AP-2020-0025. Finally, this Energy Bureau adopted validation methods that were not discussed in this proceeding nor did the Energy Bureau issue a request for comments by stakeholders regarding the same. *See* February 16th Resolution and Order, page 22. In sum, the Energy Bureau imposed ten (10) activity-based metrics, deadlines and validation methods, that **were not disclosed nor discussed in this or any other proceeding**. The record of this proceeding lacks any support for the ten (10) activity-based metrics and associated deadlines and validation methods.

As the record shows and was discussed in Section II of this Motion, none of the stakeholders, nor the Energy Bureau itself, presented a proposal on specific activity-based metrics, associated deadlines and validation methods. In fact, the metrics, deadlines and validation methods are only found in the February 16th Resolution and Order, that is, they were born on this record on the date of their approval by the Energy Bureau. The adoption of said metrics with attendant deadlines and validation methods, some of which are to be met immediately by LUMA, is a surprising ruling that lacks support on the record and is thus, an arbitrary determination that should be reconsidered and annulled.

On page 19 of the February 16th Resolution and Order, this Energy Bureau stated that in this proceeding it “asked” for stakeholder feedback on activity-based performance metrics, deadlines, and allocations.” This Energy Bureau moved on to summarize the feedback that it received from stakeholders, including LUMA. Regarding feedback by other stakeholders, to wit, the SACE, VEIC, and the ICPO, this Energy Bureau noted that: (1) SACE recommended that the metrics be simple and focus on core operational capabilities on which future programs will rely; (2) VEIC agreed and recommended that performance incentives and penalties should not discourage experimentation and learning; and (3) ICPO recommended that the Energy Bureau

consider the time taken to complete the process and application acceptance for each program and completion of EE and DR Program milestones. *See* February 16th Resolution and Order, page 19. Thus, the February 16th Resolution and Order itself shows that stakeholders provided general comments in response to a hypothetical and broad question, Question 14 of Annex A, on performance targets, but did not submit proposals or comments on specific activity-based performance metrics and targets.

Despite acknowledging that LUMA did not submit a proposal for TPP performance targets (or associated metrics) and that LUMA raised to its attention that it had proposed EE and DR performance metrics in case NEPR-AP-2020-0025, this Energy Bureau stated that the “EE Regulation requires LUMA to institute activity-based metrics,” and then adopted ten (10) activity-based metrics, deadlines, and allocations of points, and determined that these metrics would represent 10% of the incentive pool for EE and DR that will be, but has not yet been established in Case NEPR-AP-2020-0025 . *Id.* at page 20. In so holding, the Energy Bureau **did not quote or reference any portion of the administrative record in this or any other proceeding**, nor did it explain which comments, filings or proposals found on the record, may be deemed to support its determination that the record is ripe for adoption of specific activity-based metrics, deadlines for compliance, and validation methods. The crux of the matter is that no such support is found on the record.

As forewarned above, prior to February 16, 2023, this Energy Bureau did not present a proposal on specific metrics and targets. Furthermore, none of the stakeholders in this proceeding submitted to this Energy Bureau concrete proposals for activity-based metrics, nor did they suggest, much less request, that this Energy Bureau consider the ten (10) activity-based metrics that this Energy Bureau adopted in the February 16th Resolution and Order. Stakeholders replied

to a broad and hypothetical question issued by this Energy Bureau in Appendix A, Question 14, that did not include a proposal of activity-based metrics, but rather stated that “the Energy Bureau is considering developing a list of activities and associated timing.” As the record shows, stakeholders recommended that the Energy Bureau conduct additional processes regarding performance incentive mechanisms and one stakeholder agreed with LUMA that performance metrics targets be deferred during the transition period.

First, SACE stated that “[d]evelopment of more detailed performance incentive policies and metrics could be discussed through technical workshops and comments for implementation following the TPP.” *See* SACE’s Comments, paragraph 14. Secondly, VEIC responded the following:

LUMA notes in Section 2.7 of its TPP that “the Transition Period is an opportunity to learn more about EE and DR markets and program implementation and how to effectively overcome barriers to EE adoption in Puerto Rico.” For that reason, LUMA proposed to defer performance targets and incentives during the Transition Period. **VEIC agrees with this reasoning and recommends against instituting any system of performance incentives and penalties that could discourage experimentation and learning. Furthermore, the major program offered during the Transition Period will be Education and Outreach, the impact of which can be difficult to measure.** Instead, we encourage initiating binding performance targets, incentives, and penalties in the Three-Year Plan starting in 2024, following the TPP and informed by the Market Baseline and Potential Studies.

See VEIC’s November 9th Comments, page 9. Ms. Emily Levin of VEIC echoed these thoughts in her verbal comments during the November 4th Workshop.

Thirdly, although the ICPO included two recommendations on categories of activity-based metrics (program and milestone completions), it **did not** suggest specific activity-based metrics, allocations of points, targets, deadlines, or timelines. Importantly, ICPO did not submit a proposal for activity-based metrics and targets related to implementation of the TPP. Importantly, the ICPO **did not include a** response to the following questions of Appendix A regarding the composition

of the incentive pool: “c. How much should all activities be worth (in terms of the total pool of potential rewards/penalties)?,” and “d. How should the total pool of potential rewards/penalties be established (as a fixed dollar amount, percent of total EE budget, percent of the available incentive funds in LUMA's contract, etc.)?” See ICPO’s Comments, page 14. Moreover, in the November 16th Workshop, Mr. Cosme, on behalf of the ICPO, indicated that ICPO considered the transitional plan as a learning period that should go full scale as soon as possible and that the tool of the metrics would be applied in a more formal matter later on as the program progresses.

None of the stakeholders submitted proposals in connection with deadlines for each activity; how much each and all the activities should be worth; whether a potential pool of rewards/penalties should be established; whether that pool could be determined on the basis of a fixed dollar amount, percent of total EE budget or percent of the available incentive funds in LUMA's contract; validating methods; or specific rewards or penalties. Likewise, the Energy Bureau did not submit for consideration by LUMA and stakeholders any concrete proposal on activity-based metrics, targets, deadlines, or validation methods. It bears noting that the Energy Bureau adopted validation methods that, as the Energy Bureau recognizes on page 22 of the Resolution and Order, were not submitted for comments by stakeholders, nor submitted for the record prior to February 16, 2023.

The record is completely devoid of proposals or comments that could place this Energy Bureau in a position to adopt the performance incentive mechanisms, deadlines and validation methods in connection with LUMA’s implementation of the TPP that are included in the February 16th Resolution and Order. Moreover, none of the stakeholders suggested that the Energy Bureau should adopt activity-based metrics in this proceeding to determine LUMA’s ability to earn the incentive fee set forth in the T&D OMA nor that the Energy Bureau should *de facto* amend

LUMA's Revised Annex IX and fashion an EE and DR incentive pool that will apply to LUMA's Revised Annex IX but that was not discussed nor considered in Case NEPR-AP-2020-0025.

As the record shows, LUMA specifically requested that metrics and targets on EE and DR be deferred and, importantly, LUMA highlighted the fact that the matter of EE and DR metrics was under consideration in a separate proceeding; Case NEPR-AP-2020-0025. To wit, in response to Question 14 of Appendix A, on performance targets LUMA stated the following:

The Energy Bureau poses the questions of penalties and rewards and how should they be established and administered. **LUMA believes that as discussed in the EE/DR TPP Technical Workshop, this period is one of transition where learning and progress should be supported and is not the right time to implement penalties and rewards.** In the referenced Technical Workshop and addressing this question, Emily Levin from VEIC encouraged the Energy Bureau to keep a focus on the fact that this is a transition period, and the main goal of that period is to get started and to support learning and that is going to mean inevitably things aren't going to move perfectly and that the point is to learn along the way and improve. Emily Levin informs that rewards and penalties are an appropriate part of the full-scale programs that will hopefully launch in a couple of years but not as a part of the transition period. LUMA echoes this statement and continues to be committed to learning and improving as the programs grow and the public's knowledge expands.

See LUMA's Responses to the Energy Bureau's RFI-Appendix A, NEPR-MI-2022-0001, November 9, 2022, page 15, filed with the motion entitled Motion to Submit Responses to Requests for Information in Appendix A of Resolution and Order of October 12, 2022 (emphasis added).

Also relevant is LUMA's response to Question 5 of Appendix B, filed on November 4, 2022, where LUMA addressed a question on the possibility of expansion of metrics for reporting purposes and in that context, LUMA highlighted the lack of a database and funding to expand on reporting metrics and the fact that in compliance with an order by the Energy Bureau in Case NEPR-AP-2020-0025, it would file proposed metrics and targets on EE and DR.

The aforementioned shows that: 1) There is no evidence, much less substantial evidence, in the administrative record, to support the adoption of activity-based metrics, deadlines and

validation methods; 2) The record demands the conclusion that adoption of activity-based metrics, incentives and penalties is premature and inconsistent with the Transition Period which, by definition, is a temporary period that will enable learnings towards implementation of EE and DR programs; and 3) The Energy Bureau did not present a proposal nor evidence or support for the record on a proposal for activity-based metrics, targets, deadlines for compliance, or validation methods to apply to LUMA in the Transition Period. *See Padín Medina v. Administración de Sistema de Retiro*, 171 DPR 950, 962-63 (2007) (stating that agency decision is considered arbitrary and capricious when it does not consider an important aspect of the dispute or when the agency's explanation of the decision contradicts the evidence presented to the agency).

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), and that the court's deference to an administrative agency's determination will yield when the agency acted in an arbitrary, unreasonable or illegal manner making determinations that lack a rational basis, among other things. *See Torres v. Policía de PR*, 196 DPR 606, 628 (2016). A ruling such as the one issued in the February 16th Resolution and Order, pages 19 through 23, that lacks support in the administrative record and is inconsistent with the record, is unreasonable *per se* and, as will be discussed, deprives the regulated party who must comply, of due process guarantees. *See e.g., Otero Mercado v. Toyota*, 163 DPR 716, 729 (2005) (judicial deference to administrative decisions yields when the administrative decision is not based on substantial evidence or when the agency has erred in the application or interpretation of laws or regulations).

In sum, the record of this proceeding **does not support the Energy Bureau's determination to adopt and impose activity-based metrics and attendant deadlines and**

validation methods. Moreover, the Energy Bureau’s determination disregards the comments by stakeholders and LUMA who cautioned against approval at this stage of metrics and targets. This Energy Bureau should reconsider its determination to adopt activity-based metrics, deadlines and validation methods that will apply during the Transition Period and involve the TPP. Further and future processes are needed to support adoption of metrics and targets in connection with EE and DR.

C. The adoption by this Energy Bureau of activity-based performance metrics, deadlines and validation methods, is an arbitrary determination that was issued in violation of LUMA’s right to due process.

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).

Relatedly, “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) (stating that agencies must 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). Regarding the requirement to afford fair warning to regulated parties, the United States Supreme Court has held that a court may not defer to an 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 . . .”).

As explained above, the Energy Bureau did not follow its own regulations in this proceeding nor presented evidence in support of the determination to adopt performance-based incentive metrics that will affect LUMA’s ability to earn the incentive fee set forth in the T&D OMA. The Energy Bureau compounded that legal error because it adopted performance incentive metrics without prior notice to LUMA of the specific activity-based mechanisms that were unilaterally set by this Energy Bureau. The February 16th Resolution and Order deprives LUMA of hallmark due process protections on the certainty of the rules that apply to a decision by this Energy Bureau on the performance metrics targets that will determine LUMA’s ability to earn a contractually agreed incentive fee. It also deprives LUMA of substantive rights and property interests in connection with the incentive fee and of its procedural rights in Case NEPR-AP-2020-0025 that include the right to fair notice, an opportunity to be heard and present evidence and receive a decision that is based on the administrative record in said adjudicative proceeding.

On December 23, 2022, this Energy Bureau initiated an adjudicative proceeding to establish performance-based incentive mechanisms and targets for LUMA, pursuant to section 4.2(f) of the T&D OMA, Case NEPR-AP-2020-0025. That adjudicative proceeding has been conducted pursuant to the T&D OMA and Regulation 9137. Throughout the course of more than

two (2) years, LUMA defended its proposal of an initial set of performance metrics targets that arise under Annex IX of the T&D OMA, as amended. As the record of Case NEPR-AP-2020-0025 shows, LUMA's initial proposal did not include performance metrics targets on EE and DR, primarily because those categories were not selected by the parties to the T&D OMA and because EE and DR programs had not been implemented in Puerto Rico. On October 28, 2022, in compliance with an order by this Energy Bureau issued on December 22, 2021, Case NEPR-AP-2020-0025, affirmed in an order of August 1, 2022, LUMA submitted an Amended Annex IX to the T&D OMA to include proposed metrics on EE and DR,¹¹ and also filed sworn testimonies in support thereof.¹² Those metrics are: a) Interconnection: Average Duration for Net Energy Metering (NEM) Tariff Activation; b) Demand-Side Management: Energy Savings as Percent of Total Energy Sales; and c) Demand-Side Management: Peak Demand Savings as a Percent of Total Peak Demand. The aforementioned metrics were added to the incentive compensation pool on Technical, Safety and Regulatory metrics of the Revised Annex IX to the T&D OMA and were assigned points and effective weights within said pool. *See* LUMA's Revised Performance Metrics Targets in Compliance with the PREB Resolution and Order of August 1, 2022, pages 12-14. LUMA's proposed EE and DR performance metrics targets **do not include activity-based metrics regarding LUMA's implementation of the Proposed and now approved, TPP.**

At the time that this Energy Bureau issued the February 16th Resolution and Order, this Energy Bureau was aware that LUMA's proposed EE and DR metrics, -- that were filed months before on October 28, 2022 in Case NEPR-AP-2020-0025--, did not include activity-based performance metrics targets regarding implementation of the TPP. Between October 28th and

¹¹ Available at <https://energia.pr.gov/wp-content/uploads/sites/7/2022/11/Submission-of-Revised-Annex-IX-to-the-TD-OMA-NEPR-AP-2020-0025.pdf>

¹² Available at <https://energia.pr.gov/wp-content/uploads/sites/7/2022/11/LUMAS-Submission-of-Testimonies-on-Additional-Metrics-NEPR-AP-2020-0025.pdf>

February 16th, however, this Energy Bureau did not issue any order in this proceeding or in Case NEPR-AP-2020-0025, advising LUMA that it would consider the ten (10) activity-based metrics, deadlines and validating methods that were adopted on February 16, 2023, nor requiring LUMA to convert the TPP into activity-based metrics that would be added to the package of metrics that will determine LUMA's ability to earn the incentive fee under the T&D OMA. It was arbitrary and capricious to surprise LUMA on February 16, 2023, with the adoption of performance metrics that were not filed for the record in this proceeding for consideration by LUMA and stakeholders and were not even discussed in this proceeding. Moreover, it was arbitrary and capricious to allow proceedings in Case NEPR-AP-2020-0025 on LUMA's Revised Annex IX to the T&D OMA to continue and wait until the evidentiary hearing in said case concluded, to then require that LUMA adopt additional performance incentive mechanisms on EE and DR that were not discussed nor subject to discovery, pre-filed testimonies or cross examination in Case NEPR-AP-2020-0025, but that nonetheless, per the February 16th Resolution and Order, shall be added to LUMA's Revised Annex IX to the T&D OMA.

It was not foreseeable to LUMA, at the onset of this proceeding in January 2022, that this Energy Bureau would adopt performance incentive mechanisms for the TPP that would be added to the Revised Annex IX to the T&D OMA that is under consideration in Case NEPR-AP-2020-0025. As the summary of the procedural background shows, in initiating this proceeding, requesting that LUMA file a TPP and summoning stakeholders to submit comments and participate in workshops, this Energy Bureau **did not put LUMA or stakeholders on notice of a proposal on activity-based performance metrics regarding the TPP.** To be sure, the Energy Bureau issued a question to stakeholders, whereby it informed that it was considering activity-based metrics. But a question is not a proposal nor did Question 14 include any information on which

activity-based metrics the Energy Bureau would consider, the weight that each would have, their descriptions or formulas or how activity-based metrics would be applied to financial incentives. Moreover, neither in this proceeding nor in Case NEPR-MI-2020-0025, did this Energy Bureau notify LUMA that the activity-based metrics would be added to the incentive pools that LUMA proposed in the revised Annex IX to the T&D OMA that was filed on October 28, 2022. In fact, Question 14 of Appendix A included, alluded, in question form, to the possibility that metrics could be subject to financial incentive set as fixed dollar amounts, a percent of the EE Budget or a percent of LUMA's contractual incentive. Although in the November 4th and 16th workshops, the Energy Bureau stated that it was considering appropriate activities and timing for launching the TPP programs on time, referenced that it understood that targets should be considered as part of the TPP, and invited stakeholders to comment on metrics and financial mechanisms, nowhere in this docket nor in Case NEPR-AP-2020-0025, did this Energy Bureau even suggest, much less file for the record and for consideration by LUMA, stakeholders and intervenors, the activity-based metrics in connection with the TPP, that would be adopted in this proceeding to apply to LUMA's ability to earn the incentive fee set forth in the T&D OMA.

Puerto Rico's LPAU, 3 LPRA §9641 (2022), affords the following guarantees to parties in adjudicative proceedings: 1. Notice of the claims pursued; 2. Right to present evidence; 3. Right to an impartial adjudication; and 4. Right to have a decision be based on the administrative record. These are fundamental rights that are also constitutionally guaranteed through procedural due process. *See Art. II, Sec. 7, Const. E.L.A.; U.S. Const. Amendments V and XIV; see also e.g., Domínguez Castro v. ELA*, 178 DPR 1, 35 (2010) (stating that both under the Constitution of Puerto Rico and that of the United States of America, the right to due process is a fundamental right). LUMA was not given any opportunity here or in Case NEPR-AP-2020-0025, to address

the Energy Bureau's proposal on activity-based metrics and present evidence regarding the same. That deprivation of the right to present evidence, particularly to present and confront evidence on metrics that will be applied to LUMA's proposal in Case NEPR-AP-2020-0025, amounts to a material breach of due process rights. Such a deprivation of due process rights by an administrative agency requires a conclusion that the agency decision cannot prevail. *See Art. II, Sec. 7, Const. E.L.A.; U.S. Const. Amendments V and XIV; see also Ins. Agencies, Inc.*, 144 DPR page 436 (an administrative decision that deprives a party of fundamental rights cannot prevail); *see also e.g., Domínguez Castro*, 178 DPR 35 (the right to due process is a fundamental right).

Substantive and procedural due process, as well as the requirement that administrative agencies must follow their own regulations, prevent this Energy Bureau from conducting arbitrary proceedings and issuing decisions that were issued without prior notice to LUMA and opportunity to be heard. LUMA requests that this Energy Bureau vacate that portion of the February 16th Resolution and Order that adopted, without fair notice, in dereliction of applicable rules and regulations, and in violation of LUMA's due process rights, activity-based performance incentive metrics, attendant deadlines and validation methods, and that the Energy Bureau directed will determine LUMA's ability to earn a portion of the incentive fee under the T&D OMA.

IV. Request to vacate deadlines for activities to implement the approved TPP.

In addition to the fact that this Energy Bureau should reconsider in its entirety that portion of the February 16th Resolution and Order that requires LUMA to comply with ten (10) activity-based metrics within specified deadlines and following validation methods set by this Energy Bureau, LUMA hereby submits that the deadlines for completion of activities to implement the approved TPP, are arbitrary and unreasonable and should be vacated.

In the February 16th Resolution and Order, the Energy Bureau urged LUMA to contract the contractor who would assist LUMA with the launch and implementation of the TPP programs (“Implementation Contractor”) “as soon as possible” while it also establishes a Performance Incentive Metric milestone for this contracting of “14 days after Order Issuance, whichever occurs later”¹³. LUMA respectfully informs that after it submitted the Proposed TPP, LUMA diligently commenced the required steps and processes pursuant to its Procurement Manual to prepare and get an RFP approved internally for the procurement of the Implementation Contractor. This RFP was thereafter issued on August 17th, 2022. Given the procurement procedures and requirements that must be followed or met after issuance of an RFP, as well as the volume of active procurements, as of this date, the procurement for the Implementation Contractor has not been completed.

As described in the Proposed TPP, the role of the Implementation Contractor is fundamental for the launch, implementation/delivery and administration of the EE and DR programs, and their involvement provides needed expertise and additional resources to implement the Proposed TPP. Specifically, LUMA stated in the Proposed TPP that:

While the Transition Plan is in review and discussion with the Energy Bureau, LUMA will issue an RFP for a turnkey Implementation Contractor(s) for program delivery. Once selected, LUMA must work with the Implementation Contractor to finalize the program design details (measures, incentives, delivery strategies, etc.) for each program, leveraging the Contractor’s program delivery expertise and outreach to local contractors, retailers, and stakeholders as needed. LUMA and the Implementation Contractor will also work to incorporate any feedback received from the Energy Bureau during the TPP approval process.

The Implementation Contractor will work closely with LUMA departments such as Customer Experience and IT, to determine which program activities (e.g., marketing, customer service, application processing) need to be conducted via internal systems and which activities the contractor will be required to provide/develop. This work will inform the “Pre-Launch Implementation Planning” process, which will detail all activities that need to be completed prior to

¹³ The latter phrase appears to be missing some text and therefore the exact deadline for this task is not clear.

program launch to ensure a smooth, successful program launch and ongoing delivery. [...]

See Proposed TPP at page 18.

LUMA also indicated in the Proposed TPP that:

LUMA intends to hire a turnkey contractor to implement the TPP programs. The contractor may bring a team of subconsultants, as needed, to address all the areas necessary for program delivery of the broad range of programs included in the TPP. However, the prime contractor will be directly responsible to LUMA through contractual means for the delivery of the turnkey services needed. The breakdown of services for each program are described in the following tables.

Id. at page 66.

LUMA further indicated that:

LUMA's strategy for the management of Transition Period programs is to provide oversight and administration to a third-party implementation contractor(s), who will have primary responsibility for program delivery. Implementation Contractors are experts in the delivery of EE and DR programs and leverage existing processes, systems (rebate fulfillment, etc.) and program materials (websites, collateral, etc.) that would take LUMA years to develop internally.

Id. at page 68.

Based on the foregoing, LUMA respectfully submits that until the Implementation Contractor is onboarded, LUMA cannot fully undertake the pre-launch, launch and implementation of the EE and DR programs. Activities under the Proposed TPP that are yet to be launched include the following activities for which deadlines have been set by the Energy Bureau in the February 16th Resolution and Order in connection with the performance metrics that LUMA is hereby requesting that this Energy Bureau vacate on reconsideration. To wit: Launching of EE and DR program marketing (scheduled for April 1, 2023 in the February 16th Resolution and Order); enrolling customers in emergency DR (scheduled for April 15, 2023 in the February 16th Resolution and Order), demonstrating capability to call emergency DR program events (scheduled for May 15, 2023 in the February 16th Resolution and Order), processing of EE incentive

applications (for which two deadlines are provided: July 1, 2023 or within 30 days of rider approval, whichever occurs later and August 1, 2023 or within 60 days of rider approval, whichever occurs later); and submitting a the draft FY2025-2027 Three-Year Plan by December 2, 2023, *see* February 16th Resolution and Order, page 27. These deadlines are arbitrary and do not properly consider LUMA’s proposed TPP nor the realities of implementation of the TPP.

Although LUMA provided in the Proposed TPP general estimated timeframes for the different programs (based on quarters, not precise dates) for pre-launch, launch and implementation or delivery of programs, LUMA respectfully submits that in all cases these dates assumed the Implementation Contractor would be in place during the first quarter of FY 2023. *See id.* at pages 30 (Table 4-5), 35 (Table 4-10), page 40 (Table 4-14), page 45 (Table 4-19), page 50 (Table 4-24), page 55 (Table 4-28) and, page 60 (Table 4-32). LUMA also conditioned the timeframe for the launch of EE and DR programs on the timing of the Implementation Contractor procurement processes, among other factors. *See id.* at page 19. In this regard, LUMA indicated that:

Depending on the timing of funding availability, implementation contractor procurement processes, and internal administrative startup requirements, LUMA intends to launch limited EE and DR programs during Program Year 1 of the Transition Period. **Error! Reference source not found.** below provides an overview of the launch timeframe for each program. Due to uncertainty about program funding, exact program launch dates cannot be determined. Year 1 incentive programs are expected to launch three to six months after program funding is secured. LUMA will maintain flexibility in its approach and launch timing to respond to changing market conditions and unforeseen challenges in program administration and delivery.

Id. at page 19.

To the extent that this Energy Bureau intended in Table 2 the February 16th Resolution and Order, to set deadlines for completing tasks for implementation of the approved TPP, LUMA respectfully submits that the deadlines set in connection with performance metrics, were arbitrarily

because they do not consider the factors discussed in the Proposed TPP that could affect the timing of program development and launch and LUMA's up-to-date input on the subject- all of which is essential information to support the establishment of deadlines and timeframes for these activities that are realistic, reasonable and achievable. Thus, this Energy Bureau should vacate the deadlines.

The foregoing request, notwithstanding, LUMA is currently working on the preparation of the EE Rate Rider and anticipates it will be filed by April 1, 2023. In addition, this request does not affect the revised deadlines for reports, filings and the stakeholder meeting included in Table 1 of the February 16th Resolution and Order (*see* February 16th Resolution and Order at page 18), (other than the deadline for filing of the FY2025-2027 Three-Year Plan, which is also tied to the Implementing Contractor's engagement), which Table 1 LUMA understands amends the deadlines in Table 6-1 of the Proposed TPP (*see* Proposed TPP at page 71) and provides, among others, that the first report filing will be the quarterly report for the fourth quarter of FY2023 (covering any actions completed from TPP launch through June 30, 2023) with a filing deadline of August 29, 2023.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **take notice** of the aforementioned, **reconsider** the February 16th Resolution and Order as requested in this Motion and particularly, the adoption of activity-based metrics, and **vacate** the deadlines in the February 16th Resolution and Order.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 8th day of March 2023.

We hereby certify that we filed this Motion using the electronic filing system of this Energy Bureau and that we will send an electronic copy of this Motion to agraitfe@agraitlawpr.com;

info@sesapr.org; elevin@veic.org; the attorneys for PREPA at jmarrero@diazvaz.law, and the Independent Office for Consumer Protection at hriviera@jrsp.pr.gov.



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