

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

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**IN RE:**  
PERFORMANCE METRICS TARGETS  
FOR LUMA ENERGY SERVCO, LLC

**CASE NO. NEPR-AP-2020-0025**

**SUBJECT: LUMA’s Response and Opposition to  
Resolution and Order of May 25, 2023, on Taking  
of Administrative Notice**

**LUMA’S RESPONSE AND OPPOSITION TO THE RESOLUTION AND ORDER  
OF MAY 25, 2023, ON TAKING OF ADMINISTRATIVE NOTICE**

**TO THE HONORABLE PUERTO RICO ENERGY BUREAU:**

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

**I. Introduction**

On May 25, 2023, the Puerto Rico Energy Bureau (“Energy Bureau”) issued a Resolution with the subject matter “Administrative Notice,” whereby this Energy Bureau, *motu proprio*, without granting LUMA or the parties in this proceeding prior notice and an opportunity to be heard, took administrative notice of twelve (12) documents that included Resolutions and Orders and submissions from other proceedings before this Energy Bureau, an Order from the New York State Public Service Commission and two reports about benchmarking for call center performance (“May 25<sup>th</sup> Resolution”). The Energy Bureau issued the May 25<sup>th</sup> Resolution after the four days of the evidentiary hearing had concluded and, therefore, after the evidentiary record had closed. Furthermore, by May 25, 2023, the parties had filed legal briefs as instructed by this Energy Bureau.

Specifically, the Energy Bureau informed that it took official notice of (i) certain data on several metrics, which LUMA provided in Case No. NEPR-MI-2019-0007, (ii) a related Resolution and Order in the stated proceeding, (iii) data included on interconnection progress reports provided by LUMA in periodic filings in Case No. NEPR-MI-2019-0016, on the Performance of the Puerto Rico Electric Power Authority, (iv) LUMA's annual report for Fiscal Year 2022 and Report on Efficiencies as well as LUMA's filing on the Annual Budget for Fiscal Year 2024 to 2026 in LUMA's Initial Budget docket, Case No. NEPR-MI-2021-0004, (v) an associated Resolution and Order in Case No. NEPR-MI-2021-0004, (vi) an Order Approving the Scorecard for use by the New York Public Service Commission for Utility Emergency Performance Metrics, and (vi) two public reports about benchmarking for call center performance.

In support of its decision to take official notice at a decidedly advanced stage of this adjudicative proceeding, this Energy Bureau states in the May 25<sup>th</sup> Resolution that every fact for which official notice has been taken derived from a source that meets the standards requirements of Rule 201 of the Rules of Evidence, Section 9.03 of the Puerto Rico Energy Bureau Regulation on Adjudicative, Notice of Noncompliance, Rate Review, and Investigation Procedures that govern the administrative notice mechanism in the Energy Bureau, Regulation No. 8543 ("Regulation 8543") and Section 3.13 of the Puerto Rico Administrative Procedure Act ("LPAU," by its Spanish acronym). Regarding taking official notice of LUMA's regulatory filings, this Energy Bureau indicated that those filings had been made in administrative dockets and proceedings of this Energy Bureau and, without further explanation, indicated that the Energy Bureau's Resolutions and Orders are easily verifiable. This Energy Bureau also stated that the other material is associated with regulatory proceedings in other jurisdictions or procedures by credible third parties. The May 25<sup>th</sup> Resolution, however, does not define the term "credible third

parties” nor provide principled guidance on how that term may be construed as a matter of law or applied to take official or administrative notice of adjudicative facts.

As will be explained, the Energy Bureau did not comply with the requirements for taking administrative notice under Puerto Rico law and case law. The determination to take official notice issued in the May 25<sup>th</sup> Resolution infringes on LUMA’s rights to due process as it introduces new evidence to the record after the discovery process concluded, an evidentiary hearing was held, and the parties filed legal briefs, putting LUMA and the other parties at a disadvantage. The May 25<sup>th</sup> Resolution does not provide LUMA sufficient information to understand the relevance and purpose of the evidence that the Energy Bureau has chosen to consider by taking administrative notice in lieu of the main mechanism for the presentation of evidence in an adjudicative proceeding: pre-filed testimonies and cross-examination of witnesses. The fact that the Energy Bureau can apply the Rules of Evidence discretionally on taking administrative notice does not render that determination proper nor reasonable in the context of this proceeding, where LUMA presented 28 pre-filed testimonies and offered 14 witnesses who appeared at the Evidentiary Hearing and were available to be cross-examined.

In fact, on December 9, 2021, LUMA requested that this Energy Bureau inform if it planned to offer evidence and testimonies and requested the opportunity to conduct discovery. *See Motion to Request the PREB to Inform Witnesses and Evidence to Employ at the Evidentiary Hearing and Petition to Allow LUMA to Conduct Discovery.* The purpose of that request was to protect LUMA’s due process rights to timely be aware of the evidence to be presented by this Energy Bureau, evaluate or refute its proposal in this proceeding, and prepare to face that evidence at the Evidentiary Hearing. This Energy Bureau, however, did not respond to LUMA’s request and, more importantly, did not, throughout the course of more than two years of pre-hearing

processes and discovery, disclose that it would consider additional materials, evidence, or information through evidence submitted during the Evidentiary Hearing or otherwise.

The determination to take official notice at this stage and after having denied *de facto* LUMA's timely request made in December 2021 to be privy to the evidence that the Energy Bureau would consider, is manifestly unfair, arbitrary, and capricious. *See Super Asphalt Pavement Corp. v. Autoridad para el Financiamiento de la Infraestructura de Puerto Rico*, 206 DPR 803, 819 (courts shall defer to the decisions of administrative agencies so long as it has not acted arbitrarily, unreasonably, or unlawfully in making determinations lacking a rational basis or an abuse of discretion.); *see also Graciani Rodriguez v. Garage Isla Verde, LLC*, 202 DPR 117, 127 (2019). *Torres Rivera v. Pol de Puerto Rico*, 196 DPR 606, 628 (2016).

LUMA hereby respectfully raises its objections to the Energy Bureau's determination to take administrative notice of documents and information not submitted as evidence in the Evidentiary Hearing held in this proceeding or before the filing of the substantive and legal briefs by the parties. LUMA opposes the determination to take administrative notice as stated in the May 25<sup>th</sup> Resolution.

## **II. Background**

On December 23, 2020, the Energy Bureau commenced this proceeding by issuing a Resolution and Order setting forth the legal and regulatory framework pursuant to which it would conduct the evaluation and establishment of the Performance Targets and Performance Incentive Mechanisms ("PIMs") that would further the compliance and implementation of the public policy and objectives established through Act 57-2014, known as the *Puerto Rico Energy Transformation and RELIEF Act* and Act 17-2019, known as the *Puerto Rico Energy Public Policy Act*.

On February 25, 2021, LUMA filed its *Submittal and Request for Approval of Revised Annex IX to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement*, whereby it submitted a revised Annex IX pursuant to the December 23 Resolution and Order (the “February 25<sup>th</sup> Submittal and Request”). The revised Annex IX filed with the February 25<sup>th</sup> Submittal and Request included Performance Metrics Targets that were the result of the iterative review process conducted by LUMA and the Puerto Rico Public-Private Partnerships Authority (“P3 Authority”) pursuant to Section 4.2(f) of the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (“T&D OMA”), pursuant to which the P3 Authority reviewed and commented on LUMA’s proposed Performance Metrics Targets and proposed revised Annex IX.

Discovery processes were conducted between November 18, 2021, and December 28, 2021. Throughout that period, LUMA answered eight Requirements for Information issued by the Energy Bureau, four notified by the Local and Environmental Civil Organizations (“LECO”), and one served by the Independent Consumer Protection Office (“ICPO”). Meanwhile, LECO answered three Requests for Information issued by LUMA. ICPO responded to four Requests for Information served by LUMA.

In the interim, on December 9, 2021, LUMA filed a *Motion to Request the PREB to Inform Witnesses and Evidence to Employ at the Evidentiary Hearing and Petition to Allow LUMA to Conduct Discovery*. Therein, LUMA requested the Energy Bureau to disclose if it intended to employ any consultant or witness at the evidentiary hearing, specifically, if they planned to introduce any evidence and allow discovery on those witnesses the Energy Bureau intended to employ. The Energy Bureau did not issue a response to LUMA’s request, nor did it announce at that time any evidence or testimony of any witnesses.

On February 17, 2022, LUMA filed its *Response in Opposition and Objection to December 22, 2021 Resolution and Order and Request to Vacate or Grant LUMA Relief from the December 22, 2021 Resolution and Order* objecting to and requesting relief from a December 22, 2021 Resolution and Order whereby the Energy Bureau ordered LUMA to include three additional performance metrics categories as part of the revised Annex IX to the T&D OMA. Among others, LUMA contended that the Energy Bureau's decision was issued before granting LUMA an opportunity to present evidence and testimonies to refute the inclusion of such additional metrics.<sup>1</sup>

After LECO filed an objection and LUMA submitted a reply, on August 1, 2022, this Energy Bureau entered a Resolution and Order whereby it ordered LUMA to file: (i) a revised Annex IX to the T&D OMA, including Targets and supporting metrics for Interconnection, Energy Efficiency/Demand Response, and Vegetation Management; and (ii) a supplemental or revised direct pre-filed testimony for Targets and supporting metrics for the Performance Metric Targets the three additional metrics on Interconnection, Energy Efficiency/Demand Response, and Vegetation Management ("August 1<sup>st</sup> Order").

On October 28, 2022, LUMA filed a *Submission of Revised Annex IX to the T&D OMA*. The filing included the Revised Annex IX in compliance with the August 1<sup>st</sup> Order by including the three additional metrics requested by the Energy Bureau. LUMA also submitted the pre-filed testimonies of two witnesses in support of its Submission of Revised Annex IX to the T&D OMA. LUMA requested that this Energy Bureau (i) accept the Submission of Revised Annex IX to the T&D OMA, and (ii) deem LUMA complied with previous Resolutions and Orders.

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<sup>1</sup> As explained in detail in forthcoming sections, the arguments raised by LUMA in the *Response in Opposition and Objection to December 22, 2021 Resolution and Order and Request to Vacate or Grant LUMA Relief from the December 22, 2021 Resolution and Order* are relevant to the discussion in this Motion, considering that the Energy Bureau is taking administrative notice of a series of documents after the conclusion of the Evidentiary Hearing and submission of the legal briefs.

Additional discovery was conducted on the three additional metrics. LUMA answered two Requirements for Information issued by the Energy Bureau, one notified by LECO, and one served by the ICPO. As per the Energy Bureau's Resolution and Order (establishing the calendar for the proceeding), discovery ended on December 22, 2022. The Energy Bureau did not present testimony of any witnesses on the three additional metrics. The Energy Bureau scheduled the Evidentiary Hearing for February 7-10, 2023. On the first day of the Evidentiary Hearing, the Energy Bureau called those witnesses whose testimony pertained to what the government body labeled the "general approach to the Performance Metrics" proposed in this proceeding, which were duly sworn. Also, cross-examinations were conducted on witnesses Mario Hurtado, Donald Hall, Branko Terzic, and Juan Lara for LUMA; Agustín Irizarry and José Alameda for LECO. On the first session of the Evidentiary Hearing, the Energy Bureau admitted eighteen (18) documents in evidence.

The second session of the Evidentiary Hearing was held on February 8, 2023. The Energy Bureau received testimony and evidence from witnesses in regard to the "Technical, Safety, and Regulatory" Performance Metrics. This category of metrics included the following Performance Metrics: OSHA Recordable Incident Rate; OSHA Fatalities; OSHA Severity Rate; OSHA Days Away, Restricted, and Transfer Rate; System Average Interruption Frequency Index ("SAIFI"); System Average Interruption Duration Index ("SAIDI"); Vegetation Maintenance Miles Completed (230kV, 115kV, 38kV, primary Distribution); Distribution Line Inspections & Targeted Corrections; Transmission Line Inspections & Targeted Corrections; T&D Substation Inspections & Targeted Corrections; Net Energy Metering (NEM) Project Activation Duration; Energy Savings as Percent of Total Energy Sales; and Peak Demand Savings as a Percent of Total Peak Demand. Cross-examinations were conducted for witnesses Curtis Clark, Lee Wood, Don

Cortez, and Diane Watkins for LUMA; Agustín Irizarry for LECO; and Gerardo Cosme for ICPO. On the second session of the Evidentiary Hearing, the Energy Bureau admitted twenty-two (22) documents in evidence.

The third session of the Evidentiary Hearing was held on February 9, 2023. The Energy Bureau scheduled the examination of the evidence and witnesses on the “Customer Satisfaction” Performance Metrics in the morning session. The metrics under the “Customer Satisfaction” classification include J.D. Power Customer Satisfaction Survey (Residential Customers); J.D. Power Customer Satisfaction Survey (Business Customers); Average Speed of Answer (minutes); Customer Complaint Rate; and Abandonment Rate. Cross-examinations were conducted on witnesses Jessica Laird and Melanie Jeppesen for LUMA; Agustín Irizarry for LECO; and Beatriz González for ICPO. For the afternoon session, the Energy Bureau programmed the examination of evidence, and those witnesses presented for the “Finance” Performance Metrics. The metrics in that category included: Operating Budget; Capital Budget: Federally Funded; Capital Budget: Non-Federally Funded; Days Sales Outstanding: General Customers; Days Sales Outstanding: Government Customers; and Overtime. Cross-examinations were conducted on witnesses Juan Fonseca and Kalen Kostyk for LUMA; Agustín Irizarry for LECO; and Gerardo Cosme for ICPO. On the third session of the Evidentiary Hearing, the Energy Bureau admitted twenty-two (22) documents in evidence.

The fourth and final session of the Evidentiary Hearing was held on February 10, 2023. The Energy Bureau scheduled the examination of the witnesses and evidence concerning the MOE Metrics for that session. Cross-examinations were conducted on witnesses Mario Hurtado, Abner Gómez, and Terry Tonsi for LUMA; Agustín Irizarry for LECO; and Gerardo Cosme for ICPO.



On the second session of the Evidentiary Hearing, the Energy Bureau admitted five (5) documents in evidence.

Shortly thereafter, public hearings were held between February 16-17, 2023. As the docket of this proceeding shows, three individuals submitted written comments on February 16, 2023.

Following various procedural events, on April 21, 2023, the Energy Bureau issued a Resolution and Order establishing May 11, 2023, as the deadline to submit the parties' final and substantive legal briefs ("April 21<sup>st</sup> Resolution and Order"). Additionally, the Energy Bureau set June 1, 2023 as the deadline to file replies to the final briefs by the parties. Finally, June 8, 2023, was fixed as the last day for the public to submit general comments and the *amicus curiae* to file their briefs.

In accordance with the April 21<sup>st</sup> Resolution and Order, LUMA, LECO, and ICPO filed their final legal and substantive briefs before the Energy Bureau on May 11, 2023.

Then, the Energy Bureau issued the May 25<sup>th</sup> Resolution in controversy, whereby *motu proprio*, took administrative notice of twelve (12) documents regarding (i) certain data on several metrics, which LUMA provided in case No. NEPR-MI-2019-0007, (ii) a related Resolution and Order in the stated proceeding, (iii) data included on interconnection progress reports provided by LUMA in periodic filings in Case No. NEPR-MI-2019-0016, on the Performance of the Puerto Rico Electric Power Authority (iv) LUMA's annual report for Fiscal Year 2022 and Report on Efficiencies as well as LUMA's filing on the Annual Budget for Fiscal Year 2024 to 2026 in LUMA's Initial Budget docket, Case No. NEPR-MI-2021-0004, (v) an associated Resolution and Order in the stated case, (vi) an Order Approving the Scorecard for use by the New York Public Service Commission for Utility Emergency Performance Metrics, and (vi) two public reports about benchmarking for call center performance to consider for its final decision on the matter.

### III. The May 25<sup>th</sup> Resolution was Issued in Violation of Due Process.

Under Puerto Rico law, administrative adjudicative proceedings shall observe the guarantees of due process according to the nature of the proceeding, which ultimately must be fair and equal. *Báez Díaz, ELA*, 179 DPR 605, 623 (2010). Administrative adjudicative proceedings must observe the following minimum guarantees: (1) adequate notice of the proceeding; (2) proceedings before an impartial judge; (3) opportunity to be heard; (4) right to cross-examine witnesses and **examine the evidence presented**; (5) have the assistance of counsel; and (6) **a decision based on the record**. *Román Ortiz v. Oficina de Gerencia de Permisos*, 203 DPR 947, 954 (2020); *see also Cedeño Aponte v. Estado Libre Asociado de Puerto Rico*, 203 DPR 753, 761 (2019).

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). In ensuring due process guarantees, parties must not only have a *pro forma* opportunity to present and rebut evidence but be able to do so effectively. *Rentas Nieves v. Betancourt Figueroa*, 201 DPR 416, 429 (2018).

The Energy Bureau's determination to take administrative notice in this proceeding contradicts two bedrock due process guarantees: the right to present evidence and the right to have an administrative agency issue a final decision based on the administrative record. First, the

decision to take administrative notice is belated. It was issued more than three months after the discovery phase of the proceeding ended, after the evidentiary record in this proceeding closed, and weeks after the parties filed their final legal briefs. Note that the discovery process in this proceeding took place for more than one year and was arduous and meticulous. In the discovery stage, the Energy Bureau never even hinted at the possibility of taking administrative notice of any documents or information and, as explained above, did not even address a request by LUMA for the Energy Bureau to disclose the evidence that it purported to submit for the record. Nor did the Energy Bureau offer into evidence during the Evidentiary Hearing the documents that it has now introduced *via* the May 25<sup>th</sup> Resolution. The parties drafted and submitted their final legal briefs, considering the evidence already in the administrative record, which consisted of the documents and testimonies admitted during the Evidentiary Hearing. Based on this evidence, the parties constructed and developed their arguments in the proceeding. Admitting new evidence at this point in the proceeding violates the due process rights of LUMA and the parties, as it completely impairs the parties' right to examine the evidence and refute the same. *See Álvarez v. Junta de Condómines*, 121 DPR 896 (1988) (“a fundamental requirement of the due process of law is the opportunity to present evidence and argue and to be able to rebut contrary evidence”); *Asoc. de Taxis de Cayey*, 142 DPR 109 (*stating* that the right to a public hearing would be meaningless if the administrative agency were allowed to base its decision on evidence outside the hearing without allowing the parties to rebut or cross-examine new evidence or present other evidence to the contrary).

Second, the May 25<sup>th</sup> Resolution is a procedurally inequitable ruling, given that the Energy Bureau has introduced new information and documents for the record, but the parties were not provided proper notice that the Energy Bureau understood that additional data was needed to issue a final determination, nor were they afforded a timely opportunity to be heard on the need for this

evidence. Even if a final decision has not been issued on the merits, the timing of the May 25<sup>th</sup> Resolution places LUMA and the parties at a procedural disadvantage.

Prior to the close of the Evidentiary Hearing or upon filing its final legal brief, LUMA did not have notice that the Energy Bureau was looking for additional evidence, and LUMA and the parties were not given proper time to study the documents that the Energy Bureau wants to take administrative notice. LUMA and the parties do not have the opportunity to dispute the information contained in these documents through pre-filed testimonies or other evidence to support their stance, as the final legal briefs were already filed. LUMA's witnesses, who submitted pre-filed testimonies and were available for cross-examination, were not given a chance to submit testimonies to counter a proposal by this Energy Bureau that LUMA's filings in other proceedings and information from other energy regulators or third parties are relevant and admissible in this proceeding. Moreover, the majority of the documents the Energy Bureau decided to take administrative notice of were already in the dockets of other proceedings, in some cases, for more than a year. The Energy Bureau had those documents in its records; however, it was not until now, at such an advanced stage of the proceeding, it determined it was necessary to take administrative notice of them.

Third, the Energy Bureau's decision to admit new evidence infringes LUMA's due process rights and the guarantee that the final decision must be made based on facts in the administrative record. Sec. 3.1 of the LPAU, 3 LPRA § 9641; *see also Fuentes Bonilla v. ELA et al*, 200 DPR 364, 395 (2018). The administrative record shall constitute the exclusive basis for agency action in an adjudicative proceeding for judicial review. Sec. 3.18 of the LPAU, 3 LPRA § 9658. Also, and more importantly, a reviewing court will only uphold the factual determination of an agency

decision in a judicial review if they are based on substantial evidence in the administrative record. Sec. 4.5 of the LPAU, 3 LPRA §9675.

The information and documents that this Energy Bureau took administrative notice of, as informed through the May 25<sup>th</sup> Resolution, are not part of the record in this case, were never discussed during the discovery phase or the hearings, nor did the Energy Bureau refer to them in the bench orders that they issued. The official records from other proceedings (Legacy Metrics, Case No. NEPR-MI-2019-0007, Initial Budgets, NEPR-MI-2021-0004 and Interconnections, NEPR-2019-006) are unrelated to this one and do not include the same parties or the same data to be used as the basis for the metrics. In some cases, these proceedings do not even utilize the appropriate data as a basis for calculating related metrics, or are conclusive documents without any supporting data to ascertain its relation to the metrics that are part of the instant case. Therefore, these documents should not be included as part of the administrative record. Moreover, LUMA requested the Energy Bureau to be informed of any evidence the Energy Bureau would present in this instant proceeding. However, this Energy Bureau never ruled upon that request nor hinted that it would take administrative notice at some point in the proceeding.

**IV. The Energy Bureau has not Met the Requirements to Take Administrative Notice under the Puerto Rico Rules of Evidence and its Interpretative Case Law.**

Judicial or administrative notice is a means of proof. It establishes a fact as true without the formal need to present evidence. Thus, taking judicial or administrative notice of an adjudicative fact means it is accepted as true without the need to present evidence of its truthfulness. Notwithstanding this, the opposing party is not precluded from offering evidence to the contrary. *UPR v. Laborde*, 180 DPR 253, 276-277 (2010). Courts and administrative agencies in Puerto Rico may take judicial or administrative notice of an adjudicative fact without the need

to present formal evidence to establish the fact's truthfulness. *See UPR v. Laborde*, 180 DPR at 276-277; *see also Jordi v. San Geronimo Caribe Project, Inc.*, KLRA201000101, 2010 WL 4628914 at \*12-13 (July 16, 2010).

The LPAU regulates this mechanism in Puerto Rico agencies. Specifically, the LPAU allows an administrative law judge to take official notice of all the facts that can be admitted by judicial notice in the Puerto Rico Courts. Section 3.13 of the LPAU, 3 LPRA § 9653(d). The LPAU subordinates its official notice provision to that of the Puerto Rico Rules of Evidence. *Irizarry Caraballo v. Departamento de Salud del Estado Libre Asociado de Puerto Rico*, KLRA201600139, 2016 EL 3040139, at \*8 (Apr. 27, 2016)' *Comisionado de Seguros de Puerto Rico v. Integrand Assurance Co.*, KLRA0300307, 2003 WL 23317682 at \*2 (Oct. 8, 2003). This subordination means that for an agency to take administrative notice of a fact, it shall consider Rule 201 and Rule 202 of the Puerto Rico Rules of Evidence and its interpretative jurisprudence. 32 LPRA Ap. VI, R. 201 & R. 202.

Rule 201 of the Puerto Rico Rules of Evidence allows courts to take judicial notice of an adjudicative fact. The Supreme Court has defined an adjudicative fact as a disputed fact by the parties and the applicable law of the case. *Pérez v. Mun. de Lares*, 155 DPR 697, 704 (2001); *Asoc. de Periodistas v. González*, 127 DPR 704, 712-713 (1991). Rule 201 establishes two criteria that shall be met for a court to take judicial notice of an adjudicative fact that is not subject to reasonable dispute. 32 LPRA Ap. VI, R. 201. The first criterion is that the fact shall be generally known within the court's territorial jurisdiction. *Id.* The second criterion requires that the fact can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned. *Id.* This means that a judge cannot take judicial notice of an adjudicative fact through personal knowledge. *Jordi v. San Geronimo Caribe Project, Inc.*, at \*12.

Additionally, an adjudicative fact must be pertinent and admissible evidence. *UPR*, 180 DPR at 278. In other words, the court and parties cannot use the judicial notice mechanism to admit into evidence a fact that otherwise would be subject to a rule of exclusion or fact that could not have been proven with admissible evidence. *Id.* When judicial or administrative notice is proper, the moving party is relieved from presenting evidence on the adjudicative fact. *Id.* at 277-278. That is so because it is presumed that the fact will not be disputed. *Id.* at 278.

Importantly, Rule 201 of Evidence entitles the parties to be heard on the propriety of taking judicial notice. 32 LPR Ap. VI, R. 201; *see Laborde*, 180 DPR at 277 (stating that an affected party may offer evidence to oppose judicial notice). Rule 201 also entitles the affected party to be heard after taking judicial notice. 32 LPR Ap. VI, R. 201.

The Puerto Rico Supreme Court has held that an agency can take administrative notice of its own official records as long as they are related to previous litigation by the same parties. *Asoc. de Taxis de Cayey*, 142 DPR 109 (*citing J.R.T. v. Club Náutico*, 97 DPR 386, 391 (1969)). Administrative forums may take official notice of anything that could have been the subject of judicial notice in the courts, especially of their own records relating to prior, **interrelated** litigation between the same parties. It is key to ensure that all parties have the opportunity to rebut the evidence and its effect on the administrative adjudication (*citing id.*, pages 114-15).

On the other hand, Rule 202 of the Puerto Rico Rules of Evidence allows the court to take judicial notice of matters of law. Rule 202 specifies what matters of law the courts will take judicial notice of: (1) the Puerto Rico Constitution and laws; and (2) the United States Constitution and its laws. The courts may take judicial notice of: (1) the Rules and Regulations of Puerto Rico and the United States of America; (2) the Rules and Regulations of the states and territories of the United

States of America; (3) the ordinances of the municipalities of Puerto Rico; and (4) treaties to which the United States is a party and applies to Puerto Rico. 32 LPRA Ap. VI, R. 202.

The mechanism of taking administrative notice is an exception to the bedrock rule in an administrative procedure that the decision of an administrative agency must be supported on the administrative record. *Asoc. de Taxis de Cayey*, 142 DPR 109. **This mechanism, however, does not substitute the evidence presentation process in an evidentiary hearing; thus, its use is not unrestricted.** *Sabol v. Departamento de Desarrollo Económico y Comercio*, KLRA201900583, 2020 WL 5411593 at \*7 (June 29, 2020) (*stating* that an agency can take official notice of its own files in interrelated cases, provided that the specificity of the fact is alluded to, the source from which the information comes is specified, and an adequate opportunity is provided to the opposing party to argue.)

The authority to take administrative notice is limited. Agencies: (1) cannot rely on their expertise and must specify the fact and provide the source from which it took the information, and (2) must provide an affected party an opportunity to oppose or provide additional information about the fact admitted by judicial notice. *Id.* (*quoting* Demetrio Fernández Quiñónez, *Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme*, at pages 170-71); *see also* *Oficina de Seguridad v. Puerto Rico Telephone Company, Inc.*, KLRA200300597, KLRA200300719, 2004 WL 2419142 at \*9 (TCA Sept. 20, 2004) (holding that an Administrative Judge abused its discretion by failing to provide the affected party an opportunity to oppose the administrative notice and by not citing to the source of information).

Relatedly, Section 9.03 of Regulation 8543 allows the Energy Bureau to *sua sponte* or, upon a party's request, take administrative notice of "those facts and circumstances of public interest that are generally known, or can be accurately and readily determined from sources whose



accuracy cannot reasonably be questioned.” *Id.* Section 2.01 of Regulation No. 8543 states that, in adversary proceedings, the Rules of Evidence may apply to supplement the dispositions of Regulation 8543 per the Energy Bureau’s discretion.

The Energy Bureau’s determination to take administrative notice of official records in the form of twelve (12) documents includes: (1) a Resolution and Order from Case No. NEPR-MI-2019-0007, Subject: *June 2021 – May 2022, 12-Month Metrics Summary*, and (2) a Resolution and Order from Case No. NEPR-MI-2021-0004, Subject: *Determination on LUMA’s FY2023 Annual Budgets and LUMA’s FY24 Annual Budgets pre-filing requirements* issued on February 24, 2023 (“February 24<sup>th</sup> Order”). It also includes four reports from LUMA’s interconnection system progress in Case No. NEPR-MI-2019-0016 from trimesters (3) January to March 2023, (4) October to December 2022, (5) August to September 2022, and (6) May to July 2022; it includes (7) LUMA’s Annual Report for Fiscal Year 2022, (8) LUMA Annual Budgets for Fiscal Years 2024 to 2026, and (9) a portion the T&D System Metrics report filed by LUMA in Case No. NEPR-MI-2019-0007 (“Resumen Métricas”). Lastly, it includes (10) an Order Approving the Scorecard for use by the New York Public Service Commission for Utility Emergency Performance Metrics, (11) a Measuring Call Center Performance Presentation from the International Finance Corporation, and (12) a Benchmarking Report from Talkdesk.

The documents as to which the Energy Bureau took official notice do not include the Puerto Rico Constitution, laws, regulations, municipal ordinances, the United States Constitution, its laws, regulations, nor treaties to which the United States is a party. Thus, LUMA understands that the May 25<sup>th</sup> Resolution does not involve Rule 202 of the Puerto Rico Rules of Evidence. It is fair to conclude that the only applicable standard available for taking administrative notice of these documents is the one under Rule 201. As will be explained, however, the Energy Bureau has not

met that standard. The May 25<sup>th</sup> Resolution does not provide sufficient guidance on the purpose behind taking administrative notice of each of the documents, does not identify with specificity the facts to be considered, and, for certain documents that are extrinsic to the Energy Bureau and found on the Internet, the Energy Bureau did not establish that they are sources whose veracity cannot be reasonably questioned.

**A. Documents Pertaining to Other Proceedings before this Energy Bureau.**

The first nine (9) documents mentioned in the May 25<sup>th</sup> Resolution include two Resolutions and Orders entered by this Energy Bureau, and seven reports and motions filed by LUMA in other proceedings before this Energy Bureau and for purposes that are not directly related to LUMA's Proposed Performance Metrics Targets or the Revised Annex IX of the T&D OMA. It is important to begin with a discussion on the purposes of each of the aforementioned proceedings to ascertain that this Energy Bureau has not met the applicable burden to take administrative notice of several orders and filings that are a part of the records of those separate proceedings.

LUMA's Initial Budgets, Case No. NEPR-MI-2021-0004, is a proceeding whereby this Energy Bureau considers and approves the Annual Budgets for the Transmission and Distribution System and the Generation budget. In the Resolution and Order dated February 27, 2023, Subject: *Determination on LUMA's FY2023 Annual Budgets and LUMA's FY24 Annual Budgets pre-filing requirements*, this Energy Bureau approved LUMA's Budget for Fiscal Year 2023. It also imposed certain quarterly reporting requirements and requirements for the Annual Budgets for Fiscal Year 2024. Likewise, LUMA's Annual Report for Fiscal Year 2022, filed in the same docket, includes extensive information on the progress of LUMA's operational and capital spending and expenditures, as well as on milestones regarding Improvement Programs and System Remediation Programs. Finally, the document entitled LUMA Annual Budgets for Fiscal Years 2024 to 2026

is a proposal submitted for the Energy Bureau's approval that is currently pending consideration and includes, in addition to LUMA's proposed Annual T&D Budget, the GenCo's, HydroCo's, and HoldCo's operating and capital expenditures ("System Proposed Budgets for FY2024"). That is, the System Proposed Budgets for FY2024 include information that does not pertain to LUMA nor involve LUMA's performance.

The May 25<sup>th</sup> Resolution does not explain which particular portions of the System Proposed Budgets for FY2024, LUMA's Annual Report for Fiscal Year 2022, and the February 27<sup>th</sup> Order are relevant and admissible in this proceeding, nor even which portions of the lengthy and complex budget filings are to be considered in this proceeding or for what purposes. The documents that the Energy Bureau purports to consider by taking administrative notice are extensive and cover many topics<sup>2</sup> and performance areas that are not relevant in the instant proceeding. The Annual T&D Budget and LUMA's Annual Report for Fiscal Year 2022 span the totality of LUMA's operations and many areas as to which LUMA has not proposed Performance Metrics Targets in this proceeding. Moreover, the System Proposed Budgets for FY2024 include the Generation Budget and information that does not pertain to LUMA, and the February 27<sup>th</sup> Order also addresses PREPA's Generation Budget and includes orders that do not apply or pertain to LUMA. Simply put, the Energy Bureau has not established that these documents as a whole and in their entirety include or are adjudicative facts relevant to this proceeding. They cannot be admitted for the record through a cursory order that fails to explain why the filings and orders are relevant in this proceeding.

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<sup>2</sup> For example, the System Proposed Budgets for FY2024 spans 411 pages; LUMA's Annual Report for Fiscal Year 2022 has 36 pages and the Resolution and Order dated February 27, 2023, Subject: *Determination on LUMA's FY2023 Annual Budgets and LUMA's FY24 Annual Budgets pre-filing requirements* has 33 pages.

Similarly, the Resolution and Order issued in Case No. NEPR-MI-2019-0007, Subject: *June 2021 – May 2022, 12-Month Metrics Summary* and the Resumen Métricas, filed in that same proceeding, involve all the legacy metrics reported by LUMA to the Energy Bureau. At present, LUMA reports more than 900 metrics and/or statistics in different areas that exceed the areas in which LUMA proposed Performance Metrics Targets in this instant proceeding. The Energy Bureau has not placed LUMA or the parties in a position to understand or respond fulsomely to taking administrative notice of these documents, especially because not all the performance data information included in those documents is relevant to the matters to be adjudicated in this proceeding that only involves LUMA’s Proposed Performance Metrics Targets and the evidence that was filed for the record by the parties.

Finally, the four reports on the progress of interconnections of Distributed Generation (“DG”) systems, filed in Case No. NEPR-MI-2019-0016, from January to March 2023, October to December 2022, August to September 2022, and May to July 2022, encompass quarterly progress reports on interconnections and renewable energy generation. The purpose of those reports is to inform the Energy Bureau of LUMA’s progress to interconnect DG systems. Those reports involve the subject matter of one of the Performance Metrics Targets that LUMA included in its proposal in compliance with an order by this Energy Bureau (Net Energy Metering Project Activation Duration). Still, they do not include relevant information to assist this forum in considering LUMA’s Proposed Performance Metrics Targets. As explained by Mr. Lee Wood, witness for LUMA regarding the Net Energy Metering Project Activation Duration performance metric, during the Evidentiary Hearing, the metric tracked in docket Case No. NEPR-MI-2019-0016 for interconnections progress, which is reviewed every quarter, is a legacy metric that calculates the average duration for any activation during the period **for cases that were submitted**

**in that period.** Thus, the statistic does not include all the cases that arrived in the previous period or two years ago. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 390, lines 17-25, p. 391, lines 1-9; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 2 [1:14:42].

On the contrary, LUMA's proposed performance metric in this proceeding is a more rigorous method that includes all applications completed in a particular year, regardless of when they were submitted. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 391, lines 12-16; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 2 [1:16:01]. Mr. Wood testified that right now, there are basically two different metrics. Therefore, the targets that LUMA put forward in the performance metrics cannot be compared directly with the information on interconnections included in the quarterly reports filed quarterly in Case NEPR-MI-2019-0016. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 394, lines 19-25; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 2 [1:21:35]. In conclusion, the data filed by LUMA in the quarterly reports in Case No. NEPR-MI-2019-0016 will not provide relevant information regarding the proposed Performance Metrics Targets on Net Energy Metering Project Activation Duration.

In sum, in the May 25<sup>th</sup> Resolution, the Energy Bureau did not explicitly explain which portions of each document would be used as evidence and for what purposes. *See Sabol*, 2020 WL 5411593 at \*7 (*stating* that the agency must specify the fact and provide the source from which it took the information) (*quoting* Demetrio Fernández Quiñónez, *Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme*, at pages 170-71); *see also Cofan Hernandez v. OEG*, KLRA201300268, 2015 WL 4075907, \*48 (May 29, 2015) (commenting that in taking administrative notice the adjudicator may articulate the specific aspects of administrative files as

to which notice is taken.). That is, the Energy Bureau did not meet its burden of establishing that it has taken notice of adjudicative facts, which are facts disputed in a proceeding. Because of the scant information included in the May 25<sup>th</sup> Order regarding the justifications and purposes of taking official notice of the whole of each of the aforementioned filings and orders and the limited time this Energy Bureau provided to the parties, LUMA has not been placed in a reasonable or proper position to address or refute, as applicable, the relevance and admissibility of the aforementioned filings and orders or the weight and effect that they may or should have in the final adjudication of this proceeding. In these circumstances, the requirements to allow an agency to bypass the presentation of evidence and avoid the rule that the decision must be based on the record of the proceeding, have not been met, and the decision to take official notice is arbitrary and capricious.

**B. Extrinsic documents whose reliability has not been established by the Energy Bureau.**

The Energy Bureau determined to take administrative notice of a Measuring Call Center Performance Presentation from the International Finance Corporation and a Benchmarking Report that involves information regarding customers of a private corporation by the name of Talkdesk, which is self-described in the document as a “global customer experience leader for customer-obsessed companies,” and sells solutions for companies. These documents do not identify the authors, their expertise, or provide specifics on the data and how they relate to Puerto Rico’s electric grid. The Benchmarking Report by Talkdesk identifies a person who is a Product Marketing Manager; *see* name and picture on page 2. The documents **do not include or mention** the references utilized to prepare them, they do not provide information to understand their context, nor do they have information on the underlying data or methodology used to prepare them. The

documents do not even include a date of issuance, nor did the Energy Bureau provide the dates in the May 25<sup>th</sup> Resolution.

The Benchmarking Report from Talkdesk seems to be a marketing presentation for sales of products and services. It does not appear to be an industry study prepared by subject matter experts or highly regarded individuals in the electric utility industry or an expert in performance metrics and benchmarks to be implemented in a regulatory proceeding. In fact, the document does not even mention that data on customers of a public utility or an electric power company was considered. Nor does the May 25<sup>th</sup> Resolution explain how or in what manner the benchmarking study may include information relevant or applicable to PREPA or LUMA or to Puerto Rico, for that matter.

These documents, which per the May 25<sup>th</sup> Resolution may be found via the Internet, do not constitute adjudicative facts admissible as evidence in this proceeding. The accuracy of these files cannot be easily corroborated as there is no way to probe the underlying sources or methodologies or judge the authors' expertise and qualifications. The accuracy is definitely questioned and has no comparison with the evidence submitted by LUMA in the form of pre-filed testimonies by LUMA's personnel and expert witnesses who detailed their qualifications and were cross-examined. The Energy Bureau has not identified any evidence to show how the data on performance metrics and benchmarks included in these two documents have been validated and what data was taken into account to construe them. For example, the documents do not reveal if these metrics and benchmarks have been implemented by an electric utility company or their feasibility within that industry.

The May 25<sup>th</sup> Resolution does not establish that the Measuring Call Center Performance Presentation from the International Finance Corporation and the Benchmarking Report from

Talkdesk include information that can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned. The information on these documents is unreliable for the Energy Bureau to make a final decision. LUMA is concerned about how the information contained in these documents will be applied to this proceeding's controversy.

The Measuring Call Center Performance Presentation from the International Finance Corporation and the Benchmarking Report from Talkdesk, are documents entirely extrinsic to this proceeding. The Energy Bureau has not provided LUMA nor the parties the foundation for the accuracy of the proposals contained in those documents, the results of any implementation of those proposals, and their viability and applicability for the Puerto Rico transmission and distribution system in its current state. Without those elements, LUMA nor the parties are in a position to understand the Energy Bureau's rationale in taking administrative notice from a series of documents that, although available through the Internet, include proposals that have not been proven to have been implemented in an electric power utility. The reliability or validity of documents obtained from the Internet regarding the practices for measuring call centers and benchmarking reports, is unknown. They cannot be admitted nor used to make a determination in this proceeding. No discernible purpose will be advanced by taking administrative notice of these documents. To the contrary, LUMA's right to due process and to have a decision be issued on the administrative record developed during the Evidentiary Hearing, will be transgressed.

It should be noted that the Benchmarking Report from Talkdesk is irrelevant to this instant proceeding, as the Energy Bureau is not currently considering benchmarks. In fact, this Energy Bureau already stated in Case No. NEPR-MI-2019-0007, that any benchmarks are for illustrative purposes only. *See* Resolution and Order dated April 8, 2021, in Case No. NEPR-MI-2019-0007, at p. 8. Therein, the Energy Bureau indicated that although it will continue to consider benchmarks



or the information they provide, they have not been used to establish baselines in the Performance Metrics Targets docket. *Id.* evidence on benchmarks in this instant docket is irrelevant and, thus, inadmissible.

LUMA's view is that the discovery process and the Evidentiary Hearing held during this proceeding elicited more than enough evidence for this honorable Energy Bureau to make an informed decision with the correct and accurate information available.

**WHEREFORE**, LUMA respectfully requests that the Energy Bureau **grant** LUMA's Objections and Opposition to the May 25<sup>th</sup> Resolution stated in this Motion.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 9<sup>th</sup> day of June 2023.

We hereby certify that we filed this motion using the electronic filing system of this Energy Bureau. We will send an electronic copy of this motion to counsel for PREPA, Joannely Marrero-Cruz, [jmarrero@diazvaz.law](mailto:jmarrero@diazvaz.law); the Office of the Independent Consumer Protection Office, Hannia Rivera Diaz, [hrivera@jrsp.pr.gov](mailto:hrivera@jrsp.pr.gov), and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy ("ICSE"), Fernando Agrait, [agraitfe@agraitlawpr.com](mailto:agraitfe@agraitlawpr.com), counsel for the Colegio de Ingenieros y a de Puerto Rico ("CIAPR"), Rhonda Castillo, [rhoncat@netscape.net](mailto:rhoncat@netscape.net), and counsels for Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climatica, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalicion de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., CAMBIO, Sierra Club and its Puerto Rico Chapter, and Unión de Trabajadores de la Industria Eléctrica y Riego (jointly, Puerto Rico Local and Environmental Organizations), [larroyo@earthjustice.org](mailto:larroyo@earthjustice.org), [rstgo2@gmail.com](mailto:rstgo2@gmail.com), [notificaciones@bufete-emmanueli.com](mailto:notificaciones@bufete-emmanueli.com), [pedrosaade5@gmail.com](mailto:pedrosaade5@gmail.com), [jessica@bufete-emmanueli.com](mailto:jessica@bufete-emmanueli.com); [rolando@bufete-emmanueli.com](mailto:rolando@bufete-emmanueli.com), [lvelez@earthjustice.org](mailto:lvelez@earthjustice.org), [rmurthy@earthjustice.org](mailto:rmurthy@earthjustice.org), [jcassel@earthjustice.org](mailto:jcassel@earthjustice.org).



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