

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

NEPR

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

CASE NO. NEPR-AP-2020-0025

**SUBJECT: LUMA's Motion for Partial
Reconsideration to the Resolution of August 17,
2023**

**LUMA'S MOTION FOR PARTIAL RECONSIDERATION OF THE
RESOLUTION OF AUGUST 17, 2023**

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 states and requests the following:

I. Introduction

On May 25, 2023, the Puerto Rico Energy Bureau ("Energy Bureau") issued a Resolution and Order 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 25th Resolution"). The Energy Bureau issued the May 25th Resolution after the four days of the evidentiary hearing had concluded and, therefore, after the evidentiary record had closed. Furthermore, by May 11th, 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) data included as an attachment in a Resolution and Order issued on August 18th, 2022, in Case No. NEPR-MI-2019-0007 for eight metrics, (ii) data included in the Submission of Performance Metrics Report for January through March 2023 and April through June 2023 filed in Case No. NEPR-MI-2019-0007 for 11 metrics, (iii) data attached to five interconnection progress reports and five presentations for the compliance hearings 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) a Resolution and Order related to the Review of LUMA's Initial Budgets 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.

On June 9, 2023, LUMA filed *LUMA's Response and Opposition to Resolution and Order of May 25, 2023, Taking of Administrative Notice* ("June 9th Motion"). LUMA argued that the Energy Bureau did not comply with the requirements for taking administrative notice under Puerto Rico law and case law, because the determination to take official notice issued in the May 25th Resolution infringed on LUMA's rights to due process as it introduced 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. Further, the May 25th Resolution did not provide LUMA with sufficient information to understand the relevance and purpose of the evidence that the Energy Bureau had chosen to consider by taking administrative notice in lieu of utilizing the main mechanism for the admission of evidence in an adjudicative proceeding: pre-

filed testimonies and cross-examination of witnesses. Moreover, LUMA stated that the determination to take official notice at this stage is manifestly unfair, arbitrary, and capricious.

On August 17, 2023, the Energy Bureau entered a Resolution in which it determined it was appropriate to take administrative notice of specific information 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, and (vi) an Order Approving the Scorecard for use by the New York Public Service Commission for Utility Emergency Performance Metrics ("August 17th Resolution").¹

As will be discussed in detail below, LUMA reiterates that 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 August 17th Resolution continues to infringe on LUMA's rights to due process rights as it introduces new evidence to the record after the discovery process concluded, an evidentiary hearing was held, and the parties filed legal briefs, and without having afforded the parties the opportunity to express their respective positions regarding that evidence, putting LUMA and the other parties at a disadvantage.

¹ The Energy Bureau also made rulings on a filing concerning the Local and Environmental Civil Organizations ("LECO") request for the Energy Bureau to take administrative notice of several documents and set a deadline for the parties to submit their reply briefs. LUMA is not requesting reconsideration of those determinations but reserves any and all rights that attach when the Energy Bureau issues a final determination in this proceeding.

Moreover, for example, the Energy Bureau is now taking administrative notice of two (2) additional documents not previously disclosed in the May 25th Resolution. Additionally, the August 17th 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. On the August 17th Resolution, the Energy Bureau again failed to explain the relevance and purpose for which it has taken administrative notice of the specific information contained in the documents pertaining to other proceedings before this forum. Thus, the August 27th Resolution suffers from the same procedural shortcomings as those of the May 25th Resolution.

LUMA hereby respectfully requests the Energy Bureau to partially reconsider its determination to take administrative notice of the documents specified above. LUMA contends that the Energy Bureau should reconsider its determination to take administrative notice of the documents pertaining to other proceedings before this forum, namely (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, and (v) an associated Resolution and Order in Case No. NEPR-MI-2021-0004. As explained below, LUMA opposes the determination to take administrative notice as stated in the August 17th Resolution and states that the decision is procedurally defective.

II. LUMA Reiterates the Due Process Arguments Raised in the June 9th Motion Considering the Energy Bureau's Determination in the August 17th Resolution.

LUMA reiterates that 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. In the discovery stage, the Energy Bureau never even hinted at the possibility of taking administrative notice of any documents or information and never addressed a request by LUMA for the Energy Bureau to disclose the evidence it purported to submit for the record. Nor did the Energy Bureau, during the Evidentiary Hearing, offer into evidence the documents and information that it has now introduced *via* the August 17th 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. Thus, the parties did not have the opportunity to timely review, discuss, and present their positions—during the discovery or hearing phases of the case—on the evidence that now the Energy Bureau has introduced via the administrative notice mechanism.

Second, the August 17th 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 August 17th Resolution places LUMA and the parties at a procedural disadvantage.

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 LPRR § 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 LPRR § 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 LPRR §9675.

Fourth, in the August 17th Resolution, this Energy Bureau determined for the first time to take administrative notice of two (2) additional documents that were not part of the disclosed documents in the May 25th Resolution. Those documents are the *Resumen Métricas Master July 2023*, included in the *Submission of Performance Metrics Report for April through June 2023*, filed by LUMA on July 20, 2023, in Case No.: NEPR-MI-2019-0007, *In Re: The Performance of the Puerto Rico Electric Power Authority*; and the *Informe de Progreso de Interconexión de Sistemas de Generación Distribuida Trimestre abril a junio 2023* attached to the *Motion Submitting Interconnections Progress Report for April to June 2023 and Revised Report Presentation*, filed by LUMA on July 26, 2023, in Case No.: NEPR-MI-2019-0016, *In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*. LUMA filed both documents in the respective proceedings after the Energy Bureau entered the May 25th Resolution. Now, the Energy Bureau insists on taking administrative notice of these documents, disregarding the parties' due process and arguments raised before.

Importantly, 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. As will be explained further below, in some cases, the referenced proceedings do not utilize the appropriate data to calculate related metrics, and in other cases, the referenced proceedings are conclusive documents without any supporting data to ascertain the relation of the referenced proceeding to the metrics that are part of the instant case. Therefore, these documents are impertinent, not relevant, and, thus, should not be included as part of the administrative record.

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

The Puerto Rico Administrative Procedure Act (“LPAU,” by its Spanish acronym) regulates the taking of administrative notice in proceedings before Puerto Rico administrative 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, 32 LPA 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 LPA 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 Gerónimo 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 LPRA 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 LPRA 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).

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.²

The Energy Bureau has not met the standard set forth by Rule 201 of the Rules of Evidence and its interpretative case law. The August 17th Resolution does not provide sufficient guidance on the purpose behind taking administrative notice of each document. Although the Energy Bureau has identified the specific data it will take administrative notice from each document, it has not explained the purpose of introducing the evidence through such a mechanism. Thus, it has failed to establish the evidence's pertinence or relevance to the issue at bar. In some cases, even though

² The language of Section 9.03 of Regulation No. 8543 incorporates the same language of Rule 201 of the Puerto Rico Rules of Evidence. Therefore, its interpretative case law should serve as a framework for this Energy Bureau's interpretation of Regulation No. 8543 regarding taking administrative notice.

the Energy Bureau has identified the specific data, it has done it incorrectly when compared to the actual filings in the official records of other proceedings. We begin with a discussion of the documents pertaining to each of the aforementioned proceedings to ascertain if this Energy Bureau has met the applicable burden to take administrative notice of several orders and filings that are a part of the records of those separate proceedings.

A. LUMA’s Initial Budgets, Case No. NEPR-MI-2021-0004

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 August 17th Resolution, the Energy Bureau announced it would take administrative notice of the following information:

1. Data described below, included in Resolution and Order issued by the Energy Bureau on February 27, 2023, in Case No.: NEPR-MI-2021-0004, *In Re: Review of LUMA’s Initial Budgets*:
 - a. Page 28, Section G
 - b. Attachment A (Reporting Requirements)
2. Data described below, included in the file identified as *LUMA Annual Report for Fiscal Year 2022 Ending June 30, 2022* attached to the *Motion Submitting LUMA’s Annual Report for Fiscal Year 2022 and Report on Efficiencies* filed by LUMA on February 27, 2023³ in Case No.: NEPR-MI-2021-0004, *In Re: Review of LUMA’s Initial Budgets*.

Official notice is limited to the following:

- a. Operating budget and actuals on page 10
 - b. Capital budget (federally funded) and actuals on page 10
 - c. Capital budget (non-federally funded) on page 10
3. Data described below, included in the *Annual Budget Fiscal Year 2024 to 2026* filed by LUMA on May 16, 2023, in Case No.: NEPR-MI-2021-0004, *In Re: Review of LUMA’s Initial Budgets*:
 - a. Operating budget on page 17
 - b. Capital budget (federally funded) on page 17

³ The correct date of this filing is October 29th, 2022.

- c. Capital budget (non-federally funded) on page 17
- d. Table A-8, row 1, “Vegetation Management and Capital Clearing Implementation”.

In the Resolution and Order dated February 27th, 2023, Subject: *Determination on LUMA’s FY2023 Annual Budgets and LUMA’s FY24 Annual Budgets pre-filing requirements*, (“February 27th Budgets Order”), this Energy Bureau approved LUMA’s Budget for Fiscal Year 2023. This Energy Bureau also imposed quarterly reporting requirements and requirements for the Annual Budgets for Fiscal Year 2024. Finally, 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 and milestones regarding Improvement Programs and System Remediation Programs.

The document titled *Annual Budget Fiscal Year 2024 to 2026*, filed by LUMA on May 16th, 2023, is a proposal submitted for the Energy Bureau’s approval and includes, in addition to LUMA’s proposed Fiscal Year 2024 Annual T&D Budget, the budget proposal for the legacy thermal generation units (the “GenCo Budget”), the budget proposal for the hydroelectric generating units and the public irrigation facilities (the “HydroCo Budget”) and the budget proposal for the Puerto Rico Electric Power Authority (“PREPA”) and its subsidiaries other than GenCo and HydroCo (the “HoldCo Budget”) (“System Proposed Budgets for FY2024”). On June 25, 2023, the Energy Bureau entered a Resolution and Order that approved LUMA’s Fiscal Year 2024 budget, albeit with amendments (“June 25th Order approving FY 2024 Budgets”). For example, in its *Annual Budget Fiscal Year 2024 to 2026*, LUMA requested approval for an Operating Budget of \$560,283,000 for Fiscal Year 2024. *See* Operating Budget, p.17. However, the Energy Bureau approved only \$545,447,000 for LUMA’s Operating Budget in that period. *See* Attachment B of the Resolution and Order dated June 25, 2023, in Case No. NEPR-MI-2021-0004.

On July 10, 2023, LUMA filed a *Motion for Partial Reconsideration of Resolution and Order of June 25, 2023 on FY 2024 System Budgets*, requesting reconsideration, among others, of the reduction in the operational budget for the Fiscal Year 2024. *See Motion for Partial Reconsideration of Resolution and Order of June 25, 2023 on FY 2024 System Budgets* dated July 10, 2023, filed in Case No. NEPR-MI-2021-0004. Genera and PREPA also requested reconsideration of the June 25th Order approving FY 2024 Budgets. *See Submission of Motions for Reconsideration by PREPA and Genera and Notice of Intent to File Motion for Reconsideration of Resolution and Order of June 25, 2023*, filed on June 30, 2023, Case No. NEPR-MI-2021-0004. Those motions for reconsideration are pending a determination from the Energy Bureau.

Taking administrative notice of the data contained on page 17 of the *Annual Budget Fiscal Year 2024 to 2026* serves no material purpose to the determinations sought to be made in the instant case, considering that the Energy Bureau approved a decrease in LUMA's proposed operational budget for Fiscal Year 2024. Moreover, given that the Energy Bureau's determination on the June 25th Order approving FY 2024 Budgets has been challenged by LUMA, Genera, and PREPA, and a final determination on motions for reconsideration of said order is pending, the data identified by the Energy Bureau in the System Proposed Budgets for FY2024 and the June 25th Order approving FY 2024 Budgets cannot be considered facts that can be accurately and readily determined.

Further, the Energy Bureau has not explained the purpose of taking notice of the reporting requirements adopted in Attachment A of the February 27th Budgets Order, and the data on the progress of LUMA's spending and milestones of the different programs will serve in this proceeding. At this time, LUMA lacks sufficient information to determine with what purpose, how, and to what extent the Energy Bureau will consider or apply the reporting requirements to its

consideration of the Revised Annex IX. LUMA is concerned that consideration in this proceeding of reporting requirements may work to alter or amend, even *de facto*, the Financial Performance Metrics Targets included in the Revised Annex IX, including those proposed financial Performance Metrics Targets that measure LUMA's ability to stay within approved budgets. LUMA opposes any attempt to introduce in this proceeding information on reporting requirements that may serve to amend or alter the Proposed Performance Metrics Target without proper notice to LUMA or the opportunity to be heard.

B. LUMA's Quarterly Performance, Case No. NEPR-MI-2019-0007

The Energy Bureau also determined to take administrative notice from the proceeding *In Re: The Performance of the Puerto Rico Electric Power Authority*, Case No. NEPR-MI-2019-0007. The referenced proceeding has the objective for LUMA and PREPA to report its performance on a vast number of established metrics every quarter. The Energy Bureau identified that it would take administrative notice of the following data and information:

1. Data described below, included in Attachment A (Metrics with Baselines and Benchmarks) of Resolution and Order issued on August 18, 2022, in Case No.: NEPR-MI-2019-0007, *In Re: The Performance of the Puerto Rico Electric Power Authority*:
 - a. Average speed to answer (Row 81)
 - b. Percent of customer calls answered (Row 85)
 - c. SAIDI -Transmission and Distribution: System (Row 76)
 - d. SAIFI -Transmission and Distribution: System (Row 77)
 - e. OSHA DART Rate -Transmission and Distribution (Row 93)
 - f. OSHA Severity Rate -Transmission and Distribution (Row 92)
 - g. OSHA Fatality Rate -Transmission and Distribution (Row 91)
 - h. OSHA Recordable Rate -Transmission and Distribution (Row 90)
2. Data described below, which is part of an Excel file identified as *Resumen Métricas Master April 2023*, included in the *Submission of Performance Metrics Report for January through March 2023 and in compliance with Orders of January 12, 2023, and April 3, 2023*, filed by LUMA on April 20, 2023, in Case No.: NEPR-MI-2019-0007, *In Re: The Performance of the Puerto Rico Electric Power Authority*.

Official notice is limited to the following data on sheet identified as “T&D” for the following metrics:

- a. Average speed to answer (Sheet “T&D,” cells G311:AA311)
 - b. Call abandonment rate (Sheet “T&D,” cells G310:310)
 - c. SAIDI (T&D) 12 -month rolling average (Sheet "T&D," cells R135, AA135)
 - d. SAIFI (T&D) 12 -month rolling average (Sheet "T&D," cells R139, AA135)
 - e. 12 -Month Rolling OSHA DART Rate (Sheet “T&D,” cells R6, AA6)
 - f. 12 -Month Rolling OSHA Severity Rate (Sheet “T&D,” cells R7, AA6)
 - g. 12 -Month Rolling OSHA Fatality Rate (Sheet “T&D,” cells R8, AA8)
 - h. 12 -Month Rolling OSHA Recordable Rate (Sheet “T&D,” cell R9, AA9)
 - i. Distribution line inspections (Sheet “T&D,” cells G129:AA129)
 - j. Transmission line inspections (Sheet “T&D,” cells G130:AA130)
 - k. T&D substation inspections (Sheet "T&D," cells G131:AA131)
3. Data described below, which is part of an Excel file identified as *Resumen Métricas Master July 2023*, included in the *Submission of Performance Metrics Report for April through June 2023*, filed by LUMA on July 20, 2023, in Case No.: NEPR-MI-2019-0007, *In Re: The Performance of the Puerto Rico Electric Power Authority*.

Official notice is limited to the following data on sheet identified as “T&D” for the following metrics:

- a. Average speed to answer (Sheet “T&D,” cells G245:AD245)
- b. Call abandonment rate (Sheet “T&D,” cells G244:AD244)
- c. SAIDI (T&D) 12 -month rolling average (Sheet "T&D," cells R135, AD135)
- d. SAIFI (T&D) 12 -month rolling average (Sheet "T&D," cells R139, AD135)
- e. 12 -Month Rolling OSHA DART Rate (Sheet “T&D,” cells R6, AD6)
- f. 12 -Month Rolling OSHA Severity Rate (Sheet “T&D,” cells R7, AD7)
- g. 12 -Month Rolling OSHA Fatality Rate (Sheet “T&D,” cells R8, AD8)
- h. 12 -Month Rolling OSHA Recordable Rate (Sheet “T&D,” cell R9, AD9)
- i. Distribution line inspections (Sheet “T&D,” cells G129:AD129)

- j. Transmission line inspections (Sheet "T&D," cells G130:AD130)
- k. T&D substation inspections (Sheet "T&D," cells G131:AD131)

As a threshold matter, it is essential to clarify that some references to specific sheets and cells in the information listed above are erroneous. Specifically, in the *Resumen Métricas Master April 2023*, included in the *Submission of Performance Metrics Report for January through March 2023 and in compliance with Orders of January 12, 2023, and April 3, 2023*, filed by LUMA on April 20, 2023, the Energy Bureau identified the data for “SAIFI (T&D) 12 -month rolling average” in that period to be available in “Sheet "T&D," cells R139.AD135”. See August 17th Resolution, p. 6. However, the correct cells are “R139:AA139”. Also, in that same filing, the Energy Bureau stated that the data for the “12-Month Rolling OSHA Severity Rate” is in “Sheet "T&D," cells R7.AA6,” when that information is included in cells “R7:AA7” *Id.* Similarly, for the *Resumen Métricas Master July 2023*, included in the *Submission of Performance Metrics Report for April through June 2023*, filed by LUMA on July 20, 2023, the Energy Bureau indicated that the data for the “SAIFI (T&D) 12 -month rolling average” in that period to be available in “Sheet "T&D," cells R139.AD135”. The correct information is on cells “R139:AA139”.

The data the Energy Bureau purports to take administrative notice, Attachment A (Metrics with Baselines and Benchmarks) of the Resolution and Order issued on August 18, 2022, contains a table with data on the baselines, benchmarks, averages for Fiscal Year 2022, and LUMA’s performing or not performing status for the specific metrics identified by the Energy Bureau. First, any benchmark discussion 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, p. 8. 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, thus, irrelevant, impertinent, and, thus, inadmissible. Moreover, the August 17th Resolution is unduly broad and does not place LUMA in a position to determine which portions of Attachment A to the Resolution and Order of August 18, 2022, entered in Case No. NEPR-MI-2019-0007 was the subject of the Energy Bureau's analysis and is, thus, encompassed in their decision to take administrative notice.

Second, the data in Attachment A to the Resolution and Order of August 18, 2022, entered in Case No. NEPR-MI-2019-0007, regarding baselines, cannot be considered in a vacuum. The Energy Bureau should consider the record of this proceeding, including the evidentiary record that postdates that Resolution and Order, and includes evidence filed by LUMA regarding baselines for each of the proposed Performance Metrics Targets.

In addition, the Energy Bureau also purports to take administrative notice of data submitted by LUMA on the various metrics for the periods of January through March 2023, April through June 2023, and the average for the Fiscal Year 2022 (as contained in Attachment A to the Resolution and Order of August 18, 2022) in Case No. NEPR-MI-2019-0007. The Energy Bureau seeks to circumvent various of its own determinations that establish that current performance will not be considered in this instant proceeding. For example, in a Resolution and Order of April 8, 2021, in Case No. NEPR-MI-2019-0007, the Energy Bureau set baselines based on PREPA's data from the Fiscal Year 2020. Predicated on that data, the Energy Bureau ordered LUMA to revise its proposed targets in the instant proceeding. The Energy Bureau has not instituted a process to revise those baselines, even though data is available for Fiscal Years 2021, 2022, and 2023 as part of the quarterly reporting requirements regarding PREPA's Performance, established in Case No. NEPR-MI-2019-0007. Data from Fiscal Years 2021, 2022, and 2023 has not been the subject of

LUMA's proposal or any direct testimony or discovery in this instant proceeding and is thus irrelevant, impertinent, and inadmissible.

Any decision to consider current performance in this instant proceeding would amount to an arbitrary and capricious change in the Energy Bureau's position without prior notice and opportunity, infringing upon LUMA's procedural due process rights. Use of current performance to be considered in the ruling in this proceeding runs counter to cardinal elements of due process of law and amounts to an arbitrary ruling. *See e.g., Ramírez v. Policía de PR*, 158 DPR 320, 339 (2003) (stating that the exercise of discretion by an administrative agency must be rooted in reasonableness and in accordance with applicable law).

C. LUMA's Interconnections Progress, Case No. NEPR-MI-2019-0016

The Energy Bureau identified the proceeding *In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*, Case No.: NEPR-MI-2019-0016, as another proceeding from which it would take administrative notice. Specifically, the Energy Bureau stated it would take administrative notice from the following filings:

1. Data described below, included in file identified as *Informe de Progreso de Interconexión de Sistemas de Generación Distribuida Trimestre enero a marzo 2023* attached to the *Motion Submitting Interconnections Progress Report for January to March 2023 and Presentation for Next Compliance Hearing* filed by LUMA on April 13, 2023, in Case No.: NEPR-MI-2019-0016, *In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*.

Official notice is limited to slide 9, which is titled "Información sobre Tiempos Promedio para Interconexión y Medidores Bidireccionales," and, specifically, to the following data:

- a. Promedio para autorización de interconexión de los sistemas menores de 25 kW (expeditos).
- b. Promedio transcurrido que cliente notifica a LUMA la interconexión de su sistema menor de 25 kW y que se refleja el acuerdo en la factura.

2. Data described below, included in a file identified as *Informe de Progreso de Interconexión de Sistemas de Generación Distribuida Trimestre Octubre a Diciembre 2022* attached to the *Motion Submitting Interconnections Progress Report for October to December 2022 and Presentation for Next Compliance Hearing* filed by LUMA on January 13, 2023, in Case No.: NEPR-MI-2019-0016, *In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*.

Official notice is limited to slide 9, which is titled "Información sobre Tiempos Promedio para Interconexión y Medidores Bidireccionales," and, specifically, 7 to the following data:

- a. Promedio para autorización de interconexión de los sistemas menores de 25 kW (expeditos).
- b. Promedio transcurrido que cliente notifica a LUMA la interconexión de su sistema menor de 25 kW y que se refleja el acuerdo en la factura.

3. Data described below, included in file identified as *Informe de Progreso de Interconexión de Sistemas de Generación Distribuida Trimestre Julio a Septiembre 2022* attached to the *Motion Submitting Interconnections Progress Report for July to September 2022 and Presentation for Next Hearing* filed by LUMA on October 26, 2022, in Case No.: NEPR-MI-2019-0016, *In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*.

Official notice is limited to slide 11, which is titled "Información sobre Tiempos Promedio para Interconexión y Medidores Bidireccionales," and, specifically, to the following data:

- a. Promedio para autorización de interconexión de los sistemas menores de 25 kW (expeditos).
- b. Promedio transcurrido que cliente notifica a LUMA la interconexión de su sistema menor de 25 kW y que se refleja el acuerdo en la factura.

4. Data described below, included in the file identified as *Informe de Progreso de Interconexión de Sistemas de Generación Distribuida Trimestre Mayo a Julio 2022* attached to the *Motion Submitting Interconnections Progress Report for May to July 2022 and Presentation for Next Compliance Hearing* filed by LUMA on August 15, 2022, in Case No.: NEPR-MI-2019-0016, *In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*.

Official notice is limited to slide 13, which is titled "Información sobre Tiempos Promedio para Interconexión y Medidores Bidireccionales," and, specifically, to the following data:

- a. Promedio para autorización de interconexión de los sistemas menores de 25 kW (expeditos).
 - b. Promedio transcurrido que cliente notifica a LUMA la interconexión de su Sistema menor de 25 kW y que se refleja el acuerdo en la factura.
5. Data described below, included in file identified as *Informe de Progreso de Interconexión de Sistemas de Generación Distribuida Trimestre abril a junio 2023* attached to the *Motion Submitting Interconnections Progress Report for April to June 2023 and Revised Report Presentation*, filed by LUMA on July 26, 2023, in Case No.: NEPR-MI-2019-0016, *In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*.

Official notice is limited to slide 13, which is titled "Información sobre Tiempos Promedio para Interconexión y Medidores Bidireccionales," and, specifically, to the following data:

- a. Promedio para autorización de interconexión de los sistemas menores de 25 kW (expeditos).
- b. Promedio transcurrido que cliente notifica a LUMA la interconexión de su sistema menor de 25 kW y que se refleja el acuerdo en la factura.

The five reports on the progress of interconnections of Distributed Generation (“DG”) systems filed in Case No. NEPR-MI-2019-0016, from April to June 2023, 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). The reports do not include relevant information to assist this forum in considering LUMA's Proposed Performance Metrics Targets.

As explained by Mr. Lee Wood during the Evidentiary Hearing regarding the Net Energy Metering Project Activation Duration performance metric, 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, this 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 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 the August 17th Resolution, the Energy Bureau did not explicitly explain for what purposes the identified portions of data would be used as evidence. *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 Cofán Hernández 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.

As a result of the scant information included in the August 17th Order regarding the pertinence and relevancy justifications for taking official notice of the whole of each of the aforementioned filings and orders and the Energy Bureau's failure to provide LUMA an opportunity to oppose the administrative notice, 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 Energy Bureau has failed to meet the requirements to allow an agency to bypass the presentation of evidence via the mechanism of taking administrative notice. Having failed to meet the burden established in law and applicable jurisprudence, the Energy Bureau's decision to take official notice is arbitrary and capricious.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **partially reconsider** the August 17th Resolution.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 6th day of September 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; the Office of the Independent Consumer Protection Office, Hannia Rivera Diaz, hrivera@jrsp.pr.gov, and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy (“ICSE”), Fernando Agrait, agraitfe@agraitlawpr.com, counsel for the Colegio de Ingenieros y a de Puerto Rico (“CIAPR”), Rhonda Castillo, 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, rstgo2@gmail.com, notificaciones@bufete-emmanuelli.com, pedrosaade5@gmail.com, jessica@bufete-emmanuelli.com; rolando@bufete-emmanuelli.com, lvez@earthjustice.org, rmurthy@earthjustice.org, jcassel@earthjustice.org.



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