

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

NEPR

Received:

Oct 12, 2023

8:37 PM

IN RE: REVIEW OF LUMA'S INITIAL  
BUDGETS

CASE NO. NEPR-MI-2021-0004

SUBJECT: Submission of Motion and Request to  
Vacate Order

SUBMISSION OF MOTION AT THE REQUEST OF GENERA PR LLC  
AND REQUEST TO VACATE ORDER

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC (“ManagementCo”), and LUMA Energy ServCo, LLC (“ServCo”), (jointly referred to as “LUMA”), strictly in attention to the Energy Bureau’s order of June 30, 2023, stressing that it does not act as Genera’s agent in this proceeding, that its legal counsel do not advice or represent Genera, and subject to the **objections and reservation of rights stated in this motion**, and respectfully state the following:

1. On June 30, 2023, this Honorable Puerto Rico Energy Bureau (“Energy Bureau”) issued a Resolution and Order stating that it would not consider certain motions for reconsideration filed by the Puerto Rico Electric Power Authority (“PREPA”) and Genera PR LLC (“Genera”) in this administrative proceeding, returned them to PREPA and Genera, and required that they be filed through LUMA (the “June 30<sup>th</sup> Order”). Upon submitting PREPA’s and Genera’s motions for reconsideration for the record in compliance with the PREB’s June 30<sup>th</sup> Order, LUMA expressly reserved its right to separately address the Energy Bureau’s requirement for LUMA to file PREPA’s and Genera’s legal submissions. LUMA also stated that it did not prepare or participate in the development of the motions for reconsideration filed by PREPA and Genera, respectively.

2. On September 18, 2023, this Energy Bureau issued a Resolution and Order whereby, in its pertinent part, it directed that because LUMA filed with this Energy Bureau consolidated budgets for the electric power system (“System Budgets”) it should prospectively submit the budgets to actuals information for the System, that is, for GridCo,<sup>1</sup> GenCo,<sup>2</sup> and HoldCo.<sup>3</sup>

3. On October 2, 2023, LUMA filed a *Partial Response to Resolution and Order of September 18, 2023, Request for Reconsideration and Submission of Motion by Genera*, whereby it requested reconsideration of the Energy Bureau’s directive to LUMA to prospectively submit the budgets to actuals information for the System (“October 2<sup>nd</sup> Motion”). Such requirement is not only unsupported by the terms of the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (“T&D OMA”) but also raises practical concerns for LUMA, as explained in the October 2<sup>nd</sup> Motion.

4. Today, LUMA filed a *Motion to Reconsider a Portion of the Energy Bureau’s Resolution and Order of September 22, 2023*, whereby it reiterated its request for the Energy Bureau to reconsider the determination to have LUMA file in this proceeding information and documents prepared by other entities, such as PREPA and Genera.

5. LUMA hereby incorporates by reference the arguments set forth in the October 2<sup>nd</sup> Motion whereby LUMA established that it only acts on behalf of PREPA in connection with LUMA’s role as Operator *of the T&D System* and that the T&D OMA does not contemplate that

---

<sup>1</sup> Per the T&D OMA, “GridCo” is “the entity, which may be directly or indirectly owned by Owner or an Affiliate of Owner, that acquires or obtains ownership of the T&D System after the reorganization of PREPA.

<sup>2</sup>Per the T&D OMA, “GenCo” means the entity, which may be directly or indirectly owned by Owner or an Affiliate of Owner, that acquires or obtains ownership of the Legacy Generation Assets after the reorganization of PREPA.” *See also* PREPA’s Petition for Leave to Create Subsidiaries and for Approval of the Puerto Rico PREPA-GENCO-HYDROCO Operating Agreement, pages 12 and 13.

<sup>3</sup> This Energy Bureau understands that HoldCo supports PREPA’s administrative functions and those of its subsidiaries HydroCo and Property. *See* Resolution and Order of June 25, 2023, page 2, note 9.

LUMA would assume activities related to PREPA's responsibilities (as Owner) that are not the result of the operation of the T&D System. Because the T&D OMA does not impose obligations on LUMA in connection with GenCo's budget and given that LUMA does not act as Genera's agent, LUMA respectfully requests that the Energy Bureau set aside its June 30<sup>th</sup> Order requiring LUMA to submit motions prepared by PREPA and/or Genera in the public docket of this proceeding. LUMA further requests that the Energy Bureau enter a ruling clarifying that each party in this proceeding is responsible for separately submitting, through its respective legal representatives, any motions they deem proper to file for consideration by this Energy Bureau and that LUMA is not responsible for filings in this proceeding as it does not intervene in the development of HoldCo's, GenCo's or HydroCo's budgets nor in substantive and strategic determinations by PREPA or Genera to request remedies from this Energy Bureau.

6. It is important to stress that the fact that pursuant to Section 7.3(a) of the T&D OMA, LUMA submits the consolidated System Budgets to the Puerto Rico Public Private Partnerships Authority ("P3A") (including the Generation Budget that refers to the Pass-Through Expenditures incurred in providing Power and Electricity,<sup>4</sup> and the T&D Budget that includes the Operating Budget and the T&D Capital Budgets, Federally Funded and Non Federally Funded), does not render LUMA Genera's agent before this Energy Bureau nor impose on LUMA a duty to submit with this Energy Bureau legal motions prepared by Genera's counsel in connection with an approved Generation Budget.

---

<sup>4</sup> Per the T&D OMA the Generation Budget

means, for any given Contract Year, the budget of the Generation Pass-Through Expenditures for such Contract Year, together with the projected budget of the Generation Pass-Through Expenditures for the following two (2) Contract Years, in each case, including monthly budgets of such expenditures and cash flows, as such budget may be amended or adjusted from time to time in accordance with the terms and conditions of the GridCo-GenCo PPOA, the Shared Services Agreement and any Generation Supply Contract.

7. The Energy Bureau's requirement that LUMA submit a motion prepared by Genera's counsel also presents practical complications insofar as LUMA and Genera have separate legal representation, each with their own duties and responsibilities before their respective clients and this honorable Energy Bureau. Also, the directive infringes upon LUMA's rights under Applicable Law, given that it seeks to compel LUMA to associate with requests and statements that LUMA has not endorsed, thus encroaching on LUMA's right to commercial free speech and to freely make determinations and seek legal relief before this Energy Bureau.

8. Without waiving any of the arguments set forth in LUMA's October 2<sup>nd</sup> Motion, the motion for reconsideration that LUMA is filing today, and preserving its objections to the requirement that LUMA file motions prepared by Genera in this proceeding, which are incorporated by reference as if fully set forth herein, LUMA includes as *Exhibit 1* of this Motion, Genera's *Motion for Partial Reconsideration of the Resolution and Order Dated September 22, 2023*, which was prepared and signed by Genera's counsel of record in this proceeding ("Genera's Motion for Partial Reconsideration").

9. LUMA respectfully informs that it did not prepare Genera's Motion for Partial Reconsideration nor discussed with Genera the arguments or requests stated therein. LUMA's undersigned counsel did not provide any advice to Genera on *Genera's Motion for Partial Reconsideration*. To be clear, the undersigned counsels do not represent Genera nor have they established an attorney-client relationship with Genera. Thus, the positions adopted in *Genera's Motion for Partial Reconsideration* cannot be attributed to the undersigned nor serve to preclude the undersigned to represent LUMA in proceedings regarding *Genera's Motion for Partial Reconsideration*, including filing a response to the same, as applicable.

10. The fact that LUMA is submitting *Genera's Motion for Partial Reconsideration*, while the Energy Bureau considers LUMA's objections and request to vacate the orders that require LUMA to file motions or reports prepared by Genera, should not be construed as a joinder or endorsement by LUMA of *Genera's Motion for Partial Reconsideration* nor acceptance by LUMA of a role as Genera's agent in this proceeding. LUMA reserves any and all rights to file a response to *Genera's Motion for Partial Reconsideration*.

**WHEREFORE**, LUMA respectfully requests that the Honorable Bureau **take notice** of the aforementioned for all purposes, **vacate and set aside** its June 30<sup>th</sup> Order, **enter a ruling** clarifying that PREPA, Genera and LUMA, shall submit separately any motions, reports and information relating to their respective budgets, and **release** LUMA from all orders that may be construed to require that LUMA submit motions or reports for Genera or PREPA in this proceeding in connection with their approved budgets.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 12<sup>th</sup> day of October, 2023.

We hereby certify that this motion was file using the electronic filing system of this Energy Bureau and that we will send an electronic copy of this motion to the attorneys for PREPA, Joannely Marrero-Cruz, [jmarrero@diazvaz.law](mailto:jmarrero@diazvaz.law) and [mvazquez@diazvaz.law](mailto:mvazquez@diazvaz.law) from the [Díaz & Vázquez law firm](#); Lionel Santa, [Lionel.santa@prepa.pr.gov](mailto:Lionel.santa@prepa.pr.gov), and to Juan M. Martínez-Nevárez, [jmartinez@gmlex.net](mailto:jmartinez@gmlex.net), Alexis G. Rivera-Medina, [arivera@gmlex.net](mailto:arivera@gmlex.net); Joselyn Rodríguez González, [jrodriguez@gmlex.net](mailto:jrodriguez@gmlex.net), and Mirelis Valle-Cancel, [mvalle@gmlex.net](mailto:mvalle@gmlex.net) from the González & Martínez Law Offices, P.S.C.; and to Genera PR LLC, through counsels of record, Jorge Fernandez-Reboredo, [jfr@sbglaw.com](mailto:jfr@sbglaw.com) and Alejandro López Rodríguez, [alopez@sbglaw.com](mailto:alopez@sbglaw.com).

[signatures in the page that follows]



**DLA Piper (Puerto Rico) LLC**  
500 Calle de la Tanca, Suite 401  
San Juan, PR 00901-1969  
Tel. 787-945-9107  
Fax 939-697-6147

*/s/ Margarita Mercado Echegaray*  
Margarita Mercado Echegaray  
RUA NÚM. 16,266  
[margarita.mercado@us.dlapiper.com](mailto:margarita.mercado@us.dlapiper.com)

*/s/Ana Margarita Rodríguez Rivera*  
Ana Margarita Rodríguez Rivera  
RUA NÚM. 16195  
[ana.rodriguezrivera@us.dlapiper.com](mailto:ana.rodriguezrivera@us.dlapiper.com)

*Exhibit 1*

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

**IN RE:**

REVIEW OF LUMA’S INITIAL BUDGET

**CASE NO.:** NEPR-MI-2021-0004

**SUBJECT:** Motion for Partial Reconsideration of the Resolution and Order Dated September 22, 2023

**MOTION FOR PARTIAL RECONSIDERATION OF THE RESOLUTION AND ORDER  
DATED SEPTEMBER 22, 2023**

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

**COMES NOW GENERA PR LLC** (“Genera”), as agent of the Puerto Rico Electric Power Authority (“PREPA”),<sup>1</sup> through its counsels of record, and respectfully state and request the following:

**I. Introduction**

On September 22, 2023, the Energy Bureau of the Puerto Rico Service Regulatory Board (“Energy Bureau”) issued a Resolution and Order titled *Determination on the Request for Partial Revision on the FY2023 Annual Budgets by LUMA, GENERA, and PREPA* (“September 22<sup>nd</sup> Resolution”) in response to the requests for reconsideration submitted by LUMA Energy, LLC, and LUMA Energy ServCo, LLC (collectively, “LUMA”), Genera, and PREPA following the Energy Bureau's Resolution and Order dated June 25, 2023 (“June 25<sup>th</sup> Order”). Relevant to this Motion, in the September 22<sup>nd</sup> Resolution, the Energy Bureau unexpectedly deviated from its prior determination concerning Genera's budget for Fiscal Year 2024 (“FY2024”), as stated in the June

---

<sup>1</sup> Pursuant to the *Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement* (“LGA OMA”), dated January 24, 2023, executed by and among PREPA, Genera, and the Puerto Rico Public-Private Partnerships Authority, Genera is the sole operator and administrator of the Legacy Generation Assets (as defined in the LGA OMA) and the sole entity authorized to represent PREPA before PREB with respect to any matter related to the performance of any of the O&M Services provided by Genera under the LGA OMA.



25<sup>th</sup> Order. Without prior notice or reasoning based on the administrative record, the Energy Bureau changed the stipulated framework by reallocating Genera's Incentive Payment—initially set to be collected in FY2024—for other budgetary purposes in that year, to be paid in FY2025.<sup>2</sup>

Genera recognizes the Energy Bureau's authority and jurisdiction; however, removing Genera's Incentive Payment from the FY2024 budget was not an issue that Genera had raised in its June 30<sup>th</sup> Request for Partial Reconsideration. Genera also understands that the other participants in the case and intervenors did not raise this issue either, nor that this was an outstanding matter after the Energy Bureau had issued its ruling regarding the FY2024 budgets. This unforeseen change by the Energy Bureau has resulted in issues of inconsistency in budgeting guidelines, potential infringement of Genera's contractual obligations under the LGA OMA, ambiguities complicating financial planning, and concerns about good faith and regulatory stability. Furthermore, Genera has had no opportunity to articulate its position or assess the impact of these changes.

It is important to note that the determination in the June 25<sup>th</sup> Order concerning the budgeting of the Incentive Payment concludes with a clear warning: "**As contrasted with the service fee, any incentive payment is made as a lump sum that if not adequately budgeted beforehand, could have a detrimental impact on the cash flow of the utility when payable as a lump sum.**" *See* June 25<sup>th</sup> Order, at page 21 (emphasis added). Strikingly, the Energy Bureau offers no rationale for its recent unilateral decision, in which it radically shifted its original position, thus avoiding triggering the issue it cautions against in this earlier order. Moreover, the

---

<sup>2</sup> The Energy Bureau had the opportunity to review the LGA OMA in its preliminary stages and express itself regarding the Incentive Payment mechanism outlined in Section 7.1(c)(i) of the LGA OMA. *See*, Resolution and Order (Energy Compliance Certificate), *In re: Certificate of Energy Compliance*, Case No. NEPR-AP-2022-0001, January 15, 2023. While the Energy Bureau expressed itself regarding certain aspects of the clause, specifically its authority to evaluate and approve Incentive Payments and Penalties, it did not provide an alternate interpretation regarding the timing of when the Incentive Payment should be budgeted. Nor did it reserve its authority to do so in a unilateral manner.

Energy Bureau does not furnish any guidelines, safeguards, or alternatives that PREPA and Genera could employ to protect itself against adverse impacts on its cash flow when such a lump-sum payment becomes due.

Consequently, Genera respectfully requests that the Energy Bureau reconsider its September 22<sup>nd</sup> Resolution regarding funding the increased Non-Federally Funded Electric Utility Expenditures with Genera Incentive Payment for FY2024.

## **II. Background**

On May 16, 2023, LUMA filed a document with the Energy Bureau titled *Submission of Consolidated Annual Budgets for Fiscal Year 2024 and Proposed Annual T&D Projections Through Fiscal Year 2026*, in which LUMA submitted to the Proposed Consolidated FY24 Budget composed of proposed T&D Budgets developed by LUMA, the proposed GenCo Budgets revised by Genera on behalf of PREPA for the PREPA subsidiary GenCo LLC (“GenCo”), and the proposed HydroCo Budget developed by PREPA for its holding company, HoldCo, and its subsidiaries PREPA HydroCo LLC (“HydroCo”) and PREPA Property Co, LLC.

On June 9, 2023, after various Requirements of Information (“ROI”) issued by the Energy Bureau to LUMA, PREPA, and Genera, the Energy Bureau conducted a Technical Conference (“June 9<sup>th</sup> Technical Conference”) to deliberate on the budget filings and ROI responses submitted by LUMA, Genera, and PREPA.

On June 12, 2023, the Energy Bureau issued a Resolution and Order (“June 12 Order”), which included a post-June 9<sup>th</sup> Technical Conference ROI, reflecting the additional information required from LUMA, PREPA, and Genera following the discussions of the June 9<sup>th</sup> Technical Conference.

On June 15, 2023, Genera filed a document titled *Motion to Submit Genera PR LLC Responses in Compliance with the June 12 Order* in response to Bench Orders issued at the June 9<sup>th</sup> Technical Conference. Continuing its responses, on June 16, 2023, Genera filed a document titled *Motion to Submit Genera PR LLC's Supplemental Response to the June 12 Order*, addressing the Bench Orders issued at the June 9<sup>th</sup> Technical Conference.

In none of these submissions, ROIs, or responses thereto, was the Genera's Incentive Payment questioned or discussed.

On June 25, 2023, as stated in the Introduction section, the Energy Bureau issued the June 25<sup>th</sup> Order titled *Determination on the FY24 Annual Budgets for the Electric Utility System – LUMA, Genera, and PREPA*. Through this order, the Energy Bureau amended the Proposed Consolidated FY24 Budget submitted by LUMA and approved the revised budgets, provided the orders included in the Resolution and Order were complied with. On its page 19 of the June 25<sup>th</sup> Order, the Energy Bureau additionally expressed its view as a good practice the inclusion of the potential maximum incentive payment to Genera in the budget the Energy Bureau is approving for FY 2024.

Consequently, on June 30, 2023, Genera filed a document titled *Urgent Motion in Compliance with Resolution and Order of June 25, 2023 and for Partial Reconsideration* (“June 30<sup>th</sup> Request for Partial Reconsideration”) whereby it requested that the Energy Bureau reconsider the determinations made in the June 25<sup>th</sup> Order in compliance with the mandates of the June 25<sup>th</sup> Order.

On June 30, 2023, the Energy Bureau issued a Resolution and Order titled *Resolution pertaining Motion for Reconsideration of the June 25 Resolution and Order on the Determination of the FY24 Annual Budgets for the Electric Utility System - LUMA, Genera, and PREPA, filed by*

*the Puerto Rico Electric Power Authority and Urgent Motion in Compliance with Resolution and Order of June 25, 2023 and for Partial Reconsideration, filed by Genera PR, LLC*, through which it stated that it would not consider Genera’s June 30<sup>th</sup> Request for Partial Reconsideration because its submission did not comply with provisions of the T&D OMA<sup>3</sup> which stated that LUMA is the entity charged with the responsibility to represent PREPA and Genera before the Energy Bureau regarding any regulatory or legal matters as they relate to the OMA including budget policy and carry out other tasks in connection thereto before the Energy Bureau.

On June 30, 2023, LUMA filed a document titled *Submission of Motions for Reconsideration by PREPA and Genera and Notice of Intent to Request Reconsideration of Resolution and Order of June 25, 2023*, through which LUMA submitted Motions for Reconsideration of the Energy Bureau’s FY2024 Budget Determination on behalf of PREPA (“PREPA Reconsideration Motion”) and Genera (“June 30<sup>th</sup> Request for Partial Reconsideration”) and provided notice of its intention to request reconsideration on its behalf.

On July 5, 2023, the Energy Bureau issued a Resolution and Order titled (“July 5<sup>th</sup> Resolution”) through which it took notice of LUMA's June 30<sup>th</sup> Motion and granted LUMA until Monday, July 10, 2023, to file i) LUMA's position pertaining the June 25<sup>th</sup> Order, including proposed amendments, and ii) LUMA's position regarding Exhibits 2 and 3 of LUMA’s June 30<sup>th</sup> Motion.<sup>4</sup> The Energy Bureau specified that any proposed amendments by LUMA to the June 25<sup>th</sup> Order must consider those proposed in Exhibit 2 and Exhibit 3 of LUMA’s June 30<sup>th</sup> Motion.

---

<sup>3</sup> *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* (“T&D OMA”), dated June 22, 2020, executed by and among PREPA, the Puerto Rico Public-Private Partnerships Authority (“P3 Authority”), LUMA Energy LLC as Management Co, and LUMA Energy Servco, LLC as ServCo.

<sup>4</sup> Exhibit 2 refers to PREPA’s reconsideration motion and Exhibit 3 refers to Genera June 30<sup>th</sup> Request for Partial Reconsideration.

As mentioned in our introduction to this Motion, on its September 22, 2023 Resolution, the Energy Bureau determined among other things that Genera's Incentive Payment for FY2024 should be utilized for budgetary purposes in FY2024 and be **budgeted and paid** in FY2025 from that Fiscal Year's Budget.

On October 2, 2023, Genera following the Energy Bureau instructions submitted a document through LUMA titled *Request for Amendment and Clarification of Resolution and Order Dated September 22, 2023*. In this document, Genera asked the Energy Bureau to amend and clarify its September 22<sup>nd</sup> Resolution, specifically to provide adequate notice to affected parties about their right to request reconsideration or to file an appeal for judicial review. As of today, the Energy Bureau has not taken any action on this particular petition. According to Act No. 38-2017, *infra*, the Energy Bureau is required to provide adequate notice on the available remedies against any adverse determination to be exhausted by the affected party or parties and the specific timeframe to consider the filing of a petition for judicial review before the Court of Appeals.

### **III. Request for Amendment**

Genera respectfully urges the Energy Bureau to reconsider its determination to include the funding for the increased Non-Federally Funded Electric Utility Expenditures from Genera's Incentive Payment. This is a \$30.040MM reallocation of funds issued by the Energy Bureau without prior notice to Genera or any opportunity allowing Genera to justify its position on said unfounded reallocation. It is important to note that while Genera recognizes the authority of the Energy Bureau to make such determinations, Genera was utterly blindsided by such a decision, considering that Genera's June 30<sup>th</sup> Request for Partial Reconsideration did not include any pleading regarding the reconsideration of this line item, nor did other party's that participate in the captioned case proceedings. As such, to have issued this reallocation of funds in the September

22<sup>nd</sup> Resolution, which lacks findings of facts or analysis based on the filings in the administrative record, presents grave procedural and material damage to Genera. The impact of the Energy Bureau's unsubstantiated decision is further exacerbated by the absence of any proceedings or information requests between the June 25<sup>th</sup> Order and the September 22<sup>nd</sup> Resolution that would have allowed Genera an opportunity to submit the pertinent arguments to be considered prior to a determination that would affect its capacity to perform its O&M Services under the legal binding terms of LGA OMA..

The Constitution of the Commonwealth of Puerto Rico safeguards individuals' fundamental rights to life, liberty, and property as stipulated in Article II, Section 7, 1 LPR § 7. Due process is required before depriving someone of these rights, providing a fair process with legal guarantees. Aut. Puertos v. HEO, 186 DPR 417, 428 (2012). Due process includes both substantive and procedural aspects. When a claimant proves a vested interest, the appropriate process must be determined, as clarified in Álamo Romero v. Adm. de Corrección, 175 DPR 314, at 329 (2009). These protections apply to both judicial and administrative processes.

The concept of due process ensures everyone's right to a fair trial with full legal guarantees in both judicial and administrative settings. Aut. Puertos v. HEO, *supra*; Marrero Caratini v. Rodríguez Rodríguez, 138 DPR 215, 220 (1995). To meet due process requirements, the following criteria must be fulfilled: (1) proper notice of the proceeding; (2) an impartial judge; (3) an opportunity to be heard; (4) the right to cross-examine witnesses and scrutinize evidence against you; (5) legal representation; and (6) a decision based on the record. Hernández González v. Srio de Transportación y Obras Públicas, 164 DPR 390, 395–396 (2005); Domínguez Castro et al. v. E.L.A. I, 178 DPR 1, 47 (2010). In administrative adjudicative processes, agencies are required to

adhere to these same due process safeguards. Rivera Rodríguez & Co. v. Lee Stowell, 133 DPR 881, 889 (1993).

Our administrative legal system stipulates that proper notification of an adversarial process is one of the requirements that any procedure must meet to ensure the minimum requirements of due process. Hernández v. Secretario, 164 DPR 390, 396 (2005). Therefore, notification is an indispensable requirement for the validity of the administrative adjudicative procedure at its various stages. In line with this, the Supreme Court of the United States has repeatedly emphasized the need for proper notification. Mathews v. Eldridge, 424 U.S. 319, 333 (1976), noted that the opportunity to be heard must be provided at "a meaningful time and in a meaningful manner"; that is, at a significant point in the process and in a way that genuinely enables the affected party to present their position. *See also*, Rivera Rodríguez & Co. v. Lee Stowell, *supra*. Specifically, the right to due process presupposes "real and effective" notification, in accordance with applicable statutory provisions. Asoc. Residentes v. Montebello Dev. Corp., 138 DPR 412, 421 (1995).

These constitutional rights are codified in the Uniform Administrative Procedure Act of the Commonwealth of Puerto Rico ("LPAU" for its Spanish acronym), Act No. 38 of June 30, 2017, as amended. 3 LPRA § 2151. Specifically, Section 3.1 of the LPAU lays down the minimum requirements for procedural due process in administrative adjudications. These include the right to timely notification, presenting evidence, impartial adjudication, and a decision based on the record. Administrative decisions generally enjoy deference from courts and are presumed correct; however, this deference yields under certain circumstances like insufficient evidence, misapplication of laws, or infringement of constitutional rights. Misión Ind. v. J.C.A., 145 D.P.R. 908, 929 (1998). Meaning, administrative factual determinations will be upheld if based on "substantial evidence" from the complete administrative record. Torres v. Junta Ingenieros, 161

DPR 696, (2004). The right to due process in an administrative context requires that the agency's decision be based solely on the administrative record. Any decision issued must be consistent in its description of the facts and legal bases with the dispositive aspect of the resolution. López y otros v. Asoc. de Taxis de Cayey, 142 DPR 109, (1996).

The September 22<sup>nd</sup> Resolution bases its reasoning for reallocating funds on Section 7.1(c) of the LGA OMA. Regarding the Incentive Payment, the Section 7.1(c)(i) of the LGA OMA provides the following:

**(c) Incentives and Penalties.**

(i) Based on Operator's performance with respect to the Incentives and Penalties described in Section III of Annex II (*Compensation – Incentives and Penalties*), Operator shall be eligible to receive Incentive Payments or be subject to Penalties as a deduction from the applicable Service Fee in any given Contract Year. For the avoidance of doubt, no Incentive Payments or Penalties shall be earned or incurred during the Mobilization Period or the Demobilization Period. The Incentive Payments or Penalties to be earned or incurred on any given Contract Year shall be calculated as set forth in Section III of Annex II (*Compensation – Incentives and Penalties*), as adjusted on a Pro Rata basis for a Contract Year that is more or less than three hundred and sixty-five (365) days. Owner and Administrator agree that an amount equal to the maximum amount of the Incentive Payments available in any given Contract Year shall be included in the Operating Budget or the Decommissioning Budgets, as applicable, **for such Contract Year**.(Emphasis added).

Genera contends that the phrase "for such Contract Year" in Section 7.1(c)(i) of the LGA OMA is pivotal in specifying the timing for budgeting the Incentive Payments. The phrasing of Section 7.1(c)(i) of the LGA OMA requires that the Incentive Payments have to be included in the budget for the Contract Year in which the performance criteria are met, and the incentives are going to be realized, as opposed to when the payment is actually due and payable. The budgeting of the Incentive Payment should be aligned with the year of effort and actual performance realization, not with the subsequent fiscal year in which the Incentive Payments are to be disbursed. The



Energy Bureau's position, which suggests that budgeting for these Incentive Payments could be deferred to the following fiscal year when actually payable due to budgetary proceedings, produces an ambiguity between Genera's performance in a specific fiscal year and payment issuance to Genera in the following fiscal year as budgeted. It must be then noted that the term "for such contract year" referred in Section 7.1(c)(i) only allows one way of interpretation which unfortunately has been unilaterally abandoned by the Energy Bureau that is neither present nor implied in the contract's language. Such an interpretation has an immediate disrupting effect on Genera's financial planning and contractual performance. Therefore, Genera argues that the contract is explicit in tying the budgeting of the Incentive Payments to the Contract Year in which the incentives are going to be realized, underscoring that any deviation in this regard would be contrary to the agreement's provisions.

The Energy Bureau's unexpected decision on September 22<sup>nd</sup> to reallocate \$30.040MM intended for Genera's Incentive Payment raises legal and financial concerns that cannot be overlooked. This decision contravenes established norms of due process as guaranteed by the Constitution of the Commonwealth of Puerto Rico, pertinent case law, and the LPAU. More importantly, on a financial level, the decision could create an immediate liquidity crisis for Genera, and PREPA subsidiaries operators, a concern explicitly warned against in the Energy Bureau's own June 25<sup>th</sup> Order.

The issue surrounding liquidity constraints for Genera is not an abstract or theoretical concern but a concrete and immediate challenge that demands the attention of the Energy Bureau. According to the existing terms, if Genera successfully meets all the stipulated qualification criteria outlined in Section III of Annex II of the LGA OMA, the company will become eligible for a substantial lump-sum Incentive Payment of \$30,040MM. This payment would be expected

to be disbursed by November of the forthcoming FY2025. The importance of this financial obligation is considerable, and the time span within which Genera will become eligible for these funds is limited. Considering typical business cycles, cash flow patterns, and financial commitments, the narrow window between the determination of eligibility and the due date for the lump-sum payment makes it exceedingly burdensome to marshal the necessary resources. This is not a matter of simple budgetary adjustment; it is a pressing financial strain that could lead to precarious liquidity issues, as correctly warned by the Energy Bureau in its June 25<sup>th</sup> Order. In the immediate term, Genera will be forced to reevaluate its current projects and financial commitments and reassess personnel allocations to minimize the negative consequences of lack of liquidity. This kind of financial turbulence can adversely impact not just current operations but also Genera's future sustainability and capability to comply with its obligations under the LGA OMA. Additionally, disbursing a large sum of cash that was not collected in the previous fiscal year could have an adverse effect on PREPA and its subsidiaries' operators. This could create a cash flow problem that could affect their ability to collect payments and reimburse pass-through expenditures from the same revenue sources.

Moreover, this involuntary, but foreseeable liquidity crisis generated by the Energy Bureau's decision will trigger a cascading effect, setting off a series of financially related challenges that could persist over an extended period and create an additional load on Genera's responsibilities. The resulting strain of this imposed financial crisis will significantly affect subsequent fiscal years by impacting long-term financial planning, affecting stakeholders, and becoming detrimental to the people of Puerto Rico. It is evident that the Energy Bureau's September 22<sup>nd</sup> Resolution will not only impact Genera's performance for the upcoming fiscal year but become an existential threat that could potentially destabilize Genera's financial standing

for years to come. Therefore, any departure from the Energy Bureau's original June 25<sup>th</sup> Order that attempts against the fiscal soundness of the budgetary allocations for Genera's operations not only defeats the purpose of securing a constant and resilient electrical system for the people of Puerto Rico but also constitutes a regression in the public policy of economic development.

**WHEREFORE**, Genera respectfully requests that this Honorable Energy Bureau **take notice** of the above for all purposes and **reconsider** the September 22<sup>nd</sup> Order regarding the allocation of the Incentive Payment into the budget for FY2024.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 12<sup>th</sup> day of October 2023.

**ECIJA SBGB**

PO Box 363068

San Juan, Puerto Rico 00920

Tel. (787) 300.3200

Fax (787) 300.3208

/s/ Jorge Fernández-Reboredo

Jorge Fernández-Reboredo

jfr@sbgblaw.com

TSPR 9,669

/s/ Alejandro López-Rodríguez

Alejandro López-Rodríguez

alopez@sbgblaw.com

TSPR 22,996

## CERTIFICATE OF SERVICE

We hereby certify that a true and accurate copy of this motion was filed with the Office of the Clerk of the Energy Bureau using its Electronic Filing System and that we will send an electronic copy of this motion to Joannely Marrero-Cruz, at [jmarrero@diazvaz.law](mailto:jmarrero@diazvaz.law); Maralíz Vázquez-Marrero, at [mvazquez@diazvaz.law](mailto:mvazquez@diazvaz.law); Margarita Mercado Echegaray, at [margarita.mercado@us.dlapiper.com](mailto:margarita.mercado@us.dlapiper.com); and Ana Margarita Rodríguez Rivera, at [ana.rodriguezrivera@us.dlapiper.com](mailto:ana.rodriguezrivera@us.dlapiper.com).

In San Juan, Puerto Rico, this 12<sup>th</sup> day of October 2023

/s/ Alejandro López-Rodríguez  
Alejandro López-Rodríguez