

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

IN RE:

PUERTO RICO ELECTRIC POWER
AUTHORITY'S EMERGENCY RESPONSE
PLAN

CASE NO. NEPR-MI-2019-0006

**SUBJECT: LUMA's Response to the Resolution
and Order of August 16, 2023 and Request to
Vacate**

NEPR

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**LUMA'S RESPONSE TO THE RESOLUTION AND ORDER OF AUGUST 16, 2023,
AND REQUEST TO VACATE**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC ("ManagementCo"), and **LUMA Energy Servco, LLC** ("ServCo") (jointly referred to as the "Operator" or "LUMA"), through the undersigned counsel, and respectfully states and requests the following:

I. Introduction

On August 16, 2023, the Puerto Rico Energy Bureau ("Energy Bureau") entered a Resolution and Order ("August 16th Order") acknowledging the Emergency Response Plans ("ERPs") submitted by LUMA, Genera PR, LLC and the Puerto Rico Electric Power Authority ("PREPA") for the year 2023 pursuant to Section 6(m) of Act No. 83 of May 2, 1941 ("Act 83"). The Energy Bureau conditionally approved LUMA's ERP for the year 2023 ("2023 T&D ERP"), subject to compliance with requirements included in the August 16th Order. Specifically, the Energy Bureau instructed LUMA to update its 2023 ERP to comply with orders set forth on pages 8 through 13 of the August 16th Order on *Restoration Activities Timeframes*. The Energy Bureau indicated that the 2023 T&D ERP is similar in many aspects to the ERP of PSEG Long Island, including the information on timeframes for specific activities to be undertaken in association with

emergency events, including the development of estimated restoration times. *See* August 16th Order, pp. 6 and 8.

Regarding the ERPs to be submitted for the year 2024 and onward, the Energy Bureau stated that the development and review process should include an interactive process in which Energy Bureau staff will work with the parties to improve their ERPs before and after initial filing, which may result in recommended or ordered short and long-term modifications. *See id.*, pp. 26-27. Beginning with the ERPs to be submitted for 2024, the Energy Bureau directed that LUMA, PREPA, and Genera shall file them before the Energy Bureau on or before December 15 of each year to provide adequate time for the Energy Bureau's review. *Id.*, p. 26. The Energy Bureau stated that this does not change reporting requirements set forth in Act 83 or other applicable requirements of law or regulation. *Id.* In addition, the Energy Bureau included several orders for items to be considered and/or included in the ERPs to be submitted for subsequent years¹.

As the records of this Energy Bureau show, LUMA has prioritized emergency response preparedness and dutifully responded to requests by this Energy Bureau to submit information regarding LUMA's ERP, plans, resources, and ability to respond to emergencies. To wit, in connection with the approval of LUMA's Initial Budgets, Case *In re LUMA's Initial Budgets*, No. NEPR-MI-2021-0004, and LUMA's System Remediation Plan ("SRP"), Case *In re Review of the Puerto Rico Electric Power Authority's System Remediation Plan*, No. NEPR-MI-2020-0019, LUMA submitted verbal testimonies and written documentation and information on its plans and actions to prepare for emergencies and available resources to respond to emergencies, including

¹ Notably, the Energy Bureau provided LUMA instructions to include and/or modify its Emergency Response Plan ("ERP") in areas such as Key Emergency Contacts, Restoration Activities Timeframes, Municipal Coordination, Outage Management System, LUMA's Emergency Operations Center, Critical Infrastructure and Facilities, Lifeline Residential Service Customers, Vegetation Management in Anticipation of an Emergency Event, Training, Exercises, and Drills, Information Technology, Resource Acquisition and Mutual Aid Assistance, Restoration Safety, Damage Assessment, Estimated Times of Restoration, Call Center Operation, Staffing, and Answer Rates, Contingency Plans, and After-Action Process. *See* August 16th Order, pp. 13-24.

response to hurricanes. LUMA also submitted documents and information in attention to requirements of information issued by this Energy Bureau in connection with LUMA's Initial Budgets and SRP. *See, e.g., Motion in Compliance with Order Submitting Additional Information and Supplemental Responses to Questions Posed in Technical Conference and Submitting Clarifications*, filed on May 7, 2021, Case No. NEPR-MI-2021-0004, Exhibit, page 1, response to a question on Emergency Response, mutual aid agreements, and funding ahead of the 2021 hurricane season²; Resolution and Order with Agenda for SRP Technical Conference including Emergency Preparedness as a topic for LUMA to discuss in Technical Conference of May 16, 2021, Case No. NEPR-MI-2020-0019³; *Motion in Compliance with Order Submitting Additional Information and Supplemental Responses to Questions Posed in Technical Conference and Submitting Clarification*, filed on May 20, 2021, Case No. NEPR-MI-2020-0019, Exhibit, response on Emergency Preparedness during the Front End Transition Period.⁴ Furthermore, on May 31, 2021, LUMA filed its ERP with this Energy Bureau in this proceeding and answered questions during a Technical Conference.

After taking over as Operator of the T&D System, LUMA has prepared for and responded to emergencies, leveraging its expertise and that of its personnel, and in coordination with the Federal Emergency Management Agency ("FEMA"), Government of Puerto Rico, municipalities, and other public and private actors. *See* LUMA's filings in response to Hurricane Fiona, Case *In re LUMA's Response to Hurricane Fiona*, Case No. NEPR-MI-2022-0003, including LUMA's

² Available at <https://energia.pr.gov/wp-content/uploads/sites/7/2021/05/Motion-in-Compliance-with-Order-Submitting-Additional-Information-and-Supplemental-Responses-to-Questions-Posed-in-Technical-Conference-and-Submitting-Clarifications-NEPR-MI-2021-0004.pdf>.

³ Available at <https://energia.pr.gov/wp-content/uploads/sites/7/2021/05/20210510-MI20200019-Resolution-Technical-Conference-Agenda.pdf>.

⁴ Available at <https://energia.pr.gov/wp-content/uploads/sites/7/2021/05/Motion-Submitting-Responses-to-Requests-of-TC-and-Clarifications-NEPR-MI-2020-0019.pdf>

Response to Requirements of Information on LUMA's Response to Hurricane Fiona, filed on November 18, 2022.⁵ Moreover, LUMA has participated in tabletop exercises organized by FEMA at the request of the ESF-12⁶ in the federal government. The first was on a hurricane scenario held on June 29 and 30, 2022, and the second was on an earthquake scenario held on December 8 and 9, 2022. LUMA has also filed an update to its ERP with Puerto Rico Government authorities, including this Energy Bureau, each year on or before May 31st for their information as required by law. LUMA has not wavered in its mission to provide safe and reliable electric power services in Puerto Rico.

LUMA respects the authority and regulatory role of this Energy Bureau under Puerto Rico law and public policy regarding the electric power system. However, LUMA's ERP is an operational plan. It was not envisioned under Act 83 as a regulatory submission. The modifications required by the Energy Bureau in the August 16th Order may directly impact how LUMA will respond to a real emergency. Because the directives of the August 16th Order exceed the scope of this Energy Bureau's expressly delegated authority, and fall outside the mandate of Act 20-2017 and the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement of June 22, 2020 ("T&D OMA"), LUMA respectfully requests that this Energy Bureau reconsider and vacate the August 16th Order. Particularly, those rulings of the August 16th Order that require LUMA to amend the 2023 T&D ERP and impose requirements for future ERPs that Puerto Rico's Legislative Assembly did not adopt in Act 83, Act 57-2014, nor Act 20-2017, are not a part of the

⁵ Available at <https://energia.pr.gov/wp-content/uploads/sites/7/2022/12/Motion-Submitting-Responses-to-Request-for-Information.pdf>.

⁶ Within the federal government's National Incident Management System coordination of the federal response on energy-related emergency response actions is led by the Department of Energy through the Energy Support Function #12 (ESF-12).

T&D OMA and, thus, fall beyond the scope of what this Energy Bureau, may require for PREPA's ERPs and the T&D ERPs.

As explained in detail below, assuming for discussion purposes only that the Energy Bureau acted within its jurisdiction, the August 16th Order includes regulatory rulings issued in violation of LUMA's procedural and due process rights as the Energy Bureau did not give LUMA any notice, much less reasonable notice, that it purported to exercise authority to require amendments to the 2023 T&D ERP and did not grant LUMA an opportunity to be heard. Moreover, in its August 16th Order, the Energy Bureau did not explain its determination to choose the ERP of PSEG Long Island as a comparable ERP to LUMA's, making such a ruling unreasonable. That constitutional harm is compounded by the fact that this Energy Bureau has not adopted enabling regulations in connection with the electric power system. It is respectfully submitted that the August 16th Order must be vacated since it was issued *ultra vires* and deprives the parties concerned of hallmark constitutional protections against arbitrary state and agency actions.

II. Procedural Background

On December 31, 2020, this Energy Bureau issued a Resolution and Order that initiated the captioned proceeding to evaluate the ERP that LUMA was required to develop pursuant to Section 4.2(g) of the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement of June 22, 2020 ("T&D OMA") ("December 31st Order").

On May 31, 2021, LUMA submitted to this Energy Bureau an Emergency Response Plan outlining the procedures and actions necessary for responding to any emergency affecting or reasonably likely to affect the Puerto Rico Transmission and Distribution System ("T&D System"), including fire, weather, environmental, health, safety and other potential emergency conditions (the "2021 T&D ERP"). The 2021 T&D ERP was prepared and submitted to the Energy

Bureau for its information pursuant to Section 4.2(g) of the T&D OMA and in compliance with this Energy Bureau's December 31st Order.⁷

On May 27, 2022, LUMA submitted before the Energy Bureau LUMA's 2022 annual report on emergency preparedness for the T&D System ("2022 Annual T&D Emergency Preparedness Report"), pursuant to Section 6 (m) of Act 83. LUMA's 2022 Annual T&D Emergency Preparedness Report describes the measures taken during the preceding calendar year to address emergencies such as storms, atmospheric disturbances, fires, or earthquakes that could affect the T&D System. The 2022 T&D Emergency Preparedness Report summarizes the changes made to LUMA's Emergency Response Plan ("2022 T&D ERP") to address emergencies, a description of the emergency plan to face possible earthquakes; the plans and protocols to address fires in the T&D System facilities; the status of the T&D System tree trimming program to protect the power transmission lines and trees; the training offered to essential LUMA personnel to ensure they are qualified to follow the procedures to address the aforementioned emergencies; and the contingency plans to normalize or re-establish T&D System operations after severe weather, fire, earthquake, cyber-attack, or other emergencies.

On May 30, 2023, LUMA filed before the Energy Bureau LUMA's 2023 annual report on emergency preparedness for the T&D System ("2023 Annual T&D Emergency Preparedness Report"). The 2023 T&D Emergency Preparedness Report summarizes the changes made to LUMA's Emergency Response Plan.

⁷ On June 3, 2021, LUMA filed a *Submission of Annexes to Emergency Plan*, which presented Annexes A, B, and C to the 2021 T&D ERP.

III. LUMA's Position on the August 16th Order and Request to Vacate

A. The 2023 T&D ERP complies with Section 6(m) of Act 83, which establishes the only requirements of an ERP for the electric power system and with the requirements of the T&D OMA.

1. Act 83 Governs LUMA's Emergency Response Plan Submission

On April 11, 2019, the Senate of the Legislative Assembly presented the Senate Bill, P. of the S. 1121, to amend several sections of Act 83. Once the bill was approved, it became Act 17-2019. Act 17-2019 adopted a new Section 6(m) of Act 83, adding, for the first time, a requirement to file annual reports on emergency preparedness and response. By approving Act 17-2019, the Legislative Assembly's purpose was to present a solution to the problems and challenges of the electric system in Puerto Rico and help change the system to one more reliable and efficient. As such, Section 6 (m) of Act 83 requires PREPA to submit, no later than May 31 of every year, to the Puerto Rico Governor, both Houses of the Legislative Assembly, and the Energy Bureau a report:

stating the measures taken during the preceding calendar year to address the emergencies that may arise with respect to the upcoming hurricane season and other atmospheric disturbances, including floods that may affect the electrical system of the Island. Likewise, said report shall present the adopted plans or protocols to be followed in case of fires in facilities and establishments of [PREPA]. It shall also include any preventive measure identified for the conservation of the power lines in the event of an earthquake. The report shall include, but not be limited to, the following information:

- i. Improvements to the [PREPA's] Revised Operating Plan for Emergencies due to Atmospheric Disturbances;
- ii. development of an emergency plan to face a possible earthquake;
- iii. Adopted plans or protocols to be followed in case of fire in [PREPA's] facilities and establishments;
- iv. Status of the tree trimming program in order to protect power transmission lines, while protecting our trees and preventing them from being damaged;

- v. Decision-making protocol to enforce the shutting down of the electrical system;
- vi. Trainings offered to [PREPA's] essential personnel to qualify it on the procedure to be followed in case of emergencies arising from atmospheric disturbances, fire in [PREPA's] facilities or establishments, or earthquakes, as well as a certification attesting that all the personnel performing supervisory functions in the operating areas has been duly advised on the norms of the operating emergency plan in effect; and
- vii. Contingency plans to address the situation after a storm, a hurricane, a fire in [PREPA's] facilities or establishments, or an earthquake, directed to normalizing or reestablishing the electrical system as soon as possible.

Act 83, Section 6(m), 22 PR Laws Ann. §196.

The underlying purpose of Act 83 is to ensure that an emergency response plan is adopted and implemented to prepare for and manage emergencies and atmospheric disturbances that affect the provision of electric power services.

The 2023 T&D ERP fully complies with the requirements of Section 6(m) of Act 83. First, it includes the implementation of post-event review processes and the creation of After-Action Reports (to capture observations and make recommendations) and Improvement Plans. *See* 2023 T&D ERP, pp. 4, 12, and 41. The information in these reports and plans will be used, as necessary or appropriate, to assess and determine any improvements to the ERP and to file a report in the year 2024, among other things. The post-event review processes and the creation of After-Action Reports and Improvement Plans comply, at a minimum, with subsection (i) of Section 6(m) of Act 83. Second, the 2023 T&D ERP includes an Earthquake Annex to support an emergency response of the T&D System for this hazard and thus complies with Act 83's requirement to develop an emergency plan to face a possible earthquake. *See id.*, p. 11 and Annex C. Third, it includes a Fire Annex to support an emergency response of the T&D System for this hazard, as is also required by Act 83. *See id.*, p. 11 and Annex B. Fourth, by May 31, 2023, LUMA had completed the

remediation of over 1400 miles of Rights-of-Way (ROW) corridors, including approximately 800 miles of transmission ROW and 520 miles of distribution. *See* 2023 Annual T&D Emergency Preparedness Report, p. 4. In addition, LUMA completed multiple rounds of preventive maintenance at all previously cleared substation sites. *Id.* Fifth, the 2023 T&D ERP provides for the use of event classification types for major events and phases of response, as well as a Decision Flowchart to help the level of emergency response needed and activation of resources (*see id.*, pp. 23-24 and Annex A, pp. 12-17), and the use of a priority matrix for critical infrastructure and facilities restoration prioritization (*see id.*, p. 30). These inclusions in the 2023 T&D ERP comply with subsections (v) and (vii) of Section 6(m) of Act 83.

Sixth, the 2023 T&D ERP provides for training, drills, and exercises designed and conducted to develop and improve the knowledge and skills of personnel assigned to emergency response activities, and to support the safe and reasonably prompt completion of all required actions during ERP activations (*see id.*, p. 43); an exercise program following the guidelines from the Homeland Security Exercise Evaluation Program (*see id.*); and operations-based exercises (including drills and functional exercises) to validate and/or evaluate plans, policies and procedures, among other things (*see id.*, p. 43). Those provisions comply with Act 83's requirement to annually report on trainings.

Finally, as required by Act 83, the 2023 T&D ERP includes storms, hurricanes, fires, and earthquakes and provides, among other things, for: the use of the Major Outage Restoration Annex that establishes an operational and tactical comprehensive framework for responding to major outage restoration events (*see* Annex A); the use of a Restoration Priority Matrix and Guidelines providing for the most efficient approach in restoring electrical outages and prioritizing outages using a variety of factors including community lifelines, customer type, number of affected

customers, and outages involving safety conditions (*see id.* pp. 30-32 and Annex A, p. 18); measures to restore community lifelines as rapidly as possible (*see id.*, pp. 3 and 11-23); the establishment of the LUMA Emergency Operations Center, an Incident Commander, Command and General Staff, and a Crisis Management Committee, as required, to effectively manage the disaster (*see id.*, pp. 23-24); the establishment of an Operations Section to make necessary repairs to the system and direct response and restoration activities, with functions such as creating achievable restoration objectives, ensuring outages are restored within the projected global estimated time of restoration, and communicated as required, coordinating with a LUMA Planning and Intelligence Section for adequate resource and restoration monitoring, and compiling detailed damage assessments to determine the extent of damage and expedite restoration of service used to estimate the amount of resources, materials, and equipment needed to repair the system and estimated time of restoration (*see id.*, pp. 34); the establishment of a System Emergency Restoration Team to carry tactical activities to restore operations (*see id.*, p. 32); provide procurement for response and restoration activities through the Finance and Administration Section (*see id.*, p. 42); use of mutual aid assistance for restoration, as appropriate (*see id.*, p. 33); guidelines to establish estimated times of restoration, reporting and communicating this information (*see Annex A*, pp. 25-28); a performance metric for restoration (*see id.*, Annex A, Appendix A); working with municipal officials to share information, including community restoration priorities (*see id.*, p. 37); management of restoration progress information through established communications protocols (*see id.*, p. 37); distribution of restoration information via various social media outlets as appropriate (*see id.*, p. 36); broadcasting of customer outage estimated times of restoration across all available LUMA platforms (*see id.*, p. 36); use of real-time data and an Outage Map in LUMA's website to provide restoration information (*see id.*, p.

37); communications with Municipalities regarding restoration performance (*see id.*, pp. 37-38); submission of service restoration stage reports to agencies, customers and the public (*see id.*, pp. 40); advanced planning and training to aid in efficient restoration (*see id.*, pp. 43-45); and the utilization and analysis of Community Lifelines essential to human health, safety, and economic security and to enable continuous operations of critical functions and necessary actions to restore these (*see id.*, pp. 12-14).

The above depicts LUMA's commitment to comply with Section 6(m) of Act 83 and go above and beyond what is required to have a complete and functional ERP based on the conditions of the T&D System and Puerto Rico. It also shows that the 2023 T&D ERP fully complies with Section 6(m) of Act 83, and there should be no controversy as to its completeness.

In the August 16th Order, this Energy Bureau does not conclude that LUMA did not comply with the requirements of Act 83. Instead, the Energy Bureau added requirements not stated in Act 83 on *Restoration Activities Timeframes*, directing LUMA to replicate an analogous discussion and process found in the PSEG, Long Island ERP, without establishing the legal basis. However, this Energy Bureau did not explain why such modification is necessary in light of Section 6(m) requirements of Act 83 or how it tailored its suggestions to LUMA or PREPA's T&D System.

LUMA respectfully submits that the directives in the August 16th Order to amend the 2023 T&D ERP are beyond the scope of Section 6(m) of Act 83 and that this Energy Bureau did not state its authority to require those revisions, particularly because the August 16th Order did not consider that: (1) 2023 T&D ERP complies fully with Act 83; (2) other Puerto Rico government agencies in charge of emergency response received the 2023 T&D ERP; (3) the T&D OMA does not require that LUMA file ERPs annually with the Energy Bureau nor contemplates that the

Energy Bureau may order that an ERP be amended; and (3) Act 83 does not expressly grant authority to the Energy Bureau to amend an ERP.

The August 16th Order also presents practical complications that should be considered. To wit, the 2023 T&D ERP was already submitted to the Puerto Rico Governor and both Houses of the Legislative Assembly. Moreover, the Government of Puerto Rico has relied on a version of a plan submitted by LUMA almost three months before the August 16th Order was issued. Plans and resources have been allocated since May 31st based on the 2023 T&D ERP adopted by LUMA and submitted to governmental authorities in compliance with Act 83. Any modifications to a current ERP would interfere with its implementation and may disrupt responding to an emergency event.

Section 6(m) of Act 83 expressly sets the timeframe for LUMA to submit its ERP on an annual basis. The date is no later than May 31 every year to the Puerto Rico Governor, both Houses of the Legislative Assembly, and the Energy Bureau. As the record of this instant proceedings shows, LUMA has submitted its ERP to the Puerto Rico Governor, both Houses of the Legislative Assembly, and the Energy Bureau every year on or around May 31st since 2021 in observance of the language of Section 6(m) of Act 83. Respectfully, the Energy Bureau lacks the authority to rewrite the express timeframe provided under Section 6(m) of Act 83 to require LUMA to submit its ERP in a year prior, setting a due date very different from that established by the Legislative Assembly.

LUMA understands that the level of granularity that the Energy Bureau ordered in the August 16th Order is not envisioned nor required in Section 6(m) of Act 83. It is an expansive interpretation of the language of Section 6(m) of Act 83 that purports to rewrite the same.

For the reasons set forth above, LUMA respectfully contends that the Energy Bureau vacate the August 16th Order as it imposes substantive and procedural requirements contrary to Act 83.

2. *The 2023 T&D OMA complies with the requirements of the T&D OMA*

The T&D OMA was approved in accordance with the procedure established in Act 29-2009, Public-Private Partnerships Law ("Act 29-2009") and following the approval of Act 120-2018. Act 29-2009 and Act 120-2018 establish the legal framework for a private operator to assume the operations of the T&D System. Pursuant to Sections 2(f) and 5(g) of Act 120-2018, on June 17, 2020, the Energy Bureau certified that the T&D OMA complies with Puerto Rico's public energy policy and the applicable regulatory framework that includes Act 57-2014 and Act 17-2019, among others. The T&D OMA governs the transfer of responsibilities, rights, and obligations over the T&D System from PREPA to LUMA, while PREPA maintains ownership of the Electric Power System.

LUMA is the operator of the T&D System and of the facilities, equipment, and other assets related to the T&D System, and provides administration, operation, maintenance, repair, restoration and replacement, and other related services for the T&D System, which in any case are customary and appropriate for a service provider of transmission and distribution systems of utilities ("O&M Services"). In pertinent part, O&M Services include, among others: (1) emergency preparedness planning (*id.*, Annex I, Section IIA at page I-4); (2) communications with public officials, regulators, and local municipalities and counties regarding storm preparation, management, coordination and response (*see id.* Annex I, Section IV.B); and emergency response and implementation of an ERP (*id.*, Annex I, Section VII).

Pursuant to the T&D OMA, the ERP must: (i) provide for “appropriate notice of any such emergency” to the Energy Bureau and other specified Governmental Bodies with jurisdiction; (ii) “establish measures that facilitate coordinated emergency response actions by all appropriate Governmental Bodies”; (iii) “specifically include outage minimization and response measures”; and (iv) “assure the timely availability of all personnel required to respond to any emergency” in accordance with specified requirements. *Id.*, Section 4.2(g) (Footnotes added). The ERP is to be updated from time to time. *See id.*, Section 4.2(g).

The ERP shall also address “emergency response and restoration, and all necessary emergency response, business continuity, reporting and communication functions relating to the T&D System ...” *Id.*, Annex I, Section VIIB, p. I-11. Such plans are to be coordinated with the “plans of [PREPA] and the [P3A], other service providers for business continuity and disaster recovery, including response, reporting and public communications relating to storms, other unusual weather occurrences and other Emergencies.” *Id.* These requirements are to be addressed by including: (i) timely reporting of emergency conditions to Governmental Bodies “as may be necessary, appropriate or advisable” including “timely regular updates”; (ii) “storm monitoring and mobilization of [LUMA’s] or Subcontractor’s workforce (including workforce available under any Mutual Assistance Agreements) in connection with anticipated storms and other electrical system emergencies”; (iii) coordination with the media, fire, police, and municipal, state and federal government; (iv) customer communications; (v) “system condition monitoring”; (vi) “repair and replacement of damaged components of the T&D System [...]”; (vii) “public safety activities”; (viii) “restoration of the T&D System to pre-emergency conditions”; (ix) conducting periodic drills; and (x) “preparing and analyzing all information and data required to support [...]”

qualification for certain federal funding and reimbursement claims. *See id.*, Annex I, Section VII(B).

T&D OMA provisions associated directly or indirectly with the ERP include provisions requiring that: (1) in Emergency Events (as determined by LUMA in good faith), LUMA take measures that it determines in good faith to be reasonable and appropriate in accordance with the ERP to: (a) protect the safety of the public, and its and PREPA's employees; (b) protect the T&D System's safety or integrity or prevent or limit environmental harm, or (c) mitigate immediate consequences of the Emergency Event, *see id.*, Section 5.14(b)16; (2) "purchase, maintain and store inventory in a manner also consistent with ... the [ERP] ..." among other specified policies and procedures, *see id.*, Annex I, Section II(B), p. I-4; (3) in connection with the System Operation Principles and during Emergency Operating Conditions "implement the [ERP] per established protocols" and after such conditions have passed to "conduct post-event reviews with stakeholders, gather and analyze data from the Emergency Management System to determine appropriateness of actions taken during the Emergency Event, and communicate and implement lessons learned," *id.*, Annex I, Schedule 1, p. I-21; and (4) "maintain and enhance the customer outage data and information on the Operator managed web page and in other communication channels consistent with the [ERP]." *See id.*

The 2023 T&D ERP fully complies with the provisions of the T&D OMA. It provides for "LUMA's response, immediate recovery, and restoration operations to emergency events efficiently and effectively to protect lives, public health, safety, and property; to restore essential services; and to enable and assist economic recovery." *See* 2023 T&D ERP, p. 2. The 2023 T&D ERP addresses "emergency events caused by any hazard or threat that results in, or could result in, a major potential impact to the integrity of [the T&D System] and/or a disruption of electrical

service to LUMA customers.” *Id.*, p. 8. The 2023 T&D ERP covers “all hazards”- that is, it covers hazards or threats resulting from natural causes, human causes and technological causes that result in significant customer interruptions. *See id.*, pp. 2-3. It applies to LUMA personnel, staff, affiliate company employees, contractors, mutual aid resources, and any other personnel working at the direction or under the authority of LUMA. *Id.*, p. 8.

The 2023 T&D ERP covers, among other things, measures to respond, recover, and mitigate disasters; coordination of operations and structures that implement them; stabilization and restoration end states; ensuring delivery of critical services that alleviate immediate threats to life and property; an incident management structure to coordinate and deploy necessary resources for LUMA’s response; and provision for planning, training and exercising in connection with the plan. *See id.*, pp. 2-3.

The 2023 T&D ERP includes a Major Outage Restoration Annex, attached to the 2023 T&D ERP as Annex A, which provides a more detailed set of steps and measures of response during major emergencies for: (i) restoration of electric service and sequencing of energy restoration; (ii) emergency response progress notification of applicable government agencies, customers, public, and employees; and (iii) response to official requests for specific incidents, events, or actions. *See id.*, pp. 2-3 and Annex A to the 2023 T&D ERP. In addition, the 2023 T&D ERP includes a Fire Response Annex, as Annex B, and an Earthquake Response Annex, as Annex C, to support an emergency response of the T&D System for these hazards, all in compliance with Section 6(m) of Act 83. The ERP also includes myriad provisions for effective coordination of emergency response with appropriate Governmental Bodies, including: the use of NIMS as the guide for a comprehensive approach to incident management (*see id.*, p. 9 and Annex A, p. 4); the establishment of the LUMA Emergency Response Organization for both internal and external

coordination, that is aligned with NIMS and utilizes the Incident Command Structure (*see id.*, p. 32, 34); the establishment of a Liaison Officer to serve as primary point of contact for external entities such as the Government of Puerto Rico, municipal officials, and federal agencies (including with the Energy Bureau, P3A, PREPA and the Puerto Rico Emergency Management Bureau) (*see id.*, p. 37); processes and protocols for emergency response progress notifications to applicable government agencies and government officials, media outlets, customers, lifeline residential service customers, public, and employees and for responding to official requests for specific incidents, events, or actions (*see id.*, pp. 34-38 and Annex A); pre-event and restoration stage reports to government entities, the public and costumers, including media outreach, among others (*see id.*, pp. 39-41); exercises, workshops and meetings throughout the year with government officials and other stakeholders to be documented in an Advance Planning and Training Report filed annually (*see id.*, p. 37); and updates to Municipal Officials during emergency events (*see id.*, p. 37).

Regarding mobilization of the workforce and timely availability of personnel, the 2023 T&D ERP includes, among other things: detailed procedures/protocols for mobilization of personnel (*see Annex A*, pp. 7-10); the use of consistent monitoring to determine pre-event planning activities, including the maintenance of a mutual aid roster and established process to request mutual aid, as well as activation of personnel and mutual aid requests (*see id.*, pp. 24 and 33); the use of a decision methodology to establish the level of emergency response needed and mobilization (*see id.*, p. 24); the use of a flexible and standardized management structure that is scalable based on the size, scale and complexity of the emergency event (*see id.*, p. 32); and a process for timely and effective activation of personnel in a cascading fashion to maximize response efficiency and consistency (*see id.*, pp. 23-24).

With safety as the main goal, the 2023 T&D ERP focuses on Community Lifelines essential to human health, safety, or economic security to enable continuous operations of critical functions and necessary actions to restore these, including their restoration and stabilization (*see id.*, pp. 3 and 11-23); and a critical infrastructure and facilities prioritization approach wherein all outages are prioritized using a variety of factors including, but not limited to, community lifelines and outages involving safety conditions (including downed wires) (*see id.*, pp. 30-32 and Annex A, pp. 19-24).

Regarding customer contact during an emergency event, the 2023 T&D ERP provides that, among other things, LUMA will: provide a variety of critical information to LUMA customers using a set of diverse communications resources, procedures and interactive tools in advance of and following the emergency event (*see id.*, p. 36); communicate information related to the emergency via the LUMA website (with real-time information and a Customer Outage Map showing outage and restoration information), news media and social messaging (*see id.*, p. 36) as well as the use of the customer call center (*see id.*, p. 21); maintain a Lifeline Residential Service for elderly customers and customers with a disability or medical condition, for which a database will be created and to whom automated outbound telephone calls will be made pre-event (*see id.*, p. 36); and report and provide updates on estimated restoration times (for events of certain levels) via telephone by the Customer Call Center Representative, LUMA's outage central website, or an established LUMA call center (when activated) (*see id.*, p. 40).

There is no controversy that LUMA's 2023 T&D ERP complies with the provisions of the T&D OMA. In the August 16th Order, this Energy Bureau did not conclude nor even suggest that the 2023 T&D OMA has any failings in connection with T&D OMA requirements. The T&D OMA does not require that LUMA adopt or consider ERPs adopted by other utilities or applicable

in other jurisdictions, nor is LUMA required to incorporate for the year 2023 or subsequent years, PSEG Long Island's ERP. Thus, the directives for LUMA to amend the 2023 T&D OMA based on the content of the ERP of PSEG Long Island are not supported by the T&D OMA.

Moreover, the T&D OMA does not contemplate or require LUMA to submit its ERP annually for approval by the Energy Bureau. The T&D OMA merely required that LUMA submit to the Energy Bureau for its information only, the 2021 ERP prepared during the Front End Transition Period as per Section 4.2 (g) of the T&D OMA, for its information only. Therefore, the August 16th Order instructing LUMA to incorporate specific procedures and protocols to the 2023 T&D ERP and subsequent ERPs for the next years and altering the provided timeline established under Section 6(m) of Act 83, inserts new obligations upon LUMA in excess of what was agreed in the T&D OMA. Such a determination impairs already settled contractual obligations in contravention of Article II, Section 3 of the Constitution of Puerto Rico. *See Domínguez Castro et al. v. ELA I*, 178 DPR 1, 79-86 (2010); *see also* T&D OMA, Section 15.5(f) (change in regulatory law as an operator right to termination).

B. The Energy Bureau has not been provided with expressly delegated authority to require amendments to an ERP.

The Energy Bureau is an independent regulator with supervisory and regulatory powers over electrical services companies such as LUMA and with authority to require compliance with energy public policy. *See, e.g.*, Sections 6.3 and 6.4 of Act 57-2014, as amended, by Act No. 17-2019, 22 PR Laws Ann. §§ 1054(b) and 1054(c) (2023). Under Section 8(d) of Act 120-2018, the Energy Bureau can assist the P3A in monitoring a contractor's performance and compliance under a public-private partnership contract, such as the T&D OMA. 22 PR Laws Ann. §1118. However, it “shall have no authority to alter or amend the partnership contract or the contract of sale and

shall not interfere with operational or contractual matters, except as provided in subsection (f) of this section.” *Id.*

In turn, the Emergency Management and Disaster Administration Bureau has the authority to develop and maintain up to date the State Emergency Management Plan for all of the emergency and disaster management phases and coordinate the actions to be taken by state agencies and municipalities to provide essential services promptly in order to address the needs of citizens and have a speedy recovery. 25 PR Laws Ann. § 3644(a). It also has the duty to organize emergency plans for state and municipal agencies and to coordinate interagency tasks for the duration of the emergency or disaster declaration. 25 PR Laws Ann. § 3644(b)-(c). The Governor of Puerto Rico has supreme authority with respect to the direction of the Puerto Rico Emergency Management Bureau (“PREMB”); however, the administration and immediate supervision thereof is delegated to the Secretary of the Government of Puerto Rico Department of Public Safety. 25 PR Laws Ann. § 3642.

LUMA respects this Energy Bureau’s delegated authority to oversee the performance of electrical companies and “oversee the quality, efficiency, and reliability of the electric power services provided by any electric power company certified in Puerto Rico to ensure a robust network that addresses the needs of the Island.” 22 Laws Ann. § 1054(b) (a) and (d). However, Act 57-2014, as amended, **does not grant the Energy Bureau authority to establish specific requirements for LUMA’s⁸ ERPs**. The Energy Bureau’s authority to require compliance with energy public policy does not expressly encompass the authority to add requirements for LUMA’s ERPs that were not adopted in Section 6(m) of Act 83 regarding ERPs. *See ECP Incorporated v. Oficina del Comisionado de Seguros*, 205 DPR 268, 277 (2020) (administrative entities may not

⁸ As Operator of the T&D System pursuant to the T&D OMA.

act beyond the powers granted to them by their enabling law). Neither Act 57-2014 nor Act 83 expressly confers the Energy Bureau authority to require amendments to ERPs or rewrite ERPs submitted to the Governor of Puerto Rico and both Houses of the Legislative Assembly pursuant to Section 6(m) of Act 83.

The Emergency Management and Disaster Administration Bureau has delegated authority to organize emergency plans for state and municipal agencies, and the Legislative Assembly also reserved authority to receive annual ERPs. The Legislative Assembly determined that emergency response and preparedness is not an area delegated exclusively by law to the Energy Bureau.

In the August 16th Order, this Energy Bureau did not explain which provisions of Act 83, Act 57-2014, and Act 17-2019, provide it authority and jurisdiction to add requirements to PREPA's (and LUMA's) ERPs or demand that electric power companies adopt determined frameworks for emergency response, including restoration times. It is a settled principle that administrative entities may not act beyond the powers granted to them by their enabling law since any administrative action that exceeds these powers is considered *ultra vires* and, consequently, null and void. *ECP Incorporated*, 205 DPR 268. By acting in excess of the authority provided in Section 6(m) of Act 83 and its delegated authority under Act 57-2014, this Energy Bureau transgressed its delegated powers by law acting *ultra vires*.

The doctrine of deference to administrative criteria is rooted in the expertise acquired by the agencies that operate through powers delegated by the Legislature. *See Mission Ind. PR v. JP*, 146 DPR 64, 129-30 (1998); *M. & B.S., Inc. v. Dept. of Agriculture*, 118 DPR 319, 325-26 (1987); *South P.P. Sugar Co v. Board*, 82 DPR 847, 864-65 (1961). In *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), the United States Supreme Court clarified the cases in which courts should not apply criteria of deference to an administrative opinion. According to that precedent, for the agency's

interpretation to entail deference, it must be a formal interpretation of public policy by the persons with final authority in the agency and must involve the substantive *expertise* of the agency. *Id.* p. 2417. On the requirement that the matter involve the agency's expertise, the U.S. Supreme Court has determined that when two agencies or entities have inherence on the matter, deference is conferred on the entity in the best position to develop *expertise* on the matter. Finally, courts do not accord deference to an agency interpretation other than the product of fair and considerate reasoning. *Id.*

Although it may be recognized that the Energy Bureau has delegated authority and expertise to the electric power industry and services, the matter in controversy concerns revising the 2023 T&D ERP and subsequent ERPs to be submitted going forward. Emergency response and preparedness are not matters expressly delegated by law to the expertise of the Energy Bureau. Consequently, the deference doctrine to administrative agencies does not apply to the August 16th Order.

Note that even when the Legislative Assembly approved detailed requirements for LUMA's ERP, it did not impose granular requirements such as the ones included in the August 16th Order for both the 2023 T&D ERP and future ERPs starting with the 2024 ERP. In the Puerto Rican legal system, if the language of the law does not create doubts and is clear as to its purpose, its own text is the best expression of the legislative intent. *See A.A.R., Ex parte*, 187 DPR 835, 884 (2013).

The statutory requirements expressly promulgated by the Legislative Assembly under Section 6(m) of Act 83 did not arise from a vacuum but from a calm and careful judgment of the entity that in our legal system is entrusted with establishing public policy: the Legislative Branch. *See id.* The adoption of those requisites left no doubt that the Legislative Assembly understood

such as appropriate to reach the purpose sought, thus rejected the adoption of others, such as those included by the Energy Bureau in the August 16th Order. The clear mandate by the Legislative Assembly enumerating requirements for PREPA's ERPs and excluding others, must be read to exclude other and additional requirements. *See Sucesión Álvarez Crespo v. Pierluisi*, 150 DPR 252, 275–76 (2000) (stating the rule of legal hermeneutics called *expressio unius est exclusio alterius*, the specific mention of a person or thing implies the exclusion of other persons or things).

Moreover, the August 16th order deals with operational decisions and is thus at odds with Section 8(d) of Act No. 120-2018. *See* 22 PR Laws Ann. §1118 (*providing* that the Energy Bureau “shall have no authority to alter or amend the partnership contract or sales contract and shall not interfere with operational or contractual matters,” except as provided in Section 8(f)(f), regarding the Energy Bureau's jurisdiction under PREPA's Organic and special applicable laws, to review and approve any modification of rights, rents, rates or any other type of charge for electric energy services).

LUMA respectfully contends that the Energy Bureau exceeded its authority and power under Act 57-2014 when issuing the August 16th Order and requiring LUMA to revise the 2023 T&D ERP and insert specific requisites on subsequent ERPs to be submitted from 2024 onward, including setting December 15th as the date to file annually, ERPs with this Energy Bureau.

C. The August 16th Order contravenes LUMA's due process rights.

The constitutional guarantee of due process assures everyone that they shall not be deprived of liberty or property without a fair, equitable, and reasonable trial. *See* Const. E.L.A. art. II, sec. 7, 1 PR Laws Ann.; Const. USA Amdt. XIV §1; Const. USA, Amdt. V; *see e.g., Rivera Rodríguez & Co. v. Lee Stowell*, 133 DPR 881, 887 (1993); *López Vives v. Police of PR*, 118 DPR 219, 231 (1987). In its substantive aspect, the guarantee of due process of law requires evaluating

the constitutionality of a state action to protect fundamental rights. *Rivera Santiago v. Srio. Treasury*, 119 DPR 265, 273 (1987). Under this guarantee, the State is prevented from affecting through its actions the property or freedom interests of an individual in an unreasonable, arbitrary, or capricious manner. *Hernández v. Secretario*, 164 DPR 390, 394-95 (2005) (citing cases); *see also, e.g., Meléndez de León v. Keleher*, 200 DPR 740, 759 (2018) (“due process of law ‘represents a barrier to arbitrary or capricious state actions affecting citizens’ fundamental rights.’”)

Substantive protection extends to arbitrary and capricious government actions by administrative agencies. *See, e.g.,* (“due process of law also provides protection against administrative arbitrariness”); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (“The right not to be subject to “arbitrary or capricious” action by a state either by legislative or administrative action is commonly referred to as a “substantive due process right.”). Due process of procedural law, on the other hand, deals with “the minimum procedural guarantees that the State must provide to an individual when affecting his life, property or liberty.” *Rivera Santiago*, 119 DPR 273. “The essential guarantee of the due process clause is that it is fair. The procedure must be fundamentally fair to the individual in the resolution of the facts and rights that serve as the basis for those governmental actions that deprive him of his life, liberty or property.” *Id.*, on page 274 (citations and internal quotation marks omitted).

In evaluating claims of due process violations, courts first determine whether a proprietary or libertarian interest is at stake. *Rivera Rodriguez & Co. v. Stowell Taylor*, 133 DPR 881, 887 (1993). Once it is determined that this requirement has been met, due process is defined given that “different situations may require different types of proceedings, but there always remains the general requirement that the governmental process must be fair and impartial.” *Id.* at p. 888. Due process of law is circumstantial and pragmatic in nature, so its requirements will depend on the

context of the procedure. *Punta de Arenas Concrete v. Auction Board, Mun. Anthills*, 153 DPR 733, 740-42 (2001).

Among the guarantees that make up the due process of law, jurisprudence has recognized that the administrative decision must be informed, with knowledge and understanding of the evidence corresponding to the case. *A.D.C.V. v. Superior Court*, 101 DPR 875, 883 (1974). *See also Rafael Rosario Assoc. v. Dept. Familia*, 157 DPR 306, 330 (2002). In addition, the findings of fact and the reasons for the administrative decision must be stated. *Rivera Santiago*, 119 DPR at p. 274. To ensure due process guarantees, parties must have an opportunity to present and refute evidence and be able to do so effectively. *See Rentas Nieves v. Betancourt Figueroa*, 201 DPR 416, 429 (2018). Those parties to an administrative procedure have the right to participate effectively in the process. *Commission of Citizens to the Rescue of Caimito v. G.P. Real Property S.E.*, 173 DPR 998, 1014 (2008) (by the imperative of due process, parties must be notified of administrative determinations so that they can effectively participate and challenge determinations in court). In view of this, “[t]he right to a public hearing would be meaningless if [the administrative body] were allowed to base its decision on evidence received without the knowledge of the parties, outside the hearing, without giving the interested parties an opportunity to rebut or explain it by cross-examining or presenting other evidence to the contrary.” *Lopez v. Planning Board*, 80 DPR 646, 670 (1958). After all, the right to due process is a constitutional imperative.

Due process guarantees include that individuals have adequate notice of actions that the state prohibits or requires. *See White Tel. Co. V. Fed. Commc'ns Comm'n*, 991 F.3d 1097, 1116 (10th Cir 2021) (citation omitted). This pursues two guiding purposes (1) that the regulated entity can conform its conduct to the requirements of the State; and (2) to prevent agencies from acting

unreasonably or arbitrarily. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, (2012); *Henríquez v. Consejo Educación Superior*, 120 DPR 194, 202 (1987).

On due process guarantees in administrative proceedings, Section 3.1 of LPAU, 3 PR Laws Annot. § 9641 (2023), provides as follows:

In any formal award procedure before an agency, the following rights shall be safeguarded:

- (a) Right to timely notice of charges or complaints or claims against a party.
- (B) Right to Present Evidence.
- (C) Right to an impartial adjudication.
- (D) Right to have the decision [] [based] on the case file.

Id.

Section 1.3(b) of the LPAU defines “adjudication” as the pronouncement by which an agency determines the rights, obligations, or privileges vested in a party. 3 LPRA §9603(b). The Supreme Court of Puerto Rico has recognized that the informal or summary nature of an adjudicative procedure is not an obstacle to guaranteeing affected parties the “irreducible minimum of procedural guarantees recognized as fair and equitable.” *Torres Santiago v. Dept. of Justice*, 181 DPR 969, 993 (2011) (determining that the Department of Justice must grant minimum procedural guarantees to applicants for the benefit of legal representation); 994 (“the nature of informality cannot obliterate the minimum guarantees of fair and equitable process”); *see also Baerga Rodríguez v. F.S.E.*, 132 DPR 524, 538 (1993) (recognizing in the context of an Informal proceeding before the Puerto Rico Industrial Commission that the minimum procedural guarantees applicable to formal proceedings that have been deemed fair and equitable apply to informal proceedings). Even if the proceedings are informal or summary, the affected party must be given adequate notice, an opportunity to confront the other party’s evidence and present its own evidence, and the opportunity to review the administrative determination judicially. *Almonte et al. v. Brito*, 156 DPR 475, 482 (2002).

On the requirement to provide fair warning to regulated parties, the U.S. Supreme Court has held that a court cannot give deference to a new interpretation that creates an “unfair surprise” for regulated parties. *Kisor*, 139 S. Ct. at p. 2418.

As required by Section 6(m) of Act 83, LUMA updates its ERP prior to submission to the Puerto Rico Governor, both Houses of the Legislative Assembly, and the Energy Bureau no later than May 31st each year. However, in the August 16th Order, the Energy Bureau purported to rewrite the language of Section 6(m) of Act 83 by adding specific requisites to the ERPs and altering the provided timeline established under the law. The Energy Bureau was required to provide LUMA with reasonable notice that it was considering adding new requisites to an already submitted (2023 T&D ERP) and subsequent ERPs to be filed from 2024 forward. The Energy Bureau was required to allow LUMA to submit written information and testimony regarding the Energy Bureau's intention to alter the requisites and the established timeframe outlined under Section 6(m) of Act 83, explain its determination with reference to the information, data, and testimony LUMA submitted for its consideration, and issue a determination supported by substantial evidence in the administrative record. At this time, LUMA has not had access to the underlying opinion or proposal that this Energy Bureau used to issue its determination in the August 16th Order nor access to the methodology employed by the Energy Bureau. Importantly, the August 16th Order imposed on LUMA the PSEG- Long Island ERP model, without any attempt to discuss this with LUMA or other public agencies involved in emergency preparedness and response nor any opportunity to provide comments or input.

Given the absence of prior notice or an opportunity to timely present its position or evidence regarding adding specific requirements to the ERPs and altering the provided timeline established under Section 6(m) of Act 83, LUMA was not guaranteed the important procedural

protection of adequate notice that our legal system offers before an administrative agency issues a determination affecting the rights or obligations of a regulated entity and regulatory orders of an administrative agency of the State. *See Insurance Commissioner v. Real Legacy Assurance*, 179 DPR 692, 707, 719 (2010) (despite the framework of relative informality and flexibility of administrative processes, they must conform to the fundamental requirement of providing a fair process, including full disclosure of all facts and issues under discussion, and an opportunity to be heard before their interests are affected). This renders the Energy Bureau's determination null and void due to being an arbitrary administrative determination.

Finally, assuming for discussion purposes only that the Energy Bureau has jurisdiction to direct modifications on an ERP, the Energy Bureau has not approved procedural regulations on the procedure to be followed when reviewing ERPs. The Energy Bureau has also not approved ERP review standards or guidelines for PREPA, Genera, and LUMA to know in advance, the regulatory criteria and standards that guide the determination of the Energy Bureau to review the ERPs. Given the lack of substantive and procedural regulations applicable to ERP review processes before the Energy Bureau, the regulated entities that participate in this process, including PREPA, Genera, and LUMA, as PREPA's agent, are uncertain about what the applicable decision parameters and standards will be. In these circumstances, there is a clear danger of administrative arbitrariness. *See Sánchez et al. v. Dept. Housing*, 184 DPR 95, 123 (2011) (delegation of powers to administrative agencies requires that appropriate rules be established to guide their determinations).

WHEREFORE, LUMA respectfully requests that the Energy Bureau **take notice** of the aforementioned for all purposes and **reconsider and vacate the pertinent parts of** the August 16th Order as requested in this Motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on the 23rd of October, 2023.

We hereby certify that we filed this Motion using the electronic filing system of this Energy Bureau and that we will send an electronic copy of this Motion to counsel for PREPA Lionel Santa Crispín, lionel.santa@prepa.pr.gov, and counsel for GeneraPR LLC, Jorge Fernández, jfr@sbgbllaw.com, and Alejandro López, alopez@sbgbllaw.com.



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