

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

NEPR

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

CASE NO. NEPR-AP-2020-0025

**SUBJECT: LUMA's Motion for
Reconsideration of Final Resolution and
Order**

**LUMA'S MOTION FOR RECONSIDERATION OF
FINAL RESOLUTION AND ORDER**

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"), and respectfully states and requests the following:

I. INTRODUCTION

On January 26, 2024, the Puerto Rico Energy Bureau ("Energy Bureau" or "PREB") issued a *Final Resolution and Order on Performance Targets for LUMA Energy, LLC and LUMA Energy ServCo, LLC* ("Final Resolution and Order"). The Energy Bureau entered its determination on the proposal filed by LUMA to adopt an incentive Performance Metrics scheme that arises under the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement of June 22, 2020 ("T&D OMA"). In support thereof, LUMA submitted for the consideration of the Energy Bureau its Revised Performance Metrics Targets proposal and Revised Annex IX to the T&D OMA ("Revised Annex IX") on October 28, 2022, the testimonies of its twelve (12) witnesses and two (2) expert witnesses, and the exhibits admitted during the Evidentiary Hearing, as well as a

final legal brief and reply briefs where LUMA addressed the arguments and proposals of intervenors, to wit, the Independent Consumer Protection Office (“ICPO”) and the Puerto Rico Local Environmental and Civil Organizations (“LECO”).

In the Final Resolution and Order, this Energy Bureau approved LUMA’s proposed Performance Metrics,¹ including the Performance Metrics that LUMA proposed to defer,² the proposed Key Performance Metrics, and the Major Outage Event Performance Metrics (“MOE Metrics”). However, the Final Resolution and Order introduced amendments to the Revised Annex IX of the T&D OMA that constitute an arbitrary and capricious action that substantially interferes with essential provisions of the T&D OMA, materially affect LUMA’s ability to earn the contractual incentive fee, are unsupported by the record, and result in clear violations of due process requirements.

Specifically, the key determinations of the Final Resolution and Order that LUMA argues should be reconsidered are: (1) the Energy Bureau’s modification of the contractually agreed upon tier structure for non-binary metrics as was negotiated by the parties to the T&D OMA (ranging from 25% to 150%, the decision to substitute the same with three tiers corresponding to 75%, 100% and 125%, and the deadband set effectively at the 75% tier; (2) the decision to change the

¹ The approved Performance Metrics were: J.D. Power Customer Satisfaction Survey (Residential Customers); J.D. Power Customer Satisfaction Survey (Business Customers); Average Speed of Answer (minutes); Customer Complaint Rate; Abandonment Rate; OSHA Recordable Incident Rate; OSHA Fatalities; OSHA Severity Rate; OSHA Days Away, Restricted, and Transfer Rate; System Average Interruption Frequency Index (“SAIFI”); System Average Interruption Duration Index (“SAIDI”); Distribution Line Inspections & Targeted Corrections; Transmission Line Inspections & Targeted Corrections; T&D Substation Inspections & Targeted Corrections; Operating Budget; Capital Budget: Federally Funded; Capital Budget: Non-Federally Funded; Days Sales Outstanding: General Customers; Days Sales Outstanding: Government Customers; and Overtime and Major Outage Performance Metrics. The Energy Bureau also approved additional metrics that it had required LUMA to include in its proposal: Vegetation Maintenance Miles Completed (230kV, 115kV, 38kV, primary Distribution); and NEM Project Activation Duration. The Energy Bureau also deferred one the required additional metrics on energy efficiency and demand responses, Energy Savings as Percent of Total Energy Sales; and Peak Demand Savings as a Percent of Total Peak Demand.

² The Performance Metrics that were deferred are: First Call Resolution, Momentary Average Interruption Frequency Index (“MAIFI”); Customers Experiencing Multiple Interruptions (“CEMI”); and Reduction in Network Line Losses.

tiers for the MOE Metrics to include two tiers of 50% and 100% instead of the proposal of the Revised Annex IX of the T&D OMA of 25%, 50%, 100%, 125% and 150%; (3) the Energy Bureau's adoption of an annual process to determine performance explaining that the Energy Bureau will issue a final determination that shall be used by the Puerto Rico Electric Power Authority ("PREPA") to pay the incentive fee; (4) modification of the approach to performance measurements for certain metrics different from LUMA's proposal; (5) modification of the base points allocated to certain metrics as to originally proposed by LUMA; (6) modification of the performance baseline for certain metrics, in some instances considering LUMA's performance data from Fiscal Years 2022 and 2023; (7) modification of the Annual Performance Targets employing three different approaches, in a departure from LUMA's proposal which was the only comprehensive proposal submitted for the record; and (8) the determination to approve Performance Metrics that LUMA did not submit for consideration on the following performance areas: (a) Interconnections; (b) Energy Efficiency/Demand Response; and (c) Vegetation Management.

For the reasons set forth in detail below, LUMA hereby requests that this Energy Bureau reconsider the above-mentioned determinations. Two foundational arguments support LUMA's position that the Energy Bureau incurred legal error and abuse of discretion: (1) the modifications to the incentive structure of the Revised Annex IX to the T&D OMA deprive LUMA of its contractual rights, re-shape key provisions of the T&D OMA on Performance Metrics and the Incentive Fee, and amount to a substantial impairment of the legal obligations of the Government of Puerto Rico under the T&D OMA; and (2) the Energy Bureau modified components of the Revised T&D OMA and LUMA's proposed Performance Metrics Targets in contravention of bedrock due process guarantees: the rights to adequate notice and opportunity to be heard and

present evidence and the right to have an impartial administrative agency issue a final decision based on the administrative record. Particularly, the Energy Bureau did not provide LUMA prior notification that the base points and the incentive tiers were under discussion, nor that a new approach or incentive structure would be developed in this proceeding.

Moreover, as will be shown, in the Final Resolution and Order, this Energy Bureau introduced evidence for the record. This, notwithstanding the fact that LUMA requested in 2021, almost two years prior to the Evidentiary Hearings, that the Energy Bureau disclose its witnesses, consultants, and/or the documentary evidence that it intended to present in this proceeding. The Energy Bureau did not issue said disclosure, nor did it submit testimonial or documentary evidence during the Evidentiary Hearing that could support several of the determinations included in the Final Resolution and Order.

LUMA also requests clarification of those portions of the Final Resolution and Order that refer to the modified Annual Performance Targets as to each Performance Metric compared with Appendix B to the Final Resolution and Order. As will be explained in Section III. D, *infra*, the numbers dictated for the Annual Performance Targets in the body of the Final Resolution and Order differ greatly from the numbers stated in Appendix B to the Final Resolution and Order. As such, there is inconsistency and uncertainty on the corresponding Annual Performance Targets, which are those in Appendix B or those included in the discussion for each specific metric, which inconsistency is unreasonable.

II. BACKGROUND

After a competitive solicitation process that took place over sixteen (16) months, and after the Partnership Committee of the P3 Authority, which included the Chairman of this Energy Bureau,³ selected LUMA as the preferred proponent based on LUMA's proposal which included acceptance or rejection of the T&D OMA. Several drafts of the T&D OMA were discussed by the parties and the Partnership Committee.

On June 17, 2020, this Energy Bureau issued an Energy Compliance Certificate certifying that the T&D OMA complies with Puerto Rico's public energy policy and the applicable regulatory framework that includes Act 57-2014, Act 17-2019, and Regulation 9137 on Performance Incentive Mechanisms, among others.⁴

The T&D OMA is a public-private partnership agreement subject to the laws and regulations of Puerto Rico governing public-private partnerships, specifically Act 120-2018, as amended, known as the "Puerto Rico Electric Power System Transformation Act" and Act 29-2009, as amended, known as the "Public-Private Partnership Act."

PREPA and the Puerto Rico Public-Private Partnerships Authority ("P3 Authority") entered into T&D OMA with LUMA as Operator of the transmission and distribution system ("T&D System") to (i) provide management, operation, maintenance, repair, restoration and replacement, and other related services for the T&D System, in each case that is customary and appropriate for a utility T&D System service provider, and (ii) establish policies, programs, and procedures with respect thereto. *See* T&D OMA Section 5.1.

³ *See* Partnership Committee Report for the Puerto Rico Public-Private Partnership for the Electric Power Transmission and Distribution System dated May 15, 2020, *available* at <https://www.p3.pr.gov/wp-content/uploads/2020/06/20-0520-02-partnership-committee-report-r18.pdf>, p. 31 (last visited February 15, 2024).

⁴ *Available* at <https://energia.pr.gov/wp-content/uploads/sites/7/2020/06/Resolution-and-Order-NEPR-AP-2020-0002.pdf>.

The T&D OMA that was executed by the PREPA, the P3 Authority and LUMA on June 22, 2020, included an Annex IX with the Performance Metrics and performance incentive mechanism chosen by the Government of Puerto Rico and the parties to the T&D OMA to determine the ability of the Operator of the T&D System to earn the contractual incentive fee.⁵

Pursuant to Section 4.2(f) of the T&D OMA, ManagementCo was required to prepare a revised Annex IX of the T&D OMA including (i) “proposed baselines, Target and Minimum Performance Levels for certain Performance Metrics [as the term is defined in the T&D OMA]; (ii) Key Performance Metrics; (iii) Major Outage Event Performance Metrics (“MOE Metrics”), together with an explanation of the basis for each” and submit them to the P3 Authority for review and comment. Once the review and comment phase were completed with the P3 Authority, the revised Annex IX would be submitted to this Energy Bureau for review and approval. *See, Id.* The T&D OMA included three main Performance Categories: (i) Customer Satisfaction; (ii) Technical, Safety, and Regulatory; and (iii) Financial Performance, in addition to the MOE Metrics. *See* Table 1 of Annex IX of the T&D OMA. Table 2 of Annex IX of the T&D OMA further specifies the Performance Metrics included in each category, and Table 3 shows the MOE Metrics. Approval of the Performance Metrics in Annex IX of the T&D OMA, as revised, was a condition precedent to LUMA commencing operations, *see* T&D OMA, Section 4.5 (h), that was conditionally waived with the expectation that they would be approved prior to Service Commencement Date. *See* Limited Waiver of June 1, 2021, Section 1(b).⁶

⁵ As will be discussed in detail in forthcoming sections, on June 17, 2020, the Energy Bureau certified that the T&D OMA (and the Annex IX with the tiers that this Energy Bureau reviewed) complied with Puerto Rico’s public energy policy and the applicable regulatory framework that includes Act 57-2014, Act 17-2019, and Regulation 9137 on Performance Incentive Mechanisms, among others.

⁶ The limited Waiver was filed in this proceeding on June 4, 2021, *see Motion in Compliance with Request for Information of June 2, 2021, and Submitting Executed Copy of Limited Waiver*, available at <https://energia.pr.gov/wp-content/uploads/sites/7/2021/06/20210604-Motion-in-Compliance-with-Request-for-Information-of-June-2-2021-and-Submitting-Executed-Copy-of-Limited-Waiver.pdf>

On December 23, 2020, the Energy Bureau commenced this proceeding by issuing a Resolution and Order setting forth the legal and regulatory framework pursuant to which it would conduct the evaluation and establishment of the Performance Targets and Performance Incentive Mechanisms (“PIMs”) that would further the compliance and implementation of the public policy and objectives established through Act 57-2014, known as the *Puerto Rico Energy Transformation and RELIEF Act* and Act 17-2019, known as the *Puerto Rico Energy Public Policy Act*. Through the December 23 Resolution and Order, this Energy Bureau also published public interest principles. It determined that the baselines and minimum compliance benchmarks for the Puerto Rico electric system established in Case No. NEPR-MI-2019-0007 (the “Baseline Proceeding”) would guide LUMA in requesting approval of the PIMs.

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

On April 23, 2021, ICPO filed a *Petition for Intervention* before this Energy Bureau. Its request for intervention was granted in a Resolution and Order issued by this Energy Bureau on May 7, 2021. Then, on July 15, 2021, LECO filed a *Joint Petition for Intervention* before this Energy Bureau. Their request for intervention was granted by a Resolution issued on August 5,

2021, pursuant to the Energy Bureau's Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Procedures, Regulation No. 8543 ("Regulation 8543").

On June 1, 2021, the Parties executed the Limited Waiver. The Parties stipulated that they had "worked diligently since the Effective Date of the [T&D OMA] to carry out the Front-End Transition and, in accordance with its obligations under the [T&D OMA], [LUMA] . . . executed the Front-End Transition Plan and completed the Handover Checklist, to ensure an orderly transition of the responsibility for the management, operation, maintenance, repair, restoration and replacement of the T&D System to [LUMA] prior to the Target Service Commencement Date⁷ of May 8, 2021, or as soon as practicable thereafter." *See* Limited Waiver, Preliminary Matters, item B.

As the Limited Waiver shows, the P3 Authority and PREPA determined that "it is in the interest of the People of Puerto Rico to enable [LUMA] to timely commence the vital work of recovering and transforming the T&D System, . . . for the Parties to agree to waive certain documentary conditions precedent set forth in the Transaction Documents to Operator's commencement of O&M Services . . . [,]" and that had not yet been satisfied despite the efforts of the Parties. *Id.*, items C and D. LUMA agreed that it is prepared to provide O&M Services pursuant to the Supplemental Terms Agreement. *Id.* The Parties further stipulated in the Limited Waiver that the documentary conditions precedents that had not been satisfied "do not impede [LUMA] from providing O&M Services pursuant to the Supplemental Terms Agreement." *Id.*, item C.

⁷The T&D OMA defines "Target Service Commencement Date" as "the date that is 320 days after the Effective Date in the event the Effective Date is after February 16, 2020," which is May 8, 2021.

Given that on or before June 1, 2021, PREPA did not exit Title III, and that most of the conditions precedent set in the T&D OMA were met⁸, and select conditions precedent were waived, the Interim Service Commencement Date occurred on June 1, 2021. *Id.* item E, and Sections 4(a) and 5. Thus, LUMA began providing O&M Services on June 1, 2021, starting the “Interim Period⁹ Service Commencement Date. *See* T&D OMA Sections 4.5 (“Conditions Precedent to Service Commencement”) and 4.7(b) (“Establishment of Service Commencement Date”); *see also* Supplemental Terms Agreement, Sections 2.2 (“Supplemental Agreement Effective Date; Agreement Regarding Service Commencement Date”) and 2.3 (“Interim Period Service Commencement Date”).

For the limited purpose of entering the Interim Period, select conditions precedent were waived, including the condition precedent “set forth in Section 4.5(h) of the [T&D OMA] related to the approval by [the Energy Bureau] of the Performance Metrics,” that LUMA filed on February 25, 2021, in this proceeding. *See* Limited Waiver, Section 1(b). Said condition precedent “must be satisfied prior to and as a condition to the Service Commencement Date.” *Id.*

On August 18, 2021, LUMA filed a revised *Submittal of Request for Approval of Revised Annex IX to the T&D OMA* (the “August Performance Metrics Targets Request”), which included as Exhibit I, a revised Annex IX. LUMA also submitted the pre-filed testimonies of eight witnesses in support of its Revised Performance Metrics Targets Request. Through its August Performance Metrics Targets Request, LUMA requested that this Energy Bureau (i) accept and approve the

⁸ Subsequent to the execution of the Limited Waiver, conditions in Section 4 (c) of the Limited Waiver were satisfied, and LUMA confirmed that the Service Accounts were funded as required.

⁹ Pursuant to the Supplemental Terms Agreement, the Interim Period is the term in which the “th[e] Supplemental Agreement shall be in effect[,] from the Supplemental Agreement Effective Date [June 1, 2021] through the earlier of (a) the Service Commencement Date and (b) the Interim Period Termination Date (such period of time, the “Interim Period”), unless earlier terminated in accordance with the terms [of the Supplemental Terms Agreement].” *See* Supplemental Terms Agreement, Section 2.4.

Revised Annex IX and LUMA's Revised Performance Metrics Targets; (ii) set the Performance Metrics and Targets to apply for an initial period of three years of operations; and (iii) allow the periodic review of the performance baseline and Targets in accordance with the T&D OMA and Energy Bureau *Regulation for Performance Incentive Mechanisms*, Regulation No. 9137 dated December 17, 2019 ("Regulation No. 9137"). LUMA also raised concerns regarding the significant gaps in PREPA's processes and data collection, which posed a challenge to setting appropriate targets for the proposed Performance Metrics.

On November 17, 2021, ICPO and LECO submitted the pre-filed testimonies of their proposed witnesses, which included proposals to add additional Performance Metrics as part of the Revised Annex IX.¹⁰

Discovery processes were conducted between November 18, 2021, and December 28, 2021. Throughout that period, LUMA answered eight Requirements for Information issued by the Energy Bureau, four notified by LECO, and one served by ICPO. Meanwhile, LECO answered three Requests for Information issued by LUMA. ICPO responded to four Requests for Information served by LUMA.

On December 9, 2021, LUMA filed a motion entitled *Request for the Energy Bureau to Disclose Those Consultants or Witnesses and Evidence Intends to Employ at the Evidentiary Hearing and Petition to Allow LUMA to Conduct Discovery*, whereby it requested that the Energy Bureau disclose if it intended to employ any consultant or witness at the evidentiary hearing and provide the following: (1) their names; (2) if they have performed any analyses or studies on LUMA's or the intervenors' witnesses' testimonies that the Energy Bureau will submit for the

¹⁰ LECO presented the testimonies of Agustín Irizarry Rivera, an electrical engineer, and José Alameda, an economist. ICPO propounded the testimonies of Gerardo Cosme, also an electrical engineer, and Beatriz González, an attorney.

record in this proceeding; and (3) if they plan to summon- witnesses or submit evidence at the hearing (“LUMA’s 2021 Request for PREB to Disclose and Petition for Discovery”). The purpose of said request was to avoid surprises during the evidentiary hearing and in the final decision, regarding evidence, proposals, or other materials to be used by the Energy Bureau in its final decisions in this proceeding. The record shows, however, that the Energy Bureau, did not disclose the evidence it would use in this proceeding. In fact, the Energy Bureau did not issue a Resolution and Order adjudicating LUMA’s 2021 Request for PREB to Disclose and Petition for Discovery.

Instead, on December 22, 2021, the Energy Bureau issued an interlocutory ruling that, for all intended purposes, considered evidence on adjudicative facts and granted some of the relief sought by intervenors, without prior notice to LUMA or the opportunity to conduct discovery on the Energy Bureau’s intent to consider adding metrics in this proceeding (“December 22 Resolution and Order”). To wit, the Energy Bureau entered a Resolution and Order, concluding that additional performance-based incentive metrics would be evaluated as part of this procedure. Particularly, the Energy Bureau identified three additional categories of Performance Metrics: (i) Interconnection of Distributed Energy Resources; (ii) Energy Efficiency and Demand Response; and (iii) Vegetation Management and ordered LUMA to file a revised Annex IX to the T&D OMA, including Targets and supporting metrics for (i) Interconnection; (ii) Energy Efficiency/Demand Response; and (iii) Vegetation Management. This Energy Bureau also ordered LUMA to provide supplemental or revised direct pre-filed testimonies for these new metrics and Targets, allowed additional discovery by the intervenors and LUMA related to the three additional metrics, and amended the procedural calendar to provide for such discovery.

On February 17, 2022, LUMA filed a motion titled *LUMA’s Response in Opposition and Objection to December 22, 2021 Resolution and Order and Request to Vacate or Grant LUMA*

Relief from the December 22, 2021 Resolution and Order (“LUMA’s Objection”). LUMA argued that the entry of the December 22 Resolution and Order was arbitrary and in violation of LUMA’s due process rights for several reasons. LUMA established that the Energy Bureau incorrectly relied on several supplemental responses to discovery propounded by the Energy Bureau and by intervenor LECO and did not afford LUMA a prior opportunity to be heard concerning the objections to the additional Performance Metrics that LUMA had timely raised. LUMA also argued that upon entering the December 22 Resolution and Order, the Energy Bureau unfairly admitted those responses to discovery requests as evidence.

In addition, LUMA stated that the Energy Bureau erred because it did not first allow LUMA to file rebuttal testimonies regarding proposed additional Performance Metrics and did not await until the conclusion of the evidentiary hearing with the benefit of the full record, to issue a determination on whether additional categories of metrics are warranted. LUMA also argued that the December 22 Resolution and Order constituted an improper exercise of the Energy Bureau’s ability to take administrative notice of filings made in other regulatory proceedings as it did not provide LUMA a reasonable opportunity to be heard. Moreover, LUMA stressed that the Energy Bureau established an abbreviated procedural calendar for LUMA to add the new metrics to the Revised Annex IX to the T&D OMA, which only underscored the unfair and impractical nature of the December 22 Resolution and Order.¹¹

¹¹ On March 14, 2022, LECO filed a *Reply to LUMA’s Response in Opposition to the December 22, 2021 Resolution and Order on Additional Metrics*. LECO averred that the Energy Bureau had the authority to require the inclusion of additional metrics in this proceeding. LECO also set forth that the December 22 Resolution and Order preserves the due process rights to all parties in this proceeding and that LUMA’s Objection constitutes a tardy motion for reconsideration.

On March 24, 2022, LUMA filed *LUMA’s Response to LECO’s Reply to LUMA’s Response in Opposition to the December 22, 2021 Resolution and Order on Additional Metrics*. LUMA posed that the opportunity to conduct discovery as to the additional Performance Metrics does not cure the defects of the December 22 Resolution and Order arising from the fact that it was entered in violation of LUMA’s due process rights. As such, LUMA restated its request for this Energy Bureau to vacate the December 22 Resolution and Order or otherwise grant LUMA relief.

On August 1, 2022, this Energy Bureau entered a Resolution and Order, denying LUMA's Objection ("August 1st Order"). In turn, it ordered LUMA to file within twenty (20) days: (i) a revised Annex IX to the T&D OMA, including Targets and supporting metrics for Interconnection, Energy Efficiency/Demand Response, and Vegetation Management; and (ii) a supplemental or revised direct pre-filed testimony for Targets and supporting metrics for the Performance Metric Targets described in the December 22 Resolution and Order.

On October 28, 2022, LUMA filed the document entitled *Submission of Revised Annex IX to the T&D OMA*. The filing included the Revised Annex IX to conform to the August 1st Order with the inclusion of the three additional metrics. LUMA also submitted the pre-filed testimonies of two witnesses in support of its Revised Performance Metrics Targets Request. LUMA requested that this Energy Bureau (i) accept the revised Annex IX and LUMA's Revised Performance Metrics Targets and (ii) deem LUMA complied with the December 22nd and August 1st Orders.

On January 30, 2023, this Energy Bureau issued a Resolution which included, as Attachment A, a *Hybrid Evidentiary Hearing Protocol* detailing various aspects of how the evidentiary hearing scheduled would be conducted. Among other matters, this Energy Bureau instructed that any documentary evidence the parties proposed to introduce into evidence during the Evidentiary Hearing must be provided by e-mail or hand delivery to the Energy Bureau and to all other parties in PDF format or JPG format before the Hearing; no later than February 2, 2023, at 5:00 pm (E.T.).

On that same day, January 30, 2023, LUMA filed a *Motion Requesting Clarification on Evidentiary Hearing Protocol*. Therein, LUMA requested the Energy Bureau to provide clarification on the order of the witnesses, and whether the parties would be allowed to leave documents and materials in the hearing room overnight. LUMA also requested the sitting

arrangements for the witnesses and the parties' counsel, if only one attorney per party could examine a witness, and if witnesses would be sworn each day at the start of each session. LUMA also requested that the Energy Bureau identify who the Energy Bureau's consultants examining witnesses at the hearing will be.

On February 1, 2023, three business days prior to the start of the evidentiary hearing, this Energy Bureau entered a Resolution informing that case management issues, such as a potential breakdown of the hearing sessions by sub-topics, would be addressed during the hearings. This Energy Bureau clarified that the parties could utilize only one attorney per topic. On that same day, this Energy Bureau also issued a separate Resolution setting the Evidentiary Hearing Agenda for February 7-10, 2023. The Evidentiary Hearing Agenda was included as Attachment A to the Resolution. The Energy Bureau divided the hearing days into various Performance Metrics categories. However, the Energy Bureau did not disclose the names of the consultants who would pose questions nor any evidence that the consultants or the Energy Bureau would use or consult during the evidentiary hearing or in connection with the final determination.

During the first session of the Evidentiary Hearing on February 7, 2023, Mr. Dennis Seilhammer conducted the proceedings as the Hearing Examiner. On the first day of the Evidentiary Hearing, the Energy Bureau called those witnesses whose testimony pertained to the "general approach to the Performance Metrics" proposed in this proceeding. After a discussion on the pending procedural matters, including case management issues, the witnesses took oaths or affirmations, and the cross-examination of witnesses took place. This Energy Bureau decided that cross-examination of the witnesses would be performed as follows: first, the consultants for the Energy Bureau and the Commissioners would have the first turn to ask questions to all witnesses scheduled for the session. Then, counsel for intervenors would have a turn to examine all the

witnesses. LUMA would close all cross-examinations. During the first day of the Evidentiary Hearing, cross-examinations were conducted on witnesses Mario Hurtado, Donald Hall, Branko Terzic, and Juan Lara for LUMA; and Agustín Irizarry and José Alameda for LECO. All of those witnesses testified as to the general regulatory framework at issue.

The second session of the Evidentiary Hearing was held on February 8, 2023. During the second session, the Energy Bureau arranged to receive the testimonies of the witnesses that pertained to the “Technical, Safety, and Regulatory” Performance Metrics category. This category included the following Performance Metrics: OSHA Recordable Incident Rate; OSHA Fatalities; OSHA Severity Rate; OSHA Days Away, Restricted, and Transfer Rate; System Average Interruption Frequency Index (“SAIFI”); System Average Interruption Duration Index (“SAIDI”); Vegetation Maintenance Miles Completed (230kV, 115kV, 38kV, primary Distribution); Distribution Line Inspections & Targeted Corrections; Transmission Line Inspections & Targeted Corrections; T&D Substation Inspections & Targeted Corrections; NEM Project Activation Duration; Energy Savings as Percent of Total Energy Sales; and Peak Demand Savings as a Percent of Total Peak Demand. Cross-examinations were conducted for witnesses Curtis Clark, Lee Wood, Don Cortez, and Diane Watkins for LUMA; Agustín Irizarry for LECO; and Gerardo Cosme for ICPO.

The third session of the Evidentiary Hearing was held on February 9, 2023. The Energy Bureau scheduled the examination of the witnesses on the “Customer Satisfaction” Performance Metrics in the morning session. The metrics under the “Customer Satisfaction” category include J.D. Power Customer Satisfaction Survey (Residential Customers); J.D. Power Customer Satisfaction Survey (Business Customers); Average Speed of Answer (minutes); Customer Complaint Rate; and Abandonment Rate. Cross-examinations were conducted on witnesses

Jessica Laird and Melanie Jeppesen for LUMA; Agustín Irizarry for LECO; and Beatriz González for ICPO. For the afternoon session, the Energy Bureau programmed the examination of those witnesses presented for the “Finance” Performance Metrics category. The metrics in that category included: Operating Budget; Capital Budget: Federally Funded; Capital Budget: Non-Federally Funded; Days Sales Outstanding: General Customers; Days Sales Outstanding: Government Customers; and Overtime. As such, cross-examinations were conducted on witnesses Juan Fonseca¹² and Kalen Kostyk for LUMA; Agustín Irizarry for LECO; and Gerardo Cosme for ICPO.

The fourth and final session of the Evidentiary Hearing was held on February 10, 2023. The Energy Bureau scheduled the examination of the witnesses concerning the MOE Metrics for that session. At the initial portion of the session, counsel for LUMA objected to any cross-examination of Mr. Agustín Irizarry on the MOE Metrics since that witness had provided no substantive opinion on this topic. After a *voir dire* in which some Commissioners participated was

¹² During the testimony of Mr. Juan Fonseca, the Energy Bureau requested LUMA to research and present findings on the existing low-income subsidies or other assistance available to customers of the electric utilities in the following jurisdictions of the United States of America: Louisiana, Arkansas, and Mississippi. *See* Evidentiary Hearing Transcript, February 9, 2023 (Spanish Portion), p. 95, line 25, and p. 96, lines 1-9; AP-2020-0025 Evidentiary-20230209_Meeting Recording 2 [3:35:15]. Compliance with said order was required on or before February 21, 2023. The Energy Bureau also directed the intervenors to state their position on LUMA’s findings before February 28, 2023. Upon conclusion of the testimonies, the Energy Bureau instructed LUMA to clarify, in writing, the request included in its proposed Annex IX to the Puerto Rico T&D OMA, pp 35 through 37, regarding any proposed relief from the “Day Sales Outstanding” Performance Metrics for three (3) to six (6) months after the end of any government-mandated moratorium period has been lifted. Particularly, the Energy Bureau directed LUMA to explain how such relief would be implemented, what would be considered, and how the weight distribution for said Performance Metrics would operate. On February 21, 2023, LUMA filed a *Motion in Compliance with Bench Orders Issued During the Evidentiary Hearing* (“Motion in Compliance”). LUMA submitted its findings on the existing low-income subsidies or other assistance available to customers of the electric utilities in the United States jurisdictions of Louisiana, Arkansas, and Mississippi, as well as supporting information on its proposal for relief from the “Day Sales Outstanding” Performance Metrics for three (3) to six (6) months after a moratorium period has been lifted. On February 28, 2023, the ICPO filed a motion titled *Comentarios a Moción en Cumplimiento de Orden Radicada por LUMA el 21 de Febrero de 2023*. In summary, ICPO alleged that LUMA did not provide the information requested on the totality of subsidies available in Louisiana, Mississippi, and Arkansas. As such, ICPO claimed it could not submit its position with the information provided. On March 9, 2023, the Energy Bureau issued a Resolution and Order whereas it ruled that LUMA complied with the Bench Orders issued during the Evidentiary Hearing and denied ICPO’s *Comentarios a Moción en Cumplimiento de Orden Radicada por LUMA el 21 de Febrero de 2023*.

conducted, the Energy Bureau allowed the testimony. Cross-examinations were conducted on witnesses Mario Hurtado, Abner Gómez, and Terry Tonsi for LUMA; Agustín Irizarry for LECO; and Gerardo Cosme for ICPO.

On February 14, 2023, LUMA requested the audio recording of the proceedings to prepare a transcript. Upon receiving the audio recording of the proceedings, LUMA commissioned a court reporter to produce a transcript.

Between February 16 and 17, 2022, public hearings were held. As the docket of this proceeding shows, three individuals submitted written comments on February 16, 2023.

On February 22, 2023, the Energy Bureau entered a Resolution and Order granting the request for the audio recording of the Evidentiary Hearing and instructed the Secretary of the Energy Bureau to provide it as soon as possible.¹³

On February 24, 2023, the LECO filed a *Motion Requesting PREB's Official Evidentiary Hearing Transcript*. Therein, LECO stated that according to the Hybrid Evidentiary Hearing protocol, the Energy Bureau committed to providing the official transcript of the Evidentiary Hearing. According to LECO, the transcript is essential to work on the legal brief. Given the current deadline to file the final substantive and legal briefs for all parties, LECO requested an extension to file the legal briefs at least fifteen days after the initial transcript is provided.

On March 3, 2023, LUMA filed a *Motion Requesting the Energy Bureau to Amend Procedural Calendar*. Therein, LUMA requested that the Energy Bureau take notice that at least one (1) month was required for LUMA to complete the proceeding transcript. Therefore, LUMA requested an amendment to the procedural calendar to extend the March 10, 2023, deadline to

¹³ The Secretary of the Energy Bureau provided LUMA with the audio recording of the Evidentiary Hearing on February 17, 2023.

submit the final substantive and legal briefs until at least two (2) weeks after the official transcript is provided to the parties and the Energy Bureau has deemed that LUMA complied with its bench orders.

On March 9, 2023, the Energy Bureau issued a Resolution and Order where it determined, among others, that the Microsoft Teams recording would serve as the official record of the Evidentiary Hearing. It clarified that it would not produce an official transcript to avoid further delays. The Energy Bureau ruled that the parties should cite the recording in their remaining filings in this proceeding, where applicable, referring to the hours, minutes, and seconds of the testimonies. Finally, this Energy Bureau amended the procedural calendar and set March 30, 2023, as the deadline to file the final substantive and legal briefs.

On March 17, 2023, LUMA filed a *Motion to Further Amend Procedural Calendar*. LUMA informed the Energy Bureau it had already commissioned a transcript of the Evidentiary Hearing, as it was necessary for ease of reference and to have an orderly proceeding. LUMA expressed that it could share the transcript with the Energy Bureau and all parties to reach a stipulation to adopt said transcript as the official transcript. As such, LUMA requested that the March 30, 2023, deadline to submit the final substantive and legal briefs be extended until at least two (2) weeks after the parties stipulate the official transcript and all remaining deadlines be extended accordingly.

On March 24, 2023, LUMA, LECO, ICPO, and PREPA jointly filed an *Informative Motion on the Parties' Agreement on the Evidentiary Hearing Transcript and Renewed the Request to Amend the Procedural Calendar*. LUMA reported that counsel for the parties had agreed to examine the different volumes of the transcript commissioned by LUMA and requested that the

March 30, 2023, deadline be extended at least two (2) weeks beyond the date the parties would stipulate the transcript.

On March 29, 2023, the Energy Bureau entered a Resolution and Order, extending the deadline to submit the final legal and substantive briefs to April 27, 2023. The deadlines for the replies to the final briefs, the public to submit general comments, and the *amicus curiae* to file their briefs were also extended. Notwithstanding, the Energy Bureau reiterated that the references to the Evidentiary Hearing must be made exclusively based on the Microsoft Team recording.

On April 19, 2023, LUMA filed an *Informative Motion on the Evidentiary Hearing Transcript and Request for Final Amendment of the Procedural Calendar*. LUMA informed that it had a complete set of certified transcripts of the Evidentiary Hearing and required two weeks to review the transcripts. In view of the above, LUMA requested that the deadline to file final substantive and legal briefs by the parties be extended until at least May 11, 2023.

Then, on April 21, 2023, the Energy Bureau issued a Resolution and Order (“April 21st Resolution and Order”) granting LUMA's request to amend the procedural calendar of this proceeding. The Energy Bureau established May 11, 2023, as the deadline for the parties to submit the final and substantive legal briefs. Also, June 1, 2023, was set as the time limit to file the replies to the final briefs by the parties. Finally, June 8, 2023, was fixed as the last day for the public to submit general comments and the *amicus curiae* to file their briefs.

On May 11, 2023, LUMA, LECO, and ICPO submitted their final legal and substantive briefs.

Thereafter, on May 25, 2023, the Energy Bureau issued a Resolution with the subject matter “Administrative Notice,” whereby this Energy Bureau, *motu proprio*, took administrative notice of twelve (12) documents (“May 25th Resolution”).

On June 9, 2023, LUMA filed *LUMA 's Response and Opposition to the Resolution and Order of May 25, 2023, on Taking of Administrative Notice*, whereby it argued that the Energy Bureau did not comply with the requirements for taking administrative notice under Puerto Rico law and case law, because the determination to take official notice issued in the May 25th Resolution infringed on LUMA's rights to due process as it introduced new evidence to the record after the discovery process concluded, an evidentiary hearing was held, the parties filed legal briefs, and the case was submitted for adjudication. Further, LUMA established that the May 25th Resolution did not provide sufficient information to understand the relevance and purpose of the evidence that the Energy Bureau had chosen to consider by taking administrative notice in lieu of utilizing the main mechanism for the admission of evidence in an adjudicative proceeding: pre-filed testimonies and cross-examination of witnesses. Moreover, LUMA stated that the determination to take official notice at an advanced stage of the proceeding was manifestly unfair, arbitrary, and capricious.

On that same day, June 9, 2023, LECO filed a *Response to Resolution for Official Notice and Request to Take Official Notice of Additional Information* ("LECO's June 9th Motion"). LECO stated having no objection to the May 25th Resolution. However, it requested the Energy Bureau to take administrative notice of news and media articles, as well as reports, docket entries, Superior Court case entries, and information provided by LUMA. Specifically, LECO requested that the Energy Bureau take administrative notice of twenty-nine (29) documents. In addition, on that same day, ICPO filed a *Motion in Compliance with the May 25, 2023 Order* stating no objection to the May 25th Resolution.

On June 15, 2023, LUMA filed an *Urgent Request to Stay the Deadline to Submit Reply Briefs*. LUMA argued that because the Energy Bureau had not yet issued a ruling on its June 9th

Motion, it was reasonable and equitable to stay the pending deadlines on reply briefs until the matter was settled and provide LUMA the final opportunity to address the evidence in the administrative record. The Energy Bureau granted LUMA until Thursday, June 29, 2023, to file its response to LECO's June 9th Motion, as requested.

On June 29, 2023, LUMA filed *LUMA's Response and Opposition to LECO's Request on Taking of Administrative Notice*, whereby LUMA opposed LECO's June 9th Motion and argued that LECO's request infringed LUMA's right to due process, did not comply with the requirements of Rules 201 & 202 of the Puerto Rico Rules of Evidence nor the relevance or admissibility of the newspaper and media articles referenced in its Brief and the June 9th Motion was established as LECO did not establish a relationship between the newspaper and media articles and the metrics in this proceeding.

On August 9, 2023, LECO filed the *Local Environmental and Civic Organization's Reply to LUMA'S Response to Administrative Notice Order*. LECO reiterated its request to the Energy Bureau to take official notice of the facts mentioned in the LECO June 9th Motion and requested the Energy Bureau to confirm that it will take official notice of the facts mentioned in the May 25th Resolution.

On August 17, 2023, this Energy Bureau issued a Resolution with the subject "Official Notice" ("August 17th Order"), whereby this Energy Bureau denied LECO's request to take notice of the facts in the LECO's June 9th Motion. The Energy Bureau also determined that it was appropriate to take administrative notice of specific information of (i) certain data on several metrics, which LUMA provided in Case No. NEPR-MI-2019-0007, (ii) a related Resolution and Order in the stated proceeding, (iii) data included on interconnection progress reports provided by LUMA in periodic filings in Case No. NEPR-MI-2019-0016, on the Performance of the Puerto

Rico Electric Power Authority, (iv) LUMA's annual report for Fiscal Year 2022 and Report on Efficiencies as well as LUMA's filing on the Annual Budget for Fiscal Year 2024 to 2026 in LUMA's Initial Budget docket, Case No. NEPR-MI-2021-0004, (v) an associated Resolution and Order in Case No. NEPR-MI-2021-0004, and (vi) an Order Approving the Scorecard for use by the New York Public Service Commission for Utility Emergency Performance Metrics ("August 17th Resolution").

On August 25, 2023, LUMA filed a *Motion Requesting Further Extension of Time to File Replies to Final briefs by the Parties*, to request that the Energy Bureau grant an extension of time until September 21, 2023, to submit the replies to the final briefs by the parties. The Energy Bureau granted the extension requested via Resolution notified on September 1, 2023.

On September 6, 2023, the Colegio de Ingenieros de Puerto Rico ("CIAPR") filed a *Motion Requesting Extension of Time to File Amicus Brief*, requesting an extension to the deadline to submit the *amicus curiae* final brief until September 28, 2023.

Also, on September 6, 2023, LUMA filed its *LUMA's Motion for Partial Reconsideration of the Resolution of August 17, 2023* ("Motion for Reconsideration on Administrative Notice"). LUMA reiterated that the Energy Bureau did not comply with the requirements for taking administrative notice under Puerto Rico law and case law, infringing its right to due process as it introduced new evidence to the record after the discovery process concluded, an evidentiary hearing was held, and the parties filed legal briefs.

On September 8, 2023, the Energy Bureau issued a Resolution stating that all the parties in this proceeding had until no later than September 21, 2023, to reply to the final briefs. Also, the Energy Bureau granted CIAPR's request for an extension of time to submit the *amicus* final brief until September 28, 2023.

On September 21, 2023, LUMA, ICPO, and LECO submitted their respective reply briefs. LUMA also filed the Final Evidentiary Hearing Transcripts and a *Motion to Reiterate LUMA's Motion for Partial Reconsideration of the Resolution of August 17, 2023, and Reservation of Rights*. Then, on September 28, 2023, the CIAPR filed its *amicus curiae* final brief.

Finally, on January 26, 2024, the Energy Bureau entered the Final Resolution and Order that forms the basis of this Motion for Reconsideration, as announced in the introductory section of this Motion.

III. REQUESTS FOR RECONSIDERATION AND LEGAL ARGUMENTS IN SUPPORT THEREOF

A. The Energy Bureau Exceeded the Bounds of its Authority by Adopting and Incentive Mechanism that was Not a Part of the T&D OMA, Changing the Incentive Tiers for the Performance Metrics, Including the MOE Metrics, Adding a Deadband, and Establishing that Annually, it will Determine the Incentive Fee that PREPA shall Pay to LUMA.

The Energy Bureau exceeded the bounds of its legal and regulatory authority when it (1) modified the tier structure for non-binary metrics from those that were negotiated by the parties to the T&D OMA and by adding an effective deadband; and (2) held that during an annual process, and in complete disregard for the negotiated and explicit terms of the T&D OMA, the Energy Bureau will issue a final determination that PREPA shall use to pay the incentive fee, *see* Final Resolution and Order, p. 8. Each of those determinations unduly interferes with the T&D OMA and is contrary to applicable law, to wit, (1) the principle of certainty in contractual relationships and *pacta sunt servanda*; (2) Section 8(d) of Act 120-2018, 22 LPRA §1118 (2023), which states that the PREB does not have authority to alter or amend a partnership contract such as the T&D OMA and shall not interfere with operational or contractual matters; and (3) the Energy Bureau's prior ruling issuing a certificate of compliance regarding the T&D OMA.

1. The Energy Bureau Erred and Abused its Discretion when it Changed the Incentive Mechanism Chosen by the Government of Puerto Rico and Agreed by the Parties to the T&D OMA.

The Performance Metrics Targets and incentives, including the incentive tiers set forth in Annex IX of the T&D OMA and the incentive mechanism adopted in the T&D OMA, were the product of a competitive procurement process conducted by the Government of Puerto Rico. *See* Exhibit 1 of the Evidentiary Hearing, lines 70-71. As Mr. Mario Hurtado, Chief Regulatory Officer for LUMA (“M. Hurtado”), explained during the Evidentiary Hearing, “[t]he requests for proposals and then . . . [the] competitive process had a draft OMA agreement, operation and maintenance agreement, and the Annex IX was part of that. . . “[W]hen . . . the agreement was executed, Annex IX was part of that as well.” *See* Evidentiary Hearing, Vol. 1, p. 59 lines 16-21 (M. Hurtado English); AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:45:00]. Annex IX of the T&D OMA was developed during an 18-month negotiation period led by the P3 Authority and its Partnership Committee. *Id.*, lines 71-73. The evaluation of proposals included the comments made by proponents on customer service, technical, and operational and financial Performance Metrics to improve the T&D system. *Id.*, lines 73-76. As stated in the Partnership Committee Report for the Puerto Rico Public-Private Partnership for the Electric Power Transmission and Distribution System dated May 15, 2020, LUMA’s approach was considered by the Partnership Committee as more favorable and aligned with Puerto Rico’s goals. *Id.*, lines 76-79.¹⁴ “LUMA essentially accepted the Performance Metrics as defined in the Final Form of O&M Agreement... The other Proponent provided differing views on the Performance

¹⁴ The full text of the Partnership Report is available at <https://www.p3.pr.gov/wp-content/uploads/2020/06/20-0520-02-partnership-committee-report-r18.pdf>, *see e.g.*, pages 61 and 66. As stated in the Partnership Report, “LUMA generally accepted the Performance Metrics set out in the RFP with minor exceptions.” *Id.* page 62 (last visited February 15, 2024).

Metrics and the calculation of the Incentive Fee from what was included in the Final Form of O&M Agreement.”¹⁵

Revisions to Annex IX to the T&D OMA were then made according to Section 4.2 of the T&D OMA. It indicates that, during the Front-End Transition Period, LUMA was required to establish a planning team with PREPA and the P3 Authority to prepare, with the input of said planning team, “a revised Annex IX (Performance Metrics), including (i) proposed baseline, Target and Minimum Performance Levels for certain Performance Metrics, (ii) Key Performance Metrics and (iii) Major Outage Event Performance Metrics, together with an explanation of the basis for each of the foregoing.” *Id.*, lines 82-88. Accordingly, LUMA concluded an iterative review process with the P3 Authority during the months of December 2020 and January 2021 before submitting the Performance Metrics to the P3 Authority on February 5, 2021, for their final review and comments, as required in the T&D OMA. *Id.*, lines 90-93. After reviewing and addressing the comments and suggestions of the P3 Authority, LUMA filed the Revised Annex IX on February 25, 2021, for approval by this Energy Bureau. *Id.*, lines 93-98.¹⁶

The version of the Annex IX of the T&D OMA and the incentive mechanism contained therein, that was approved by the parties to the T&D OMA, bears essential elements, including: (1) three performance categories; and (2) a performance mechanism with base points, performance levels and Targets, pursuant to which the incentive would be paid if performance exceeds the

¹⁵ *Id.* page 66-68.

¹⁶ LUMA subsequently re-filed the Annex IX of the T&D OMA and submitted revisions to this Energy Bureau on August 18, 2021, to consider the determinations in Case Number NEPR-MI-2019-0007, setting performance benchmarks and baselines for PREPA. *Id.*, lines 105-108. The revisions included data, and observations gathered by LUMA during the end of the Front-End Transition Period and the period of two months after assuming operations of the T&D System on June 1, 2021. *Id.*, lines 108-112. Finally, as required by this Energy Bureau in orders issued on December 21, 2022, and August 1, 2022, on October 28, 2023, and to comply with those orders, LUMA submitted a Revised Annex IX to include additional Performance Metrics on Vegetation Management, Energy Efficiency and Demand Response, and Interconnections of DG Systems to comply with the Energy Bureau’s orders on additional metrics.

Minimum Performance Levels and Targets. *See* Annex IX of the T&D OMA. Regarding the ability to earn base points, the parties agreed in Annex IX of the T&D OMA that if LUMA exceeded the Minimum Performance Level for the Performance Metrics (except for the binary performance metrics), LUMA would have the ability of earning 25%, 50%, 100%, 125% or 150% (the “Base Point Multipliers”) of the Base Points depending on the metric result relative to the established baseline. *Id.* This means that “for a result between the Minimum Performance Level and the 25% tier, the Operator would receive points equal to 25% of the Base Points, for a result between the 25% threshold and the 50% threshold, the Operator would receive points equal to 50% of the Base Points, etc.” *Id.*

Importantly, the incentive tiers were developed in the competitive procurement process conducted by the Government of Puerto Rico and accepted by LUMA. In fact, the tiers were introduced by the Government of Puerto Rico on at least November 15, 2019, as the records of the procurement process show.¹⁷

The tiers are an essential component of Annex IX of the T&D OMA and one of the main considerations of the incentive mechanism set forth in the T&D OMA. These contractually mandated tiers were not subject to review or amendment in the iterative process conducted during the Front-End-Transition Period to revise Annex IX of the T&D OMA. Tellingly, as the record of this proceeding shows, the incentive tiers remained unaltered when LUMA filed Annex IX with this Energy Bureau on February 25, 2021, and later when LUMA filed revisions on August 18, 2021, and October 28, 2022. The reason is pellucid: the tiers were negotiated and accepted by the parties to the T&D OMA, are embedded in the performance incentive mechanism scheme that the

¹⁷ *See* draft T&D OMA of November 15, 2019, available at [att Annex D - TD OM Agreement 11.17.19.pdf \(pr.gov\)](#) (last visited November 15, 2019).

Government of Puerto Rico chose for the T&D OMA and that LUMA accepted and proposed to this Energy Bureau in accordance with the T&D OMA.

Under settled cannons of contract law in Puerto Rico, both pursuant to the Puerto Rico Civil Code of 1930 and the Puerto Rico Civil Code of 2020, the pacts, clauses, and conditions set forth in valid contracts that are not contrary to the law, morale, or public order, are law among the parties and must be honored. *See* Art. 1044 of the Civil Code of Puerto Rico of 1930, 31 LPRA §2994 (now repealed); Art. 1233 of the Civil Code of Puerto Rico of 2020, 31 LPRA §9754 (2023); *see, e.g., Oriental Bank v. Perapi* 192 DPR 7, 15 (2014). Only in exceptional circumstances rooted in equity and principles of good faith in contractual relations, may a court of law vary or annul the terms of a valid contract. *See BPPR v. Suc. Talavera*, 174 DPR 686, 694-95 (construing the equitable doctrine of *rebus sic stantibus* that may moderate the strictness and rigidity of the *pacta sunt servanda* principle and allows the court to intervene in those contracts where good faith is impaired, or an injustice would be committed if specific performance of the agreement were demanded). The application of the doctrine of *rebus sic stantibus* has no place in the situation at issue, for which the *pacta sunt servanda* principle governs.

The T&D OMA is a valid and binding contract under Puerto Rico law that must be honored and cannot be altered or changed. The incentive mechanism adopted therein, including the tier structure, are clear and unambiguous contractual provisions adopted by the Government of Puerto Rico through the competitive process that led to choosing LUMA as the T&D Operator, are not contrary to law, nor does the Final Resolution and Order find that they are contrary to law. The Energy Bureau derided settled principles of Puerto Rico contract law in changing said incentive mechanism. It acted outside the scope of its authority when it rewrote Annex IX of the T&D OMA to change the incentive tiers and added an effective deadband between the minimum performance

level and the 75% tier.

In one fell swoop, this Energy Bureau substituted the determination of the Government of Puerto Rico that the private operator of the T&D System would have the ability to earn 25%, 50%, 100%, 125%, or 150% (the “Base Point Multipliers”) of the Base Points depending on the metric result relative to the established baseline and adopted a deadband that was not negotiated, and agreed upon, by the parties to the T&D OMA. Contrary to what the Energy Bureau suggests in the Final Resolution and Order, LUMA did not design this tier structure. It was the Government of Puerto Rico. It is arbitrary and capricious for this Energy Bureau to fault LUMA for a structure that is contractually mandated to then deprive LUMA, *via fiat*, of the agreed-upon tiers that determine LUMA’s ability to earn base points and, thus, earn the incentive fee if its performance exceeds the Minimum Performance Level.

LUMA acknowledges that pursuant to Section 8(d) of Act No. 120-2018, this Energy Bureau has the authority to assist the P3 Authority in monitoring a contractor’s performance and compliance under a public-private partnership contract, such as the T&D OMA. 22 LPRA §1118 (2023). This Energy Bureau also has the authority to develop performance-based incentive mechanisms per Acts 17-2019 and 57-2014, as amended. However, that authority is not limitless. One material limit is found in Act No. 120-2018, which provides that the Energy Bureau cannot do precisely what it did in the Final Resolution and Order; it cannot **“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.”**¹⁸*Id.* The substitution of the incentive mechanism chosen in the T&D OMA, including the elimination and substitution

¹⁸ Subsection (f) of Section 8(d) of Act 120-2018 provides that the Energy Bureau retains jurisdiction “to review and approve any modification of [the] rights, rents, rates or any other type of charge [.]” that LUMA and PREPA may charge. *Id.*

of incentive tiers and the decision to impose a deadband below the 75% tier, are proscribed alterations or amendments to the T&D OMA in violation of Act No. 120-2018.

It is important to note that the Energy Bureau's findings in the Final Resolution and Order that the incentive tiers may allegedly allow LUMA to earn compensation for substandard performance and that the tiers are complex and may lead to adverse outcomes, are newly conceived disagreements with a valid and binding Public-Private Partnership contract. Moreover, they are inconsistent with the prior determination by this Energy Bureau of June 17, 2020, when it certified that the T&D OMA (and the Annex IX with the tiers that this Energy Bureau reviewed and that it now arbitrarily seeks to modify) complies with Puerto Rico's public energy policy and the applicable regulatory framework that includes Act 57-2014, Act 17-2019, and Regulation 9137 on Performance Incentive Mechanisms, among others.¹⁹ The determination in the Final Resolution and Order is an arbitrary change in regulatory posture that infringes on LUMA's substantive and procedural due process rights. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (holding that "an agency's reading of a rule must reflect 'fair and considered judgment' . . . And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise"

¹⁹ Available at <https://energia.pr.gov/wp-content/uploads/sites/7/2020/06/Resolution-and-Order-NEPR-AP-2020-0002.pdf>. On page 9 of the June 17th Order, which was issued five days before the parties to the T&D OMA adopted said Public-Private Partnership Agreement, this Energy Bureau ruled the following:

The Energy Bureau carefully analyzed and evaluated the Report, the Preliminary Contract (as modified), taking into consideration the energy public policy and regulatory framework of Puerto Rico. The public policy tenets established through in Act 120-2018 and Act 17-2019 are not affected by the provisions of the Preliminary Contract. Besides, the principles of public policy established, and the regulatory framework are incorporated in the different provisions of the Preliminary Contract. Moreover, the regulatory authority of the Energy Bureau to oversight compliance with public policy and the regulatory framework remain intact. Therefore, in light of such analysis and evaluation, the Energy Bureau DETERMINES that the Proposed Contract (as modified) complies with the Puerto Rico Energy Public Policy and the regulatory framework and ISSUES an Energy Compliance Certificate in connection with the Preliminary Contract (as modified).

(emphasis added).

to regulated parties ...”); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007). This determination is also contrary to the rule that agencies are obliged to comply with their own regulations. *See Ayala Hernández v. Consejo Titulares*, 190 DPR 547, 548 (2014) (holding that “when an administrative agency promulgates a regulation, it has the force of law because it is binding and determinative of the rights, duties, and obligations of persons subject to the agency's jurisdiction. Therefore, once it is approved, the public, including the agency that adopted it, is bound by it. Accordingly, ... after an agency defines the contours of its action by means of a regulation, **it has a responsibility to apply it zealously.**”) (Translation provided) (emphasis added).

Furthermore, the determination to approve an incentive mechanism not stated in the T&D OMA, including the decision to deprive LUMA of the contractual ability to earn Base Points if its performance yields results between the Minimum Performance Level and the 25% tier, between the 25% threshold and the 50% threshold and up to 150%, amounts to a substantial impairment of LUMA’s contractual rights and expectations in violation of Section 7 of Article I of the Constitution of the Commonwealth of Puerto Rico and Section 10 of Article I of the Constitution of the United States; *see also e.g., Trinidad Hernández v. ELA*, 188 DPR 828, 834-35 (2013) (stating the constitutional prohibition on impairment of contractual rights and applicable standard of unjustified substantial or severe impairment); *Dominguez Castro v. E.L.A.*, 178 DPR 1, 80 (2010) (“[the] protection against impairment of contractual obligations limits the power of the government to interfere with contractual obligations between private parties, as well as contractual obligations contracted by the State.”). *See, also, Trinidad Hernández v. ALS*, 188 DPR 828, 834 (2013); *Bayrón Toro v. Serra*, 119 DPR 605, 620 (1987).

Pursuant to LUMA’s preliminary calculations considering performance for Fiscal Year

2023 (“FY2023”), LUMA could have earned approximately \$11.7 million of the incentive, but applying the base points, tiers, and targets adopted by this Energy Bureau in the Final Resolution and Order, LUMA would earn less than half of that sum, to wit, \$4.4 million. *See Appendix A* of this Motion. A reduction in the potential incentive fee amount due to the changes adopted by this Energy Bureau in the Final Resolution and Order of more than half of the Incentive Fee for FY2023, is a substantial and severe impairment of LUMA’s contractual expectations under the T&D OMA.

The deprivation of LUMA’s rights and contractual expectations, and the threat of substantial impairment of LUMA’s contractual ability to earn the contractual Incentive Fee in accordance with Annex IX of the T&D OMA, demands immediate action on reconsideration. As will be discussed in Section III. B, *infra*, the determination to amend the tiers set in Annex IX of the T&D OMA was also issued in violation of LUMA’s rights to due process of law.

2. The Energy Bureau is not Tasked with Determining the Incentive Fee PREPA Shall Pay LUMA.

In a lone paragraph included on page 8 of the Final Resolution and Order, that lacks citations to the record and is bereft of support in applicable law, this Energy Bureau determined that LUMA shall file an annual Incentive Fee Report with the Energy Bureau documenting performance and calculating the Incentive Fee and, more importantly, that “PREPA shall pay LUMA the amount determined by the Energy Bureau in the Resolution and Order issued in the referenced annual proceeding. *See* Final Resolution and Order, p. 8. The latter determination on the Energy Bureau’s authority to direct what PREPA shall pay LUMA in attention to the incentive under the T&D OMA undermines the clear provisions of the T&D OMA that vest said authority to the P3 Authority. The Energy Bureau does not have delegated authority to determine the Incentive Fee to be paid to LUMA.

The P3 Authority has a legal duty under Act 29-2009 to supervise the performance and compliance of a contractor under a public-private partnership contract, such as the O&M Agreement. *See* Section 10(d), Act No. 29-2009, 27 LPRA §2609 (2023). The T&D OMA includes several provisions under which the P3 Authority, as Administrator, monitors LUMA's compliance with said agreement, and among others and in relevant part, **is the only entity** tasked with evaluating LUMA's incentive fee report and to voice any disagreements with the report before PREPA pays the incentive fee, *see* O&M Agreement, Section 7.1(c) (Incentive Fee).²⁰ The T&D

²⁰ Section 7.2 (c) of the T&D OMA provides as follows, in pertinent part:

(c) incentive fee

- (i) Based on Operator's ability to timely achieve or exceed the performance metrics set forth in Annex IX (Performance Metrics) (the "Performance Metrics"), Operator shall be entitled to earn the incentive fee in any given Contract Year ("Incentive Fee"), which fee shall be set forth in Annex VIII (Service Fee), adjusted on a Pro Rata basis for a partial Contract Year and calculated as set forth in Annex X (Calculation of Incentive Fee). Owner and Administrator agree that an amount equal to the maximum amount of the Incentive Fee available in any given Contract Year shall be included in the Operating Budget for such Contract Year.
- (ii) No later than sixty (60) days following the end of a Contract Year, Operator shall submit a report (the "Incentive Fee Report") to Administrator (with copy to PREB) with (A) supporting performance data, information and reports evidencing its achievement of one or more of the Performance Metrics and (B) based thereon, its good faith calculation of the proposed Incentive Fee, in each case for such Contract Year. The Incentive Fee Report shall comply with the requirements set forth in Section 9.2(c) (Anti-Corruption and Sanctions Laws – Policies and Procedures).
- (iii) Administrator shall have a period of sixty (60) days after receipt to review the Incentive Fee Report. During this period, Operator shall grant to Administrator reasonable access during normal business hours to all relevant personnel, Representatives of Operator, books and records of Operator and other items reasonably requested by Administrator in connection with the review of the Incentive Fee Report.
- (iv) If Administrator delivers to Operator a written statement describing any disagreements with the Incentive Fee Report during such sixty (60) day review period, then Operator and Administrator shall attempt to resolve in good faith any such disagreements. If (A) Administrator does not deliver such statement during such sixty (60) day review period (in which case it shall be deemed to have agreed with the Incentive Fee Report), (B) if Operator and Administrator reach a resolution with respect to such matters or (C) if Administrator has no disagreements with the Incentive Fee Report, then Owner shall pay the Incentive Fee in accordance with Section 7.1(c)(v) (Service Fee – Incentive Fee).
- (v) Once determined in accordance with Section 7.1(c)(iv) (Service Fee– Incentive Fee), Owner shall pay the Incentive Fee, or any portion thereof that is not subject to a Dispute, for a given Contract Year within ten (10) days of such determination and in any event within six (6) months following the end of the given Contract Year or, in the event of an early termination of this Agreement, six (6) months following the date of such

OMA did not endow the Energy Bureau with the authority to direct PREPA on the incentive fee to be paid to LUMA, nor was that authority delegated to this Energy Bureau per Acts 57-2014, 120-2018, or 17-2019. The determination of the Final Resolution and Order that the Energy Bureau will annually determine the incentive fee that PREPA should pay per the T&D OMA is an unlawful alteration or amendment to the T&D OMA and falls outside the scope of this Energy Bureau's authority.

The Energy Bureau's legal authority regarding performance incentive mechanisms for electric power service companies is to establish and develop performance-based incentive mechanisms. To that end, the legislator authorized this Energy Bureau to "prescribe by regulations, . . . such incentive and penalty mechanisms that take[s] into account electric power companies' performance and compliance with the performance metrics set forth in the energy public policy." *See* Section 6.25B Act No. 57-2014, 22 LPRA § 1054x-2 (2023). In developing such performance-based incentives and penalties, the Energy Bureau shall consider criteria set forth in Act 57-2014 and may employ different mechanisms that include decoupling mechanisms, Performance-Based Regulation or PBR; Time of Use Rates; Prepaid Rates; Unbundled Rates; Formula Ratemaking and rate review mechanism; and Reconciliation Mechanisms. *Id.* Act No. 57-2014, as amended by Act 17-2019, however, does not provide that this Energy Bureau may issue determinations on the amount of an incentive fee to be paid to an electric power service company under a contract such as the T&D OMA.

A review of the Energy Bureau's Regulation for Performance Based Mechanisms, Regulation No. 9137 ("Regulation No. 9137"), confirms that the Energy Bureau itself has not

termination.

interpreted its authority to extend to require an Incentive Fee Report nor determine the payments that an electric power service company may receive per a contractual incentive. Regulation No. 9137. In the relevant part, Regulation No. 9137 includes a requirement for those electric power service companies subject to compliance with performance metrics, to file an “Annual Performance Report.” *See* Regulation No. 9137, Section 4.2. Tellingly, Regulation No. 9137 does not provide that the Energy Bureau may require an “Incentive Fee Report” as required in the Final Resolution and Order. Nor does it identify the source of funds for any such incentive payments.

Moreover, Regulation No. 9137 does not contemplate that the Annual Performance Report includes calculations for an incentive fee. Instead, it dictates annual processes to supervise performance whereby electric power service companies file an Annual Performance Report with information on: the achieved level for each sub-annual period; a narrative discussing in detail what progress was achieved; whether the company met the targets, including a justification in the case that the company did not perform to the level of the target; workpapers or documents supporting the company's findings; processes to enable progress and any other pertinent information; a description of any impediment or barriers that hindered the company's progress; an assessment on how to improve performance; and any other information the Energy Bureau requests or that the company believes relates to the Energy Bureau's understanding of the company's performance regarding that Metric. *Id.*

The inclusion both in Act 17-2019 and Regulation No. 9137 of allowed performance incentive mechanisms and the exclusion of authority over payment of incentives, must be read to exclude the Energy Bureau's authority to calculate incentive payments and issue determinations on payment of an incentive fee. *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).

It is a cardinal maxim of administrative law rooted in constitutional principles of separation of powers, that administrative agencies, such as this Energy Bureau, must conform their actions to the authority specifically delegated to them by the Legislative Assembly. *See Yiyi Motors, Inc. v. E.L.A.*, 177 DPR 230, 247 (2009) (Stating that the law is the legal means or source that sets the limits of the power and faculties of administrative agencies; that when the Legislative Assembly affirmatively delegates a function to an agency, the administrative body may not exceed the limits expressly or implicitly set forth in the statute or by clear implication thereof; and that if the action of the administrative agency exceeds the powers delegated by the Legislative Branch, the courts must declare it *ultra vires* and, therefore, null and void.).

Considering that Act 17-2019 did not delegate to this Energy Bureau authority to determine the Incentive Fee that may be payable annually per the T&D OMA, the Energy Bureau's determination on page 8 of the Final Resolution and Order is null and void and should be vacated. That determination is also clearly contrary to the Energy Bureau's own Regulation No. 9137, which does not require an Incentive Fee Report nor rule processes to fix incentive fees or order payments regarding incentive fees and, thus, does not place any electric power service company on notice that the Energy Bureau may require calculations for an incentive fee or has the authority to issue a determination in connection with payment of an incentive fee. *See Ayala*, 190 DPR at 568 (stating the rule that agencies must follow their own regulations).

It bears noting that the Energy Bureau did not rely on any statutory provision to support its interpretation that it may direct PREPA what incentive fee it shall pay to LUMA. The Energy Bureau did not even acknowledge Section 7.1(c) of the T&D OMA nor the role of the P3 Authority in connection with the Incentive Fee Report that LUMA must prepare for the P3 Authority under

the T&D OMA. That dearth of legal support and disregard for the clear text of the T&D OMA underscores the arbitrary nature of these portions of the Final Resolution and Order. It demands that this Energy Bureau vacate the determination on reconsideration.

B. Several of the Determination of the Final Resolution and Order Run Afoul of Due Process Requirements.

Art. II, Sec. 7 of the Constitution of the Commonwealth of Puerto Rico establishes the right of every person to be guaranteed due process of law as a condition for being deprived of his property or liberty. *See also Fuentes Bonilla v. ELA*, 200 DPR 364 (2018). The procedural aspect of due process requires the deprivation of property and liberty rights to be carried out through a fair and equitable process. *Picorelli López v. Depto de Hacienda*, 179 DPR 720, 735-36 (2010). For the procedural modality of due process of law to apply, an individual interest of liberty or property must be at stake. *Rivera Rodríguez & Co. v. Stowell Taylor*, 133 DPR 881, 887 (1993). Once it is determined that this requirement has been met, it is necessary to define what process is due. “In view of the circumstances, different situations may require different types of procedures, but there always remains the general requirement that the governmental process must be fair and impartial.” *Id.*, at 888.²¹

The Puerto Rico Supreme Court has recognized due process in administrative proceedings as requiring “a fair and equitable process that respects the dignity of affected individuals.” *López Vives v. Policía de PR*, 118 DPR 219, 231 (1987); *see also López y otros v. Asoc. de Taxis de Cayey*, 142 DPR 109 (1996). Among the guarantees that make up due process of law, jurisprudence has recognized that the “administrative decision must be informed, with knowledge and

²¹ Courts evaluate: (1) what are the individual interests affected by the official action; (2) the risk of an erroneous determination depriving the person of the interest protected by the process used and the likely value of additional or different guarantees, and (3) the governmental interest protected by summary action and the possibility of using alternative methods. *Rivera Rodríguez*, 133 DPR at p. 888.

understanding of the evidence pertaining to the case.” *A.D.C.V. P. v. Tribunal Superior*, 101 DPR 875, 883 (1974). Furthermore, findings of fact must be included, and the grounds for the administrative decision shall be stated. *Rivera Santiago v. Srio. De Hacienda*, 119 DPR 265, 274 (1987). In ensuring due process guarantees, parties must not only have a *pro forma* opportunity to present and rebut evidence but be able to do so effectively. *Rentas Nieves v. Betancourt Figueroa*, 201 DPR 416, 429 (2018).

It is also a fundamental principle in administrative law that the resolution or order issued by the agency must be based exclusively on the record of the case in question. *Magriz Rodríguez v. Empresas Nativas, Inc.*, 143 DPR 63, 70 (1997). Only when the administrative determination is based on the record of the case are the parties guaranteed the opportunity to challenge the correctness of the agency’s opinion and subsequent judicial review. *Id* at 71. Thus, it is reasonable to conclude that a decision issued in disregard of the principle of exclusivity of the record of the case cannot prevail, since it has no legal effect. *Id*.

Due process guarantees in administrative adjudicative proceedings are codified in Section 3.1 of the Uniform Administrative Procedure Act of the Government of Puerto Rico (“LPAU” by its Spanish acronym), 3 LPRA § 9641(2023). Section 3.1 of LPAU provides:

In all formal adjudicative proceedings before an agency, the following rights will be safeguarded:

- (A) Right to timely notification of the charges or complaints or claims against a party.
- (B) Right to present evidence.
- (C) Right to a fair adjudication.
- (D) Right to have the decision based on the record of the case.

3 LPRA § 9641.

Section 1.3 (b) of LPAU defines “adjudication” as the pronouncement by which an agency determines the rights, obligations, or privileges that correspond to a party. 3 LPRA § 9603(b). The

Puerto Rico Supreme Court has also recognized that the informal or summary nature of an adjudicative proceeding cannot be an obstacle in guaranteeing affected parties the irreducible minimum of procedural guarantees recognized as fair and equitable. *Baerga Rodríguez v. F.S.E.*, 132 DPR 524, 538 (1993) (recognizing that the minimal procedural guarantees in LPAU’s Section 3.1 for formal proceedings should apply to the informal proceeding at hand. However, the court did not specifically recognize the “right to have the decision based on the record” as one of the guarantees).

In our administrative legal system, courts give deference to administrative decisions. *Graciani Rodríguez v. Garage Isla Verde*, 202 DPR 117, 126 (2019). However, this rule is not absolute. Courts cannot validate administrative determinations and interpretations that are unreasonable, illegal, or contrary to law under the pretext of deference. *Id.*, at 127. Judicial review of an administrative decision seeks to determine whether the agency acted arbitrarily or illegally, or in such an unreasonable manner that it abused its discretion. *Mun. de San Juan v. J.C.A.*, 149 DPR 263 (1999). The Puerto Rico Supreme Court has identified situations in which the adjudicator abused discretion. These include:

[W]hen the judge, in the decision he issues, does not take into account and ignores, without basis for it, an important material fact that could not be overlooked; when, on the contrary, the judge, without any justification or basis for it, attaches great weight and value to an irrelevant and immaterial fact and bases its decision exclusively on it; or when, while considering and taking into account all material and important facts and discarding irrelevant ones, the judge lightly weighs and calibrates them.

Ramírez v. Policía de PR, 158 DPR 320, 340-41 (2002).

The Energy Bureau’s rulings in the Final Resolution and Order (1) modifying the contractually agreed upon tier structure for non-binary metrics as was negotiated by the parties to the T&D OMA (ranging from 25% to 150%, the decision to substitute the same with three tiers

corresponding to 75%, 100% and 125%, and the deadband set effectively at the 75% tier; (2) modifying the tiers for the MOE Metrics to include two tiers of 50% and 100% instead of the proposal of the Revised Annex IX of the T&D OMA of 25%, 50%, 100%, 125% and 150%; (3) modifying the approach to performance measurement for certain metrics, different from LUMA's proposal, (4) modifying base points allocated to certain metrics as originally proposed by LUMA, (5) updating the presented performance baseline for certain metrics, in some instances considering LUMA's performance data from Fiscal Years 2022 and 2023, and (6) updating the Annual Performance Targets employing three different approaches, in a departure from what was proposed, *see* Final Resolution and Order, infringes LUMA's due process rights.

In the discovery stage, the Energy Bureau never addressed a request by LUMA for the Energy Bureau to disclose the evidence it purported to submit for the record. *See* LUMA's 2021 Request for PREB to Disclose and Petition for Discovery. **Nor did the Energy Bureau offer evidence of the incentive framework ultimately adopted by this Energy Bureau that includes incentive tiers and their thresholds, an effective deadband, baselines, methodologies to update targets, and revised targets, which were introduced for the first time in this proceeding in the Final Resolution and Order.** LUMA prepared the Revised Annex IX of the T&D OMA and supporting testimonies and evidence, rebutted proposals by intervenors, appeared at the Evidentiary Hearing, and submitted opening and reply briefs (all complying with Energy Bureau Orders in the instant case), considering the evidence in the administrative record, which consisted of the documents and testimonies admitted during the Evidentiary Hearing. In clear violation of due process and rendering ineffectual this adjudicative process that spanned three years, LUMA did not have the opportunity to review, discuss, and present its positions in a timely manner—during the discovery or hearing phases of the case—on the incentive framework that

this Energy Bureau adopted in the Final Resolution and Order, that eliminates and adds incentive tiers, changes baselines and targets and adopts methodologies to setting target thresholds.

The Final Resolution and Order is a procedurally inequitable ruling, given that the Energy Bureau introduced new methodologies, approaches, and an incentive mechanism scheme for the record that were not discussed during the Evidentiary Hearing nor disclosed for the record these methodologies, approaches, and mechanisms for LUMA to conduct discovery and state its position or objections. This, despite the fact that LUMA promptly requested during the initial stages of this proceeding, that this Energy Bureau disclose the evidence that it would consider through its consultants, to evaluate LUMA's Revised Annex IX and issue a final decision. *See* LUMA's 2021 Request for PREB to Disclose and Petition for Discovery. The parties were not provided proper notice that additional or different methodologies, approaches, and mechanisms were needed or would be considered to issue a final determination. Thus, they were not afforded a timely opportunity to be heard on each of these nor their merits therein.

The Energy Bureau's decision also contravenes the requirement that the final decision must be made based on facts in the administrative record and supported by substantial evidence on the record. *See* Sec. 3.1 of the LPAU, 3 LPRA § 9641 (guaranteeing the right that the decision be based on the administrative record); Sec. 3.18 of the LPAU, 3 LPRA § 9658 (The administrative record shall constitute the exclusive basis for agency action in an adjudicative proceeding for judicial review); Sec. 4.5 of the LPAU, 3 LPRA §9675 (a reviewing court will only uphold the factual determination of an agency decision in a judicial review if they are based on substantial evidence in the administrative record.).

1. The Modifications on Base Points, the Approach to Update the Performance Metrics, and the Incentive Tiers on all Performance Metrics were Arbitrary Determinations that Infringed LUMA's Due Process.

In the Final Resolution and Order, the Energy Bureau made several modifications to LUMA's proposed Revised Annex IX that directly and substantially impact its potential to earn an incentive. The Energy Bureau modified the allocation of base points and the effective weight of individual metrics within the Customer Service and Technical, Safety, and Regulatory categories. These modifications in the distribution of base points between metrics were undertaken in the interest of several considerations to ensure the overall portfolio of performance metrics is in the public interest. *See* Final Resolution and Order, p.p. 6-7.

In addition, the Energy Bureau used two distinct approaches to update performance targets. For most metrics for which performance targets were updated, the Energy Bureau made updates to performance targets based on the year-on-year improvement rates implicit in LUMA's proposed Annual Performance Targets (i.e., targets at the 100-percent incentive level), thus preserving LUMA's general approach to setting performance targets. *See* Final Resolution and Order, p. 24. In other cases, the Energy Bureau first determined a Long-Term Performance Target, then plotted a trajectory from the metric baseline to this Long-Term Performance Target to interpolate a series of intermediate-year performance targets. *Id.*, p. 24. The Energy Bureau determined that the Long-Term Performance Target should correspond to the target performance level in the fifth year, such that the Annual Performance Targets (corresponding to 100 percent of the allocated incentive) are determined along the line connecting the baseline to the Long-Term Performance Target. *Id.*, p. 25.

Further, the Energy Bureau determined that LUMA did not provide enough justification as to why so many earnings tiers are required. *See id.*, p. 27. The Energy Bureau made three modifications to the approach to performance incentive tiers and threshold performance levels in the incentive framework. First, the Energy Bureau eliminated the 25-percent, 50-percent, and 150-

percent incentive tiers. Second, the Energy Bureau introduced a new 75-percent incentive tier. *Id.*, p. 28.

All these rulings constitute a material modification to LUMA's Revised Annex IX, which LUMA was not afforded the opportunity to rebut during the administrative proceeding. Importantly, the Energy Bureau did not provide LUMA prior notification that the base points and the incentive tiers were under discussion, nor that an approach would be developed to update the performance metrics. Especially when the Energy Bureau designed a method (i.e., the approaches to update the performance targets) that seems to have been developed or created specifically for this proceeding and is not accompanied by citations to any referenced literature or publications. The first notice to LUMA that such an approach or new incentive tiers would be adopted was through the Final Resolution and Order. Throughout the proceeding, the Energy Bureau never hinted that it would consider other base points, approaches to updating the performance metrics, or new or different incentive tiers. The prospect of changing tiers and base points and a different incentive scheme was never raised at discovery and much less discussed through cross-examination of the several witnesses who testified during the Evidentiary Hearing.

The Energy Bureau also determined that modifications to the base points are warranted in the interest of several considerations to ensure that the overall portfolio of performance metrics is in the public interest. However, the Energy Bureau did not provide an explanation on how or to what extent those several considerations and the public interest were to be protected. For example, in the category of Customer Service, the Performance Metrics contained therein were each given one equal base points. *See* Final Resolution and Order, p. 6. Meanwhile, in the Technical, Safe, and Regulatory category, the Energy Bureau disproportionately allocated the base points, providing one point to each OSHA-related performance metric but giving thirteen points each to

SAIFI and SAIDI metrics, while allocating four points to the Vegetation Maintenance Miles Completed performance metric. *Id.*, pp. 6-7. As we know, the Vegetation Maintenance Miles Completed performance metric is directly related to performance in SAIFI and SAIDI. Nonetheless, the Energy Bureau does not provide a plausible explanation as to why the disproportionate allocation of base points to some metrics but not to others, even though related. Such a determination is, in all fairness, unsupported and arbitrary.

For similar reasons, the adoption of different approaches by the Energy Bureau to update the performance metrics targets is unsupported and arbitrary. The Energy Bureau did not afford LUMA the opportunity to rebut this new design to the proposed performance metrics targets even when the proposed approaches to LUMA's proposal are considerably more complex than what was presented originally to the Energy Bureau. The approaches adopted by the Energy Bureau would have necessitated an expert witness to rebut any of those proposals effectively. More critically, the Energy Bureau did not refer to any evidence in the administrative record that would support such a design. It determined that those approaches were warranted without any reference to the documentary evidence or witnesses' testimonies.

The same argument applies regarding the modification of the incentive tiers. The Energy Bureau concludes that LUMA did not provide enough justification as to why so many earnings tiers were required. However, the Energy Bureau does not indicate where there is any support for the new incentive tiers it adopted in the administrative record. The Energy Bureau decided *motu proprio* to introduce a new design to the incentive tiers, which was never the subject of discussion in this proceeding. LUMA is clearly at a complete disadvantage with adopting these new modifications, as this new design affects all the performance metrics subject to approval, including the MOE Metrics, irrespective of whether the Energy Bureau then decided to modify the baselines

or Annual Performance Targets. This is the specific case of the Overtime Performance Metric, as to which the Energy Bureau accepted LUMA's proposed baseline and Annual Performance Targets values but, by eliminating the 25-percent and 50-percent incentive tiers and imposing a new 75-percent incentive tier, entered a new value for the 75-percent incentive tier. This results in a vastly different tier structure, unsupported by the administrative record evidence, making a reasonable opportunity to achieve any incentive very difficult.

It should be noted that Regulation 9137 does not provide any guidance on the parameters or criteria for evaluation of the specific tiers, base points, and values that the Energy Bureau is now modifying. Therefore, the modifications by the Energy Bureau of base points, approaches to updating the performance metrics, and the incentive tiers are unsupported by the evidence in the administrative record, arbitrary, and run afoul of the protections afforded by the due process normative.

2. The Final Resolution and Order is Arbitrary and Unreasonable in as much as it Relies on Performance Data for Fiscal Year 2022 (FY2022) and Fiscal Year 2023 (FY2023) that was not Presented for the Record Prior to the Close of the Evidentiary Hearings.

In the Final Resolution and Order, the Energy Bureau held that it was in the public interest to update the performance baselines, where possible, for all metrics for which updated performance data is available, reasoning that much time had elapsed since LUMA first proposed baselines and more recent data, where available, better reflects the state of LUMA's performance. *See* Final Resolution and Order, p. 21. It noted that the determination to update LUMA's proposed baselines with the most recent performance data is consistent with the positions expressed by the parties to this proceeding. *Id.*, p. 22.

As Table 5 of the Final Resolution and Order shows, this Energy Bureau set baselines for eleven of LUMA's Performance Metrics (Average Speed of Answer;²² Customer Complaint Rate²³; OSHA Recordable Incident Rate²⁴; OSHA Fatalities²⁵; OSHA Severity Rate and OSHA Days Away, Restricted, and Transfer Rate²⁶; SAIDI²⁷; SAIFI²⁸; and NEM Project Activation Duration²⁹), after it took notice of data on LUMA performance that was not included in LUMA's proposal on Performance Metrics Targets or the Revised Annex IX, was not submitted or considered for the record during the Evidentiary Hearing, nor subject to discovery. Moreover, this determination was issued without regard to LUMA's timely objection during the Evidentiary Hearing, whereby LUMA objected to consideration of data on its current performance and stated the following through counsel:

I would just lay out LUMA's legal position, that current performance in LUMA is being tracked in a separate proceeding, that the performance of PREPA . . . 2019-007, and we do understand that although that information is available for the Bureau and for the public as well, and it's available for review, it's not in itself a subject of the controversies or issues that have been laid out to be adjudicated precisely in these proceedings

The filing has certain dates, August/September 2021 and in October 2022, we know that time has passed and that LUMA has been operating. But it's our request and position that a particular adjudication of performance and . . . other metrics, it's not what we understand are the orders that the Energy Bureau issued on the matters to be adjudicated and LUMA does have reservations or arguments on due process and fair notice of whether current performance and performance in fiscal year 2022, and thereafter

²² See also Final Resolution and Order, pp. 37-38.

²³ See also *id.*, p. 41.

²⁴ See also *id.*, pp. 50-53.

²⁵ See also *id.*

²⁶ See also *id.*

²⁷ See also *id.*, pp. 59-60.

²⁸ See also *id.*, pp. 55-56.

²⁹ See also *id.*, p. 79.

See Evidentiary Hearing, Vol. 1, p. 44, lines 12-25, p. 45, lines 1-12, AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:25:00].

The Energy Bureau should reconsider the modification of the baselines for the above-described performance metrics since LUMA's performance data from Fiscal Years 2022, and 2023 was never a part of the discussion throughout this instant proceeding, as LUMA stated during the evidentiary hearing. At all times, the Energy Bureau ordered LUMA to consider data pertaining to PREPA's performance during the Fiscal Year 2020. Surprisingly, the Energy Bureau determined in the Final Resolution and Order that for certain metrics, current performance data would be used to set the baselines.

Although when the Final Resolution and Order was issued on January 22nd, performance data for FY2022 and FY2023 was available in the Baseline Proceeding, procedural due process and basic notions of fairness in adjudicative proceedings, render that data admissible in this proceeding by any means, including administrative notice. The Energy Bureau's decision to admit new evidence on current performance infringed LUMA's due process rights and the guarantee that the final decision must be made based on facts in the administrative record. Sec. 3.1 of the LPAU, 3 LPRA § 9641; *see also Fuentes Bonilla*, 200 DPR at 395; Sec. 3.18 of the LPAU, 3 LPRA § 9658 (stating that the administrative record shall constitute the exclusive basis for agency action in an adjudicative proceeding for judicial review).

a. The Energy Bureau Ignored its Own Ruling and the Baselines set in Case No. NEPR-MI-2019-0007.

The Energy Bureau conducted proceedings in Case No. NEPR-MI-2019-0007, to set performance baselines and compliance benchmarks for Puerto Rico's electric system (the "Baseline Proceeding"). Those performance baselines and benchmarks would be used to "develop the corresponding targets to be applied to certified electric service companies such as LUMA."

See Resolution and Order of December of December 23, 2020, Case No. NEPR-MI-2019-0007 p. 5. In the Baseline Proceeding, LUMA submitted filings that addressed the Energy Bureau's data on PREPA's baselines and presented proposed performance baselines, metrics, and an initial assessment of compliance benchmarks. Moreover, a technical conference was held on February 22, 2021, in the Baseline Proceeding to discuss the comments and replies filed by LUMA, PREPA, and stakeholders on PREPA's baseline performance and performance metrics.

On April 8, 2021, this Energy Bureau issued a Resolution and Order in the Baseline Proceeding with its determination on PREPA's performance baselines, addressing LUMA's submissions as well as those filed by stakeholders. It included a series of orders: (1) establishing PREPA's performance baseline and (2) setting the prospective metrics to be reported by PREPA. *See* Resolution and Order dated April 8, 2021. Also, the baselines took into consideration PREPA's performance for Fiscal Year 2020. *Id.*

Thereafter, on May 21, 2021, this Energy Bureau issued another Resolution and Order adopting principles for establishing performance metric benchmarks; establishing four categories of performance metrics applicable to PREPA; and setting initial benchmark values for several metrics subject to reporting requirements. *See* Resolution and Order dated May 21, 2021. **The Energy Bureau instructed that the baselines and benchmarks would be, among other things, the basis for establishing the performance incentives or targets to be applicable to LUMA. Such performance incentives and targets will be determined in this instant proceeding. *Id.*, p. 15. In the May 21st Resolution and Order, the Energy Bureau stated that there is room for a future revision of the baselines and benchmarks and that it may determine later that a revision of the baseline period is warranted. *Id.***

On July 2, 2021, the Energy Bureau ordered LUMA to use the baselines and benchmarks established in the Baseline Proceeding to revise its filing on this instant proceeding. *See* Resolution and Order dated July 2, 2021. Consequently, on August 18, 2021, LUMA filed a *Revised Performance Metrics Targets and the Revised Annex IX to the OMA* in this instant proceeding. LUMA considered the Resolutions and Orders issued by the Energy Bureau on April 8, 2021, May 21, 2021, and July 2, 2021, in the Baseline Proceeding.

As LUMA explained in its February 5, 2021 submission and in LUMA's February 19th Reply in the Baseline Proceeding, PREPA's performance is well below industry standards. *See Motion Resubmitting LUMA's Comment on Performance Baselines and Metrics Based on Data Presented on January 19th, 2021 by the Energy Bureau and Resubmitting Proposed Performance Metrics and Baselines, and Motion Submitting Luma's Reply to Comments Filed by PREPA and Stakeholders on Performance Baselines, Performance Metrics and Compliance Benchmarks*, filed in Case No. NEPR-MI-2019-0007. The conditions of PREPA and of the T&D System were critical in setting applicable targets and implementing performance incentive mechanisms that will apply to LUMA as the new Operator of the T&D System who will undertake significant remediation efforts as part of a complex recovery and transformation effort that is designed to comply with energy public policy within the current rate structure. In its assessment both during the Front-End Transition Period and after the commencement of operations of the T&D System, LUMA found significant gaps in processes and data that pose challenges in establishing a baseline performance to set realistic targets for the proposed metrics. For example, nonexistent or inadequate data; in a few instances, industry practices suggested doubtful results even if sufficient data was available; and there were significant gaps between PREPA's processes for data collection and calculation of metrics when compared with applicable industry standards.

Even though LUMA repeatedly contested the accuracy of the data used by PREPA and proposed new baselines, the Energy Bureau set baselines in the Baseline Proceeding based on PREPA's data from Fiscal Year 2020. Based on that data, the Energy Bureau ordered LUMA to revise its proposed targets in the immediate proceeding. It should be noted that the Energy Bureau has not instituted a process to revise those baselines in the Baseline Proceeding. However, data was already available from Fiscal Years 2021, 2022, and 2023 as part of the quarterly reporting process LUMA is required to submit in Case No. NEPR-MI-2019-0007. Further, the data pertaining to Fiscal Years 2021, 2022, and 2023 was not the subject of LUMA's proposal or any direct testimony or discovery in this instant proceeding. Based on those determinations issued in the Baseline Proceeding that have not been vacated or substituted, on the applicable baselines, LUMA proceeded to propose baselines and targets for the performance metrics in this proceeding and submitted that proposal for review by the Energy Bureau.

Given the aforementioned orders, the Energy Bureau's determination in the Final Resolution and Order to set baselines considering data from FY2022 and FY2023 contradicts two bedrock due process guarantees: the right to present evidence and the right to have an administrative agency issue a final decision based on the administrative record. First, the decision is belated. Prior to the close of the evidentiary record, the Energy Bureau never even hinted at the possibility of considering data on current performance, not even in response to the timely objection stated for the record by LUMA. Moreover, during the Evidentiary Hearing, this Energy Bureau did not offer evidence of any updated data on LUMA's performance for any time period after LUMA began operating the T&D System on June 1, 2021. Nor did the Energy Bureau state that the record would remain open until the date of its final determination, as it did in the Final

Resolution and Order, considering performance data on a rolling basis up to or near the time when it issued its final decision in this proceeding.

Following the rules set by this Energy Bureau, LUMA presented its case in support of the Revised Annex IX of the T&D OMA, including the proposed baselines, without knowing nor having any reason to anticipate, that the baselines would become moving targets and be set considering LUMA's performance during the months following the close of evidentiary record on February 10, 2023. On May 11, 2023, when LUMA finalized and submitted its final legal brief, it did not have any notice from this Energy Bureau that the baselines that LUMA defended in its legal brief would be adjudged per the prism of performance data up to June 2023, which performance data that was not yet available in full form and would be filed close to two months later in the Case No. NEPR-MI-2019-0007, on July 20, 2023.

Regarding data for baselines and baselines, this Energy Bureau changed the rules after the case had closed, in contravention of due process and, *de facto*, vacating its prior rulings on the topic, that date back to the year 2021 in the Baseline Proceeding when it ruled that current performance will not be considered in this instant proceeding. Thus, the determinations in the Final Resolution and Order to consider LUMA's performance data for FY2022 and FY2023 for several of the Performance Metrics, is an arbitrary and capricious change in the Energy Bureau's position without prior notice and opportunity, infringing upon LUMA's procedural due process rights. *See, e.g., Ramírez*, 158 DPR at 339 (stating that the exercise of discretion by an administrative agency must be rooted in reasonableness and in accordance with applicable law).

As the regulated party in this proceeding, LUMA is afforded the basic protections required by the due process clause of the Constitution of the Commonwealth of Puerto Rico. Any decision to impose baselines and targets on current performance in this instant proceeding thus amounts to

an arbitrary change in position by this Energy Bureau without prior notice that infringes upon LUMA's rights to procedural due process. *See Kiso*, 139 S. Ct. at 2418 (holding that "an agency's reading of a rule must reflect 'fair and considered judgment' . . . And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties"); *see also Long Island Care at Home, Ltd.*, 551 U.S at 170. Therefore, any use of current performance to be considered in the ruling in this proceeding runs counter to cardinal elements of due process of law and amounts to an arbitrary ruling.

b. The Energy Bureau did not Meet the Requirements to Take Administrative Notice under the Puerto Rico Rules of Evidence and its Interpretative Case Law. LUMA Reiterates the Due Process Arguments Raised on the June 9th.

In the Final Resolution and Order, this Energy Bureau took administrative notice of the following documents: (i) *Resumen Métricas Master July 2023*, included in the *Submission of Performance Metrics Report for April through June 2023* ("Resumen Métricas July 2023"), filed by LUMA on July 20, 2023, in Case No.: NEPR-MI-2019-0007 for the Average Speed of Answer; OSHA Recordable Incident Rate; OSHA Fatalities; OSHA Severity Rate and OSHA Days Away, Restricted, and Transfer Rate; SAIDI; and SAIFI Performance Metrics; (ii) an unidentified quarterly filing in Case No. NEPR-MI-2019-0016 for the NEM Project Activation Duration Performance Metric ("Interconnections Progress Report"); and (iii) a FY2023 value reported by PREB for the Customer Complaint Rate Performance Metric that was not included with the Final Resolution and Order and is thus, unknown to LUMA.

The record of this proceeding shows that over LUMA's procedural due process objections, this Energy Bureau ruled in the August 17th Order, that it would take administrative notice of the *Resumen Métricas July 2023* and several quarterly reports filed in No. NEPR-MI-2019-0016. The third document, the FY2023 value reported by PREB for the Customer Complaint Rate

Performance Metric, was not included in the August 17th Order. Thus, the Final Resolution and Order is the first instance where the Energy Bureau announced its intention to consider the document in this proceeding.

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

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

Additionally, an adjudicative fact must be pertinent and admissible evidence. *UPR v. Laborde Torres y otros*, 180 DPR 253, 278 (2010). In other words, the court and parties cannot use the judicial notice mechanism to admit into evidence a fact that otherwise would be subject to a rule of exclusion or fact that could not have been proven with admissible evidence. *Id.* When judicial or administrative notice is proper, the moving party is relieved from presenting evidence on the adjudicative fact. *Id.* at 277-278. That is so because it is presumed that the fact will not be disputed. *Id.* at 278.

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

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

The authority to take administrative notice is limited. Agencies: (1) cannot rely on their expertise and must specify the fact and provide the source from which it took the information, and (2) must provide an affected party an opportunity to oppose or provide additional information about the fact admitted by judicial notice. *Id.* (quoting Demetrio Fernández Quiñónez, *Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme*, at pages 170-71); *see also*

Oficina de Seguridad v. Puerto Rico Telephone Company, Inc., KLRA200300597, KLRA200300719, 2004 WL 2419142 at *9 (TCA Sept. 20, 2004) (holding that an Administrative Judge abused its discretion by failing to provide the affected party an opportunity to oppose the administrative notice and by not citing to the source of information).

Relatedly, Section 9.03(a) of Regulation No. 8543 allows the Energy Bureau to *sua sponte* or, upon a party's request, take administrative notice of "those facts and circumstances of public interest that are generally known, or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" *Id.* Section 2.01 of Regulation No. 8543 states that, in adversary proceedings, the Rules of Evidence may apply to supplement the dispositions of Regulation 8543 per the Energy Bureau's discretion.³⁰

The determination to rely on the Resumen Métricas July 2023 document and the Interconnections Progress Report dates to the August 17th Order on taking administrative notice. An order that LUMA challenged because the Energy Bureau did not meet the legal requirements. The August 17th Order continues to be defective and does not serve as a valid basis to issue determinations in the Final Resolution and Order. Particularly, because the August 17th Order did not provide sufficient guidance on the purpose behind taking administrative notice of each of the documents referenced in the August 17th Order. For example, the quarterly filings in the Baseline Proceeding include a vast number of established metrics every quarter that exceed the type of metric under discussion in this proceeding.

In the Final Resolution and Order, this Energy Bureau did not identify with specificity which quarterly report it considered and whether that quarterly report was included within the

³⁰ The language of Section 9.03 of Regulation 8543 incorporates the same language of Rule 201 of the Puerto Rico Rules of Evidence. Therefore, its interpretative case law should serve as a framework for this Energy Bureau's interpretation of Regulation 8543 regarding taking administrative notice.

realm of the August 17th Order on taking administrative notice. In any event, the decision to take notice of said report does not comport with the rules for taking administrative notice. Said quarterly report was filed in a separate proceeding for purposes that differ from LUMA's Revised Annex IX and proposed Performance Metric Targets. *See In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico*, Case No.: NEPR-MI-2019-0016. The Interconnections Report aims to inform the Energy Bureau of LUMA's progress in interconnecting DG systems. It involves the subject matter of one of the Performance Metrics Targets that LUMA included in its Revised Annex IX in compliance with an order by this Energy Bureau (Net Energy Metering Project Activation Duration) but **does not** include relevant information to assist this forum in considering LUMA's Proposed Performance Metrics Targets.

As explained by Mr. Lee Wood, former Director of Business Transformation for LUMA, during the Evidentiary Hearing regarding the Net Energy Metering Project Activation Duration performance metric, the metric tracked in docket Case No. NEPR-MI-2019-0016 for interconnections progress, which is reviewed every quarter, is a legacy metric that calculates the average duration for any activation during the period **for cases that were submitted in that period**. Thus, this statistic does not include all the cases that arrived in the previous period or two years ago. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 390, lines 17-25, p. 391, lines 1-9; AP-2020-0025 Evidentiary-20230209_Meeting Recording 2 [1:14:42].

On the contrary, LUMA's proposed performance metric in this proceeding is a more rigorous method that includes all applications completed in a particular year, regardless of when they were submitted. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 391, lines 12-16; AP-2020-0025 Evidentiary-20230209_Meeting Recording 2 [1:16:01]. In conclusion, because the data filed by LUMA in the quarterly reports in Case No. NEPR-MI-2019-

0016 will not provide relevant information regarding the Net Energy Metering Project Activation Duration Performance Metrics. This Energy Bureau erred in taking notice of one quarterly report to set the baseline for this Performance Metric.

The Energy Bureau also erred in taking administrative notice in the August 17th Resolution since it did not explicitly explain for what purposes the identified portions of data would be used as evidence. *See Sabol v. Departamento de Desarrollo Económico y Comercio*, KLRA201900583, 2020 WL 5411593 at *7 (June 29, 2020) (*stating* that the agency must specify the fact and provide the source from which it took the information) (*quoting* Demetrio Fernández Quiñónez, *Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme*, at pages 170-71); *see also Cofán Hernández v. OEG*, KLRA201300268, 2015 WL 4075907, *48 (May 29, 2015) (commenting that in taking administrative notice the adjudicator may articulate the specific aspects of administrative files as to which notice is taken). The Energy Bureau did not meet its burden of establishing that it had taken notice of adjudicative facts disputed in a proceeding.

As a result of the scant information included in the August 17th Order regarding the pertinence and relevancy justifications for taking official notice of the whole of each of the aforementioned filings and orders, LUMA was not placed in a reasonable or proper position to address or refute, as applicable, the relevance and admissibility of the aforementioned filings and orders or the weight and effect that they may or should have in the final adjudication of this proceeding. In these circumstances, the Energy Bureau failed to meet the requirements to allow an agency to bypass the presentation of evidence via the mechanism of taking administrative notice. The Energy Bureau was precluded from taking administrative notice in the Final Resolution and Order of the *Resumen Metricas-Master_July2023.xlsx* and the unidentified quarterly report filed in Case No. NEPR-MI-2019-0016. Having failed to meet the burden established in law and

applicable jurisprudence, the Energy Bureau's decision in the Final Resolution and Order to take official notice of data included in those reports, is arbitrary and capricious.

Moreover, the determination to consider the performance of FY2023 to modify the baseline of the Customer Complaint Rate performance metric seems to be supported by internal information in possession of the Energy Bureau and not by any evidence part of the administrative record nor by any of the evidence that the Energy Bureau purported to take administrative notice in the August 17th Order. It should be noted that LUMA does not report any of the types of complaints subject to the Customer Complaint Rate performance metrics in Case No. NEPR-MI-2019-0007. These types of complaints are classified as "NEPR-QR" and "NEPR-RV." Thus, taking administrative knowledge of any information reported in that proceeding would not provide the necessary information the Energy Bureau needed to craft the baseline based on LUMA's performance in FY2023. Nor was that information presented by any parties during the Evidentiary Hearing. By utilizing internal information not presented to any of the parties before, the Energy Bureau acted arbitrarily and capriciously.

c. The Administrative Record Does Not Support the Modification of LUMA's Proposed Baselines.

i. Average Speed of Answer

For the Average Speed of Answer performance metric, Ms. Jessica Laird testified that the baseline was calculated using data from Fiscal Year 2019 to March 2020. LUMA determined that data from Fiscal Year 2020 would not support a reliable baseline due to the data being available for a period of six months only, the reported abandonment varies from month to month due to COVID-19 and the onboarding of new outsource vendors, and the lack of visibility into three separate call routing systems. *See Exhibit 41 of the Evidentiary Hearing, lines 151-156.*

In its Final Resolution and Order, the Energy Bureau updated the baseline to performance over FY2023. The updated baseline value is now 1.69 minutes. *See* Resolution and Order, p. 38. It should be noted that the baseline established by the Energy Bureau for this metric was originally 8:30. *See* Exhibit 11 of the Evidentiary Hearing, p. 22.

The Energy Bureau disregarded its previous mandate and determined to impose a baseline based on data from current performance, data which was not subject to discovery nor discussed at the Evidentiary Hearing. The administrative record establishes that the data considered and subject to discussion in this proceeding, that is, pertaining to the Fiscal Year 2019 to March 2020, was the most reliable at the time, considering COVID-19 and the onboarding of new outsourcing vendors and the lack of visibility into three separate call routing systems. Based on that data, LUMA submitted an Average Speed of Answer performance metric proposal, which was discussed for more than two years.

The modified baseline for the Average Speed of Answer performance metric, as determined by the Energy Bureau, is based on its decision to take administrative notice of LUMA's current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. Said decision has caused LUMA prejudice since the Energy Bureau has based its determination on modifying the baseline of the data introduced by means of taking administrative notice. It is LUMA's position that the modification of the baseline based on that data was unsupported by the administrative record presented at the Evidentiary Hearing and was arbitrary.

ii. Abandonment Rate

To develop the proposed baseline, Ms. Laird expounded that the data from three separate contact center platforms (PREPA, Insight, and Telecontacto) was reviewed. *See* Exhibit 41 of the

Evidentiary Hearing, lines 175-176. The baseline was calculated using data from Fiscal Year 2019 to March 2020. LUMA determined that data from Fiscal Year 2020 would not support a reliable baseline, due to the data being available for a period of six months only, the reported abandonment varies from month to month due to COVID-19 and the onboarding of new outsource vendors, and the lack of visibility into three separate call routing systems *Id.*, lines 178-183. As such, LUMA set the baseline using the PREPA contact center data based on subject matter experience and the under-industry standards results. As a result, LUMA reduced the abandonment rate by 2% to achieve an immediate improvement. *Id.*, lines 187-189.

The Energy Bureau found that the Abandonment Rate baseline should be revised to reflect more current data. *See* Resolution and Order, p. 45. As such, it updated the baseline to reflect performance over Fiscal Year 2023, with a value of 8.7 percent. *Id.* Originally, the Energy Bureau declined to set a baseline for this metric in Case No. NEPR-MI-2019-0007.

As a threshold matter, the Abandonment Rate Performance Metric was not challenged by any of the testimonies submitted by the intervenors' witnesses. Notwithstanding, the Energy Bureau ignored LUMA's proposal based on the most reliable available data at the time and, instead, imposed a baseline based on data from current performance, which was not subject to discovery nor discussed at the Evidentiary Hearing. The modified baseline for the Abandonment Rate performance metric, as determined by the Energy Bureau, is based on its decision to take administrative notice of LUMA's current performance, as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. That decision has caused LUMA prejudice since the Energy Bureau has based its determination on modifying the baseline and, as we will see in upcoming pages in the targets, on the data introduced by means of taking administrative notice. It

is LUMA's position that the modification of the baseline based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

iii. Customer Complaint Rate

As a result of the discussion that ensued in the Evidentiary Hearing on whether the Customer Complaint Rate Metric could include cases that the Energy Bureau classifies as "NEPR-RV" proceedings, LUMA proposed to include both complaints classified as "NEPR-QR" and "NEPR-RV" in the calculation of the total number of complaints in the Customer Complaint Rate Performance Metric. The baseline will comprise the same period originally proposed from May 2019 through February 2020, annualized. *See* LUMA's Legal Brief, Exhibit B, Sworn Statement of Melanie Jeppesen, ¶8. The baseline for the revised Customer Complaint Rate Performance Metric includes these cases filed in 2019 after NEPR-QR-2019-0070 and up to case NEPR-QR-2020-0020. *Id.*, ¶15. The proposed baseline, including complaints classified as "NEPR-QR" and "NEPR-RV," was 23.51. *Id.*, ¶15.

Even though LUMA proposed a revised Customer Complaint Rate metric, the Energy Bureau determined to update the baseline to reflect performance over the full Fiscal Year 2023, with a value of 17.3. *See* Final Resolution and Order, p. 41. It concluded that it is preferable to use a full year of data rather than to annualize a partial year of data, as LUMA proposes. The Energy Bureau also concluded it is best to set the baseline with LUMA's performance data, not PREPA's data. *Id.*

In the Final Resolution and Order, the Energy Bureau departed from its previous mandate by ruling that it is best to set a baseline based on LUMA's data instead of PREPA's, as originally ordered in Case No. NEPR-MI-2019-0007. It should be noted that based on PREPA's data, LUMA submitted a Customer Complaint Rate performance metric proposal, which was discussed for more

than two years in this instant proceeding. Throughout those two years, however, this Energy Bureau did not issue an order to consider an updated date, much less an order that would consider performance for the Fiscal Year prior to its final determination. Data on current performance was not subject to discovery nor discussed at the Evidentiary Hearing.

The administrative record supports LUMA's proposed baseline that was considered and subject to discussion in this proceeding, with annualized data pertaining to May 2019 through February 2020. The time from May 2019 to February 2020 was selected as it represents the most normal period of operations since Hurricane Maria and prior to the onset of the pandemic. *See* Exhibit 43 of the Evidentiary Hearing, Revised Direct Testimony of Melanie Jeppesen (September 24, 2021), lines 77-82.

The modified baseline for the Customer Complaint Rate performance metric, as determined by the Energy Bureau, is based on its decision to take administrative notice of LUMA's current performance. The determination to consider the performance of FY2023 to modify the baseline of the Customer Complaint Rate performance metric seems to be supported by internal information in possession of the Energy Bureau and not by any evidence part of the administrative record nor by any of the evidence that the Energy Bureau purported to take administrative notice in the August 17th Order. It should be noted that LUMA does not report any of the types of complaints subject to the Customer Complaint Rate performance metrics in Case No. NEPR-MI-2019-0007. The determination to adopt a different baseline has caused LUMA prejudice since the Energy Bureau based its determination on modifying the baseline and, as we will see in upcoming pages in the targets, on data improperly introduced by means of taking administrative notice without prior notification to the parties in the specific case of LUMA's performance on complaints filed against it in the Energy Bureau during FY2023. LUMA has no capability to verify the

correctness of said data. It is LUMA's position that the modification of the baseline based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

iv. OSHA-Related Performance Metrics

The record of this proceeding shows that for the OSHA-related Performance Metrics, LUMA revised the PREPA OSHA 300 and 301 Logs, and the PREPA Injury and Illness Data Reports, including a "Casi Casi" report, that PREPA began recording at the end of 2019. The data includes GENCO, Administration, and Transmission & Distribution records. *See* Exhibit 19 of the Evidentiary Hearing, lines 99-103.

The record, through the testimony of Mr. Curtis Clark, former Functional Lead, Emergency Preparedness for LUMA, establishes that the historical safety data compiled by PREPA contains inaccuracies. *See* Exhibit 19 of the Evidentiary Hearing, lines 142-143. Also, PREPA was historically using an erroneous formula for Severity Rate. *Id.*, line 150. Additionally, PREPA did not provide LUMA with the *Corporación del Fondo del Seguro del Estado* reports to determine if the recordable injury details match. As such, LUMA could not compare the data utilized by the Energy Bureau, as portrayed in the Resolution and Order of May 21, 2021, in Case No. NEPR-MI-2019-0007, with the reports of the *Corporación del Fondo del Seguro del Estado*. *Id.*, lines 154-158. For those reasons, Mr. Clark explained that LUMA proposed baselines different from those established by the Energy Bureau in Case No. NEPR-MI-2019-0007, due to the data being inaccurate. Instead, LUMA used health and safety data compliant with OSHA standards. *See* Exhibit 19 of the Evidentiary Hearing, lines 165-168. As a result, LUMA requested the Energy Bureau approve an adjustment to the baselines, which included relevant incidents from the PREPA Casi Casi report. *Id.*, lines 174-176.

In the Final Resolution and Order, the Energy Bureau disregarded the aforementioned evidence that is the only evidence on the record to support a baseline for the OSHA-related Performance Metrics and instead, arbitrarily decided to update the baselines to reflect performance over FY2023. The baselines for the OSHA Recordable Incident, DART, Severity, and Fatality Rates were set at 2.20, 1.30, 17.90, and 0.08, respectively. *See* Resolution and Order, p. 50. The Energy Bureau's rationale for modifying the proposed targets was that a target set at or below baseline performance is not consistent with the principle established in Section 7.1 of Regulation 9137, including that performance metrics should induce behavior that would not otherwise occur absent the incentive mechanism. *Id.*

The Energy Bureau's rationale for modifying the baselines comes from the assumption that in FY2023, LUMA exceeded the baseline and even the proposed targets. However, as argued before, LUMA submitted OSHA-related performance metrics proposals, which were discussed for over two years in this instant proceeding. Data on current performance was not subject to discovery nor discussed at the Evidentiary Hearing. Thus, LUMA was not afforded the opportunity to present evidence in connection with the possibility that the baselines for the OSHA-related Performance Metrics would be set in accordance with performance data for FY2023. The administrative record establishes that the data considered and subject to discussion in this proceeding was from past performance, in alignment with what was ordered by the Energy Bureau at the beginning of this proceeding. It is unreasonable for this Energy Bureau to change the baselines and targets for the OSHA-related Performance Metrics, considering performance data that was not a part of the record in this adjudicative proceeding.

The modified baseline for the OSHA-related performance metrics, as determined by the Energy Bureau, is based on its decision to take administrative notice of LUMA's current

performance, as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. The determination has caused LUMA prejudice since the Energy Bureau has based its determination on modifying the baseline and, as we will see in upcoming pages in the targets, on the data introduced by means of taking administrative notice. It is LUMA's position that the modification of the baselines based on that data, is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

v. SAIFI and SAIDI

The SAIDI and SAIFI Performance Metrics followed the baselines that this Energy Bureau adopted in Case No. NEPR-MI-2019-0007. *See* Exhibit 11 of the Evidentiary Hearing, pp. 17-19; *see also* Exhibit 10 of the Evidentiary Hearing, lines 97-143.

However, for SAIFI, the Energy Bureau took notice that LUMA's performance on SAIFI has improved from the baseline set by the Energy Bureau in 2021. *See* Final Resolution and Order, p. 55. Based on the data in Case No. NEPR-MI-2019-0007, the 12-month rolling average of SAIFI has improved compared to PREPA's historical performance. *Id.* Also, based on the SAIDI data that LUMA submitted for FY2023, the 12-month rolling average for SAIDI improved to 1,218 minutes per customer compared to 1,564 minutes per customer at the end of FY2022. *Id.*, p. 59. The Energy Bureau decided to update the SAIDI baseline to reflect performance for FY2023. *Id.*, p. 60.

The Energy Bureau disregarded its previous mandate and determined to impose a baseline based on data from current performance, data which was not subject to discovery nor discussed at the Evidentiary Hearing. The administrative record establishes that the data considered and subject to discussion in this proceeding was established specifically by the Energy Bureau in Case No.

NEPR-MI-2019-0007. As such, the modified baseline for the SAIFI and SAIDI performance metrics, as determined by the Energy Bureau, is based on its decision to take administrative notice of LUMA's current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. That determination has caused LUMA prejudice since the Energy Bureau has based its determination on modifying the baselines and, as we will see in upcoming pages in the targets, on the data introduced by means of taking administrative notice. It is LUMA's position that the modification of the baselines based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

vi. Net Energy Metering ("NEM") Project Activation Duration

In compliance with the December 22nd Resolution and Order and the August 1st Order, on October 28, 2022, LUMA submitted for consideration a Revised Annex IX to the T&D OMA that included a metric on NEM Project Activation Duration Performance Metric measures the average duration (days) for activating NEM projects within the category of Technical, Safety and Regulatory Performance Metrics. *See* Exhibit 11 of the Evidentiary Hearing, p. ____.

Considering that the NEM Project Activation Duration Performance Metric was a new metric added pursuant to an Order entered by the Energy Bureau, the regulator provided no baseline, nor did LUMA propose a baseline. However, in the Final Resolution and Order, the Energy Bureau updated the baseline to reflect performance over FY2023, consisting of 20.3 days. *See* Final Resolution and Order, p. 79.

Performance on interconnection progress is reported on a quarterly basis in the proceeding Case No. NEPR-MI-2019-0016 before this Energy Bureau. Mr. Lee Wood, witness for LUMA in support of this Performance Metrics, explained during the Evidentiary Hearing that the Net Energy

Metering Project Activation Duration performance metric that is tracked in Case No. NEPR-MI-2019-0016 and that is reviewed every quarter. It is a legacy metric that calculates the average duration for any activation during the period **for cases that were submitted in that period**. Thus, this statistic **does not include** all the cases that arrived in the previous period or two years ago. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 390, lines 17-25, p. 391, lines 1-9; AP-2020-0025 Evidentiary-20230209_Meeting Recording 2 [1:14:42].

In contrast, the record shows that LUMA's proposed performance metric in this proceeding entails a more rigorous method that includes all applications completed in a particular year, **regardless of when they were submitted**. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 391, lines 12-16; AP-2020-0025 Evidentiary-20230209_Meeting Recording 2 [1:16:01]. Mr. Wood testified that right now, there are basically two different metrics. Therefore, the targets that LUMA put forward in the proposed performance metrics cannot be compared directly with the information on interconnections included in the quarterly reports filed in Case NEPR-MI-2019-0016. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 394, lines 19-25; AP-2020-0025 Evidentiary-20230209_Meeting Recording 2 [1:21:35].

It is a legal error and an abuse of discretion for this Energy Bureau to, through administrative notice, change LUMA's proposed Performance Metric by considering the data filed by LUMA in the quarterly reports in Case No. NEPR-MI-2019-0016. This is because, as the record amply shows, said reports do not provide relevant information regarding the proposed Performance Metrics Targets on Net Energy Metering Project Activation Duration. The decision to utilize the data reported from Case No. NEPR-MI-2019-0016 to set a baseline in this instant proceeding is unsupported and arbitrary, considering that it is extrapolating data incorrectly and, even more so,

ignoring that LUMA has challenged its introduction to the administrative record through administrative notice, as discussed previously.

d. The Determination to Impose Modified Annual Performance Targets is Unsupported and Arbitrary.

In the Final Resolution and Order, this Energy Bureau changed performance targets in LUMA's proposed incentive framework. It used two distinct approaches to update performance targets. *See* Final Resolution and Order, p. 24. For most metrics for which performance targets were updated, the Energy Bureau made updates to performance targets based on the year-on-year improvement rates implicit in LUMA's proposed Annual Performance Targets (i.e., targets at the 100-percent incentive level), thus preserving LUMA's general approach to setting performance targets. *Id.*

As the Final Resolution and Order states, where the application of LUMA's implicit improvement rates was not suitable (because baselines could not be updated or because the application of these improvement rates to the updated baselines did not yield reasonable results), the Energy Bureau used a complementary approach to derive updated performance targets. *See* Final Resolution and Order, p. 24. Under this complementary approach, the Energy Bureau first determined a Long-Term Performance Target and then plotted a trajectory from the metric baseline to this Long-Term Performance Target to interpolate a series of intermediate-year performance targets. *Id.* For this particular approach, the Energy Bureau modified the Long-Term Performance Target based on criteria separate from LUMA's proposal, including peer utility and industry performance data. *Id.*

LUMA requests reconsideration of this determination on alternate frameworks to set the performance targets that will determine LUMA's ability to earn the contractually agreed incentive fee.

i. LUMA's Proposal for Revising Annual Performance Targets Was to Be Implemented After PREPA's Exit of the Title III Proceeding.

First and foremost, LUMA proposed that this Energy Bureau approve an initial set of Performance Metrics and that further proceedings are pursued to review —once set— the Minimum Performance Levels and Targets (25%-150%) for the appropriate metrics with the benefit of new data while considering changes in circumstances and the state of the T&D System. *See* LUMA's Brief, p. ---. LUMA explained that it was in the public interest to have both metrics that are attainable, and that drive the necessary performance to meet contractual, legal, and public policy requirements. *Id.* As Mr. Hurtado testified during the evidentiary hearing:

It's important that . . . the metrics . . . have a direct relation to the state of the utility and the current conditions. So, if there were major events or major changes, there's always an opportunity to request a change in accordance with the impacts that change might have had on the metrics.

. . . the general concept is that you want metrics that are attainable and drive the necessary change in the different areas that will benefit customers and align with Puerto Rican Public Energy policy.

See Evidentiary Hearing, Vol. 1, p. 71, lines 23-25 and p. 72, lines 1-11 (M. Hurtado English); AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [2:03:14].

The substantial evidence on the record establishes that the Performance Metrics Targets included in the Revised Annex IX, Exhibit 11 of the Evidentiary Hearing, were an initial set of metrics that advanced important statutory and public policy objectives to enable the transformation of PREPA's T&D System in accordance with the T&D OMA and allow LUMA a reasonable opportunity to earn the incentive payment set forth in the T&D OMA. Given the passage of time since LUMA submitted the Revised Annex IX for approval on February 25, 2021, and August 18, 2021, LUMA indicated that the Minimum Performance Levels and Targets should be revisited, as there was new and updated information relevant to the applicable Minimum Targets that should

be considered. *See* Evidentiary Hearing, Vol. 1, p. 56, lines 2-16 (M. Hurtado Spanish Portion); AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 2 [2:47:31].

As the record shows, the proposed Performance Metrics Targets were the product of the negotiations that led to the execution of the T&D OMA in June 2020 and revisions during the Front-End Transition Period from July 2020 through February 2022. As stated by LUMA in its Legal Brief, the experience of LUMA's operations of the T&D System since July 2021, new data obtained and maintained by LUMA, funding availability, and the current state of the T&D System were to be considered in setting reasonable targets to allow LUMA a reasonable opportunity to earn the incentive fee. *See* LUMA's Brief, p. 21. The targets were set based on the available data, and there was a direct relationship between the available data and the targets. Therefore, although targets should be revised to consider the new data now available with time since LUMA's prior submissions of the Revised Annex IX to the T&D OMA, LUMA proposed **that a key moment in time when Minimum Performance Levels and Targets should be revised is close to when PREPA exits Title III.** *Id.* (emphasis ours).

As established in the Revised Annex IX, and the supporting testimonies by LUMA's representatives, the information that was available for some of the Performance Metrics Targets was inaccurate or insufficient when LUMA prepared and submitted the Revised Annex IX to the T&D OMA. There were issues with the "accuracy, precision, quality of the data in general terms and . . . the method of recording the data." *See* Evidentiary Hearing, Vol. 1, p. 31, lines 10-13 (M. Hurtado English Portion); AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:07:26]. Given these circumstances, Mr. Hurtado explained that LUMA's proposal was that the Energy Bureau should determine which metrics should be used to measure LUMA's performance. Then, give LUMA an opportunity to re-evaluate the Minimum Performance Levels and Targets.

See Evidentiary Hearing, Vol. 1, p. 49, lines 17-19 (M. Hurtado English Portion); AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:32:05]. LUMA was not proposing that the Energy Bureau re-open a process to consider which metrics to include in Annex IX to the T&D OMA. See Evidentiary Hearing, Vol. 1, p. 53, lines 8-13 (M. Hurtado English Portion); AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:36:30]. The proposal was to review the Targets and the Minimum Performance Levels so that they are in line with the current system as it stands closer to the start of the application of the Performance Metrics. See Evidentiary Hearing, Vol. 1, pp. 97-98, lines 14-25; AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [2:37:13]. In terms of the Targets, LUMA proposed that there should be an opportunity to update and provide further information to the Bureau, **once a determination has been made on what metrics will be used to evaluate LUMA's performance and incentive fee payment.** See Evidentiary Hearing, Vol. 1, p. 51, lines 19-25 (M. Hurtado English Portion), AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:32:33] (emphasis ours). Regarding this topic, Mr. Hurtado testified as follows:

In the context of where we are today, a lot of time has passed. So there's much more information. And there's also uncertainty as to when these metrics will start to apply to LUMA, because the key condition precedent for that is PREPA exiting Title 3, in addition to the approval of the metrics themselves. **So LUMA would propose that there be a determination on which metrics are going to be applied to LUMA, and that when there's more information about the exit from Title 3 or at least closer to what that date is, LUMA can provide updated data.** Because certainly there's a lot of time that's passed and there's a lot of information so that the Bureau can take that into account and decide whether these Targets should be adjusted or the baseline should be adjusted based on the data being presented.

See Evidentiary Hearing, Vol. 1, p. 50, lines 3-25, p. 51, line 1 (M. Hurtado English portion), AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:32:17] (emphasis ours).

“[P]rimarily what [LUMA] would be focused on is the Targets and the Minimum Performance Levels so that they are in line with the current system as it stands closer to the start of the application of the metrics.” *See* Evidentiary Hearing, Vol. 1, p. 98, lines 20-24 (M. Hurtado English Portion); *See* AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [2:38:28].

In summary, LUMA proposed that to have the most appropriate metrics and set the right targets. This Energy Bureau should consider the current system and what LUMA has or has not achieved. They are subject to new data and new information that the Energy Bureau can take into account. *See* Evidentiary Hearing, Vol. 1, p. 100, lines 2-7 (M. Hurtado English Portion); AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [2:40:47]. LUMA’s proposal was meant to facilitate that the metrics reflect the current state of the system, where LUMA is today, and where it needs to be in the next three years to attain the results for the best interest of customers and policy. *See* Evidentiary Hearing, Vol. 1, p. 101, lines 10-15 (M. Hurtado English portion), AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [2:42:03].

Unfortunately, and surprisingly, in the Final Resolution and Order, this Energy Bureau did not weigh or consider the aforementioned evidence on the record regarding the limitation in data available to set targets and the proposal to revisit the targets after PREPA exits the Title III proceeding. Instead, it chose to reject LUMA’s proposal, concluding that it was inconsistent or lacked transparency, and adopt a proposal on targets that **were never discussed throughout the proceedings nor disclosed to LUMA to place it in a position to examine the documents, studies, analyses that may support the Energy Bureau’s proposed frameworks on targets.** Not only did the Energy Bureau issue a determination contrary to the evidence presented on the record of this proceeding, but it also deprived LUMA of procedural due process in connection with

the Energy Bureau's approach to updating performance targets. Given these violations of LUMA's right to due process, this Energy Bureau should reconsider the decision on approaches to updating performance targets. It should adopt LUMA's proposal, the only proposal supported by the evidence admitted into the administrative record.

ii. The Administrative Record Does Not Support the Modification of LUMA's Proposed Annual Performance Targets.

As discussed previously, the Final Resolution and Order ignored the administrative record evidence supporting LUMA's proposed targets. In lieu, the Energy Bureau determined to adopt new targets based on evidence that was not part of the administrative record up until and after the Evidentiary Hearing was held. These new targets were designed for the Final Resolution and Order purposes and were never the subject of discussion before the parties. As discussed below, the adoption of new Annual Performance Targets is contrary to the due process guarantees afforded to any party in an adjudicative proceeding to have the right to confront the evidence and that the final decision is based on evidence in the administrative record.

aa. J.D. Power Customer Satisfaction Surveys (Residential and Business)

The Targets for the J.D. Power Customer Satisfaction Surveys (Residential and Business) Performance Metrics were developed by reviewing the LIPA agreement, which showed that after the agreement was implemented, the scores of the J.D. Power Survey demonstrated a slow improvement over time. However, Ms. Laird noted in her testimony that the LIPA utility was in significantly better condition than PREPA. *See* Exhibit 41 of the Evidentiary Hearing, lines 111-115. Moreover, the scores for the two categories in the surveys of Price and Quality & Reliability were the two lowest scores, both of which will take time to create significant improvements. *Id.*,

lines 110-118. The proposed Targets for the J.D. Power Customer Satisfaction Surveys (Residential and Business) Performance Metrics are illustrated below:

Table 2-4. J.D. Power Customer Satisfaction Survey (Residential Customers)

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	N/A						
Baseline	398						
Year 1	427	398	450	439	427	415	405
Year 2	455	427	480	468	455	440	430
Year 3	484	455	500	492	484	470	460

See Exhibit 11 of the Evidentiary Hearing, p. 21.

Table 2-5. J.D. Power Customer Satisfaction Survey (Business Customers)

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	N/A						
Baseline	345						
Year 1	380	345	415	400	380	370	355
Year 2	414	380	450	432	414	400	390
Year 3	449	414	475	462	449	435	425

See Exhibit 11 of the Evidentiary Hearing, p. 22.

The Energy Bureau determined that it was appropriate to change the performance targets for the J.D. Power Customer Satisfaction Surveys (Residential and Business) metrics. *See* Final Resolution and Order, p. 35. In so doing, the Energy Bureau indicated that LUMA provided no specific justification for its own proposed J.D. Power Customer Satisfaction Surveys (Residential and Business) performance targets. *Id*; *see also id.*, p. 112, findings of facts 23 and 24.

As demonstrated above, LUMA did provide justification for the targets it proposed for this particular metric, and the factual determinations to the contrary are unsupported. Ms. Laird offered

testimony on how the LIPA agreement served as a parameter to develop the targets in the Revised Annex IX. LUMA considered the experience of the LIPA agreement, how it demonstrated a slow improvement over time, and how the LIPA state compared to the state of PREPA's assets. Also, the fact that the two categories in the surveys of Price and Quality & Reliability will take time to create significant improvements. Moreover, Ms. Laird testified that the surveys consistently proved that Price was the most important factor for customers. Evidentiary Hearing Transcript, February 9, 2023 (English Portion), p. 637, lines 3-10; AP-2020-0025 Evidentiary-20230209_Meeting Recording [2:52:16]. This is a factor that is entirely out of LUMA's control, given that the cost of electricity is entirely regulated. Therefore, improvement on this factor alone could be extremely slow or stagnant.

The Energy Bureau unreasonably disregarded the evidence in the administrative record. It based its decision to modify the proposed LUMA Annual Performance Targets for the J.D. Power Customer Satisfaction Surveys (Residential and Business) metrics, on an incorrect assumption that LUMA omitted to justify the reason behind the values put forward for those targets. However, the Energy Bureau did not provide any rationale for the specific values it imposed other than it was appropriate to update them. Thus, the Energy Bureau's ruling in this particular matter is unsupported and, thus, arbitrary.

bb. Average Speed of Answer

To establish the targets for the Average Speed of Answer performance metric, LUMA calculated a reasonable year-to-year improvement that accounts for hiring, learning curve, training, ramp-up, turnover, process improvement, and other standard operational changes. *See* Exhibit 41 of the Evidentiary Hearing, lines 158-160. The proposed Targets are shown below:

Table 2-6. Average Speed of Answer (minutes)

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	8.3						
Baseline	10.0						
Year 1	9.0	9.7	4.5	6.8	9.0	9.3	9.6
Year 2	6.4	7.1	3.2	4.8	6.4	6.7	7.0
Year 3	5.8	6.4	2.9	4.4	5.8	6.1	6.3

See Exhibit 11 of the Evidentiary Hearing, p. 22.

The Energy Bureau changed the target levels to reflect recent improvements based on one of the guiding principles for this proceeding, which is that LUMA needs to go "above and beyond" to earn incentive payments. *See* Final Resolution and Order, p. 39. It considered that under LUMA's proposal, its recent average annual FY2023 performance of 1.7 minutes would surpass the proposed 125-percent performance level in Year 3 (4.4 minutes). *Id.*

The Energy Bureau seems to ignore that the targets proposed by LUMA in the Average Speed of Answer metric were based on the proposed baseline derived from data from Fiscal Year 2019 to March 2020. LUMA determined that data from Fiscal Year 2020 would not support a reliable baseline due to the data being available for a period of six months only, the reported abandonment varied from month to month due to COVID-19 and the onboarding of new outsource vendors, and the lack of visibility into three separate call routing systems. *See* Exhibit 41 of the Evidentiary Hearing, lines 151-156.

The modified targets for the Average Speed of Answer performance metric, as determined by the Energy Bureau, are based on its decision to take administrative notice of LUMA's current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion.

The determination to adopt targets that LUMA did not propose and were not discussed during the Evidentiary Hearing nor considered in this proceeding prior to the Final Resolution and Order, has caused LUMA prejudice and placed it effectively at an unreasonable procedural and substantive disadvantage without timely and meaningful opportunities to file evidence in connection with the revised targets. It is LUMA's position that the modification of the targets based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

cc. Customer Complaint Rate

As a result of the discussion that ensued in the Evidentiary Hearing on whether the Customer Complaint Rate Metric could include cases that the Energy Bureau classifies as "NEPR-RV" proceedings, LUMA then proposed to include both complaints classified as "NEPR-QR" and "NEPR-RV" in the calculation of the total number of complaints in the Customer Complaint Rate Performance Metric. The revised calculation of the proposed Minimum Performance Level and Targets for Years 1, 2, and 3 of the Customer Complaint Rate Performance Metrics is proportional to the original values included in the Revised Annex IX. *See* LUMA's Brief, Exhibit B, Sworn Statement of Melanie Jeppesen, ¶20. The values increased proportionally because of the inclusion of the "NEPR-RV" complaints for May 2019 to February 2020 and the addition of the four new "NEPR-QR" complaints to the calculation of the baseline. *Id.* The targets follow the same proportion between percentages and years as the original proposal, that is, a straight-line trajectory, *Id.*; *see also* Evidentiary Hearing Transcript, February 9, 2023 (English Portion), p. 567, lines 9-23; AP-2020-0025 Evidentiary-20230209_Meeting Recording 1 [1:01:07].

The proposed baseline, Minimum Performance Level, and Targets for the Revised Customer Complaint Rate Performance Metric were included in the Excel workbook accompanying Ms. Jeppesen's Sworn Statement, in a worksheet labeled "Table Metric." *See*

LUMA’s Brief, Exhibit B, Sworn Statement of Melanie Jeppesen, ¶21; Exhibit C attached to Ms. Jeppesen’s Sworn Statement. The worksheet labeled “Table Metric” includes a comparison between the previous values for the Customer Complaint Rate performance metric and the ones being proposed today. *Id.* For ease of reference, the table with the proposed baseline, Minimum Performance Level, and Targets for the Revised Customer Complaint Rate Performance Metric is shown below:

Proposed Revised Metric - May 2023; QR and RV							
	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
Baseline					23.51		
Year 1	23.51	24.73	22.36	23.05	23.51	24.21	24.67
Year 2	22.39	23.56	21.27	21.95	22.39	23.07	23.51
Year 3	21.27	23.44	20.15	20.83	21.27	21.95	22.39

See LUMA’s Brief, Exhibit B, Sworn Statement of Melanie Jeppesen, ¶21.

At the Evidentiary Hearing, Ms. Jeppesen expressed concern about revising the proposed targets with current data because LUMA was not currently disconnecting customers for nonpayment, which would potentially significantly impact the numbers. *See* Evidentiary Hearing Transcript, February 9, 2023 (English Portion), p. 573, lines 7-11; AP-2020-0025 Evidentiary-20230209_Meeting Recording 1 [1:10:54]. Thus, customer complaints would be expected to increase when that process resumes. *Id.*, p. 570, lines 23-25, and p. 571, line 1; AP-2020-0025 Evidentiary-20230209_Meeting Recording 1 [1:06:01]. As explained by Ms. Jeppesen in her Sworn Statement, even though LUMA is proposing to include both complaints classified as “NEPR-QR” and “NEPR-RV” in the calculation of the total number of complaints in the Customer Complaint Rate performance metric, LUMA still has concerns regarding the potential for

fluctuations in the filing of those complaints due to external factors (fuel cost increases, natural disasters, rate changes, etc.). *See* LUMA's Brief, Exhibit B, Sworn Statement of Melanie Jeppesen, ¶13. The record shows that it is typical for these types of events to impact not just customer perception leading to complaints, but actual complaints due to a customer's individual experience resulting from these other factors. *Id.* That is why LUMA maintained the same baseline period between May 2019 and February 2022 and used the same methodology for the Minimum Performance Level and target thresholds.

In the Final Resolution and Order, the Energy Bureau stated dissatisfaction with LUMA's approach to setting targets for the Customer Complaint Rate metric. *See* Final Resolution and Order, p. 41. However, the Energy Bureau did not provide any further reasons or explanations why it decided to modify the revised targets proposed by LUMA and presented above. We can merely infer that since it adopted a baseline using performance data from FY2023, the targets reflect the imposed new baseline. In that scenario, the modified targets for the Customer Complaint Rate performance metric, as determined by the Energy Bureau, are based on its decision to take administrative notice of LUMA's current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. The determination to adopt targets that LUMA did not propose and were not discussed during the Evidentiary Hearing nor considered in this proceeding prior to the Final Resolution and Order, has caused LUMA prejudice and placed it effectively at an unreasonable procedural and substantive disadvantage without timely and meaningful opportunities to file evidence in connection with the revised targets. It is LUMA's position that the modification of the targets based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

dd. Abandonment Rate

To establish the targets for the Abandonment Rate Performance Metric, LUMA calculated a reasonable year-to-year improvement that accounts for hiring, learning curve, training, ramp-up, turnover, process improvement, and other standard operational changes. *See* Exhibit 41 of the Evidentiary Hearing, lines 191-193. The proposed Targets are reflected below:

Table 2-8. Abandonment Rate

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	N/A						
Baseline	50.0%						
Year 1	40.0%	45.0%	20.0%	30.0%	40.0%	41.0%	42.0%
Year 2	32.0%	35.0%	16.0%	24.0%	32.0%	33.0%	34.0%
Year 3	29.0%	34.0%	14.5%	22.0%	29.0%	31.0%	33.0%

See Exhibit 11 of the Evidentiary Hearing, p. 24.

The Abandonment Rate Performance Metric, as proposed by LUMA, was not challenged by any of the testimonies submitted by the intervenors' witnesses. Nonetheless, the Energy Bureau held that considering LUMA's recent Abandonment Rate performance, LUMA's deployment of technologies to improve customer self-service options and reduce call volumes, and LUMA's willingness to revise targets based on updated data, the Energy Bureau finds that the Abandonment Rate baseline and performance targets should be revised to reflect more current data. *See* Final Resolution and Order, p. 45. The Energy Bureau calculated LUMA's proposed improvement rates for Abandonment Rate considering the updated baseline of 8.7 percent taken from LUMA's FY2023 performance, and LUMA's proposed rate of improvement for Abandonment Rate in its Final Revised Annex IX to develop performance targets. *Id.*, p. 46. However, the Energy Bureau disregarded the factors explained by LUMA that accounted for the trend of improvement in the

proposed targets, such as hiring, learning curve, training, ramp-up, turnover, process improvement, and other standard operational changes.

As discussed before, by adopting a baseline using performance data from FY2023, the modified targets by the Energy Bureau reflect the imposed new baseline. As such, the modified targets for the Abandonment Rate performance metric, as determined by the Energy Bureau, are based on its decision to take administrative notice of LUMA's current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. The determination to adopt targets that LUMA did not propose and were not discussed during the Evidentiary Hearing nor considered in this proceeding prior to the Final Resolution and Order, has caused LUMA prejudice and placed it effectively at an unreasonable procedural and substantive disadvantage without timely and meaningful opportunities to file evidence in connection with the revised targets. It is LUMA's position that the modification of the targets based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

ee. OSHA Recordable Incident Rate and OSHA Dart Rate

Per the testimony of Mr. Curtis Clark for LUMA, LUMA's proposed OSHA Recordable Incident Rate Target improvements were first compared to Edison Electric Institute ("EEI") industry standards, then by assessing feasibility from PREPA's current state related to health and safety matters. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 274, lines 21-25; AP-2020-0025 Evidentiary-20230208_Meeting Recording 1 [0:57:23]. The EEI is a collection of private transition industry distribution operators. Organizations voluntarily provide their occupational injury data using similar metrics to the ones proposed by LUMA. *Id.*, p. 275, lines 7-13; AP-2020-0025 Evidentiary-20230208_Meeting Recording 1 [0:58:02]. To the best of

Mr. Clark’s knowledge, the industry average total reportable injury rate is approximately 2.5 for this given year. *Id.*, lines 15-18. A strategy was developed to lead LUMA to an Incident Reduction near 50% from the baseline in Year 3, as shown below:

Table 2-9. OSHA Recordable Incident Rate

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	6.9						
Baseline	8.75						
Year 1	6.56	7.88	5.68	6.12	6.56	7.00	7.44
Year 2	5.25	7.25	3.99	4.59	5.25	5.95	6.69
Year 3	4.20	6.67	2.79	3.45	4.20	5.06	6.02

See Exhibit 19 of the Evidentiary Hearing, lines 188-189, and Exhibit 11 of the Evidentiary Hearing, p. 25.

A similar approach to the OSHA Recordable Incident Rate Performance Metric was adopted in the OSHA DART Rate Performance Metric to lead LUMA to an Incident Reduction near 50% from the baseline in Year 3, as shown below:

Table 2-12. OSHA DART Rate

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	4.80						
Baseline	6.85						
Year 1	5.14	6.17	4.45	4.80	5.13	5.48	5.82
Year 2	4.11	5.67	3.12	3.60	4.11	4.66	5.24
Year 3	3.29	5.22	2.18	2.70	3.29	3.96	4.72

See Exhibit 11 of the Evidentiary Hearing, p. 26.

The Energy Bureau modifies performance targets for the OSHA Recordable Incident Rate and for the OSHA DART Rate using LUMA’s reported rolling 12-month average FY2023

performance as the baseline. *See* Final Resolution and Order, p. 50. The Energy Bureau set the Target Performance Levels equal to the Long-Term Target and removed the 75-percent and 125-percent incentive tiers, effectively making these metrics a binary metric. *Id.*, p. 51. However, the Energy Bureau did not provide any other reasons for making these metrics binary metrics, departing considerably from what LUMA originally proposed.

First, a proposal for these metrics to be binary metrics was not presented by any of the parties during this proceeding nor hinted at by the Energy Bureau at any stage. Binary metrics, while seemingly straightforward, may oversimplify the intricate factors contributing to safety incidents and fail to capture the subtleties necessary for effective risk management. Introducing binary metrics at this juncture does not align as a whole with the complexities of LUMA's operational landscape and labor regulations. The dynamic nature of LUMA's workforce and the challenges faced every day necessitate a more nuanced approach to safety performance measurement. Thus, LUMA contends that the determination to make these metrics binary is unsupported and arbitrary and neglects any rational considerations for not adopting them.

Further, by adopting baselines using performance data from FY2023, the modified targets by the Energy Bureau reflect the imposed new baselines. As such, the modified targets for the OSHA Recordable Incident Rate and the OSHA DART Rate performance metrics, as determined by the Energy Bureau, are based on its decision to take administrative notice of LUMA's current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. The determination to adopt targets that LUMA did not propose and were not discussed during the Evidentiary Hearing nor considered in this proceeding prior to the Final Resolution and Order, has caused LUMA prejudice and placed it effectively at an unreasonable procedural and substantive

disadvantage without timely and meaningful opportunities to file evidence in connection with the revised targets. It is LUMA's position that the modification of the targets based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary. This has caused LUMA prejudice since the Energy Bureau has based its determination for modifying the targets on the data introduced by means of taking administrative notice.

ff. OSHA Severity Rate

The OSHA Severity Rate Targets have a high degree of fluctuation, depending on external factors. *See* Evidentiary Hearing Transcript, February 8, 2023 (English Portion), p. 285, lines 5-8; AP-2020-0025 Evidentiary-20230208_Meeting Recording 1 [1:11:36]. LUMA has programs in the System Remediation Plan that have a large impact on the overall trend and improvement of Severity Rate Targets. *Id.*, lines 9-13; AP-2020-0025 Evidentiary-20230208_Meeting Recording 1 [1:11:36]. However, there will always be a higher degree of variability in how the Target is calculated. In any given year, one or two specific injuries can cause the Severity Rate to increase significantly. *Id.*, lines 14-19; AP-2020-0025 Evidentiary-20230208_Meeting Recording 1 [1:11:36]. External factors cause a higher degree of variability, but it is still significantly within the limits of a utility's control to develop programs to improve the trend. *Id.*, lines 20-23; AP-2020-0025 Evidentiary-20230208_Meeting Recording 1 [1:11:36]. The industry standard for OSHA Severity Rate tends to vary because of the nature of the calculation, but it is approximately 30 to 40. *Id.*, p. 275, lines 20-23 AP-2020-0025 Evidentiary-20230208_Meeting Recording 1 [0:58:02].

Since OSHA Severity Targets rely significantly on external factors outside LUMA's control, Targets were set to improve performance but provide flexibility to the extenuating

circumstances that exist on a case-by-case basis. *See* Exhibit 19 of the Evidentiary Hearing, lines 192-194. LUMA’s proposed Targets are reflected below:

Table 2-11. OSHA Severity Rate

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	31.00						
Baseline	58.03						
Year 1	49.32	53.38	43.52	46.42	49.32	52.23	53.38
Year 2	41.92	49.12	32.64	37.14	41.92	44.39	48.05
Year 3	35.64	45.19	24.48	29.71	35.64	37.74	43.25

See Exhibit 11 of the Evidentiary Hearing, p. 26.

Like the other OSHA-related performance metrics, the Energy Bureau derived a Long-Term Target from the improvement trajectory implied by LUMA's proposed performance targets and calculated updated performance targets using LUMA's reported FY2023 performance as the baseline. *See* Final Resolution and Order, p. 51.

In implementing the applicable targets for the OSHA Severity Rate metric, the Energy Bureau completely disregarded the substantial evidence in the administrative record that established that the industry standard for OSHA Severity Rate tends to vary because of the nature of the calculation, but it is approximately 30 to 40. Instead, the Energy Bureau imposed targets well below 30, departing considerably from the industry standard for this metric. Also, the Energy Bureau omitted to consider testimony that pointed out that this metric relies significantly on external factors outside LUMA’s control. Thus, the targets were proposed to improve performance but provide flexibility to the extenuating circumstances that exist on a case-by-case basis. The Energy Bureau’s ruling on this metric is arbitrary and is not supported by any evidence, testimony, studies, or information on industry standards.

Moreover, by adopting a baseline using performance data from FY2023, the modified targets by the Energy Bureau reflect the imposed new baseline. As such, the modified targets for the OSHA DART Rate performance metric, as determined by the Energy Bureau, are based on its decision to take administrative notice of LUMA’s current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. The determination to adopt targets that LUMA did not propose and were not discussed during the Evidentiary Hearing nor considered in this proceeding prior to the Final Resolution and Order, has caused LUMA prejudice and placed it effectively at an unreasonable procedural and substantive disadvantage without timely and meaningful opportunities to file evidence in connection with the revised targets. It is LUMA’s position that the modification of the targets based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

gg. SAIFI and SAIDI

LUMA’s proposed Targets as supported and explained by Mr. Don Cortez for LUMA, for both SAIFI and SAIDI, are uncontested. The proposed targets are depicted below:

Table 2-13. System Average Interruption Frequency Index (SAIFI)

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	10.6						
Baseline	10.6						
Year 1	9.8	10.4	8.2	8.9	9.8	10.0	10.2
Year 2	8.5	10.1	6.8	7.5	8.5	8.9	9.5
Year 3	7.4	9.8	5.8	6.6	7.4	8.2	9.0

Table 2-14. System Average Interruption Duration Index (SAIDI)

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	1,243						
Baseline	1,243						
Year 1	1,119	1,212	870	994	1,119	1,150	1,181
Year 2	932	1,155	684	808	932	1,007	1,081
Year 3	746	1,118	497	622	746	870	994

See Exhibit 11 of the Evidentiary Hearing, p. 27.

Regarding the Targets for SAIFI, Mr. Cortez testified that since no reliable historical data exists that indicates what degree of T&D reliability improvement can generally be expected from a specific level of funds invested in Puerto Rico, LUMA relied upon my many years of experience in T&D at various utilities and the LUMA current and forecasted annual budgets to estimate an aggressive but attainable annual percent improvement from the baselines to establish future annual Targets for LUMA's first three years of operation. See Exhibit 10 of the Evidentiary Hearing, lines 342-347. Regarding SAIFI, the resulting values are the Target thresholds (100% goal) with an improvement of 7.5% by the end of Year 1, a cumulative annual improvement of 20% by the end of Year 2, and a cumulative annual improvement of 30% by the end of Year 3. See *Id.*, lines 347-350. The estimated expected annual percent improvement is then reasonably varied to establish values for the minimum, 150%, 125%, 50%, and 25% performance goals. *Id.*, lines 350-352.

Similarly, regarding SAIDI, Mr. Cortez testified that since no reliable historical data exists that indicates what degree of T&D reliability improvement can generally be expected from a specific level of funds invested in Puerto Rico, LUMA relied upon my many years of experience in T&D at various utilities and the LUMA current and forecasted annual budgets to estimate an aggressive but attainable annual percent improvement from the baselines to establish future annual Targets for LUMA's first three years of operation. *Id.*, lines 358-363. The resulting values are the Target thresholds (100% goal) for this Performance Metric with an improvement of 10% by the

end of Year 1, a cumulative annual improvement of 25% by the end of Year 2, and a cumulative annual improvement of 40% by the end of Year 3. *Id.*, lines 363-366. The estimated expected annual percent improvement is then reasonably varied to establish values for the minimum, 150%, 125%, 50%, and 25% performance goals. *Id.*, lines 366-368.

In setting the 25% Target, LUMA examined pursuant to its experience, what would be the worst-case scenario for its ability to improve; that is, if LUMA had more problems on the grid than anticipated, what would be the minimum performance and the minimum achievable Target. See Evidentiary Hearing, Vol. 2 (English Portion), p. 315, lines 3-25, p. 316, lines 1-2; AP-2020-0025 Evidentiary Hearing-20230208_Meeting Recording 1 [1:54:16-1:55:42].

During the Evidentiary Hearing, Mr. Cortez explained that to set the Targets, LUMA considered the unknowns, the fact that the health of the T&D System was not documented by PREPA, which led LUMA to do some visual assessments to then use its judgment to determine that the rest of the T&D System was in similar or worse condition. *See* Evidentiary Hearing, Vol. 2 (English Portion) p. 304, lines 24-25, p. 305, lines 1-8; AP-2020-0025 Evidentiary Hearing-20230208_Meeting Recording 1 [1:35:14-1:35:55]. LUMA also looked at the budget constraints and, using its experience and reliability improvement and systems, determined that it could achieve a 30 percent improvement by year 3 in SAIFI, and a 40 percent improvement in SAIDI by year 3 and then LUMA used its experience to adjust how much improvement could be achieved per year. *See* Evidentiary Hearing, Vol. 2 (English Portion), p. 305, lines 9-17; AP-2020-0025 Evidentiary Hearing-20230208_Meeting Recording 1 [1:35:55-1:36:24].

As Mr. Cortez explained, an examination of the SAIFI and SAIDI Fiscal Years 2019, 2020, and 2021 results clearly shows that the performance of the T&D System was not stable but had been and continued to degrade year after year. *See* Exhibit 10 of the Evidentiary Hearing, lines

374-375. The testimony of Mr. Cortez during the evidentiary hearing illustrates that the electromechanical grid was deteriorating at an accelerated rate, not a linear rate. Things were failing on an exponential curve because of a lack of maintenance work over a decade. The system was no longer failing linearly or flat, but it was failing exponentially. *See* Evidentiary Hearing, Vol. 2 (English Portion), p. 307, lines 7-125, p. 308, lines 1; AP-2020-0025 Evidentiary Hearing-20230208_Meeting Recording 1 [1:38:29-1:34:41].

Also uncontested on record regarding LUMA's method for setting targets for the reliability metrics, is that to meet the proposed performance Targets, LUMA must make performance improvements on top of reversing this continually degrading performance. This will require aggressive action and stretch capabilities and budgets. *See* Exhibit 10 of the Evidentiary Hearing, lines 377-380. The record also establishes the significant challenges faced by LUMA in meeting the proposed Targets. For example, several T&D assets were out of service and did not work prior to June 1, 2021. Work was done to place them back in service. *See* Exhibit 10 of the Evidentiary Hearing, lines 382-384. The number of T&D assets that were out of service and the fact that no work was performed prior to June 1st, 2020, causes further constraints to the electrical system, thus contributing to an accelerated rate of degradation to the metrics. *Id.*, lines 384-385. In some cases, the placement of assets back into service will require the procurement of long-lead high-voltage equipment items that can take up to a year to receive, followed by an additional year for the installation and commissioning of this equipment. *Id.*, lines 385-388. Another challenge that was taken into consideration is the lengthy process and work associated with documentation for FEMA reimbursement eligibility. *Id.*, lines 389-390. Asset reliability will improve after the completion of the larger projects. It is then that reliability will start to improve significantly. *Id.*, lines 390-395. It will take months to complete the larger projects. *Id.*, lines 394-395.

As the testimony of Mr. Cortez during the Evidentiary Hearing shows, the current conditions of the T&D System are such that it is increasingly difficult to improve SAIFI, and SAIDI continues to be a challenge as there are many more aspects of the grid that fail such as for example, an underground cable and that affects SAIDI. *See* Evidentiary Hearing, Vol. 2 (English Portion), p. 311, lines 21-25, p. 312, lines 1-2; AP-2020-0025 Evidentiary Hearing-20230208_Meeting Recording 1 [1:45:30]. Thus, the record shows without contest, that the proposed Targets for these metrics remain aggressive considering the conditions of the assets and should have been adopted by this Energy Bureau at this time.

In the Final Resolution and Order, the Energy Bureau determined to update the SAIFI target levels to reflect recent improvements in SAIFI. *See* Final Resolution and Order, p. 56. It stated that FY2023 was a commendable improvement from past performance and updating targets will encourage further progress on this important reliability metric during the initial three-year period. *Id.* As for SAIDI, the Energy Bureau established targets based on the updated baseline to reflect LUMA's improved performance in FY2023. *Id.*, p. 60.

The Energy Bureau's ruling to adopt different and more aggressive targets ignores the aforementioned evidence that is found in the administrative record, which demonstrates that LUMA relied on my many years of experience in T&D at various utilities and LUMA's current and forecasted annual budgets to estimate an aggressive but attainable annual percent improvement from the baselines to establish future annual Targets for LUMA's first three years of operation. Also, LUMA considered the unknowns to set the proposed targets. the fact that the health of the T&D System was not documented by PREPA led LUMA to do some visual assessments to use its judgment then to determine that the rest of the T&D System was in similar or worse condition. LUMA also considered that reliability would improve after the completion of the larger projects,

and then reliability would start to improve significantly. The Energy Bureau erred and abused its discretion when it ignored the facts and evidence on record regarding the accelerated rate of degradation of the T&D System, which affects performance regarding reliability. Those facts were entered into evidence and form part of the administrative record, which the Energy Bureau completely disregarded in favor of current performance data, which was not the subject of discussion.

As stated previously for other metrics, by adopting baselines using performance data from FY2023, the modified targets by the Energy Bureau reflect the imposed new baseline. As such, the modified targets for the SAIFI and SAIDI performance metrics, as determined by the Energy Bureau, are based on its decision to take administrative notice of LUMA's current performance as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. The determination to adopt targets that LUMA did not propose and were not discussed during the Evidentiary Hearing nor considered in this proceeding prior to the Final Resolution and Order, has caused LUMA prejudice and placed it effectively at an unreasonable procedural and substantive disadvantage without timely and meaningful opportunities to file evidence in connection with the revised targets. It is LUMA's position that the modification of the targets based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

hh. NEM Project Activation

Mr. Lee Wood submitted a pre-filed direct testimony in support of the NEM Project Activation Duration Performance Metric. He indicated that the most effective way that LUMA can currently support customer adoption of DG is to activate the NEM tariff as expeditiously as

possible, ensuring each application meets regulatory and technical requirements. *See* Exhibit 23 of the Evidentiary Hearing, Direct Testimony of Lee Wood (October 28, 2022), p. 8, lines 187-189.

LUMA proposed a Target of 28 days, which is more aggressive than the current performance (33 days) and the Minimum Performance Level (30 days) while facilitating a reasonably achievable rate of improvement with the resources and IT systems available. *Id.*, lines 172-175. LUMA’s witness further stated that over the past several years, there had been a steadily increasing number of new NEM applications submitted to the utility each month, which makes it difficult to predict and control program performance. *See* Exhibit 23 of the Evidentiary Hearing, p. 8, lines 195-197. Also, the expedited project application process is still very manual and labor-intensive. *Id.*, line 216. Those factors were considered to meet the proposed Targets for the NEM Project Activation Duration Performance Metric, as shown below:

Table 2-19. NEM Project Activation Duration

	Target Threshold	Minimum Performance Level	150%	125%	100%	50%	25%
PREB Order	N/A						
Baseline	N/A						
Year 1	28	30	26	27	28	29	30
Year 2	28	30	26	27	28	29	30
Year 3	28	30	26	27	28	29	30

See Exhibit 11 of the Evidentiary Hearing, p. 30.

Mr. Cosme, a witness on behalf of the ICPO, submitted testimony in relation to the proposed NEM Project Activation Duration Performance Metric. He opined that the Target threshold of (28) days for the Interconnection Performance Metric was not that much of an improvement from the (30) days, that it should be set to a number that will reflect an outstanding performance by the utility, and that the Target could be (15) days. *See* Exhibit 32 of the Evidentiary

Hearing, Direct Testimony of Gerardo Cosme (December 8, 2022), p. 2, lines 75-80. However, Mr. Cosme did not provide support for his proposal of a target of 15 days.

In response to Mr. Cosme's testimony, Mr. Cortez submitted a rebuttal testimony for LUMA. Mr. Cortez explained that LUMA's proposed Target threshold is considered aggressive, considering that circumstances beyond LUMA's control influence the average number of days to activate NEM projects. For example, the number of NEM cases is increasing monthly, and that increase is dictated by the customers and other reasons that LUMA does not control. *See* Exhibit 26 of the Evidentiary Hearing, Direct Testimony of Don Cortez (January 23, 2023), p. 5, lines 89-92, and p. 6, line 93. Also, Mr. Cosme's proposal to set the Target at 15 days is not feasible. NEM cases that arrived and were completed in FY2022 had an average of 12 days for the validation of the customer's NEM application due to information still being required by the client. *Id.*, lines 106-108.

In the Final Resolution and Order, the Energy Bureau held that LUMA has not justified that it is reasonable for the performance targets for this metric to be so close to the statutory minimum performance level, nor has LUMA justified why these targets should not improve over time. *See* Final Resolution and Order, p. 80. That determination ignores the weight of the evidence found in the administrative record.

Through witnesses' testimonies, LUMA established that over the past several years, there had been a steadily increasing number of new NEM applications submitted to the utility each month, which makes it difficult to predict and control program performance. Also, the expedited project application process is still very manual and labor-intensive. All those factors were considered when LUMA submitted the values for the proposed targets for the NEM Project Activation Duration Performance Metric and were improperly weighed or discarded by this

Energy Bureau. Notwithstanding the aforementioned evidence and facts, the Energy Bureau set the targets based on a baseline from data derived from a quarterly report in another proceeding that, as discussed previously, does not correlate with the information to be reported for this specific performance metric. It ignored the justifications provided by LUMA's witnesses in favor of an incorrect interpretation of data pertaining to a different proceeding. The Energy Bureau erred and abused its discretion and should reconsider the determination to set an aggressive target for this metric that is not supported by the record.

The Energy Bureau based its targets on a decision to take administrative notice of LUMA's current performance, as reported in another proceeding before the Energy Bureau. A decision that LUMA challenged due to being a due process violation, which objection reiterates in the present Motion. The determination to adopt targets that LUMA did not propose and were not discussed during the Evidentiary Hearing nor considered in this proceeding prior to the Final Resolution and Order, has caused LUMA prejudice and placed it effectively at an unreasonable procedural and substantive disadvantage without timely and meaningful opportunities to file evidence in connection with the revised targets. It is LUMA's position that the modification of the targets based on that data is unsupported by the administrative record presented at the Evidentiary Hearing and is arbitrary.

C. The Energy Bureau Erred and Abused its Discretion when Ordering LUMA to include Additional Performance Metrics in Revised Annex IX of the T&D OMA.

As stated previously, in the December 22 Resolution and Order, the Energy Bureau concluded that additional performance-based incentive metrics must be evaluated as part of this procedure ("Additional Metrics"). To that end, the Energy Bureau identified three additional categories of performance metrics: (i) Interconnection of Distributed Energy Resources; (ii) Energy Efficiency and Demand Response; and (iii) Vegetation Management. The Energy Bureau

issued its decision based on LUMA's responses to written discovery. Furthermore, the Energy Bureau considered information beyond the confines of this adjudicative proceeding. It took notice of comments submitted by LUMA in connection with the draft regulation on Energy Efficiency, NEPR-MI-2021-0005, and data on vegetation-related outages filed by LUMA in Case NEPR-MI-2019-

In opposition in LUMA's Objection filed on February 17, 2022, LUMA contended that the entry of the December 22 Resolution and Order was arbitrary and in violation of LUMA's due process rights for several reasons. Specifically, upon entering the December 22 Resolution and Order, the Energy Bureau incorrectly relied on several supplemental responses to discovery propounded by the Energy Bureau and by LECO that LUMA was ordered to provide without being afforded the prior opportunity to be heard concerning the objections that LUMA had timely raised. LUMA also argued that upon entering the December 22 Resolution and Order, the Energy Bureau unfairly admitted those responses to discovery requests as evidence. In addition, the Energy Bureau did not first allow LUMA to file rebuttal testimonies regarding the information and documentation in the record from which the Energy Bureau drew its conclusion to include additional categories of performance metrics in this proceeding. Nor did the Energy Bureau wait until the conclusion of the evidentiary hearing with the benefit of the full record to issue a determination on whether additional categories of metrics are warranted.

Additionally, LUMA established for the record that the December 22 Resolution and Order also constituted an improper exercise of the Energy Bureau's ability to take administrative notice of filings made in other regulatory proceedings as it did not provide LUMA a reasonable opportunity to be heard. Moreover, the Energy Bureau established an abbreviated procedural calendar for LUMA to add the new metrics to the revised Annex IX, which only underlined the

unfair and impractical nature of the December 22 Order and Resolution. The opportunity to conduct discovery as to the additional performance metrics **did not cure** the defects of the December 22 Resolution and Order arising from the fact that it was entered in violation of LUMA's due process rights. As such, LUMA hereby incorporates its arguments that the Energy Bureau erred and abused its discretion in issuing the December 22 Resolution and Order and further erred and abused its discretion in refusing to vacate said order or otherwise grant LUMA relief from that portion of the December 22 Resolution and Order that required LUMA to add Additional Metrics to the revised Annex IX.

The Energy Bureau's order for LUMA to include Additional Metrics is and remains an order that violates LUMA's due process rights in the present proceeding. The aforementioned violation of due process was maintained in the Final Resolution and Order, whereby this Energy Bureau included the Additional Metrics. That due process injury was further compounded by the determination to approve amendments to the revised Annex IX of the T&D OMA that LUMA was required to file on October 18, 2022, with the Additional Metrics. On reconsideration, this Energy Bureau should vacate the December 22nd Order and the portions of the Final Resolution and Order that include the Additional Metrics over LUMA's objections and reservation of rights.

D. Specific Factual Determinations by this Energy Bureau that are not Supported by the Record and Must be Reconsidered. The Conclusions of Law do not Satisfy the Requirements of the LPAU.

As discussed in Section III.B, *supra*, this Energy Bureau issued several determinations that are not supported by the administrative record. The following is a list of the factual findings stated on pages 111 through 115 of the Final Resolution and Order, which are also not supported by the administrative record nor by substantial evidence in the administrative record and ignore the substantial evidence presented by LUMA for the record in this proceeding:

1. Finding of fact Number 5: *Current baseline performance is best indicated by the performance results for the last completed performance period, which is Fiscal Year 2023 (2023).* Neither this Energy Bureau nor the parties to this proceeding submitted any evidence during the evidentiary hearing on LUMA's performance during FY2023. In fact, during the evidentiary hearing, LUMA objected to the admissibility of evidence regarding current performance in a timely manner. *See* Evidentiary Hearing, Vol. 1, p. 44, lines 12-25, p. 45, lines 1-12, AP-2020-0025 Evidentiary Hearing-20230207_Meeting Recording 1 [1:25:00]. The record of the evidentiary hearing lacks any evidence of current performance to support the Energy Bureau's surprising determination on current baseline performance. In issuing this factual determination, this Energy Bureau did not reference the discussions and objections during the evidentiary hearing where LUMA established that current performance is beyond the scope of the matters subject to adjudication and outside LUMA's Revised Annex IX, which is the only proposal that was submitted for consideration and that did not include any request to set baselines in accordance with LUMA's performance during FY2023. As discussed in Section III B, *supra*, this determination to consider FY2023 performance for baseline purposes is also arbitrary, null, and void, as it was issued in violation of procedural due process and is contrary to the Energy Bureau's prior orders in this proceeding and Case No. NEPR-MI-2019-0007, to set performance baselines and compliance benchmarks for Puerto Rico's electric system (the "Baseline Proceeding").
2. Finding of fact Number 8: *LUMA has not proposed a consistent approach to setting performance targets for its performance metrics.* As explained in Section III. B.

supra, LUMA’s Revised Annex IX, the pre-filed testimonies submitted for the record on behalf of LUMA, and the testimonies presented throughout the Evidentiary Hearing, set forth the methodology and rationale of the targets proposed for each of the performance metrics. This conclusion ignores said evidence in clear violation of applicable procedural rules and due process requirements. The determination is not accompanied by a reference to which evidence was presented for the record that can establish that a consistent approach is required, nor that LUMA’s proposals on targets for each of the metrics should be rejected.

3. Finding of fact Number 9: *LUMA[']s approach to setting performance targets lacks transparency.* LUMA’s Revised Annex IX, the pre-filed testimonies and testimonies presented throughout the evidentiary hearing set forth the methodology and rationale of the targets proposed for each of the performance metrics. This conclusion ignores that evidence and is not accompanied by a reference to which evidence was presented for the record that can establish that LUMA’s proposals on targets for each of the metrics were not transparent.
4. Finding of fact number 11: *The inclusion of performance tiers at the 25-percent, 50-percent, and 150-percent levels in LUMA’s incentive structure is unduly complex and could lead to compensating LUMA for non-exemplary performance.* The Energy Bureau did not include any citation to the administrative record or other regulatory or legal support to apply, in this case, the concept of “exemplary performance” which is not even a defined term in Regulation No. 9137. The Energy

Bureau also failed to reference substantial evidence for the conclusion that LUMA's proposal is unduly complex.

5. Finding of fact number 12: *Replacing the 50-percent performance level with a 75-percent performance level in the incentive structure will provide a stronger incentive to LUMA to achieve meaningful performance improvements.* The Energy Bureau does not include any citation to the administrative record or other regulatory or legal support for the conclusion that replacing the 50-percent performance level with the 75-percent performance level will provide a stronger incentive to achieve meaningful performance improvements. The Energy Bureau also failed to reference substantial evidence for the conclusion on what meaningful performance is, a term not even defined in Regulation No. 9137.
6. Finding of fact number 15: *Defining performance targets so that they represent the minimum, not maximum performance required to earn the associated incentive enhances transparency in the performance incentive structure.* The Energy Bureau did not reference any evidence admitted for the record on how and to what extent its definition of targets enhances transparency in the performance incentive structure.
7. Finding of fact number 20: *LUMA's proposed allocation of incentive base points to each of the two J.D. Power metrics is too high.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocations of base points of the J.D. Power Performance Metrics are too high. The record lacks any such evidence. The PREB-approved allocation of base points for these Performance

Metrics was not submitted for the record prior to the issuance of the Final Resolution and Order.

8. Finding of fact number 22: *The performance targets for each of the J.D. Power metrics as proposed by LUMA are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the J.D. Power Survey Performance Metrics are not designed to maximize net benefits for customers. The record lacks any evidence to support the conclusion that these performance metrics do not incentivize behavior to benefit customers. The only objections to these metrics that the Energy Bureau stated in its Final Resolution and Order involve alleged concerns with the surveys conducted by a third-party specialist in customer surveys, and do not pertain to the proposed targets.
9. Finding of fact number 25: *LUMA's proposed allocation of incentive base points to the Average Speed of Answer metric is too high.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocation of base points of the Average Speed of Answer Performance Metric is too high. The record lacks any such evidence. The PREB-approved allocation of base points for this Performance Metric was not submitted for the record prior to the issuance of the Final Resolution and Order.
10. Finding of fact number 28: *LUMA's proposed allocation of incentive base points to the Customer Complaint Rate metric is too low.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocation of base points for the Customer Complaint Rate Performance Metric is too high. The record

lacks any such evidence. The PREB-approved allocation of base points for this Performance Metric was not submitted for the record prior to the issuance of the Final Resolution and Order.

11. Finding of fact number 30: *The performance targets for the Customer Complaint Rate metric proposed by LUMA are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the Customer Complaint Performance Metric are not designed to maximize net benefits for customers. The record lacks evidence to support the conclusion that this Performance Metric does not incentivize behavior to benefit customers.

12. Finding of fact number 32: *LUMA's proposed allocation of incentive base points to the Abandonment Rate metric is too high.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocation of base points of the Abandonment Rate Performance Metric is too high. The record lacks any such evidence. The PREB-approved allocation of base points for this Performance Metric was not submitted for the record prior to the issuance of the Final Resolution and Order.

13. Finding of fact number 34: *The performance targets for the Abandonment Rate metric proposed by LUMA are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the Abandonment Performance Metric are not designed to maximize net benefits for customers. The record lacks evidence

to support the conclusion that this Performance Metric does not incentivize behavior to benefit customers.

14. Finding of fact number 35: *LUMA's proposed allocation of incentive base points to each of the labor safety metrics is too high.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocation of base points of the labor safety Performance Metrics is too high. The record lacks any such evidence. The PREB-approved allocations of base points for these Performance Metrics were not submitted for the record prior to the issuance of the Final Resolution and Order.
15. Finding of fact number 37: *The performance targets for the OSHA Severity Rate metric, the OSHA DART Rate metric, and the Recordable Incident Rate are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the labor safety Performance Metrics are not designed to maximize net benefits for customers. The record lacks evidence to support the conclusion that these metrics do not incentivize behavior to benefit customers.
16. Findings of facts numbers 38 and 41: *LUMA's proposed allocation of incentive base points to the SAIFI metric is too low; and LUMA's proposed allocation of incentive base points to the SAIDI metric is too low.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocations of base points of the SAIFI and SAIDI Performance Metrics is “too low”. The record lacks any such evidence. The PREB-approved allocations of base points for these

Performance Metrics were not submitted for the record prior to the issuance of the Final Resolution and Order.

17. Findings of facts numbers 40 and 43: *The performance targets for the SAIFI metric proposed by LUMA are not designed to maximize net benefits for customers; and the performance targets for the SAIDI metric proposed by LUMA are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the SAIFI and SAIDI Performance Metric are not designed to maximize net benefits for customers. -The record lacks any evidence to support the conclusion that these performance metrics do not incentivize behavior to benefit customers.
18. Finding of fact number 44: *LUMA's proposed allocation of incentive base points to the Vegetation Maintenance metric is too high.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocation of base points of the Vegetation Management Performance Metrics is too high. The record lacks any such evidence. The PREB-approved allocation of base points for this Performance Metric was not submitted for the record prior to the issuance of the Final Resolution and Order.
19. Findings of facts numbers 48, 51, 54: *LUMA's proposed allocation of incentive base points to the Transmission Line Inspections and Targeted Corrections metric is too high; LUMA's proposed allocation of incentive base points to the Distribution Line Inspections and Targeted Corrections metric is too high; and LUMA's proposed allocation of incentive base points to the T&D Substation Line Inspections and Targeted Corrections metric is too high.* The Energy Bureau did not cite any

evidence that could plausibly support the conclusion that the allocations of base points of the Lines Inspections and Targeted Corrections Inspections Performance Metrics are too high. The record lacks any such evidence. The record does not establish PREB's authority to modify the proposed base points. The PREB-approved allocations of base points for these Performance Metrics were not submitted for the record prior to the issuance of the Final Resolution and Order.

20. Findings of facts numbers 49, 52, 55: *The performance targets for the Transmission Line Inspections and Targeted Corrections metric proposed by LUMA are not designed to maximize net benefits for customers; The performance targets for the Distribution Line Inspections and Targeted Corrections metric proposed by LUMA are not designed to maximize net benefits for customers; and The performance targets for the T&D Substation Line Inspections and Targeted Corrections metric proposed by LUMA are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the Targeted Corrections Inspections Performance Metrics are not designed to maximize net benefits for customers. The Energy Bureau did not even reference regulatory or legal support for the concept of maximizing net benefit for customers in the context of these Performance Metrics. The record lacks any evidence to support the conclusion that these performance metrics do not incentivize behavior to benefit customers.

21. Finding of fact number 57: *LUMA's proposed allocation of incentive base points to the NEM Project Activation Duration metric is too low.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the allocation of

base points of the NEM Project Activation Duration Performance Metric is too low. The record lacks any such evidence. The record does not establish PREB's authority to modify the proposed base points. The PREB-approved allocation of base points for this Performance Metric was not submitted for the record prior to the issuance of the Final Resolution and Order.

22. Finding of fact number 59: *The performance targets for the Project Activation Duration metric proposed by LUMA are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the NEM Project Activation Duration Performance Metrics are not designed to maximize net benefits for customers. The record lacks evidence to support the conclusion that this Performance Metric does not incentivize behavior to benefit customers.

23. Finding of fact number 62: *LUMA's proposed allocation of incentive base points to each of the Energy Savings as a Percentage of Sales and Demand Response Savings as a Percentage of Peak Demand metrics is too low.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the Energy Savings as a Percent of Sales and Demand Response Savings as a Percentage of Peak Demand Performance Metrics is too low. The record lacks any such evidence. The record does not establish PREB's authority to modify the proposed base points. The PREB-approved allocation of base points for this Performance Metric was not submitted for the record prior to the issuance of the Final Resolution and Order.

24. Findings of facts numbers 70, 71, and 72: *The definition proposed by LUMA for the Operating Budget metric will not maximize net benefits for customers; The definition proposed by LUMA for the Capital Budget (Federally Funded) metric will not maximize net benefits for customers; and The definition proposed by LUMA for the Capital Budget (Non-Federally Funded) metric will not maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the definitions of LUMA's Operating Budget, Capital Budget (Federally-Funded), and Capital Budget (Non-Federally Funded) Performance Metrics will not maximize net benefit for customers. The Energy Bureau did not rely on any evidence or study submitted for the record to prove its conclusion that benefits will not be realized. The Energy Bureau did not even reference regulatory or legal support for the concept of maximizing net benefit for customers in the context of this Performance Metric. The record lacks any evidence to support the conclusion that these performance metrics do not incentivize behavior to benefit customers.

25. Findings of facts Numbers 74, 76, and 77: *The performance targets for the Overtime metric proposed by LUMA are not designed to maximize net benefits for customers; The performance targets for the Days Sales Outstanding: General Customers metric; and The performance targets for the Days Sales Outstanding: Government Customers metric proposed by LUMA are not designed to maximize net benefits for customers proposed by LUMA are not designed to maximize net benefits for customers.* The Energy Bureau did not cite any evidence that could plausibly support the conclusion that the performance targets for the Overtime and Day sales

Outstanding Performance Metrics are not designed to maximize net benefits for customers. The Energy Bureau did not even reference regulatory or legal support for the concept of maximizing net benefit for customers in the context of these Performance Metrics. The record lacks any evidence to support the conclusion that these performance metrics do not incentivize behavior to benefit customers.

It is widely known in our jurisdiction that administrative agencies must support their findings of facts from substantial evidence in the administrative record. *Otero v. Toyota*, 163 DPR 716, 728 (2005). The findings of facts made by the Energy Bureau as included in the Final Resolution and Order are conclusory, repetitive, speculative, and lack support from the administrative record. As demonstrated from the discussion in previous sections, the administrative record contains sufficient substantial evidence that refutes the Energy Bureau's factual determinations. The Energy Bureau acted unreasonably based on the totality of the evidence in the administrative record. The deficiencies of the factual determinations highlight the arbitrary and capricious nature of the Final Resolution and Order and affect LUMA's right, as it lacks guidance on the reasons that underlie the decision, and this, in turn, affects its right to reconsider and seek judicial review. *See Rivera Santiago v. Srio. de Hacienda*, 119 DPR 265, 276–77 (1987) (outlining that defective factual determinations by administrative agencies affect a Court's ability to review the decision and that the requirement of factual determinations is meant to dissuade arbitrary, capricious and unauthorized decisions by administrative agencies and to allow the party to understand the determination to decide if it seeks further remedies, including judicial review).

Relatedly, the conclusions of law stated on pages 115 and 116 of the Final Resolution and Order are also defective and should be vacated. In eleven numbered paragraphs under the title of

“Conclusions of Law,” the Energy Bureau merely referenced or quoted provisions of Act 57-2014, Act 17-2019, and Regulation No. 9137. Those references and quotations, however, are not accompanied by legal conclusions based on the facts or evidence on the record. There is no discussion on how the referenced laws and regulations support any determination made in the Final Resolution and Order. That is, there is no reasoning to apply the quoted legal and regulatory provisions to the facts and controversies of this case, as required by Section 3.14 of the LPAU 3 LPRA §9654. As if said failings are not enough, the Energy Bureau did not include a single conclusion of law regarding the T&D OMA, which is the binding contract in connection with LUMA’s Performance Metrics and the main source of legal support to determine LUMA’s ability to earn the Incentive Fee.

E. The Energy Bureau Should Clarify the Discrepancies in Baselines and Annual Performance Targets in Certain Metrics in Different Sections of the Final Resolution and Order.

The Energy Bureau provided baselines and annual performance targets for each metric individually throughout the Final Resolution and Order. *See* Final Resolution and Order, pp. 33, 39, 46, 51, 56, and 60. In addition, Appendix B of the Final Resolution and Order also includes a table with the baselines and annual performance targets for all metrics. *See* Appendix B to the Final Resolution and Order, pp. 134-136. However, when comparing the values provided for the baselines and annual performance targets of certain metrics, some discrepancies can be found for the following performance metrics: JD Power Customer Satisfaction Survey (Residential Customers), Average Speed of Answer, Abandonment Rate, OSHA Dart Rate, SAIFI, and SAIDI, as explained below:

1. JD Power Customer Satisfaction Survey (Residential Customers)

For the JD Power Customer Satisfaction Survey (Residential Customers) performance metric, there is a discrepancy in the value provided for the Minimum Performance Level of Year 1, as shown below:

Table 9. Performance Targets and Other Key Parameters for J.D. Power Customer Satisfaction Survey (Residential Customers)

Baseline	398			
Long-Term Target	714			
Incentive Level	Minimum	75%	100%	125%
Year 1	390	443	461	503
Year 2	427	488	524	609
Year 3	455	533	588	714

See Final Resolution and Order, p. 33.

J.D. Power Customer Satisfaction Survey (Residential Customers)				
Baseline	398			
Year 1	398	443	461	503
Year 2	427	488	524	609
Year 3	455	533	588	714

See Final Resolution and Order, Appendix B-Performance Metric Annual Targets and Minimum Performance Levels, p. 134.

2. Average Speed of Answer

In the Average Speed of Answer performance metric, there is a discrepancy in the values provided for the baseline and the Annual Targets for Years 1, 2, and 3, as depicted below:

Table 11. Performance Targets and Other Key Parameters for ASA Performance Metric

	Minimum	75%	100%	125%
Baseline	1.69			
Long-Term Target	1.00			
Year 1	9.70	1.59	1.55	1.46
Year 2	7.10	1.49	1.41	1.23
Year 3	6.40	1.39	1.28	1.00

See Final Resolution and Order, p. 39.

Average Speed of Answer (minutes)				
Baseline	1.70			
Year 1	9.70	1.60	1.56	1.47
Year 2	7.10	1.50	1.42	1.23
Year 3	6.40	1.40	1.28	1.00

See Final Resolution and Order, Appendix B-Performance Metric Annual Targets and Minimum Performance Levels, p. 134.

3. Abandonment Rate

For the Abandonment Rate performance metric, there is a discrepancy in the value provided for the Annual Target for Year 3, as follows:

Table 13. Performance Targets and Other Key Parameters for Abandonment Rate Performance Metric

	Minimum	75%	100%	125%
Baseline	8.7%			
Long-Term Target	3.8%			
Year 1	45.0%	8.0%	7.7%	7.1%
Year 2	35.0%	7.3%	6.7%	5.4%
Year 3	34.0%	6.6%	5.8%	3.8%

See Final Resolution and Order, p. 46.

Abandonment Rate				
Baseline	8.7%			
Year 1	45.0%	8.0%	7.7%	7.1%
Year 2	35.0%	7.3%	6.7%	5.4%
Year 3	34.0%	7.0%	5.8%	3.8%

See Final Resolution and Order, Appendix B-Performance Metric Annual Targets and Minimum Performance Levels, p. 134.

4. OSHA Dart Rate

In the OSHA Dart Rate performance metric, there is a discrepancy in the values provided for the Annual Target for Year 1 for the 75% tier and there is no value provided for the Annual Target for Year 1 for the 125% tier, as shown below:

Table 15. Performance Targets and Other Key Parameters for OSHA DART Rate Metric

	Minimum	75%	100%	125%
Baseline	1.32			
Long-Term Target	1.10			
Year 1	6.17	1.20	1.10	N/A
Year 2	5.67	N/A	1.10	N/A
Year 3	5.22	N/A	1.10	N/A

See Final Resolution and Order, p. 51.

OSHA DART Rate				
Baseline	1.32			
Year 1	6.17	1.21	1.10	N/A
Year 2	5.67	N/A	1.10	N/A
Year 3	5.22	N/A	1.10	N/A

See Final Resolution and Order, Appendix B-Performance Metric Annual Targets and Minimum Performance Levels, p. 134.

5. SAIFI

For the SAIFI performance metric, there is a discrepancy in the values provided for the baseline and Annual Targets for Years 1, 2, and 3, as depicted below:

Table 18. Performance Targets and Other Key Parameters for SAIFI Metric

	Minimum	75%	100%	125%
Baseline	7.0			
Long-Term Target	4.0			
Year 1	10.4	6.6	6.4	6.0
Year 2	10.1	6.1	5.8	5.0
Year 3	9.8	5.7	5.2	4.0

See Final Resolution and Order, p. 56.

System Average Interruption Frequency Index (SAIFI)				
Baseline		6.9		
Year 1	10.4	6.5	6.3	5.9
Year 2	10.1	6.1	5.7	4.9
Year 3	9.8	5.6	5.1	3.9

See Final Resolution and Order, Appendix B-Performance Metric Annual Targets and Minimum Performance Levels, p. 135.

6. SAIDI

In the SAIDI performance metric, there is a discrepancy in the values provided for the baseline and Annual Targets for Years 1, 2, and 3, as follows:

Table 19. Performance Targets and Other Key Parameters for SAIDI Metric

	Minimum	75%	100%	125%
Baseline	1,218			
Long-Term Target	557			
Year 1	1,212	1,124	1,086	998
Year 2	1,155	1,029	954	777
Year 3	1,118	935	821	557

See Final Resolution and Order, p. 60.

System Average Interruption Duration Index (SAIDI)				
Baseline	1223			
Year 1	1,212	1,128	1,090	1,002
Year 2	1,155	1,033	958	781
Year 3	1,118	939	825	559

See Final Resolution and Order, Appendix B-Performance Metric Annual Targets and Minimum Performance Levels, p. 135.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **take notice** of the aforementioned and **reconsider** the Final Resolution and Order as requested in this Motion, particularly, that the Energy Bureau reconsider the following determinations: (1) the Energy Bureau’s modification of the contractually agreed upon tier structure for non-binary metrics as was negotiated by the parties to the T&D OMA (ranging from 25% to 150%, the decision to substitute the same with three tiers corresponding to 75%, 100% and 125%, and the deadband set effectively at the 75% tier; (2) the decision to change the tiers for the MOE Metrics to include two tiers of 50% and 100% instead of the proposal of the Revised Annex IX of the T&D OMA of 25%, 50%, 100%, 125% and 150%; (3) the Energy Bureau’s adoption of an annual process to determine performance explaining that the Energy Bureau will issue a final determination that shall be used by the Puerto Rico Electric Power Authority (“PREPA”) to pay the incentive fee; (4) modification of the approach to performance measurements for certain metrics different from LUMA’s proposal; (5) modification of the base points allocated to certain metrics as to originally proposed by LUMA; (6) modification of the performance baseline for certain metrics, in some instances considering LUMA’s performance data from Fiscal Years 2022 and 2023; (7) modification of the Annual Performance Targets employing three different approaches, in a departure from LUMA’s proposal which was the only comprehensive proposal submitted for the record; and (8) the determination to approve Performance Metrics that LUMA did not submit for consideration on the

following performance areas: (a) Interconnections; (b) Energy Efficiency/Demand Response; and (c) Vegetation Management. **Secondly**, LUMA requests clarification of that portion of the Final Resolution and Order that refers to the modified Annual Performance Targets. **Thirdly**, LUMA requests that this Energy Bureau **approve** the baselines, incentive tiers, and targets presented by LUMA in its Proposed Performance Metrics Targets and the Revised Annex IX submitted on October 28, 2022.

RESPECTFULLY SUBMITTED.

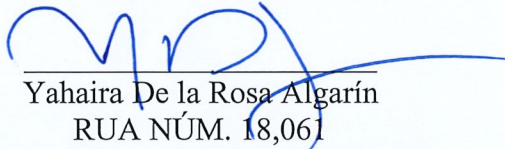
We hereby certify that we filed this motion using the electronic filing system of this Energy Bureau and hand-delivered it to the Puerto Rico Energy Bureau. We will send a copy of this motion to counsel for PREPA via certified mail and also via email to: Lionel Santa Crispin, Puerto Rico Electric Power Authority, P.O. Box 364267, San Juan, PR 00936-4267, lionel.santa@prepa.pr.gov; the Office of the Independent Consumer Protection Office, Hannia Rivera Díaz, 500 Ave. Roberto H. Todd, Parada 18 Santurce, San Juan, PR 00907-3941, hrivera@jrsp.pr.gov, and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy (“ICSE”), Fernando Agrait, Edificio Centro de Seguros, 701 Ave. Ponce de León, Oficina 414, San Juan, PR 00907, agraitfe@agraitlawpr.com, counsel for the Colegio de Ingenieros y Agrimensores de Puerto Rico (“CIAPR”), Rhonda Castillo, 9 Calle Francisco Cruz Haddock, Suite 3, Cidra, PR 00739, rhoncat@netscape.net, and counsels for Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climática, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., CAMBIO, Sierra Club and its Puerto Rico Chapter, and Unión de Trabajadores de la Industria Eléctrica y Riego (jointly, Puerto Rico Local and Environmental Organizations), Laura Arroyo, 4500 Biscayne Blvd., Suite 201, Miami, Florida 33137, larroyo@earthjustice.org, Ruth Santiago, Apartado 518, Salinas, PR 00751, rstgo2@gmail.com, Rolando Emmanuelli Jimenez, 472 Tito Castro Ave., Marvesa Building, Suite 106, Ponce, PR 00716, rolando@emmanuelli.law; notificaciones@bufete-emmanuelli.com; Jessica Méndez-Coldberg, jessica@emmanuelli.law, Pedro Saadé Llorens, Clínica Asistencia Legal, Sección Ambiental, Escuela de Derecho, Universidad de Puerto Rico, Condado 605-Office 616, San Juan, PR 00907; pedrosaade5@gmail.com, Lorena I. Vélez Miranda, 151 Calle de San Francisco, Suite 200, PMB 0528, San Juan, PR 00901-1607; lvelez@earthjustice.org, Raghu Murthy, 48 Wall Street, 19th Floor, New York, NY 10005; rmurthy@earthjustice.org, Jennifer Cassel, 311 S. Wacker Drive, Suite 1400, Chicago, IL 60606, jcassel@earthjustice.org.

In San Juan, Puerto Rico, on this 15th day of February 2024.



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Appendix A

Appendix A

Illustrative Scenarios

Objective

- To illustrate the potential impact of January 26th, 2024, PREB's Final Resolution and Order on LUMA's ability to earn the incentive fee as per T&D OMA and LUMA's October 28, 2023, Revised Annex IX submission.

Incentive Fee Scenarios Fiscal Year 2023: Potential Earned Fee vs Loss



The potential loss based on the January 26th R&O Scenario when compared to Revised Annex IX is:

-62%



Scenario: PREB's January 26th, 2024, R&O

Illustrative Incentive Fee Fiscal Year 2023

Performance Categories Summary As Per 01-26-24 R&O				CY2 ¹ Fiscal Year 2023			
Performance Category	Performance Goal	Incentive Allocation	Base Points	Points Earned	Performance	Percent of Fee Earned	Illustrative of Incentive Fee - \$13.0 MM
A. Customer Satisfaction	Achieve a high-level of customer satisfaction across all customer classes.	25%	30	12.0	40.0%	10.0%	\$ 1,300,000
B. Technical, Safety & Regulatory	Operate a safe and reliable electric grid while remaining compliant with applicable safety regulations.	50%	58	15.9	27.4%	13.7%	\$ 1,782,915
C. Financial Performance	Meet the approved Operating Budget, Capital Budget: Federally Funded and Capital Budget: Non-Federally Funded.	25%	33	13.4	40.5%	10.1%	\$ 1,317,235
Total Performance		100%	121	41.3	33.8%	33.8%	\$ 4,400,150

¹ Based on Contract Year(CY) 2 targets.



Scenario: LUMA's Revised Annex IX

Illustrative Incentive Fee Fiscal Year 2023

Performance Categories Summary As Per LUMA's Revised Annex IX				CY2 ¹ Fiscal Year 2023			
Performance Category	Performance Goal	Incentive Allocation	Base Points	Points Earned	Performance	Percent of Fee Earned	Illustrative of Incentive Fee - \$13.0 MM
A. Customer Satisfaction	Achieve a high-level of customer satisfaction across all customer classes.	25%	30	45.0	150.0%	25.0%	\$ 3,250,000
B. Technical, Safety & Regulatory	Operate a safe and reliable electric grid while remaining compliant with applicable safety regulations.	50%	55	53.8	97.7%	48.9%	\$ 6,352,273
C. Financial Performance	Meet the approved Operating Budget, Capital Budget: Federally Funded and Capital Budget: Non-Federally Funded.	25%	33	21.0	63.6%	15.9%	\$ 2,068,182
Total Performance		100%	118	119.8	102.3%	89.8%	\$ 11,670,455

¹ Based on Contract Year(CY) 2 targets.

