

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

NEPR

Received:

Mar 15, 2024

5:12 PM

IN RE: PERFORMANCE TARGETS FOR
LUMA ENERGY SERVCO, LLC

CASE NO.: NEPR-AP-2020-0025

SUBJECT: FINAL ORDER AND
RESOLUTION

**LOCAL ENVIRONMENTAL AND CIVIC ORGANIZATION'S RESPONSE IN
OPPOSITION TO LUMA'S MOTION FOR RECONSIDERATION**

TO THE PUERTO RICO ENERGY BUREAU:

COME NOW, Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc.
- Enlace Latino de Acción Climática, Inc., Alianza Comunitaria Ambientalista del
Sureste, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río
Guaynabo, Inc., CAMBIO, and Sierra Club and its Puerto Rico chapter, and Unión
de Trabajadores de la Industria Eléctrica y Riego (collectively, "LECO"), and
respectfully state the following:

**I. LUMA'S ARGUMENTS DO NOT MEET THE HIGH BAR FOR ARBITRARY
AND CAPRICIOUS CONDUCT.**

LUMA's request for reconsideration conjures an image of a child stomping his
foot because he did not get what he wanted. It rests, essentially entirely, on LUMA's
grave misunderstanding of PREB's authority and how that authority interacts with
the T&D OMA the company signed. As PREB has already held on multiple occasions,¹
Puerto Rico law – as well as the T&D OMA – are crystal clear that PREB has full

¹ See, e.g., PREB, *Resolution and Order* at 5-6, NEPR-AP-2020-0025 (Aug. 1, 2022); *Resolution and Order* at 1 NEPR-AP-2020-2025 (Jan. 22, 2021).

authority to establish performance metrics above, beyond, and different than any of the “illustrative”² metrics included in Annex IX to the T&D OMA. LUMA’s verbal tirade to the contrary should be rejected in full.

To begin with, Laws 57-2014 and 17-2019 grant PREB broad authority to regulate electric power service companies, including LUMA, via the establishment of performance metrics. Law 17-2019 directs PREB to “use mechanisms other than cost-based regulation when deemed necessary in order to comply with and implement the metrics and goals set out in this Act”³ and provides that, “[w]hen deemed appropriate, during ratemaking processes, [PREB] shall establish performance-based incentives and penalty mechanisms for electric power service companies....”⁴ Similarly, Law 57-2014 grants PREB wide authority to “[r]eview and approve and, if applicable, modify the rates or fees charged by electric power service companies in Puerto Rico in connection with any matter directly or indirectly related to the provision of electric power services.”⁵

Regulation 9137 further confirms PREB’s extensive authority – and duty – to establish performance metrics. It states that PREB “shall establish Metrics, Targets, and Financial Incentives in an initial proceeding,” and each year after that proceeding, PREB shall “evaluate the relevant Companies’ Performance Reports, to make any adjustments to the Performance Incentive Mechanisms, and to determine whether to establish, eliminate, or modify any Metric, Target, or Financial

² See T&D OMA at Section 4.2(f).

³ Law 17-2019, Section 1.5.

⁴ *Id.*

⁵ Law 57-2014, Section 6.3.

Incentive.”⁶ In short, there is no ambiguity in Puerto Rico law: PREB is the entity charged with establishing performance metrics for electric power service companies such as LUMA.

The T&D OMA does not constrain PREB’s authority and obligation to establish performance metrics. The words of the OMA itself are clear:

Notwithstanding anything to the contrary herein, no provision of this Agreement shall be interpreted, construed or deemed to limit, restrict, supersede, supplant or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the T&D System, Owner or Operator.⁷

Lest there be any doubt, the T&D OMA further explains that the performance metrics LUMA included in Annex IX are merely “illustrative” examples of metrics that are to be filed with PREB, which will “review, and approve, deny, or propose modifications to such proposed revised Annex IX (Performance Metrics) *in accordance with Applicable Law*.”⁸

Far from being the “terms of a valid contract,”⁹ Annex IX is merely a proposal that in no way binds PREB. As LECO has detailed multiple times in previous filings in this docket,¹⁰ which are hereby adopted and incorporated herein, and as PREB succinctly explained in this docket when rejecting this very argument, “contrary to

⁶ Regulation 9137, Sect. 3.1.

⁷ OMA, Adm. Exh. 18, Section 20.17.

⁸ *Id.* at Section 4.2(f) (emphasis added); *see also* Section 4.2 of the OMA (providing that LUMA “shall be required to respond promptly to any changes or modifications from PREB to the proposed revised Annex IX (Performance Metrics) and submit any updates to the proposed revised Annex IX (Performance Metrics) *to PREB for its approval*”) (emphasis added).

⁹ LUMA brief at 27.

¹⁰ *See, e.g.,* LECO, *Reply to LUMA’s Opposition to LECO’s Request for the Imposition of Penalties in LUMA’s Performance-Based Mechanism*, NEPR_AP-2020-0025 (July 15, 2022); *Reply to LUMA’s Response In Opposition to the December 22, 2021 Order on Additional Metrics* at 4-9, NEPR_AP-2020-2025 (Mar.14, 2022).

LUMA's suggestion, regarding regulatory matters, the Energy Bureau is not bound or limited by the T&D OMA. Notably, the Energy Bureau is not bound by the Illustrative Performance Metrics in Annex IX of the T&D OMA.”¹¹

II. PREB HAS NOT VIOLATED LUMA’S DUE PROCESS PROTECTIONS.

LUMA’s protests of due process violations ring hollow. None of the statutes and regulations establishing PREB’s authority are a surprise to LUMA; these laws and regulations were adopted long before this metrics proceeding commenced. Nor would it be relevant if LUMA had somehow failed to notice PREB’s broad authority: longstanding legal precedent establishes that ignorance of the law is no excuse for non-compliance. LUMA’s failure to read or understand the terms of a contract that it signed – a contract in which LUMA agreed to waive the condition precedent of PREB’s final approval before commencing service¹² – also does not create a due process violation. PREB should reject LUMA’s baseless due process claims.

CONCLUSION

LUMA’s disregard for PREB’s authority and attempt to render meaningless the entirety of the multi-year proceeding developing these performance metrics is troubling. LUMA’s arguments further underscore its failure to recognize that it is a

¹¹ PREB, *Resolution and Order* at 5-6, NEPR-AP-2020-0025 (Aug. 1, 2022); *see also* Resolution and Order, NEPR-AP-2020-2025, at 1 (Jan. 22, 2021) (“As a certified electric service company and the operator of the T&D System, LUMA is subject to compliance with Performance-Based Incentives Mechanisms. To that effect the OMA has provisions requiring LUMA to file for the approval of the Energy Bureau ... a request for the establishment of performance incentive mechanisms applicable to LUMA. It is important to clarify that, as expressed in the Energy Bureau’s Resolution and Order of June 17, 2020 under Case No. NEPR-AP-2020-002, neither the time limitations in the foregoing provision regarding the Energy Bureau’s review and approval of the Performance Metrics *nor the content of Annex IX are binding to the Energy Bureau*”) (emphasis added).

¹² *See* T&D OMA, Section 4.5(h); LUMA brief at 6.

regulated entity, subject to laws, regulations, and regulatory authority, and make it all the more clear that LUMA must – as the law provides – be subject to penalties for failure to provide essential levels of electric service to Puerto Rico residents, as LECO asserts in its motion for reconsideration. It is the least that PREB can do to repair the damage caused to citizens who are traumatized, frustrated and fed up with LUMA's poor performance in Puerto Rico.

PREB was entirely within its authority to deviate from LUMA's highly deficient proposed performance metrics – indeed, as discussed in LECO's motion for reconsideration, the law so requires – and it should reject, in its entirety, LUMA's motion.

Respectfully submitted. In San Juan Puerto Rico, March 15, 2024.

/s/ Laura Arroyo

Laura Arroyo
RUA No. 16653
Earthjustice
4500 Biscayne Blvd.
Suite 201
Miami, FL 33137
T: 305-440-5436
E: larroyo@earthjustice.org

/s/ Raghu Murthy

Raghu Murthy
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
T: 212-823-4991
E: rmurthy@earthjustice.org

/s/ Ruth Santiago

Ruth Santiago
RUA No. 8589
Apartado 518
Salinas, PR 00751
T: 787-312-2223
E: rstgo2@gmail.com

/s/ Pedro Saadé Lloréns

Pedro Saadé Lloréns
RUA No. 4182
Clínica Asistencia Legal,
Sección Ambiental
Escuela de Derecho
Universidad de Puerto Rico
Condado 605 – Office 616
San Juan, PR 00907
T: 787-397-9993
E: pedrosaade5@gmail.com

/s/ Lorena I. Vélez Miranda

Lorena I. Vélez Miranda
RUA No. 22720
Earthjustice
151 Calle de San Francisco
Ste. 200 PMB 0528
San Juan, PR 00901-1607

/s/ Jennifer Cassel

Jennifer Cassel
Earthjustice
311 S. Wacker Drive, Suite 1400
Chicago, IL 60606
T: (312) 500-2198
E: jcassel@earthjustice.org

/s/ Rolando Emmanuelli Jiménez

Rolando Emmanuelli-Jiménez
RUA No. 8509
E: rolando@emmanullie.law

/s/ Zoé C. Negrón Comas

Zoé C. Negrón Comas
RUA No. 22276
E: zoe@emmanuelli.law

472 Tito Castro Ave.
Marvesa Building, Suite 106
Ponce, Puerto Rico 00716
Tel: (787) 848-0666
Fax: (787) 841-1435
notificaciones@bufeteemmanuelli.com

CERTIFICATION OF SERVICE

I hereby certify that on March 15, 2024, this response is served to the following parties:

- Puerto Rico Energy Bureau: secretaria@energia.pr.gov; secretaria@jrsp.pr.gov; legal@jrsp.pr.gov and atorres@jrsp.pr.gov
- LUMA Energy LLC and LUMA Energy ServCo LLC: mmercado@mercado-echegaray-law.com; margarita.mercado@us.dlapiper.com; yahaira.delarosa@us.dlapiper.com; and ana.rodriguezrivera@us.dlapiper.com
- PREPA: jmarrero@diazvaz.law
- Oficina Independiente de Protección al Consumidor (OIPC): contratistas@oipc.pr.gov; hrivera@oipc.pr.gov
- Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico (ICSE): agraitfe@agraitlawpr.com
- Colegio de Ingenieros y Agrimensores de Puerto Rico (CIAPR): rhoncat@netscape.net

/s/ Laura Arroyo

Laura Arroyo

RUA No. 16653

Earthjustice

4500 Biscayne Blvd.

Suite 201

Miami, FL 33137

T: 305-440-5436

E: larroyo@earthjustice.org