

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

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

**CASE NO. NEPR-AP-2020-0025**

**SUBJECT:**

**LUMA's Response in Opposition to  
LECO's Motion for Reconsideration of  
Final Resolution and Order**

**LUMA'S RESPONSE IN OPPOSITION TO LECO'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 state and request the following:

**I. Introduction**

On January 26, 2024, the Puerto Rico Energy Bureau ("Energy Bureau") 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 the Final Resolution and Order, this Energy Bureau approved LUMA's proposed Performance Metrics,<sup>1</sup> including the Performance Metrics that LUMA

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<sup>1</sup> 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

proposed to defer,<sup>2</sup> the proposed Key Performance Metrics, and the Major Outage Event Performance Metrics (“MOE Metrics”), albeit with modifications. In disagreement with those modifications and concerned that several of the Final Resolution and Order determinations were issued in violation of due process guarantees and disregarded material provisions of the T&D OMA, LUMA timely filed a Motion for Reconsideration. *See LUMA’s Motion for Reconsideration of Final Resolution and Order*, filed on February 15, 2024 (“LUMA’s Motion for Reconsideration”).

On February 15, 2024, the Puerto Rico Local Environmental and Civil Organizations (“LECO”) filed a Motion for Reconsideration of Final Resolution and Order with this Energy Bureau. *See Local Environmental and Civic Organizations’ Motion for Reconsideration of Final Resolution and Order on Performance Targets for LUMA Energy LLC and Energy ServCo, LLC* (“LECO’s Motion for Reconsideration”). LECO argued that the Energy Bureau should reconsider the determination that penalties are not to be added to LUMA’s performance metrics scheme that arises from the Revised Annex IX of the T&D OMA as filed on October 28, 2022 (“Revised Annex IX”). Additionally, LECO alleged that the approved Performance Metrics for Operating Budget,

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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.

<sup>2</sup> 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.

Capital Budget: Federally Funded, Capital Budget: Non-Federally Funded, Vegetation Maintenance, J.D. Power Customer Survey, Customer Complaint Rate, Energy Efficiency & Demand Response, Safety, and Major Outage Events should be reconsidered.

On February 22, 2024, LUMA filed a LUMA's *Notice of Intent to Respond to the Local Environmental and Civic Organizations' Motion for Reconsideration of Final Resolution and Order on Performance Targets for LUMA Energy LLC and LUMA Energy ServCo, LLC*, whereby it announced its intent to oppose LECO's Motion for Reconsideration and requested twenty (20) days after this Energy Bureau determined if it would consider LECO's Motion for Reconsideration, to file said opposition. On February 26, 2024, this Energy Bureau ruled that it would consider the motions for reconsideration filed by LUMA and LECO, and in what is relevant to this Motion, granted LUMA twenty (20) days to file its opposition to LECO's Motion for Reconsideration. LUMA hereby opposes LECO's Motion for Reconsideration.

As a threshold matter, LECO did not establish that the Energy Bureau incurred legal error or abuse of discretion in declining to adopt penalties or approving LUMA's proposed Performance Metrics for Operating Budget, Capital Budget: Federally Funded, Capital Budget: Non-Federally Funded, Vegetation Maintenance, J.D. Power Customer Survey, Customer Complaint Rate, Energy Efficiency & Demand Response, Safety, and Major Outage Events. Thus, LECO failed to provide the requisite basis for a reversal of the decision of the Energy Bureau on these matters.

Throughout its Reconsideration, LECO improperly merely repeats or references arguments it raised in the legal brief filed in this proceeding. Said repetition of arguments unaccompanied by arguments showing how this Energy Bureau erred or acted arbitrarily in rejecting LECO's prior

arguments and requests, does not place the Energy Bureau in a position to reconsider portions of the Final Resolution and Order, and does not meet settled standards for motions for reconsideration that require specificity in stating the grounds for relief on reconsideration, *see*; Section 11.01 of the Puerto Rico Energy Bureau's Regulation on Adjudicative, Notice of Noncompliance, Rate Review, and Investigations Proceedings, Regulation No. 8543 ("Regulation 8543") (stating that any party dissatisfied with the Energy Bureau's final decision may file a motion for reconsideration, which shall state in detail the grounds supporting the petition and the remedy that the Energy Bureau should have granted); *see also e.g., Morales y Otros v. The Sheraton Corp.*, 191 DPR 1, 9 (2014) (construing and applying Puerto Rico Rule of Civil Procedure 47 on the specificity standard applicable to motions for reconsideration, which this Energy Bureau may apply within its discretion, and ruling that a valid motion for reconsideration must reasonably question the ruling **and support the arguments for reconsideration**).

Also, LECO constantly presents arguments based on a clear misunderstanding and lack of comprehension of the Revised Annex IX and the T&D OMA, while simultaneously seeking to undermine, annul, and re-write the T&D OMA.

This Energy Bureau should reject LECO's arguments to adopt penalties in connection with LUMA's Revised Performance Metrics Targets and Revised Annex IX. LECO has not identified any evidence admitted for the record, much less substantial evidence in the record, capable of countering the opinions of LUMA's expert witnesses, who refuted LECO's proposal on penalties. In sum, LECO has not provided any basis to support its contention for the Energy Bureau to reconsider its decision not to adopt a penalty scheme. Nor does LECO address that, as LUMA's

documentary and testimonial evidence established, the T&D OMA includes penalty provisions for failure to meet performance thresholds in connection with Key Performance Metrics.<sup>3</sup>

As will be discussed, LECO's arguments regarding the adopted Performance Metrics for Operating Budget, Capital Budget: Federally Funded, Capital Budget: Non-Federally Funded, Vegetation Maintenance, J.D. Power Customer Survey, Customer Complaint Rate, Energy Efficiency & Demand Response, Safety, and Major Outage Events, are meritless and were correctly denied by this Energy Bureau in the Final Resolution and Order. LECO has not put forth any new arguments or justifications based on the evidence admitted to the administrative record to warrant reconsideration. The testimonies of LUMA's twelve (12) witnesses and two (2) expert witnesses, and the exhibits admitted during the Evidentiary Hearing, remain uncontested and were not substantively challenged by any evidence admitted for the record, as will be discussed in detail below. Thus, LUMA respectfully requests that the Energy Bureau deny LECO's Motion for Reconsideration.

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<sup>3</sup> Section 14.1 (k) of the T&D OMA, includes among the events of default by LUMA, failure to "meet the Minimum Performance Threshold for any three (3) Key Performance Metrics during three (3) or more consecutive Contract Years and no such failure shall have been excused by a Force Majeure Event, an Outage Event or Owner Fault (a "Minimum Performance Threshold Default")." The Key Performance Metrics are: (i) Average Speed of Answer; (ii) Abandonment Rate; (iii) OSHA Fatalities; (iv) OSHA Severity Rate; (v) System Average Interruption Frequency Index (SAIFI); (vi) System Average Interruption Duration Index (SAIDI); (vii) Distribution Line Inspections & Targeted Corrections; (viii) Operating Budget; (ix) Capital Budget: Federally Funded; and (x) Capital Budget: Non-Federally Funded. *See* Exhibit 11 of the Evidentiary Hearing, Section 2.6.

## **II. Discussion**

### **A. LECO's Motion for Reconsideration Fails to Meet the Requisite Legal Standard for Review.**

Section 11.01 of Regulation 8543 provides that any party dissatisfied with the Energy Bureau's final decision may file a motion for reconsideration, which shall state in detail the grounds supporting the petition and the remedy that the Energy Bureau should have granted. Although no case law has yet interpreted the extension of the requisite for a motion for reconsideration before the Energy Bureau to state in detail the grounds supporting the petition, the Puerto Rico Supreme Court has done so in the context of Rule 47 of the Puerto Rico Rules of Civil Procedure, which regulates a motion for reconsideration and also requires that the moving party state its request for relief and arguments with particularity.

Rule 47 of the Puerto Rico Rules of Civil Procedure establishes, in its pertinent part, that the motion for reconsideration must set forth with sufficient particularity and specificity the facts and law that the moving party believes should be reconsidered and be based on substantial issues relating to relevant findings of fact or conclusions of material law. 32 PR Laws Ann. App. V, R. 47. Per Section 2.01 of Regulation 8543, the Puerto Rico Rules of Civil Procedure may apply, in a "supplemental manner to ... any [adjudicative proceeding] before the [Energy Bureau] when, in the exercise of its discretion to handle cases before it, the [Energy Bureau] determines it by way of an order." Thus, the Energy Bureau can apply Rule 47 of the Rules of Civil Procedure and its interpretative case law to supplement any interpretation that correlates with the provisions of Regulation 8543. In *Morales y otros v. The Sheraton Corp.*, 191 DPR 1 (2014), the Puerto Rico Supreme Court interpreted the requirements of particularity and specificity under Rule 47 of the

Puerto Rico Rules of Civil Procedure. The Court held a motion for reconsideration must reasonably question the decision and substantiate its arguments. *Id.*, p. 9.

As is widely known, judicial review of administrative decisions involves evaluating if the findings of facts are based on the evidence in the administrative record. 3 PR Laws Ann. § 9675 (2024). Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Otero v. Toyota*, 163 DPR 716, 728 (2005). The moving party must convince the forum that the evidence the agency relied on to make such determinations is not substantial. *Id.* It must show that there is other evidence in the record that reduces or undermines the probative value of the challenged evidence to such an extent that it cannot be concluded that the agency's determination was reasonable under the totality of the evidence before it. *Id.* Moreover, the standard of review to be applied is that of reasonableness, upholding administrative findings and interpretations as long as the agency has not acted arbitrarily or unlawfully or abused its discretion. *Misión Ind. P.R. v. J.P.*, 146 DPR 64, 134 (1998).

LECO's Motion for Reconsideration **does not** detail the grounds supporting each of the petitions and remedies sought on reconsideration. **Nor does it set forth the facts and law that should be reconsidered with sufficient particularity and specificity.** Thus, LECO's omission to include the facts and law supporting its request for reconsideration nulls said petition. LECO improperly repeats or references arguments that it raised in its legal briefs filed in this proceeding. For example, although LECO purports to challenge the Energy Bureau's determination not to impose an alternate penalty scheme, LECO does not establish how the administrative body's ruling was unreasonable, arbitrary, or unlawful, nor how there is substantial evidence in the

administrative record that would support the adoption of an alternative penalty scheme. Further, LECO does not identify substantial evidence on the record to support its challenge to the Performance Metrics that this Energy Bureau adopted on Operating Budget, Capital Budget: Federally Funded, Capital Budget: Non-Federally Funded, Vegetation Maintenance, J.D. Power Customer Survey, Customer Complaint Rate, Energy Efficiency & Demand Response, Safety, and Major Outage Events, nor does it show that the record lacks substantial evidence for those metrics. As discussed in detail in forthcoming sections, LECO makes scant references to the administrative record. Also, LECO does not show that the Energy Bureau's decision to adopt those Performance Metrics is unreasonable, arbitrary, or unlawful. LECO has not placed the Energy Bureau in a position to reconsider its Final Resolution and Order in this instant proceeding. LECO's Motion for Reconsideration does not comply with Section 11.01 of Regulation 8543 nor Rule 47 of the Puerto Rico Rules of Civil Procedure and its interpretative case law and should be denied.

**B. The Energy Bureau Should Reject LECO's Request to Adopt Penalties.**

LECO's first contention in its Motion for Reconsideration is that the Energy Bureau should, on reconsideration, impose a penalty scheme on LUMA. LECO alleges that creating a mechanism based solely on incentives ignores applicable laws and regulations. *See* LECO's Motion for Reconsideration, p.p. 3-4. According to LECO, the statutes that govern the penalty-reward scheme direct the Energy Bureau to impose penalties as part of a balanced approach. *Id.*, p. 1. Specifically, LECO poses that in adopting deadbands, the Energy Bureau created ready-made tools to identify substandard performance that warrants penalties. *Id.*, p. 3.



First, on May 26, 2022, LECO filed a *Motion Requesting the Imposition of Penalties in LUMA's Performance-based Mechanism* whereby they requested from this Energy Bureau that the performance mechanism adopted as a result of the instant proceeding include a penalty scheme as a measure to encourage LUMA's compliance with its responsibilities and obligations pursuant to the T&D OMA. LUMA opposed LECO's request to impose penalties since it was inappropriate due to its inconsistency with the legal framework adopted by the Government of Puerto Rico and pursuant to which the T&D OMA was executed. *See Opposition to LECO's Motion Requesting Imposition of Penalties in LUMA's Performance-Based Mechanism*, filed on June 23, 2022. Additionally, LUMA established that adopting the mechanism proposed by LECO would alter material contractual considerations according to which LUMA balanced the risk inherent to the T&D OMA and assumed the responsibilities and obligations outlined in the contract. *See Evidentiary Hearing, Vol. 1, February 7, 2023, p. 74, lines 21-25, p. 75, lines 1-4 (M. Hurtado English Portion); AP-2020-0025 Evidentiary Hearing-20230207\_Meeting Recording 1 [2:06:50]*. In arguing that penalties should be imposed, LECO once again ignores the binding nature of the covenants of the T&D OMA and misconstrues the state of applicable law, namely, Act 17 of April 11, 2019 ("Act 17-2019").

Second, in support of its request for the imposition of penalties as part of the performance-based mechanism, LECO cites Section 1.5(3)(d) of Act 17-2019, which provides that "*[w]hen deemed appropriate*, in the ratemaking processes, the Bureau shall establish performance-based incentives and penalty mechanisms based on performance metrics applicable to electric power service companies as well as mechanisms that ensure strict compliance with the orders of the

Bureau.” 22 PR Laws Ann. §1141d(3)(d). The express language of Section 1.5(3)(d) makes clear that the imposition of penalties is not mandated by the statute but established as an option to be considered by the Energy Bureau as part of the rate-making process. It should be emphasized that the instant proceeding does not entail a ratemaking process, which is currently considered in another proceeding before the Energy Bureau.

Given the clear language of Act 17-2019, LECO seriously errs in relying on partial portions of the legislative history, namely, statements made by an individual senator whose position is not law and does not bind the Energy Bureau in interpreting Act 17-2019. *See Cordero Vargas v. Pérez*, 198 DPR 848, 863 (2017) (stating the primary rule of statutory construction in Puerto Rico that when the text of the law is clear, there is no need to resort to extrinsic documents such as legislative history as statutory text is the binding decree of the Legislative Assembly). Similarly, Senate Report No. 1121 of November 6, 2018, quoted by LECO on page 2 of its Motion for Reconsideration, does state the proposition that the Energy Bureau must impose penalties or that a balanced scheme was required, as LECO would like to suggest. Rather, the Report mentions that the incentive-based mechanisms available to this Energy Bureau, proposed as Article 6.25B to be added to Act No. 57 of May 27, 2014, as amended, known as the Puerto Rico Energy Transformation and Relief Act (“Act 57-2014”) , would include incentives and penalties.

It bears noting that this Energy Bureau’s *Regulation for Performance Incentive Mechanisms*, Regulation No. 9137 dated December 17, 2019 (“Regulation 9137”) confirms that penalties are not required to be imposed alongside incentives. To wit, the definition of a “Financial Incentive” in Regulation 9137 refers to “the financial reward *or* penalty that *may* be attached to a

Target and which, if attached, is applied to a given Electric Power Service Company, for meeting or failing to meet such Target.” Section at 1.7(B)(8) of Regulation 9137. (Emphasis added). Section 7.3(2)(b) of the same Regulation further establishes that a Financial Incentive “*may*” include a penalty. Again, the clear language of Regulation 9137 establishes without room for doubt that adopting a penalty as part of an incentive mechanism is discretionary. To interpret otherwise would run counter to the clear language of Act 17-2019, which, as discussed, ***contemplates but does not mandate*** the adoption of penalties as part of a performance-based mechanism.

Third, in its Motion for Reconsideration, LECO ignored the clear text of the T&D OMA, which establishes a penalty scheme with a penalty mechanism adopted by the parties to the T&D OMA. LECO’s insistence on ignoring the T&D OMA is untenable. Particularly because the record in this proceeding establishes that adopting an additional penalty mechanism, in this case, would constitute an unreasonable and arbitrary determination that not only disregards the provisions of the T&D OMA but effectively impairs them.

Section 4.2(f) of the T&D OMA required ManagementCo to prepare a “revised Annex IX [of the T&D OMA] including (i) proposed baseline, target and minimum performance levels for certain Performance Metrics [as the term is defined in the T&D OMA]; (ii) Key Performance Metrics; and (iii) Major Outage Event Performance Metrics, together with an explanation of the basis for each” and submit them to the [Puerto Rico Public-Private Partnerships Authority (“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.*

Annex IX of the T&D OMA specifically establishes in Section I that “For each Contract Year, the Operator shall be eligible to receive [*financial incentive compensation* (“Incentive Fee”)] based on the Operator’s performance during the Contract Year as measured against the performance goals set forth by the Performance Metrics” as described in this Annex IX (*Performance Metrics*).” Annex IX contemplates three main Performance Categories: (i) Customer Satisfaction; (ii) Technical, Safety and Regulatory; and (iii) Financial Performance. *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. In sum, Annex IX clearly establishes a performance-based mechanism that does not include penalties. The T&D OMA, however, does include a section on Events of Default that details the consequences of any non-compliance with the contractual terms. *See* Article 14 of the T&D OMA.

The uncontested testimony of Mr. Branko Terzic, Expert Witness for LUMA in the instant proceeding, established that the T&D OMA’s Events of Default effectively constitute contractual “penalties.” *See* Rebuttal Testimony of Brank Terzic dated February 15, 2022, p. 18, lines 345-347. Further, Mr. Terzic established that the adoption of additional or independent penalties “after a contract has been negotiated and signed and [approved] by two independent government agencies and approved by the independent regulator, the PREB, adds additional risks which were not considered by the parties in the original negotiations.” *Id.* at p. 18 l. 350-353. In other words, upon entering into the T&D OMA, LUMA (as did PREPA and the P3 Authority) considered and balanced the risks inherent to the contract. However, once the contract is signed, “LUMA has no way of accommodating this additional risk if penalties are added or changed retrospectively

without other contract adjustments.” *Id.* at lines 356-357. Such penalties could also potentially represent budget changes to ensure adequate resources are available to meet the evaluation criteria. *Id.* at lines 357-359. In its Motion for Reconsideration, LECO willingly ignores this testimony to insist that this Energy Bureau adopt a scheme **not supported by the record, is contrary to law, and unlawfully and materially impair LUMA’s contract with the Government of Puerto Rico without justification.**

Fourth, in its Motion for Reconsideration, LECO did not identify any evidence capable of countering the opinions of LUMA’s expert witnesses, Mr. Branko Terzic and Dr. Juan Lara, who refuted LECO’s proposal on the adoption of penalties and the reward penalty scheme proposed by LECO through its witnesses Mr. Agustín Irizarry and Mr. José Alameda. LUMA incorporates by reference the arguments raised in Section III C of its Opening Brief filed on May 11, 2023, whereby LUMA established, with reference to the evidence submitted for the record, including the pre-filed testimonies and testimonies offered during the Evidentiary Hearings by Mr. Donald Hall, Mr. Mario Hurtado, Mr. Terzic, and Dr. Lara, that this Energy Bureau should reject LECO’s proposal on the imposition of penalties and that LECO’s proposal is unsupported. Importantly, LECO has not faced the documented fact that Dr. Lara, an economist, refuted LECO’s proposal of a reward and penalties scheme, showing that it is unsupported and contrary to basic economic principles.

Ultimately, what LECO is proposing when it insists that this Energy Bureau reconsider the Final Resolution and Order to adopt a reward-penalty scheme that is not supported by the record and **was and remains refuted on the record**, is that the Revised Annex IX be disregarded, and

the T&D OMA rewritten to eschew the public policy adopted by the Government of Puerto Rico, all to the detriment of settled legal principles in our legal system regarding certainty in legal contracts and protection of rights that arise out of a legally binding contract. LUMA opposes LECO's continued arguments that seek to re-write and override the T&D OMA to add penalties that could deprive LUMA of its contractual right to earn the agreed-upon incentive payment and, *via fiat*, add new causes to terminate the T&D OMA.

The Constitution of Puerto Rico, which is Supreme law, *see* Const. PR, Art. II, Sec. 7, *see also* U.S. Const. Art. 1, Sec. 10, protects contracting parties from actions by government entities that impair contractual rights. *See e.g., Total Petroleum Corp. v. Autoridad de los Puertos*, 210 DPR 16, 27-29 (2022). Thus, regulatory authority over LUMA's performance cannot be used to unsettle contractual expectations. LUMA cannot countenance continued attempts by LECO to upend the T&D OMA, which is a valid and binding contract that was approved by this Energy Bureau on June 17, 2020, when the Energy Bureau certified that the T&D OMA complies with Puerto Rico's public energy policy and the applicable regulatory framework, including Act 57-2014 and Act 17-2019, among others. *See* Resolution and Order of June 27, 2020, Case NEPR-AP-2020-0002.<sup>4</sup>

In this proceeding, this Energy Bureau has not issued an order advising LUMA that it will consider the adoption of a reward-penalty scheme that could, as LECO suggests, lead to a reduction of LUMA's compensation or termination of the T&D OMA. If this Energy Bureau entertains

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

LECO's proposal, it will issue an arbitrary ruling in violation of LUMA's right to due process, namely, the right of adequate notice, to confront a proposal by the Energy Bureau on penalties that could apply to determine LUMA's ability and contractual right to earn the incentive fee and to have a decision be based on the administrative record. *See Blanca Telephone Company v. Federal Communications Commissions*, 991 F.3d 1097, 1116 (10th Cir. 2021) (citation omitted) (Due process guarantees include that individuals have adequate notice of actions that the state prohibits or requires); *Hernández v. Secretario*, 164 DPR 390, 394-95 (2005) (recognizing that the State is prevented from affecting through its actions the property or freedom interests of an individual in an unreasonable, arbitrary or capricious manner.); *Otero Mercado v. Toyota de Puerto Rico*, 163 DPR 716, 727-28 (2005) (outlining the standard of substantial evidence in the administrative record and that an agency's determinations must be consistent with the totality of the evidence before the judge) (citing *Rebollo v. Yiyi Motors*, 161 DPR 69 (2004)); *Lopez v. Junta de Planificación*, 80 DPR 646, 670 (1958) ("[t]he right to a public hearing would be meaningless if [the administrative body] were allowed to base its decision on evidence received without the knowledge of the parties, outside the hearing, without giving the interested parties an opportunity to rebut or explain it by cross-examining or presenting other evidence to the contrary.")

**C. The Adopted LUMA's Performance Metrics Targets Should Be Sustained.<sup>5</sup>**

**1. Finance Performance Metrics**

LECO requests that the Energy Bureau reconsider the adopted Operating Budget, Capital Budget- Federally Funded, and Capital Budget- Non-Federally Funded Performance Metrics (jointly for purposes of this discussion, “the Budgets Performance Metrics”). *See* LECO’s Motion for Reconsideration, p. 5. Specifically, LECO proposes that the Energy Bureau modify the adopted metrics by ruling that the target is met if the actual expenses for a given fiscal year divided by the original approved budget for the same fiscal year as incurred are between 95 percent and 100 percent. *Id.* LECO did not support that proposition and ignored the uncontested testimony on the record that supports these metrics.

The uncontested evidence on the record establishes that the performance objective of the Budgets Performance Metrics is to incentivize effective cost management. *See Id.*, p. 32, Exhibit 59 of the Evidentiary Hearing (Direct Testimony, Mr. Kalen Kostyk of August 17, 2021), lines 70, 87-88 and p. 34, lines 101-102. They measure the ability to stay within budget. *See* Exhibit 11 of the Evidentiary Hearing, p. 32, p. 34, Exhibit 59 of the Evidentiary Hearing, line 71, lines 87-88 and 103. The uncontested record also shows that LUMA’s Targets for the Operating Budget, Capital Budget – Non-Federally Funded –, and Capital Budget- Federally Funded were set with the intention to manage and strengthen the resiliency of the T&D System effectively. *See* Exhibit

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<sup>5</sup> On February 26, 2024, LUMA filed a Motion for Reconsideration whereby it requested reconsideration of certain aspects of the Final Resolution and Order, including the adopted modifications to the Performance Metrics as originally proposed by LUMA in the Revised Annex IX. LUMA proposes the adopted Performance Metrics should be sustained by the Energy Bureau, however, as requested by LUMA in its request for reconsideration.



59 of the Evidentiary Hearing, lines 165-167. To wit, LUMA intends to and is in the interest of ratepayers, to spend all its budgeted amounts to assist in stabilization efforts. *Id.*, lines 167-168. There is no evidence to suggest that these metrics are designed to allow LUMA to overspend through budget amendments but still earn points towards the Incentive Fee as LECO claims.

The fundamental error in LECO's argument is the suggestion that the budget amendment provision of the T&D OMA allows LUMA to meet the performance metric at the end of a Contract Year by requesting additional monies through a budget amendment. That reflects a fundamental misunderstanding of the T&D OMA and ignores the fact that LUMA's budgets are designed and approved within the constraints of applicable rate orders. The budget amendment process that LECO references in its Motion for Reconsideration does not allow LUMA to request and obtain additional funding. That would require a petition to review rates.

The arguments set forth by LECO—in less than two pages of its Motion for Reconsideration—regarding the Budget Performance Metrics, do not provide any support for modifying the adopted Budgets Performance Metrics and must be rejected.

## **2. Vegetation Management Performance Metric**

LECO requests the Energy Bureau reconsider its decision on the Vegetation Management Performance Metric and adopt instead its proposal, allegedly stated in its Legal Brief, to eliminate the 75% target and impose penalties for non-compliance with the 100% target each year. *See* LECO's Motion for Reconsideration, p. 6.

As a threshold matter, this Energy Bureau should reject LECO's request because it did not support the petition with arguments or reference to substantial evidence on the record. To the extent

that LECO purports to resurface in its Motion for Reconsideration the proposal expounded by Mr. Irizarry who proposed to measure electric miles lines annually subjected to tree trimming, *see* Exhibit 7 of the Evidentiary Hearing, p. 25 lines 16-18, and that an incentive for vegetation management should only be awarded in connection with hard-to-reach targets which he associated with the location of the vegetation, *see* Exhibit 9 of the Evidentiary Hearing, and his testimony in the evidentiary hearing, this Energy Bureau should rule that it correctly rejected Mr. Irizarry's proposals.

The record shows that Mr. Irizarry did not consider that meaningful aspects of a vegetation management program include safety, customers, outage events and frequency, tree density, schedules, and specific vegetation types, among other areas. *See* Exhibit 27 of the Evidentiary Hearing, p. 6, lines 98-100. Tracking one unit or metric will not directly correlate to the success of a whole vegetation management program. *Id.*, lines 100-101. The Puerto Rico T&D System is fragile, and the vegetation conditions are poor across the entire island. *Id.*, lines 82-84. Whether vegetation work is easily accessible or "hard-to-reach," LUMA is committed to finding the best way to complete the necessary vegetation work regardless of if the Targets are "hard-to-reach" or considered roadside. *Id.*, lines 86. The work location is entirely subjective and should not be the only factor in setting goals. *Id.*, lines 86-87.

Similarly, this Energy Bureau should maintain its decision to reject Mr. Irizarry's contention that the Energy Bureau should require LUMA to identify the relative difficulty for vegetation maintenance for each line or region, *see* Exhibit 9 of the Evidentiary Hearing, p. 13, lines 26, and p. 14, lines 1-2. The "relative difficulty" concept he proposes is entirely subjective.

*Id.*, lines 94-95. There are no industry standards, definitions, or criteria for “relative difficulty” in vegetation management. *Id.*, lines 96-97. Additionally, the configuration of most electrical feeders or circuits will have a combination of roadside, backyard, and cross-country sections of line within the same feeder or circuit. *Id.*, lines 97-99.

### **3. Customer Satisfaction Performance Metrics**

#### **a. J.D. Power Customer Satisfaction Survey (Residential and Business).**

In its Final Resolution and Order, the Energy Bureau determined that the J.D. Power Customer Satisfaction Survey (Residential and Business) metrics merit approval for the initial three-year period. It acknowledged that the J.D. Power Customer Satisfaction Survey (Residential and Business) metrics offer an established mechanism for assessing customer satisfaction with a wide record of use across many jurisdictions. *See* Final Resolution and Order, p. 34. Further, the Energy Bureau stated that even though intervenors raised concerns about the validity of the J.D. Power index for the Puerto Rican context and the associated sampling methodology, it did not find that these concerns outweighed the value of approving the metrics for the initial three-year period. *Id.*

Notwithstanding, LECO petitions that the J.D. Power Customer Satisfaction Survey (Residential and Business) metrics be eliminated because they allegedly do not accurately represent Puerto Rico’s current demographic, reward mediocre performance, and were already denied by the Energy Bureau. *See* LECO’s Motion for Reconsideration, p. 9. As is the case with most of LECO’s arguments in its Motion for Reconsideration, LECO did not support its request for reconsideration on the J.D. Power Customer Satisfaction Survey Performance Metrics with

reference to the evidence admitted for the record nor developed argumentation that could support a finding that this Energy Bureau's decision to adopt these metrics es erroneous or arbitrary. This warrants rejection on its face of LECO's Motion for Reconsideration.

In any event, the evidence in the administrative record supports the adoption of the J.D. Power Customer Satisfaction Survey (Residential and Business) metrics. Ms. Jessica Laird, Vice-President of Customer Experience for LUMA, submitted a pre-filed rebuttal testimony addressing the arguments posed by LECO. Ms. Laird has been involved in the development of surveys for over ten years. *See* Evidentiary Hearing Transcript, Vol. 3, February 9, 2023 (English Portion), p. 640, lines 23-24; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 2 [00:06:18]. She testified that email is the survey method that J.D. Power uses for its Electric Utility Syndicated Studies across North America. According to Ms. Laird's experience, digital channels (mobile device, laptop, P.C.) are the most widely used and cost-effective means to conduct these studies. *See* Exhibit 42 of the Evidentiary Hearing, Rebuttal Testimony of Jessica Laird (February 17, 2022), p. 14, lines 273-277.

Ms. Laird indicated that as of December 31, 2021, 609,982 customers had registered an electronic MiLUMA account, and the MiLUMA app has been downloaded 451,127 times. *See* Exhibit 42 of the Evidentiary Hearing, p. 15, lines 295-297. At that time, LUMA had almost half of the customer base signed up on MiLUMA – which means that almost half of the customer base had active e-mail. That is sufficient data to represent a customer base. *Id.*, p. 21, lines 419-421. LUMA shares information from its customer database for those customers that have authorized LUMA and PREPA to share their e-mail addresses. *Id.*, p. 12, lines 225-226. For the surveys

conducted from the fourth quarter of 2020 until the fourth quarter of 2021, LUMA shared 543,682 email addresses with J.D. Power. J.D. Power then runs the email addresses through a set of queries to achieve a unique sample size. *Id.*, lines 232-234.

As further evidence, Ms. Laird stated that the so-called in-person surveys (in which potential respondents are intercepted, screened, and interviewed in person) can be both time-consuming and expensive. Another concern is that the in-person interviewers may influence the responses. Further, they can potentially suffer from geographic and demographic limitations on who can be interviewed. *See* Exhibit 42 of the Evidentiary Hearing, p. 17, lines 332-336. In Ms. Laird's experience, surveying in person can be challenging due to the time it takes to complete the survey and people's limited time when visiting a commercial office. Also, an in-person survey would require a pre-screening selection process to be conducted on-site before a customer is selected to respond to an in-person survey in a LUMA commercial office. *Id.*, p. 18, lines 346-350.

Ms. Laird also explained that statistically, customers sampled via e-mail are standard across all utilities. Usability for the survey is higher via e-mail because customers can complete the survey at their convenience. Moreover, there is no technology gap issue with LUMA's customers. *See* Exhibit 42 of the Evidentiary Hearing, p. 21, lines 416-419. Further, the survey itself asks customers about all aspects of LUMA's customer interactions, therefore pulling in data regarding online, in-person, and telephone customer service. *Id.*, p. 21, lines 421-423.

During the Evidentiary Hearing, Ms. Laird testified that the majority of customers have emails, and the survey is used to get a sample representation of all customers. LUMA sends over

to J.D. Power all the email addresses of customers that are registered with LUMA. At the time, there were over 750,000 customers signed with LUMA. However, this number changes daily. *Id.*, p. 622, lines 9-15; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 1 [2:31:58].

Ms. Laird explained that J.D. Power, on an annual basis, sends out 100,000 surveys using a sample selected at random. Each quarter J.D. Power sends surveys to 25,000 randomly selected customers who were not previously selected. The number of customers that respond to those 25,000 becomes your sample size. On average, there have been over a thousand customers that respond each quarter. *See* Evidentiary Hearing Transcript, Vol. 3, February 9, 2023 (English Portion), p. 624, lines 10-19; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 1 [2:34:45].

Although LECO contends that the methodology behind the survey fails to avoid selection bias because it only uses online surveying techniques, they did not offer any evidence at the Evidentiary Hearing that supports such a conclusion. *See* LECO's Motion for Reconsideration, p. 9. LECO continues to assume that a survey firm with better knowledge of Puerto Ricans may well have found that phone, mail, or a different method would receive better results at the same cost. ***Id.* Again, this is an unfounded conclusion, unsupported by any evidence brought forward by LECO.** LECO did not establish, in this case, its expertise to determine whether a particular surveying method is proper or not.

Further, LECO ignores Ms. Laird's testifying that using a customer satisfaction survey by a qualified professional survey firm is a contractual requirement under the T&D OMA. The contractual requirement is shown in Annex I (Scope of Services), Annex IX (Performance

Metrics), and Annex X (Calculation of Incentive Fee) of the T&D OMA. The condition in the T&D OMA regarding the use of a qualified professional survey firm was put into the contract directly by the P3 Authority. *Id.*, p. 8, lines 141-147. J.D. Power was explicitly listed as the vendor in the T&D OMA. *Id.*, line 152; *see also* Evidentiary Hearing Transcript, Vol. 3, February 9, 2023 (English Portion), p. 627, lines 1-3; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 1 [2:37:24]. As such, LUMA was contractually precluded from considering any alternate survey choices.

LECO also argues that the performance targets imposed by the Energy Bureau are still below industry standards, allowing LUMA to receive incentives for mediocre performance. *See* LECO's Motion for Reconsideration, p. 9. **That is also unsupported.** Regarding the targets, Ms. Laird explained that 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. Further, Ms. Laird testified that operational indicators such as reliability metrics, price, wait times, and billing accuracy indicate that PREPA was not performing at the same level as its comparable utilities; therefore, the poor results are indicative of performance. *Id.*, lines 106-108. LECO improperly ignored this evidence in pursuing its Motion for Reconsideration and erred

in failing to consider that LUMA's targets in this category account for the current and near-future conditions of the T&D System when compared to other well-established electric companies in the industry and their respective survey results.

LECO has not offered a substantive challenge to the J.D. Power Customer Satisfaction Surveys (Residential and Business) Performance Metrics. It did not establish with reference to evidence admitted to the administrative records that it has any experience or expertise in the subject matter. Instead, LECO offers unsubstantiated opinions and statements. The Energy Bureau should reject LECO's request to eliminate these Performance Metrics.

**b. Customer Complaint Rate.**

Regarding the Customer Complaint Rate Performance Metric, the LECO requests that the Energy Bureau reconsider its decision not to include informal complaints as part of this metric. *See* LECO's Motion for Reconsideration, p. 9. The only justification put forth by LECO is that Ms. Jeppesen, for LUMA, testified that LUMA receives informal complaints and its unexplained view that the Performance Metric approved by this Energy Bureau allegedly falls short of measuring customer satisfaction. LECO, however, did not rely on nor reference any evidence, much less, substantial evidence, showing that informal complaints should be included in this Performance Metric nor that the Energy Bureau incurred in error or acted arbitrarily in adopting a modified version of LUMA's proposal choosing to use a complaint tracking metric tabulated by the Energy Bureau rather than based on complaints received and tracked by LUMA or another party. *See* Final Resolution and Order, p. 41.



The administrative evidence in the record supports the Energy Bureau's ruling. Ms. Melanie Jeppesen, Director of Billing Services for LUMA, submitted a pre-filed direct testimony supporting the Customer Complaint Rate performance metric. She explained that the Customer Complaint Rate Performance Metric is a measure of LUMA's ability to resolve customer complaints or issues without a customer feeling they need the involvement of the Energy Bureau. *See* Exhibit 43 of the Evidentiary Hearing, Revised Direct Testimony of Melanie Jeppesen (September 24, 2021), lines 143-145. Ms. Jeppesen also testified that there is a foundational issue with expecting that the Customer Complaint Rate metric measures customer satisfaction. *See* Exhibit 44 of the Evidentiary Hearing, p. 11, lines 225-226. The Customer Complaint Rate metric is not a measure of customer satisfaction. *Id.*, lines 226-227. The objective of the metric is to reduce the number **of formal complaints**. *Id.*, p. 11, line 227, and p. 12, line 228. Moreover, she also testified during the Evidentiary Hearing that this Performance Metric is part of the overall portfolio from a customer satisfaction perspective, but, in fact, it measures how effective a utility is at resolving the complaints that arise within the administrative process. *See* Evidentiary Hearing Transcript, Vol. 3, February 9, 2023 (English Portion), p. 669, lines 19-24; AP-2020-0025 Evidentiary-20230209\_Meeting Recording 2 [0:54:01]. Thus, in insisting that a customer complaint rate performance metric should measure customer satisfaction, LECO confuses the purpose of the Customer Complaint Rate Performance Metric with that of scientifically measuring customer satisfaction.

Moreover, the suggestion that this Performance Metrics should include informal complaints is not supported by the record. Ms. Jeppesen's testimony constitutes substantial

evidence to support the Energy Bureau's approved metric that does not include informal complaints. To wit, Ms. Jeppesen submitted a pre-filed rebuttal testimony, in which she disagreed with the suggestion that the Customer Complaint Rate performance metric includes formal and informal complaints. *See* Exhibit 44 of the Evidentiary Hearing, Rebuttal Testimony of Melanie Jeppesen (February 17, 2022), p. 5, lines 74-75. Ms. Jeppesen explained that informal claims filed with the utility often include many inquiries or requests for redress on issues not typically in LUMA's control, such as a customer's high consumption. The majority of those informal complaints are because a customer has used more electricity than in previous periods or the customer did not consider the impacts of the changing costs of electricity that are built into rates through the FCA and PPCA riders or other tariff adjustments that are not set or controlled by LUMA. *Id.*, lines 77-83. These claims are addressed by first analyzing the customer's account and consumption and then spending additional time communicating with a customer about their bill or consumption patterns. *Id.*, lines 87-89.

In support, Ms. Jeppesen provided data for PREPA from 2017 to 2020, in which claims for high electricity consumption were the reason customers filed informal complaints for 58% of the claims. *Id.*, lines 89-91. **Moreover, she noted that consideration must be given to the fact that a customer who files an informal complaint can later file a formal complaint, creating two different complaints, and two counts towards the metric, based on the same set of facts or the same event.** *Id.*, p. 6, lines 105-108. This rebuttal testimony by Ms. Jeppesen is uncontested. Thus, LUMA respectfully proposes that the record does not support a proposal to include informal complaints in LUMA's proposed Customer Complaint Rate Metric.

LUMA respectfully contends that LECO's arguments in opposition to the Customer Complaint Rate Performance Metric, as adopted by the Energy Bureau, are not supported by any evidence in the record of this instant proceeding and should be rejected.

#### **4. Major Outage Event Metrics**

The Energy Bureau found that major event response is a priority function for LUMA as the T&D operator of Puerto Rico's electric grid. The Energy Bureau supported a quantitative evaluation tool to measure LUMA's response to each major outage event and approved the proposed Major Outage Event Metrics ("MOE Metrics")

In its *Motion for Reconsideration*, LECO opposes the adopted MOE metrics. First, LECO argues that the Energy Bureau acted arbitrarily and contrary to the law in awarding incentives for MOE Metrics at "a 50-percent range of performance" under the MOE scorecard, inconsistent with the incentives scheme adopted for other performance metrics. *See* LECO's *Motion for Reconsideration*, pp. 10-11.

In *LUMA's Motion for Reconsideration*, LUMA objected to the Energy Bureau's decision to modify 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%, as infringes LUMA's due process rights. LUMA also challenged on reconsideration, the Energy Bureau's determination to modify the approach to performance incentive tiers and threshold performance levels for the other Performance Metrics whereby the Energy Bureau eliminated the 25-percent, 50-percent, and 150-percent incentive tiers and introduced a 75-percent incentive tier. *See* Final Resolution and Order, p. 28.

To the extent that LECO is arguing that this Energy Bureau should apply the modified tiers with an effective deadband of 75% to the MOE Metrics, LUMA disagrees for the reasons expounded in LUMA's Motion for Reconsideration. Said ruling (and LECO's proposal that the 75% deadband apply to the MOE Metrics) constitute material modifications to LUMA's Revised I Annex IX, issued in violation of due process guarantees because LUMA was not afforded the opportunity to rebut during the administrative proceeding, which LUMA considers an impermissible modification of the contractual provisions agreed by the parties to the T&D OMA. Importantly, the Energy Bureau did not provide LUMA prior notification that the incentive tiers were being discussed, nor would an approach be developed to update the performance metrics.

**Any modifications** to the incentive tiers are unsupported by the evidence in the administrative record, are arbitrary and run against the protections afforded by the due process normative. LECO's proposal to amend the incentive tiers for the MOE metrics is belated and unsupported by the record. If the Energy Bureau accepts LECO's suggestion to approve an effective deadband of 75% for the MOE Metrics, it will issue an arbitrary ruling impairs LUMA's contractual expectations and rights.

Second, LECO claims that under the Final Resolution and Order, LUMA may receive incentives for its actions during a MOE even if it fails to address downed wires. LECO seems to construe, without support on the record, that an activity that satisfactorily meets emergency response measures is to fix downed wires. *See* LECO's Motion for Reconsideration, pp. 12-13. It is clear from LECO's unsupported argumentation that they have not studied nor applied prudent utility practices for responding to emergencies. The uncontested testimonies of LUMA's

witnesses, who are experts in the field of Emergency Preparedness and Response, Mr. Terri Tonsi and Mr. Abner Gómez, establish and refute this unprincipled argument.

The record amply shows that the MOE Metrics are part of the prudent management of outages and incentivize utilities to be better prepared and have an optimal response during major events as disasters become more frequent across the world. *See* Exhibit 64 of the Evidentiary Hearing, Rebuttal Testimony, Terry Tonsi February 1, 2022, lines 149-152. Tracking, monitoring, and measuring these metrics is essential as they act as a road map to provide LUMA with valuable tracking mechanisms throughout a major event and enable LUMA to prioritize key objectives and allow LUMA to perform a post-event debrief and review its response in order to improve over time. *Id.*, lines 153-157.

Moreover, the Order issued by the New York Public Service Commission (“NY PSC”) on December 23, 2013, in Case 13-E-0140, *Approving the Scorecard for use by the Commission as a Guidance Document to Assess Electric Utility Response to Significant Outages* (“NY PSC Order on MOE Scorecard”), which served as the basis in adopting the MOE Metrics, establishes beyond reproach that MOE Metrics such as the ones that this Energy Bureau approved, are critically important to improving performance to reduce the impacts of storm events and increase customer safety and security. *See* NY PSC Order on MOE Scorecard, pp. 2, 3, 27.

In adopting the NY PSC Order on MOE Scorecard, the NY PSC explained that “[r]ecent experience has shown that it is difficult to perform an assessment of the utility response to major storm events or outages without the capability to define and apply the constituent metrics for preparation prior to the event, operational response during and after the outage event, and utility

communications to customers and community leaders as the event and recovery from the event are occurring.” *Id.*, p. 3. With this framework on the importance of applying performance metrics indicators to preparation for and response to major events, the NY PSC adopted three categories of performance metrics: preparation phase, operational response, and communications. Those are the same categories that this Energy Bureau adopted. The MOE Metrics aid in furtherance of those purposes, in alignment with public policy, to ensure that PREPA and LUMA are prepared to face emergency events and are held accountable for their performance.

Although LECO suggests that the MOE Metrics are defective because there is only one metric capable of involving the reparation of the system, LECO conveniently ignores that the MOE Metrics include several metrics to enable LUMA to restore power: downed wires, damage assessment, crewing, estimated time of restoration, ETR accuracy for 90% of service restoration, municipality coordination, utility coordination, Emergency Operations Center (“EOC”) Coordination, safety, and mutual assistance. *See* Exhibit 11, pp. 40-43. As Mr. Tonsi testified, LUMA’s operation and the MOE Metrics are designed to enable LUMA to restore power safely and efficiently: “we don’t stop until the last customer is restored.” Evidentiary Hearing, Vol. 4, February 10, 2023 (English Portion), p. 823, lines 11-12, p. 824, lines 6-7; AP-2020-0025 Evidentiary Hearing-20230210\_Meeting Recording 1 [1:09:31].

Similarly, LECO mistakenly argues that the MOE Metrics would allow LUMA to earn an incentive for alleged “plainly easy tasks” and would be rewarding LUMA for achieving required compliance. *See* LECO’s Motion for Reconsideration, p. 14. However, LECO does not include any accepted definition based on regulations, applicable law, prudent utility, or regulatory

practices for the term “plainly easy tasks.” LECO has not established with reference to evidence admitted for the record that this is a technical or accepted term in the electric power industry or in connection with Performance Metrics Indicators. Additionally, LECO does not define nor provide any support for the proposition that “plainly easy tasks” have any relevance to this proceeding or should be considered in MOE Metrics.

In another example of unsupported arguments devoid of references to the evidence admitted for the record, LECO contends that reporting injuries is already required by OSHA and is not going “above and beyond.” *See* LECO’s Motion for Reconsideration, p. 14. LECO is mistaken in suggesting that recording safety incidents does not incentivize performance to promote a safe workplace. By tracking all safety incidents, including near-misses that did not actually cause any injury or damage, LUMA “will take all of those learnings to make . . . all of [its] contractors [and] LUMA employees . . . more successful and trained.” Evidentiary Hearing, Vol. 4, February 10, 2023 (English Portion), p. 829, lines 5-10; AP-2020-0025 Evidentiary Hearing-20230210\_Meeting Recording 1 [1:17:45]. Moreover, the record establishes LUMA’s commitment to safety in connection with its response to an MOE and implementation of the MOE Metrics. In this regard, Mr. Hurtado testified that “in an emergency, there’s a need to prioritize very specific actions. And lots of other things are put on the back burner, as we say in English, right, or you hold because you have to prioritize **safety** and restoring customers.” Evidentiary Hearing, Vol. 4, February 10, 2023 (English Portion), p. 839, lines 12-16; AP-2020-0025 Evidentiary Hearing-20230210\_Meeting Recording 1 [1:31:31]. The “Major Outage Events metrics exist to be able to gauge performance, and . . . to learn from that and to be able to present

that and provide transparency on how the company has prepared for an emergency, how the company acts during an emergency on some very specific things such as estimated time of restoration, **very important things in terms of safety**, and then generally in terms of communications with regulators, stakeholders, the public and customers.” *See* Evidentiary Hearing, Vol. 4, February 10, 2023 (M. Hurtado English Portion), p. 836, lines 4-17; AP-2020-0025 Evidentiary Hearing-20230210\_Meeting Recording 1 [1:27:04] (emphasis added).

Also unavailing is LECO’s contention that the MOE Metrics involve basic actions such as notifying critical and essential customers about forecasted events that will likely create major outages that do not go “above and beyond.” *See* LECO’s Motion for Reconsideration, p. 14. Mr. Tonsi stated that the practice by utilities is to “focus on the critical lifeline customers that you’ve got to get major facilities on. And all of the resources are working in collaboration to get that done.” Evidentiary Hearing, Vol. 4, February 10, 2023 (English Portion), p. 824, lines 8-15; AP-2020-0025 Evidentiary Hearing-20230210\_Meeting Recording 1 [1:10:25]. Contrary to what LECO suggests, Mr. Tonsi’s testimony **underscores the importance of addressing lifeline customers at all stages of an MOE, including the preparation phase**. The fact that these are actions that all prudent utilities shall undertake establishes the need to approve a Performance Metric that measures LUMA’s compliance with the requirement to communicate with lifeline customers. Moreover, the record refutes the contention that communicating with lifeline customers is not an important task in preparing for an MOE. As Mr. Abner Gómez explained, this is an essential component of the preparation phase. Evidentiary Hearing, Vol. 4, February 10, 2023



(Spanish Portion), p. 31, lines 4-11 and 22-25, pp. 32, lines 1-25 and p. 33 lines 1-16; AP-2020-0025 Evidentiary Hearing-20230210\_Meeting Recording 1 [2:23:41].

LECO's position is an unsupported opinion by entities and persons not versed in emergency response and the operations of an electric power utility. The major flaw in LECO's arguments is that **LECO did not put forth in this case nor reference in its Motion for Reconsideration, any evidence, expert evidence, or otherwise, for its propositions that the MOE Metrics do not further public policy, involve "plainly easy tasks," or assign points for basic obligations of a utility.** This Energy Bureau should reject LECO's arguments that ignore the evidence in the administrative record regarding the MOE Metrics and are just rationalizations by non-expert entities that do not have experience in preparing for and responding to major outage events, and that did not submit any expert testimony to support their claims.

In conclusion, this Energy Bureau should reject LECO's objections to the adopted MOE Metrics, which are not based on technical expertise or knowledge of the actions that a public utility must undertake to prepare for and respond to an MOE. LUMA hereby incorporates by reference the discussion included in pages 133 through 151 of its Opening Brief, whereby LUMA outlines the uncontested evidence for the record that supports the adopted MOE Metrics.

## **5. Safety Performance Metrics<sup>6</sup>**

In only a sentence in its Motion for Reconsideration, LECO requests the Energy Bureau to reconsider its decision to provide an incentive for all labor safety metrics and impose penalties if

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<sup>6</sup> LECO repeatedly refers to LUMA's Safety Performance Metrics as "Labor" metrics, which seems to indicate an intent to rename them. LUMA vehemently objects to this characterization.

minimum standards are not met. *See* LECO's Motion for Reconsideration, p. 14. This Energy Bureau should reject this argument on its face for lack of any developed argumentation and consider it waived. *See e.g., U.S. v. Boudreau*, 58 F.4<sup>th</sup> 26, 32 (1<sup>st</sup> Cir. 2023) (deeming waived argument that was not sufficiently developed). It bears noting that LECO did not support its cursory claim with any references to the record or support under applicable law. LECO did not expend any effort to show that the Energy Bureau could have erred or abused its discretion.

The Energy Bureau held in its Final Resolution and Order that the opportunity to earn additional financial incentives may encourage LUMA to take actions it may not otherwise prioritize in a penalty-only framework. *See* Final Resolution and Order, p. 49. The evidence in the administrative record entirely supports this determination. During the Evidentiary Hearing, Mr. Curtis Clark, witness for LUMA, stated that OSHA has a series of regulations for the operation of electrical T&D Systems that outline specific safety rules for the hazards that workers are exposed to. *See* Evidentiary Hearing Transcript, Vol. 2, February 8, 2023 (English Portion), p. 282, lines 4-8; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 1 [1:07:49]. The principal mechanism is compliance enforcement of those specific regulations to maintain the public interest and reduce recordable injuries. *Id.*, lines 9-12; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 1 [1:08:00]. They can inspect if there is evidence of non-compliance with an OSHA regulation. *Id.*, p. 282, lines 16-19; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 1 [1:08:22]. Based on that inspection, they will evaluate the applicable regulations. If out of compliance with the regulations, they have administrative tools, including warnings or fines. *Id.*, lines 20-25; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 1 [1:08:30]. However, Mr.

Clark explained that LUMA felt that treating the OSHA Recordable Incident Rate as a Performance Metric was critically important as this area needed significant improvement compared to the performance of PREPA and the industry averages. *Id.*, p. 280, lines 1-8; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 1 [1:04:41].

Mr. Clark further stated that LUMA does not have a financial incentive to make the targeted improvements without a performance metric. *See* Evidentiary Hearing Transcript, Vol. 2, February 8, 2023 (English Portion), p. 281, lines 7-8; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 1 [1:06:25]. For example, OSHA does not set minimum performance standards, baselines, or targets to impose penalties. OSHA is not in the business of setting specified percentages in the reduction of recordable incidents or fatalities that a utility must meet. *See* Exhibit 20 of the Evidentiary Hearing, Rebuttal Testimony of Curtis Clark (January 24, 2023), p. 6, line 115, and p. 7, lines 116-117. OSHA sets standards that must be met, and on a case-by-case basis, investigates recordable incidents and imposes penalties if it determines that the employer incurred in violations. *Id.*, p. 7, lines 117-119. Also, OSHA does not impose penalties for all recordable incidents, nor does OSHA impose penalties for failure to meet minimum performance standards. LECO's expert witness, Mr. Irizarry, recognized that even though having a safe work environment is an indispensable business requirement, what OSHA establishes are minimums. *See* Evidentiary Hearing Transcript, Vol. 2, February 8, 2023 (Spanish Portion), p. 12, lines 17-20; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 2 [2:23:00]. That is, the record is clear as to the distinct role that OSHA regulations play and the purposes that Performance Metrics

related to safety play in connection with Performance Incentive Mechanisms, such as the ones proposed by LUMA that arise out of the T&D OMA and were approved by this Energy Bureau.

OSHA's standards are minimums that need to be met but do not necessarily induce behavior consistent with public policy that would not otherwise occur to a sufficient degree in the absence of the Safety Performance Metrics. The Safety Performance Metrics promote precisely going beyond and above the bare minimum in a measurable and quantifiable manner. Certainly, LUMA has a legal obligation to meet OSHA's safety standards. However, adopting the Safety Performance Metrics would aid in improving those safety standards to more than what is legally required. LECO would have to agree that incentivizing the improvement of safety standards beyond those legally required will ultimately benefit LUMA's workforce and customers.

Additionally, LECO contradicts itself in opposing the safety metrics, although it favors the imposition of penalties for poor performance regarding safety. LECO argues that financial incentives are wasteful in light of the duty to comply with OSHA but advocates for the imposition of penalties despite the fact that OSHA may levy sanctions on LUMA if LUMA violates safety regulations.

LECO's proposition is also flawed in that it seeks penalties when certain minimum standards are not met, but it did not identify those standards in its Motion for Reconsideration. To be clear, LECO does not even state if those standards are equivalent to not following OSHA standards and local law.

Mr. Clark presented a pre-filed rebuttal testimony on the topic of penalties, establishing that, like all utilities and other employers, LUMA falls under OSHA regulations and is subject to

penalties and fines for non-compliance. Thus, imposing additional penalties as LECO requests on reconsideration, will not promote incremental improvement in performance and could instead amount to double or multiple penalties. *See* Exhibit 20 of the Evidentiary Hearing, Rebuttal Testimony of Curtis Clark (January 24, 2023), p. 5, lines 79-82. It bears noting that the uncontested testimony of LUMA's expert witness, Dr. Lara, establishes that penalties may have perverse effects and are not guaranteed to encourage better performance. *See* Exhibit 6 of the Evidentiary Hearing, p. 6, lines 98-107.

Although OSHA does not impose penalties for all recordable incidents, nor does OSHA impose penalties for failure to meet minimum performance standards, on a case-by-case basis, OSHA investigates recordable incidents and imposes penalties if it determines that the employer incurred violations. *See* Exhibit 20 of the Evidentiary Hearing, p. 7, lines 118-121. OSHA has a large number of regulations that could result in fines and penalties. *See* Evidentiary Hearing Transcript, Vol. 2, February 8, 2023, p. 288, lines 2-6; AP-2020-0025 Evidentiary-20230208\_Meeting Recording 1 [1:14:42]. If LECO's pretense is to subject LUMA to penalties, even when OSHA understands there should be none, they purport to subject LUMA to penalties for a standard that not even OSHA would apply. LECO's argument that because there is no impediment to establishing incentives, there should not be an impediment to imposing penalties is overly simplistic, unsupported, and irresponsible, at best.

LUMA's proposed safety metrics serve purposes different from those served by penalties, such as those that OSHA has the authority to impose. Incentives for safety metrics encourage the utility to improve safety metrics beyond the minimum threshold, whereas penalties are only useful

for deterring poor performance in this area. *See* Exhibit 20 of the Evidentiary Hearing, p. 5, lines 82-86.

In addition, as Mr. Clark stated, termination of the T&D OMA is the severest of penalties. To his knowledge, other utilities do not face a similar type of penalty. *See* Exhibit 20 of the Evidentiary Hearing, p. 6, lines 94-99.

Given the above, LUMA requests the Energy Bureau to deny LECO's request for reconsideration of the Final Resolution and Order to impose penalties if minimum standards regarding safety performance metrics are not met.

#### **6. Energy Efficiency and Demand Response Performance Metrics**

As to the Energy Savings as Percent of Total Energy Sales Performance Metric and the Peak Demand Savings as a Percent of Total Peak Demand Performance Metric ("EE&DR"), LECO claims that by deferring the implementation of energy efficiency and demand response metrics, the Energy Bureau does not comply with its mandate to further the earlier compliance with public policy on establishing targets for accelerated implementation in those areas. *See* LUMA's Motion for Reconsideration, pp. 14-15. LECO, however, did not explain this proposition nor support its contention with reference to evidence on the record. LECO, thus, did not meet the applicable standard to place this Energy Bureau in a position to reconsider any determination regarding the Energy Efficiency and Demand Response Performance Metrics.

The Energy Bureau determined that given that LUMA did not propose action-based performance metrics for the Transition Period and the Three-Year EE Plan process has not begun; it is premature to approve performance metrics for energy efficiency. This conclusion aligns with

LUMA's suggestion that these performance metrics be deferred. *See* Final Resolution and Order, p. 84. Moreover, the Energy Bureau discarded LECO's proposal on EE&DR because establishing performance metrics in the future and as part of the Three-Year EE Plan development and approval process will help ensure energy efficiency and peak demand targets are based on available program budgets and energy and peak demand savings potential. *Id.*, pp. 84-85.

The evidence in the administrative record supports the Energy Bureau's decisions to defer the metrics. Mr. Don Cortez, a witness for LUMA, submitted a pre-filed rebuttal testimony in this proceeding in support of the deferral of implementation of the EE&DR performance metrics. He expounded that since PREPA has never implemented EE&DR programs, a baseline metric by customer class does not exist. *See* Exhibit 26 of the Evidentiary Hearing, p. 10, lines 183-195. As a result, there is a high degree of uncertainty about the market readiness for these types of programs. *Id.* lines 183-185. LUMA has no data on how the customers from Puerto Rico as a whole or in the different consumer classes will react to energy efficiency offers, rebate price points, or the price of energy-efficient goods. *Id.*, lines 186-188. The Transition Period Program ("TPP") for Energy Efficiency and Demand Side Response programs is meant to understand market readiness. *Id.* Lines 188-189. The TPP quick-start programs will provide a greater understanding of the Puerto Rico market, customer needs, and preferences, and how best to address barriers to adoption across LUMA's customer classes. *Id.*, lines 193-195.

LUMA explained for the record that the EE&DR metrics, as incentive Performance Metrics, should be deferred during the transition period and not be effective until after the TPP program ends. *See id.*, p. 10, lines 203-204, and p. 11, line 205. In addition, the program, as outlined,

cannot be fully deployed until a funding mechanism, such as an EE rider, is approved and implemented. *Id.*, p. 11, lines 209-211. LECO has not offered any evidence to counter the evidence on the record that supports the Energy Bureau’s conclusion on these metrics. Thus, LECO’s request for reconsideration in this regard should be denied.

**WHEREFORE**, LUMA respectfully requests that the Energy Bureau **take notice** of the aforementioned and **deny** LECO’s Motion for Reconsideration.

**RESPECTFULLY SUBMITTED.**

We hereby certify that we filed this motion using the electronic filing system of this Energy Bureau. We will send an electronic copy of this motion to counsel for PREPA, Joannely Marrero-Cruz, [jmarrero@diazvaz.law](mailto:jmarrero@diazvaz.law); the Office of the Independent Consumer Protection Office, Hannia Rivera Diaz, [hrivera@jrsp.pr.gov](mailto:hrivera@jrsp.pr.gov), and counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy (“ICSE”), Fernando Agrait, [agraitfe@agrailawpr.com](mailto:agraitfe@agrailawpr.com), counsel for the Colegio de Ingenieros y a de Puerto Rico (“CIAPR”), Rhonda Castillo, [rhoncat@netscape.net](mailto:rhoncat@netscape.net), and counsels for Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climatica, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalicion de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., CAMBIO, Sierra Club and its Puerto Rico Chapter, and Unión de Trabajadores de la Industria Eléctrica y Riego (jointly, Puerto Rico Local and Environmental Organizations), [larroyo@earthjustice.org](mailto:larroyo@earthjustice.org), [rstgo2@gmail.com](mailto:rstgo2@gmail.com), [notificaciones@bufete-emmanuelli.com](mailto:notificaciones@bufete-emmanuelli.com), [pedrosaade5@gmail.com](mailto:pedrosaade5@gmail.com), [jessica@bufete-emmanuelli.com](mailto:jessica@bufete-emmanuelli.com); [rolando@bufete-emmanuelli.com](mailto:rolando@bufete-emmanuelli.com), [lvelez@earthjustice.org](mailto:lvelez@earthjustice.org), [rmurthy@earthjustice.org](mailto:rmurthy@earthjustice.org), [jcassel@earthjustice.org](mailto:jcassel@earthjustice.org).

In San Juan, Puerto Rico, this 18<sup>th</sup> day of March 2024.





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