

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

NEPR Received: Jun 20, 2024 8:46 PM
--

**IN RE: THE PERFORMANCE OF THE
PUERTO RICO ELECTRIC POWER
AUTHORITY**

CASE NO.: NEPR-MI-2019-0007

**SUBJECT: Motion in Compliance with Order to Show
Cause from June 10, 2024**

**MOTION IN COMPLIANCE WITH ORDER TO SHOW CAUSE FROM JUNE 10, 2024
TO THE PUERTO RICO ENERGY BUREAU:**

COME NOW LUMA Energy, LLC and LUMA Energy ServCo, LLC (jointly referred to as “LUMA”), and respectfully state and request the following:

I. Introduction

On June 10, 2024, the Honorable Puerto Rico Energy Bureau (“Energy Bureau”) issued a Resolution and Order in this instant proceeding, requesting information regarding an [apparent] increase in the number of work-related injuries or illnesses reflected in LUMA’s quarterly report on performance for the period from January to March 2024, and filed on April 22, 2024 (“June 10th Order”). The Energy Bureau stated that the aforementioned quarterly report reflected an increase in the metric corresponding to the rate of recordable incidents from the Occupational Safety and Health Administration of the United States (“OSHA”) and concluded that such an increase was unacceptable. The Energy Bureau then ordered LUMA to implement more rigorous corrective and preventive actions and provide adequate training to its employees to minimize the risk of accidents in the workplace. Further, the Energy Bureau directed LUMA to show cause

within the next ten (10) days as to why a fine of twenty-five thousand dollars (\$25,000) should not be imposed, such fine to be treated as a disallowed cost pursuant to Section 7.6(a)(ii) of the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* (“T&D OMA”).

As a threshold matter, LUMA would like to emphasize that since June 1, 2021, LUMA has markedly improved safety and, with regards to the OSHA Severity Rate metric, LUMA has consistently performed better than the performance levels reflected in the reports submitted to this Energy Bureau prior to LUMA beginning operation of the electric grid. For Fiscal Year 2024 OSHA Severity Rate, OSHA Recordable Rate and OSHA DART Rate performance year to date are significantly below baseline. OSHA Severity Rate for this period is 24.54, OSHA Recordable Rate is 2.19 and OSHA DART Rate is 1.49, compared to their respective baselines of 31.00, 6.90 and 4.80. Such results are reflective of all the corrective safety measures taken to date, of LUMA proactively providing employees with a safe working environment, and of LUMA adequately training its employees to minimize the risk of work accidents. Isolated performance in a quarter is not a tendency and should not amount to being a measure for the Energy Bureau to impose a fine on LUMA. The recent incidents have been isolated events and not the norm in the workplace, as the information submitted herein and discussed hereafter will show. Therefore, LUMA respectfully contends that imposing a fine against LUMA for an increase in one metric for three months is not warranted. The historical data indicates that LUMA’s performance has been better than was historically the case and has complied with every safety measure imposed by law and regulation.¹

¹ See Resolution and Order dated May 21, 2021, at p. 22 for the Energy Bureau’s determination on the OSHA Severity Rate baseline.

Moreover, the June 10th Order violates LUMA's due process rights because it states the imposition of a fine, unless LUMA shows cause for not imposing it, without following the applicable law, regulation, and case law mandates. It will be further argued that this instant proceeding does not contemplate, as part of its objectives, the imposition of penalties or fines for an increase in the values reported for any given metric. Therefore, imposing a penalty on LUMA in a proceeding that does not contemplate the imposition of penalties, and its only purpose is to gather and receive information regarding the system, violates LUMA's due process right. Lastly, the Energy Bureau has not established the rules for performance worse than the baseline of a metric under the regulations in its jurisdiction. Consequently, imposing fines on LUMA for performing in any given manner when parameters for noncompliance with the baselines of a metric have not been determined results in a violation of LUMA's right to due process.

Further, any fine imposed pursuant to the June 10th Order that the Energy Bureau deems should be treated as a "Disallowed Cost" under the T&D OMA impairs the contractual obligations set forth under the T&D OMA. Pursuant to the T&D OMA, any fines imposed by the Energy Bureau should be treated as a "Disallowed Cost" only if LUMA has failed to comply with its obligations under the T&D OMA. The Energy Bureau has not stated in the June 10th Order which obligation under the T&D OMA LUMA has failed to comply with, if any. Further, the T&D OMA clearly establishes that any dispute in relation to whether an expense is a "Disallowed Cost" is subject to a Technical Dispute to be decided by the Puerto Rico Public-Private Partnerships Authority ("P3A"). As such, the Energy Bureau exceeds its jurisdiction and scope by ruling that any fine imposed pursuant to the matters discussed in the June 10th Order should be treated as a "Disallowed Cost" under the T&D OMA.

For these reasons, which will be discussed in detail below, LUMA respectfully contends the Energy Bureau should vacate the June 10th Order, considering that LUMA shows cause on why the imposition of a fine is not warranted and determine what it is appropriate in law.

II. Procedural Background

On May 14, 2019, the Energy Bureau issued a Resolution and Order (“May 14th Order”) initiating a process to gather information and establish performance metrics for the electric system of the Puerto Rico Electric Power Authority (“PREPA”) through the aforementioned case. In accordance with “typical practices of the electric industry,” in Puerto Rico, as well as in the United States, the metrics used to measure the performance and execution of electric service companies are generated by the regulated entity and reported to the regulator through quarterly or annual reports. Through the May 14th Order, the Energy Bureau ordered PREPA to submit quarterly reports starting September 15, 2019.

On June 22, 2020, P3A, PREPA, and LUMA executed the T&D OMA, whereby LUMA manages and operates the transmission and distribution system of PREPA. Pursuant to Section 5.6 of the T&D OMA, LUMA, as an agent of PREPA, submits systems data regarding the Transmission and Distribution System (“T&D System”).

On December 23, 2020, the Energy Bureau issued a Resolution and Order (“December 23rd Order”), starting the procedure to establish a Performance Baseline and Performance Compliance Benchmarks for the operation of PREPA’s electric system. The Performance Baseline metrics measure the historical behavior of PREPA regarding specific parameters and serve as a starting point for any improvement in the area. However, the Performance Compliance Benchmarks metrics result from a specific parameter, following the evaluation of the performance of eight (8) utilities comparable to PREPA, either by the number of customers or the geography of the service area. On December 30, 2020, the Energy Bureau issued a Resolution and Order (“December 30th

Order”) ordering PREPA to present, every 20th day of the month after each quarter closes, the quarterly system reports. On May 21, 2021, the Energy Bureau issued a Resolution and Order (“May 21st Order”), where it approved and established the baselines and benchmarks for the metrics and ordered PREPA and LUMA to coordinate the necessary logistics to file the quarterly reports.

On June 22, 2021, LUMA submitted the quarterly performance metrics for March, April, and May 2021, with performance data prior to Interim Service Commencement, which occurred on June 1, 2021. Since then, LUMA has complied with the submission of quarterly reports on system data and updates requested by this Energy Bureau until the present. *See filings* of August 6, 2021; August 13, 2021 (filing updated quarterly report with System Data for March through May 2021, in compliance with order of August 6, 2021); September 20, 2021; December 22, 2021; March 21, 2022; June 20, 2022; July 29, 2022; October 20, 2022; January 20, 2023; April 20, 2023; July 20, 2023; October 20, 2023; October 31, 2023 (submitting restated values); January 29, 2024; and April 22, 2024.

On April 22, 2024, LUMA filed its *Submission of Quarterly Report on System Data for January through March 2024*. LUMA submitted the relevant data for the OSHA Severity Rate metric as in any other quarterly report.

In the June 10th Order, the Energy Bureau stated its concerns with the increase in the metric corresponding to the rate of recordable incidents from OSHA. Specifically, the OSHA Severity Rate calculates the number of lost or restricted days due to work-related injuries or illnesses. The Energy Bureau ordered LUMA to implement more rigorous corrective and preventive measures and provide adequate training to its employees to minimize the risk of work accidents. On the June 10th Order, the Energy Bureau also ordered LUMA to “show cause within ten (10) days, counted

from the notification of the order, why it should not be subject to a fine of twenty-five thousand dollars (\$25,000), to be paid from its own funds, as a result of its poor performance regarding said metric.” On a footnote, the Energy Bureau stated that the fine will be treated as a “Disallowed Cost” in accordance with Section 74(a)(ii) of the T&D OMA. *See* June 10th Order, at p. 2, footnote 6.

III. Discussion

A. LUMA’s Historical Performance in the OSHA Severity Rate Metric Has Been, on Average, Below PREPA’s Baseline.

This Energy Bureau initiated this instant proceeding to set performance baselines and compliance benchmarks for Puerto Rico’s electric system. Those performance baselines and benchmarks would be used to develop the corresponding targets for certified electric service companies such as LUMA. *See* Resolutions and Orders dated May 14, 2019, and December 23, 2020. Consequently, 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. *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* dated February 5, 2021; *Motion Submitting Luma’s Reply to Comments Filed by PREPA and Stakeholders on Performance Baselines, Performance Metrics and Compliance Benchmarks* dated February 19, 2021; *Motion Submitting LUMA’S Sur Reply and Comments on the Information Presented at the Technical Conference of February 22, 2021*, dated March 1, 2021.

On April 8, 2021, this Energy Bureau issued a Resolution and Order (“April 8th Order”) 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. The baselines took into consideration PREPA's performance for Fiscal Year 2020. The Energy Bureau instructed that the baselines and benchmarks would be, among other things, the basis to establish the performance incentives or targets to be applicable to LUMA in Case No. NEPR-AP-2020-0025. *See* April 8th Order, at pp. 4-5.

Among the additional metrics the Energy Bureau identified in the April 8th Order that PREPA shall report was the OSHA Severity Rate. The OSHA Severity Rate is used to measure the severity of workplace injuries and is commonly used to measure safety performance across the utility industry. Its calculation considers the total number of restricted and lost time days incurred due to a work-related injury. *See Motion for Leave to file Revised Exhibit 2 to LUMA's Submission of February 5, 2021, on Proposed Performance Metrics and Baselines and Submitting Revised Exhibit 2*, dated February 8, 2021, at p. 2, ¶5.

Subsequently, in the May 21st Order, the Energy Bureau approved and established the baselines and benchmarks for the metrics. Specifically, the Energy Bureau established that the OSHA Severity Rate will be measured with the "rate" unit using the PREPA Fiscal Year 2020 Baseline, which was 31, and that the proposed benchmark will be determined later. *See* May 21st Order, at p. 22. Thereafter, LUMA submitted its performance values for the OSHA Severity Rate. LUMA has reported values well below the Baseline set by the Energy Bureau in the May 21st Order, on average, three times less than the set Baseline.²

On August 18, 2022, the Energy Bureau issued a Resolution and Order ("August 18th Order") summarizing the metrics data from June 2021 to May 2022. On the August 18th Order, the

² For example, for the OSHA Severity Rate metric, LUMA reported the following monthly values: 1.19 (June 2021), 5.71 (July 2021), 22.75 (August 2021), 13.36 (September 2021), 2.46 (October 2021), 4.11 (November 2021), 1.43 (December 2021), 3.82 (January 2022), 14.03 (February 2022), 14.30 (March 2021), 10.82 (April 2022), and 16.81 (May 2022). *See* Resolution and Order dated August 18, 2022.

Energy Bureau stated that the OSHA Severity Rate Fiscal Year 2022 Average was 10.0 and determined that the Fiscal Year 2022 metric was “performing” relative to the PREPA Fiscal Year 2020 Baseline, which was 31. *See* August 18th Order, at p. 21.

From June 2022, LUMA continued to report values below the PREPA Fiscal Year 2020 Baseline throughout June 2023.³ Thus, on December 21, 2023, the Energy Bureau issued a Resolution and Order (“December 21st Order”), conducting the same analysis from July 2022 to June 2023. In the December 21st Order, the Energy Bureau concluded that the Fiscal Year 2023 Average, 18.0 for the OSHA Severity Rate for the T&D System sub-group, had “Improved” compared with the PREPA Fiscal Year 2020 Baseline. *See* December 21st Order, at p. 28. However, the Energy Bureau concluded that compared with the Fiscal Year 2022 Average, the Fiscal Year 2023 Average had “Not Improved.” *Id.*

In December 2023, LUMA reported an incident where two employees were injured. Then, in January 2024, another incident was reported by LUMA in which one employee suffered an injury. Considering the type of injuries sustained by those employees and the short span of time between the two incidents, the total number of restricted and lost time days incurred due to the work-related injury reflected the severity of the injuries sustained. By the time the reporting period at issue arrived (January through March 2024), the total number of restricted and lost time days incurred by those affected employees significantly impacted the metric values for that quarter. However, as noted from the values reported by LUMA since commencement of the OSHA Severity Rate metric, the values reported in the quarter corresponding to January through March

³ LUMA reported the following values for that period: 19.15 (June 2022), 8.55 (July 2022), 8.84 (August 2022), 7.82 (September 2022), 15.09 (October 2022), 25.47 (November 2022), 28.90 (December 2022), 29.01 (January 2023), 22.85 (February 2023), 12.89 (March 2023), 13.28 (April 2023), 13.47 (May 2023), and 29.32 (June (2023)). *See* Resolution and Order dated December 21, 2023.

2024 represent isolated incidents that are uncommon and should not be treated as illustrative of future performance by LUMA and neither does it reflect the performance over time of said metric.

OSHA defines the Severity Rate as a metric for assessing the severity of workplace injuries and illnesses. *See* U.S. Department of Labor, Occupational Safety and Health Administration, *Standard Interpretations: Clarification on how the formula is used by OSHA to Calculate Incident Rates* (August 23, 2016) <https://www.osha.gov/laws-regs/standardinterpretations/2016-08-23> (last visit June 20, 2024). This rate is calculated by multiplying the total number of lost and restricted workdays by 200,000 and dividing by the total hours worked (as clarified by OSHA). *Id.* While this calculation provides a valuable indicator, it is essential to recognize the potential impact of external factors on the Severity Rate. *Id.* OSHA highlights that external factors can highly influence the Severity Rate. *Id.* A single injury can significantly impact a company's rate. *Id.* Additionally, factors beyond direct company control, such as waiting times for worker's compensation appointments and evaluations, can affect the number of restricted workdays, thus impacting the overall rate. *Id.* Furthermore, OSHA's interpretative letter titled '*Standard Interpretations: Clarification on How OSHA Uses the Formula to Calculate Incident Rates*' (dated August 23, 2016) emphasizes that evaluating data on injuries and illnesses is vital for hazard identification and reduction. *Id.* However, relying solely on incident rates can lead to erroneous conclusions. OSHA advocates for considering multiple variables when assessing the effectiveness of an employer's safety and health program. *Id.*

Nonetheless, with the data available for Fiscal Year 2024, LUMA foresees that at the end of the Fiscal Year 2024, performance under the OSHA Severity Rate metric will still be considered an improvement, in comparison with the PREPA Fiscal Year 2020 Baseline. This Energy Bureau has continuously assessed performance in this instant proceeding on a twelve-month period basis.

Based on those parameters, LUMA has always performed under the set Baseline for the OSHA Severity Rate metric. This is because performances based on a short period will only record compliance at a single point in time, and does not show trends, or aggregate performance over a certain period. Therefore, any assessment of LUMA's performance based on a three-month period is contrary to the approach instituted by the Energy Bureau in this instant proceeding, putting LUMA at an extreme disadvantage considering that the June 10th Order alludes to the imposition of a fine for "poor performance." LUMA's performance regarding the OSHA Severity Rate only demonstrates compliance with the parameters set by this Energy Bureau; thus, labeling it as "poor performance" inevitably contradicts its own standards. It is only logical to conclude that a fine should not be imposed for this reason alone, and the June 10th Order should be vacated.

B. Since Commencement, LUMA Has Improved Unparalleled its Employees' Safety and Working Conditions and Continues to Do So.

Since its commencement, LUMA's Health, Safety, and Environment ("HSE") department has contributed to developing LUMA's entire workforce's skills, in alignment with its core objectives of prioritizing safety and operational excellence. This emphasis on continuous improvement has been evident and showcases LUMA's unwavering commitment to maintaining operational and workplace safety. As will be evidenced in detail in the upcoming paragraphs, LUMA has implemented rigorous corrective and preventive actions and provided adequate training to its employees to minimize the risk of accidents in the workplace.

As examples of LUMA's commitment to those values, HSE has implemented a comprehensive training program, completing over 137,000 hours of in-class and on-the-job health and safety training for more than 4,000 employees and contractors. This training covers critical areas, including OSHA standards, First Aid/ Cardiopulmonary resuscitation (CPR)/Automated external defibrillator (AED), and equipotential bonding and grounding, essential for protecting

individuals from electrical hazards. LUMA has also established a robust Safety Program in collaboration with the Operations Department. This includes four apprenticeship programs pairing field personnel with experienced, skilled, and trained temporary employees who provide critical guidance, ensure the completion of job hazard analyses, teach safe, efficient, and standard work practices, and reinforce consistent work habits. These apprenticeships, still in effect today, also focus on quality workmanship, effective issue resolution, and work ethics. In Fiscal Year 2024 alone, LUMA conducted over 80,000 hours of comprehensive safety and health training, emphasizing proper equipment usage, hazard recognition, and incident reporting.

Similarly, during Fiscal Year 2024, LUMA provided over 32,000 pieces of personal protective equipment (“PPE”) to ensure the safety of its employees. Over this period, LUMA has also initiated the implementation of Telematics technology into its safety measures, to enhance vehicle and driver safety. Telematics systems will monitor vehicle use, driving behavior, and location data, providing real-time feedback and analytics to improve driving habits, reduce accidents, and ensure compliance with safety protocols. Also, all employees must perform a 360-degree walk-around of their vehicles before driving to ensure safety. In addition, a “Stretch & Flex” program is conducted at the beginning of each shift to minimize muscular injuries. Implementing a “Near Miss” program enables employees to report potential incidents, fostering a proactive safety culture.

Moreover, LUMA has conducted over 61,000 safety inspections to identify and address hazards and non-compliance procedures, providing leading indicators for potential incidents. Additionally, LUMA has doubled the field safety staff to ensure two safety personnel per region and increased frontline leadership by 50%.

As to recent incidents, LUMA has taken immediate and proactive measures in response to these, including the unfortunate fatality on May 23, 2024.⁴ In line with LUMA's commitment to safety and incident prevention, it has undertaken several actions, including (1) conducting all-hands safety stand-down meetings with the Chief Executive Officer to emphasize the importance of safety; (2) implementing a new Low Voltage handbook and Low Voltage Job Hazard Analysis ("JHA"); and (3) scheduled the start of a Low Voltage employee assessment on July 15, 2024.

Regarding contractor safety management, LUMA's Contractor Safety Management program is designed to protect all employees, both LUMA and contracted, as well as equipment and facilities, from injury or loss. This program was developed based on industry standards, particularly the Edison Electrical Institute's "Model for Contractor Safety Program Guidelines." LUMA's Contractor Safety Team is expanding to meet increasing workload demands. Key actions undertaken include (1) providing thorough contractor orientations, (2) conducting safety observations, (3) enhancing the contractor qualification process, and (4) ensuring contractors comply with the Health and Safety Terms and Conditions in their contracts. These efforts underscore LUMA's ongoing commitment to safety, aiming to improve reliability and deliver the best possible service to customers while building a safer and better energy future.

These initiatives collectively demonstrate LUMA's commitment to maintaining a safe working environment. The extensive training programs, provision of PPE, proactive safety measures, and rigorous monitoring and compliance inspections underscore LUMA's dedication to the health and safety of its employees. The continuous improvement and sustained efforts over nearly three years further support LUMA's contention that it has provided safe working conditions. At present, LUMA is steadfast in its commitment to enhancing the safety and well-being of its

⁴ It should be noted that this fatality involved a LUMA employee, not a contractor, and the incident is currently under investigation.

employees. It continues to identify corrective actions and preventive measures to enhance its employees' safety and well-being. LUMA aims to ensure a safer working environment through comprehensive training, stringent safety protocols, and continuous improvement initiatives.

First and foremost, LUMA has instituted a mandatory safety stand down companywide scheduled for May 8, May 10, May 22, May 30, and June 6, 2024. This was an immediate action plan. In addition, LUMA is retraining and reinforcing its "5 Life-Saving Rules" with all employees. These include (1) *Jobsite Hazard Assessment*: Ensuring thorough and consistent evaluation of potential risks at every job site; (2) *Minimum Approach Distance*: Adhering to safety distances to prevent accidental contact with live electrical components; (3) *Equal Bonding & Grounding*: Implementing measures to protect individuals from electric shock and prevent equipment damage due to electrical faults; (4) *Lock Out Tag Out*: Procedures to ensure that machines are properly shut off and not started up again before maintenance or repair work is completed; and (5) *Safety at Heights*: Implementing fall protection systems and training to prevent injuries from falls.

Additional safety protocols instituted by LUMA include: (1) *Our 7 Steps of Electrical Safety*: A comprehensive guideline for safe electrical work; (2) *33 ft of Safety*: Maintaining a safe distance from high-voltage equipment; (3) *Where's the Line*: Ensuring awareness of power lines and their locations; (4) *Know Your Limits*: Recognizing and respecting personal and equipment limitations; (5) *Don't Hang Around Operating Equipment*: Staying clear of active machinery; (6) *Shuffle or Hop - Don't Step*: Techniques to avoid step potential hazards; and (7) *Call Before You Dig*: Preventing underground utility damage by ensuring proper notification and marking.

LUMA is currently working on implementing specific initiatives, such as the *Distribution Live Line Work and Equal Potential Zone Training Program*, which provides field employees with

specialized training and a new manual for reference in the field. Also, a Safety Emphasis Plan has been developed, focusing on nine critical areas to enhance overall safety. It includes Leadership Commitment and Employee Engagement, Strategy and Resources, The Capacity Model (TCM) Integration, Driver Safety Framework, Health & Safety Systems, Health & Safety Operations, Professional Development and Training, Continuous Improvement and Learning, and Contractor Safety Management.

Another program created by LUMA is the *Injury Management Program*, which is focused on managing cases of injured employees and establishing contacts with hospitals around the island. It entails collaborating with the Puerto Rico State Insurance Fund Corporation to provide additional recovery-at-work options (i.e., modified duties). Weekly safety communications and multiple stand-down initiatives are programmed to alert employees of hazardous conditions and safe procedures.

Additionally, LUMA is expanding foremen's knowledge of safety and active leadership to foster a proactive safety culture through the *Foreman Front Line Leadership Training*. Also, it has created the *Jobsite Safety Observation Guide*, a new guide to help focus on the critical work being performed on the job site, enhancing on-site safety vigilance.

The timeline for the above-described initiatives is either ongoing (i.e., continuous professional development, leadership training, and injury management programs) or short-term (i.e., implementation of training programs, distribution of new manuals, and initiation of the Safety Emphasis Plan). These measures demonstrate LUMA's commitment to improving workplace safety, reducing the OSHA Severity Rate, and ensuring the well-being of all employees through proactive actions. Further, they are evidence of LUMA's commitment to observe rigorous corrective and preventive actions as to safety and health and provide adequate training to its

employees to minimize the risk of accidents in the workplace, which has been the goal since its commencement and continues to be so at present. As such, LUMA should be deemed to have complied with the June 10th Order in this regard.

C. The June 10th Order violates LUMA's Due Process Rights Under the Applicable Law and Regulation.

The constitutional guarantee of due process assures everyone that they shall not be deprived of liberty or property without a fair, equitable, and reasonable trial. *See* Const. E.L.A. art. II, sec. 7, 1 LPRA; Const. USA Amdt. XIV §1; Const. USA, Amdt. V; *see e.g., Rivera Rodriguez & Co. v. Lee Stowell*, 133 DPR 881, 887 (1993); *López Vives v. Police of PR*, 118 DPR 219, 231 (1987). In its substantive aspect, the guarantee of due process of law requires evaluating the constitutionality of a state action to protect fundamental rights. *Rivera Santiago v. Srio. Treasury*, 119 DPR 265, 273 (1987). Under this guarantee, the State is prevented from affecting property or freedom interests of an individual in an unreasonable, arbitrary, or capricious manner. *Hernández v. Secretario*, 164 DPR 390, 394-95 (2005) (citing cases); *see also, e.g., Meléndez de León v. Keleher*, 200 DPR 740, 759 (2018) (“due process of law ‘represents a barrier to arbitrary or capricious state actions affecting citizens’ fundamental rights.”).

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

fundamentally fair to the individual in resolving the facts and rights that serve as the basis for those governmental actions that deprive him of his life, liberty, or property.” *Id.*, on page 274 (citations and internal quotation marks omitted).

In evaluating claims of due process violations, courts first determine whether a proprietary or libertarian interest is at stake. *Rivera Rodriguez & Co. v. Stowell Taylor*, 133 DPR 881, 887 (1993). Once it is determined that this requirement has been met, due process is defined given that “different situations may require different types of proceedings, but there always remains the general requirement that the governmental process must be fair and impartial.” *Id.* at p. 888. Due process is circumstantial and pragmatic in nature, so its requirements will depend on the context of the procedure. *Punta de Arenas Concrete v. Auction Board, Mun. Anthills*, 153 DPR 733, 740-42 (2001).

Among the guarantees that make up due process, jurisprudence has recognized that the administrative decision must be informed, with knowledge and understanding of the evidence corresponding to the case. *A.D.C.V. v. Superior Court*, 101 DPR 875, 883 (1974). *See also Rafael Rosario Assoc. v. Dept. Familia*, 157 DPR 306, 330 (2002). In addition, the findings of fact and the reasons for the administrative decision must be stated. *Rivera Santiago*, 119 DPR at p. 274. To ensure due process guarantees, parties must have an opportunity to present and refute evidence and be able to do so effectively. *See Rentas Nieves v. Betancourt Figueroa*, 201 DPR 416, 429 (2018). Those parties to an administrative procedure have the right to participate effectively. *Commission of Citizens to the Rescue of Caimito v. G.P. Real Property S.E.*, 173 DPR 998, 1014 (2008) (by the imperative of due process, parties must be notified of administrative determinations so that they can effectively participate and challenge determinations in court). In view of this, “[t]he right to a public hearing would be meaningless if [the administrative body] were allowed to

base its decision on evidence received without the knowledge of the parties, outside the hearing, without allowing the interested parties to rebut or explain it by cross-examining or presenting other evidence to the contrary.” *Lopez v. Planning Board*, 80 DPR 646, 670 (1958). After all, due process guarantees are constitutional imperatives.

Due process guarantees include giving individuals adequate notice of actions the state prohibits or requires. *See White Tel. Co. V. Fed. Commc'ns Comm'n*, 991 F.3d 1097, 1116 (10th Cir 2021) (citation omitted). This pursues two guiding purposes: (1) that the regulated entity can conform its conduct to the requirements of the State; and (2) to prevent agencies from acting unreasonably or arbitrarily. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, (2012); *Henríquez v. Consejo Educación Superior*, 120 DPR 194, 202 (1987).

On due process guarantees in administrative proceedings, Section 3.1 of Puerto Rico’s Uniform Administrative Procedures Act (LPAU for its Spanish acronym), 3 LPRA § 9641 (2023), provides as follows:

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

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

Id.

Section 1.3(b) of the LPAU defines “adjudication” as the pronouncement by which an agency determines the rights, obligations, or privileges vested in a party. 3 LPRA §9603(b). The Supreme Court of Puerto Rico has recognized that the informal or summary nature of an adjudicative procedure is not an obstacle to guaranteeing affected parties the “irreducible minimum of procedural guarantees recognized as fair and equitable.” *Torres Santiago v. Dept. of*

Justice, 181 DPR 969, 993 (2011) (determining that the Department of Justice must grant minimum procedural guarantees to applicants for the benefit of legal representation); *Id.*, 994 (“the nature of informality cannot obliterate the minimum guarantees of a fair and equitable process”); *see also Baerga Rodríguez v. F.S.E.*, 132 DPR 524, 538 (1993) (recognizing in the context of an Informal proceeding before the Puerto Rico Industrial Commission that the minimum procedural guarantees applicable to formal proceedings that have been deemed fair and equitable apply to informal proceedings). Even if the proceedings are informal or summary, the affected party must be given adequate notice, an opportunity to confront the other party’s evidence and present its own evidence, and the opportunity to review the administrative determination judicially. *Almonte et al. v. Brito*, 156 DPR 475, 482 (2002). Regarding the requirement to provide fair warning to regulated parties, the U.S. Supreme Court has held that a court cannot make a deference to a new interpretation that creates an “unfair surprise” for regulated parties. *Kisor*, 139 S. Ct. at p. 2418.

1. A Fine Pursuant to the June 10th Order Has No Basis in the Applicable Law, Regulation and Case Law, Contravening the Due Process Guarantees.

In our jurisdiction, given the existing due process guarantees, decisions by administrative agencies imposing fines shall not exceed statutory authorization, must be supported by substantial evidence in the administrative record, and cannot amount to a clear abuse of discretion. See *Comisionado de Seguros v. Antilles Ins. Co.*, 145 DPR 226, 233-34 (1998); *Assoc. Ins. Agencies, Inc. v. Com. Seg. PR*, 144 DPR 425, 439-41 (1997); See also e.g. *ECP Incorporated v. Oficina del Comisionado de Seguros*, 205 DPR 268, 281 (2020) (stating the general rule that decisions by administrative agencies should be reasonable and based on the administrative record); see also *Graciani Rodríguez v. Garage Isla Verde*, 202 DPR 117, 126-27 (2019).

The determination to impose a fine entail the exercise of discretion and a concomitant avoidance of arbitrary actions. In the context of administrative law, the Puerto Rico Supreme Court has held that the exercise of discretion by an administrative agency must be rooted in reasonableness and accordance with applicable law. See e.g., *Ramírez v. Policía de PR*, 158 DPR 320, 339 (2002). Discretion, in turn, has been defined as a form of reasonableness applied to judicial discernment to reach a just conclusion. See, e.g., *Banco Popular de PR v. Mun. de Aguadilla*, 144 DPR 651, 657-58 (1997); *Pueblo v. Ortega Santiago*, 125 DPR 203, 211 (1990).

Section 6.36 of Act 57-2014, as amended by Act 17-2019, gives the Energy Bureau the authority to “impose administrative fines for violations of this Act, or the regulations and orders issued thereunder, committed by any person or electric power company subject to its jurisdiction, of up to a maximum of twenty-five thousand dollars (\$25,000) per day.” 22 LPRA §154jj (2024) (translation ours). Article XII of Regulation No. 8543, also known as *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceeding* (“Regulation 8543”), establishes that the Energy Bureau “may issue any order or resolution it deems necessary to give effect to the purpose of Act. No. 57-2014 [and] to compel compliance with any law whose interpretation and implementation is subject to the jurisdiction of the [Energy Bureau] and to enforce its rules, regulations, orders, and decisions.” Regulation 8543, Section 12.01. Specifically, the Energy Bureau stated that due to a party’s noncompliance to provisions of Act 57-2014, Energy Bureau regulation, and/or laws subject to their jurisdiction, the Energy Bureau may impose administrative fines of up to twenty-five thousand dollars (\$25,000) per day. Regulation 8543, Section 12.02.

Regulation 8543 applies to all notices of non-compliance and investigations addressed before or by the Energy Bureau. See Section 1.04, Regulation 8543. Pursuant to Regulation 8543,

the Energy Bureau may issue a Notice of Noncompliance if it learns that a person has incurred, is, or may be incurring a violation of the energy public policy set forth in Act No. 57-2014. *See* Regulation 8543, Section 14.01. The Notice of Noncompliance shall be issued by summoning the person. *Id.* The Notice of Noncompliance shall state the alleged breach, according to public information or the information that forms part of the administrative record, as well as the facts that give rise to the Notice of Noncompliance. *See* Regulation 8543, Section 14.02. The Notice of Noncompliance shall inform the person of his/her right to address the Energy Bureau to examine the information and documentation in the administrative record. *Id.* As part of the proceedings, the person can submit witnesses and testimonies. *See* Regulation 8543, Section 14.04.

After providing the notified party an opportunity to be heard, if the Energy Bureau determines that said party has engaged in one or more of the breaches alleged in the notice, it may impose the appropriate remedy, in accordance with the law, or with the remedies set forth in Sections 10.01 thru 10.03. *See* Regulation 8543, Section 14.05. If the notified party fails to comply with any of the Energy Bureau's orders issued during a Notice of Noncompliance proceeding, the Energy Bureau may impose any fine or sanction it deems appropriate, including fines and penalties set forth in Section 12.02 of the Regulation. *See* Regulation 8543, Section 14.06.

As Article 14 of Regulation 8543 establishes, the Energy Bureau must notify of the non-compliance to the person that has incurred or is incurring a violation of the public energy policy of Puerto Rico or any law or regulation under the jurisdiction of the Energy Bureau. However, the June 10th Order does not comply with the requirements of Article 14, as it does not state the legal baseline of the alleged breach LUMA has incurred. *See* Regulation 8543, Section 14.02. The Notice of Noncompliance shall order the party to present its response in writing and provide its defenses and position regarding the alleged violation. *Id.* The notice shall also state the period the

party has to present its response and the warning that if it does not comply with the notice, a penalty of imposition of fines may be imposed. *Id.* Once the Notice of Noncompliance is issued and the party has the opportunity to respond and present their defenses, if the Energy Bureau determines that breach or violation has occurred, it may impose a remedy or fines.

Nonetheless, the June 10th Order does not comply with the aforementioned, it does not identify that alleged violation. Neither does it order LUMA to present a response and to provide its defenses and position. The only opportunity the June 10th Order gives LUMA is to explain why a fine should not be imposed, as the June 10th Order concludes that LUMA has jeopardized the safety of their employees or that there has been a failure to provide a safe workplace. The June 10th Order also provides LUMA with a short period of time to respond to why a fine should not be imposed because of “poor performance” regarding the OSHA Severity Rate metric. In this way, the Energy Bureau has already concluded that LUMA has incurred a violation, for which the basis has not yet been identified. Instead of warning of a penalty if LUMA does not respond to the order, the Energy Bureau has already concluded that it will impose a fine. Thus, the Energy Bureau only gives LUMA a chance to express the reasons why a fine should not be imposed.

Another reason why the June 10th Order does not comply with Article 14 of Regulation 8543 is that, instead of the Energy Bureau providing LUMA the opportunity to be heard before deciding on the possible imposition of a fine, the Energy Bureau has already concluded that LUMA has incurred a violation, that had put their employees at risk and that it has not provided a safe workplace and that it will be imposing a fine against LUMA for said violation. This action, as stated above, violates due process. LUMA is entitled to be heard before concluding a violation has taken place and before imposing a penalty.

In addition, Regulation 8543, in its Article 15, provides the Energy Bureau with the mechanism of an investigation to identify if a party is violating or breaching an energy public policy under the jurisdiction of the Energy Bureau. Article 15 of Regulation 8543 establishes that once the investigation results reveal a violation or breach of the public energy policy of Puerto Rico, the Energy Bureau may issue a Notice of Noncompliance to the party. Thus, if the investigation results conclude that a violation or breach has been committed, the Energy Bureau may issue a Notice of Noncompliance to the party and start proceedings against them, where penalties may be imposed. However, before the Energy Bureau imposes a penalty, a Notice of Noncompliance must be issued to preserve the party's due process rights. Nevertheless, in this proceeding the Energy Bureau did not align its actions with said regulatory structure. Through the June 10th Order, the Energy Bureau has omitted complying with the opening of an investigation or issuing a Notice of Noncompliance to understand better the circumstances for which the OSHA Severity Rate metric has increased in the last trimester, and objectively gauge what recourse to require or what actions should be asked of LUMA in said matter.

It is clear that the applicable law, regulations, and jurisprudence establish that the Energy Bureau can only impose fines under specific parameters. As previously discussed, the Energy Bureau has not issued a Notice of Noncompliance against LUMA regarding the OSHA Severity Rate performance metric. Neither has the Energy Bureau opened an investigation regarding the aforementioned metric and its performance. The June 10th Order does not comply with the already discussed law, regulation, and jurisprudence. Thus, imposing said fine to LUMA without complying with Article 14 and Article 15 of Regulation 8543 will violate LUMA's due process rights.

As the June 10th Order does not comply with the requirements of Article 14 to be considered a Notice of Noncompliance or Article 15 to be regarded as an ongoing investigation proceeding, LUMA respectfully requests that this Energy Bureau vacate the June 10th Order. LUMA also respectfully requests that this Energy Bureau vacate the June 10th Order as this proceeding does not contemplate the imposition of fines for an increase in a metric. This Energy Bureau should also refrain from imposing a fine against LUMA given that the Energy Bureau did not identify the laws, regulations, or orders that LUMA has breached and did not provide LUMA with the requisite proper opportunity to be heard on the allegations as required by applicable law, regulation, and jurisprudence.

LUMA takes very seriously the safety of its employees. Therefore, LUMA has already implemented rigorous corrective and preventive measures and has and continues to provide adequate training to its employees to minimize the risk of work accidents. LUMA also takes seriously the Energy Bureau's concerns with the increase in the metric of OSHA Severity Rate. However, as discussed, in our jurisdiction, it is a fundamental principle that a natural or legal person, such as LUMA, is protected under the due process guarantees, such as having the opportunity to receive clear and unambiguous notice of the specific law, regulation, or order under the jurisdiction of the Energy Bureau that it allegedly has violated. This type of notification should detail the nature of the violation and the evidence supporting said claim. This information is essential for anyone to prepare a defense or corrective action. Another important due process right that LUMA is entitled to is a reasonable opportunity to respond to allegations against it and submit a response with evidence prior to the imposition of any fine from the Energy Bureau.

It should be noted that this instant proceeding was initiated by the May 14th Order, which only contemplated that the process would be used to gather information and establish performance

metrics for the electric system. Then, on the May 21st Order, the Energy Bureau approved and established the baselines and benchmarks for all the metrics reported in this instant proceeding. In the May 21st Order, the Energy Bureau instructed PREPA and LUMA to start filing the quarterly reports, considering the approved metrics. Therefore, after the May 21st Order, the proceedings became exclusively a matter of gathering information regarding the electric system of Puerto Rico. LUMA believes that a penalty imposition of fines for an increase in a metric is not contemplated for the purpose of this proceeding and will represent a procedural violation.

2. The Energy Bureau Has Not Established a Mechanism for Penalties for Non-Compliance Under Regulation 9137.

The Energy Bureau has established regulations recognizing the Bureau's right to conduct a process for establishing performance incentive mechanisms and penalties. Regulation No. 9137 is also known as *Regulation for Performance Incentive Mechanisms* (“Regulation 9137”). Article 7 of Regulation 9137 states that the Energy Bureau shall establish the Bureau’s policy for their Performance Incentive Mechanisms, which shall include: economic incentives and investment payback, customer services, compliance with standards established in Act 17-2019, compliance with federal and local environmental policies, and others. *See* Regulation 9137, Section 7.1. These Performance Incentive Mechanisms shall be clearly defined, easily interpreted, and verified. *Id.* Regulation 9137 also provides gives the Energy Bureau with the means to establish mechanisms to impose penalties for noncompliance with a metric under its authority pursuant to Section 6.36 of Act 57-2014.

However, even though Regulation 9137 allows the imposition of penalties for the non-compliance of a metric, LUMA’s due process has yet again been infringed as the June 10th Order refers to the imposition of a fine even in the case when the Energy Bureau has not yet established (as required by regulation) the parameters to impose such penalties for noncompliance with the

baseline of a metric. The June 10th Order does not even specify how LUMA has not complied with the metric. The language in the June 10th Order only acknowledges that the OSHA Severity Rate metric has increased and is considered “poor performance” for the Energy Bureau. Nevertheless, it has not been identified how LUMA has not complied with the metric. Moreover, as previously mentioned, this instant proceeding was initiated so that the Energy Bureau could receive reports on the performance of the company operating the electric system. Therefore, the imposition of penalties for noncompliance with a baseline of a metric is not procedurally appropriate or correct in this case.⁵

D. Any Fine Imposed by the Energy Bureau Pursuant to the June 10th Order Cannot Constitute a Disallowed Cost Under the T&D OMA.

The T&D OMA governs the relationship between LUMA, as an agent and operator, and PREPA, as the owner of the T&D System. As such, Section 7.6 of the T&D OMA regulates the “Disallowed Costs” under the agreement. *See* T&D OMA, Section 7.6. This Section provides a list of expenditures that shall be the sole responsibility of LUMA as operator of the T&D System.

These expenditures are:

- (i) any and all T&D Pass-Through Expenditures, Capital Costs, Outage Event Costs, or Excess Expenditures incurred as a result of Operator’s negligence (including gross negligence) or willful misconduct . . .;
- (ii) **any and all fines, penalties or other similar payments or charges imposed by PREB on Operator, except to the extent Operator is performing its obligations under this Agreement in accordance with this Agreement;** and
- (iii) other than as a result of Owner Fault, any and all Losses resulting from a denial by FEMA, HUD or a similar Governmental Body (such as COR3 or PRDH) of reimbursement of all or a portion of Capital Costs – Federally Funded on the grounds that actions taken by Operator were in violation of any Federal Funding Requirements, which denial becomes final, except that any Capital Costs – Federally Funded that were incurred in accordance with the Federal Funding Procurement Manual or approved by FEMA shall not be treated as a Disallowed Cost.

⁵ It should be noted that this Energy Bureau precisely determined not to include a penalty mechanism as part of its evaluation of LUMA’s proposed incentive metrics in Case No. NEPR-AP-2020-0025. *See* Final Resolution and Order dated January 26, 2024, and Resolution and Order dated June 14, 2024.

Id., Section 7.6(a).

Further, Section 7.6(b) states that “if a dispute arises in connection with the Disallowed Costs, the matter shall be subject to resolution as a Technical Dispute in accordance with Article 15.” In this type of dispute, LUMA may continue to withdraw such T&D Pass-Through Expenditures, and once the Technical Dispute is resolved, LUMA shall reimburse PREPA if that is determined. Accordingly, Article 15 of the T&D OMA states that if a Technical Dispute arises, P3A will participate on behalf of PREPA to resolve the dispute. *See* T&M OMA, Section 15.1.

As stated before, any fines or penalties imposed by the Energy Bureau on LUMA will be considered “Disallowed Costs,” except those to the extent that LUMA is performing its obligations under the T&D OMA. The Energy Bureau, in the June 10th Order, established that if \$25,000 fines were imposed, the fine would be considered as a “Disallowed Cost.” As mentioned, LUMA has reported values in the OSHA Severity rate metric below PREPA’s baseline since commencement. Only the unfortunate and isolated events in December 2023 and January 2024 have prompted the values reported for said metric to increase in the quarterly report of January through March 2024. LUMA reaffirms its commitment to providing employees with a safe working environment and handling workplace accidents according to best practices. As discussed previously, LUMA has provided its employees with adequate training to minimize the risk of work accidents and continues to do so.

Notwithstanding, the Energy Bureau has failed to indicate or refer to the specific obligation under the T&D OMA LUMA has been unable to fulfill, which requires any fine imposed for that omission to be treated as a “Disallowed Cost.” Section 5.7 of the T&D System establishes that LUMA “shall take all actions which may be required in order to bring the T&D System into and maintain compliance with the applicable Commonwealth [of Puerto Rico] and federal

requirements in accordance with and related to the Occupational Safety and Health Act.” LUMA hereby states that, consistent with the stipulated obligations in the T&D OMA, it has taken all reasonable precautions and safety measures to ensure the security of its employees in compliance with the applicable laws and regulations, including those enacted by OSHA.

In addition, Section 7.6(b) of the T&D OMA provides LUMA with a mechanism to dispute whether an expenditure should be considered a “Disallowed Cost.” The T&D OMA expressly establishes that until such a dispute has been decided, all expenses should be treated as T&D Pass-Through Expenditures. However, such a dispute would be resolved by P3A, who has the authority to rule upon such matter. Therefore, the final decision on whether this expenditure is a “Disallowed Cost” belongs to P3A pursuant to Section 15.1 of the T&D OMA.

Concluding otherwise and classifying any fine of this sort as a “Disallowed Cost” without complying with Section 7.6(a) dispositions and prohibiting LUMA from disputing said expense, would impair 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); *Domínguez 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).

Therefore, in the alternative that this Honorable Energy Bureau determines to impose a fine on LUMA because of the increase in the OSHA Severity Rate metric, it should not be

considered a “Disallowed Cost,” as there is no indication whatsoever in the June 10th Order that LUMA has omitted to comply with its obligations under the T&D OMA. Moreover, the determination of whether any fine imposed should be treated as a “Disallowed Cost” is one to be made pursuant to the provisions of the T&D OMA in that regard, and not for the Energy Bureau. Any determination of the Energy Bureau of that sort would be an impairment of the contractual obligations set forth in the T&D OMA and in excess of the authority and scope of this Energy Bureau.

WHEREFORE, LUMA respectfully requests that the honorable Energy Bureau **take notice** of the aforementioned; and **vacate** the June 10th Order. In the alternative, **deem** LUMA complied with the June 10th Order; and **decline** to impose a fine on LUMA.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 20th day of June 2024.

We hereby certify that we filed this motion using the electronic filing system of this Energy Bureau and that I will send an electronic copy of this motion to PREPA’s counsel of record, Alexis Rivera Medina, arivera@gmlex.net and Mirelis Valle Cancel, mvalle@gmlex.net, and Genera PR LLC, through its counsel of record Jorge Fernández-Reboredo, jfr@sbgblaw.com and Alejandro López Rodríguez, alopez@sbgblaw.com, and the Independent Consumer Protection Office, Hannia Rivera Diaz, hrivera@jrsp.pr.gov.



DLA Piper (Puerto Rico) LLC
500 Calle de la Tanca, Suite 401
San Juan, PR 00901-1969
Tel. 787-945-9132 / 9145
Fax 939-697-6102 / 6145

/s/ Yahaira De la Rosa Algarín
Yahaira De la Rosa Algarín
RUA No. 18,061
yahaira.delarosa@us.dlapiper.com

/s/ Valeria Belvis Aquino
Valeria Belvis Aquino
RUA No. 22,584
valeria.belvis@us.dlapiper.com