

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

NEPR

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

CASE NO.: NEPR-AP-2020-0025

SUBJECT: Request for Amendment of Resolution
and Order Dated June 14, 2024, and to Re-Issue Same

**REQUEST FOR AMENDMENT OF RESOLUTION AND ORDER DATED JUNE 14, 2024,
AND TO RE-ISSUE SAME**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC (“ManagementCo”), and **LUMA Energy ServCo, LLC** (“ServCo”), (jointly referred to as “LUMA”), and respectfully state and submit 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”), whereby it entered its determination on the proposal filed by LUMA to adopt the incentive Performance Metrics scheme that arises under the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* dated June 22, 2020 (“T&D OMA”). In the Final Resolution and Order, this Energy Bureau approved LUMA’s proposed Performance Metrics, but amended LUMA’s submitted Revised Annex IX of the T&D OMA in a manner that results in an arbitrary and capricious action that materially affects LUMA’s ability to earn the contractual incentive fee. Furthermore, said determination is unsupported by the record and results in clear violations of due process requirements.

On February 15, 2024, LUMA filed *LUMA’s Motion for Reconsideration of Final Resolution and Order* (“LUMA’s Motion for Reconsideration”), whereby it requested this Energy

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

Additionally, LUMA requested clarification of the portion of the Final Resolution and Order that referred to the modified Annual Performance Targets. LUMA further requested that this Energy Bureau approve the baselines, incentive tiers, and targets presented by LUMA in its Proposed Performance Metrics Targets and the Revised Annex IX submitted on October 28, 2022.

On that same date, February 15, 2024, Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climática, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., CAMBIO, Sierra Club and its Puerto Rico Chapter, and Unión de Trabajadores de la Industria Eléctrica y Riego (jointly, “Local and Environmental Civil Organizations” or “LECO”), filed a *Motion for Reconsideration of the Final Resolution and Order on Performance Targets for LUMA Energy, LLC and LUMA Energy ServCo, LLC* (“LECO’s Reconsideration”), whereby LECO requested that the Energy Bureau reconsider several determinations contained in its Final Resolution and Order.

After a series of procedural events, on June 14, 2024, this Energy Bureau issued a Resolution and Order ruling on LUMA’s and LECO’s request to reconsider the Final Resolution and Order (“June 14th Resolution and Order”). In summary, this Energy Bureau denied LECO’s Reconsideration and denied in part and granted in part, LUMA’s Motion for Reconsideration. This Energy Bureau, however, did not include in the June 14th Resolution and Order the requisite notice informing the affected parties (in connection with this Motion, LUMA) of their right to seek judicial review and the corresponding terms to pursue said relief.

Considering that the Energy Bureau failed to provide the statutory warnings required for LUMA to proceed with a judicial review of its determinations, LUMA now finds itself devoid of certainty regarding its legal procedural options, including the date when the June 14th Resolution and Order may be considered a final determination subject to judicial review. Thus, LUMA hereby requests that this Energy Bureau amend and re-issue the June 14th Resolution and Order to include the requisite notice regarding the right to pursue judicial review before the Puerto Rico Court of Appeals (“Court of Appeals”).

II. Legal Basis for Request to Amend and Re-Issue the June 14th Resolution and Order

Article II, Sec. 7 of the Constitution of the Commonwealth of Puerto Rico and the Fifth and Fourteenth Amendments to the United States Constitution guarantee that “[n]o person shall be deprived of his liberty or property without due process of law.” Const. E.L.A. Art. II, § 7, 1 LPRA; Const. EE.UU. Enm. XIV § 1; Const. EE. UU., Enm. V; *Rivera Rodríguez & Co. v. Lee Stowell*, 133 DPR 881, 887 (1993).

Due process assumes two different dimensions: substantive and procedural. Under substantive due process, courts examine the validity of state action in light of the pertinent constitutional provisions in order to protect people’s fundamental rights. *Rivera Santiago v. Srio. de Hacienda*, 119 DPR 265, 273 (1987). Under this test, when the State enacts laws or undertakes any action, it cannot unreasonably, arbitrarily, or capriciously affect property or liberty interests. *Hernández v. Secretario*, 164 DPR 390, 394-95 (2005). On the other hand, procedural due process imposes on the State the obligation to guarantee that any interference with individual liberty and property interests will take place through a fair and equitable procedure. *López Vives v. Policía de P.R.*, 118 DPR 219 (1987).

The Puerto Rico Supreme Court has consistently held that the following requirements must be met in order to fulfill constitutional due process guarantees: (1) **adequate notice**; (2) proceedings before an impartial judge; (3) opportunity to be heard; (4) right to cross-examine witnesses and examine evidence presented against the individual; (5) right to be represented by counsel; and (6) a decision based on the record. *Román Ortiz v. OGPe*, 203 DPR 947, 954 (2020); *González Segarra et al. v. CFSE*, 188 DPR 252, 279 (2013); *Vázquez González v. Mun. de San Juan*, 178 DPR 636, 643 (2010). It is an established principle that due process also offers protection

against administrative arbitrariness. *López Santos v. Asoc. de Taxis*, 142 DPR 109, 113 (1996) (citing *Henríquez v. C.E.S.* 120 DPR 194, 202 (1987)).

The duty of notifying the parties of an administrative determination in an adequate and complete manner is not a mere requirement. *Río Const. Corp. v. Mun. de Caguas*, 155 DPR 394 (2001). Courts have understood the adequate notice guarantee to be a core element of due process, as it affords the parties the opportunity to actually learn of the decision rendered, while granting those whose rights will be affected a greater opportunity to decide whether to exercise the remedies granted by law. *Gautier Vega v. State Election Comm'n*, 205 DPR 724 (2020) (citing *Asoc. Vec. Altamesa Este v. Mun. San Juan*, 140 DPR 24, 34 (1996)). Plainly put, an inadequate notice compromises a party's ability to contest an administrative determination and debilitates due process guarantees. *Río Const. Corp.*, 155 DPR, at 406; *Mun. De Caguas v. AT&T*, 154 DPR 401, 414 (2001).

In alignment with the above, Section 3.14 of Act 38-2017, also known as the Uniform Procedure Act of the Commonwealth of Puerto Rico ("LPAU," per its Spanish initials), amongst other things, states that the orders or resolutions of administrative agencies must be notified to the involved parties. *Comisión Ciudadanos v. G.P. Real Prop.*, 173 DPR 998, 1014 (2008). Moreover, it specifies that such notice must warn of the right of the parties to request reconsideration before the agency or to seek judicial review before the Court of Appeals, with mention of the jurisdictional terms that the parties have to exercise said rights. *Id.* Said provision, in pertinent part, reads as follows:

The order or decision shall notify the right to request reconsideration by the agency or to file a petition for review as a matter of law before the Court of Appeals, as well as the parties to be served with notice of said petition for review, and the pertinent time limits therefor. The aforementioned time limits shall start to run once these requirements have been met.

3 LPRA § 9654 (2024).

Accordingly, the jurisdictional time constraints for seeking judicial review of an administrative determination cannot be enforced against a party who has not been adequately notified of such determination in accordance with the law. *Horizon v. Jta. Revisora, RA Holdings*, 191 DPR 228, 235 (2014); *IM Winner, Inc. v. Mun. de Guayanilla*, 151 DPR 30, 38 (2000).

In the June 14th Resolution and Order, this Energy Bureau failed to include any provision or warning advising LUMA of its right to initiate a writ of judicial review as a matter of law. Therefore, the June 14th Resolution and Order does not comply with settled due process requirements regarding notice, which aim to ensure that adversely affected parties are notified of their right to seek judicial review.

Said omission hinders LUMA's possibilities of seeking judicial redress, including that the Puerto Rico Court of Appeals could dismiss the writ of judicial review as premature and declare that it lacks jurisdiction over the same because the June 14th Resolution and Order lacks the requisite warnings on the right to seek judicial review. *See Rosado Gómez v. González Santiago*, KLRA201600931, 2017 PR App. LEXIS 1798, at pgs. *8-9 (P.R. Court of Appeals, May 31, 2017) (The Puerto Rico Court of Appeals held it lacked jurisdiction to review an order by an administrative agency denying a motion for reconsideration because the order omitted a warning of the party's right to seek judicial review); *see also Juliá Padró et al. v. Epifanio Vidal, S.E.*, 153 DPR 357, 366 (2001) (A premature writ suffers from the serious and irremediable defect of depriving the court to which review is sought of jurisdiction. Its presentation lacks effectiveness and does not produce any legal effect, since, at the time of its presentation, there is no judicial authority to accept it.); *Martínez v. Junta de Planificación*, 109 DPR 839, 842 (1980) (Discretion may not be exercised to assume jurisdiction where there is none.); *Interamerican Imports, Inc., v.*

Departamento del Trabajo y Recursos Humanos, KLRA201800056, 2018 PR App. LEXIS 352, at pgs. *6-9 (P.R. Court of Appeals, February 28, 2018) (The Puerto Rico Court of Appeals concluded that the final resolution of an agency that failed to notify the party of its right to request reconsideration or to seek judicial review, and the terms to exercise said rights, was inadequate and, therefore, dismissed for lack of jurisdiction.); *Resto Pagán v. Departamento de Corrección y Rehabilitación*, KLRA202000430, 2020 PR App. LEXIS 2587, at pgs. 3-5 (P.R. Court of Appeals, December 17, 2020) (The Puerto Rico Court of Appeals found an agency’s final resolution inadequate because it lacked notice of party’s right to review and the corresponding terms, dismissing as premature and for lack of jurisdiction.)

To safeguard LUMA’s administrative due process rights, LUMA hereby requests that the June 14th Resolution and Order be amended and re-issued to include adequate notice regarding the judicial mechanisms available to seek review of the determinations contained in the June 14th Resolution and Order.

WHEREFORE, LUMA respectfully requests that this Energy Bureau take notice of the above and amend and re-issue the June 14th Resolution and Order to include an adequate legal notice stating LUMA’s right of appeal and the corresponding terms.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 28th day of June, 2024

We hereby certify that this motion was filed using the electronic filing system of this Energy Bureau. We also certify that a copy of this motion will be notified to counsel for the Puerto Rico Electric Power Authority, lionel.santa@prepa.pr.gov; counsel for the Independent Consumer Protection Office, Hannia Rivera Díaz, hrivera@jrsp.pr.gov; counsel for the Puerto Rico Institute for Competitiveness and Sustainable Economy (“ICSE”), Fernando Agrait, agraitfe@agrailawpr.com; counsel for the Colegio de Ingenieros y Agrimensores de Puerto Rico (“CIAPR”), Rhonda Castillo, rhoncat@netscape.net; and counsels for Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climática, Alianza Comunitaria Ambientalista del Sureste, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., CAMBIO, Sierra Club and its Puerto Rico Chapter, and Unión de

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