NEPR

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Aug 30, 2024

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

IN RE: CÁLCULO DE CARGO REGULATORIO PARA COMPAÑÍAS DE SERVICIO ELÉCTRICO

CASE NO.: NEPR-MI-2020-0007

SUBJECT: Motion in Compliance with Order to Show Cause of August 28, 2024

MOTION IN COMPLIANCE WITH ORDER TO SHOW CAUSE OF AUGUST 28, 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. Relevant Background

1. Article 6.16 of Act 57-2014[1], known as the Puerto Rico Energy Transformation and RELIEF Act, states that, beginning Fiscal Year 2019-2020, the annual budget of the Honorable Puerto Rico Energy Bureau ("Energy Bureau") shall be twenty million dollars ($20,000,000) and shall be computed on the basis of a regulatory fee to be determined by the Energy Bureau, from the annual gross income of the Puerto Rico Electric Power Authority ("PREPA") and electric power service companies in Puerto Rico. 22 LPRA § 1054o(e) (2024).

2. According to Article 6.16 of Act 57-2014, PREPA or any electric power service company that operates the transmission and distribution network shall be required to collect from other electric power companies, pay and transfer the regulatory fee to the Energy Bureau as follows: a

[1] As amended by Act 17-2019, known as the Puerto Rico Energy Public Policy Act.

first payment of ten million dollars ($10,000,000) on or before July 1st of each year and a second payment of ten million dollars ($10,000,000) on or before January 1st of each year. *Id*.

3. Relatedly, Section 4.03 of Regulation 8701[2] states that the Energy Bureau shall calculate a regulatory fee for each electric power service company based on the gross revenue it has generated during each calendar year.[3]

4. On June 22, 2020, the Puerto Rico Public-Private Partnerships Authority (P3A), PREPA, and LUMA entered the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement ("T&D OMA"), in virtue of which LUMA manages and operates the transmission and distribution system owned by PREPA (T&D System). As of June 1, 2021, LUMA began its functions as Operator of the T&D System, subject to the provisions of T&D OMA.

5. Pursuant to Act 57-2014, on July 16, 2024, the Energy Bureau issued a Resolution and Order where it calculated and established the annual regulatory fee for Fiscal Year 2024-2025 proportionally based on the corresponding gross revenues for both LUMA and other electric power service companies. However, on August 6, 2024, the Energy Bureau issued a new Resolution and Order, which included a revised regulatory fee for Fiscal Year 2024-2025. This, is in light of certain differences stemming from EcoEléctrica, LLP's financial documents.

6. On August 28, 2024, the Honorable Puerto Rico Energy Bureau ("Energy Bureau") issued an Order to Show Cause ("August 28th Order") in this instant proceeding, whereby it stated that LUMA had not satisfied the regulatory fee payable on or before July 1, 2024, as mandated by Act 57-2014. The Energy Bureau ordered LUMA to pay ten million dollars ($10,000,000) on or before

[2] See *Amendment to Regulation No. 8618 on Certification, Annual Fees, and Operational Plans for Electric Service Companies in Puerto Rico*, Regulation No. 8701 of February 17, 2016, as amended by *Amendment to Regulation No. 8701 on Certification, Annual Fees, and Operational Plans for Electric Service Companies in Puerto Rico*, Regulation No. 9182 of June 24, 2020.

[3] Section 4.01 of Regulation 8701 defines gross revenue as the "volume of business generated by an electric service company as a result of the provision of electric services in the jurisdiction of the Commonwealth of Puerto Rico prior to any deduction for operational, administrative or any other expenses of any sort."

Friday, August 30, 2024, at 5:00 p.m., and to provide an explanation on why the payment was not issued by the July 1, 2024 deadline and the measures taken to prevent similar occurrences in the future. Moreover, the Energy Bureau warned LUMA that, in accordance with Article 6.36 of Act 57-2014, noncompliance with the granted term would entail a daily fine of twenty-five thousand dollars ($25,000) until payment was entered. Furthermore, the Energy Bureau added that LUMA's failure to respond or provide adequate justification could result in additional sanctions. Finally, the Energy Bureau admonished LUMA and stated that payment of any fine shall not be considered, construed, or treated as a pass-through expenditure under any circumstances.

II. Compliance with August 28th Order

7. In light of the foregoing, LUMA hereby respectfully informs this Honorable Energy Bureau that, in compliance with the August 28th Order, it issued electronic transfers to satisfy payment of the regulatory fee. *See Exhibit 1*.

8. Ordinarily, the regulatory fee payment is satisfied from funds located in PREPA accounts. LUMA manages payment to the Energy Bureau on behalf of PREPA as part of the Treasury Operations and Cash Management services provided by LUMA pursuant to the *Shared Services Agreement* dated June 1, 2021. *See Shared Services Agreement* dated June 1, 2021, Exhibit A; *see also Exhibit 1, p. 2*. In this particular occasion, the delay in the first installment of the Fiscal Year 2024-2025 regulatory fee was largely due to setbacks in the corresponding payment processes and authorization from PREPA to withdraw the funds. Said authorization was issued on August 29, 2024.

9. LUMA reiterates that it is committed to working with the Energy Bureau in furtherance of operating the T&D System safely and reliably and complying with Act 57-2014. LUMA understands that the Energy Bureau's regulatory functions are essential for achieving these

objectives and has never envisioned intentionally obstructing the Energy Bureau's regulatory oversight.

10. In compliance with the August 28th Order, LUMA hereby proposes adopting certain modifications to the invoice generated by the Energy Bureau to prevent future defaults. Specifically, LUMA requests that the Energy Bureau modify the invoice so that it can be addressed to PREPA instead of LUMA. LUMA will adopt a standard operating procedure to streamline the process whereby it requests authorization from PREPA to withdraw funds from PREPA's accounts and pay the regulatory fee on PREPA's behalf. LUMA understands that if the Energy Bureau's invoice is addressed to PREPA, LUMA may avoid delays in enabling funds transfers from PREPA's account to pay the regulatory fee.

III. Reservation of Rights

A. Regulation 8543

11. Section 6.36 of Act 57-2014, as amended by Act 17-2019, gives the Energy Bureau 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, in response 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.

12. 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.

13. 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 through 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.

14. LUMA respectfully submits that it is not clear from the August 28th Order that this Energy Bureau issued the notice of noncompliance required by Regulation 8543 nor if it initiated a

noncompliance process under said Regulation. LUMA reserves the right to raise procedural due process arguments if this Energy Bureau determines to levy a fine.

B. Any Fine Imposed by the Energy Bureau Pursuant to the August 28th Order Cannot Constitute a Disallowed Cost Under the T&D OMA.

15. The T&D OMA governs the relationship between LUMA, as an agent of PREPA and operator of the T&D System, and PREPA, as the owner of the T&D System. In what is relevant to this Motion, Section 7.6 of the T&D OMA regulates "Disallowed Costs" and includes a list of expenditures that shall be the sole responsibility of LUMA as operator of the T&D System and thus, are not considered T&D Pass-Through Expenditures. 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.

Id., Section 7.6(a) (emphasis added).

16. Section 7.6(b) of the T&D OMA 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." While the dispute is ongoing, LUMA may continue to withdraw such T&D Pass-Through Expenditures. *See id.* Relatedly, 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. 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.

17. In the August 28th Order, this Energy Bureau stated that if fines were imposed, payment should not be considered, construed, or treated as a pass-through expenditure. Thus, the fine would be considered as a "Disallowed Cost." This Energy Bureau, however, did not explain said determination with reference to applicable law nor its delegated legal authority to adopt said rule. The statement also ignores the text of the T&D OMA in connection with the definition of "Disallowed Cost," which clearly sets forth scenarios where fines are considered T&D Pass-Through Expenditures, and sidesteps the dispute resolution process set forth in the T&D OMA for disputes involving "Disallowed Costs." Classifying a future or potential fine categorically as a "Disallowed Cost" unduly interferes with the T&D OMA, is premature, and impairs LUMA's contractual rights and expectations without justification, 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. *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).

18. In light of the above, if this Honorable Energy Bureau determines to impose a fine on LUMA, LUMA reserves the right to contest a determination that said fine should be considered a "Disallowed Cost."

WHEREFORE, LUMA respectfully requests that the honorable Energy Bureau **take notice** of the aforementioned for all purposes; **deem** LUMA in compliance with the August 28th Order; and **decline** to impose a fine on LUMA.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 30th day of August 2024.

We hereby certify that we filed this motion using the electronic filing system of this Energy Bureau.[4]

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[4] Considering that only LUMA received notification of the August 28th Order, LUMA understands that there are no concerned parties requiring notification of the present motion.

Exhibit 1

[redacted]

Web Cash Manager
Banco Popular de Puerto Rico

Report Date:29-Aug-2024
Report Time:08:16:14 AT

Batch Summary Report by ID Number

Company Name:	**LUMA ENERGY MANAGECO LLC**	**Effective Date:**	**08/28/24**
Template ID:	**[redacted]0827**	**Release Date and Time:**	**08/28/24 10:51:54**
Template Name:	**[redacted]0827**	**Extract File Name:**	**[redacted]3.ACH**
Batch Status :	**Extracted**	**Entry Class:**	**VendorPayments**

Transaction Details:

Name	ID Number	Amount	D/C	Bank ID	Account#	Acct Type	Trace #	Addenda
LUMA ENERGY	[redacted]0278	$546,221.66	D	[redacted]2011	[redacted]5595	CHK	[redacted]0001	
NEGOCIADO DE ENERGIA D	[redacted]	$546,221.66	C	[redacted]2011	[redacted]3056	Checking	[redacted]0002	

Total # Credits:	1	**Total Credit Amt:**	$546,221.66
Total # Debits:	0	**Total Debit Amt:**	$0.00
Total $ Offset Credit:	0.00	**Total $ Offset Debit:**	546,221.66

Subtotals for Effective Date:	2024-08-28		
Subtotal # Credits:	1	**Subtotal Credit Amt:**	$546,221.66
Subtotal # Debits:	0	**Subtotal Debit Amt:**	$546,221.66

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PUERTO RICO ELECTRIC POWER AUTHORITY
ELECTRONIC FUND TRANSFER

Document No.: 22482
Date: 30-AUG-24
Bank Name: Banco Popular de P.R
Bank Account: ********7862

NEGOCIADO DE ENERGIA DE PUERTO RICO
#268 AVE MUNOZ RIVERA
EDIFICIO WORLD PLAZA
SUITE 702
HATO REY, PR 00918

Document No.	Vendor No.	Batch
22482	[redacted]	VRR 2024-08-30 ACH PREPA PREB

Pay Group	Invoice	Date	Description	Gross	Withheld Amount	Discount	Net
001-PAGO	2024-034	12-JUN-24	PRIMER PAGO, APORTACION AL NEPR, LEY 17-2019. AÑO FISCAL 2024-2025 - JUL DIC 2024.	10,000,000.00	0.00	0.00	10,000,000.00
001-PAGO	2024-034-DM	12-JUN-24	DEBITO A PRIMER PAGO, APORTACION AL NEPR, LEY 17-2019. AÑO FISCAL 2024-2025 - JUL DIC 2024. LUMA HIZO PAGO DIRECTO DE SU APORTACION EL 28-AGO-24.	-546,221.66	0.00	0.00	-546,221.66
			TOTAL	**9,453,778.34**	**0.00**	**0.00**	**9,453,778.34**

Company Name:	**Autoridad Energia Electrica**	**Effective Date:**	**08/30/24**
Template ID:	[redacted]**830P**	**Release Date and Time:**	**08/29/24 14:15:20**
Template Name:	[redacted]**830P**	**Extract File Name:**	
Batch Status :	**Released**	**Entry Class:**	**VendorPayments**

Transaction Details:

Name	ID Number	Amount	D/C	Bank ID	Account#	Acct Type	Trace #	Addenda
NEGOCIADO DE ENERGIA D	[redacted]	$9,453,778.34	C	[redacted]2011	[redacted]3056	Checking		
AEE	[redacted]747A	$9,453,778.34	D	[redacted]2011	[redacted]7862	CHK		

Total # Credits:	1	**Total Credit Amt:**	$9,453,778.34
Total # Debits:	0	**Total Debit Amt:**	$0.00
Total $ Offset Credit:	0.00	**Total $ Offset Debit:**	9,453,778.34

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