

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

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**IN RE: Puerto Rico Electric Power
Authority Rate Review**

CASE NO. NEPR-AP-2023-0003

SUBJECT: Legal Issues

ICSE'S REPLY TO LEGAL BRIEFS

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TO THE HONORABLE ENERGY BUREAU:

Comes now the **Institute of Competitiveness and Economic Sustainability** ("ICSE" as its Spanish acronym), represented by the undersigned, respectfully states and prays:

Preliminary Statement

This Reply addresses fundamental legal errors advanced by LUMA, PREPA, Bondholders, and Genera that, if accepted, would distort the ratemaking process and undermine the Puerto Rico Energy Bureau's ("PREB" or "Bureau") statutory authority. Although framed as discrete issues, the positions advanced by these parties share a common defect: they seek to decouple ratemaking from its governing legal standards, allowing rates to be established without a complete evidentiary foundation, without regard to affordability, and subject to contractual or external constraints that cannot lawfully displace the Bureau's authority. These positions also ignore

that every legal rule seeks to promote and/or protect public values and interests.

At its core, ratemaking is a structured and prospective regulatory exercise. It requires that all components of the revenue requirement be established *ex ante*, based on record evidence, and that rate design merely allocate their recovery in a manner consistent with statutory mandates, including the requirement that rates be just, reasonable, and in the public interest. The proposals advanced in this proceeding invert that structure. They would permit the approval of rate mechanisms untethered from defined costs, defer critical determinations to future outside proceedings, and subordinate regulatory accountability to private contractual arrangements.

These deviations are not merely procedural—they have substantive consequences. They risk insulating regulated entities from administrative accountability, shifting the economic burden of regulatory violations onto ratepayers, and approving rates that are neither supported by evidence nor sustainable in practice. They also raise serious concerns regarding the integrity of judicial review, as courts cannot meaningfully assess the lawfulness of rates that are premised on undefined or deferred revenue requirements.

ICSE's position is straightforward. The Bureau's ratemaking authority cannot be displaced by contract, deferred to future outside proceedings, or exercised in a manner untethered from the evidentiary record and governing public policy. Affordability is not an aspirational concept—it is a binding constraint that informs whether proposed rates are, in fact, practicable.

Likewise, revenue requirements must be defined before rates are designed, and liability for regulatory violations cannot be shifted in a manner that undermines deterrence or contravenes constitutional limits.

For these reasons, and as explained below, the arguments advanced by LUMA, PREPA, Bondholders, and Genera should be rejected.

I. PREB Fines

LUMA argues that it possesses contractual rights that may exempt it from administrative liability before the Energy Bureau, contending that “fines imposed by PREB are treated as Disallowable Costs only to the extent the operator failed to perform its obligations under the [T&D] OMA in accordance with the agreement.” LUMA’s Legal Brief, p. 4. LUMA fails to establish any legally cognizable distinction.

First, all of LUMA’s commercial conduct is necessarily framed within, and arises exclusively from, the T&D OMA, as LUMA operates solely by virtue of, and in furtherance of, that agreement. To the extent that all of LUMA’s commercial activities involve the operation of PREPA’s transmission and distribution assets, it follows that every such action is inextricably tied to the T&D OMA and constitutes performance thereunder. Thus, any fine imposed by the PREB must be borne by LUMA without recourse against PREPA, as LUMA itself effectively concedes in its Brief. *See* LUMA’s Legal Brief, pp. 4-5 (*citing* Mr. Alejandro Figueroa’s testimony on November 24, 2025).

More fundamentally, however, LUMA’s position rests on a false premise: that contractual provisions in the T&D OMA may alter or limit its regulatory exposure before the PREB. They cannot. LUMA’s obligations as an “electric service company” under Act 57-2014 arise independently of the T&D OMA and are non-delegable as a matter of law. Private parties may allocate risk among themselves, but they cannot reallocate or diminish regulatory accountability vis-à-vis the State.¹

Accepting LUMA’s position would lead to the untenable result that violations of statutory duties – those imposed to protect the public interest – would be treated more leniently than breaches of contractual obligations. The sanctioning authority of administrative agencies, repeatedly validated under our administrative law, cannot be contractually displaced without undermining its essential purpose.

The Puerto Rico Supreme Court has made clear that administrative fines are a civil remedy whose purpose is not merely compensatory, but to vindicate the powers delegated by the Legislative Assembly and to deter violations of the law. Oficina de la Procuradora de las Mujeres v. Corteva Agriscience Puerto Rico, Inc., 2025 TSPR 146, 217 DPR ___ (2025), at p. 10. Indeed, such fines are a tool “to achieve the objectives of the agency.” *Id.* (citing Martínez v. D.A.Co., 163 DPR 594 (2004); Assoc. Ins. Agencies, Inc. v.

¹ When referring to the “State”, we are referring to the PREB given the fact it does not act as a private party contracting with electric service companies: it is the regulator of the energy market. Even though PREPA and the P3A are both public entities, with respect to LUMA and Genera, they are contracting parties.

Com. Seg. P.R., 144 DPR 425, 441 (1997)). Allowing a regulated entity to shift the economic consequences of its violations to another party (or ratepayers, as in this case) would substantially erode their deterrent force.

LUMA's proposed reading of the OMA would frustrate the public policy underlying administrative fines. It would permit a regulated entity to dilute the consequences of its own regulatory violations through private contractual arrangements—an outcome incompatible with the very nature of administrative enforcement. Any contract provision to the contrary would be void and null. Article 342 of Puerto Rico Civil Code, 31 LPRA § 6312 (“A contract may be null or voidable. It is null if: [...] (d) it is contrary to mandatory law, morality, or public order”).

Moreover, LUMA's position is flatly inconsistent with the text of the T&D OMA itself. Section 20.17 expressly provides:

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

Thus, LUMA's arguments regarding a purported impairment of its contractual rights are misplaced. PREB fines are not imposed under a contractual regime to which the Energy Bureau is not a party, but rather pursuant to the procedures established by the Puerto Rico Uniform Administrative Procedure Act and the PREB's enabling act, Act 57-2014.

As the Supreme Court has explained: “The imposition of fines is subject to the administrative process and its corresponding safeguards, as well as to subsequent judicial review by the courts to ensure that the administrative agency has acted within the authority delegated to it and in a manner consistent with legislative policy.” Oficina de la Procuradora de las Mujeres v. Corteva Agriscience Puerto Rico, Inc., at p. 11 (translation ours) (citations omitted).

The imposition of a fine does not constitute interference by the PREB in the parties’ contractual relationship; rather, it is LUMA’s proposed reading of the contract that would improperly subordinate the Bureau’s sanctioning authority to private agreement.

Lastly, ICSE addresses LUMA’s assertion that “the treatment and payment of fines is premature” and that “LUMA’s proposed revenue requirement does not include a line item to pay a fine imposed by PREB.” LUMA’s Legal Brief, p. 2. ICSE agrees that there is a lack of a “concrete factual predicate.” *Id.* However, the record’s deficiency on this matter is entirely attributable to LUMA as rate proponent. ICSE does not agree that failure of presenting evidence should be rewarded by postponement. LUMA’s admission of a lack of evidentiary support is, if anything, an additional basis for precluding any recourse to ratepayer funds.

To be sure, it would make little sense for LUMA—or any regulated entity—to propose a revenue requirement that affirmatively includes costs associated with noncompliance with its legal obligations, whether contractual or statutory. It would be anomalous for an entity to budget for

its own violations. But that observation does not advance LUMA's position. It merely underscores that, to the extent such costs materialize, they must be borne by LUMA – not by ratepayers.

Nor is LUMA's contention that such costs would be "speculative" dispositive. Rate cases, by their very nature, involve forward-looking determinations and projections of costs. As repeatedly recognized in these proceedings, ratemaking necessarily entails a degree of estimation and informed judgment regarding future expenses.

It likewise makes little sense that LUMA's legal positions – funded by ratepayer dollars and ostensibly advanced in the interest of ratepayers – would result in those same ratepayers bearing the cost of sanctions imposed on LUMA for acting contrary to their interests. Such a scheme would not only harm ratepayers through the underlying violation, but would further require them to subsidize its consequences. **If that were the governing framework, the more rational course would be for the Bureau to refrain from exercising its sanctioning authority altogether.**

With respect to Genera's Brief on the issue of fines, Genera does not advance a substantially problematic reading of administrative or contract law. However, Genera raises certain issues that warrant attention, specifically the statement that "No other law diminishes the rights, protections, and agreements of Genera under the LGA OMA." Genera's Legal Brief, p. 9.

Textually, this language does not appear problematic. Indeed, no legislation diminishes or impairs public-private partnership contracts. The issue, however, is that this statement, *read in context*, suggests that the LGA OMA occupies a superior position in the normative hierarchy relative to energy legislation.

Under this view, the LGA OMA could come into conflict with energy legislation, and in such cases, the contract would prevail. But that interpretation is foreclosed by the contract itself. Like the T&D OMA, the LGA OMA contains a materially identical provision—Section 21.17—which makes clear that nothing in the agreement affects “the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the Legacy Generation Assets, Owner or [Genera].”

Any effort to displace PREB’s jurisdiction with respect to Genera presents the additional problem that Genera—and LUMA, for that matter—would be subject to a regulatory regime different from that applicable to other electric service companies in Puerto Rico. The public policy underlying public-private partnerships does not seek to bifurcate the legal framework, much less to create disparate treatment among entities subject to PREB’s jurisdiction.

Such an interpretation would raise serious equal protection concerns and would be inherently anticompetitive. Puerto Rico’s energy policy is designed precisely to promote a competitive market—not to create regulatory asymmetries among market participants.

II. Affordability and Practicability

The rate proponents in this proceeding have not meaningfully addressed the relationship between affordability and practicability. Instead, they suggest that these concepts may come into tension, and that practicability should govern ratemaking even at the expense of affordability. That framing is flawed. The premise advanced by ICSE is not that affordability should displace cost recovery, but that the affordability of rates directly affects whether such costs are, in fact, recoverable. There is no contradiction between these principles; rather, they are interdependent.

Ratemaking is not a purely mechanical exercise in cost aggregation. It is a regulatory function constrained by statutory mandates and public policy objectives. Among those objectives is the provision of electric service at rates that are just, reasonable, and consistent with the public interest. Affordability is not extraneous to that inquiry – it is integral to it. A rate that is unaffordable is, by definition, unsustainable and therefore impracticable in any meaningful sense. No matter how hard rate proponents and Bondholders try, Puerto Rico’s economic reality is what it is.

Bondholders contend that affordability is merely an aspirational component of Puerto Rico’s energy policy and, as such, cannot meaningfully inform ratemaking. That argument misunderstands the role of public policy in administrative decision-making. The fact that a statutory objective is framed in aspirational terms does not render it legally irrelevant or unenforceable. Administrative agencies are routinely required to give effect

to policy objectives that guide, constrain, and inform the exercise of delegated authority.

Indeed, public policy goals already operate as constraints on revenue requirements. The Bureau does not—and cannot—approve costs that are inconsistent with governing law or contrary to public policy, even where such costs may otherwise be “practicable” from a purely operational standpoint and be helpful to provide “reliable and adequate service”. *See* Bondholders’ Brief, p. 4. The same principle applies to affordability. If the Bureau may disallow costs that conflict with public policy objectives – which would necessarily be before rate design in the revenue requirement determination phase – it may likewise consider whether the resulting rates are consistent with the policy goal of affordability.

To hold otherwise would create an artificial hierarchy in which practicability operates as a binding constraint, while affordability is relegated to a non-operative aspiration. That distinction finds no support in law or policy. On the contrary, it would produce outcomes in which rates are technically sufficient to recover costs but practically incapable of being borne by the consumers who must pay them—an outcome incompatible with the very concept of just and reasonable rates.

Accordingly, affordability should not be viewed as subordinate to practicability, but as a co-equal principle that informs and constrains the ratemaking process. Properly understood, affordability is not in tension with cost recovery; *it is a necessary condition for it*. If it is not affordable, it will not raise the revenues needed.

Lastly, Bondholders argue that there is “no competent record evidence that PREPA’s customers would not pay what is necessary to produce revenues sufficient to cover reasonable, prudent, and necessary costs”. Bondholders’ Legal Brief, pp. 4-5. The converse, however, is equally true: there is no competent record evidence that PREPA’s customers will, in fact, pay what is necessary to recover such costs. And the burden of proving the rate’s practicability is on rate proponents. *See ICSE’s Reply on RR, pp. 8-9 (“The burden of proving that proposed rates are practicable rests with those who seek their approval. Both LUMA and the Bondholders, however, proceed as if a rate’s practicability were presumed unless disproven. There is no such presumption in ratemaking”).*

The only evidence in the record consists of generalized assertions that the price elasticity of demand for electricity is mostly inelastic in the short term. But short-term inelasticity does not imply that demand is unresponsive, nor does it guarantee that, under the proposed rates, all costs will be recovered. There is no record evidence demonstrating that the proposed rates will, in fact, produce revenues sufficient to recover reasonable, prudent, and necessary costs. Theory untethered from Puerto Rico-specific facts is insufficient to establish practicability.

Moreover, LUMA and Bondholder witnesses have acknowledged that, at least theoretically, rate increases may elicit a demand response and, over time, increase price sensitivity. In other words, even the theoretical framework relied upon by Bondholders and LUMA recognizes the possibility that higher rates could reduce consumption and undermine cost

recovery. The relevant question, then, is at what point that effect becomes material. No rate proponent, who have the burden of proof, has provided an answer – much less evidence – to support one.

Lastly, there have been statements in the record by LUMA suggesting that customers will not leave the grid because it is their only viable option. In essence, this argument seeks to minimize concerns regarding practicability by relying on the premise that ratepayers face significant barriers to opting out of the system. This mindset is troubling.

Act 17-2019 expressly recognizes this dynamic, noting that the electric system “holds hostage approximately 1.5 million customers, which represent close to \$3.45 billion in total revenue.” *See Statement of Motives*. LUMA’s position effectively embraces that legislative finding as justification for rate design, rather than as a condition that warrants regulatory caution.

That approach is fundamentally flawed. For argumentative purposes, let’s assume that LUMA is correct in that there is an absence of readily available substitutes for the energy grid, even though LUMA conducted no analysis and provided no evidence in this case regarding the competitiveness of the distributed generation market.

The absence of meaningful alternatives for ratepayers is not a basis to disregard affordability or practicability; it is precisely the condition that heightens the Bureau’s obligation to ensure that rates remain just and reasonable. To rely on customer captivity as a defense would invert the purpose of regulation—transforming a lack of consumer choice into a

justification for imposing rates untethered from practical and economic constraints. To invoke, as a defense, the very condition of ratepayers' lack of alternatives is therefore indefensible.

III. Legacy Debt, Pensions, and Preemption

From an institutional standpoint, it is not coherent for a public corporation such as PREPA to assert that an organ of the Government of Puerto Rico—the PREB—is preempted by federal law in establishing a legacy debt rider or in considering affordability in ratemaking. It is important to note that if treatment of one specific component or rate rider is preempted since it is part of Title III debtor's (PREPA) estate, the same would be true to this whole rate review proceeding. That is, this proceeding would be subject to the automatic stay insofar it deals specifically with PREPA's revenue approval and allocation, which have a direct effect on the utility's ability to repay legacy debts.

PREPA's position is irreconcilable with the Fiscal Oversight and Management Board's *Fifth Amended Title III Plan of Adjustment of the Puerto Rico Electric Power Authority* (Docket Entry No. 5581 in Case No. 17-4780), which specifically states that the "Oversight Board does not assert that PROMESA preempts PREB's approval powers of PREPA's rates". Fifth Amended Plan, 5581-4, p. 3 (p. 117). As ruled just this week by the Title III Court, this plan "remains PREPA's operative proposed plan of adjustment". See *Opinion and Order Denying PREPA Bondholders' Motion for Allowance of Administrative Expense Claim* (Docket Entry No. 6063 in Case No. 17-4780), at p. 15. As such, PREPA in this proceeding is contradicting the Oversight

Board’s—its sole Title III representative—last formal assessment on preemption. The Oversight Board has not appeared in this proceeding to contradict its “operative proposed plan of adjustment.”

Nor does it make sense to treat pension benefits differently from other categories of legacy debt.² PREPA’s theory relies primarily on Vázquez-Garced v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.), 945 F.3d 3, 8 (1st Cir. 2019), in which the First Circuit held that section 202(e)(4)(C) of PROMESA “precludes the territorial government from reprogramming funds from prior fiscal years except to the extent such reprogrammed expenditures are authorized in a subsequent budget approved by the Board, and any Puerto Rico law to the contrary is preempted by virtue of PROMESA section 4.” According to PREPA, this holding establishes that Fiscal Plans and Certified Budgets carry binding legal force, preempt inconsistent Puerto Rico law, and require compliance with PayGo funding obligations. *See* PREPA’s Legal Brief, p. 10.

PREPA assigns undue weight to that decision. The circumstances surrounding pension obligations are readily distinguishable from those in Vázquez-Garced. That case addressed the *reprogramming* of funds for

² ICSE’s position is that pension costs constitute a legitimate expense with an immense social value: ensuring the livelihood of individuals who served by providing electric service to the country for many years. This is a matter grounded in principles of equity and the condition of vulnerability and uncertainty faced by PREPA’s pensioners. As such, even if these costs should not be borne through rates, they are costs that should—and must—be borne by the Government and the People of Puerto Rico. However, the economic future of Puerto Rico cannot be unduly burdened by legacy debts.

expenditures that had not been budgeted. *Id.*, at 8. In other words, the prohibition is designed to ensure that appropriated funds are not diverted to unbudgeted purposes. It does not stand for the proposition that every cost included in a certified Fiscal Plan must be incurred – yet that is precisely the premise underlying PREPA’s position with respect to pension payments.

The rule articulated in Vázquez-Garced is intended to promote fiscal discipline and prevent the incurrence of unauthorized and unbudgeted expenditures – not to mandate the incurrence of costs irrespective of regulatory determinations. If, as a matter of law, the PREB were to eliminate the rider associated with pension benefits, that action would not conflict with the policy rationale underlying Vázquez-Garced. To the contrary, it would result in cost avoidance, not reprogramming. It would be conceptually unsound to characterize the non-collection of funds as a “reprogramming” of funds. Indeed, such funds could not be reprogrammed at all, as they would never be collected in the first place.

PREPA therefore provides no legal basis to conclude that Certified Fiscal Plans bind the PREB’s ratemaking authority. If they did, this proceeding would be unnecessary, and rates would be set exclusively through the Fiscal Plans.

It is also worth noting that Bondholders refuse to assign any value to the revenue requirement associated with legacy debt service. Bondholders were admitted to this proceeding precisely to advance the interest they claim, namely having a non-avoidable legacy debt. Yet they have provided no record evidence as to what the Legacy Debt Rider (“LDR”) would entail.

Bondholders have declined to quantify the real cost of such a claim and conveniently evade confronting its disastrous impact on the rate and its affordability.

Instead, they merely assert that “PREB can advance its statutory duties by establishing a placeholder LDR to efficiently implement any future resolution of legacy debt.” Bondholders’ Legal Brief, p. 10.

The problem with that position is twofold. First, it assumes that, after the conclusion of the rate case, the PREB may revisit and redesign rates—a proposition that is procedurally untenable. Second, and more fundamentally, it assumes that the revenue requirement associated with the LDR will be determined outside the ratemaking process, through proceedings before the Title III Court.

To be sure, the Title III Court has jurisdiction to resolve Bondholders’ entitlement to recovery. *The issue here is not jurisdiction, but sequencing.* As a matter of ratemaking, all components of the revenue requirement must be established *ex ante*, based on the evidentiary record, and rate design merely allocates their recovery. Bondholders’ position inverts that structure by deferring a component of the revenue requirement to a later stage, after rate design has already been approved.

From the standpoint of practicability and affordability—which, according to Bondholders, are to be addressed through rate design—there is no explanation as to how a placeholder LDR, whose value would be determined only after approval of the rate structure, can be implemented

without distorting the ratemaking process. Bondholders do not address the consequences of such an approach, nor do they provide any analysis of its impact on price sensitivity or demand.

The use of a placeholder LDR also raises concerns analogous to retroactive ratemaking. Ratemaking is, by design, a prospective exercise: rates must be established based on a defined revenue requirement supported by the record at the time of approval. A mechanism that defers the determination of a component of that revenue requirement to a later stage effectively alters the economic substance of rates after they have been set.

While styled as an implementation mechanism, such an approach risks introducing retroactive effects into what must remain a prospective ratemaking framework. It allows rates to be approved without a complete evidentiary basis and later adjusted to recover costs that were neither quantified nor evaluated at the time of approval.

IV. Liability

LUMA assumes, *a priori*, that costs arising from negligence liability are recoverable through rates and characterizes “T&D Pass-Through Expenditures” to include “claims, lawsuits, litigations, losses, fines, penalties, costs and expenses, judgments, liens, settlements, appeals, disbursements, and similar expenses incurred in connection with the performance of O&M Services.” LUMA Legal Brief, p. 10.

The threshold issue is that, for such costs to be borne with PREPA funds, there must be consideration running to PREPA. If the defense or payment of T&D Pass-Through Expenditures does not confer a benefit on PREPA, it makes little sense for the beneficiary of those expenditures to be the agent, LUMA. Ultimately, the OMA is an agency agreement, and absent a benefit to the principal, there is no basis for imposing the cost on it. Only to the extent that these costs are incurred for PREPA's benefit is it reasonable to conclude that they may be passed through to ratepayers.

More importantly, however, is the effect of the Puerto Rico Supreme Court's decision. The Court's ruling is unambiguous: the PREB lacks the authority to create a liability waiver for the benefit of LUMA, and any such exercise would be unconstitutional insofar as it encroaches upon the Legislature's powers. If costs arising from LUMA's negligence may be recovered through rates, that would operate as a *de facto* liability waiver. In addressing this issue, the PREB must ensure that it does not repeat the same constitutional error.

V. Principal-agent conundrum

No party to this proceeding contests that LUMA is PREPA's agent. And in this record PREPA has filed motions in which it expressly deauthorizes LUMA's July 3 Rate Review Petition.³ This Bureau cannot ignore this conundrum and must rule on what is the effect of PREPA's filings. As a

³ Irresponsibly, PREPA has deauthorized LUMA's petition *without* proposing its own rate petition. This, however, is a different issue.

matter of law, this is an issue that should be fully addressed in the Final Rate Order so that judicial review can assess its legality fully.

VI. Conclusion

For the foregoing reasons, the Bureau should reject the positions advanced by LUMA, PREPA, Bondholders, and Genera to the extent they seek to depart from the legal and procedural requirements governing ratemaking. The Bureau's determination must remain grounded in the evidentiary record, consistent with its statutory mandate, and structured in accordance with the proper sequence of ratemaking.

RESPECTFULLY SUBMITTED.

I CERTIFY the present document was submitted electronically in the PREB's filing system and copy sent to the Hearing Examiner and the attorneys of record: mvalle@gmlex.net; alexis.rivera@prepa.pr.gov; jmartinez@gmlex.net; jgonzalez@gmlex.net; nzayas@gmlex.net; Gerard.Gil@ankura.com; Jorge.SanMiguel@ankura.com; Lucas.Porter@ankura.com; mdiconza@omm.com; golivera@omm.com; pfriedman@omm.com; msyassin@omm.com; katiuska.bolanos-lugo@us.dlapiper.com; Yahaira.delarosa@us.dlapiper.com; margarita.mercado@us.dlapiper.com; carolyn.clarkin@us.dlapiper.com; andrea.chambers@us.dlapiper.com; regulatory@genera-pr.com;

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