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

IN RE: REVIEW OF LUMA'S INITIAL BUDGETS	**CASE NO.:** NEPR-MI-2021-0004 **SUBJECT:** Resolution and Order regarding *Motion in Compliance with Order to Show Cause and Request for Reconsideration*, filed by LUMA Energy, LLC and LUMA Energy ServCo, LLC.

RESOLUTION AND ORDER

On November 2, 2022, LUMA[1] filed before the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") a document titled *Motion Submitting Fiscal Year 2022 Budget Amendment* ("Third Amendment Request"). Through the Third Amendment Request, LUMA requested that the Fiscal Year 2022 ("FY22") Budget be amended to reallocate a $21 million surplus in LUMA's Operating Budget to its Non-Federally Funded Capital Budget line items. LUMA stated that said modification was a result of LUMA's cost saving measures and year-end closing adjustments and financial reviews. LUMA asserted that as a result of these cost savings in operational expenditures, it was able to increase overall spending on non-federally funded capital and advance work on several Improvement Programs. LUMA further indicated that the activities in its Second Amendment Request remain unchanged. Finally, LUMA stressed that the proposed modification did not result in increased customer base rates or in an increase to LUMA's aggregate expenditures.

On November 11, 2022, the Energy Bureau issued a Resolution and Order whereby it denied LUMA's Third Amendment Request ("November 11 Resolution").

On November 23, 2022, LUMA filed before the Energy Bureau a document titled *Motion for Reconsideration of Resolution and Order of November 11, 2022 on LUMA's Fiscal Year 2022 Budget Amendment* ("Reconsideration Request"), through which it requested reconsideration of the November 11 Resolution and approval of the Third Amendment Request, seeking to reallocate $21 million from the approved Operating Budget for FY22 to the Non-Federally Funded Capital Budget.

Upon review of LUMA's Reconsideration Request, on December 14, 2022 ("December 14 Resolution"), the Energy Bureau highlighted that the OMA[2] clearly sets forth the requirement that the need for a budget amendment be recognized during the Contract Year and that LUMA promptly notify and submit the proposed amendment to the Energy Bureau for review and approval. Accordingly, the Energy Bureau referenced that in a Resolution and Order issued on August 3, 2022 ("August 3 Resolution") pertaining LUMA's Second Amendment Request, the Energy Bureau stated that the expectation under the OMA is that LUMA shall notify the Energy Bureau, promptly, upon becoming aware that the T&D Pass Through expenditures are expected to exceed the budget for that Contact Year.

As such, the Energy Bureau determined that LUMA's Third Amendment Request simply misconstrues Section 7.3(e) of the OMA. The Energy Bureau clarified that the budget amendment procedure established therein does not provide for modifications of the approved budgets after expenses have been incurred. Rather, it provides a mechanism for the Energy Bureau (and P3A,[3] as the case may be) to review and approve **necessary** budget modifications **in advance**. The Energy Bureau emphasized that LUMA cannot spend money contrary to the approved budget, and then obtain a retroactive modification, which would

[1] LUMA Energy LLC ("Management") and LUMA Energy ServCo, LLC ("ServCo"), jointly referred to as "LUMA".

[2] Puerto Rico Transmission and Distribution System Operations and Maintenance Agreement ("OMA").

[3] Puerto Rico Public-Private Partnerships Authority ("P3 Authority").

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otherwise seem to suggest that LUMA fully complied with the applicable budget limitations. The Energy Bureau also highlighted that budget amendment requests must be received in a timely manner, when expenditures are expected to exceed the approved budget and, in all cases, **before the expense is incurred**.

In its December 14 Resolution, the Energy Bureau concluded that LUMA's allegation that it could only identify the need to request a budget amendment upon conclusion of year-end spending activities had no merit. The Energy Bureau further clarified that LUMA must not view the end of the year financials as enabling funds to be allocated without adequate forethought after being expended and that amendment requests can be reasonably based on projections and/or estimates.

Consequently, the Energy Bureau denied LUMA's Reconsideration Request and ordered LUMA to show cause within ten (10) business days as to why LUMA should not be fined the maximum allowed fine of twenty-five thousand dollars ($25,000.00) per day for: (i) exceeding the expenses of the Non-Federally Funded Capital Budget for approved FY22 Budget in an amount of $21 million, without first obtaining the Energy Bureau's approval, and (ii) failing to comply with a Resolution and Order issued by the Energy Bureau on August 3 Resolution pertaining LUMA's Second Amendment Request, which establishes that: (a) the window for justifications of budget modifications based on lack of actual information was closed and that unexpected, delayed, or complex work cannot be a generic excuse for delayed work, and (b) any future reallocation or redistribution of funds amongst budget programs or line items shall be timely anticipated and the corresponding budget amendment timely requested before the Energy Bureau.

On January 3, 2023, LUMA filed before the Energy Bureau a document titled *Motion in Compliance with Order to Show Cause and Request for Reconsideration* ("January 3 Motion"). Through the January 3 Motion, LUMA argued that the imposition of a fine and the denial of the Third Amendment Request based on regulatory rules and limitations adopted in the August 3 and December 14 Resolutions would be an arbitrary and capricious determination that penalizes LUMA for actions undertaken at a time when the Energy Bureau had not adopted rules or limitations on the timing, circumstances, and justifications for LUMA to move for an amendment of an approved budget.[4] LUMA further asserted that a sanction would be an undue retroactive punishment to LUMA that infringes LUMA's due process right to prior notice of applicable regulatory requirements and rules.[5]

LUMA maintained that in a Resolution and Order issued on May 31, 2021, through which LUMA's Initial Budgets for FY22 were approved, the Energy Bureau did not include the requirements for filing requests to amend the FY22 Budgets, nor the directives that LUMA shall anticipate the need to amend the FY22 Budgets or to reallocate funds.[6]

LUMA argued that the August 3 Resolution cannot apply retroactively to spending and budgetary actions by LUMA during FY22 which ended on July 31, 2022.[7] According to LUMA, the August 3 Resolution announced and established new interpretative rules regarding the timing and circumstances in which LUMA should request, and may obtain, and amendment to an approved annual budget.[8] LUMA further stated it did not have timely, fair, or reasonable notice of the rules and requirements that the Energy Bureau announced in the August 3 Order; thus, there was no basis that could warrant the imposition of a fine.[9]

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[4] January 3 Motion, pp. 2 – 4.

[5] *Id.*, pp. 3 – 4.

[6] *Id.*, p. 6.

[7] *Id.*, p. 13.

[8] *Id.*

[9] *Id.*

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In its January 3 Motion, LUMA relied on numerous cases which, as correctly summarized by LUMA, hold that, generally, the law disfavors retroactivity, and courts should not give administrative rules retroactive effect in the absence of an express statutory grant of retroactive rulemaking power by Congress.[10] Said general ban on retroactive rulemaking applies with the same force whether the agency issues a legislative rule pursuant to a specific statutory directive or an interpretative rule construing the meaning of authorizing legislation.[11]

The Energy Bureau is well aware that the law disfavors retroactive rulemaking and that said ban applies with the same force whether an agency issues a legislative rule or an interpretative rule. Nevertheless, such principle is not applicable under the factual situation in the instant case.

In its August 3 and December 14 Resolutions the Energy Bureau did not interpret its regulations or otherwise engage in rulemaking actions but rather it reinforced a requirement established in Section 7.3(e) of the OMA pertaining budget amendment. Specifically, Section 7.3(e) clearly sets forth the requirement that the need for a budget amendment be recognized during the Contract Year and that LUMA promptly notify and submit the proposed amendment to the Energy Bureau for review and approval.

Therefore, the Energy Bureau finds no merit to LUMA's argument that due process bars application of the requirements set by the Energy Bureau in the August 3 and December 14 Resolutions. Simply put, the Energy Bureau has not exercised its rulemaking or interpretative rulemaking authority. Thus, the imposition of a fine in connection with the November Budget Amendment cannot be construed as an undue retroactive punishment.

Moreover, the Energy Bureau **CLARIFIES** that it can rely upon the OMA's terms and conditions for, amongst other things, the process LUMA is required to follow with regard to budget amendments, without having to specifically restate them in its orders.

Reliance by the Energy Bureau upon the provisions of the OMA, is further supported by the Energy Bureau's issuance of a Certificate of Energy Compliance in accordance with Act 120-2018[12] and Act 29-2009[13] in determining that the OMA, pursuant to which the private operator would provide services, complies with the Puerto Rico Energy Public Policy and regulatory framework.[14] In addition, the Energy Bureau recognized in its Resolution Regarding Request for Certification as an Energy Provider,[15] "LUMA was contracted to provide Operations and Maintenance services for Puerto Rico Electric Power Authority's ("PREPA") Transmission and Distribution ("T&D") system pursuant to the Puerto Rico Transmission and Distribution System Operations and Maintenance Agreement ("OMA")." As such, in certifying LUMA as an Electric Service Company, the Energy Bureau expressly recognized that LUMA's Transmission and Distribution services were to be provided in accordance with the OMA and it is entitled to rely on the provisions set forth in that agreement. LUMA's contention that the Energy Bureau's requirements and expectations with regard to budget amendments were not expressed to LUMA, is therefore unavailing, as relevant requirements were set forth in the OMA, upon which the Energy Bureau relied.

Finally, it is important to note that the referenced budget monitoring and management mechanism, even in the absence of a contract such as the OMA, are applicable to both LUMA

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[10] *Id.*, pp. 12 – 19.

[11] *Id.*

[12] *Puerto Rico Electric Power System Transformation*, as amended ("Act 120-2018").

[13] *Public-Private Partnership Act*, as amended ("Act 29-2009").

[14] *See* Resolution and Order, *Certificate of Energy Compliance*, NEPR-AP-2020-0002, June 17, 2020.

[15] *See* Resolution and Order, *Request for Certification LUMA Energy ServCo, LLC*, NEPR-CT-2020-0007, November 4, 2020.

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and PREPA under the Energy Bureau's regulatory powers to ensure the appropriate use of ratepayers' monies in furtherance of compliance with public policy.[16]

In light of the foregoing, the Energy Bureau **DENIES** LUMA's January 3 Motion and **DETERMINES** that LUMA has not shown good cause as to why it should not be fined. Accordingly, pursuant to the provisions of Act 57-2014,[17] the Energy Bureau **IMPOSES** upon LUMA a fine in the amount of **twenty-five thousand dollars ($25,000.00)**. LUMA is **ORDERED** to, within **fifteen (15) days** of the notification of this Resolution and Order, pay the aforementioned fine with the Energy Bureau's Clerk. Such fine shall be treated as a *Disallowed Costs* as per section 7.6(a)(ii) of the OMA.

The Energy Bureau **REITERATES** that future budget amendment requests must be received in a timely manner, when expenditures are expected to exceed the approved budget and, in all cases, before the expense is incurred. If future LUMA's Budget Amendment Requests are not filed opportunely, more significant fines will be imposed.

Be it notified and published.

Edison Avilés Deliz
Chairman

Lillian Mateo Santos
Associate Commissioner

Ferdinand A. Ramos Soegaard
Associate Commissioner

Sylvia B. Ugarte Araujo
Associate Commissioner

Antonio Torres Miranda
Associate Commissioner

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[16] Pursuant to the provisions of Act 57-2014, known as the *Puerto Rico Energy Transformation and RELIEF Act*, as amended ("Act 57-2014"), and Act 17-2019, known as the *Puerto Rico Energy Public Policy Act* ("Act 17-2019"), the Energy Bureau is tasked, among other things, with the enforcement of public policy to ensure that electric service companies provide services at reasonable and just prices. See Act 57-2014, Articles 1.2, 6.3, 6.4 and 6.25 and Act 17-2019, Article 1.5(1)(a). This duty inescapably entails the **review and monitoring of budgets, fiscal and operational practices, and the prudency of spending activities**.

[17] Article 6.37(a) of Act 57-2014 which states: "The Energy Bureau shall 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. Said fines shall never exceed five percent (5%) of the gross sales, fifteen percent (15%) of the net income, or ten percent (10%) of the net worth of the sanctioned person or the electric power company. The greater of the aforementioned amounts corresponding to the most recent taxable year shall be the amount of the fine."

CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on March 20, 2023. I also certify that on March 20, 2023 a copy of this Resolution and Order was notified by electronic mail to jaime.elkoury@promesa.gov; margarita.mercado@us.dlapiper.com; ana.rodriguezrivera@us.dlapiper.com; jmarrero@diazvaz.law; brannen@genera-services.com; kbolanos@genera-services.com; regulatory@genera-services.com; and I have proceeded with the filing of the Resolution and Order issued by the Puerto Rico Energy Bureau.

I sign this in San Juan, Puerto Rico, today, March 20, 2023.

Sonia Seda Gaztambide
Clerk

