



February 24, 2025

Mr. Andrew D'Amora
Acting Regional Administrator
Region 2
Federal Emergency Management Agency
U.S. Department of Homeland Security
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Through: VIA GRANTS PORTAL & E-MAIL (appeals@cor3.pr.gov; esoria@cor3.pr.gov)
Mr. Eduardo Soria Rivera, Esq., CPA
Executive Director
Central Office for Recovery, Reconstruction and Resiliency
Commonwealth of Puerto Rico
P.O. Box 42001
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RE: First Appeal – FEMA's Determination re Performance of Work by Seconded Labor
Disaster: FEMA-4339-DR-PR (Hurricane Maria)
FEMA-4671-DR-PR (Hurricane Fiona)
Applicant: Puerto Rico Electric Power Authority
PA ID: 000-UA2QU-00
PACU ID: 34365
Project No.: N/A
Amount in Dispute: \$1,000,000.00+

Dear Messrs. D'Amora and Soria Rivera:

The Puerto Rico Electric Power Authority ("PREPA"), through its agent LUMA Energy, LLC ("LUMA"), hereby files this First Appeal of the Federal Emergency Management Agency's ("FEMA") determination dated December 27, 2024 regarding LUMA's use of seconded labor in the performance of federally funded work (the "Determination").¹ In the Determination, FEMA found a Secondment Agreement between LUMA and its affiliates under which LUMA utilizes seconded employees did not comply with federal procurement regulations. FEMA based its Determination on a "high-level compliance review" performed by FEMA's Procurement Disaster Assistance Team ("PDAT"). PDAT concluded that "it appears" the Secondment Agreement is a contract, and

¹ Attachment 1, FEMA Determination re LUMA Use of Seconded Labor (received Dec. 27, 2024) [hereinafter, the "Determination"].

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therefore raises "potential" issues of procurement noncompliance. PDAT's conclusion is based on the false premise that the procurement standards at 2 C.F.R. Part 200, Subpart D, apply to the Secondment Agreement. This error appears to stem from a review of partial information, and a misunderstanding of the purpose of secondment and the complex agreements, procedures, and policies that LUMA must follow when using seconded labor.

LUMA's authority to act as agent of PREPA when operating PREPA's transmission and distribution ("T&D") system is set forth in the Operations and Maintenance Agreement ("OMA") competitively awarded to LUMA by the Government of Puerto Rico in 2020. Under the OMA, LUMA conducts competitive procurements on PREPA's behalf for work that will be submitted for federal reimbursement under the FEMA Public Assistance ("PA") program. The OMA defines the agreements that result from these competitive procurements as "Contracts."

But the OMA also authorizes LUMA itself to perform work that will be submitted for federal reimbursement (i.e., "self-performed" work).² When self-performing work on the T&D system, LUMA is performing as a contractor, not as a subrecipient, and contractors are not required to comply with the procurement standards in 2 C.F.R. Part 200, Subpart D. That is, contractors are not required to competitively *subcontract* work or otherwise required to compete secondment agreements.

FEMA has explicitly acknowledged this contractor-subrecipient distinction in prior correspondence: "LUMA is the Subrecipient's contractor and authorized representative; it is not PREPA's force account."³ Also, the requirement for LUMA to "sign and submit a 'Federal Clauses Certification'" when self-performing work (which it has done) confirms that, when self-performing work, LUMA is a contractor as opposed to a subrecipient.⁴

Accordingly, when LUMA is self-performing work on the T&D System under the OMA, like any other contractor, it may select its own workforce, either through the use of its own employees, through subcontracting, or through a secondment agreement with an affiliate. When contracting at lower tiers, LUMA is bound by the terms of its contract (the OMA), not the federal procurement standards. Furthermore, the OMA expressly excludes such agreements from the definition of "Contracts." Rather, it provides that agreements entered into on LUMA's own behalf and not as agent of PREPA, are "Subcontracts." PREPA is not a party to LUMA's Subcontracts, and LUMA's Procurement Manual does not apply to LUMA's Subcontracts. Instead, the OMA requires that

² LUMA and COR3 sought guidance from FEMA on the eligibility of LUMA's self-performed work. *See e.g.*, Attachment 15, Letter from COR3 to FEMA re PREPA/LUMA Performance of Federally Funded Work (Aug. 12, 2022).

³ Attachment 2, Letter from Danna E. Planas Ocasio (FEMA Region 2) to Manuel Laboy (COR3) re Performance of Federally Funded Work by Subrecipient's Operators (Aug. 9, 2024), at 3.

⁴ *Id.*; *see also* 2 C.F.R. § 200.327 ("The recipient or subrecipient's *contracts* must contain the applicable provisions described in Appendix II of this part." (emphasis added))

LUMA must pass through its seconded employee and subcontractor costs to PREPA at cost, without a markup for profit, as it does for any self-performed work.

In contrast, PREPA "Contracts" awarded in LUMA's role as PREPA's agent under the OMA must comply with the procurement standards at 2 C.F.R. Part 200, Subpart D. LUMA affiliates may not be considered for a "Contract" unless the procurement is conducted by a third party independent of LUMA, consistent with LUMA's Procurement Manual and Organizational Conflict of Interest Avoidance and Mitigation Plan ("OCIAMP"). But as defined in the OMA, LUMA's agreements with its affiliates to provide LUMA with seconded labor are not PREPA Contracts, and consistent with the federal framework, LUMA's Procurement Manual and the competitive procedures outlined therein, including the OCIAMP, are expressly inapplicable to LUMA "Subcontracts."

It is evident from FEMA's Determination that PDAT did not fully appreciate LUMA's dual authority under the OMA to both (1) conduct procurements on behalf of PREPA as PREPA's agent for PREPA-executed Contracts and (2) award Subcontracts on its own behalf as PREPA's prime contractor to perform work under the OMA. Nor did PDAT appreciate the compliance measures that exist to mitigate conflicts of interest in the award of PREPA Contracts to LUMA affiliates. This First Appeal demonstrates that LUMA's use of seconded labor does not violate the federal procurement standards.

LUMA's ability to leverage skilled labor from its affiliates is one of the primary reasons LUMA was competitively selected to be PREPA's Operator. In its proposal for the T&D public-private partnership, LUMA committed to the Government of Puerto Rico that it would use this workforce sourcing method if selected. LUMA's responsibilities as Operator include sourcing a sufficient and qualified workforce, including via secondment from LUMA's parent company affiliates, to supplement the LUMA workforce in Puerto Rico. The use of secondment allows LUMA to temporarily incorporate talent with utility experience, including highly skilled and specialized workers, into its workforce. One of the objectives of secondment is to provide technical knowledge transfer and facilitate training in best practices for utility operations and construction. Secondment between affiliates is a common practice in the electric utility and other industries.

LUMA's use of affiliate talent is also consistent with the legal requirement that PREPA form public-private partnerships to allow access to private sector expertise and innovation to operate Puerto Rico's systems more efficiently and more reliably. When selecting LUMA, the Puerto Rico Public Private Partnership Authority ("P3A") factored in the Operator's ability not only to self-perform work, but to include seconded labor at cost without markup to do so. LUMA does not self-perform all work, and only uses seconded labor for a portion of the work it does self-perform. Requiring LUMA to rely solely upon competitively procured resources – when obtaining such contracts will take time and include contractor markup for profit – when the Commonwealth has already competitively procured these services from LUMA *at cost* – is irrational. It also arguably directly

contradicts the efficiency demanded by the President in his recent Executive Orders directed at the Nation's energy supply.⁵

We request that FEMA rescind its December 27, 2024 Determination, confirm that LUMA's secondment agreements are not subject to the federal procurement standards at 2 C.F.R. Part 200, and confirm that PREPA's reasonable costs incurred for the performance of eligible work by LUMA's seconded labor are eligible for PA.

PREPA timely files this First Appeal within 60 days of its receipt of the Determination as required by 44 C.F.R. § 206.206.⁶ The impact of the Determination extends to disasters beyond Hurricane Maria, making the total actual amount in controversy unknown. However, for Hurricane Maria, LUMA estimates that the total amount of potential PA funding impacted by FEMA's Determination is more than \$1,000,000.00.

I. Background

A. Procurement of a Private Partner as Agent of PREPA

The relationship between PREPA and LUMA arises out of the legal requirement that PREPA delegate operation of its T&D system to a private partner through a competitively awarded contract.⁷ This requirement was imposed on PREPA by the Government of Puerto Rico due to PREPA's significant financial, operational, and technical challenges (it entered bankruptcy in July 2017), which were exacerbated by Hurricanes Irma and Maria in September 2017.

The procurement of a private partner to operate PREPA's T&D assets was administered by P3A, a Puerto Rico government agency responsible for facilitating collaborations between the public and private sectors to develop infrastructure projects. P3A issued a *Request for Qualifications for the Puerto Rico Electric Power Transmission and Distribution System* on October 31, 2018.⁸ The Request for Qualifications ("RFQ") expressly invited "Any natural or legal person, joint venture, partnership or other entity, or consortium thereof" to submit a statement of qualifications ("SOQ") in response to the RFQ.⁹ Respondents were required to demonstrate "experience operating a large electric utility" and "strong technical expertise, with a track record of high-quality

⁵ See, e.g. *Unleashing American Energy*, Executive Order 14,154 (Jan. 20, 2025), *Declaring a National Energy Emergency*, Executive Order 14,156 (Jan. 20, 2025), wherein the definition of "energy supply" includes the transmission of electricity.

⁶ See, Attachment 1, Determination at 6 ("The Subrecipient has the right to appeal this determination in accordance with 44 C.F.R. § 206.206, Appeals.")

⁷ See generally, the Puerto Rico Electric Power System Transformation Act, Act No. 120-2018, as amended ("Act 120"), the Puerto Rico Energy Public Policy Act, Act No. 17-2019 ("Act 17"), and the Puerto Rico Transformation and RELIEF Act, Act No. 57-2014, as amended ("Act 57").

⁸ Attachment 3, P3A RFQ 2018-2, *Request for Qualifications for the Puerto Rico Electric Power Transmission and Distribution System* (Oct. 31, 2018).

⁹ *Id.* at 5.

operations.”¹⁰ Respondents proposing to form a consortium to participate in the RFP process were required to include “the identity, role and capabilities of each consortium member” in its SOQ.¹¹ Respondents deemed qualified by P3A moved on to a competitive Request for Proposals (“RFP”) phase of the procurement.

The RFQ provided that “Throughout the term of the PPP [Public Private Partnership] Contract, the Government will retain ownership of and title to all T&D assets and the Private Partner will manage and operate the T&D system and assist with the procurement associated with, and the management and deployment of, federal funds received for the restoration of the T&D system.”¹² P3A envisioned that “a single Private Partner will assume all rights and responsibilities related to the operation, maintenance and management of the T&D system.”¹³ Further, it was contemplated that “In addition to the services typically performed by the operator of a T&D system, [P3A] intends for the Private Partner to administer the federal disaster recovery funding available for the restoration of the T&D system.”¹⁴

The RFP sought a private partner with highly organized staffing capacity and relevant expertise that could operate PREPA's T&D system in lieu of the owner. On November 25, 2019, a consortium comprised of ATCO Ltd (“ATCO”), Quanta Services Inc. (“Quanta”), and Innovative Emergency Management, Inc. (“IEM”) submitted a proposal which emphasized the unparalleled expertise of the consortium members.¹⁵ From the start, the consortium's intention was to hire PREPA talent, use talent from consortium members, and hire talent from the employment market to staff a new standalone entity, LUMA.¹⁶

LUMA's plan to leverage the expertise of its affiliates was clear from the beginning:

We will also rely on the expertise of our people, which includes globally recognized experts in technical fields such as high-voltage transmission engineering, distributed energy resources and microgrid integration. We will leverage that talent currently at PREPA, as well as our team's substantial capacity, experience and expertise to deliver a modern, secure and affordable electric grid for the residents of Puerto Rico.¹⁷

¹⁰ *Id.* at 7.

¹¹ *Id.* at 10.

¹² *Id.* at 17.

¹³ *Id.*

¹⁴ *Id.* at 17-18.

¹⁵ Attachment 4, LUMA, *Definitive Proposal Form 1.2 (Executive Summary)* at 8 (Nov. 25, 2019).

¹⁶ *Id.*

¹⁷ *Id.* at 5.

Ultimately, five Respondents submitted SOQs. Four were deemed qualified to participate in the RFP process, and three decided to move forward with the RFP process. In the minutes of a meeting of the P3A Partnership Committee, it was noted that "LUMA's proposed workforce is larger than that of [another Respondent]."¹⁸ Indeed, one of the most significant determining factors for why LUMA's Proposal was chosen over the other Respondents was the consortium's rich expertise across all relevant areas of need, as later outlined in the OMA.¹⁹

When P3A awarded the contract to LUMA it announced that the award was made because of LUMA's "(i) industry-leading experience in building reliable and sustainable infrastructure and skilled workforce training (through Quanta), (ii) a proven track record in operating several worldclass utility businesses that deliver safe, reliable, and affordable energy to millions of customers (through ATCO), and (iii) expertise in obtaining, managing, and retaining federal funds (through IEM)."²⁰ P3A continued, "LUMA is uniquely equipped to reinvigorate Puerto Rico's electricity T&D system (the "T&D System"), ushering in both a clean and resilient energy future for the people of Puerto Rico, and rapid disaster and emergency response expertise to ensure the safety of the people of Puerto Rico."²¹ Another factor was that "personnel across Quanta's business lines receive the highest level of training at the Quanta Advanced Training Center on a 2,300-acre ranch transformed into a state-of-the-art training facility in La Grange, Texas, and at the Northwest Lineman College, the Quanta-owned accredited college that specializes in developing electric power, gas distribution, and telecommunications service skills, and trains more than 9,000 technical field workers per year at four campuses across the U.S."²²

The solicitation, proposal, and selection of LUMA demonstrate that it was the Government of Puerto Rico's expectation that LUMA's workforce would include the valuable knowledge, skills, and abilities of Quanta and ATCO's extensive network of employees. As discussed below, the at-cost access to LUMA's seconded workforce is an asset to the Government of Puerto Rico and was a deliberate feature of this public-private partnership. There is an immense amount of work to be done on PREPA's T&D system, but not enough skilled resources on-island to do it. Without access to additional labor, Puerto Rico customers would suffer the effects of slower program implementation and potentially higher costs.

¹⁸ Attachment 5, P3A, *Partnership Committee Minutes* (Dec. 20, 2019).

¹⁹ Attachment 4, LUMA, *Definitive Proposal Form 1.2 (Executive Summary)* at 5.

²⁰ Attachment 6, P3A, *Partnership Committee Report*, at 4 (May 15, 2020).

²¹ *Id.*

²² *Id.* at n.4 (emphasis added).

B. The Operations and Maintenance Agreement

1. Parties

On June 22, 2020, PREPA, P3A, LUMA Energy, LLC, and LUMA Energy ServCo, LLC entered into the OMA.²³ Under the OMA, LUMA Energy, LLC and LUMA Energy ServCo, LLC (collectively "LUMA") are the Operator of PREPA's T&D assets, P3A serves as PREPA's agent Administrator, overseeing LUMA's performance as Operator, and PREPA remains Owner, retaining legal ownership and responsibility for its facilities, budgeting and funding the operation of its facilities, and serving as subrecipient of any federal funding.²⁴

The OMA refers to the parties as follows:

- P3A as "Administrator"
- PREPA as "Owner"
- LUMA Energy, LLC as "ManagementCo"
- LUMA Energy ServCo, LLC as "ServCo"
- ManagementCo and ServCo together as "Operator"

ServCo is a subsidiary service company of ManagementCo formed to provide substantially all the services required under the OMA.²⁵ LUMA's workforce, including seconded labor from LUMA's parent companies' affiliates, are direct hire employees of or seconded employees to ServCo. ServCo also incurs the costs and expense of carrying out the services under the OMA, which are reimbursed by PREPA at cost without markup for profit as "T&D Pass-Through Expenditures".²⁶ The ManagementCo and ServCo structure was established to facilitate the transition of operator services from LUMA when the term of the OMA expires.²⁷ The OMA contemplates that, should the OMA be terminated or otherwise expire, a back-end transition would allow ManagementCo to transfer ServCo to PREPA or a successor Operator to facilitate stability.²⁸

²³ See Attachment 7, *Puerto Rico Transmission & Distribution System Operation & Maintenance Agreement* (June 20, 2020) [hereafter, the "OMA"].

²⁴ See *id.*

²⁵ *Id.* at 8.

²⁶ *Id.* at Annex XI.

²⁷ *Id.* at Annex II § XI and Annex III.

²⁸ *Id.* at Annex III-II.

2. Scope of Services

The OMA establishes that while PREPA remains the Owner of all T&D assets, LUMA has “the autonomy and responsibility to” maintain and operate the T&D System, which includes “management, operation, maintenance, repair, restoration and replacement and other related services” in accordance with industry standards (the “O&M Services”).²⁹

The OMA's Scope of Services distinguishes between several different types of operations activities:

- General T&D System Operation Services
- Day-to-Day Operation
- System Operator Activities
- Engineering Activities
- Maintenance of Technical Documentation
- Energy Efficiency Activities
- Planning, Environmental, and Regulatory
- Legal Services
- Insurance and Claims
- Outsourcing
- Other

Other broad categories of services include:

- Asset Management and Maintenance Services
- Continuous Improvement Services
- Government, Community and Media Relations
- Testing, Reports and Records
- Finance and Accounting Services
- Emergency Response
- Maintenance
- Customer Service

“General T&D System Operation Services” includes “management and performance of construction of improvements [to PREPA's T&D system], including compliance with approved FEMA scope of work for projects that are eligible for Federal Funding and required maintenance”.³⁰ Thus, it is within the scope of services of the OMA for LUMA to manage *and perform* construction activities, including those that are federally funded.



²⁹ *Id.* at § 5.1; *see also id.* at Annex I.

³⁰ *Id.* at Annex I, § I.A.

While PREPA remains the Owner of the facilities and thus is the subrecipient of federal funding with respect to the T&D System, under the OMA, LUMA is required to help PREPA obtain, administer, manage, and apply for such funding.³¹ The OMA provides that LUMA shall “act as agent” of PREPA in connection with any Federal Funding requests related to the T&D System, as well as when contracting for capital improvements.³²

The OMA also reflects the parties’ intent that LUMA will self-perform the Scope of Services by requiring that “Operator shall evaluate opportunities for the outsourcing of any specific activities associated with this Annex I (*Scope of Services*) that will provide greater efficiencies and value to customers and the T&D System’s operation and seek to implement such activities within budget and regulatory constraints (e.g., fleet management, vegetation management and/or customer service call center).”³³

Under the OMA, affiliates of the parent companies or owners of LUMA are deemed to be “Affiliates” of LUMA following the front-end transition period,³⁴ but internal staff from those Affiliates working as seconded labor at LUMA, are specifically categorized as “Other Employees,” as defined in the OMA.³⁵ Those “Other Employees” consist of seconded employees of LUMA’s Affiliates as well as LUMA’s direct employees, and together with former PREPA employees hired by LUMA, are referred to as the “ServCo Employees” that are “necessary to provide the O&M Services.”³⁶

The OMA makes clear that the Government of Puerto Rico expected that LUMA would perform work using its own workforce (which includes seconded labor from LUMA Affiliates) and evaluate opportunities for outsourcing.

To summarize, under the OMA:

- The O&M Services include federally funded capital improvements.
- LUMA is permitted to self-perform O&M Services.
- LUMA is also authorized to outsource any of the O&M Services to “provide greater efficiencies and value to customers and the T&D System’s operation.”

³¹ *Id.* at § 5.9.

³² *Id.* at § 5.9(e)(ii); *see also id.* at §§ 5.2, 11.1 (emphasis added); Attachment 8, Letter from PREPA & P3A to FEMA & COR3 re *Consent to Federal Funding* (June 2, 2021) (PREPA and P3A “hereby consent that Operator [LUMA] shall act as agent of Owner [PREPA] (and any permitted transferee thereto) in connection with any Federal Funding requests related to the T&D System submitted to FEMA.”).

³³ Attachment 7, OMA at § 4.2(k) and Annex I, I.1.

³⁴ *Id.* at § 1.1.

³⁵ *Id.*

³⁶ *Id.* at §§ 1.1, 4.2(k).



3. Contracts vs. Subcontracts

The OMA distinguishes between agreements that LUMA enters into as *agent of PREPA* and agreements LUMA enters into *on its own behalf* to perform its obligations under the OMA. The former is defined as a "Contract" with reference to 2 C.F.R. Part 200, while the latter is defined as a "Subcontract" without reference to the federal procurement standards:

"Contract" means an agreement or purchase order between Operator, as agent for Owner, and a third party, including Contracts as defined in 2 CFR 200.22.

"Contractor" means a party that enters into a Contract with Operator, as agent for Owner, including Contractors as defined in 2 CFR 200.23.³⁷

* * *

"Subcontract" means an agreement or purchase order by Operator to a Subcontractor or a Subcontractor to Operator, as applicable.

"Subcontractor" means every Person (other than employees of Operator) employed or engaged by Operator or any Person directly or indirectly in privity with Operator for the performance of any portion of the Front-End Transition Services, the O&M Services or the Back-End Transition Services, whether for the furnishing of labor, materials, equipment, supplies, services or otherwise. For the avoidance of doubt: (i) Subcontractors includes personnel from Operator's Affiliates assigned to perform the Front-End Transition Services, the O&M Services or the Back-End Transition Services under this Agreement, and (ii) Subcontractors does not include third parties merely providing commercially available "off-the-shelf" Software or Information Systems to Operator (directly or as a service).³⁸

Article 11 of the OMA authorizes LUMA to use both Subcontractors and Contractors to perform O&M Services, including for federally-funded capital improvements:

Subcontractors Generally. Operator shall have the right, but not the obligation, to engage Subcontractors to perform the O&M Services, subject to Section 11.1(c) (*Ability to Subcontract and Contract –*

³⁷ Section 2.1 of the OMA excludes LUMA itself from the definition of "Contractor."

³⁸ Attachment 7, OMA § 1.1 (emphasis added).



Federally Funded Capital Improvements) in the case of Federally Funded Capital Improvements....

* * *

Contractors Generally. Operator shall have the right, but not the obligation, to engage Contractors as agent for Owner to perform the O&M Services, subject to Section 11.1(c) (*Ability to Subcontract and Contract – Federally Funded Capital Improvements*) in the case of Federally Funded Capital Improvements.³⁹

For Contractors, the OMA contains additional language requiring compliance with LUMA's Federal Funding Procurement Manual, as applicable, that is not found in the paragraph related to Subcontractors:

Operator agrees that any Contractors engaged to perform O&M Services shall be required to comply with the applicable provisions of the Federal Funding Procurement Manual or Non-Federal Funding Procurement Manual, as applicable.⁴⁰

Additionally, even though both paragraphs regarding Subcontractors and Contractors refer to § 11.1(c), that section—which requires compliance with Federal Funding Requirements and LUMA's Federal Funding Procurement Manual—only applies to Contractors and Contracts, not Subcontractors and Subcontracts:

Federally Funded Capital Improvements. Owner acknowledges and agrees that Operator may hire Contractors, as agent for and on behalf of Owner, to perform any Federally Funded Capital Improvements; provided that any Contracts related to the performance of any Federally Funded Capital Improvement shall comply with the Federal Funding Requirements, including the requirements described in the Federal Funding Procurement Manual and any competitive bidding processes required for the award of any such Contracts.⁴¹

This distinction the OMA makes between PREPA Contracts and LUMA Subcontracts as it relates to the applicability of 2 C.F.R. Part 200 is consistent with federal procurement standards. For example, if a PA subrecipient intends to award a contract funded by its PA grant, it must follow

³⁹ *Id.* at § 11.1(a)-(b).

⁴⁰ *Id.* at § 11.1(b).

⁴¹ *Id.* at § 11.1(c) (emphasis added).



the federal procurement standards in awarding that contract.⁴² This is also true where the subrecipient uses a procurement agent to award a contract—the procurement agent is required, on the subrecipient's behalf, to conduct the procurement in compliance with the federal procurement standards.⁴³ But, if the selected *contractor* performs the work using subcontractors, the prime contractor's procurement of those subcontractors is subject to the terms of its contract with the subrecipient, not the federal procurement standards. Only a limited number of provisions in the federal procurement standards flow down to subcontracting (e.g., the affirmative steps at 2 C.F.R. § 200.321). And none of the *competition rules* under the federal procurement standards apply to the contractor's hiring decisions for its own workforce. Those subcontracts and hiring decisions are not "procurements" subject to 2 C.F.R. Part 200.⁴⁴

Consistent with the requirements of the OMA,⁴⁵ LUMA developed and P3A approved a Procurement Manual "to document the procurement policies and procedures that [LUMA] will use when procuring goods and services as agent for [PREPA]."⁴⁶ The Procurement Manual was written to be compliant with the federal procurement standards at 2 C.F.R. Part 200 and FEMA guidance.⁴⁷

To summarize, under the OMA:

- LUMA can enter into Subcontracts and Contracts for the performance of O&M Services, including federally funded capital improvements.
- Subcontracts are entered into by LUMA as Operator under the OMA, while Contracts are awarded by LUMA, as agent of PREPA.
- PREPA is not a party to LUMA Subcontracts.
- PREPA Contracts are subject to the federal procurement standards; LUMA Subcontracts are not.
- PREPA Contracts must be procured following LUMA's Procurement Manual, which incorporates the federal procurement standards; LUMA Subcontracts do not.

⁴² 2 C.F.R. § 200.317. Unless otherwise noted, all C.F.R. citations are to the regulation as it existed on September 20, 2017, the date Hurricane Maria was declared a major disaster in Puerto Rico.

⁴³ FEMA, *Procurement Guidance for Recipients and Subrecipients under 2 C.F.R Part 200 (Uniform Rules) Supplement to the Public Assistance Procurement Disaster Assistance Team (PDAT) Field Manual*, at III-1; VI-13 (June 21, 2016), https://www.fema.gov/sites/default/files/2020-07/fema_procurement-under-grants-field-manual-supplement_1.pdf; FEMA, *PDAT Manual*, at 9-10; 106-107 (Oct. 2021), https://www.fema.gov/sites/default/files/documents/fema_PDAT-field-manual_102021.pdf.

⁴⁴ 2 C.F.R. § 200.22 (currently 2 C.F.R. § 200.1) (defines a "contract" subject to federal procurement standards as a transaction through which a non-Federal entity buys goods and services needed to carry out the project or program under the Federal award); 2 C.F.R. § 200.69 (currently 2 C.F.R. § 200.1) (defines "Non-Federal entity" as "a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient").

⁴⁵ Attachment 7, OMA at § 4.1(e)-(f).

⁴⁶ Attachment 9, *LUMA Procurement Manual v.2* at 3.

⁴⁷ See generally, *id.*

4. Payment for O&M Services

When LUMA awards a Contract as PREPA's agent, PREPA is a party to the Contract and incurs costs under the Contract directly. When LUMA enters into a Subcontract, those costs are incurred by LUMA (specifically, ServCo) in providing the O&M Services. All invoices are reimbursed by PREPA at cost, without a markup for profit, as "T&D Pass-Through Expenditures."⁴⁸ Annex XI to the OMA provides an extensive, but non-exhaustive list of what constitutes "T&D Pass-Through Expenditures". That list includes Subcontractor costs, including:

- Wages, salaries, bonuses, and benefits incurred by ServCo in performing the O&M Services, including Capital Improvements;
- costs incurred by ServCo in performing the O&M Services, including costs of all subcontracted and seconded employees, all goods and services (including all materials, supplies, spare parts, vehicles and mileage, equipment rental, other transportation, freight, purchased services, training, Subcontractor costs, employee per diems, administrative costs such as dues, subscriptions, meals and entertainment, office supplies, postage, rent and travel communications, utilities and other costs), repair and maintenance costs, and the costs (including fees) incurred or payable with respect to banking services and accounts, cash management, leases, equipment rentals, easements, licenses, permits, consents and similar instruments;
- costs related to Capital Improvements to the system, including project management costs incurred by ServCo Employees;
- costs incurred with respect to professional services, including legal, engineering, accounting, financial, auditing, information technology, telecommunication and other contracted services;⁴⁹

To summarize, the OMA:

- Expressly permits the use of both seconded employees and Subcontractors to perform O&M Services.
- Defines T&D Pass-Through Expenditures to be the costs and expenses incurred by LUMA in the course of providing O&M Services without markup for profit.
- Requires PREPA to reimburse LUMA for the cost of both subcontracted and seconded labor.

⁴⁸ Attachment 7, OMA at § 7.2. LUMA (specifically, ManagementCo) is compensated for the performance of the O&M Services through a Service Fee; the OMA provides that the "no Federal Funding shall be used to pay the Service Fee." *Id.* at § 7.1. The Service Fee is not at issue in this First Appeal.

⁴⁹ *Id.* at Annex XI.

C. Summary of the OMA Framework

The OMA is a contract that was competitively procured by P3A, in its role as agent for PREPA as authorized by Commonwealth law. The framework of the OMA envisioned that, to perform O&M Services, which include federally funded capital improvements, LUMA would use its own workforce, including seconded employees, and also enter into Subcontracts on its own behalf, and award competitively procured PREPA Contracts in its role as PREPA's agent. PREPA Contracts must be awarded consistent with a federally-compliant Procurement Manual, while LUMA's Subcontracts do not. PREPA is not a party to LUMA's Subcontracts, including the Secondment Agreement. Under the OMA, LUMA is required to perform O&M Services and evaluate opportunities for outsourcing that will provide greater efficiencies and value to customers and the T&D System's operation.

The costs and expenses incurred by LUMA to perform O&M Services are passed through to PREPA at cost, without markup for profit. This means that through secondment, the Government of Puerto Rico receives access to the extensive employee pool of LUMA Affiliates, with their expertise and experience – without markup for profit. In other words, where an affiliate would normally recover an employee's cost at their fully loaded rate plus profit via third party contracts, it *cannot* do that with LUMA. Secondment in practice, involves the reimbursement of costs. When Quanta or ATCO directs one of their Affiliates to second employees to LUMA, that Affiliate foregoes the revenue (including profit) that the employee would generate while working on any other project for a customer. The Affiliate bears the opportunity cost of the secondment. This allows PREPA access to private sector resources, expertise, and innovation at lower cost, while transferring risk to LUMA and its Affiliates – resulting in value to the Commonwealth.

The Determination's requirement that LUMA competitively procure seconded labor, when use of this labor was part of its proposal in response to a competitive procurement for the OMA, is inconsistent with the federal procurement standards and contrary to the framework and significant financial benefit negotiated by and for the benefit of the Government of Puerto Rico when it entered into the OMA. Prohibiting LUMA from using seconded labor to self-perform federally funded work is not only a misapplication of the federal rules, but it will also hinder LUMA's ability to perform under the OMA, as well as add delay and cost to Puerto Rico's recovery. This is exactly the sort of bureaucratic inefficiency and waste that the Trump Administration seeks to curtail.⁵⁰

⁵⁰ See, e.g., Executive Order 14,192, *Unleashing Prosperity Through Deregulation* (Jan. 31, 2025); Executive Order 14,180, *Council to Assess the Federal Emergency Management Agency* (Jan. 24, 2025); Executive Order 14,210, *Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative* (Feb. 11, 2025); and *Fact Sheet: President Donald J. Trump Eliminates the Federal Executive Institute* (Feb. 10, 2025).

D. The 3PPO

Both the first and second versions of LUMA's Procurement Manual prohibit unmitigated real or apparent personal and organizational conflicts of interest ("OCI") except in very limited situations related to exigency or emergency.⁵¹ Consistent with the expectations FEMA included in the Determination to "identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible and avoid or mitigate potential conflicts", LUMA, P3A, and COR3 were sensitive to the possibility that an OCI could arise when procuring PREPA contracts as PREPA's agent. To avoid and mitigate that risk, LUMA created, at the request of P3A, and P3A reviewed, modified, and approved, an Organizational Conflict of Interest Avoidance and Mitigation Plan ("OCIAMP").⁵²

The OCIAMP provides detailed instructions for complying with the Procurement Manual's prohibition on unmitigated OCIs. Among the avoidance and mitigation measures included in the OCIAMP is the use of an Independent Third-Party Procurement Office ("3PPO"). The entity serving as PREPA's 3PPO was competitively procured by P3A, and must be used whenever LUMA deems it in PREPA's best interest not to exclude LUMA Affiliates from competing for a PREPA Contract.⁵³ LUMA's Affiliates are disqualified from Contract procurements that do not use the 3PPO process. As explained throughout the OCIAMP and its appendices, when a procurement event involves (or is likely to involve) a LUMA Affiliate, the 3PPO administers and manages the procurement process independently of LUMA's procurement office. LUMA does not control the 3PPO and has no access to the 3PPO's evaluation process. LUMA's participation during the process is strictly limited and includes only the ability to answer questions from the 3PPO, which uses masking identifiers to disguise vendor identities. The 3PPO posts opportunities, reviews and evaluates vendor responses, and makes selection recommendations to P3A. If P3A agrees with the recommendation, it directs LUMA to award the PREPA Contract to the selected vendor.

E. LUMA Self-Performed Work

Following execution of the OMA and a front-end transition period, LUMA assumed control of PREPA's T&D system and related facilities, equipment, and other assets related to the T&D system on June 1, 2021. In its role as Operator, LUMA operates and maintains PREPA's system and performs capital improvements, including but not limited to federally funded capital improvements. Where PREPA would have performed repairs with its force account labor or hired contractors to do so before the OMA, LUMA now performs the work itself as PREPA's contractor or contracts for the repairs on PREPA's behalf, as PREPA's agent.

⁵¹ See Attachment 9, *LUMA Procurement Manual* v.2 at 7-8, 14, 31.

⁵² See Attachment 10, *LUMA Procurement Toolkit* v.1, containing the *LUMA Organizational Conflict of Interest Avoidance and Mitigation Plan* v.2 (July 31, 2023) at 47-75. Of note, version 1 of the OCIAMP was issued on December 27, 2022.

⁵³ See *id.* at 51.

When self-performing the Scope of Services under the OMA, LUMA uses its own workforce which includes direct employees and seconded employees from its Affiliates. This is referred to as "self-performed work".

Notwithstanding the clear language in the OMA that LUMA could self-perform work, in 2022 and 2023, consistent with their oversight requirements as Recipient and OMA Administrator, respectively, COR3 and P3A engaged with FEMA as to the PA eligibility of LUMA self-performed construction work. COR3, P3A, and LUMA developed an authorization, pre-approval, and certification process for self-performed construction work. Part of that framework requires LUMA to sign a "Federal Clauses Certification" (consistent with LUMA's role as PREPA's contractor) and to perform a cost analysis.⁵⁴ COR3, P3A, and LUMA excluded non-construction work from the pre-authorization/notification/certification framework.

The framework developed by COR3, P3A, and LUMA acknowledges that "in the performance of self-performed work, LUMA may use its internal [workforce], which may include a blend of LUMA seconded employees."⁵⁵ COR3, P3A, and LUMA shared this framework with FEMA and requested concurrence.⁵⁶ FEMA "acknowledge[d] the approved process".⁵⁷

II. FEMA's December 27, 2024 Determination re Seconded Labor is Based on a False Premise

In 2024, FEMA issued a series of requests for information related to seconded labor, culminating in the December 27, 2024 Determination that is the subject of this First Appeal. In the Determination, FEMA said that LUMA's use of seconded employees for self-performed work without following the Federal procurement standards was not compliant with Federal procurement and contracting requirements.⁵⁸

FEMA's Determination is based on a "high-level compliance review" of a Secondment Agreement by PDAT. The review does not appear to be based on a full understanding of the agreements, policies, and procedures applicable to LUMA when contracting for PREPA, as PREPA's agent, versus when subcontracting as itself. Importantly, the analysis does not seem to appreciate that PREPA is not a party to the Secondment Agreement. The analysis is largely a recitation of basic information about the federal procurement standards and uses inconclusive terms throughout in applying those standards to LUMA, e.g., "it appears," "potential issues or procurement noncompliance," "potential for organizational conflicts of interest," "would likely be in violation,"

⁵⁴ Attachment 11, LUMA Federal Clauses Certification (May 28, 2024).

⁵⁵ Attachment 12, Letter from COR3 to FEMA re LUMA's Performance of Federally Funded Work (Aug. 11, 2023) at Attachment 1, *Template - LUMA Request Authorization Self Performed Work* at n.2.

⁵⁶ See generally, *id.*

⁵⁷ Attachment 16, Letter from Danna E. Planas Ocasio (FEMA Region 2) to Manuel Laboy (COR3) re LUMA Performance of Federally Funded Work (Aug. 23, 2023).

⁵⁸ Attachment 1, Determination at 1.



and "may have restricted full and open competition." Based on PDAT's "high-level" review and vague determinations, FEMA issued an imprecise and inaccurate Determination that if not rescinded, threatens the value of the public-private partner framework as contemplated by the Government of Puerto Rico and will increase the time and costs for Puerto Rico's disaster recovery.

A. The Secondment Agreement is Not a Contract Subject to Procurement Standards

The analysis relied upon in the Determination was based on a false premise and is rife with errors. Each will be discussed in turn, below:

- PDAT says, "Applying 2 Code of Federal Regulations (C.F.R.) § 200.331 to the facts, it appears the Secondment Agreement between LUMA and Quanta and its affiliates) [sic] is a contract in which Quanta and its affiliates are providing seconded employees and transferring the employment costs of wages and benefits to LUMA."⁵⁹ First, PDAT's citation to § 200.331, as it existed in the regulations in 2017, *Requirements for pass-through entities*, is irrelevant, as it applies to Recipients, not to PREPA. In a footnote, PDAT seems to clarify it meant to cite to § 200.330, *Subrecipient and contractor determinations*. PDAT reviewed the Secondment Agreement between LUMA and Quanta in the context of this regulation, but the regulation is inapplicable. 2 C.F.R. § 200.330 recognizes that sometimes a non-Federal entity (here, PREPA) may "concurrently receive Federal awards as a recipient, a subrecipient, and a contractor" and helps *recipients* determine when "the party receiving the funds" is doing so "in the role of a subrecipient or a contractor."⁶⁰ However, neither LUMA nor Quanta is "the party receiving the funds" and thus 2 C.F.R. § 200.330 does not apply to them. This regulation is not meant to define whether an agreement between two non-recipients and non-subrecipients (i.e., LUMA and Quanta) is a "contract" under the federal procurement standards. The appropriate regulation for that guidance is the definition of "Contract" at 2 C.F.R. § 200.22 (2017), which provides that a "Contract" is "a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award." And "Non-Federal entity" is defined as "a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient."⁶¹ PREPA is not a party to the Secondment Agreement and LUMA did not enter into the Secondment Agreement as PREPA's agent. Accordingly, it is not a "Contract" under 2 C.F.R. Part 200 definitions.
- PDAT says, "As a contract, the Secondment Agreement is subject to the Federal procurement rules applicable to state entities."⁶² This is incorrect, as explained in the

⁵⁹ *Id.* at 2.

⁶⁰ 2 C.F.R. § 200.330 (2017).

⁶¹ 2 C.F.R. § 200.69 (2017).

⁶² Attachment 1, Determination at 2.

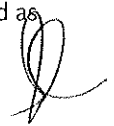
preceding paragraph. Notably, PDAT doesn't seem entirely sure either—it states in a footnote, “The secondment agreement certainly *appears to be* a legal instrument with clearly established acts, duties, and obligations among the signatories[.]”⁶³ PDAT failed to consider that the signatories to the Secondment Agreement are neither the recipient nor subrecipient and thus it is not a “Contract” as defined in the regulations.

- PDAT says, “PREPA and in this case LUMA, is required to include all contract clauses in accordance with 2 C.F.R. § 200.327 and outlined in 2 C.F.R. Appendix II to Part 200.”⁶⁴ PDAT is correct that “state” entities like PREPA are required to comply with 2 C.F.R. § 200.317, § 200.321 (for disasters declared after November 12, 2020), § 200.322, and § 200.327 (formerly § 200.326). But PDAT is incorrect that the Secondment Agreement must comply with these requirements, because, as explained above, it is not a contract subject to 2 C.F.R. Part 200.
- PDAT says, “The Secondment Agreement presents the potential for organizational conflicts of interest to arise, because Quanta and its affiliates may have access to information not available to the public, and the selection of the labor is being made based on an existing relationship and not competitive purchasing.”⁶⁵ As explained above, the Secondment Agreement is not a contract to which the federal procurement standards apply. Moreover, under the OMA, LUMA is not required to hire its employees, seconded employees, or award Subcontracts pursuant to the Procurement Manual. Generally speaking, however, to the extent there is a concern that LUMA could award Subcontracts to Affiliates as a means to achieve multiple layers of profit, that concern is unwarranted. First, as discussed in the Background section above, LUMA's ability to leverage the knowledge, skill, and expertise of its Affiliates was a primary reason for its competitive selection as PREPA's private operating partner. The use of seconded labor or affiliate Subcontracts was contemplated from inception and is expressly permitted by the OMA. Second, LUMA's costs for seconded employees are passed through to PREPA at cost, *without a markup for profit*. Thus, there is no validity to any concern of inflated profits as a result of a conflict of interest—LUMA makes no profit on these costs, nor do its Affiliates. Third, to allow any Affiliate to compete for any PREPA Contract, LUMA must comply with organizational conflict of interest avoidance and mitigation procedures, which include an independent

⁶³ *Id.* at 2 n.2 (emphasis added). PDAT is presumably familiar with many other “legal instruments” that include “acts, duties, and obligations among the signatories” that FEMA and the Federal Government do not consider “Contracts” and are not subject to contracting rules, such as mutual aid agreements, memoranda of understanding, grant agreements, and the FEMA Write-Your-Own Agreement under which insurance companies act as agents of FEMA. These are legal instruments but definitively are not “contracts” as defined in 2 C.F.R. 200.1 and are not treated as such by FEMA.

⁶⁴ *Id.* at 2.

⁶⁵ *Id.* at 3.




procurement process. Compliance with the OCIAMP and 3PPO process ensures that LUMA does not control any PREPA procurement in which its affiliates may compete for an award.

- PDAT says, "Since [the OMA] contains written standards of conduct covering conflicts of interest⁶⁶, the Secondment Agreement would likely be in violation of their own rules, which would result in noncompliance with 2 C.F.R. § 200.317 which states, 'When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds.'"⁶⁶ The OMA does not require LUMA's Subcontracts to comply with the Procurement Manual that was established for procurements performed by LUMA as PREPA's agent. Accordingly, the Secondment Agreement is not required to be procured pursuant to the Procurement Manual. PDAT's citation to the Procurement Manual as the applicable rule on conflict of interest is incorrect. Moreover, it appears PDAT considered outdated documents in conducting its review. In footnote 4 of the Determination, PDAT cites to "LUMA Procurement Manual, Chapter 4, Sections 4.3 - 4.3.4.2." The current version of LUMA's Procurement Manual has no Section 4.3. The current LUMA Procurement Manual (version 2) (which, again, does not apply to Secondment Agreements) has a Conflicts of Interest provision at Section X. That section provides, "As soon as an actual or potential Conflict of Interest is discovered, LUMA will consider action to avoid, neutralize, or mitigate such Conflict of Interest in compliance with LUMA's OCIAMP."⁶⁷ LUMA's OCIAMP is located in LUMA's Procurement Toolkit (version 1) and provides for the independent 3PPO that conducts procurements where a potential conflict of interest is identified. The Secondment Agreement is not a Contract subject to the Procurement Manual and LUMA's direct use of seconded employees or Subcontractors is consistent with the OMA and thus complies with 2 C.F.R. § 200.317. Further, as described above, any potential conflict of interest related to the use of seconded employees is mitigated by the fact that neither LUMA nor the Affiliate charges or realizes any profit on pass-through costs.
- PDAT says, "PREPA and in this case LUMA may have restricted full and open competition in the following ways: Created an agreement where private entities can be selected and awarded funds without competition."⁶⁸ Again, for the reasons explained above, the requirements for full and open competition do not apply to LUMA's hiring process or its Subcontracts under the OMA. PREPA, as a state entity, is required only to follow its own policies and procedures to comply with 2 C.F.R. § 200.317. To the extent the Secondment Agreement is referred to as a Subcontract under the OMA, a prime contractor's subcontracts are not subject to the federal procurement standards, the Procurement Manual, or the rules for full and open competition thereunder. To the extent seconded employees are LUMA's own workforce, hiring is also not a "Contract" to which the Procurement Manual applies. This is consistent with the OMA and with the federal

⁶⁶ *Id.*

⁶⁷ Attachment 9, *LUMA Procurement Manual* v.2 at 31.

⁶⁸ Attachment 1, Determination at 4.



procurement standards which do not apply to subcontracts of contractors of non-Federal entities. PDAT's concern that LUMA "may have" restricted full and open competition is not valid—full and open competition is not required.

- PDAT says, "Here, the Subrecipient did not show that it satisfied federal procurement requirements; namely, it has not shown documentation that justifies why there was inadequate competition and why it moved forward with a noncompetitive award without revising or cancelling the solicitation and re-soliciting offers or bids."⁶⁹ Curiously, PDAT makes this statement under the heading "Time-and-Materials Contracts", even though this is a statement about noncompetitive awards. The rules applicable to T&M contracts have nothing to do with inadequate competition. In any case, PDAT's statement is based on the false premise that the Secondment Agreement is subject to the federal procurement standards, which it is not.

B. The Secondment Agreement is not a PREPA Contract

When self-performing work with seconded labor, LUMA may do so through Secondment Agreements between LUMA and its Affiliates that PDAT incorrectly identified as "potential" PREPA contracts. To document the secondment terms among its affiliated entities, LUMA's parent entities (the consortium members who competed for, and were ultimately selected by P3A for award of, the OMA—Quanta and ATCO) enter into Secondment Agreements with those affiliated entities, as they did with LUMA.⁷⁰ In turn, each seconded employee has an agreement that they enter into with their employer establishing the details of their secondment. Those employee-specific agreements follow their employer's templates.⁷¹ PREPA is not a party to the Secondment Agreement, neither directly nor through LUMA as its agent.

The Secondment Agreement now at issue defines the term "Seconded Services" as:

"Seconded Services" means the duties to be performed by Seconded Employees in the Commonwealth during the Secondment Period, to or for the benefit of LUMA, as set forth in each Seconded Employee's Assignment Letter(s). The Parties acknowledge and agree that, in addition to this Agreement: (a) LUMA has accepted assignment from LUMA Energy, LLC ("ManageCo") of the Affiliate Services Agreement dated June 1, 2020 by and between ManageCo and Home Company pursuant to which Home Company will provide certain services as more specifically set out therein, including,

⁶⁹ *Id.* at 4.

⁷⁰ See Attachment 13, Secondment Agreement at 4th Whereas clause and Exhibit A (June 1, 2021).

⁷¹ See, e.g., Attachment 14, Quanta Workforce Solutions, LLC, Template Assignment Agreement for Assignments to LUMA.

without limitation, labor services through its employees while such employees are located in the U.S. mainland or otherwise outside of the Commonwealth, and back-end and technical support services, among others to LUMA from the Home Company's offices outside the Commonwealth...⁷²

Not only is PREPA not a signatory to the agreement, but the terms of the agreement also clearly articulate that the employee is assigned to and performing services for LUMA. Any argument of a common law relationship between the secondees and PREPA must fail. The relationship between PREPA and LUMA arises out of the legal requirement that PREPA delegate operation of its T&D system to a private partner through a competitively awarded contract (the OMA).⁷³ PREPA lacks any control over the employee.⁷⁴

The Secondment Agreement unequivocally vests LUMA with the power and control to direct the means and manner in which the seconded employees perform their general duties exclusively for the benefit of LUMA and as directed by LUMA. Specifically, § 1.3 of the Secondment Agreement provides:

The Seconded Employees shall perform services on a full-time or part-time basis, as may be specified by LUMA for LUMA during any Secondment Period. For any periods the Seconded Employees are in the Commonwealth, the Seconded Employees shall be under secondment to LUMA and shall provide services only for the benefit of LUMA. For greater certainty, during any such period, the Seconded employees shall not render services to, or on behalf of, either the Home Company or the Original Employer.⁷⁵

Finally, the Secondment Agreement acknowledges that although the seconded employees remain employed by their original employer, while they are on secondment working for LUMA's benefit in Puerto Rico, they are LUMA employees under the laws of the Commonwealth and the OMA.⁷⁶

⁷² Attachment 13, Secondment Agreement at § 2.2.

⁷³ See generally, the Puerto Rico Electric Power System Transformation Act, Act No. 120-2018, as amended ("Act 120"), the Puerto Rico Energy Public Policy Act, Act No. 17-2019 ("Act 17"), and the Puerto Rico Transformation and RELIEF Act, Act No. 57-2014, as amended ("Act 57").

⁷⁴ See, e.g., *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221-22 (1909) (emphasis added) (holding that an employment relationship is usually answered by ascertaining who has the power to control and direct individuals in the performance of their work.); and *Lopez v. Cruz Ruiz*, 131 D.P.R. 694, 1992 WL 755510 (1992) (an independent contractor relationship existed because "[t]here is no evidence that the Municipality exerted any control over the means and manner used and the persons involved in the land clearance contract").

⁷⁵ Attachment 13, Secondment Agreement at § 1.3.

⁷⁶ *Id.* at § 1.6



In the words of the U.S. Supreme Court, they are LUMA's "pro hac vice" (i.e., in this circumstance) employees during secondment.⁷⁷

The Secondment Agreement is consistent with the language of the OMA, in that Affiliate staff working as seconded labor at LUMA are LUMA's "Other Employees", and together with former PREPA employees hired by LUMA, comprise the "ServCo Employees" that are "necessary to provide the O&M Services", and whose costs are incurred as T&D Pass Through Expenditures in Annex XI.⁷⁸ "For the avoidance of doubt: (i) Subcontractors includes personnel from Operator's Affiliates assigned to perform the Front-End Transition Services, the O&M Services or the Back-End Transition Services under [the OMA]..."⁷⁹ The Secondment Agreement is, under the terms of the OMA, a LUMA Subcontract, not a PREPA Contract.

III. FEMA's Determination Threatens to Delay and Increase the Cost of Puerto Rico's Disaster Recovery

The Determination is inconsistent with the competitive procurement for the OMA, the language of the OMA, and the federal procurement standards, and it undercuts the significant financial benefit negotiated by and for the Government of Puerto Rico when it entered into the OMA. The Commonwealth promulgated Acts 120, 17, and 57 to decentralize PREPA operations through the use of public-private partnerships such as this, "to transform the Island's electric power system into a modern, sustainable, reliable, efficient, [and] cost-effective [system that is] resilient to the ravages of nature."⁸⁰ As discussed below, if left in place, this Determination would eliminate LUMA's ability to self-perform work using its Affiliate's resources as pass-through costs when in PREPA's best interest. This will only work to delay and increase the cost of disaster recovery work.

Additionally, the language of the remedies imposed by FEMA leave many questions, adding concern about the extent of the harm they will create. Those remedies are:

⁷⁷ *Standard Oil Co.*, at 221.

⁷⁸ Attachment 7, OMA at § 4.2(k).

⁷⁹ *Id.* at § 1.1.

⁸⁰ Act 120, Statement of Motives at 2.

- FEMA says, "Projects already submitted by PREPA/LUMA where seconded employees were used to perform work will be strictly evaluated for reasonable costs. FEMA will not consider future, non-compliant projects."⁸¹ The Determination appears to affect not only PREPA's recovery from Hurricane Maria, but also Hurricanes Fiona and Ernesto and other declared and yet to occur events. Also, while the correspondence about self-performed work that led to the Determination excluded non-construction work, FEMA's Determination does not make clear whether it also applies only to construction work. While LUMA does not agree with the Determination for the reasons explained herein, if a remedy is to be imposed by FEMA for any reason, it must be clear and unambiguous. If FEMA continues to impose these remedies, LUMA requests clarification.

But, more importantly, given the information in this appeal demonstrating that LUMA's use of seconded labor is, in fact and law, compliant with the federal procurement standards, this remedy, as with all the remedies in the Determination, is inconsistent with 2 C.F.R. § 200.339, which authorizes FEMA to impose remedies for *noncompliance*. There is no noncompliance here. The OMA, which was awarded to LUMA based in part on the availability of seconded labor to augment LUMA's workforce and which expressly contemplates the use of seconded employees, was the result of a competitive procurement. LUMA is a competitively-procured prime contractor and is not required to comply with the federal procurement standards in hiring seconded labor to join its workforce or when awarding Subcontracts. There is no justification for the imposition of "Remedies for noncompliance" or to evaluate seconded labor costs for reasonableness more "strictly" than FEMA would for any other eligible cost.⁸² Consistent with the applicable regulation and FEMA's implementing policy,⁸³ FEMA should be reviewing costs from the perspective of a prudent person in the circumstances of the subrecipient at the time the costs were incurred.

Given the information in this appeal demonstrating that LUMA's use of seconded labor is in fact compliant, there is no foundation for what appears to be a presumption of unreasonableness. To the contrary, because secondees costs are incurred by LUMA and passed through to PREPA as a pass-through expenditure *without markup for profit*, the resulting at-cost expenses should be presumptively reasonable.

⁸¹ Attachment 1, Determination at 5.

⁸² The definition of the term "reasonable costs" at 2 C.F.R. § 200.404 (2017) states that agencies must take the circumstances into consideration and cannot review strictly.

⁸³ "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the Applicant makes the decision to incur the cost." FEMA, Public Assistance Program and Policy Guide at 22 (Apr. 2018).

- FEMA says, "FEMA will temporarily withhold cash payments pending correction of the deficiency: FEMA will place a hold or stop payment on the grant award in the appropriate award payment system pending the Recipient's submission of satisfactory documentation as to correction of the noncompliance."⁸⁴ PREPA currently has several open subgrants with FEMA, across multiple disasters. The scope of the funding freeze is not provided, leaving it unclear what "grant award" is frozen, and provides no clear instruction as to what action(s) PREPA/LUMA is expected to take to satisfy FEMA so it will release frozen funds. The most likely impact of this funding freeze, should it continue during the pendency of this appeal, would be to delay work restoring damage to and improving the resilience of PREPA's electric grid, which in turn would raise costs of completing this work.
- FEMA requests additional project monitoring: "FEMA will require technical assistance visits, desk reviews or site visits by the relevant grant program office to ensure recipients or subrecipients are taking the appropriate corrective actions to correct noncompliance or if there is a need to continue monitoring because of noncompliance."⁸⁵ PREPA/LUMA has no concerns with or objections to project monitoring and will gladly accept technical assistance, however, it is unclear what "appropriate" corrective actions FEMA expects to be performed to satisfy what, as explained above, appears to be a misunderstanding by FEMA, as opposed to PREPA/LUMA's noncompliance.
- FEMA requests the non-Federal entity to seek technical assistance or management assistance: "FEMA requires the Subrecipient to obtain specialized technical or management assistance, including, but not limited to, webinars targeted at specific issues or concerns, and training from FEMA's PDAT. The Subrecipient will notify FEMA on the steps taken to comply with this requirement."⁸⁶ LUMA is committed to compliance and has worked collaboratively with COR3 and P3A in developing its Procurement Manual, OCIAMP, and the 3PPO process, and has provided significant compliance training to staff, including in-person and webinar presentations. LUMA welcomes greater interaction and collaboration with FEMA and PDAT, including training and feedback. For example, LUMA would like to update its Procurement Manual to reflect recent policy changes by COR3 and the Federal Government, and any updated guidance from PDAT. LUMA would appreciate PDAT's support in that process. We have also valued FEMA and COR3's recent willingness to engage in collaborative training and working sessions with LUMA, to help avoid future misunderstandings and facilitate efficient review.



⁸⁴ Attachment 1, Determination at 5

⁸⁵ *Id.*

⁸⁶ *Id.*

IV. Conclusion


Notwithstanding that LUMA did not violate procurement regulations that are inapplicable to secondment agreements, FEMA's specified remedies are unclear, unwarranted, and demonstrably harmful. Further, FEMA's concern regarding LUMA's use of seconded labor is unnecessary.

LUMA uses Contracts (as defined in the OMA) to procure services and materials for federally funded work, in addition to hiring employees directly or through secondment agreements (Subcontracts). LUMA uses seconded labor as a supplement to on-island resources and PREPA's contracted resources. Work performed with secondees is a small, yet significant, subset of self-performed work in that LUMA uses secondees where it otherwise lacks access to qualified, cost-effective, resources. Of the more than 4,500 full time employees on LUMA's payroll, less than 9% are seconded. This small number of secondees, however, are critical to temporarily incorporate highly skilled and specialized workers into its workforce. Without secondees, LUMA will need to take time to contract for these resources. To the extent they are available, those contractors are likely to charge rates that exceed the at-cost rates of LUMA's Affiliates.

Perhaps most importantly, FEMA's Determination will slow the recovery of the electric system in Puerto Rico, which is in a fragile state. The longer it takes to repair the T&D assets, the more difficult and expensive it becomes, as damage is exacerbated by use the assets can't sustain or by subsequent storms. The Government of Puerto Rico awarded a competitively procured contract to LUMA for LUMA to operate PREPA's system, including managing the effort to rebuild the grid under PREPA's PA grant. FEMA's Determination prohibits LUMA from using resources that are ready and available to do the work, even though doing so is consistent with the OMA and the federal procurement standards.

For the aforementioned reasons, PREPA/LUMA respectfully requests that FEMA Region 2 grant this appeal, and in doing so, rescind the December 27, 2024, Determination, confirm that LUMA's secondment agreements are not subject to the federal procurement standards at 2 C.F.R. Part 200, and confirm that PREPA's reasonable costs incurred for the performance of eligible work by LUMA's seconded labor are eligible for PA.

Respectfully,



Juan D. Saca
President and Chief Executive Officer
LUMA Energy ServCo, LLC

cc: Mary Carmen Zapata, Executive Director, PREPA

List of Attachments

1	FEMA Determination re LUMA Use of Seconded Labor (Dec. 27, 2024)
2	Letter from Danna E. Planas Ocasio (FEMA Region 2) to Manuel Laboy (COR3) re Performance of Federally Funded Work by Subrecipient's Operators (Aug. 9, 2024)
3	P3A RFQ 2018-2, <i>Request for Qualifications for the Puerto Rico Electric Power Transmission and Distribution System</i> (Oct. 31, 2018)
4	LUMA, <i>Definitive Proposal Form 1.2 (Executive Summary)</i> (Nov. 25, 2019)
5	P3A, <i>Partnership Committee Minutes</i> (Dec. 20, 2019)
6	P3A, <i>Partnership Committee Report</i> (May 15, 2020)
7	<i>Puerto Rico Transmission & Distribution System Operation & Maintenance Agreement</i> (June 20, 2020) (the "OMA")
8	Letter from PREPA & P3A to FEMA & COR3 re Consent to Federal Funding (June 2, 2021)
9	<i>LUMA Procurement Manual v.2</i> (July 31, 2023)
10	<i>LUMA Procurement Toolkit v.1</i> (includes <i>LUMA Organizational Conflict of Interest Avoidance and Mitigation Plan v.2</i> (July 31, 2023))
11	LUMA Federal Clauses Certification (May 28, 2024)
12	Letter from COR3 to FEMA re LUMA's Performance of Federally Funded Work (includes Attachment 1, <i>Template - LUMA Request Authorization Self Performed Work</i> (Aug. 11, 2023))
13	<i>Secondment Agreement</i> (June 1, 2021); with Amendment 1 (May 31, 2023).
14	Quanta Workforce Solutions, LLC, <i>Template Assignment Agreement for Assignments to LUMA</i>
15	Letter from COR3 to FEMA re PREPA/LUMA Performance of Federally Funded Work (Aug. 12, 2022).
16	Letter from Danna E. Planas Ocasio (FEMA Region 2) to Manuel Laboy (COR3) re LUMA Performance of Federally Funded Work (Aug. 23, 2023).