



June 24, 2025

Mr. Andrew D'Amora
Acting Regional Administrator, Region 2
Federal Emergency Management Agency (FEMA)
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 (COR3)
Commonwealth of Puerto Rico
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RE: First Appeal – Seconded Labor Costs
Disaster: FEMA-4671-DR-PR (Hurricane Fiona)
Applicant: Puerto Rico Electric Power Authority
PA ID: 000-UA2QU-00
PACU ID: 34365
Project No.: 723085
Amount in Dispute: \$20,992,419.55

Dear Messrs. D'Amora and Soria Rivera:

The Puerto Rico Electric Power Authority ("PREPA"), through its agent LUMA Energy, LLC ("LUMA"), files this First Appeal of the April 25, 2025 Determination Memorandum issued by FEMA's Puerto Rico Recovery Office regarding the cost of LUMA's seconded labor in the performance of federally funded work (the "DM").¹ This First Appeal disputes both the basis for the Recovery Office's procurement noncompliance determination as well as the adequacy of its reasonable cost analysis used to disallow federal funds.

As explained in this First Appeal, the Recovery Office misapplied federal regulations, misconstrued contracts designed to facilitate Puerto Rico's ongoing and cost-effective disaster recovery efforts, acted inconsistent with FEMA's 2022 acknowledgement of the framework under which LUMA would perform work under its contract with PREPA, and relied upon a flawed cost analysis to determine reasonable costs. The resulting determination is exemplary of the kind of bureaucracy

¹ Attachment 1, FEMA Determination Memorandum re Project 723085 (Apr. 25, 2025) [hereinafter, the "DM"].

that President Trump seeks to eliminate from the Federal Government² and from FEMA in particular.³ The amount in controversy is \$20,992,419.55. However, if the Recovery Office is allowed to continue making these errors, the true financial and operational impact of this determination is far greater.

I. Introduction

The Recovery Office incorrectly decided that secondment agreements between LUMA (a contractor) and its Affiliates (as defined by LUMA's contract with PREPA) were required to comply with federal procurement regulations (applicable to grant recipients and subrecipients). After finding that the agreements failed to comply with those rules, the Recovery Office agreed to reimburse reasonable costs as a remedy for non-compliance then used a flawed cost analysis to determine reasonable costs. These decisions were based on a "high-level compliance review" that fundamentally misunderstood the contract between PREPA and LUMA, and misapplied the federal rules, resulting in a series of errors that, if sustained, threatens to have a catastrophic effect on PREPA's disaster recovery.⁴

A. LUMA's Secondment Agreements Do Not Violate Federal Procurement Standards Because the Federal Procurement Standards Do Not Apply

The DM fails to recognize that the contract between PREPA and LUMA, the Operations and Maintenance Agreement ("OMA")⁵, requires LUMA to serve dual roles. When acting as PREPA's agent (i.e., standing in the *subrecipient's* shoes), the OMA requires LUMA to comply with the federal procurement standards, as incorporated in LUMA's Procurement Manual.⁶ But the OMA also contemplates that LUMA is to perform work as PREPA's contractor.⁷ When self-performing work on PREPA's electric grid⁸ with its own workforce, LUMA is performing as a traditional *contractor*, **not** as a subrecipient (or an agent of one).⁹

² 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.

³ *Council To Assess the Federal Emergency Management Agency*, Executive Order 14, 180 (Jan. 24, 2025) ("The Federal responses to Hurricane Helene and other recent disasters demonstrate the need to drastically improve the Federal Emergency Management Agency's ("FEMA's) efficacy, priorities, and competence, including evaluating whether FEMA's bureaucracy in disaster response ultimately harms the agency's ability to successfully respond.").

⁴ Attachment 1, DM at 9.

⁵ See Attachment 7, *Puerto Rico Transmission & Distribution System Operation & Maintenance Agreement* (June 22, 2020) [hereafter, the "OMA"].

⁶ The LUMA Procurement Manual (Attachment 9, hereto) incorporates the federal procurement standards at 2 C.F.R. Part 200, Subpart D.

⁷ See Attachment 7, OMA at, e.g., §§ 4.2(k), 5.1, 5.5, 11.1, Annex I, Annex XI.

⁸ PREPA's electric grid is referred to herein as the "T&D system", and includes all transmission, distribution, and substation infrastructure.

⁹ See, e.g., Attachment 7, OMA at §§ 4.2(k), 5.1, 5.5, 5.14, 11.1, Annex I, Annex XI.

FEMA confirmed as much when in response to COR3's 2022 proactive request for guidance on the allowability of self-performed work¹⁰, FEMA approved the process for documenting self-performed work and required LUMA to "sign and submit a 'Federal Clauses Certification' confirming that it shall comply with all applicable **contract** provisions for **non-federal contracts** (NFCs) under federal awards."¹¹ This is a requirement for contractors, not recipients or subrecipients. The procurement standards in 2 C.F.R. Part 200 do **not** require contractors to comply with federal procurement standards when subcontracting work or otherwise require a contractor to enter into a secondment agreement through a competitive process.

The fact that LUMA does not enter into its secondment agreements as PREPA's agent is evident in that PREPA is not a party to them, and the labor provided by the agreements is for the benefit and direction of LUMA – not PREPA.¹² LUMA's seconded labor is part of LUMA's own workforce, which it has the discretion to employ to complete work.¹³ Seconded personnel are employees, not "contractors" or "subcontractors," in the traditional meaning of those terms. Like any other contractor performing work under a federally funded contract, the contractor's use of seconded employees is governed by internal corporate policies and direct employer oversight; the legal instruments documenting their arrangement do not trigger competitive procurement requirements.¹⁴

The Recovery Office previously approved the process for self-performed work, which expressly included seconded employees.¹⁵ But the analysis in the DM failed to appreciate that PREPA is not a party to the Secondment Agreement. Without a recipient or subrecipient as a party to the agreement, the federal procurement standards do not apply. It is also evident that the analysis in the DM did not consider the compliance measures that exist to mitigate conflicts of interest in the award of PREPA Contracts when LUMA is acting as PREPA's procurement agent. This First Appeal demonstrates that it is not possible for LUMA's use of seconded employees to violate the federal procurement standards, because those regulations do not apply.

¹⁰ Attachment 2, Letter from COR3 to FEMA re PREPA/LUMA Performance of Federally Funded Work (Aug. 12, 2022).

¹¹ Attachment 11, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work at 2 (Sept. 26, 2022).

¹² Attachment 19, QWS Secondment Agreement.

¹³ See Attachment 7, OMA at §§ 5.1, 11.1, Annex I § VII.

¹⁴ See, e.g., Government of Puerto Rico Human Resources Administration and Transformation Act, Act No. 8 of February 4, 2017, as amended; Labor Transformation and Flexibility Act, Act No. 4 of January 26, 2017, as amended.

¹⁵ Attachment 12, Letter from Manuel A.J. Laboy Rivera (COR3) to José G. Baquero (FEMA) re LUMA's Performance of Federally Funded Work (Aug. 11, 2023) ("For the avoidance of doubt, in the performance of self-performed work, LUMA may use its internal Force Account Labor, which may include a blend of LUMA seconded employees. However, LUMA shall provide to the P3 an estimate of the total internal Force Account Labor vs LUMA seconded workforce."); Attachment 13, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work (Aug. 23, 2023).

B. FEMA's Reasonable Cost Analysis Was Flawed and the Denied Costs Are Reasonable

As a remedy for what it incorrectly deemed procurement noncompliance, the Recovery Office decided to reimburse only those costs it considered reasonable. To determine reasonableness, it relied on one data point—comparing actual contractor hourly rates with hypothetical force account labor rates for a labor pool that did not exist at the time work was performed. In doing so, the Recovery Office used rates in the fictional model that were not consistent with applicable labor policy. Accordingly, this appeal includes a detailed multi-source cost analysis that is consistent with FEMA guidance and demonstrates that the cost incurred for LUMA's seconded employees to perform emergency work were not only reasonable, but below market.

The PREPA-LUMA public-private partnership was formed to allow access to private sector expertise and innovation to operate Puerto Rico's systems more efficiently and more reliably. The results of LUMA's cost analysis are consistent with what one would expect from a contractor providing services at cost without markup for profit, and consistent with the strategy developed by the Government of Puerto Rico to tackle the challenge of restoring and modernizing PREPA's T&D system using a private partner, while the system continues to be battered by disasters like Hurricane Fiona.

C. LUMA Sufficiently Documented Claimed Costs

The DM excluded four items from this project because they were performed outside the approved period of September 17, 2022 to November 16, 2022 for the 100% federal cost share.¹⁶ LUMA does not appeal that action. However, an additional 174 line items were excluded because no documents or information were found to support the claimed costs.¹⁷ LUMA includes Attachment 23 of this appeal, with the missing information, supporting the obligation of additional eligible costs in the amount of \$101,654.¹⁸

D. The Recovery Office's Decision is Irrational and Wasteful

LUMA's ability to leverage skilled labor from its affiliates at cost is cost-effective and 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.¹⁹ When selecting LUMA, the Puerto Rico Public Private Partnership Authority ("P3A") factored in vendors' ability not only to self-perform work, but to include seconded labor at cost without markup to do so.²⁰ LUMA's responsibilities as

¹⁶ See Attachment 1, DM at 12.

¹⁷ *Id.*

¹⁸ Attachment 23, FEMA Determination - Missing Information Analysis.xlsx.

¹⁹ Attachment 4, LUMA, *Definitive Proposal Form 1.2 (Executive Summary)* at 5, 8 (Nov. 25, 2019).

²⁰ Attachment 5, P3A, *Partnership Committee Minutes* (Dec. 20, 2019); Attachment 6, P3A, *Partnership Committee Report* at 4 (May 15, 2020).

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.²¹

Requiring LUMA to rely solely upon non-seconded employees and resources contracted from other sources even though the Commonwealth has already purchased the services of seconded employees from LUMA *at cost*, is inconsistent with the law, and irrational. It also directly contradicts the efficiency demanded by the President in his recent Executive Orders directed at the Nation's energy supply.²² If FEMA continues to take the unsupported positions in the DM, over 100 federally funded projects expected to be all or partially self-performed in 2025 will be at risk of being indefinitely delayed until qualified replacement resources can be retained or competitively procured. Limiting the use of seconded employees in federally funded work also deprives Puerto Rico of immediate access to lifesaving resources in the event of future emergencies and other declared disaster events. As demonstrated by its response to Hurricane Fiona, LUMA's ability to call on seconded employees in response to an emergency significantly improves its ability to rapidly restore service to our customers.

It is imperative for the rapid and efficient restoration of Puerto Rico's electric grid that FEMA Region 2 reverse the Recovery Office's decisions, which effectively prohibit LUMA's use of seconded employees when performing disaster recovery work for PREPA. For all the reasons stated in this First Appeal, LUMA, as PREPA's agent, requests that FEMA Region 2 rescind the April 25, 2025 DM and confirm that LUMA's secondment agreements are not subject to the federal procurement standards at 2 C.F.R. Part 200, Subpart D. Moreover, LUMA requests that FEMA approve PREPA's reasonable costs claimed in this project totaling \$50,463,048.99 incurred for the performance of eligible emergency work by LUMA's seconded labor. Given the impact of the Recovery Office's DM on both the speed and cost of the projects to restore PREPA's T&D system, LUMA further requests a meeting with you to answer any questions and expedite resolution of this appeal.

II. Background

A. Creation of the Public-Private Partnership

After PREPA entered bankruptcy in July 2017, the Government of Puerto Rico formed the Puerto Rico Public-Private Partnership Authority ("P3A").²³ One of P3A's tasks was to procure a private partner to operate PREPA's electric grid. P3A issued a *Request for Qualifications for the Puerto*

²¹ See OMA at §§ 1.1, 4.2(k), Annex XI.

²² 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.

²³ See generally, the Puerto Rico Electric Power System Transformation Act, Act No. 120-2018, as amended ("Act 120"); Puerto Rico Energy Public Policy Act, Act No. 17-2019 ("Act 17"); Puerto Rico Transformation and RELIEF Act, Act No. 57-2014, as amended ("Act 57").

Rico Electric Power Transmission and Distribution System on October 31, 2018.²⁴ The 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.²⁵ Respondents were required to demonstrate “experience operating a large electric utility” and “strong technical expertise, with a track record of high-quality operations.”²⁶ 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.”²⁷ 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.”²⁸

The RFQ also advised potential respondents that where federal grant funds were available for repair or construction work, “such work must be separately procured by or for the account of PREPA in full compliance with the requirements of the PPP Regulation and the procurement rules set forth in 2 C.F.R. Part 200 and applicable to procurement by PREPA.”²⁹ But, on November 15, 2019, P3A issued a revised OMA that no longer required “procurement” of all work related to the T&D system, only that work submitted for federal reimbursement be compliant with law, policy, and the Federal Funding Procurement Manual, **as applicable**.³⁰

B. P3A’s Selection of LUMA to Serve as Private Operator

After P3A issued the revised OMA text, a consortium comprised of ATCO Ltd (“ATCO”), Quanta Services Inc. (“Quanta”), and Innovative Emergency Management, Inc. (“IEM”) submitted a proposal that emphasized the expertise of the consortium members.³¹ From the start, the

²⁴ Attachment 3, P3A RFQ 2018-2, *Request for Qualifications for the Puerto Rico Electric Power Transmission and Distribution System* (Oct. 31, 2018) [hereinafter “RFQ”].

²⁵ *Id.* at 5.

²⁶ *Id.* at 7.

²⁷ *Id.* at 17.

²⁸ *Id.*

²⁹ *Id.* at 18.

³⁰ P3A, *Electric Power Transmission & Distribution System*, November 15, 2019 DRAFT OMA at § 5.9(c) <https://www.p3.pr.gov/t-d/electric-power-transmission-distribution-system>. Note not only was the Operator to complete the work in compliance with “applicable law” but also consistent with the Procurement Manual “as applicable,” indicating that P3A and PREPA envisioned situations in which the Operator would perform activities for which the Procurement Manual was *not* applicable.

³¹ Attachment 4, LUMA, *Definitive Proposal Form 1.2 (Executive Summary)* at 8 (Nov. 25, 2019).

consortium's intention was to hire PREPA talent, use talent from consortium members, and hire new talent from the labor market to staff a new standalone entity, LUMA:

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.³²

Ultimately, five Respondents submitted SOQs. Four were deemed qualified to participate in the RFP process, and three moved forward to 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]."³³ Notably, LUMA was not the only vendor to propose its own personnel and that of its affiliate to perform work. PSEG Puerto Rico LLC also proposed to use affiliate personnel:

Use of PSEG Affiliates for O&M Services: In order to fully utilize the capabilities of PSEG and its affiliated companies, affiliate personnel should not be treated as Subcontractors under the OMA. The OMA should explicitly allow for PSEG to use affiliate personnel to provide ServCo related O&M Services (at their hourly fully allocated cost rate without mark-up and that these costs would be a T&D Pass-Through Expenditure)...³⁴

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)."³⁵ 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

³² *Id.* at 5.

³³ Attachment 5, P3A, *Partnership Committee Minutes* (Dec. 20, 2019).

³⁴ PSEG Puerto Rico, LLC, Proposal for PREPA T&D System Public-Private Partnership at 35 (Nov. 25, 2019), https://docs.pr.gov/files/P3-PublicaPrivadas/Projects/Projects/TD%20-%20LUMA/RFP%20Submittals/PSEG/PSEG_Puerto_Rico_RFP_-_Final.pdf.

³⁵ Attachment 6, P3A, *Partnership Committee Report* at 4 (May 15, 2020).

safety of the people of Puerto Rico.”³⁶ Another factor was the advanced training offered to “**personnel across Quanta’s business lines**” including training provided to “more than 9,000 technical field workers per year at four campuses across the U.S.”³⁷ There is no doubt that the quantity and quality of Quanta’s human resources that would be available to PREPA through LUMA was a key factor in LUMA’s selection.

C. The OMA

The OMA, together with the Annexes and Exhibits attached thereto, is the entire agreement between P3A, PREPA, and LUMA with regard to the operation and maintenance of PREPA’s T&D system and supersedes any and all prior oral or written agreements, understandings, proposals, representations or warranties, including those contained in the RFP, the Proposal by Operator or its Affiliate and any amendments or supplements to the RFP or the Proposal.³⁸

1. Parties

The P3A procurement process for a private partner resulted in the OMA between LUMA Energy, LLC and LUMA Energy ServCo, LLC (collectively “LUMA”) as the Operator of PREPA’s T&D assets, P3A as PREPA’s agent Administrator (overseeing LUMA’s performance as Operator), and PREPA as 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).³⁹

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.⁴⁰ LUMA’s workforce is comprised of direct hire employees of and seconded employees to LUMA Energy ServCo, LLC.⁴¹ Under Puerto Rico law and the law of secondment generally, seconded employees are considered employees of the host company, in this case, LUMA Energy ServCo, LLC.⁴² LUMA also incurs the costs and expense of carrying out the

³⁶ *Id.*

³⁷ *Id.* at n.4 (emphasis added).

³⁸ See Attachment 7, OMA at § 20.4.

³⁹ See Attachment 7, OMA.

⁴⁰ The ManagementCo and ServCo structure was established to facilitate the transition of operator services from LUMA when the term of the OMA expires. Attachment 7, OMA at Annex II § XI, Annex III.

⁴¹ See OMA at §§ 1.1, 4.2(k), Annex XI.

⁴² See *infra*, n.125.

services under the OMA, which are reimbursed by PREPA at cost without markup for profit as “T&D Pass-Through Expenditures”.⁴³

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.⁴⁴ This includes “management, operation, maintenance, repair, restoration and replacement and other related services” in accordance with industry standards (the “O&M Services”).⁴⁵ The Scope of Services provides a non-exhaustive list of work included within the O&M Services, and distinguishes between several different types of operations activities, including “Day-to-Day Operation,”⁴⁶ “General T&D System Operation Services,”⁴⁷ and “Emergency Response”.

Relevant to this emergency work project for Hurricane Fiona, the O&M Services include the following Emergency Response activities:

- storm monitoring and mobilization of Operator or Subcontractor’s workforce (including workforce available under any Mutual Assistance Agreements) in connection with anticipated storms and other electrical system emergencies;
- system condition monitoring;
- public safety activities;
- restoration of the T&D system to pre-emergency conditions; and
- preparing and analyzing all information and data required to support qualification for, and/or claims for reimbursement from, FEMA, CDBG (HUD), and similar federal funds, for costs incurred due to Outage Events (including funds for emergency response and/or permanent work).⁴⁸

The O&M Services also include activities such as performing and supervising Capital Improvements, including engineering and related design and construction management services.⁴⁹ In its performance of System Operation Services, which includes Day-to-Day Operation and General T&D System Operation Services, but not Emergency Response, LUMA is directed to evaluate opportunities to outsource specific activities that will provide greater efficiencies and

⁴³ Attachment 7, OMA at Annex XI.

⁴⁴ *Id.* at § 5.1.

⁴⁵ *Id.*; see also *id.* at Annex I.

⁴⁶ “Operator shall be responsible for the day-to-day operation of the T&D System, including” such things as maintaining a culture of safety, managing customer relationships, inspecting the T&D system, and routine maintenance. *Id.* at Annex I § I.B.

⁴⁷ “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.” *Id.* at Annex I § I.A.

⁴⁸ *Id.* at Annex I § VII.

⁴⁹ See *id.* at § 5.5, Annex I § I(A)(2).

value to customers and grid operation within budget and regulatory constraints.⁵⁰ LUMA is not required to outsource, or even consider outsourcing, Emergency Response. Nevertheless, the OMA grants LUMA the “right, but not the obligation” to contract and subcontract to perform the O&M Services.⁵¹ Thus, it is within the scope of O&M Services for LUMA to manage *and perform* both emergency work and permanent work.

LUMA is required to employ “ServCo Employees” “as are necessary to provide the O&M Services.”⁵² “ServCo Employees” include (1) former PREPA employees hired by ServCo; and (2) “Other Employees” which include (a) any employees of Operator (i.e., LUMA direct hires) and (b) any employees of “Affiliates” (i.e., seconded employees).⁵³ The methods by which LUMA hires the ServCo employees are governed by the OMA and Puerto Rico law, and do not trigger procurement procedures.⁵⁴ The OMA makes clear that the Government of Puerto Rico expected LUMA to perform work using its own workforce (including seconded labor from LUMA Affiliates) and, where appropriate, evaluate opportunities for outsourcing.

3. PREPA Contracts and LUMA Subcontracts

Article 11 of the OMA authorizes LUMA to use both Subcontractors and Contractors to perform O&M Services:

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 – 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. ... Operator agrees that any Contractors engaged to perform O&M Services shall be required to comply with the applicable provisions of the Federal

⁵⁰ *Id.* at Annex I § I.J. (examples provided for outsourcing consideration were fleet management, vegetation management, and customer service call center).

⁵¹ *Id.* at § 11.1.

⁵² *Id.* at § 4.2(k).

⁵³ *Id.*

⁵⁴ *See, e.g.,* Government of Puerto Rico Human Resources Administration and Transformation Act, Act No. 8 of February 4, 2017, as amended; Labor Transformation and Flexibility Act, Act No. 4 of January 26, 2017, as amended; Attachment 7, OMA at Article 4.

Funding Procurement Manual or Non-Federal Funding Procurement
Manual, as applicable.⁵⁵

The OMA intentionally distinguishes between agreements that LUMA enters into as *agent of PREPA* (standing in the shoes of the *subrecipient*) and agreements LUMA enters into *on its own behalf* to perform its obligations under the OMA (i.e., self-performed work). 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 federal regulation:

“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 200.23.⁵⁶

“Subcontract” means an agreement or purchase order by Operator to a Subcontractor or a Subcontractor to Operator, as applicable.⁵⁷

When contracting as PREPA (i.e., when PREPA is a party to the contract), LUMA must comply with LUMA’s Federal Funding Procurement Manual, as applicable, but that requirement is not found in the paragraph related to Subcontractors. 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.⁵⁸

This distinction 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.⁵⁹ To facilitate LUMA’s ability to procure Contracts as PREPA’s agent, LUMA developed and P3A approved a Procurement Manual “to document the procurement policies and procedures that [LUMA] will use **when**

⁵⁵ Attachment 7, OMA at § 11.1(a)-(b).

⁵⁶ Section 2.1 of the OMA excludes LUMA itself from the definition of “Contractor.”

⁵⁷ Attachment 7, OMA § 1.1 (emphasis added). Notably, the parties to the OMA took extra effort to mitigate against improper misconstruction of secondment agreements as PREPA Contracts, by including the following within the definition of “Subcontractor” at § 1.1 (“For the avoidance of doubt: (i) Subcontractors include 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,...”).

⁵⁸ *Id.* at § 11.1(c) (emphasis added).

⁵⁹ 2 C.F.R. § 200.1 (defines a “contract” subject to federal procurement standards as “a legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the project or program under a Federal award”) (unless otherwise noted, all references to 2 C.F.R. Part 200 herein are to the regulations as they existed on September 21, 2022, when Hurricane Fiona was declared a disaster for Puerto Rico).

procuring goods and services as agent for [PREPA].⁶⁰ The Procurement Manual was written to comply with 2 C.F.R. Part 200 and FEMA guidance.⁶¹

4. LUMA Employees

As noted above, the OMA outlines how LUMA (specifically, ServCo) is to hire personnel.⁶² Section 4.2(k) directs LUMA to give priority to hiring former PREPA employees, but that “On the Service Commencement Date and during the Term” of the OMA “ServCo shall employ such other employees, including any employees of Operator or any of its Affiliates...as are necessary to provide the O&M Services.”⁶³ These employees are defined in the OMA as “Other Employees.”⁶⁴ LUMA, Quanta, and ATCO (and the affiliates of Quanta and ATCO) are “Affiliates” under the OMA.⁶⁵

5. 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 hires an employee or enters into a Subcontract, those costs are incurred by LUMA (specifically, ServCo) to provide the O&M Services. Costs to provide the O&M Services are reimbursed by PREPA at cost, without a markup for profit, as “T&D Pass-Through Expenditures.”⁶⁶ Annex XI of the OMA provides a non-exhaustive list of T&D Pass-Through Expenditures that LUMA might incur in the course of providing O&M Services and then pass through to PREPA without markup for profit.⁶⁷ The costs listed include (1) the wages, salaries, bonuses, and benefits incurred by ServCo in performing O&M Services, (2) the “costs of all subcontracted and **seconded employees**”, and (3) “Subcontractor costs.”⁶⁸ These three categories cover the costs of LUMA’s direct hire employees, employees of Affiliates seconded to LUMA, and amounts invoiced to LUMA by its Subcontractors, respectively.

Thus, the OMA expressly contemplates that LUMA will use the employees of its Affiliates and pass those costs through to PREPA, whether as “subcontracted employees,” “seconded employees,” or “subcontractors.” Designation as secondees or subcontractors does not change their allowability under the OMA or the way the costs are passed through to PREPA.

⁶⁰ See Attachment 7, OMA at § 4.1(e)-(f); Attachment 9, *LUMA Procurement Manual*, v.2, at 3 (July 31, 2023).

⁶¹ See generally Attachment 9, *LUMA Procurement Manual*, v.2 (July 31, 2023).

⁶² See Attachment 7, OMA at Article 4 (“Front-End Transition Period”).

⁶³ *Id.* at § 4.2(k).

⁶⁴ See *id.* at § 4.2(k), § 1.1.

⁶⁵ See *id.* at § 1.1 (definitions of “Affiliate” and “Equity Participant”).

⁶⁶ See *id.* 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.

⁶⁷ See *id.* at § 7.2, Appendix XI.

⁶⁸ See *id.* at Appendix XI.

By passing through its costs to provide O&M Services without mark-up for profit, it means that with secondment, the Government of Puerto Rico accesses the extensive employee pool of LUMA Affiliates, with their expertise and experience when needed – without having to pay contractor profit. In other words, where an Affiliate would normally recover an employee’s cost at their fully loaded rate plus profit, it *cannot* do that with LUMA. 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. Neither the Affiliate nor LUMA profits from providing seconded employees. This allows PREPA access to private sector resources, expertise, and innovation at lower cost.

D. Mitigating Organizational Conflicts of Interest

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.⁶⁹ Consistent with the expectations FEMA included in the DM to “identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible and avoid or mitigate potential conflicts,”⁷⁰ LUMA, P3A, and COR3 were sensitive to the possibility that an OCI can arise when a private partner procures public contracts. In 2023, an Organizational Conflict of Interest Avoidance and Mitigation Plan (“OCIAMP”) was created to avoid and mitigate that risk.⁷¹ Prior to that (and at the time the costs at issue were incurred) there was no mechanism by which LUMA could award a PREPA Contract to an Affiliate.

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 3PPO services were 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.⁷² LUMA’s Affiliates are disqualified from PREPA 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. LUMA’s participation during the process is strictly limited and incorporates the use of masking identifiers to disguise vendor identities in those instances where the 3PPO must consult with LUMA. The

⁶⁹ See Attachment 9, *LUMA Procurement Manual* v.2 at 7-8, 14, 31.

⁷⁰ Attachment 1, DM at 8.

⁷¹ 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.

⁷² See *id.* at 51.

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. Communications with FEMA Regarding Self-Performed Work

On June 1, 2021, following execution of the OMA and the Front-End Transition period, LUMA assumed control of PREPA's T&D system. In its role as Operator, LUMA operates and maintains PREPA's electric grid. Where PREPA would have performed repairs with its force account labor or hired contractors to do so prior to 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.

Due to the unusual nature of the PREPA/LUMA relationship in the FEMA Public Assistance context, confusion arose among the Puerto Rico entities as to whether PREPA's costs for LUMA's self-performed work should be submitted to FEMA as PREPA's Force Account Labor ("FAL") or as contract costs, and to what extent LUMA would self-perform work for construction projects.

Consistent with its role as Recipient, COR3 proactively sought FEMA's concurrence as to the Public Assistance eligibility of LUMA self-performed construction work.

1. Request to FEMA for Input

When seeking concurrence from FEMA, COR3 noted that although the RFQ contained language limiting the performance of repair or construction work, the resulting contract, the OMA, "requires LUMA to perform and supervise capital improvements," allows "LUMA...[to] manage and perform federally funded construction, engineering and design work," and "provides that LUMA shall also be responsible for contracting for" federally funded capital improvements.⁷³ COR3 advised FEMA that it had considered this change and "determined that if LUMA self-performs eligible [Public Assistance] work in compliance with all applicable policies and regulations, the same would be eligible for reimbursement."⁷⁴ COR3 described the parameters it would implement to ensure the eligibility of self-performed work under the federal cost principles (that is, 2 C.F.R. Part 200, Subpart E—not Subpart D, which is where the procurement standards are found) and submitted its "analysis and approach" to FEMA for its "knowledge and consideration."⁷⁵

⁷³ Attachment 2, Letter from COR3 to FEMA re PREPA/LUMA Performance of Federally Funded Work (Aug. 12, 2022) at 4-5. Although not included in COR3's letter, the RFQ was followed by the RFP. The RFP did not include the language quoted above from the RFQ, or other similar limiting language regarding the performance of work. Additionally, P3A revised the draft OMA to change this provision before receiving vendor responses, and per § 20.4 of the executed OMA, the language of the OMA superseded the language of the RFQ.

⁷⁴ *Id.* at 5.

⁷⁵ *Id.* at 6.

Approximately one week after Hurricane Fiona made landfall, FEMA responded to COR3, acknowledging COR3's proposed approach and advising that PREPA/LUMA would have to provide supporting documentation for submitted costs.⁷⁶

A year later, in August 2023, COR3 sent another letter to FEMA with a proposed form to be used by LUMA to request authorization to self-perform construction work and an accompanying document that outlined the "criteria" for the kind of self-performed work that would require P3A's prior authorization versus that which would only require prior notification to P3A.⁷⁷ The proposed authorization form sent to FEMA, and the "Self-Performed Work Authorization Criteria" document that accompanied it, specifically stated, **"For the avoidance of doubt, in the performance of self-performed work, LUMA may use its internal Force Account Labor, which may include a blend of LUMA seconded employees."**⁷⁸ In response, FEMA acknowledged the "approved process."⁷⁹

2. FEMA Determines LUMA is a Contractor and Requests Information About Seconded Employees

As LUMA began to submit labor projects containing self-performed work, the Recovery Office issued requests for information ("RFI"), and on August 9, 2024, sent a letter providing notice, clarification, and a further RFI with general applicability to FEMA-4339-DR-PR and FEMA-4671-DR-PR.⁸⁰ In the letter, the Recovery Office notified COR3 that it had "re-assessed the newly submitted administrative requirements related to LUMA self-performed work and procedures, and is formally requesting from COR3/PREPA a response to the open RFI items" related to seconded employees.⁸¹ Also in this letter, FEMA for the first time confirmed that PREPA's costs for LUMA's labor would not be treated as PREPA's FAL, but instead as contract costs: "In the case of PREPA and LUMA, LUMA is the Subrecipient's contractor and authorized representative; it is not PREPA's force account."⁸²

3. LUMA Responds to FEMA's RFI Regarding Seconded Labor.

LUMA provided an 18-page explanation in response to the RFI, including copious backup documentation detailing the procurement of a private operator, the award of the OMA, language in the OMA that supports self-performed work and use of secondees, correspondence defining

⁷⁶ Attachment 11, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work (Sept. 26, 2022).

⁷⁷ Attachment 12, Letter from Manuel A.J. Laboy Rivera (COR3) to José G. Baquero (FEMA) re LUMA's Performance of Federally Funded Work (Aug. 11, 2023).

⁷⁸ *Id.* at Attachment 1 - Template- Luma Request Authorization Self Performed Work at 1, n.2 (emphasis added).

⁷⁹ Attachment 13, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work at 1 (Aug. 23, 2023).

⁸⁰ Attachment 14, Letter from Danna E. Planas Ocasio (FEMA) to Manuel Laboy (COR3) re Performance of Federally Funded Work by Subrecipient's Operators (Aug. 9, 2024).

⁸¹ *Id.* at 1.

⁸² *Id.* at 3.

the parameters of self-performed work, and the history of LUMA's and its Affiliates' use of seconded labor.⁸³ Within the RFI Response, LUMA explained that it does not consider seconded employees to be subcontractors or the relationship between LUMA and its Affiliates providing the seconded employees to be contractual.⁸⁴

4. FEMA Issues December 27, 2024 Determination of Procurement Non-Compliance

On December 27, 2024, FEMA responded with a letter communicating a determination of procurement non-compliance that is in large part identical to language in the DM. In both decisions, FEMA said:

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 is a contract in which Quanta and its affiliates are providing seconded employees and transferring the employment costs of wages and benefits to LUMA. As a contract, the Secondment Agreement is subject to the Federal procurement rules applicable to state entities.⁸⁵

The December 27 letter included a notice of the right to appeal pursuant to 44 C.F.R. § 206.206, so LUMA timely submitted, on behalf of PREPA, a First Appeal to COR3 explaining among other things, that whether LUMA's secondment agreements were subcontracts (as it appeared FEMA had determined) or merely intra-entity agreements, in either case, the use of seconded labor is allowable under the federal procurement standards, the LUMA Procurement Manual, and the OMA. The same day, FEMA's Director of the Puerto Rico Recovery Office e-mailed COR3, PREPA, and LUMA directing that the December 27 letter was not appealable and that the right of appeal would not be triggered until FEMA issued a determination memo denying costs.⁸⁶

⁸³ Attachment 15, LUMA Response to FEMA RFI re Seconded Labor (Aug. 22, 2024).

⁸⁴ *Id.* at n.23.

⁸⁵ Attachment 16, Letter from José G. Baquero (FEMA) to Manuel A.J. Laboy Rivera (COR3) re Performance of Federally Funded Work at 2 (Dec. 27, 2027). At this point, FEMA had now determined that (1) LUMA is a contractor; and (2) the Secondment Agreement between LUMA and QWS is a "contract".

⁸⁶ Attachment 17, E-mail from Andrés R. García Martínó (FEMA) to Eduardo Soria (COR3), et al. re Seconded Employees (Feb. 25, 2025).

5. FEMA Issues Letter Affirming Procurement Non-Compliance

On March 7, 2025, the Recovery Office issued a letter affirming that its December 27 letter was not appealable and providing its “reanalysis” of the OMA and other documents.⁸⁷ As a result of its reanalysis, the Recovery Office shared that:

It is evident for FEMA that LUMA acted and acts as PREPA’s agent, more specifically for work being performed for Disaster Related Damages where reimbursement for Federal funds will be sought to pay for those services. The State and the Subrecipient have always emphasized, both in the OMA and all throughout different communications and representations to FEMA, their intent to adhere and comply to the 2 C.F.R. procurement rules whenever Federally funded projects are involved.⁸⁸

The sole support for this sweeping observation was a citation to COR3’s August 12, 2022 letter that proactively sought FEMA’s guidance on the eligibility of LUMA’s self-performed work. FEMA cited to COR3’s letter as if COR3 took the position that LUMA was required to competitively procure all federally-funded construction work. But, as explained above, COR3 took exactly the opposite position in that letter.⁸⁹ COR3’s letter advised FEMA that it believed self-performed work is eligible for reimbursement when such self-performed work comports with the federal cost principles.⁹⁰

The Recovery Office continued its letter with a position that ignores LUMA’s multiple roles under the OMA, and incorrectly states that LUMA was acting as a purchasing agent of PREPA when procuring secondment agreements.⁹¹ As described above and discussed further below, LUMA enters into secondment agreements in its own capacity. Secondment agreements are neither “procured” nor are they “Contracts” under the OMA or 2 C.F.R. § 200.1 (formerly § 200.22) and thus are not subject to the federal procurement standards. The Recovery Office concluded its

⁸⁷ Attachment 18, Letter from Andrés R. García Martínó (FEMA) to Mary Carmen Zapata (PREPA) re Request for Meeting Regarding December 27, 2024 FEMA Letter (Mar. 7, 2025).

⁸⁸ *Id.* at 1-2.

⁸⁹ Attachment 2, Letter from COR3 to FEMA re PREPA/LUMA Performance of Federally Funded Work (Aug. 12, 2022) (explaining that despite that the RFQ originally contemplated that construction work would be competitively procured, the OMA expressly permitted LUMA to self-perform work and that COR3 determined that self-performed work could be eligible for Public Assistance reimbursement if it met the requirements of the federal cost principles).

⁹⁰ The Recovery Office’s March 7, 2025 letter appears to conflate the procurement standards at 2 C.F.R. Part 200, Subpart D, which contain the requirements applicable to competition and other procurement requirements, with the cost principles at 2 C.F.R. Part 200, Subpart E, which contain the principles that form the basis for determining allowable costs.

⁹¹ Attachment 18, Letter from Andrés R. García Martínó (FEMA) to Mary Carmen Zapata (PREPA) re Request for Meeting Regarding December 27, 2024 FEMA Letter (Mar. 7, 2025).

letter explaining that its decisions are not appealable until denial of funding via determination memo.

6. FEMA Issues the DM

On April 25, 2025, FEMA issued the DM for Project 723085 that is the subject of this appeal.⁹² In the DM, the Recovery Office determined the use of seconded labor was noncompliant with the federal procurement standards.⁹³ As a remedy, the DM indicated FEMA would reimburse those costs it determines are reasonable and allowable.⁹⁴ The Recovery Office undertook a cost analysis and developed “comparable FY2023 labor rates” by taking 2018 rates for PREPA’s FAL, applying an inflation factor, and adding a fringe benefit rate.⁹⁵ Based on its analysis, FEMA determined that while costs from LUMA and ATCO were reasonable, the costs claimed for seconded employees from Quanta affiliates were 63% higher than the rate calculated by FEMA.⁹⁶ The Recovery Office found the difference to be unreasonable.

FEMA validated only \$11,936,081.83 of costs claimed for seconded employees from Quanta affiliates as reasonable, denying the remaining \$20,992,419.55 of incurred actual costs.⁹⁷ The DM is based on the false premise that 2 C.F.R. § 200.317 requires LUMA’s seconded labor to be competitively procured and a fatally flawed cost analysis that uses a single, fictional comparator unavailable in the market as the benchmark for reasonableness.

III. Argument

The DM is rife with errors, leading to a series of determinations including a faulty reasonable cost determination that must be overturned.

A. LUMA Does Not Enter Into Secondment Agreements as PREPA’s Agent

The OMA directs LUMA to perform the O&M Services, which include the Emergency Response activities performed in response to Hurricane Fiona.⁹⁸ In its performance of System Operation Services, which includes Day-to-Day Operation and General T&D System Operation Services, but not Emergency Response, LUMA is directed to evaluate opportunities to outsource specific activities that will provide greater efficiencies and value to customers and grid operation within budget and regulatory constraints.⁹⁹ LUMA is not required to outsource, or even consider

⁹² See generally Attachment 1, DM.

⁹³ *Id.* at 4, 7-10.

⁹⁴ *Id.* at 10.

⁹⁵ *Id.* at 11.

⁹⁶ *Id.* at 12.

⁹⁷ *Id.*

⁹⁸ Attachment 7, OMA at Recitals, 5.1, Annex I (generally and at § VII specifically).

⁹⁹ Attachment 7, OMA at Annex I § I.J. (examples provided for outsourcing consideration were fleet management, vegetation management, and customer service call center.)

outsourcing, Emergency Response activities.¹⁰⁰ Nevertheless, the OMA grants LUMA the “right, but not the obligation” to contract and subcontract to perform the O&M Services.¹⁰¹ The OMA makes clear that the Government of Puerto Rico expected LUMA to perform work using its own workforce (including seconded labor from LUMA Affiliates) and, where appropriate, evaluate opportunities for outsourcing. Thus, although LUMA is authorized to act as PREPA’s agent, it is within the scope of O&M Services for LUMA to manage *and perform* both emergency work and permanent work as PREPA’s contractor in its own capacity and not as PREPA’s agent.

To perform the O&M Services, LUMA employs “ServCo Employees” “as are necessary to provide the O&M Services.”¹⁰² “ServCo Employees” include (1) former PREPA employees hired by ServCo; and (2) “Other Employees” which include (a) any employees of Operator (i.e., LUMA direct hires) and (b) any employees of “Affiliates” (i.e., seconded employees).¹⁰³ The methods by which LUMA hires the ServCo employees are governed by the OMA and Puerto Rico law, and do not trigger procurement procedures.¹⁰⁴

In addition to direct hiring, LUMA enters into secondment agreements to supplement its workforce with the extensive employee pool of LUMA Affiliates, with their expertise and experience when needed, as it had committed to doing in its proposal. The Secondment Agreement under which the costs at issue are denied is “by and between Quanta Workforce Solutions, LLC [“QWS”], a Delaware limited liability company..., and LUMA Energy ServCo, LLC, a Puerto Rico limited liability company.”¹⁰⁵ PREPA is not a party to the QWS Secondment Agreement – LUMA enters into these agreements on its own behalf, not as PREPA’s purchasing agent.

Not only is PREPA not a signatory to secondment agreements, but the terms of the agreements also clearly articulate that the employee is assigned to and performing services for *LUMA*. For example, the QWS Secondment Agreement provides:

"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

¹⁰⁰ *Id.* The language applicable to outsourcing are in § I of Appendix I, while the language applicable to Emergency Response activities is in § VII.

¹⁰¹ *Id.* at § 11.1.

¹⁰² *Id.* at § 4.2(k).

¹⁰³ *Id.*

¹⁰⁴ See, e.g., Government of Puerto Rico Human Resources Administration and Transformation Act, Act No. 8 of February 4, 2017, as amended; Labor Transformation and Flexibility Act, Act No. 4 of January 26, 2017, as amended; Attachment 7, OMA at Article 4.

¹⁰⁵ Attachment 19, QWS Secondment Agreement at 1.

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, 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...¹⁰⁶

Any argument that a contractual relationship exists 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).¹⁰⁷ PREPA lacks any control over the employees seconded to LUMA.¹⁰⁸

LUMA's secondment agreements unequivocally vest 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*. QWS, for example, is not being hired to do a job; specific employees are being seconded from QWS. QWS does not have the ability to direct the means and manner in which a specific project is performed. Specifically, § 1.3 of the QWS 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.¹⁰⁹

Finally, this Secondment Agreement acknowledges that although the seconded employees remain employed by their original employer, while they are on secondment working for LUMA's benefit

¹⁰⁶ *Id.* at § 2.2.

¹⁰⁷ See generally the Puerto Rico Electric Power System Transformation Act, Act No. 120-2018, as amended ("Act 120"); Puerto Rico Energy Public Policy Act, Act No. 17-2019 ("Act 17"); Puerto Rico Transformation and RELIEF Act, Act No. 57-2014, as amended ("Act 57").

¹⁰⁸ 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 power to control and direct individuals in performance of their work); *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").

¹⁰⁹ Attachment 19, QWS Secondment Agreement at § 1.3.

in Puerto Rico, they are LUMA employees under the laws of the Commonwealth and the OMA.¹¹⁰ In the words of the U.S. Supreme Court, they are LUMA's "pro hac vice" (i.e., in this circumstance) employees during secondment.¹¹¹

LUMA's secondment agreements are 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 by PREPA as T&D Pass Through Expenditures in Annex XI of the OMA.¹¹² "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]..."¹¹³ Secondment agreements are, under the terms of the OMA, the mechanism by which LUMA hires "seconded employees" or a LUMA Subcontract. PREPA is not a party to the secondment agreements, and LUMA does not enter into them as PREPA's agent.

B. Not All Contracts Are Subject to the Federal Procurement Standards

The DM 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."¹¹⁴ The DM also says "As a contract, the Secondment Agreement is subject to the Federal procurement rules applicable to state entities", referencing a footnote from its December 27 letter that said, "The secondment agreement certainly appears to be a legal instrument with clearly established acts, duties, and obligations among the signatories[.]"¹¹⁵ The DM's conclusion is incorrect. Not every legal instrument is a "Contract" as defined in 2 C.F.R. § 200.1 and thus subject to the federal procurement standards. This statement in the DM failed to consider LUMA's role as a contractor when self-performing work on PREPA's electric grid.

In the context of self-performed work, LUMA is performing as a traditional *contractor*, not as a subrecipient (or an agent of one). FEMA confirmed as much by requiring LUMA to "sign and submit a 'Federal Clauses Certification' confirming that it shall comply with all applicable **contract** provisions for **non-federal contracts** (NFCs) under federal awards."¹¹⁶ This is a requirement for contractors, not recipients or subrecipients. The procurement standards at 2 C.F.R. Part 200, Subpart D do not require contractors to comply with federal procurement standards when

¹¹⁰ *Id.* at § 1.6

¹¹¹ *Standard Oil Co.*, at 221.

¹¹² Attachment 7, OMA at § 4.2(k).

¹¹³ *Id.* at § 1.1.

¹¹⁴ Attachment 1, DM at 8.

¹¹⁵ *Id.* at 7.

¹¹⁶ Attachment 11, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work at 2 (Sept. 26, 2022); Attachment 13, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work (Aug. 23, 2023).

subcontracting work or otherwise require a contractor to source its workforce through a competitive process.

C. LUMA's Secondment Agreements Are Not Subject To, and Therefore Do Not Violate, Federal Procurement Standards

The DM 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 is a contract in which Quanta and its affiliates are providing seconded employees and transferring the employment costs of wages and benefits to LUMA."¹¹⁷

FEMA reviewed the Secondment Agreement between LUMA and QWS in the context of 2 C.F.R. § 200.331, *Subrecipient and contractor determinations*. But that regulation 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."

With respect to FEMA Public Assistance, COR3 is the Recipient, and PREPA is the Subrecipient. But, as discussed in Section III.A above, neither COR3 nor PREPA are parties to LUMA's secondment agreements. Because neither the Recipient nor Subrecipient are parties to the QWS Secondment Agreement, 2 C.F.R. § 200.331 does not apply. Neither LUMA nor QWS is "the party receiving the funds" from FEMA.

To the extent 2 C.F.R. § 200.331 could be used to inform the presence of a procurement relationship, a procurement relationship would exist when the contractor provides the goods and services within normal business operations; provides similar goods or services to many different purchasers; normally operates in a competitive environment; provides goods or services that are ancillary to the operation of the Federal program; and is not subject to compliance requirements of the Federal program as a result of the agreement.

QWS does not provide secondment services to many different purchasers in a competitive environment. The agreement between LUMA and QWS is an inter-entity resource sharing agreement and not available to other purchasers in the marketplace. QWS is comprised of employees from many different Quanta operating companies. It exists to facilitate secondments among Quanta affiliates. Accordingly, if using 2 C.F.R. § 200.331 as a test, there is no procurement relationship between LUMA and QWS.

Similarly, the OMA does not require LUMA's secondment agreements to be subject to the federal procurement standards. The OMA requires that when entering into a "Contract" as agent for Owner, including Contracts as defined in 2 C.F.R. § 200.1 (formerly 2 C.F.R. § 200.22), LUMA must

¹¹⁷ *Id.* at 7 (internal references omitted).

comply with the federal procurement standards.¹¹⁸ But, it imposes no such requirements on LUMA when entering into an agreement or purchase order on its own behalf as Operator. For those transactions, the federal procurement standards do not apply.¹¹⁹ To reiterate the point, to be a “Contract” under the OMA, PREPA must be a party, and, as already demonstrated, PREPA was not a party to the QWS Secondment Agreements.¹²⁰

Even the federal rules themselves would not consider LUMA’s secondment agreements to be contracts subject to the federal procurement standards. Under the federal rules in effect at the time of the disaster, “Contract” was defined at 2 C.F.R. § 200.1 to mean “a legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the project or program under a Federal award.”¹²¹ LUMA’s secondment agreements are not contracts subject to the federal procurement standards for the same reason that they are not Contracts under the OMA, and that 2 C.F.R. § 200.331 does not apply – neither COR3 nor PREPA, the recipient and subrecipient, are parties to LUMA secondment agreements. LUMA entered into the QWS Secondment Agreements on its own behalf, not as PREPA’s agent.

FEMA can confirm the distinction between a PREPA “Contract” entered into by LUMA as PREPA’s agent, and a contract (i.e., Subcontract) entered into on LUMA’s own behalf by looking at the other costs that LUMA has submitted for competitively procured work. In each instance where LUMA awards a contract to which PREPA is a party, either LUMA or the 3PPO carry out a competitive procurement, and the language of the contract notes PREPA as a party and explains the relationship between PREPA and LUMA.

Because the federal procurement standards do not apply, all statements in the DM finding noncompliance with them are incorrect, including the statement that “the Applicant 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”.¹²² The DM is based on the false premise that the LUMA’s secondment agreements are subject to the federal procurement standards, which, as discussed throughout this appeal, they are not.

¹¹⁸ Attachment 7, OMA § 1.1. Of note, Section 2.1 of the OMA excludes LUMA itself from the definition of “Contractor.”

¹¹⁹ *See id.*

¹²⁰ *See* Attachment 19, QWS Secondment Agreement (June 1, 2021) with Amendment 1 (May 31, 2023).

¹²¹ 2 C.F.R. § 200.1.

¹²² Attachment 1, DM at 10. The statement in the DM that “The OMA, and the Secondment Agreement are prepositioned contracts, but none of them provide a scope of work that specifically cover the emergency work claimed by the Applicant, with details of rate or costs” is also inaccurate, as the emergency work performed in this project was performed within the scope of the OMA at § 5.14 and Annex I § VII.

D. Use Of Seconded Employees Is Consistent with Puerto Rico Law

The Recovery Office's "high-level compliance review" is also inconsistent with applicable law. Seconded personnel are employees, not "contractors" or "subcontractors," in the traditional meaning of those terms. Their employment remains governed by internal corporate policies and direct employer oversight. In Puerto Rico, secondments are expressly recognized and legitimized by two key statutes:

- Act No. 8-2017, which facilitates secondments in the public sector to promote government efficiency, expertise sharing, meet temporary needs, and enhance interagency collaboration.¹²³ These secondments are referred to as "destaques" in Spanish.
- Act No. 4-2017, which allows secondments across entities in the private sector for the same reasons.¹²⁴

Both statutes pursue the same goals. They regulate the temporary assignment of employees to different organizations or departments within related entities while maintaining the original employment relationship.

A secondment is a legitimate and distinct employment practice that involves the temporary assignment of an employee to another entity within the same corporate family or conglomerate, where both the original employer and host entity function as co-employers. Crucially, the original employer retains legal control and full responsibility to pay the employee's wages and benefits; but while the employee is seconded, the employee acts at the direction of the host company, in this case, ServCo (LUMA).¹²⁵ During the secondment, the host company reimburses the original employer for the original employer's costs incurred.

Courts draw a firm line between secondment and other forms of contracting by analyzing the nature and structure of the employment relationship. Secondment is consistently treated as an internal reassignment within the same corporate framework, in which the original employer maintains authority over the employee and no replacement of internal staff with external labor occurs. There is no substitution of internal employees with external labor. It remains an internal, temporary personnel assignment conducted under the legal framework of a single corporate entity or affiliated group. In contrast, contracting or subcontracting involves transferring work—

¹²³ *Government of Puerto Rico Human Resources Administration and Transformation Act*, Act No. 8 of February 4, 2017, as amended.

¹²⁴ *Labor Transformation and Flexibility Act*, Act No. 4 of January 26, 2017, as amended.

¹²⁵ See *Rivera-Vega v. ConAgra Inc.*, 70 F.3d 153, 163 (1st Cir. 1995); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993).

—to an outside company, which then assumes full responsibility for hiring, supervising, and paying employees to perform that work. This distinction has been consistently affirmed in case law.¹²⁶

When a secondment, or “destaque”, has been used to perform work subsequently submitted for Public Assistance reimbursement by the Government of Puerto Rico, to our knowledge it has not been construed as external contracting or subcontracting. Further, to our knowledge, FEMA has not denied reimbursement to the Government of Puerto Rico on those grounds for their payroll costs. The same principle or reasoning applies to LUMA’s secondments in the private sector, as they share the same legal foundation. The language in the QWS Secondment Agreement cited by FEMA reflects this legal construct.

Based on PDAT’s “high-level” review and vague determinations, an imprecise and inaccurate DM was issued that, if not rescinded, threatens the value of the public-private partner framework as contemplated by the Government of Puerto Rico. As demonstrated by LUMA’s cost analysis, this decision will increase the time and costs for Puerto Rico’s disaster recovery by preventing PREPA from accessing a labor pool that it competitively procured from LUMA. In addition, the decision could set a dangerous precedent by preventing government entities in a similar scenario from seeking federal reimbursement for the cost of labor hours incurred by secondees/detailees/destaques on loan from other government agencies without performing a competitive procurement for those resources.

E. The Secondment Agreements Did Not Violate Competition Rules

The DM 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.”¹²⁷ The DM also 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.”¹²⁸ Again, for the reasons explained above, the requirements for full and open competition, and any of the other federal procurement standards do not apply in this circumstance. LUMA and QWS do not have a procurement relationship. As a contractor, LUMA is not subject to the federal procurement standards. In its role as contractor, LUMA may perform its responsibilities under the OMA, including self-performing O&M Services with seconded labor recruited through secondment agreements

¹²⁶ See *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, 817 N.W.2d 250 (2012); *DeFranco v. Storage Tech. Corp.*, 622 F.3d 1296 (10th Cir. 2010); *Sterling Fluid Sys. (USA), Inc. v. Chauffeurs, Teamsters, & Helpers Local Union # 7*, 322 F. Supp. 2d 837 (W.D. Mich. 2004); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 85 S. Ct. 398 (1964).

¹²⁷ Attachment 1, DM at 9.

¹²⁸ *Id.*

between LUMA and its Affiliates. FEMA incorrectly identified these secondment agreements as “potential” PREPA contracts.

Allowing LUMA to continue seconding resources is of critical importance to PREPA’s disaster recovery. LUMA has launched, directly or through the 3PPO, 444 procurement events, 176 of which are ongoing. More than 44 of those procurement events received inadequate participation (as this term is defined by federal regulations) and 12 of those had no participation from interested bidders, highlighting the challenges associated with procuring contractors in an environment with strong industry demand and limited resources. Allocating resources such as borrowing employees from Affiliates to supplement and enhance LUMA’s workforce provides an exceptional opportunity for Puerto Rico to continue to perform work that would otherwise be delayed due to limited or the absence of contractor resources, particularly when such work is critical to the reconstruction of the energy system and ending Puerto Rico’s ongoing energy emergency.¹²⁹

F. LUMA’s Secondment Agreements Are Not Subject to the LUMA Procurement Manual

The DM says, “Since [the OMA] contains written standards of conduct covering conflicts of interest¹³⁰, 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.’”¹³⁰ First, the LUMA Procurement Manual, including its Conflicts of Interest section and accompanying OCIAMP, was written to apply to both federally- and non-federally funded procurement activities performed by LUMA as agent for PREPA.¹³¹ As such, it is written to be compliant with not only the terms of the OMA, and its Anti-Corruption and Sanctions Laws, but also 2 C.F.R. Part 200.¹³²

But the OMA does not require LUMA’s own hiring decisions or Subcontracts to comply with the Procurement Manual.¹³³ PREPA, by entering into the OMA, already purchased the use of LUMA’s workforce, including its seconded employees, to perform this emergency work. Accordingly, the Secondment Agreement is not required to be procured pursuant to the Procurement Manual.

Seconded employees are LUMA’s Other Employees – they are LUMA’s own labor – there is no conflict of interest in their use by LUMA to fulfill LUMA’s contractual obligation to PREPA. To the

¹²⁹ U.S. Department of Energy Order No. 202-25-2 (May 16, 2025); EO-2025-016, Executive Order by the Governor of Puerto Rico, Hon. Jenniffer A. Gonzalez Colon, to Modify and Expand the Energy emergency in Puerto Rico, Align Priorities with the National Energy Emergency Declaration, and Authorize Necessary measures to Carry Out Repairs on the System and increase Generation Capacity (April 2, 2025).

¹³⁰ Attachment 1, DM at 8. The Recovery Office’s footnote 33 makes reference to an outdated version of the LUMA Procurement Manual. The latest version is attached here at attachment 9.

¹³¹ Attachment 9, Procurement Manual at §I.A.

¹³² See *id.* at §§ I.A., IV.A.8, X.

¹³³ See *id.* at §§ I.A.

extent there is a concern that LUMA could award Subcontracts to Affiliates as a means to achieve multiple layers of profit, or that Quanta and its affiliates may have access to non-public information, 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, both Quanta's provision of seconded employees to LUMA and LUMA's costs for seconded employees are passed through to PREPA at cost, *without a markup for profit*.¹³⁴ The Secondment Agreement makes this clear:

The Parties [LUMA and QWS] acknowledge and agree that the Secondment is not the furnishing of goods or services by Home Company to LUMA, but only the temporary transfer **at cost** of certain employees of the Original Employers from Home Company to LUMA....¹³⁵

Because LUMA reimburses Affiliates only for the actual cost of seconded labor under the Secondment Agreement, there is no validity to any concern about inflated profits creating a conflict of interest or that Quanta and its affiliates may profit from non-public information—neither Quanta nor LUMA make any profit on these costs.

Should LUMA, acting as agent for PREPA, allow any Affiliate to compete for any PREPA Contract (i.e. an agreement allowing markup for profit), LUMA must comply with organizational conflict of interest avoidance and mitigation procedures, which include an independent procurement process. Compliance with the OCIAMP and 3PPO process ensures that LUMA does not improperly control any PREPA procurement in which Affiliates may compete for an award or provide Affiliates improper access to information.

G. FEMA's Cost Analysis was Flawed

As a remedy for what it concluded (in error) to be procurement noncompliance, FEMA allowed as eligible the portion of costs it determined to be reasonable. FEMA conducted a cost analysis that separately compared the labor rates paid to LUMA, ATCO, and Quanta personnel to PREPA's historical 2018 FAL rates, adjusted to 2023 values using a six percent annual inflation factor and applicable fringe benefits. Based on this analysis, FEMA validated in full the claimed costs for LUMA and ATCO personnel, finding them reasonable. However, for Quanta secondees, FEMA

¹³⁴ The DM also cautioned against the use of time-and-materials ("T&M") contracts "of this type." But, as the DM noted, T&M contracts include profit. Costs incurred under LUMA's secondment agreements, as with all O&M Service costs, do not include markup for profit. Neither the affiliate nor LUMA can charge profit on these costs. Instead, the Secondment Agreements are cost reimbursement contracts.

¹³⁵ Attachment 19, QWS Second Agreement at § 1.8 (emphasis added.)

determined that the claimed labor costs exceeded FEMA's adjusted rates by approximately 63 percent and therefore reduced the reimbursable amount accordingly. FEMA also excluded 174 line items from reimbursement due to missing documentation such as hours worked, positions, or rates, and reallocated \$3,475.90 in costs incurred outside the 100 percent federal cost share period to a separate project for review. In total, FEMA approved \$29,467,153.54 of the \$50,463,048.99 originally claimed by LUMA and denied \$20,992,419.55.

"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 decision was made to incur the cost."¹³⁶ One factor FEMA considers in determining whether a cost is reasonable is whether it is comparable to the current market price for similar goods or services in the same geographical area.¹³⁷ This may be determined, e.g., by looking at historical prices paid by the Applicant for a similar scope of work or looking at average costs in the area.¹³⁸ Average costs can be taken from work by other applicants with a similar scope of work in the area, or from the costs of the Applicant's other projects – making adjustments for scope of work, taking into account differing circumstances "such as event impacts, magnitude, comparable shortages, market factors, and any other unique circumstances that may impact either of the costs."¹³⁹

FEMA's cost analysis considered only the historical PREPA FAL rates from 2018, and concluded that these rates, with an inflation factor, were the highest reasonable rates for PREPA/LUMA to spend on emergency power restoration in 2022. FEMA did not consider the costs PREPA/LUMA paid to contractors working under competitively procured contracts for power restoration after Hurricane Fiona, or any other available data.

Limiting its analysis to PREPA's 2018 FAL rates was a fundamental error because, after LUMA became operator of PREPA's T&D system, PREPA no longer had any force account personnel capable of performing emergency power restoration. LUMA's only options – after fully committing its existing employees, many of whom are former PREPA employees – were to utilize power restoration contractors or increase its own workforce by employing more seconded labor.¹⁴⁰

¹³⁶ 2 C.F.R. § 200.404.

¹³⁷ FEMA, Public Assistance Program and Policy Guide v.4.0 (June 1, 2020) at 66-67.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ FEMA is well aware that PREPA's 2017-2018 workforce was inadequate to restore power after Hurricane Maria, and funded at least four contractors (Whitefish, Cobra, and, through a USACE Mission Assignment, Flour and PowerSecure) to perform emergency work. FEMA also funded mutual aid work from more than a dozen electric utilities. The DM did not explain why a cost analysis should exclude consideration of the cost of contract resources required to supplement PREPA's work force. In any event, as noted *infra*, provided with this First Appeal is ample documentation of the cost of contract resources available and utilized for power restoration in Puerto Rico after Hurricane Fiona. These contemporaneous costs were also higher than the cost of seconded labor. The cost of USACE contractors operating under Mission Assignments was particularly expensive, given the substantial (on the order of 30%) overhead charged by USACE.

Comparing seconded labor rates to rates of a non-existent workforce is unreasonable. *In the Matter of Baldwin County Electric Membership Corporation*, the applicant engaged vendor “ABC” after it had exhausted all other lower cost resources first and found that it still required additional support to restore power to its system.¹⁴¹ FEMA denied a portion of the costs for ABC (as it has done here for Quanta costs), finding its hourly rates unreasonable.¹⁴² FEMA determined the reasonable rate to be the average cost for the other contractors and mutual aid providers that had been engaged on the job, even though they did not have capacity to provide additional crews.¹⁴³ The Civilian Board of Contract Appeals (“CBCA”) disagreed with FEMA’s approach, finding ABC’s rate reasonable under the circumstances prevailing “after Hurricane Sally and the time-sensitive nature of the restoration that was required.”¹⁴⁴ The CBCA held, “FEMA’s conclusion that the rate of the next highest contractor was the reasonable rate ignores the reality that the next highest contractors and all of the other contractors hired did not have additional capacity nor could the applicant find another contractor other than ABC.”¹⁴⁵ In other words, rates that are not reasonably available to the Subrecipient at the time the Subrecipient agreed to incur the cost are not a reasonable cost comparator. Here, when evaluating PREPA’s emergency work costs in response to Hurricane Fiona, FEMA is not even using the “next highest” rate in its analysis of Quanta’s rates—it is using a rate used to pay crews that no longer exist. A crew that is significantly less expensive, but non-existent is not a true alternative. This is not a proper cost analysis when there are contemporaneous cost comparators that were in fact available.

The Recovery Office’s use of PREPA’s 2018 FAL rates is also flawed for three other reasons. First, they did not consider that PREPA’s labor policies in 2018 would have required PREPA to pay double time rates for work performed outside of the normal schedule, such as in response to a major disaster.¹⁴⁶ Second, they expressly stated in their August 9, 2024 letter to COR3 that “LUMA is the Subrecipient’s contractor and authorized representative; it is not PREPA’s force account.”¹⁴⁷ Comparing a FAL rate to a contractor rate is not apples-to-apples. Finally, separately comparing the LUMA, ATCO, and Quanta costs for reasonableness was an error because they are all LUMA employees. As explained extensively above, under Puerto Rico law and the law of secondment generally, seconded employees are considered employees of the host company, in this case, LUMA Energy ServCo, LLC.

A proper cost analysis should compare rates/costs of options available to the applicant at the time it was making the decision to incur the costs.

¹⁴¹ *In the Matter of Baldwin County Electric Membership Corporation*, CBCA 77811-FEMA (Feb. 5, 2024).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 8.

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g.*, Attachment 21, PREPA Labor Policy at 56 (Sept. 15, 2014 – Sept. 15, 2018).

¹⁴⁷ Attachment 14, Letter from Danna E. Planas Ocasio (FEMA) to Manuel Laboy (COR3) re Performance of Federally Funded Work by Subrecipient’s Operators at 3 (Aug. 9, 2024).

H. LUMA's Seconded Labor Costs Are Reasonable

The solicitation, proposal, and selection of LUMA demonstrate that when creating the public-private partnership, 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. This 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. Indeed, the amount of work to be done on PREPA's T&D system is unprecedented and much of it funded by what was (and likely still is) the largest obligation of funding awarded to a single applicant for Public Assistance.¹⁴⁸ Executing this work has unique challenges, including the very limited local labor pool and the geographic isolation of Puerto Rico that limits access to contractors in a way not experienced by mainland utilities. Some of the work can (and has been) performed by contractors procured by LUMA on behalf of PREPA, but access to LUMA's seconded employees is critical to meet the need for skilled resources on-island to carry out the volume of work – particularly during emergency response activities such as those required for the response to Hurricane Fiona.

Therefore, rather than relying on fictional PREPA employees to perform emergency power restoration, as contemplated by the Recovery Office's cost analysis, LUMA activated competitively procured emergency power restoration contracts with Continental Lord, Inc., Marathon, LLC, Roman Electric Contractors, Inc., Tekniek Construction, Inc., Electricoop, and Multicom Group Corp. and requested all available qualified crews. Needing additional crews, LUMA also entered into a new emergency contract with Mastec Renewables Puerto Rico, LLC. Finding that the need exceeded the capacity of these contractors and LUMA's own, existing workforce, LUMA flew in additional seconded crews (at cost), as well as affiliate-provided equipment (at no cost), to perform the power restoration work.

Among the over 2,000 utility workers assembled, resources included over 500 trouble and operations crew members¹⁴⁹ and low voltage utility workers, over 350 construction and maintenance workers, over 100 substation maintenance workers, and over 350 vegetation clearing workers. At the start of the emergency, Quanta seconded 122 line workers, but finding the need exceeding available resources, LUMA asked Quanta to provide additional line workers under the Secondment Agreement. Within 11 days, Quanta increased its seconded linemen to 217, peaking at about 266 linemen (56 crews) by early October 2022.

Because of the additional workforce, on October 14, 2022 LUMA was able to announce that power had been restored to 1.46 million customers, and that it was demobilizing its emergency

¹⁴⁸ The White House, *Statement from the Press Secretary on the Largest FEMA Infrastructure Grant Being Awarded to Puerto Rico* (Sept. 28, 2020), [https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-largest-fema-infrastructure-grants-awarded-puerto-rico/#:~:text=Under%20the%20leadership%20of%20President,\\$11.6%20billion%20for%20the%20projects.](https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-largest-fema-infrastructure-grants-awarded-puerto-rico/#:~:text=Under%20the%20leadership%20of%20President,$11.6%20billion%20for%20the%20projects.)

¹⁴⁹ In the utility industry "trouble crews" are the one- or two-man crews that are first responders to an outage.

posture.¹⁵⁰ It took LUMA 26 days to return electrical service to Puerto Rico following the island-wide blackout caused by Hurricane Fiona.¹⁵¹ For comparison, after Hurricane Maria, some parts of the island were without power for over a year.¹⁵² Nevertheless, the pressure on LUMA to rapidly stabilize the grid was intense.¹⁵³

The decision to use seconded labor was prudent under the circumstances considering LUMA's responsibility as PREPA's Operator to restore critical power service as quickly as possible to the people of Puerto Rico. This is especially true as LUMA, through COR3, sought and received FEMA approval to self-perform work, complied with the requirements imposed by COR3 and FEMA, and the framework for self-performed work developed with P3A and COR3 expressly contemplated the use of seconded employees.¹⁵⁴

LUMA prepared a cost analysis showing the actual cost of power restoration services and personnel available to LUMA after Hurricane Fiona. This analysis establishes that the costs at issue are reasonable.¹⁵⁵ As the cost analysis shows, the hourly rates paid to bargaining unit seconded personnel (which comprised over 90 percent of seconded labor costs) were approximately 20 percent lower than other competitively procured contractors performing electric power restoration work for PREPA in response to Hurricane Fiona.¹⁵⁶ For non-bargaining unit personnel, the hourly rates paid were approximately 14.8 percent lower than other competitively procured contractors.¹⁵⁷

¹⁵⁰ LUMA Press Release, *LUMA Restores Power to 1.46 Million Customers, Begins Process of Demobilizing Emergency Posture* (Oct. 14, 2022), <https://lumapr.com/news/luma-restores-power-to-1-46-million-customers-begins-process-of-demobilizing-emergency-posture/?lang=en>.

¹⁵¹ *Id.*

¹⁵² Sullivan, Emily, *Nearly a Year After Maria, Puerto Rico Officials Claim Power Is Totally Restored*, NPR, (Aug. 15, 2018), <https://www.npr.org/2018/08/15/638739819/nearly-a-year-after-maria-puerto-rico-officials-claim-power-totally-restored>.

¹⁵³ See, e.g., Tucker, Emma, *Behind the blackout triggered by Hurricane Fiona is a long-embattled history of Puerto Rico's weak and outdated electrical grid*, CNN (Oct. 1, 2022), <https://www.cnn.com/2022/10/01/us/hurricane-fiona-puerto-rico-electrical-grid>; Reuters, *One million still without power in Puerto Rico after Fiona*, Reuters (Sept. 22, 2022), <https://www.reuters.com/world/americas/one-million-still-without-power-puerto-rico-after-fiona-2022-09-22/>.

¹⁵⁴ Attachment 11, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work at 2 (Sept. 26, 2022); Attachment 12, Letter from Manuel A.J. Laboy Rivera (COR3) to José G. Baquero (FEMA) re LUMA's Performance of Federally Funded Work, (Aug. 11, 2023); Attachment 13, Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work (Aug. 23, 2023); Attachment 24, LUMA Federal Clauses Certification (May 28, 2024).

¹⁵⁵ Attachment 22, LUMA Cost Reasonableness Analysis re Hurricane Fiona Projects 723085, 736347, 740284, 743595 [hereafter, "LUMA Cost Analysis"]. The attached cost analysis covers this project and other Hurricane Fiona emergency work projects that contain costs for seconded labor, as it was prepared pursuant to the framework developed by LUMA, P3A, and COR3 to ensure the eligibility of self-performed work under the federal cost principles.

¹⁵⁶ *Id.*; Attachment 22A, Cost Analysis of Hourly Rates Paid to Bargaining Unit Seconded Employees.

¹⁵⁷ Attachment 22, LUMA Cost Analysis; Attachment 22B, Cost Analysis of Hourly Rates Paid to Non-Bargaining Unit Seconded Employees.

Because a comparison of hourly rates alone does not consider crew composition and productivity levels, which affects the reasonableness of the total cost, LUMA's cost analysis also analyzes:

- Seconded labor costs associated with a sample of 13 scopes of work compared to the cost of other contractor crews performing approximately the same work on similar feeders; and
- The aggregate costs of restoration efforts for Hurricane Fiona compared to the aggregate costs incurred by mainland utilities for similar hurricane disasters, normalized to the number of customers impacted.

When considering the costs to complete comparable scopes of work, seconded crew costs were 18 to 25 percent lower than competitively procured contractors.¹⁵⁸ When compared to the restoration costs incurred by mainland utilities per customer impacted, LUMA's costs were comparable to or lower than the costs incurred by other utilities for similar disasters.¹⁵⁹

All three of the cost analyses conducted affirm the reasonableness of the costs of LUMA's seconded crews.

This First Appeal and attached cost analysis demonstrate that the costs at issue are reasonable. It also demonstrates that LUMA's use of seconded labor is, in fact and law, compliant with the federal procurement standards. The imposition of a remedy for noncompliance under 2 C.F.R. § 200.339 is unsupported, because there is no noncompliance here. The emergency work performed was within the scope of work of the OMA, which was awarded to LUMA based in part on the availability of seconded labor as part of LUMA's workforce and expressly contemplates the use of seconded employees. LUMA is a contractor and is not required to comply with the federal procurement standards when establishing its workforce. There is no justification for the imposition of "Remedies for noncompliance."

I. LUMA Sufficiently Documented Claimed Costs

Four-line items, in the amount of \$3,475.90, were excluded from this project because they were performed outside the approved period of September 17, 2022 to November 16, 2022 for the 100% federal cost share.¹⁶⁰ These line items will be added to Project 736347 which includes work performed after November 16, 2022 at a different cost share.¹⁶¹ LUMA does not appeal that action.

In addition, 174-line items were excluded because no documents or information was found to support the claimed costs.¹⁶² Specifically, the Recovery Office determined that the information

¹⁵⁸ Attachment 22, LUMA Cost Analysis; Attachment 22C, Cost Analysis of 13 Scopes of Work Performed.xlsx.

¹⁵⁹ Attachment 22, LUMA Cost Analysis; Attachment 22D, Cost Analysis of Aggregate Storm Costs for Similar Hurricane Disasters.xlsx.

¹⁶⁰ See Attachment 1, DM at 12.

¹⁶¹ *Id.*

¹⁶² *Id.*

provided in LUMA's consolidated cost summary did not include hourly rates/wages paid (120-line items), hours claimed (51 line-items), and/or positions for these items (3-line items).¹⁶³ Attachment 23 of this appeal contains much of the missing information. This information supports the obligation of additional eligible costs in the amount of \$101,654.¹⁶⁴

IV. Conclusion

Any conclusion that LUMA is required to competitively procure its seconded labor, when use of this labor was part of its proposal in response to a competitive procurement for the OMA and included within its responsibilities in the OMA, is contrary to the framework and significant financial benefit negotiated by and for the Government of Puerto Rico when it entered into the OMA. Prohibiting PREPA from accessing LUMA's seconded labor pool for federally funded work is not only a misapplication of the federal rules, but hinders LUMA's ability to perform under the OMA and adds 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.

If a subrecipient intends to award a contract funded by its Public Assistance grant, it must follow the federal procurement standards in awarding that contract. 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. But, if the selected *contractor* performs the work it was hired to perform, the contractor's hiring practices and procurement of subcontractors is subject to the terms of its contract with the subrecipient, not the federal procurement standards. 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 the federal procurement standards.

Accordingly, there was no procurement non-compliance, and there is no justification for imposing "Remedies for noncompliance" or to evaluate seconded labor costs for reasonableness more strictly than FEMA would for any other eligible cost. Consistent with the applicable regulation and FEMA's implementing policy, 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. Further, because secondees costs are a pass-through expenditure *without markup for profit*, by either the Affiliate or LUMA, the resulting at-cost expenses should be presumptively reasonable.

As the attached multi-source cost analysis shows, the costs submitted in this project for seconded personnel are reasonable. Whether compared to rates of other contractors, compared by cost

¹⁶³ *Id.*

¹⁶⁴ Attachment 23, FEMA Determination - Missing Information Analysis.xlsx.

for discrete scopes of work, or compared in the aggregate to amounts spent by other utilities for disaster response, LUMA's costs are below or on par.

LUMA uses seconded labor as part of its own workforce. Work performed with secondees is a small, yet significant, subset of self-performed work. LUMA uses secondees where it otherwise lacks access to a sufficient number of 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 when needed. Without secondees, LUMA will need to take time to contract for these resources, and to the extent they are available, those contractors are likely to charge rates that exceed the at-cost rates of LUMA's secondees.

Puerto Rico cannot afford the delay caused by this DM and the Recovery Office's errors leading to this DM. If FEMA continues to take the unsupported position that LUMA cannot use seconded personnel, over 100 federally funded projects expected to be performed in 2025 will be at risk of being indefinitely delayed until qualified replacement resources can be retained or competitively procured. Those projects include substation rebuilds, transformer replacements, distribution automation device installations and the replacement of transmission and distribution poles and structures. Limiting the use of seconded employees in federally funded work also deprives Puerto Rico of immediate access to lifesaving resources in the event of future emergencies and other declared disaster events. As demonstrated by its response to Hurricane Fiona, LUMA's ability to call on seconded employees in response to an emergency significantly improves its ability to rapidly restore service to our customers.

In addition, if not overturned, the decision could set a dangerous precedent by preventing government entities in a similar scenario from seeking federal reimbursement for the cost of labor hours incurred by secondees/detailees/destaques on loan from other government agencies without performing a competitive procurement for those resources.

For the aforementioned reasons, PREPA/LUMA respectfully requests that FEMA Region 2 grant this appeal, and in doing so, rescind the April 25, 2025 DM, confirm that LUMA's secondment agreements are not subject to the federal procurement standards at 2 C.F.R. Part 200 Subpart D, and confirm that the costs incurred by PREPA for the performance of eligible work by LUMA's seconded labor are reasonable and eligible for Public Assistance reimbursement.

Respectfully,


Juan Saca (Jun 24, 2025 18:43 EDT)

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 Memorandum re Project 723085 (April 25, 2025)
2	Letter from COR3 to FEMA re PREPA/LUMA Performance of Federally Funded Work (Aug. 12, 2022)
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 22, 2020)
8	Letter from PREPA & P3A to FEMA & COR3 re Consent to Federal Funding (June 2, 2021)
9	LUMA Procurement Manual v.2 (July 31, 2023)
10	LUMA Procurement Toolkit v.1, containing the LUMA Organizational Conflict of Interest Avoidance and Mitigation Plan v.2 (July 31, 2023)
11	Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work (Sept. 26, 2022)
12	Letter from Manuel A.J. Laboy Rivera (COR3) to José G. Baquero (FEMA) re LUMA's Performance of Federally Funded Work (Aug. 11, 2023)
13	Letter from Danna E. Plana Ocasio (FEMA) to Manuel A.J. Laboy Rivera (COR3) re LUMA Performance of Federally Funded Work (Aug. 23, 2023)
14	Letter from Danna E. Planas Ocasio (FEMA) to Manuel Laboy (COR3) re Performance of Federally Funded Work by Subrecipient's Operators (Aug. 9, 2024)
15	LUMA Response to FEMA RFI re Seconded Labor (Aug. 22, 2024)
16	Letter from José G. Baquero (FEMA) to Manuel A.J. Laboy Rivera (COR3) re Performance of Federally Funded Work (Dec. 27, 2027)

17	E-mail from Andrés R. García Martinó (FEMA) to Eduardo Soria (COR3), et al. re Seconded Employees (Feb. 25, 2025)
18	Letter from Andrés R. García Martinó (FEMA) to Mary Carmen Zapata (PREPA) re Request for Meeting Regarding December 27, 2024 FEMA Letter (Mar. 7, 2025)
19	QWS Secondment Agreement (June 1, 2021) with Amendment 1 (May 31, 2023)
20	Quanta Workforce Solutions, LLC, Template Assignment Agreement for Assignments to LUMA
21	PREPA Labor Policy (Sept. 15, 2014 – Sept. 15, 2018)
22	LUMA Cost Reasonableness Analysis re Hurricane Fiona Projects 723085, 736347, 740284, 743595
22A	Cost Analysis of Hourly Rates Paid to Bargaining Unit Seconded Employees
22B	Cost Analysis of Hourly Rates Paid to Non-Bargaining Unit Seconded Employees
22C	Cost Analysis of 13 Scopes of Work Performed.xlsx
22D	Cost Analysis of Aggregate Storm Costs for Similar Hurricane Disasters
23	FEMA Determination – Missing Information Analysis.xlsx
24	LUMA Federal Clauses Certification (May 28, 2024)






LUMA - First Appeal re GMP 723085 Fiona Labor (002)

Final Audit Report

2025-06-24

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