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Written statement before the Committee on Natural Resources
United States House of Representatives
“The Transformation of the Puerto Rico Electric Power Authority”

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Mr. Chair, Madam Vice-Chair and Members of the Natural Resources Committee:

This testimony is presented by Ingrid M. Vila-Biaggi and Luis E. Rodríguez-Rivera on behalf of CAMBIO PR, Inc. (CAMBIO), a not-for-profit organization located in San Juan, Puerto Rico, committed to promoting sustainable and responsible actions for the Island. CAMBIO concentrates its efforts on research, design, promotion, education and implementation of responsible policies and strategies that contribute to the construction of an equitable society with greater opportunities, capacities, and resources. Work focuses on pressing social, environmental and energy matters.

CAMBIO is one of the lead coordinators and supporters of the Queremos Sol proposal that promotes a dramatic transformation of the Puerto Rico Electric Power Authority (PREPA) as a public utility by integrating efficiency, rooftop solar and storage to achieve 100% renewable generation by 2050. Such an approach is geared towards improving transparency and accountability, reducing vulnerability, maximizing use of local renewables resources, ensuring a fair transition of workers, and promoting active participation of communities and citizens. CAMBIO has developed educational campaigns and materials promoting efficiency and adoption of rooftop solar (cambiopr.org/menosesmas), and has actively participated as an intervening party in the administrative and regulatory processes related to rulemaking within the Puerto Rico Energy Bureau (PREB), including its evaluation of PREPA’s Integrated Resource Plan. In 2019, CAMBIO sued PREPA to obtain public documents pertaining to its privatization process, proposed generation projects, asset valuations, system data, among others. All documents obtained were made available to the public through CAMBIO’s webpage. CAMBIO prepared and released with the Institute for Energy Economics and Financial Analysis (IEEFA) the report, *Is Puerto Rico’s Energy Future Rigged? Examining the \$1.5 billion New Fortress--PREPA Deal*, evaluating a lucrative contract for the conversion and delivery of natural gas to PREPA’s San Juan 5 and 6 units. Moreover, CAMBIO is developing a collective rooftop solar model for communities

and conducting modeling work to specifically delineate a technical and investment plan to implement the Queremos Sol proposal. CAMBIO is also currently developing a sustainable integrated solid waste management plan in collaboration with other organizations and communities.

Ingrid M. Vila-Biaggi is a founding member and president of CAMBIO. She holds a Bachelor's Degree in Environmental Engineering from Cornell University and a Master's Degree in Environmental Engineering and Water Studies from Stanford University. Eng. Vila-Biaggi is a former Chief of Staff of the Commonwealth of Puerto Rico (2013-2014) and former Deputy Chief of Staff (2002-2004). She holds expertise on sustainable energy transformation, water resources management, solid waste management, project management, and public sector governance. She serves as Urban Waters Ambassador for the Urban Waters Federal Partnership for the Caño Martín Peña, recently joined the Institute for Energy Economics and Financial Analysis' (IEEFA) Board of Directors, and also serves in the Advisory Council for the Puerto Rico Urban Resilience to Extremes Sustainability Research Network (Julie Anne Wrigley Global Institute of Sustainability, Arizona State University, USDA Forest Service). Eng. Vila-Biaggi participates as speaker and panelist in forums and conferences of varying topics related to Puerto Rico, is an Op-Ed contributor to local newspapers, a permanent broadcast news analyst at the University of Puerto Rico's radio station, and has published articles in the University of Puerto Rico Law Review, in Acta Científica (Scientific Record), among others.

Luis E. Rodríguez-Rivera is co-founder of CAMBIO, and Professor at the University of Puerto Rico School of Law where he teaches environmental, international, and administrative law courses, and has lectured on comparative environmental law at the University of Fribourg's Faculty of Law, Switzerland, and the University of Barcelona, Spain. He holds a Bachelor's Degree in Political Science from Yale University, a Juris Doctor Degree from Harvard Law School and a Master's in Law Degree from Cambridge University, UK. Prof. Rodríguez-Rivera served as Secretary of the Puerto Rico Department of Natural and Environmental Resources (2002-2004); Executive Director of the Puerto Rico Solid Waste Authority (2001-2002) and Executive Director of the Puerto Rico Science, Technology and Research Trust (2006-2010). In the Summer of 2019, he was appointed to the Puerto Rico House of Representatives' Special Committee for the Initiation of the Impeachment Process against the Governor of Puerto Rico. His scholarship has focused on the Human Right to Environment, Disaster Law, Law of the Sea, International Environmental Law and Puerto Rico Environmental Law, and his articles have been published internationally by leading legal publishers, such as, Cambridge University Press, Springer, Brill/Nijoff, NWV Verlag, BWV–Berliner, Intersentia, Penn University Press, and Carolina University Press. Prof. Rodríguez-Rivera has offered numerous lectures in international conferences held in Austria, Estonia, South Korea, Spain, Switzerland, United Kingdom, United States and Puerto Rico, among others.

We submit this written statement to alert Congress of concerns regarding two significant and substantial contracts entered into by PREPA with New Fortress Energy (NFE) and LUMA Energy (LUMA). Our review of these contracts show irregular bidding (in the case of NFE, as we have not been afforded documents to review the LUMA process), questionable approval processes, onerous and highly biased contractual terms which were completely devoid of transparency or public participation. Our concern derives not only from the analysis of available documentation on these contracts, but is further supported by PREPA Executives' track record, particularly following Hurricane María, of mishandling and noncompliance, including the Whitefish and Cobra contracts.¹ The NFE and LUMA contracts violate Puerto Rico's renewable energy policies, lead to the continued dependency on fossil fuel generation, and run counter to the best interests of the people of Puerto Rico to the exclusive benefit of contractors, consultants and private interests. **Therefore, we respectfully urge this Committee to open an investigation regarding the New Fortress Energy-PREPA Contract and the LUMA Energy-PREPA Contract.**

New Fortress Energy-PREPA Contract

On June 10, 2020, CAMBIO and IEEFA released the report, *Is Puerto Rico's Energy Future Rigged? Examining the \$1.5 billion New Fortress--PREPA Deal*,² evaluating a lucrative contract for the conversion and delivery of natural gas to PREPA's San Juan 5 and 6 units. This report, product of a thorough and careful review of thousands of pages of public documents obtained through litigation with PREPA,³ unveils fiscally irresponsible practices wrought with suspect internal handling. Further, the NFE-PREPA contract reflects an ill-conceived and irregular project which is inconsistent with the meaningful and sustainable transformation of Puerto Rico's energy system called for in the Island's recently legislated renewable energy goals, as well as, with the best interest of the people of Puerto Rico.

With regards to the NFE-PREPA contract, we found that just a month after Hurricane María in 2017, when most of the people of Puerto Rico were still without power, NFE was meeting with the Federal Energy Regulatory Commission (FERC) and presenting an unsolicited proposal to PREPA to convert units 5 and 6 of PREPA's San Juan generation facility to natural gas and supply fuel. Immediately upon presenting this unsolicited proposal, NFE was granted communication and access to PREPA officials and its financial advisor Filsinger Energy Partners (FEP). NFE was able to later secure a confidentiality agreement with PREPA at the same time PREPA was drafting a Request for Proposal for the very same project presented by NFE. PREPA executives then

¹ See, e.g., <https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-57-Jul20.pdf>.

² Tom Sanzillo & Ingrid M. Vila-Biaggi, *Is Puerto Rico's Energy Future Rigged? Examining the \$1.5 billion New Fortress--PREPA Deal*, CAMBIO/IEEFA, June 10, 2020 (available at: https://secureservercdn.net/198.71.233.109/v0h.b59.myftpupload.com/wp-content/uploads/2020/06/Is-Puerto-Ricos-Energy-Future-Rigged_June-2020_EN.pdf or <https://cambiopr.org/>)

³ See, *Cambio Puerto Rico v. Autoridad de Energía Eléctrica*, Case Num. SJ2019CV04901 (Puerto Rico Superior Court of First Instance 2019).

announced that this project was key in the transformation of PREPA after the Hurricanes Irma and María, and that it would result in a decrease of vulnerabilities and electricity rates.

Our investigation demonstrates, among other things:

- PREPA's non-compliance with its own regulatory frameworks.
- Absence of a desirability and convenience study to determine the actual benefit of the project or consideration for other more desirable alternatives, such as rooftop solar.
- Uneven playing field for bidders who were not made aware of the unsolicited proposal, the confidentiality agreement, the leasing of neighboring docks and other important information.
- The Puerto Rico Energy Bureau approved the project outside of the Integrated Resource Plan, thus evading rigorous evaluation and public participation, and without having a written determination from the FERC.
- The Fiscal Oversight and Management Board (FOMB) approved the project even though it recognized costs were 30-40% over market benchmark and savings were much lower than NFE and PREPA estimated.
- The alleged savings are not included as a contract requirement.
- The contract was negotiated by an external US based law firm representing PREPA, King and Spalding, that has admitted that it also represents entities of NFE's parent company, in an apparent conflict of interest that has not been disclosed or clarified.

The project began operations on May 2020, yet on June 2020 FERC issued a motion to show cause to NFE in which it establishes a preliminary determination of jurisdiction over the project. As mentioned above, NFE did not present written determination from FERC regarding its decision on jurisdiction on the project. Although final determination by FERC is still pending, given all the irregularities summarized above and further discussed in the report, an important questions needs to be answered: if this is a project for the benefit of the people of Puerto Rico or is this a project with enough political muscle behind it that nobody asked questions?

LUMA Energy – PREPA Contract

On June 22, 2020, PREPA entered into yet another \$1.5 billion contract, but this time with LUMA, for the privatization of the transmission and distributions system, commercial offices and overall operations. Pursuant to the Puerto Rico Public-Private Partnerships Law (Law 29-2009), PREPA was able to bid for, negotiate and sign this contract in complete confidentiality through a process handled behind closed doors by the Puerto Rico Public-Private Partnerships (P3 Authority). Law-29-2009 imposes on the P3 Authority the duty of disclosing all public documents related to the LUMA–PREPA transaction upon approval of the partnership contract. To this day, the P3 Authority has only released the contract and a manicured P3 Committee Report. Hence, the people of Puerto Rico have not had access to other public documents related to this transaction. On July

7, 2020, CAMBIO sent a request for information to the P3 Authority for access to all public documentation related to said procurement process and project. Although the P3 Authority responded indicating that they are evaluating our request for public documents, no documents have been made available, thus, preventing any public scrutiny of such an important and substantial privatization contract. We must emphasize that public scrutiny of the NFE contract occurred only after a Puerto Rico court ordered the production of the public documents related to this transaction. More than 40 days have lapsed since the LUMA contract was signed, and yet no public documents have been released.

With the scarce information publicly available, CAMBIO can safely conclude that the terms of the LUMA contract are, at a minimum, biased in favor of LUMA and extremely onerous to the best interests of the people of Puerto Rico. LUMA, is a newly formed company, just recently incorporated in Puerto Rico under the auspices of Quanta Services and ATCO/Canadian Utilities (ATCO).⁴ Since LUMA is a newly incorporated company, the people of Puerto Rico have no way of assessing past performance or track record for the contracted services they will perform on the Island. ATCO indicates they have worked on projects with Quanta Services,⁵ but this is not a mere “project.” This contract involves the full administration of an essential service upon which the livelihood and well-being of Puerto Ricans, including the Island’s future economic recovery. This contract, which represents \$1.5 billion in payments over a 15-year period, involves an annual fee payment starting in \$60 million during the transition year, and escalating up to \$125 million per year.

It is important to note that as part of CAMBIO’s litigation with PREPA for public documentation we requested reports, analysis and evaluations relating to PREPA’s privatization. We were seeking analysis that would support the government’s allegation of privatization of transmission, distribution and assets as the preferred alternative for the transformation of PREPA. PREPA responded that such evaluations, reports or analysis do not exist, and presented a certified declaration from PREPA’s legal counsel attesting to that effect (Attachment 1). So, just as in the NFE contract, where no desirability and convenience study was conducted (and supposed savings estimates vary dramatically depending on who you ask because there was no rigorous analysis), in the case of the LUMA contract PREPA also embarked blindfolded on the privatization of Puerto Rico’s most important infrastructure asset. This is not only irresponsible and reckless, but it raises an important question of: what is the motivation behind this transaction? We must remember that government’s intent to privatize PREPA was announced after the disastrous handling of Hurricane

⁴ Atco’s own webpage describes: "LUMA, our newly-formed company, which has been selected to transform and operate Puerto Rico’s electric transmission and distribution (T&D) system." <https://www.atco.com/en-ca/about-us/stories/historic-win-puerto-rico-luma.html>.

⁵ “LUMA is 50 per cent owned by Canadian Utilities, an ATCO Company, and 50 per cent owned by Quanta Services, an infrastructure project execution company that we’ve worked with on many projects." <https://www.atco.com/en-ca/about-us/stories/historic-win-puerto-rico-luma.html>.

María by Ricardo Rosselló's administration. Is PREPA proceeding on a \$1.5 billion privatization scheme with no clear benefit to the public driven merely as a public relations strategy to deflect attention from a governor that was forced to resign by the people of Puerto Rico?

A detailed review of the LUMA contract, by itself, reveals non-compliance and raises questions about contract negotiations. For instance:

- Objectives established in the Puerto Rico Energy Public Policy Act (Law 17-2019) to attain a 20 cent/kWh rate—Not only is a required rate reduction not included in the contract, but there is no contract obligation to avoid a rate increase. Responses provided by public officials during the hearing regarding this aspect were at the best deceiving. They argue that LUMA does not establish rates, that this is instead the responsibility of the Puerto Rico Energy Bureau (PREB). However, the PREB regulations establish that PREPA, and in the future LUMA, may recover incurred costs through rates. Thus, the \$105 million in fees to be paid annually to LUMA under this contract will be an additional incurred cost that will have to be covered through rate increases, as PREPA does not have current savings to cover those. The Fiscal Oversight and Management Board recognizes in its most recent PREPA Fiscal Plan:

“The Fiscal Plan shows a surplus in FY2020, but a deficit in FY2021 that is largely due to the operator fee. At the end of FY2020, PREPA expects a \$153 million surplus, driven by underspending in vegetation management and necessary maintenance expenses. Under the current PREB-approved rate case, the 2020 Fiscal Plan projects a deficit of \$132 million in FY2021, which is due to the front-end transition fee to the T&D operator, which is expected to be paid by the end of FY2021. PREPA is expected to pay this fee from cash on hand, and their current cash reserve is approximately \$510 million. For the remaining thirty years, the budget is balanced as the 2020 Fiscal Plan projections assume revenue requirement rates.”⁶

On a side but important note, this Committee should request the FOMB for an explanation as to how it allowed PREPA to underspend this past year in vegetation management and maintenance, particularly on the onset of a hurricane season which the National Weather Service predicted to be “extremely active.” This Fiscal Plan was approved June 29, 2020 and just a month later, on July 29, Tropical Storm Isaias was affecting Puerto Rico. The Island suffered massive power outages precisely as a result of a lack of maintenance and

⁶ FOMB, *PREPA's Fiscal Plan*, (June 29, 2020), available at: <https://drive.google.com/file/d/1paRgy0dJBkUH4-5eev7z2SuR0dii18g9/view>.

vegetation management. The fact that PREPA had the moneys and did not use should be subject to further inquiry, and public explanation by both PREPA and the FOMB.

- Labor union protections as defined in the Puerto Rico Electric Power Authority Transformation Act (Law 120-2018) -- Section 15 of Law 120-2018 states regarding labor protections provides:

“They will keep all the rights acquired in accordance with the laws, rules, collective bargain agreements and regulations that are applicable to them, as well as the privileges, obligations and status with respect to any existing pension, retirement or savings and loan fund system established by law, which were received before the approval of this Law.”

In turn, the LUMA-PREPA contract establishes though the “System Contracts” that LUMA would assume and clarifies:

“For the avoidance of doubt, System Contracts shall not include (x) any agreements between GenCo and a third party, Generation Supply Contracts, the GridCo-GenCo PPOA or collective bargaining agreements with union labor or (y) any arrangements that would have been considered System Contracts under clauses (i) or (ii) above but which have been rejected by Owner in the Title III Case prior to the Title III Exit.”

Therefore, LUMA is not a successor employer, does not recognize union representation or labor organization within PREPA, and will not be bound by the terms and conditions of collective agreements. This is contrary to Law 120-2018, that provides for protection of worker's rights, and one of those rights is union representation. Furthermore, there is no guarantee as to what happens to current PREPA employees that transfer to LUMA if they are laid off because of “right-sizing” measures that may be undertaken by LUMA, or what happens to workers if LUMA decides to abandon the contract, as they can do under multiple scenarios. Clearly the intention is to break the union and to debilitate worker's protections to ensure generous corporate gains. This follows track with austerity measures imposed and labor protections debilitation promoted by the FOMB since 2017, even under false premises, as evidenced by an investigation conducted by the *Centro de Periodismo Investigativo*.⁷ If the intent was to support unions, as both LUMA and the P3 Authority have publicly claimed, a different language would have been incorporated into the contract and both the P3 Authority and LUMA would have included labor participation in the

⁷ See, <https://periodismoinvestigativo.com/2018/05/enmiendan-la-ley-80-de-despido-injustificado-con-argumentos-falsos-de-la-junta/>.

confection of the contract. Contractual obligations are established by written contractual language, not by unwritten intentions.

- Renewable energy objectives established in Puerto Rico Energy Public Policy Act (Law 17-2019) and Puerto Rico Climate Change Mitigation, Adaptation and Resilience Act (Law 33-2019) - Both laws compile renewable objectives for Puerto Rico of 20% by 2022; 40% for 2025; 60% for 2040; and 100% for 2050. The LUMA contract includes no specific requirement or metric for complying with such objectives, and therefore no consequence if they are not met. Hence, in this case, the people of Puerto Rico will be paying additional hundreds of millions of dollars in fees with no guarantee of a sustainable transformation based on renewables. This is particularly worrisome when we are referring to a contract that depends on federal funds for reconstruction and rebuilding of the system. The people of Puerto Rico deserve an answer to this question: why were renewable energy objectives not included as a contractual metric with consequences if unmet? The only reasonable answer is a one-sided negotiation process to favor LUMA's conditions to accept this contract, rushed by the pressure of an electoral year.

Furthermore, it is important to note additional contractual terms that favor LUMA disproportionately:

- Non-compliance with defined contract metrics have no penalties associated with it, nor does it lead to contract cancellation.
- As mentioned briefly above, LUMA can abandon the contract under numerous conditions including events that affect Puerto Rico for more than 18 months, as would be case of an extreme weather event, an on-going pandemic or a continuous fiscal crisis. Again, responses provided by officials during the hearing alluding that "it is not LUMA's intention" have no validity when compared to what is written in the contract.

Approval process by the PREB that granted an Energy Compliance Certificate to this transaction should also be scrutinized. We have come to learn that the President of PREB was a member of the P3 Committee that approved the project, voting in favor of it and later participated as PREB President in the legally mandated PREB evaluation, voting also in favor of the transaction. PREB evaluation should be an independent evaluation process. Clearly in this case, it was not.

Moreover, the contract does not require LUMA to invest private funds into the electric system, thus, relying entirely on \$18 billion in federal funds that PREPA executives are expecting to receive in upcoming years. Such federal funds are associated to reconstruction efforts related to Hurricane María. As Quanta Service explicitly stated in a recent presentation:

“Significant Opportunity for Electric T&D System Modernization and Transformation – Quanta believes there is opportunity for it to compete for work associated with Puerto

Rico's electric T&D system modernization efforts that are separate from its ownership interest in LUMA. Puerto Rico's electric T&D system is at a critical juncture after the destruction caused by Hurricanes Maria and Irma. As a result, the government of Puerto Rico, through the P3 and in collaboration with PREPA, have embarked on a plan to rebuild, modernize, harden and "green" its power grid, **a majority of which is expected to be funded by U.S. federal disaster relief agencies and managed by LUMA. The P3 estimates that more than \$18 billion of electric T&D capital investment could be required through 2028 for this initiative.**⁸

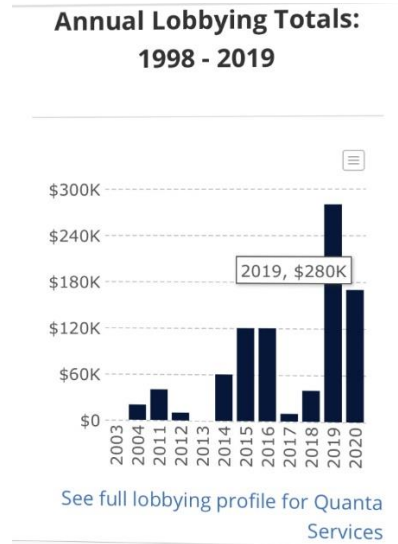
A 2018 report authored by the Center for the New Economy (CNE) identified issues regarding transparency in the use of federal disaster funds, concluding that ninety percent of federal contracts that had been awarded relating to response and recovery after Hurricane María were granted to companies whose headquarters are outside of Puerto Rico.⁹ The CNE report urged congressional action to ensure local contracting with said funds as this would have a more direct positive impact in our ailing economy. Of course, \$18 billion in federal funding for the reconstruction of Puerto Rico's electrical infrastructure would have a positive compounding effect in our economy were PREPA and local companies to do the work.

Therefore, it is essential that this Committee take notice of the above quoted statement where Quanta Service has the intention and expectation of contracting with partly-owned LUMA for work related to these \$18 billion in federal disaster funding. This also provides a plausible explanation as to why Quanta Services set up LUMA as a separate entity: the opportunity to have inside privileged information and a clear advantage during the bidding process for contracts funded with said federal funds. As was the case with the NFE contract, Quanta Service would have an unfair advantage in PREPA/LUMA's administration of the \$18 billion in federal funds through direct communications which will surely not be provided to other bidders. The seed is already planted.

We also want to raise to the Committee's attention considerable increase in Quanta Services' lobbying in the 2019, coinciding with PREPA's contract negotiation. It would be important to learn whether these lobbying efforts included the PREPA contract or are related in any way to Puerto Rico.

⁸ Press Release, <https://www.prnewswire.com/news-releases/quanta-services-and-atco-led-consortium-selected-by-the-puerto-rico-public-private-partnership-authority-for-the-operation-and-maintenance-of-puerto-ricos-electric-power-transmission-and-distribution-system-301081318.html>. (Emphasis added).

⁹ Center for New Economy, *Transforming the Recovery into Locally-led Growth: Federal Contracting in the Post-Disaster Period* (Sep. 26, 2018), available at: <https://grupocne.org/2018/09/26/transforming-the-recovery-into-locally-led-growth-federal-contracting-in-the-post-disaster-period/>.



Source: Open Secrets¹⁰

We conclude by reiterating our request that this Committee open an investigation regarding the New Fortress Energy-PREPA Contract and the LUMA Energy-PREPA Contract and that it provide support in moving forward the Queremos Sol proposal.

Thank you for the opportunity to submit this statement to the Natural Resources Committee. We are available to answer any follow-up questions you may have. You can reach us via ingridmvila@cambiopr.org.

Respectfully submitted,

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/enclosure

¹⁰ Open Secrets, Quanta Services Annual Lobbying Totals 1998-2020, available at: <https://www.opensecrets.org/orgs/lobbying?id=D000036905>.