
INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID CASE NO. ARB/10/23

CLAIMANT'S MEMORIAL

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CLAIMANT'S MEMORIAL

I. INTRODUCTION

1. Claimant TECO Guatemala Holdings, LLC (“TECO” or “Claimant”) hereby submits its Memorial in accordance with the procedural schedule established by the Tribunal.¹

Claimant’s Memorial is supported by the following witnesses:

- *Carlos Manuel Bastos*: Third and presiding member of the Expert Commission established to resolve the dispute relating to Empresa Eléctrica de Guatemala, S.A.’s (“EEGSA”) 2008-2013 tariff review;²
- *Sandra W. Callahan*: Senior Vice President of Finance and Accounting, Chief Accounting Officer, and Chief Financial Officer for TECO Energy, Inc.;³
- *Miguel Francisco Calleja Mediano*: former Manager of Planning, Control and Regulation for EEGSA;⁴
- *Leonardo Giacchino*: Member of the Expert Commission established to resolve the dispute relating to EEGSA’s 2008-2013 tariff review; founding Partner of Solutions Economics, LLC; former Partner at Bates White, LLC; former Vice President at NERA Economic Consulting;⁵
- *Gordon L. Gillette*: President of Tampa Electric and Peoples Gas; former President of TECO Guatemala, Inc.;⁶
- *Luis Maté*: former General Manager of EEGSA.⁷

¹ See Minutes from the First Session, dated 23 May 2011, at 6.

² Witness Statement of Carlos Bastos, dated 21 Sept. 2011 (hereinafter “Bastos”) (CWS-1).

³ Witness Statement of Sandra Callahan, dated 16 Sept. 2011 (hereinafter “Callahan”) (CWS-2).

⁴ Witness Statement of Miguel Calleja, dated 22 Sept. 2011 (hereinafter “Calleja”) (CWS-3).

⁵ Witness Statement of Leonardo Giacchino, dated 23 Sept. 2011 (hereinafter “Giacchino”) (CWS-4).

⁶ Witness Statement of Gordon Gillette, dated 23 Sept. 2011 (hereinafter “Gillette”) (CWS-5).

⁷ Witness Statement of Luis Maté, dated 21 Sept. 2011 (hereinafter “Maté”) (CWS-6).

2. In addition, Claimant's Memorial is supported by the following experts:

- *Rodolfo Alegría Toruño*: Expert on Guatemalan law; Head of the Taxes, Labour, Regulatory Law, Telecommunications, Energy, and Commercial Law Practice Groups and Partner at Carrillo & Asociados;⁸
- *Brent C. Kaczmarek*: Valuation and Damages Expert; Managing Director of Navigant Consulting, Inc.⁹

* * *

3. This case is quite simple. Guatemala took actions that were expressly intended to induce – and did induce – Claimant and other foreign investors to invest in its failing electricity sector. After Claimant made that investment, Guatemala reneged on its promises and proceeded to dismantle the very legal and regulatory framework that had induced Claimant's investment. Specifically, in the late 1990s, Guatemala sought – and obtained from Claimant and other foreign investors – a high premium for a substantial stake in Respondent's poor-performing, dilapidated, and obsolete electricity distribution company, Empresa Eléctrica de Guatemala, S.A. ("EEGSA"). Guatemala obtained this high premium by promising Claimant and its partners that they would recover and earn a reasonable return on their investment based in large part on Guatemala's enactment of a new, transparent, and depoliticized legal regime that governed the electricity sector. Having obtained the benefit of a high premium for EEGSA, and after further inducing Claimant and its partners to invest millions of dollars more to improve EEGSA's network, Guatemala then injured Claimant and its partners by deliberately gutting the legal regime that Guatemala touted during EEGSA's privatization. For Guatemala, the calculus was easy: Once it had obtained substantial financial benefits from Claimant and its partners, Guatemala felt free to revoke its promises and score easy political points by lowering electricity rates thus ensuring that EEGSA would not be able to charge its customers enough to provide EEGSA's foreign investors the benefits of their investment. For Claimant and its partners, the

⁸ Expert Report of Rodolfo Alegría, dated 22 Sept. 2011 (hereinafter "Alegría") (CER-1).

⁹ Expert Report of Brent Kaczmarek, dated 23 Sept. 2011 (hereinafter "Kaczmarek") (CER-2).

financial repercussions were nearly ruinous. As detailed herein, while Guatemala manipulated its legal regime to avoid accountability for its actions, this Tribunal, should hold Guatemala to account for these internationally wrongful acts, and should award Claimant the full benefits of its investment.

* * *

4. Desperate to attract foreign investment to ameliorate the electricity crisis that plagued the nation, in 1996, Guatemala enacted its General Electricity Law (the “LGE”) and, shortly thereafter, issued accompanying regulations (the “RLGE”), as a necessary step towards privatizing its largest electricity distribution company, EEGSA. Earlier in the decade, Guatemala had been advised that any attempt to privatize EEGSA would be unsuccessful and unlikely to attract much needed foreign investment because Guatemala lacked a modern electricity law and a stable regulatory environment free from political interference. Facing blackouts and brownouts for several hours each day, and with only a small portion of the country having access to electricity, Guatemala embarked on a regulatory reform process intended to remedy these shortcomings and entice foreign investors to rescue EEGSA and, with it, Guatemala’s prospects for a brighter economic future.

5. The enactment of the LGE provided Guatemala with the opportunity to obtain a large payout for EEGSA’s privatization by attracting foreign investors with the promise that they would be able to earn a reasonable return on their investment. At privatization, however, EEGSA’s financial performance was dismal, because, among other reasons, the Government subsidized electricity rates. Thus, EEGSA could not be – and was not – valued by reference to its past financial performance. Nor was it priced with regard to the value of its depreciated and deteriorated assets. Instead, as Guatemala explained to potential foreign investors, EEGSA was valued much higher because the LGE provided that (i) the distributor would receive a real return (*i.e.*, adjusted for inflation) of between 7% to 13% on the value of a model distribution company and, (ii) at the beginning of every five-year tariff period, the model distribution company’s network would be valued as if it were new. To investors, these guarantees would have meant practically nothing absent Guatemala’s promise to depoliticize the tariff-setting process by creating a system where both the distributor and the regulator would play a role in calculating the

distribution tariffs; where tariffs would be based on economic and technical criteria reflected in a study that the distributor commissioned with the regulator's input; and where disputes between the parties would be resolved by an independent Expert Commission. In light of this newly-adopted framework and Guatemala's promises, Claimant and its partners in 1998 paid US\$ 520 million for 80% of EEGSA, which amount corresponded to the new replacement value of the network of a model distribution company providing service to EEGSA's customers. Following EEGSA's purchase, Claimant and its partners then proceeded to invest large sums of money into EEGSA in order to upgrade its network and expand its coverage.

6. While it obtained substantial proceeds and the benefit of further investment from Claimant and its foreign investor partners, Guatemala was intent on lowering electricity rates for political reasons. Guatemala thus proceeded to dismantle the legal and regulatory framework it had created in order to induce Claimant to invest in EEGSA and arbitrarily and unilaterally imposed an unjustifiably low distribution tariff for the 2008-2013 period, in complete disregard of law and TECO's legitimate expectations.

7. Specifically, just prior to the commencement of EEGSA's 2008 tariff review, Guatemala amended the RLGE to grant itself the ability under certain circumstances to have its own consultant prepare the study upon which the distribution tariffs would be based, notwithstanding that the LGE expressly provided that the distributor's consultant (not the regulator's) should prepare that critical study. This unconstitutional amendment, by its terms, applied only in situations where the distributor's consultant essentially failed to engage with the regulator. No such circumstances ever arose in EEGSA's case, as EEGSA actively engaged with the regulator throughout the 2008 review. The Government nevertheless improperly invoked the amendment on numerous occasions during EEGSA's 2008 review in a blatant attempt to hijack the tariff review process. When EEGSA fought these attempts, Guatemala drafted terms of reference for the distributor's study – in complete disregard of the legal regime that had induced Claimant to invest – that pre-determined the study's outcome; contained formulae and conditions that contravened the law and ensured that the distributor would not obtain its guaranteed return; and granted the Government the right to disregard the study at its discretion. After EEGSA obtained provisional relief from the court against Guatemala's improper use of the terms of reference, and unwilling to accept the study that EEGSA's consultant had prepared, Guatemala

called for the establishment of an Expert Commission and then turned its attention to manipulating that process.

8. In negotiations concerning the Operating Rules to govern the Expert Commission, Guatemala insisted that after the Expert Commission issued its ruling and after EEGSA's consultant had made any revisions to its study to comport with that ruling, Guatemala – and not the Expert Commission – would determine whether the study complied with the Expert Commission's ruling and thus could be used as the basis for the tariffs. At the same time, Guatemala again amended the RLGE, this time to grant itself the right to appoint two of the three members of the Expert Commission. Faced with Guatemala's blatant efforts to render ineffective the independent dispute-resolution process enshrined in the law, EEGSA fought against the application of both provisions and, eventually, prevailed. But, when the Expert Commission issued its ruling – the result of which was largely favorable to EEGSA – Guatemala unilaterally and unlawfully disbanded the Expert Commission. Guatemala then immediately published tariffs based on a study that it had unilaterally commissioned and on which EEGSA never was given an opportunity to see or comment. That study, moreover, contravened several of the Expert Commission's most critical decisions, contravened key provisions of the LGE providing that the return be based on the new replacement value of the model distribution company's assets, and, consequently, resulted in distribution tariffs that were far lower than those to which Claimant was entitled and even lower than those in effect at the time. Guatemala relied on the amendments to the RLGE that it had enacted at the beginning of EEGSA's tariff review to justify its actions, although the amendment not only was unconstitutional but, by its very terms, was inapplicable.

9. The unlawful nature of Guatemala's actions was readily recognized by lower courts, which ordered Guatemala to refrain from interfering with the Expert Commission process and rejected Guatemala's misguided reliance on the RLGE amendment as a basis for its actions. All of these decisions eventually were reversed by a politically-motivated Constitutional Court, intent on doing Respondent's bidding. The Court's decision rendered the entire Expert Commission process – which was a central part of the legal framework adopted by Guatemala to entice foreign investors to invest in its troubled electricity sector – utterly futile, by giving Respondent unfettered discretion to set EEGSA's tariffs.

10. The low rates that Guatemala unilaterally and unlawfully imposed upon EEGSA were crippling. They forced EEGSA to adopt severe cost-cutting measures to stave off ruin. Not only did EEGSA suffer financially in the aftermath of Guatemala's actions, but the State then retaliated against EEGSA's foreign managers, eventually forcing them to flee the country. In light of this unpredictable and hostile climate, as well as financial returns that were far below EEGSA's cost of capital and what Guatemala had promised at privatization, TECO (along with its partners) sold its shares in EEGSA for far less than its investment should have been worth. As demonstrated in detail herein, Guatemala's arbitrary actions, which frustrated TECO's legitimate expectations, violated its obligation under the DR-CAFTA to accord fair and equitable treatment to TECO's investment. As a direct result of Guatemala's actions, TECO suffered damages in the amount of US\$ 249,524,000, which amount should be awarded to Claimant.

II. FACTS

A. Politicization And Inefficiencies Led To A Crisis In Guatemala's Electricity Sector And Its Eventual Privatization

11. In the early 1990s, Guatemala faced a crisis in its electricity sector, with blackouts and brownouts of up to eight hours per day as demand significantly exceeded the available supply of electricity in the country.¹⁰ To address this crisis and improve the operating standards of its electricity sector, Guatemala decided to privatize certain assets in the sector and, in order to encourage private investment, established a new legal and regulatory framework to unbundle and depoliticize the generation, transmission, and distribution of electricity.

12. At the time, the National Electrification Institute ("INDE")¹¹, a State-owned entity established in 1959 principally to build and develop Guatemala's electricity infrastructure,¹² was the primary entity responsible for the generation, transmission, and distribution of electricity

¹⁰ See Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America* (2003), at 219-220 (C-61).

¹¹ In Spanish, the *Instituto Nacional de Electricidad*, hence the acronym "INDE."

¹² See Alegría ¶ 9 (CER-1); *Who We Are*, INDE website, available at <http://www.inde.gob.gt> (C-323); HÉCTOR ALEXANDER CUELLAR SCHAART, *EL AMBIENTE ECONÓMICO, FINANCIERO Y ELEMENTOS DE AUDITORÍA DE LAS EMPRESAS GENERADORAS DE ELECTRICIDAD*, Graduation thesis, Francisco Marroquín University (Guatemala City 1997) ("CUELLAR SCHAART"), at 8 (C-19).

throughout Guatemala.¹³ During the 1970s and 1980s, however, efficiency in the electricity sector had declined significantly, widening the gap between electricity supply and demand.¹⁴ As explained in the expert legal opinion of Professor Rodolfo Alegría Toruño, this gap resulted in large part from the fact that INDE had no incentive to operate efficiently due to its role as both the regulator of the electricity sector (responsible for setting the electricity tariffs) and the regulated entity itself.¹⁵ The Government's reluctance to increase tariff rates had resulted in a highly subsidized rate policy, as well as tariff levels that did not reflect actual costs.¹⁶ With the oil shocks in the 1970s, the depreciation of the Guatemalan currency, and delays in completing new hydroelectric plants, electricity supplies had become less reliable.¹⁷ The quality of electricity service also suffered due to adverse climate conditions, such as droughts; the overuse of hydroelectric power plants during the summer, which drained the water reserves; and the lack of proper maintenance by INDE of its power plants and transmission facilities.¹⁸ As Professor Alegría explains, the political influence and control exerted over INDE during these two decades further compounded its inefficiencies, resulting in a highly politicized and bureaucratic administration, which lacked a long-term energy policy and was subject to corruption.¹⁹

13. During the 1980s, Guatemala, like many other countries in Latin America at the time, faced a debt crisis because of its inability to repay loans granted by international creditors.²⁰ The strain of the debt crisis affected many sectors of Guatemala's economy,

¹³ See Alegría ¶ 9 (CER-1). In 1983, the Government transferred EEGSA's shares to INDE, making INDE the primary entity responsible for the electricity sector in Guatemala. *See id.*

¹⁴ *See id.* ¶ 10; Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 219-220 (C-61).

¹⁵ Alegría ¶ 10 (CER-1).

¹⁶ Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 219 (C-61).

¹⁷ *Id.*

¹⁸ Alegría ¶ 10 (CER-1); HERNAN DEL VALLE PEREZ, *HISTORIA DE LA EEGSA 1894-1994* (Ediciones América, Guatemala 1995) ("DEL VALLE PEREZ"), at 183 (C-12).

¹⁹ Alegría ¶ 10 (CER-1); DEL VALLE PEREZ, at 239 (C-12).

²⁰ *See* Kaczmarek ¶ 25 (CER-2); Alegría ¶ 11 (CER-1); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 2 (C-61).

including its electricity sector.²¹ Beginning in 1986, the debt crisis forced INDE to freeze its investment programs and to reduce the State subsidies that supported the electricity sector.²² To compensate for the reduction in State subsidies, INDE eventually increased its tariff rates.²³ These tariff increases, however, were inadequate to generate sufficient funds and, by the early 1990s, the financial condition of INDE was substantially impaired.²⁴ Indeed, by 1991, Guatemala's financial and banking institutions had cut all credit and loans to INDE due to lack of payment,²⁵ and, by 1992, INDE's generation and supply of electricity had grown so unstable that INDE was forced to ration electricity on a daily basis, leading to systematic blackouts and brownouts.²⁶

14. In response to this instability, Guatemala began to consider the privatization of certain assets in the sector.²⁷ As explained in the expert report of Brent C. Kaczmarek of Navigant Consulting, Inc., Guatemala's privatization decision coincided with similar decisions in many other Latin American countries in the 1990s.²⁸ In general, these decisions were driven by four common factors: (i) the poor performance of State-run enterprises characterized by high costs, inadequate expansion of access, and unreliable supply; (ii) the inability of the State-run sector to finance the expenditures required to maintain and expand the system; (iii) the need to

²¹ See Kaczmarek ¶ 25 (CER-2); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 219 (C-61).

²² See Kaczmarek ¶ 26 (CER-2); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 219 (C-61); DEL VALLE PEREZ, at 302 (C-12).

²³ See Kaczmarek ¶ 26 (CER-2); Susan Berger, *Guatemala: Coup and Countercoup* in NACLA REPORT ON THE AMERICAS, Vol. 27 (1993) (C-10).

²⁴ See Kaczmarek ¶ 26 (CER-2); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 219-220 (C-61); DEL VALLE PEREZ, at 302 (C-12).

²⁵ See Alegría ¶ 11 (CER-1); DEL VALLE PEREZ, at 302 (C-12).

²⁶ See Alegría ¶ 11 (CER-1); CUELLAR SCHAART, at 7 (C-19).

²⁷ See Kaczmarek ¶ 26 (CER-2); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 219-220 (C-61).

²⁸ Kaczmarek ¶ 27 (CER-2); see also Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 1-3 (C-61).

eliminate State subsidies to the sector to free up additional public funds; and (iv) the desire to generate additional revenues for the government through the sale of assets (*i.e.*, privatization).²⁹

15. In 1990, Guatemala's President Jorge Serrano requested, through the U.S. Agency for International Development ("USAID"), a study of privatization options for EEGSA, the largest electricity distribution company in Guatemala.³⁰ At the time, INDE owned 91.7% of the shares in EEGSA.³¹

16. The accounting firm Price Waterhouse prepared a privatization study of EEGSA between September and November of 1990.³² As the study reflects, Price Waterhouse concluded that it was too early to privatize EEGSA due to four essential factors: (i) EEGSA's continued dependence on State subsidies; (ii) lack of regulatory mechanisms for the electricity sector; (iii) low privatization price due to EEGSA's condition at the time; and (iv) EEGSA's reliance on INDE, which created significant State-intervention risks.³³ As Price Waterhouse explained, the two most important obstacles to privatizing EEGSA were:

- the regulatory structure – in other words, how are investors' profits going to be regulated. If investors think that the Government will still have control over EEGSA even after privatization efforts, they will be very wary of investing. The regulatory scheme will directly effect [*sic*] the way they will value EEGSA's shares, because it will determine EEGSA's potential profitability. Valuations will vary depending on the regulatory scheme that is assumed.

²⁹ See Kaczmarek ¶ 27 (CER-2); R.W. Bacon and J. Besant-Jones, *Global Electric Power Reform, Privatization and Liberalization of the Electric Power Industry in Developing Countries*, The International Bank for Reconstruction and Development/The World Bank (2001), at 332 (C-51).

³⁰ See Kaczmarek ¶ 28 (CER-2); Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991 (C-7).

³¹ See Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991, at 8 (C-7). As Professor Alegría explains, the State acquired majority control in EEGSA when EEGSA's 50-year concession expired in 1972. See Alegría ¶ 8 (CER-1).

³² See Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991 (C-7).

³³ Kaczmarek ¶ 29 (CER-2); see also Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991, Executive Summary (C-7).

- the reliability of power supplies – if EEGSA was private and INDE remained state-owned, investors would be concerned about power supplies because EEGSA would continue to be almost totally reliant upon INDE for power. Thus investors would require long-term supply contracts between EEGSA and INDE, as well as a commitment by INDE to guarantee the availability of electricity.³⁴

17. Price Waterhouse emphasized Guatemala’s need to liberalize its electricity sector more broadly (generation, as well as distribution) and to select a regulatory regime under which private investors could properly assess EEGSA’s value.³⁵ As Price Waterhouse explained, “[u]ntil a regulatory scheme was established for EEGSA and its long-term relationship with INDE was guaranteed, investors would be hesitant to invest in EEGSA.”³⁶ With respect to the value of INDE’s 91.7% shareholding in EEGSA, Price Waterhouse concluded that,

although based upon net asset value, EEGSA’s stock would be worth approximately Q297.8 million (about \$59.6 million), a more appropriate valuation based upon earnings indicates a much lower value of approximately Q69.6 million (about \$13.9 million).³⁷

Price Waterhouse thus recommended that “the Government of Guatemala and INDE take a slow and planned approach to any final decisions regarding the future of EEGSA.”³⁸

18. In 1991, Guatemala began addressing Price Waterhouse’s recommendations. From 1991 to 1993, Guatemala increased electricity tariffs to reduce the need for State subsidies, despite the politically unpopular nature of such tariff increases.³⁹ Beginning in 1992, after Enron Corporation had brought online the first new private electricity generation project, Guatemala

³⁴ Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991, at 17 (C-7).

³⁵ *See id.* at 29-32.

³⁶ *Id.* at 17.

³⁷ *Id.* at 26.

³⁸ *Id.* at 27.

³⁹ *See* Kaczmarek ¶ 30 (CER-2); Susan Berger, *Guatemala: Coup and Countercoup* in NACLA REPORT ON THE AMERICAS, Vol. 27 (1993) (C-10).

began breaking up INDE and reducing INDE's role in the generation of electricity.⁴⁰ In 1994, the Guatemalan Congress enacted the INDE Organic Law (Decree No. 64-94), which included changes aimed at demonopolizing electricity generation and partially liberalizing the electricity sector.⁴¹ Following the enactment of the INDE Organic Law, INDE and EEGSA entered into power purchase agreements with several private companies.⁴² While these agreements ultimately facilitated the generation of electricity by private investors,⁴³ the price of electricity in the power purchase agreements was high, reflecting the risk of investing in a State-controlled industry and the fact that the agreements had been negotiated on an emergency basis.⁴⁴ This exacerbated INDE's (and the Government's) financial difficulties, and INDE's yearly deficits continued to grow.⁴⁵

19. Guatemala thus began considering ways of restructuring its electricity sector more broadly. INDE, with the help of USAID, hired Chilean consultants Juan Sebastián Bernstein and Jean Jacques Descazeaux to prepare a report for restructuring and deregulating the electricity sector.⁴⁶ In their June 1993 report, Messrs. Bernstein and Descazeaux observed that

[the electricity] sector's institutional framework, the political pressures exerted on it and INDE's poor response to its obligations

⁴⁰ See Kaczmarek ¶ 30 (CER-2); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 220 (C-61).

⁴¹ See Alegría ¶ 11 (CER-1); *Energización de la Cadena Alimentaria Convergencia entre Políticas Energéticas y Agrícolas*, at 3, available at <http://www.fao.org/docrep/006/ad098s/AD098S07.htm> (C-397).

⁴² See Alegría ¶ 12 (CER-1); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 220 (C-61). In 1995, Tampa Centro Americana de Electricidad, Limitada, a subsidiary of TECO Energy, built the Alborada Power Station, located in Escuintla, Guatemala, and entered into a long-term power purchase agreement with EEGSA. See Gillette ¶ 5 (CWS-5).

⁴³ See Kaczmarek ¶ 30 (CER-2); Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 219-220 (C-61).

⁴⁴ See Alegría ¶ 12 (CER-1); Héctor Vinicio España González, *Generación Distribuida por Medio de Energías Alternas Renovables y su Influencia en la Evolución del Sistema Eléctrico Secundario de Distribución Tradicional*, Graduation Thesis, Universidad San Carlos de Guatemala (Guatemala 2008), at 9 (C-304); DEL VALLE PEREZ, at 303 (C-12).

⁴⁵ See Alegría ¶ 12 (CER-1).

⁴⁶ Juan Sebastián Bernstein and Jean Jacques Descazeaux, *Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report* dated June 1993 ("Bernstein and Descazeaux") (C-9).

led up until recently Guatemala's power sector to a serious crisis which has manifested itself in a low service coverage, serious inefficiency in the construction of power plants, INDE's overstaffing, poor reliability of service, distorted electric tariffs and a serious financial deficit together with a high level of debt in the sector.⁴⁷

Messrs. Bernstein and Descazeaux further noted that Guatemala's new Government and INDE's administration, together with other social and political sectors, had come together to conceive a new institutional framework for the electricity sector, "in which INDE stopped being the state monopoly in the industry, and in which the private sector would come to play a main role."⁴⁸

20. With respect to the then existing Guatemalan legislation, Messrs. Bernstein and Descazeaux observed that it was "absolutely insufficient" and would "obstruct the participation of private external investors in competitive generation and distribution."⁴⁹ As they explained, Guatemala was in need of "objective rules which define the parties' obligations and rights, thus preventing the arbitrary intervention of regulatory entities."⁵⁰ Messrs. Bernstein and Descazeaux further stated that "it would be possible to minimize the intervention of a regulatory organism in those matters most sensitive to regulation, such as price regulation in the segments with characteristics of a natural monopoly: transmission and distribution."⁵¹ In order to achieve this, Messrs. Bernstein and Descazeaux recommended "a Committee formed by the Ministers of Finance and of Energy and Mines, to supervise [an outside tariff study] commissioned by the concession holders from a prestigious consulting agency."⁵² They further recommended that "[t]he permanent regulatory function would be limited to overseeing compliance with the law in

⁴⁷ *Id.* at 2.

⁴⁸ *Id.*

⁴⁹ *Id.* at 34.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

matters such as safety of facilities” and that the arbitration of disputes “might be given to arbitrating courts appointed by the parties.”⁵³

21. After issuing their report, Messrs. Bernstein and Descazeaux prepared a draft of the new General Electricity Law and its regulations.⁵⁴ As reflected in the cover letter to the draft law, the project was required to “adhere to the objectives of de-concentration and de-monopolization defined by the Government and by a large number of social and political classes of the country, and create the conditions to attract private investment in generation, transmission and distribution of electricity.”⁵⁵ Messrs. Bernstein and Descazeaux further explained that

[a]lthough the main objective of the work performed consisted of preparing the bills of law for the electricity law and its regulations, an important part of the tasks performed consisted of presenting and discussing the way in which decentralized electric systems work in the world, with strong private participation and operating under competitive market conditions in generation. Special emphasis was given to the operation of the wholesale markets at the generation level, and to the need to establish transparent and objective regulations for those activities with the characteristics of a natural monopoly, such as transmission and distribution.⁵⁶

22. On 19 September 1996, the Congressional Commission on Energy and Mines (the “Congressional Commission”) issued a report recommending passage of Decree No. 93-96, which contained the new General Electricity Law of Guatemala (the “LGE”).⁵⁷ Decree No. 93-96 was based on the report and draft of the law prepared by Messrs. Bernstein and Descazeaux.⁵⁸ In its report, the Congressional Commission observed that the monopoly model had been unsuccessful in providing electricity to Guatemala’s citizens, and that the LGE represented “the

⁵³ *Id.*

⁵⁴ *See* Final Draft of the General Electricity Law and Regulation, Republic of Guatemala (USAID Project No. 520-0353) dated 4 Apr. 1995 (“Draft LGE”) (C-13).

⁵⁵ *Id.*, Preamble.

⁵⁶ *Id.*

⁵⁷ Decree No. 93-96, General Electricity Law dated 16 Oct. 1996, entered into force on 15 Nov. 1996 (“LGE”) (C-17).

⁵⁸ *See* Alegría ¶ 13 (CER-1).

response [that the Congressional Commission] considered most effective and viable” to “expeditiously promote the national electrification process” that would give Guatemala’s citizens “access to the higher qualities of life that exist in the world today.”⁵⁹ The Congressional Commission emphasized that politicization had crippled Guatemala’s electricity system and discouraged private investment.⁶⁰ As the Congressional Commission explained, “[t]he depletion of the systems that have been used in the electric subsector systems that were based on the state monopoly and on corrosive or controversial private contracting, not only have resulted in the paralysis of the State as an entity promoting national electrification, but have also de-incentivized private investment”⁶¹

23. The Congressional Commission observed that a key objective of the LGE would be to attract foreign investment:

[T]he objectives of this law are . . . the establishment of a legal framework of general application that provides *legal certainty to public and private investment in the [electricity] subsector, as a basic condition for the securing of financing from international credit entities and from national capitals*, which seek to invest in conditions of equality and competitiveness, so as to be able to ensure maximum benefits of quality and price for electricity services to users and the urgency of taking the service to the majority of the population — approximately 70% — that today lacks such service and that is also the most abandoned and needy population.⁶²

The Congressional Commission further noted that the LGE was aimed at depoliticizing the sector and establishing legal certainty:

The objectives of the law also include the de-monopolization and de-politicization of the activities of the subsector, by creating entities and authorities that regulate and avoid the political interference that has caused, and can cause, so much distortion and

⁵⁹ Report of the Congressional Commission on Energy and Mines dated 19 Sept. 1996, at 1 (C-15).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

damage, unless clear legal provisions of general application are established, which is precisely the intent of this law, seeking, above all, the common good.⁶³

24. In October 1996, following the Congressional Commission's recommendation, the Guatemalan Congress debated Decree No. 93-96. As Professor Alegría explains, the debate made clear that the Congress understood that the objective of the LGE was to improve the quality and coverage of electricity services in Guatemala, but that the LGE also would likely lead to higher electricity tariffs.⁶⁴ Thus, for example, Deputy R. Morales Veliz expressed support for the LGE, because the LGE would “enable[] energy to be permanent in this country. If there is no energy there is no development.”⁶⁵ Deputy Veliz also supported the LGE, because, under the system existing at the time, “we positively know that there is no capacity to expand coverage and give the Guatemalan population, principally the rural area, that is 70% of the population, with the energy they also need.”⁶⁶ Deputy R. Ruano Herrera similarly expressed support for the LGE, noting that centralized States with planned economies were “rigid structures that did not allow for growth nor did it stimulate investments, proof of this has been the inefficiency of bureaucratic organizations, accompanied by high operating costs and the highest of all costs: the cost of scarcity.”⁶⁷ Deputy R. Crespo Villegas, on the other hand, declared that “the Guatemalan Republican Front, just as we have stated in the media, we vote against this bill of law because we consider that the [LGE] will produce a new hike in the electricity tariff.”⁶⁸

25. On 16 October 1996, following this debate, the Guatemalan Congress enacted the LGE, which entered into force on 15 November 1996.⁶⁹ As Professor Alegría explains, the

⁶³ *Id.*

⁶⁴ See Alegría ¶ 17 (CER-1).

⁶⁵ Diary of Sessions of the Congress of the Republic of Guatemala, Ordinary Period 1996-1997, Record of Session No. 074 dated 16 Oct. 1996, at 100 (C-16).

⁶⁶ *Id.*

⁶⁷ *Id.* at 102.

⁶⁸ *Id.* at 97.

⁶⁹ LGE (C-17).

preamble to the LGE echoes much of the Congressional Commission's findings, noting, for example, that:

- a. The supply of electric energy does not satisfy the needs of the majority of the Guatemalan population, and is not proportional to the requirements for a greater supply vis-à-vis its growing demand, and the deficiency in this sector is an obstacle to the country's integral development, for which reason it is necessary to increase the production, transmission and distribution of such energy by liberalizing the sector;⁷⁰ and
- b. The Government of the Republic of Guatemala, as coordinator and underlying entity for national development, deems that it is of national urgency, as stipulated in the Political Constitution of the Republic of Guatemala, in its Article 129, and, as the Government does not have the economic-financial resources for a venture of such breadth, it is necessary to have the participation of investors who can support the establishment of electric energy generation, transmission and distribution companies and optimize the growth of the electrical subsector.⁷¹

As contemplated by the LGE,⁷² in March 1997, the President of Guatemala and the Ministry of Energy and Mines ("MEM") issued regulations relating to the LGE (the "RLGE").⁷³

26. As shown below, in accordance with the recommendations of Messrs. Bernstein and Descazeaux and in order to encourage private investment in Guatemala's electricity sector, the LGE and its implementing regulations set forth a new legal framework for the generation, transmission, and distribution of electricity in Guatemala, which sought to attract foreign investment by depoliticizing the sector and establishing a stable and predictable regulatory regime.

⁷⁰ LGE, First Recital of the Preamble (C-17); Alegría ¶ 18 (CER-1).

⁷¹ LGE, Second Recital of the Preamble (C-17); Alegría ¶ 18 (CER-1).

⁷² LGE, Section VII, Transitory Provisions, Ch. 1, Art. 4 ("Within a period of ninety (90) days counted from the date of publication of this law, the Executive Branch shall issue the regulations of the same.") (C-17).

⁷³ Government Accord No. 256-97, Regulations of the General Electricity Law dated 21 Mar. 1997 ("RLGE") (C-21).

B. When Guatemala Privatized Its Electricity Sector, It Adopted A Legal Regime Designed To Attract Foreign Investment By Guaranteeing Fair Returns And A Depoliticized Process

1. The LGE Provides That The VAD Will Be Calculated On The New Replacement Value Of The Capital Base Of A Model Company Every Five Years And Guarantees A Minimum 7 Percent Real Rate Of Return

27. In order to attract much needed investment in electricity distribution, the LGE established a framework to regulate electricity prices, while ensuring a reasonable rate of return for distributors. As Mr. Kaczmarek explains, the significant fixed costs that electricity distributors incur in establishing their distribution network make it uneconomical for competitors to establish alternative networks, thus creating a natural monopoly.⁷⁴ Because natural monopolies do not have competitors, they are routinely subject to price regulation, which is intended to guard against exorbitant pricing and, at the same time, to allow the monopoly to obtain a reasonable profit.⁷⁵ Natural monopolies like electricity distributors with high, fixed, upfront costs face significant investment risk as they must recoup their substantial investment over time, along with a reasonable profit, yet their service is widely consumed and, thus, often subject to political pressure to lower prices.⁷⁶ As respected analysts note:

The reason for the politicization of infrastructure pricing is threefold.

First, the fact that a large component of infrastructure investments is sunk, implies that once the investment is undertaken the operator will be willing to continue operating as long as operating revenues exceed operating costs. Since operating costs do not include a return on sunk investments (but only on the alternative value of these assets), the operating company will be willing to operate even if prices are below total average costs.

Second, economies of scale imply that in most utility services, there will be few suppliers in each locality. Thus, the whiff of monopoly will always surround utility operations.

⁷⁴ Kaczmarek ¶ 43 (CER-2).

⁷⁵ *Id.* ¶ 44.

⁷⁶ *Id.* ¶ 45.

Finally, the fact that utility services tend to be massively consumed, and thus that the set of consumers closely approximates the set of voters, implies that politicians and interest groups will care about the level of utility pricing. Thus, massive consumption, economies of scale and sunk investments provide governments (either national or local) with the opportunity to behave opportunistically vis-à-vis the investing company. For example, after the investment is sunk, the government may try to restrict the operating company's pricing flexibility, may require the company to undertake special investments, purchasing or employment patterns or may try to restrict the movement of capital. All these are attempts to expropriate the company's sunk costs by administrative measures.⁷⁷

28. The regulatory framework adopted by Guatemala for its electricity sector sought to address these concerns by ensuring that electricity tariffs would be set in accordance with economic and technical criteria; that the rights of the regulator and regulated company would be balanced; and that there would be no political intervention in the tariff process.

29. The LGE vests the MEM with the "administration and enforcement of the LGE and RLGE,"⁷⁸ while creating a new entity, the National Electric Energy Commission ("CNEE"),⁷⁹ as a "technical," rather than political, body of the MEM with "functional independence" in exercising its powers to regulate distributors and set the tariffs.⁸⁰

30. The LGE establishes that the tariff rates will be set every five years,⁸¹ with periodic interim adjustments for inflation and fuel costs, among other things.⁸² The electricity

⁷⁷ Pablo Spiller and Mariano Tommasi, *The Institutions of Regulation: An Application to Public Utilities*, Mar. 2004 at 6-7 (citations omitted) (C-86); Kaczmarek ¶ 45 (quoting same) (CER-2); see also *id.* ¶ 33 ("The importance of [the regulator's] role is often particularly acute when previously state-owned natural monopolies, particularly those monopolies that charged low prices due to the existence of state-subsidies are privatized. In these cases, prices often rise substantially when the monopoly is transferred to private hands and the subsidies are removed. These price increases can create public dissatisfaction and threaten the private investor's ability to recover the acquisition price of its investment.") (CER-2).

⁷⁸ LGE, Art. 3 (C-17); Alegría ¶ 22 (CER-1).

⁷⁹ In Spanish, the *Comisión Nacional de Energía Eléctrica*, hence the acronym "CNEE."

⁸⁰ LGE, Art. 4 (C-17); Alegría ¶¶ 22-23 (CER-1).

⁸¹ LGE, Art. 77 (C-17); RLGE, Art. 95 (C-21); Kaczmarek ¶ 83 (CER-2).

⁸² RLGE, Arts. 79, 86, 87 (C-21); see also Kaczmarek ¶ 83 (CER-2).

tariff, which is paid by the ultimate consumer, comprises the cost for generation, transmission, and distribution.⁸³ In accordance with the LGE, the tariff rates must “strictly reflect the economic cost of acquiring and distributing the electric energy.”⁸⁴ The distribution company pays for the cost of the electricity from the generator and also pays a transmission toll to the transmission company.⁸⁵ These costs are passed through to the consumer.⁸⁶ The portion of the tariff that the distributor retains is the Value Added for Distribution or “VAD,”⁸⁷ from which the distributor recoups its investment and makes its profit.⁸⁸

31. The VAD compensates the distributor for both operating costs (*i.e.*, costs incurred in distributing electricity) and capital costs (*i.e.*, the financial cost of capital). There are three principal components comprising operating costs.⁸⁹ The first of these are user costs that depend on the number of customers, regardless of the amount of electricity consumed, such as metering and billing costs.⁹⁰ The second category of costs is for capital, operation, and maintenance.⁹¹ These costs tend to increase as energy consumption increases and include the costs of operating

⁸³ LGE, Art. 71 (“The rates to end consumers for the final distribution service, in their components of power and energy, shall be calculated by the Commission as the sum of the weighted price of all the distributor purchases referenced to the inlet to the distribution network and the Value Added by Distribution”) (C-17); *see also* Alegría ¶ 25 (CER-1); Giacchino ¶ 6 (CWS-4); Calleja ¶ 5 (CWS-3).

⁸⁴ LGE, Art. 76 (C-17).

⁸⁵ *See* Calleja ¶ 5 (CWS-3).

⁸⁶ LGE, Art. 61 (C-17); RLGE, Arts. 86, 88 (C-21); Empresa Eléctrica de Guatemala S.A., Memorandum of Sale prepared by Salomon Smith Barney dated 1998 (“Sales Memorandum”), at 48 (“The obligation of the Commission, at the moment of determining final tariffs for the public, is to transfer the average price of capacity and energy indicated above, to guarantee the concept of “pass-through” of the total value of purchases, as provided in the law.”) (C-29); Alegría ¶ 25 (noting that “the cost of energy, *i.e.*, the cost to the distributor of obtaining electricity from generators and transmitters” are “passed through to the consumer”) (CER-1); *see also* Kaczmarek ¶ 69 (CER-2); Calleja ¶ 5 (CWS-3).

⁸⁷ In Spanish, the *Valor Agregado de Distribución*, hence the acronym “VAD.”

⁸⁸ *See* Alegría ¶ 25 (CER-1); Giacchino ¶ 6 (CWS-4); Kaczmarek ¶ 70 (CER-2); Calleja ¶ 5 (CWS-3).

⁸⁹ LGE, Art. 72 (C-17); Alegría ¶ 26 (CER-1); Kaczmarek ¶ 72-75 (CER-2).

⁹⁰ LGE, Art. 72 (providing that the VAD “shall take into account . . . [c]osts associated with the user, regardless of its demand for power and energy”) (C-17); Alegría ¶ 26 (CER-1); Kaczmarek ¶¶ 73 (CER-2).

⁹¹ LGE, Art. 72 (providing that the VAD “shall take into account . . . [a]verage distribution losses, broken down into their power and energy components”) (C-17); Alegría ¶ 26 (CER-1); Kaczmarek ¶ 74 (CER-2).

installations, maintenance of equipment, and salaries.⁹² And the third category is average energy losses.⁹³ A certain amount of energy is lost as it travels through cables, and there is additional energy lost through theft.⁹⁴ The distributor consequently purchases more electricity than is ultimately consumed by paying customers, which amounts to a cost to the distributor.⁹⁵ Finally, the capital cost component of the VAD allows the distributor to recover a portion of its invested capital, *i.e.*, a return of capital, and also to receive a profit, *i.e.*, a return on capital.⁹⁶

32. The VAD does not compensate the distributor for the actual costs that it incurs in distributing electricity or its actual cost of capital. Instead, with the LGE, Guatemala adopted the model company approach.⁹⁷ Article 71 of the LGE thus provides that the VAD corresponds to “the average capital and operational cost of a distribution system of a benchmark efficient company operating in a given density area.”⁹⁸ In other words, the LGE “establishes that the VAD is calculated using a hypothetically efficient firm as a benchmark,” rather than the distributor’s actual capital and operational costs.⁹⁹ As Mr. Kaczmarek explains, “Model Company regulation . . . does not require detailed cost reviews of the regulated company because costs and the regulatory asset base are based upon a ‘model company.’ Thus, Model Company regulation focuses on what is ideal rather than what actually exists.”¹⁰⁰ Advocates of this

⁹² Kaczmarek ¶ 74 (CER-2).

⁹³ LGE, Art. 72 (providing that the VAD “shall take into account . . . [c]osts of capital, operation and maintenance associated with distribution stated by unit of power supplied.”) (C-17); Alegría ¶ 26 (CER-1); Kaczmarek ¶ 75 (CER-2).

⁹⁴ See Giacchino ¶ 80 (CWS-4).

⁹⁵ Kaczmarek ¶ 75 (CER-2).

⁹⁶ *Id.* ¶¶ 76-77; Giacchino ¶ 6 (CWS-4).

⁹⁷ LGE, Arts. 71-73 (C-17); RLGE, Art. 97 (C-21); Alegría ¶ 25 (CER-1); Bastos ¶ 20 (CWS-1); Giacchino ¶ 8 (CWS-4); Kaczmarek ¶¶ 60 (CER-2); Gillette ¶ 12 (CWS-5); Calleja ¶ 8 (CWS-3).

⁹⁸ LGE, Art. 71 (C-17); *see also* RLGE, Art. 91 (same) (C-21).

⁹⁹ Alegría ¶ 25 (CER-1); *see also* LGE, Art. 73 (“The operation and maintenance cost will be that corresponding to efficient management of the benchmark distribution network.”) (C-17); Giacchino ¶ 8 (CWS-4).

¹⁰⁰ Kaczmarek ¶ 56 (CER-2); *see also id.* ¶ 54 (noting that in model company regulation, “the regulatory asset base is typically established as the value of the fixed assets that a hypothetical, ‘ideal’ company would own”); Expert Commission’s Report dated 25 July 2008 (“EC Report”), Introduction, at 9 (noting that “the calculated VAD does not necessarily represent the actual company costs since the grid designed hardly ever

approach maintain that “it creates more incentives for the regulated company to operate or perform at a high level”¹⁰¹

33. To calculate the operational and capital costs of a model company, the value of that model company’s asset base must be ascertained. In this regard, the LGE provides in Article 67 that the VAD is “calculated based of the New Replacement Value” – that is to say the “VNR”¹⁰² – “of the optimally designed facilities”¹⁰³ The VNR thus represents the value of the assets that a model, efficient company would need to service the area and customer base of the distribution company, and assumes that all of those assets are new.¹⁰⁴

34. Chief among the benefits for a State that adopts the model company approach along with basing the VAD on the new replacement value of the asset base is the ability to obtain a high price when privatizing a distribution company, even if the company’s assets are obsolete or deteriorated.¹⁰⁵ This is because “the regulatory asset base would reflect a ‘model’ distribution company” and, thus, investors would pay for the asset base of a model distribution company, as opposed to paying for the actual value of the company’s assets.¹⁰⁶ Adopting this approach

coincides with the actual grid and may have costs that exceed or fall under the costs the actual company incurs”) (emphasis omitted) (C-246).

¹⁰¹ Kaczmarek ¶ 56 (CER-2); see also Bastos ¶ 20 fn. 17 (CWS-1).

¹⁰² In Spanish, the *Valor Nuevo de Reemplazo*, hence the acronym “VNR.”

¹⁰³ LGE, Art. 67 (C-17); see also Alegría ¶ 25 (CER-1); Kaczmarek ¶ 80 (CER-2).

¹⁰⁴ The VNR is defined in LGE Article 67 as “the cost involved in building the works and physical assets of the authorization with the technology available on the market to provide the same service. The concept of economically adapted installation involves recognizing in the New Replacement Value only those facilities or parts of facilities that are economically justified to provide the required service.” LGE, Art. 67 (C-17); see also Alegría ¶ 25 (CER-1); Bastos ¶ 20 (CWS-1); Kaczmarek ¶ 80 (CER-2); Giacchino ¶ 7 (CWS-4); EC Report, Introduction, fn. 3 (noting that the VNR “by definition is the cost to totally replace with new the calculated grid and installations for which the totality of each type of equipment must be multiplied by the unit value of same in effect on the date of the Study.”) (C-246).

¹⁰⁵ Kaczmarek ¶ 59 (CER-2); Giacchino ¶ 7 (CWS-4).

¹⁰⁶ Kaczmarek ¶ 59 (CER-2); see also Giacchino ¶ 7 (CWS-4).

likewise “result[s] in higher electricity rates, as the [investor] would need to recover the much higher regulatory asset base.”¹⁰⁷

35. The distributor’s capital costs, *i.e.*, its return of capital and return on capital, are the product of the VNR and what is called the Capital Recovery Factor (“FRC”).¹⁰⁸ The return of capital portion of the FRC is calculated based on the estimated useful life of the assets.¹⁰⁹ Thus, assuming that the assets have a useful life of thirty years, the investor’s return of capital would be 1/30 of the new replacement value of the asset base, so as to allow the distributor to recover the full value of the regulatory asset base over the life of the assets.¹¹⁰ For the profit component of the FRC, or the distributor’s return on capital, the LGE provides that the cost of capital must be between 7% and 13% in real terms (*i.e.*, adjusted for inflation).¹¹¹ This cost of capital is applied to the VNR to obtain the distributor’s return on capital or profit.¹¹² Thus, for example, if the cost of capital is 10%, the distributor receives 10% of the new replacement value of the model company’s asset base as its profit. The privatization model adopted by Guatemala thereby allowed Guatemala to receive a high price for EEGSA’s substandard assets, but ensured investors that they would receive a return based on the assets as if they were new.

2. The Law Provides That Disputes Between The Distributor And The Regulator Regarding The VAD Study Are To Be Resolved By An Expert Commission

36. In keeping with the objective of balancing the interests of the regulator with the rights of the distributor, the law establishes a framework where neither the regulator nor the

¹⁰⁷ Kaczmarek ¶ 59 (CER-2); *see also* Giacchino ¶ 7 (CWS-4).

¹⁰⁸ In Spanish, the *Factor de Recuperación de Capital*, hence the acronym “FRC.” *See* Kaczmarek ¶¶ 55, 79 (CER-2); Bastos ¶ 20 (CWS 1); Giacchino ¶ 6 (CWS-4).

¹⁰⁹ LGE, Art. 73 (“The cost of capital per unit of power shall be calculated as the constant annuity of cost of capital corresponding to the New Replacement Value of an economically sized distribution network. The annuity will be calculated with the typical useful life for distribution facilities and the discount rate that is used in calculation of the rates.”) (C-17); Kaczmarek ¶ 82 (CER-2).

¹¹⁰ Kaczmarek ¶ 116 (CER-2).

¹¹¹ LGE, Art. 79 (“In any event, if the discount rate should be less than an annual real rate of seven percent or greater than an annual real rate of thirteen percent, the latter values, respectively, will be used.”) (C-17); *see also* Alegría ¶ 25 (CER-1); Kaczmarek ¶ 77 (CER-2); Giacchino ¶ 6 (CWS-4).

¹¹² Kaczmarek ¶¶ 50, 77 (CER-2); Bastos ¶ 20 (CWS-1); Giacchino ¶ 6 (CWS-4).

distributor may unilaterally set the tariff rates or impose its views on the other party.¹¹³ The legal framework adopted by Guatemala thus does not “grant the CNEE discretionary power to determine the tariffs as a fixed number.”¹¹⁴ Rather, the LGE and RLGE ensure that “various actors provide input to calculate a VAD based on economic and technical data,” as is consonant with the “goal of the LGE to depoliticize the tariff process and thus foster foreign investment in the electricity sector.”¹¹⁵

37. As a first step, the LGE provides that the CNEE must commission an independent study to calculate the distributor’s cost of capital.¹¹⁶ As noted above, the LGE provides that the cost of capital must be between 7% and 13% in real terms and, thus, if the study finds a cost of capital outside of this range, the low or high point of the range must be used.¹¹⁷

38. To calculate the VNR and the resulting VAD and tariff rates, the distributor is tasked with retaining an independent consultant to perform a study.¹¹⁸ That consultant must be selected from a list of consultants that have been prequalified by the CNEE.¹¹⁹ This is a “fundamental aspect” of the regulatory regime “since the prequalification performed by CNEE presupposes that such entity understands that the firm finally selected by the distribution

¹¹³ See LGE, Art. 75 (C-17); see also Alegría ¶¶ 30-31 (CER-1).

¹¹⁴ Alegría ¶ 23 (CER-1).

¹¹⁵ *Id.* ¶ 27.

¹¹⁶ LGE, Art. 79 (“The discount rate to be used in this Law to determine the rates shall be equal to the rate of cost of capital determined by the Commission through studies commissioned with private entities that specialize in the matter, and it must reflect the rate of cost of capital for activities of similar risk in the country.”) (C-17); see also Kaczmarek ¶ 50 (explaining that “[t]he rate of return is essentially the profit the utility expects to earn in operating the utility. The rate of return is often defined as the cost of capital necessary to establish (or purchase) the regulatory asset base.”) (CER-2); *id.* ¶ 77 (noting that “[t]he financial cost of capital often is determined as the weighted average cost of capital (‘WACC’). We refer to this cost element as the ‘return on capital.’”).

¹¹⁷ LGE, Art. 79; see also Alegría ¶ 25 (CER-1).

¹¹⁸ LGE, Art. 74 (“Each distributor shall calculate the VAD components through a study entrusted to an engineering firm prequalified by the Commission.”) (C-17); RLGE, Art. 97 (“The Distributor must contract with specialist consulting firms the performance of studies to calculate the components of the Value Added of Distribution.”) (C-21); Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. 2.4 (C-59) (providing that the distributor is the one responsible for the study that shall be used to issue the tariffs); EC Report, Introduction, at 2-3 (C-246); Alegría ¶¶ 27-28, 31, 69 (CER-1); Calleja ¶ 8 (CWS-3).

¹¹⁹ LGE, Art. 74 (C-17); RLGE, Art. 97 (C-21); Alegría ¶ 23 (CER-1).

company has the solvency, capacity, suitability and independence of criteria to perform a Tariff Study, which is to say, impartiality.”¹²⁰

39. One year before the existing tariffs expire, the CNEE issues terms of reference for the study (“ToR”).¹²¹ The RLGE contains numerous formulas and calculations and “establish[es] a mandatory framework for the CNEE to draft the ToR.”¹²² The ToR provide guidance for the consultant, but cannot dictate the results of the study.¹²³ The consultant firm must prepare its study “based on objective information and reliable techniques,”¹²⁴ and the study must be delivered to the CNEE four months before the expiration of the old tariffs.¹²⁵

40. The CNEE is responsible for supervising the study and may comment on it.¹²⁶ As provided in the RLGE (as amended in 2007), the CNEE, upon receipt of the consultant’s study, has two months to accept or reject parts of the study and to formulate its observations:

Four months prior to the initial effective date of the new tariffs, the Distributor shall deliver to the Commission the tariff study which must include the resulting tariff schedules, the justification for each cost line item to be included and the respective adjustment formulas, as well as the respective backup report; the Commission, within a term of two months, shall decide on the acceptance or rejection of the studies performed by the consultants, making the observations it deems pertinent.¹²⁷

¹²⁰ EC Report, Introduction, at 2 (C-246).

¹²¹ LGE, Art. 74 (“The terms of reference of the study(ies) of the VAD shall be drawn up by the Commission, which shall have the right to supervise progress of such studies.”) (C-17); RLGE as amended by Government Resolution No. 68-2007 dated 2 Mar. 2007 (“Amended RLGE”), Art. 98 (C-105); *see also* Alegría ¶ 30 fn. 82 (CER-1); Calleja ¶ 8 (CWS-3).

¹²² Alegría ¶ 29 (CER-1); *see also id.* ¶ 23 fn. 67 (discussing RLGE, Arts. 86-90, 97 (C-21)).

¹²³ LGE, Art. 75 (C-17); Alegría ¶ 29 (CER-1).

¹²⁴ Alegría ¶ 28 (CER-1).

¹²⁵ Amended RLGE, Art. 98 (C-105); Alegría ¶ 30 fn. 84 (CER-1).

¹²⁶ LGE, Art. 74 (stating that the CNEE has the right to supervise the progress of the study) (C-17); *id.*, Art. 75 (stating that “[t]he Commission shall review the studies performed and may make comments on the same.”).

¹²⁷ Amended RLGE, Art. 98 (C-105). The original version of RLGE Article 98 provided that, upon receipt of the distributor’s study, the CNEE had one month to accept or reject the study. *See* RLGE, Art. 98 (C-21); *see also* Alegría ¶ 30 fn. 85 (CER-1).

41. Fifteen days after receiving the CNEE's observations, the distributor, based on the consultant's analysis, must provide the CNEE with its responses to the CNEE's observations.¹²⁸ If the CNEE has no observations, or if the distributor's consultant accepts all of the CNEE's observations and revises its study accordingly, then the study is accepted and the CNEE must publish the tariffs on the basis of the study.¹²⁹

42. In the event that the distributor rejects any of the CNEE's observations, in accordance with LGE Article 75, the CNEE and the distributor will convene an Expert Commission to resolve the dispute:

The [CNEE] shall review the studies performed and may make comments on the same. In case of differences made in writing, the [CNEE] and the distributors shall agree on the appointment of an Expert Commission made of three members, one appointed by each party and the third by mutual agreement. The Expert Commission shall rule on the differences in a period of 60 days counted from its appointment.¹³⁰

43. As set forth in the LGE, the three-member Expert Commission thus has 60 days from the date of its appointment to resolve the dispute.¹³¹ The Expert Commission's ruling is binding on the parties and must be incorporated into the distributor's VAD study.¹³² The

¹²⁸ Amended RLGE, Art. 98 ("The Distributor, through the consultant company, shall analyze the observations, perform the corrections to the studies and shall deliver them to the Commission within the term of fifteen days after receiving the observations.") (C-105); *see also* Alegría ¶ 30 fn. 86 (CER-1).

¹²⁹ Alegría ¶ 23 fn. 86 (CER-1); Amended RLGE, Art. 98 (noting that the Commission has two months to decide on the acceptance or rejection of the studies and make any observations); Amended RLGE, Art. 99 ("Once the tariff study referred to in [Article 98] has been approved, the Commission shall proceed to set definitive tariffs as of the date on which the definitive study was approved....") (C-105).

¹³⁰ LGE, Art. 75 (C-17); *see also* RLGE, Art. 98 ("If discrepancies between the Commission and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed. The cost of this contracting shall be covered by the Commission and the Distributor in equal parts.") (C-21); EC Report, Introduction, at 3 ("Those observations made by CNEE, if not incorporated by the Consultant and therefore, if they persist, constitute discrepancies and must be resolved by the Expert Commission (articles 75 LGE and 98 RLGE).") (C-246); Alegría ¶ 31 (CER-1).

¹³¹ LGE, Art. 75 (C-17); Alegría ¶ 30 (CER-1).

¹³² Alegría ¶¶ 31, 76-78 (noting that the text and context of LGE Article 75 makes clear that the Expert Commission's ruling is binding on the parties) (CER-1); *see also* CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5, 6 (CNEE explaining that "[i]n the event of discrepancies, pursuant to

resulting VAD rate then must used by the CNEE to set the tariff schedule for the distributor.¹³³

44. The Expert Commission process established by Guatemala in the LGE creates a fair, depoliticized, and efficient method of resolving disputes between the CNEE and the distributor relating to the calculation of the VAD.¹³⁴ As Mr. Alegría explains in his expert legal opinion, “the resolution of disputes concerning the variables needed to be determined for the calculation of the VAD is left to experts, with neither the regulator nor the distributor having the power to impose its will on the other.”¹³⁵

C. Claimant Invested In EEGSA In Reliance On The Guarantees And Protections Provided By The New Legal Regime, Which Was Adopted To Attract Foreign Investment

45. As set forth above, Guatemala decided to privatize certain assets in the sector in order to address its electricity crisis and improve the quality and standard of its electricity sector. On 13 February 1997, shortly after the LGE was enacted, the Government of President Alvaro Arzú thus announced the privatization of EEGSA, the largest electricity distribution company in Guatemala.¹³⁶ As set forth below, in reliance on the new legal and regulatory framework established by Guatemala to attract foreign investment in its electricity sector, Claimant decided to invest in EEGSA as part of a consortium comprised of Iberdrola Energía, S.A. (“Iberdrola”), a Spanish utility company; TPS de Ultramar Guatemala, S.A. (“TPS”), an indirect, wholly-owned

Article 98 [of the RLGE] and [Article] 75 of the [LGE], an Expert Commission shall be constituted, which shall resolve [the discrepancies] in a term of 60 days.”) (C-81).

¹³³ LGE, Art. 76 (“The Commission shall use the VAD . . . to structure a set of rates for each awardee.”) (C-17); *see also* Alegría ¶ 37 (noting that “the LGE expressly provides that the distributor’s Consultant is to prepare the VAD study and that the tariffs must be based on that study”) (CER-1).

¹³⁴ Alegría ¶ 16 (explaining that Guatemalan legislators “expected that passage of the LGE would depoliticize the energy sector and guarantee legal certainty”) (CER-1); *id.* ¶ 27 (noting “the goal of the LGE to depoliticize the tariff process and thus foster foreign investment in the electricity sector”); *id.* ¶ 55 (commenting that a “key objective” of the LGE is to “have disputes resolved in a depoliticized process on the basis of economic, technical, and objective considerations by a three-member panel”).

¹³⁵ *Id.* ¶ 31.

¹³⁶ *See* Alegría ¶ 19 (CER-1); *Diccionario Histórico Biográfico de Guatemala*, Fundación para la Cultura y el Desarrollo Asociación de Amigos del País (First Edition, 2004), at 371 (C-84).

Guatemalan subsidiary of Claimant; and Electricidad de Portugal, S.A. (“EDP”), a Portuguese utility company (collectively, the “Consortium”).¹³⁷

46. Following the Government’s decision to privatize EEGSA, President Arzú issued Government Accord No. 865-97 dated 17 December 1997, which authorized the privatization of EEGSA through a national and international public offering of the State’s 96% shareholding in EEGSA.¹³⁸ As Government Accord No. 865-97 provides:

Pursuant to the Law of State Contracts, whenever the authority deems it applicable or convenient, the sale of assets may be performed. Therefore, ownership of the shares that amount to 96% of the share capital of Empresa Eléctrica de Guatemala Sociedad Anónima, which is state owned, is to be transferred to the private sector in order for the energy distribution service and marketing that said company provides be performed competitively and efficiently, especially by making the investments needed to timely satisfy the growth of demand, which the Government cannot achieve as it lacks the essential financial resources needed to perform such objective.¹³⁹

Pursuant to Article 7 of the Accord, EEGSA was responsible for the public offering, which was to be presided over by EEGSA’s Board of Directors or a committee appointed by the Board.¹⁴⁰ To organize the public offering, a High Level Committee was constituted, comprised of EEGSA’s directors and the then Minister of Energy and Mines, Leonel López Rodas.¹⁴¹

47. Pursuant to Article 5 of the Accord, EEGSA was authorized to subcontract with an “internationally renowned financial advisor” to promote the public offering internationally.¹⁴² EEGSA selected Salomon Smith Barney as its financial advisor and, on 28 January 1998, Salomon Smith Barney submitted a Preliminary Report to the High Level Committee, setting

¹³⁷ See Gillette ¶¶ 9-16.

¹³⁸ Government Accord No. 865-97 dated 17 Dec. 1997 (C-23).

¹³⁹ *Id.*, Third Recital of the Preamble.

¹⁴⁰ *Id.*, Art. 7.

¹⁴¹ Representatives of the High Level Commission, Empresa Eléctrica de Guatemala, S.A. (C-18).

¹⁴² Government Accord No. 865-97 dated 17 Dec. 1997, Art. 5 (C-23).

forth a proposed marketing strategy, as well as a list of critical decisions that needed to be taken, including setting the new tariff schedule for EEGSA and defining the standards for the prequalification of investors.¹⁴³ Salomon Smith Barney further proposed that invitation letters be sent together with a Preliminary Information Memorandum to selected strategic investors.¹⁴⁴

48. In February 1998, an Advisory Team identified a list of strategic investors to target.¹⁴⁵ As the Advisory Team explained, “[t]he selection of the investor base to be contacted in the marketing stage is key since to guarantee the success of the process, there has to be competition;” however, “competition is not generated by inviting a large number of investors, but rather through the accurate selection of an adequate number of them with the possibility of investing in EEGSA.”¹⁴⁶ As reflected in the Advisory Team’s presentation, “TECO” was selected as one of the strategic investors.¹⁴⁷

49. In April 1998, Salomon Smith Barney prepared a Preliminary Information Memorandum based on materials and information provided by EEGSA, which was sent to the strategic investors, including TECO.¹⁴⁸ As the Preliminary Information Memorandum explains, EEGSA “is the principal electricity distribution company in the Republic of Guatemala,” and “[i]ts authorized coverage area currently includes the provinces of Guatemala, Escuintla and Sacatepéquez.”¹⁴⁹ It further explains that “[t]he Government of Guatemala has determined to

¹⁴³ See Empresa Eléctrica de Guatemala S.A., Preliminary Report of the Financial and Technical Advisor prepared by Salomon Smith Barney dated 28 Jan. 1998, at 2 (C-25).

¹⁴⁴ *Id.* at 6.

¹⁴⁵ Empresa Eléctrica de Guatemala, S.A., Investors’ Profiles dated 17 Feb. 1998 (C-26).

¹⁴⁶ *Id.*, at 2.

¹⁴⁷ *Id.*, at 9, 44.

¹⁴⁸ See Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998, at 2 (C-27); Gillette ¶ 8 (noting that “TPS received various promotional materials prepared by Salomon Smith Barney regarding EEGSA’s privatization process, including a Road Show presentation, a Preliminary Information Memorandum, and a Memorandum of Sale”) (CWS-5).

¹⁴⁹ Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998, at 3 (C-27). As the Preliminary Information Memorandum explains, “[u]ntil 1997, EEGSA operated as a vertically integrated electric utility, participating in generation, transmission and distribution in Guatemala. Pursuant to the requirements of the Guatemalan General Electricity Law approved by the Congress of Guatemala in 1996, EEGSA spun off its generation assets through an international public auction in the second half of 1997.” *Id.* at 4.

divest itself of its holdings in EEGSA as part of the modernization process that is currently being undertaken by the administration of President Alvaro Arzú.”¹⁵⁰ With respect to EEGSA’s share capital, the Preliminary Information Memorandum provides that:

- 80% of the equity capital of EEGSA shall be placed through an international public auction directed to prequalified investors;
- 16.1% shall be held by the Government of Guatemala for sale under preferential conditions to eligible employees of the Company and for subsequent sale by a public offering registered in the *Bolsa de Valores de Guatemala* (the Guatemalan Stock Exchange);
- The remaining 3.9% shall continue to be held by private investors.¹⁵¹

50. In a section entitled “New Regulatory Framework,” the Preliminary Information Memorandum explains that, on 13 November 1996, “the Congress of the Republic of Guatemala signed the General Electricity Law (the ‘Law’) in order to regulate the activities of generation, transmission, distribution and commercialization of electricity,” and that, on 21 March 1997, “the Executive Branch, acting through the Ministry of Mines and Energy, issued the Regulations relating to the General Electricity Law.”¹⁵² As it notes, “[t]he new regulatory framework mandates the vertical and horizontal segregation of the industry” and “creates the *Comision Nacional de Energía Eléctrica* . . . as a fiscally and operationally independent arm of the Ministry of Mines and Energy, in order to monitor the implementation of the Law and the . . . Regulations.”¹⁵³ In a section entitled “Tariffs,” the Preliminary Information Memorandum describes how EEGSA’s tariffs are to be calculated under the LGE and RLGE:

Pursuant to the provisions of the Law and the Regulations, tariffs for regulated customers, defined under the Law as those with maximum capacity demanded under 100 kW, are set by adding (i) the average cost of energy purchased by the distribution

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.*

¹⁵² *Id.* at 9.

¹⁵³ *Id.*

company, through contracts and the Spot Market; and (ii) the *valor agregado de distribución* (the Value Added for Distribution, or ‘VAD’).

Costs of energy purchased that are used to calculate tariffs for regulated consumers shall be calculated every five years and are based on a model efficient distribution company.

Such costs must include transmission, subtransmission and transformation costs applicable until the energy enters medium distribution voltage (13.8 kV for EEGSA). Costs are expressed in energy and capacity components. It is the duty of the Commission to insure that tariffs [*sic*] are set on a pass through basis.¹⁵⁴

51. Observing that EEGSA “presents an attractive investment opportunity for international electric utilities and other investors interested in the Guatemalan electricity sector and in Central America,”¹⁵⁵ the Preliminary Information Memorandum, in a section entitled “Investment Considerations,” highlights the “[p]otential for growth of the Guatemalan economy;” that “Guatemala is a critical element of a Central American investment strategy;” that Guatemala has an “[a]ttractive electricity market with a high potential for growth;” EEGSA’s stature as a “[l]eading company in the sector;” the favorable “[s]upply costs of energy;” and the opportunity for “[e]xpansion of coverage area.”¹⁵⁶ The Preliminary Information Memorandum specifically notes that “[t]he electric sector in Guatemala offers investors a high potential for growth within a regulatory framework designed to stimulate the development of the sector through free competition.”¹⁵⁷

52. Following distribution of the Preliminary Information Memorandum, EEGSA opened a data room and made available additional documents to potential investors, including the Terms of Reference for the public offering,¹⁵⁸ the final Memorandum of Sale,¹⁵⁹ and a draft

¹⁵⁴ *Id.* at 9-10.

¹⁵⁵ *Id.* at 12.

¹⁵⁶ *Id.* at 12-14.

¹⁵⁷ *Id.* at 13.

¹⁵⁸ Empresa Eléctrica de Guatemala, S.A., Terms of Reference dated May 1998 (C-30).

¹⁵⁹ Empresa Eléctrica de Guatemala S.A., Memorandum of Sale prepared by Salomon Smith Barney (“Sales Memorandum”) dated May 1998 (C-29).

of the Share Purchase Agreement. The Memorandum of Sale, which was prepared by Salomon Smith Barney with the assistance of EEGSA,¹⁶⁰ includes the text of the LGE and RLGE, as well as an audit report on EEGSA prepared by a public accountant and independent auditor.¹⁶¹ The Memorandum of Sale provides an overview of EEGSA,¹⁶² as well as the Guatemalan electricity sector, noting that

[t]he development of the electricity sector during the 1970s and the 1980s was severely flawed given the INDE's institutional weakness and the financial hardships confronting the Institute as a consequence of political meddling with its management and shortcomings in its capacity to supervise the implementation of major hydroelectric projects.¹⁶³

As the Memorandum of Sale emphasizes, “[o]ne of the main goals of the incumbent administration is to attract foreign investment on the back of reforms designed to promote a free market and the privatization of state-controlled companies.”¹⁶⁴

53. In a section entitled “The Regulatory Framework,” the Memorandum of Sale describes in detail the process by which the distributor’s VAD is calculated under the LGE and RLGE.¹⁶⁵ The Memorandum of Sale thus explains that the VAD accounts for:

- The constant monthly costs of capital, operating and maintenance costs, expressed in USD/KW/month, of an efficient standard distribution company (the ‘model company’) with a certain distribution density.
- The administrative and customer service costs per user of the properly-managed ‘model company,’ expressed in USD/client/month.

¹⁶⁰ *Id.* at 2.

¹⁶¹ *See id.*, Appendices A-C.

¹⁶² *Id.* at 5-11, 18-33.

¹⁶³ *Id.* at 37.

¹⁶⁴ *Id.* at 53.

¹⁶⁵ *Id.* at 42-49.

- Energy and power losses of the ‘model company’. Consequently, the tariff for a given distribution company is not equal to the costs it incurs, but to the ‘market’ costs inherent in distribution, which result from the theoretical costs of a highly-efficient ‘model company.’¹⁶⁶

The Memorandum of Sale further explains that the “capital recovery factor is applied to the resulting cost of investment, at an actual interest rate to be determined, which should usually range between 7% and 13%, and considering a useful life of around 30 years.”¹⁶⁷

54. With respect to the calculation of the VAD, the Memorandum of Sale describes the tariff review process set forth in the LGE and RLGE, as well as the role of the Expert Commission in resolving disputes between the CNEE and the distributor relating to the VAD:

VADs must be calculated by distributors by means of a study commissioned from an engineering firm, but the [CNEE] may dictate that the studies be grouped by density. The [CNEE] will review those studies and can make observations, but in the event of discrepancy, a Commission of three experts will be convened to resolve the differences. The Law states that for the purposes of the tariffs to be first set in May 1998, the Commission may rely on VADs taken from other countries applying a similar methodology (like Chile, Peru, and El Salvador, for example).¹⁶⁸

With respect to EEGSA’s tariffs, the Memorandum of Sale notes that, “[h]istorically, tariffs have been low, which has severely stunted the distributor’s potential for gains. In fact, EEGSA has subsidized the market—a burden which gravely compromised its financial health.”¹⁶⁹ As it explains, the LGE “addresses this particular issue, empowering the companies (INDE and EEGSA) to fix tariffs by reference to market prices.”¹⁷⁰

¹⁶⁶ *Id.* at 48-49.

¹⁶⁷ *Id.* at 49. The Sales Memorandum also explains that the management, operating, and maintenance costs of a model company are added to capital costs. *See id.* at 49.

¹⁶⁸ *Id.* at 49.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

55. In May 1998, Guatemala held a series of Road Show presentations to promote EEGSA's privatization.¹⁷¹ As the Road Show presentation reflects, Guatemala noted that "President Arzú's administration has been characterized by its political stability and modernization program," including an "[a]ggressive privatization program" and "[d]eregulation of the main sectors of the economy."¹⁷² With respect to the new regulatory framework, Guatemala highlighted EEGSA's "[e]conomically-based tariff structure [which is] revised every five years,"¹⁷³ and described how the tariffs adjustments are carried out:

- Electricity costs are adjusted every three months;
- The tariff methodology is revised every five years by the CNEE. Any material change in tariff methodology must be supported by a study conducted by an internationally recognized independent consultant;
- The new tariff package sets the discount rate between 7% and 13%. The initial discount rate has been set at 10%;
- The VAD is adjusted annually to correct for foreign exchange exposure.¹⁷⁴

In closing, Guatemala emphasized that EEGSA represented a "landmark opportunity for investors," providing access to "a growing economy within a stable political framework;" "the leading company of an attractive electric market with high growth potential;" and "the Central American market through interconnection projects."¹⁷⁵

56. As Gordon Gillette, the current President of Tampa Electric and Peoples Gas and former President of TECO Guatemala, Inc., notes, TECO was interested in investing in EEGSA and "believed that its privatization presented an excellent opportunity to provide increased security for [TECO's] other investments in Guatemala and to expand and consolidate TECO

¹⁷¹ See Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998 (C-28).

¹⁷² *Id.* at 10.

¹⁷³ *Id.* at 40.

¹⁷⁴ *Id.* at 19.

¹⁷⁵ *Id.* at 39.

Energy's presence in Central America."¹⁷⁶ As Mr. Gillette explains, TECO already had invested in two power plant projects in Guatemala: the Alborada Power Station, a 78-megawatt ("MW") simple-cycle, oil-fired peaking generation facility located in Escuintla, Guatemala, which was TECO Energy's first international investment;¹⁷⁷ and the San José Power Station, a 120-MW pulverized coal-fired power plant to be located near the town of Masagua, Guatemala.¹⁷⁸ As Mr. Gillette notes, because TECO's "two power plants in Guatemala were supplying or were under construction and planned to supply all of their power to EEGSA, placing EEGSA in private hands provided increased security for those investments, as they would no longer be wholly reliant on the Government."¹⁷⁹

57. In addition to EEGSA's synergies with TECO's other investments in Guatemala, Mr. Gillette testifies that the investment opportunity was attractive "in its own right as well."¹⁸⁰ As he explains:

Guatemala was the largest market in the region, with a population of over 11 million. The country also was experiencing rapid economic growth rate and an even greater electricity demand growth rate. Based on information we received and reviewed, we concluded that there were good opportunities for additional growth of EEGSA's customer base and per-customer-usage rates, as well as cost-cutting opportunities which would increase EEGSA's profitability. At that time, EEGSA held a 50-year non-exclusive electricity distribution concession covering the Departments of Guatemala, Escuintla, and Sacatepéquez. This region was the most developed region of Guatemala, accounting for 72% of the total energy consumption of Guatemala. As of 31 December 1997, EEGSA distributed electricity to approximately 511,000 customers, with its customer base growing at an annual rate of 4%

¹⁷⁶ Gillette ¶ 9 (CWS-5).

¹⁷⁷ *Id.* ¶ 5. As Mr. Gillette explains, "[a]s a precursor to the construction of the plant, Alborada entered into a long-term power purchase agreement with EEGSA on 24 January 1995." *Id.*

¹⁷⁸ *Id.* ¶ 6.

¹⁷⁹ *Id.* ¶ 9; *see also* EEGSA Privatization, Management Presentation dated 9 July 1998, at 27 (C-33).

¹⁸⁰ Gillette ¶ 10 (CWS-5).

from 1994 to 1997, and energy consumption in its concession area growing by over 7% per annum in the same period.¹⁸¹

Mr. Gillette further recounts that “[t]he laws that Guatemala had enacted to reform its electricity sector were central to [TECO’s] decision to participate in the bid to privatize EEGSA.”¹⁸² As he explains, “these laws established a stable and predictable regulatory framework for setting EEGSA’s tariffs.”¹⁸³ That the stability and predictability of the new regulatory framework was a critical investment consideration is reflected in the July 1998 presentation by TPS to TECO Energy’s Board of Directors regarding EEGSA, which provides:

Regulatory Framework

In November of 1996, the Government Of Guatemala (“GOG”) approved a new electricity law (the “Law”), establishing a consistent regulatory framework for the sector. The Law eliminated subsidies, mandated the unbundling of the generation, transmission and distribution assets, and prepared the two state-owned electric companies, EEGSA and the Instituto Nacional de Electricidad (“INDE”) for privatization.

EEGSA’s tariffs have been restructured pursuant to the Law. New tariffs, valid for a five-year period, were issued on June 22, 1998, with methodologies closely following the Chilean, Argentine and El Salvador tariff regimes. EEGSA’s tariffs have three components: (i) an electricity generation cost component; (ii) a transmission cost component; and (iii) a distribution value added component, based on an efficiently operated distribution company.

[. . .]

¹⁸¹ *Id.* ¶ 10 (internal citations omitted) (CWS-5); *see also* TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 7-2, 7-4 (C-32); Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998, at 4, 13 (C-27); Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998, at 5 (C-28). On 15 May 1998, EEGSA and the MEM executed an Authorization Contract for the distribution of electricity in the departments of Guatemala, Sacatepéquez, and Escuintla for a term of 50 years. *See* Authorization Contract between EEGSA and the Ministry of Energy and Mines dated 15 May 1998, at 2 (C-31).

¹⁸² Gillette ¶ 11 (CWS-5).

¹⁸³ *Id.*; *see also* TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 7-3 (C-32); EEGSA Privatization, Management Presentation dated 9 July 1998, at 4-5 (C-33).

Risks and Mitigation

The Law and its Regulations represent a new approach for Guatemala and its power sector investors. TPS believes that there is sufficient experience with similar systems in-place in Chile, Argentina, and El Salvador. The features of this system are more manageable than some found in other Latin American countries.¹⁸⁴

58. Another important aspect of the new regulatory framework was the manner in which the VAD is calculated under the LGE and RLGE; as explained above, the VAD is the segment of the overall electricity tariff through which the distributor earns its return. As Mr. Gillette notes, TECO was “particularly interested in the fact that Guatemala uses the model efficient company approach” to calculate the VAD,¹⁸⁵ as this methodology “held out the promise that, if we managed the company well and achieved large efficiencies, our returns would increase.”¹⁸⁶ Mr. Gillette explains that TECO also was

aware that Guatemala’s law provided for the VAD to be adjusted every five years based on a study performed by an independent consultant prequalified by Guatemala and selected by the distributor; that, in calculating the VAD, the assets of the company for each tariff period are valued as if they were new; and that the law guaranteed a real rate of return on the new replacement value of the assets between 7% and 13%.¹⁸⁷

As he further explains, “[a]ll of this was taken into account by us, along with our partners, in structuring our bid.”¹⁸⁸ Mr. Gillette observes that “[t]hese aspects of the law allowed Guatemala

¹⁸⁴ TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 7-3, 7-6 (C-32); see also EEGSA Privatization, Management Presentation dated 9 July 1998, at 4-5 (C-33); Gillette ¶ 11 (CWS-5).

¹⁸⁵ Gillette ¶ 12 (CWS-5).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; see also EEGSA Privatization, Management Presentation dated 9 July 1998, at 5, 29-30 (noting that the rate is “recalculated every 5 years based on allowable return on new replacement cost of efficient network plus O&M costs”) (C-33); Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998, at 19 (C-28). As Mr. Gillette explains, because the rate of return guaranteed by Guatemalan law is a real rate, the nominal annual returns reported on the financial statements need to be adjusted for inflation before comparing them to the guaranteed rate of return. Gillette ¶ 12 fn. 15 (CWS-5).

¹⁸⁸ Gillette ¶ 12 (CWS-5).

to obtain a price for its shareholding in EEGSA that was significantly higher than the book value of EEGSA's assets."¹⁸⁹

59. In addition to analyzing the new legal and regulatory framework established by Guatemala for its electricity sector, TECO performed extensive due diligence, including "analyses to determine whether the estimated overall internal rates of return met [its] targets."¹⁹⁰ With respect to TECO's expected returns, Mr. Gillette recounts that his "position at the time was – and remains – that, in order to justify making the investment, it should attain return levels that exceed those of a US utility. Otherwise, there would be no reason for the company to undertake the increased risk in investing abroad."¹⁹¹ As Mr. Gillette explains:

The regulatory regime in the U.S. is that utilities earn a nominal return based on their cost of capital on the depreciated value of the actual investments they make in utility plant and equipment. The allowed rate of return for invested depreciated capital for our Florida utility investments was and remains at approximately 8%, as it does for most investor-owned utilities in the United States. We determined that we could make a return on the EEGSA investment in excess of our current utility returns in the United States, in large part because the law guaranteed a real rate of return of between 7% and 13% on the new replacement value of the assets.¹⁹²

Mr. Gillette further testifies that TECO "expected that EEGSA's internal cash flows would be sufficient to provide for the maintenance and replacement of distribution assets, as well as any growth that EEGSA would experience,"¹⁹³ and that, while TECO was "optimistic about the opportunities for growth in demand in EEGSA's service area – both in terms of population

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶ 13.

¹⁹¹ *Id.*

¹⁹² *Id.*; see also EEGSA Privatization, Management Presentation dated 9 July 1998, at 35 (noting that EEGSA "provides purchase price based upon targeted IRR") (C-33).

¹⁹³ Gillette ¶ 14 (CWS-5).

growth and increased use per customer – the model on which the bid price was based assumed what [it] deemed at the time to be conservative growth figures.”¹⁹⁴

60. In preparation for the bid, TPS formed a bidding Consortium with Iberdrola and EDP.¹⁹⁵ As Mr. Gillette explains, the Consortium agreed that, if the bid were successful, Iberdrola, TPS, and EDP would each own 40%, 30%, and 30%, respectively, of the Consortium’s acquired 80% ownership interest in EEGSA.¹⁹⁶ Pursuant to the Terms of Reference for the public offering,¹⁹⁷ the Consortium established an investment company in Guatemala, Distribución Eléctrica Centroamericana, S.A. (“DECA”), to purchase EEGSA’s shares.¹⁹⁸ As Mr. Gillette notes, TECO and its partners later reconsidered their ownership interests and, while TPS’s share remained the same, Iberdrola’s share increased, and EDP’s share decreased, so that Iberdrola, TPS, and EDP held a 49%, 30%, and 21% ownership interest in DECA, respectively.¹⁹⁹

61. On 15 July 1998, the Board of Directors of TECO Energy authorized TPS to participate in the Consortium bidding to acquire a substantial equity interest in EEGSA.²⁰⁰ On 30 July 1998, after being prequalified by Guatemala, the Consortium submitted its bid for 80% of EEGSA’s shares.²⁰¹ With a bid of US\$ 520 million, the Consortium was declared the winner

¹⁹⁴ *Id.*; TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 7-6 (C-32).

¹⁹⁵ Gillette ¶ 15 (CWS-5). As Mr. Gillette notes, Coastal Power Corporation, a U.S. energy company based in Houston, Texas, initially formed part of the bidding Consortium, but later withdrew. *See id.*

¹⁹⁶ *Id.*; TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 7-1 (C-32).

¹⁹⁷ Empresa Eléctrica de Guatemala, S.A., Terms of Reference dated May 1998, Art. 3.2 (C-30).

¹⁹⁸ Gillette ¶ 15 (CWS-5).

¹⁹⁹ *Id.*; *see also* DECA Consolidated Financial Statements from 14 Aug. 1998 (date of inception) through 31 Dec. 1998, at 7 (C-40).

²⁰⁰ Gillette ¶ 16 (CWS-5); Minutes of the Board of Directors of TECO Energy, Inc. dated 15 July 1998, at 4 (C-34).

²⁰¹ Gillette ¶ 16 (CWS-5); Notarized Minutes of the Award dated 30 July 1998 (C-36).

of the auction, beating the second highest bid of US\$ 475 million from a consortium formed by Enron Corporation, a U.S. energy company, and Union FENOSA, a Spanish utility company.²⁰²

62. As Mr. Kaczmarek notes, EEGSA's "purchase price implied an equity price to book value ratio ('P/B') of 17.0x and enterprise value to earnings before interest, taxes, depreciation, and amortization ratio (EV/EBITDA) of 40x," which are "extremely high valuation multiples," as compared with the typical P/B ratios for regulated utilities of .06x to 1.6x and typical EV/EBITDA multiples of 6.0x to 10.0x.²⁰³ As Mr. Kaczmarek further explains, "[t]hese extremely high valuation multiples are the product of the form of Model Company regulation that Guatemala chose to adopt for EEGSA."²⁰⁴ Only seven years earlier, Price Waterhouse had concluded that if Guatemala adopted a different legal framework where tariff rates were based on the company's actual assets and costs, rather than the new replacement value of the assets of a model company, the market value of 100% of EEGSA's equity was just US\$ 13.9 million, and that only if the Government increased tariff rates and subsidized EEGSA's debt could it even hope to obtain an amount equivalent to the company's net book value of approximately US\$ 60 million.²⁰⁵ By adopting the legal framework that it did, Guatemala thus was able to obtain substantial privatization proceeds for EEGSA's network, which was deteriorated and in need of significant investment.²⁰⁶

63. The closing for the purchase of 80% of the shares of EEGSA occurred on 11 September 1998.²⁰⁷ Shortly after the closing, DECA's governing infrastructure was created, with the Board of Directors of DECA consisting of two representatives from Iberdrola, one representative from TPS, and one representative from EDP, each having one vote on the

²⁰² *Id.*

²⁰³ Kaczmarek ¶ 62 (CER-2).

²⁰⁴ *Id.*

²⁰⁵ *Id.* ¶ 64.

²⁰⁶ *Id.* ¶¶ 58, 65.

²⁰⁷ Gillette ¶ 16 (CWS-5); Stock Purchase Agreement between DECA and the Government of Guatemala dated 11 Sept. 1998 (C-38).

Board.²⁰⁸ As Mr. Gillette explains, in 1999, DECA merged with EEGSA, and Iberdrola, TPS, and EDP formed a new company, Distribución Eléctrica Centroamericana Dos, S.A. (“DECA II”), incorporated in Guatemala, to hold their shares in EEGSA.²⁰⁹

64. During the first full year of ownership by the Consortium, EEGSA experienced 5.4% customer growth, producing an 8.2% growth in energy consumption and a substantial decrease in energy losses.²¹⁰ In addition, EEGSA was able to reduce its operating expenses by outsourcing many operational and some corporate functions and by reducing the number of employees.²¹¹ As reflected in a report by the Inter-American Development Bank, from 1998 to 2001, EEGSA made substantial improvements in the quality of its electricity service:

During 1998 to 2001, EEGSA increased bill payment locations from 16 to 250, reduced the percentage of unread meters from 5 percent to 1.5 percent, and reduced billing errors from 1.6 percent of all bills to 0.5 percent. The number of customer calls handled annually increased from 4,000 to 50,000, and average complaint response time decreased from 39 days to 7. The average waiting period for obtaining new service fell from 90 days to 9. Over the same period, the annual SAIDI [System Average Interruption Duration Index] decreased from 16 to 8.7 hours, while the annual SAIFI [System Average Interruption Frequency Index] fell from 30 to 12 outages per year.²¹²

65. As discussed below, despite EEGSA’s growth and improvements in efficiency, EEGSA experienced significant cash flow constraints during the first five-year tariff period due

²⁰⁸ Gillette ¶ 16 (CWS-5); TECO Power Services Corp. Operating Project Activities, Board Book Write-up dated Jan. 1999, at 2-30 (C-41).

²⁰⁹ Gillette ¶ 16 (CWS-5); TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated July 1999 (C-44).

²¹⁰ Gillette ¶ 17 (CWS-5); TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 (C-47).

²¹¹ *Id.*

²¹² Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 256 (C-61).

to EEGSA's low VAD rate, rapid increases in fuel costs, and the devaluation of Guatemala's currency in 1999.²¹³

D. The VAD For The First Period Post-Privatization [1998-2003] Was A Placeholder That Was Financially Crippling For EEGSA

66. The ordinary VAD calculation process set forth in the LGE and discussed above did not apply to the first five-year period after EEGSA's privatization, *i.e.*, 1998 to 2003. As set forth in Article 2 of Section VII of the LGE:

The first establishment of tolls and rates for customers of the service of final distribution, applying the criteria and methodology set out in this law, shall occur in the first half of May 1997. In that case the distribution VADs determined by the [CNEE] shall be based on values used in other countries that apply a similar methodology.²¹⁴

As Leonardo Giacchino, EEGSA's consultant for the subsequent tariff periods, explains, "[w]hen privatizing state-owned companies, many countries have problems with lack of relevant data to determine the initial tariffs. EEGSA was not an exception"²¹⁵ Delaying the implementation of the VAD process set forth in the LGE until the second tariff period also benefitted Guatemala by "soften[ing] the impact of much higher electricity tariffs on the consuming public" once the LGE was fully implemented.²¹⁶

67. On 17 July 1998, the CNEE issued Resolution No. 15-1998, setting forth EEGSA's tariffs for the period from 1 July 1998 to 30 June 2003.²¹⁷ To calculate these tariffs,

²¹³ See *infra* II.D.

²¹⁴ LGE, Section VII, Art. 2 (C-17); see also Sales Memorandum, at 49 (providing that "for the purposes of the tariffs to be first set in May 1998, the [CNEE] may rely on VADs taken from other countries applying a similar methodology, like Chile, Peru, and El Salvador") (C-29). As noted herein, the VAD actually was set on 17 July 1998.

²¹⁵ Giacchino ¶ 5 (CWS-4); see also Calleja ¶ 6 (stating that at the time of EEGSA's privatization "there was insufficient data or practical knowledge to conduct a tariff study in accordance with the general criteria established in the law") (CWS-3).

²¹⁶ Kaczmarek ¶ 86 (CER-2).

²¹⁷ Resolution No. CNEE-15-1998 dated 17 July 1998, at 3 (C-35).

the CNEE turned to El Salvador for comparable data.²¹⁸ The choice of El Salvador, however, was a poor one and resulted in distorted tariffs, because “distribution companies in El Salvador generally are not comparable to those in Guatemala” due to, among other things, the different densities of EEGSA’s distribution territory and El Salvador.²¹⁹ As Mr. Giacchino explains, because of these differences, “using data from El Salvador was a very crude way to calculate a tariff for EEGSA.”²²⁰ The use of data from El Salvador led to tariffs that were “too low,”²²¹ and “did not cover the operating costs or the investments required to update and expand the substandard electricity network that was in place at the time of privatization.”²²²

68. As Mr. Gillette recounts, in the first year post-privatization, EEGSA grew its customer base by 5.4%, and energy consumption rose by 8.2%.²²³ This growth continued throughout the first tariff period. The company also substantially decreased energy losses and significantly reduced operating expenses during this time period.²²⁴

69. Despite these gains, EEGSA did not prosper financially. Combined with rapid increases in fuel costs and a significant devaluation of the Guatemalan currency in 1999,²²⁵ the low tariffs resulted in negative free cash flows for EEGSA in 1999 and 2000 and negative net

²¹⁸ Giacchino ¶ 5 (CWS-4); Kaczmarek ¶ 86 (CER-2). The consulting firm that prepared the study used to calculate the tariffs also used data from other jurisdictions, but did not use data from Guatemala. Giacchino ¶ 5 fn. 2 (citing Synex, *Determination of Electric Tariffs at the Generation-Transmission and Distribution Levels in Guatemala*, Preliminary Report for the World Bank dated Jan. 1997, Ch. 3, at 12 (“Synex Report”) (C-20)) (CWS-4).

²¹⁹ Giacchino ¶ 5 fn. 3 (CWS-4).

²²⁰ *Id.*

²²¹ *Id.*

²²² Maté ¶ 3 (CWS-6).

²²³ Gillette ¶ 17 (CWS-5); TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 (C-47).

²²⁴ Gillette ¶ 17 (CWS-5); TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 (C-47).

²²⁵ *See* TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 (C-47).

profit in 2001.²²⁶ During this tariff period, TECO received only slightly more than US\$ 2 million in dividends.²²⁷ As Mr. Kaczmarek explains in his expert report, “EEGSA’s [return on invested capital] during the First Rate Period was consistently lower than the lower bound of 7 percent established by the regulatory framework,”²²⁸ ranging between 3% to just over 4%.²²⁹ The tariff rates, in short, had been “incorrectly calculated, underestimated and set at a level too low.”²³⁰

70. The first period tariffs failed to cover the costs of necessary improvements to EEGSA’s infrastructure, much less return a profit to EEGSA’s investors.²³¹ Despite this, EEGSA invested heavily in its network and financed improvements by making multiple cash calls to its shareholders.²³² As Mr. Kaczmarek’s report confirms, EEGSA’s foreign investors not only paid US\$ 520 million to acquire their 80 percent stake in EEGSA, but reinvested during the first tariff period approximately US\$ 100 million in additional capital into EEGSA to maintain, upgrade and expand the network.²³³ During this time, TECO put at least an additional US\$ 11 million into EEGSA.²³⁴ These substantial investments were necessary to update and expand the substandard electricity network that existed at the time of EEGSA’s privatization.²³⁵ EEGSA’s

²²⁶ Kaczmarek, Appendix 3 (CER-2); *see also* TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 (C-47); Gillette ¶ 17 (CWS-5); Giacchino ¶ 5 fn. 5 (CWS-4); Calleja ¶ 7 (CWS-3).

²²⁷ Gillette ¶ 17 (CWS-5); Kaczmarek ¶ 94, Appendix 3 (CER-2). EEGSA declared dividends of Q 65,923,754 in 1999 and Q 353,997 in 2002. EEGSA Audited Financial Statements, 1999-2000, at 7 (C-49); EEGSA Audited Financial Statements for 2001-2002, at 5b (C-60). TECO’s share of the dividends was 24% (30% of 80%), and the prevailing exchange rate during that time was approximately 7.6Q/US\$. *See* Kaczmarek, Appendix 6, Note 4 (CER-2).

²²⁸ Kaczmarek ¶ 96 (CER-2).

²²⁹ Kaczmarek, Figure 10 ¶ 96 (CER-2). The LGE sets a minimum cost of capital of 7%. LGE, Art. 79 (C-17); *see also supra* II.B.1.

²³⁰ Giacchino ¶ 5 fn. 4 (CWS-4).

²³¹ Maté ¶ 3 (CWS-6).

²³² Maté ¶ 3 (CWS-6); *see also* Gillette ¶ 17 (CWS-4).

²³³ Kaczmarek, Appendix 3.b (CER-2). EEGSA reinvested another US\$ 80 million during the second tariff period. *See id.*; *see also id.* ¶ 93.

²³⁴ Gillette ¶ 17 (CWS-5); TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Apr. 2004, at 2-29 (C-87).

²³⁵ Maté ¶ 3 (CWS-6).

investors made these investments because, as Miguel Calleja, formerly of EEGSA, explains, they understood that “EEGSA’s revenue and cash flow would increase significantly once the tariff and the VAD were calculated in accordance with the general procedures established under the LGE and its regulations.”²³⁶ As Mr. Giacchino notes, “the CNEE [also] expected that the tariffs for the 2003-2008 period would be higher than the existing tariffs.”²³⁷

71. The tariffs for the first period thus were intended to serve as a placeholder, not a benchmark.²³⁸ EEGSA’s investors suffered through the first period expecting that, beginning with the second tariff period, EEGSA would receive the return envisioned by the LGE. In spite of the low tariffs, EEGSA invested heavily in improving the distribution network, and EEGSA’s customers, and the Government, reaped the benefits envisioned during EEGSA’s privatization.

E. The VAD For The Second Period [2003-2008] Allowed TECO To Obtain A Return In Line With Its Expectations

72. The second tariff period presented the first opportunity to set the tariffs in accordance with the procedures set forth in Chapter III of the LGE, and the accompanying regulations. Accordingly, the year before the new tariffs were to take effect, the CNEE prequalified six consulting firms to bid on preparing EEGSA’s VAD study.²³⁹ EEGSA selected NERA Economic Consulting, a U.S. firm, to perform the tariff study, which study was led by Leonardo Giacchino.²⁴⁰ The CNEE retained PA Consulting to advise it during the process.²⁴¹

73. The CNEE issued the terms of reference for the tariff review in October 2002,²⁴² which provided, among other things, that the study should be done using a top-down

²³⁶ Calleja ¶ 7 (CWS-3); *see also* Gillette ¶ 18 (noting that as TECO had “expected and hoped” that the VAD for the second period was significantly higher than the one in the first period) (CWS-3); Maté ¶ 3 (stating that “when the first tariff review process pursuant to Articles 71 through 79 of the LGE took place in 2003, the VAD was expected to produce a figure more in keeping with the Company’s actual needs”) (CWS-6).

²³⁷ Giacchino ¶ 5 (CWS-4).

²³⁸ *See* Kaczmarek ¶ 124 (CER-2).

²³⁹ Giacchino ¶ 4 (CWS-4).

²⁴⁰ Maté ¶ 4 (CWS-6); Calleja ¶ 9 (CWS-3); Giacchino ¶ 4 (CWS-4).

²⁴¹ Maté ¶ 4 (CWS-6); Calleja ¶ 9 (CWS-3); Giacchino ¶ 9 (CWS-4).

²⁴² Resolution No. CNEE-88-2002 dated 23 Oct. 2002 (C-59).

methodology.²⁴³ In essence, this meant that the consultant would use the actual network (and the distributor's actual costs) and then make adjustments to optimize the network so that it resembled a model efficient distribution company.²⁴⁴

74. As Mr. Giacchino explains, the tariff review for the second period was conducted in a “climate of collaboration” between EEGSA, the CNEE, and the parties’ consultants.²⁴⁵ The parties regularly held meetings where NERA reported on its progress and responded to the CNEE’s inquiries.²⁴⁶ This significantly contributed to the progress of the report, as agreement was reached regarding methodology and partial results at each meeting.²⁴⁷ According to EEGSA’s then General Director, Luis Maté, “[a]lthough there were significant disagreements between the parties and their consultants relating to the calculation of the VAD, EEGSA, the CNEE and the consultants maintained an ongoing dialogue.”²⁴⁸

75. NERA submitted its tariff study on 30 July 2003 to the CNEE for review and approval.²⁴⁹ The CNEE made various observations in response to NERA’s study.²⁵⁰ It did so not only in writing, but also during meetings with EEGSA’s consultant to explain the bases for its disagreements and to explain what changes it wished EEGSA to make.²⁵¹ NERA and PA

²⁴³ Giacchino ¶ 8 (CWS-4); Kaczmarek ¶ 88 (CER-2).

²⁴⁴ See JONATHAN LESSER AND LEONARDO GIACCHINO, FUNDAMENTALS OF ENERGY REGULATION 85-87 (2007) (C-99).

²⁴⁵ Giacchino ¶ 10 (CWS-4).

²⁴⁶ *Id.*; Calleja ¶ 10 (describing how the parties “met on numerous occasions to discuss issues relating to the calculation of the VAD”) (CWS-3).

²⁴⁷ Giacchino ¶ 10 (*citing, e.g.*, Minutes of Meeting with CNEE dated 4 Apr. 2003 (C-63)) (CWS-4).

²⁴⁸ Maté ¶ 4 (CWS-6).

²⁴⁹ NERA, *Estudio del Valor Agregado de Distribución de la Empresa Eléctrica de Guatemala, S.A.*, 30 July 2003 (C-71 – C-77); *see also* Calleja ¶ 10 (CWS-3).

²⁵⁰ Giacchino ¶ 11 (*citing, e.g.*, Letter No. CNEE-4748-2003, GT-NotaS-398 from R. Urdiales to L. Giacchino and M. Calleja dated 4 July 2003 (C-67); Letter No. CNEE-4614-2003, GT-NotasS-377 from R. Urdiales to L. Giacchino and M. Calleja dated 16 June 2003 (C-66); Letter No. CNEE-3687-2003, GT-NotaS-267 from R. Urdiales to L. Giacchino and M. Calleja dated 3 Mar. 2003 (C-62)) (CWS-4).

²⁵¹ Giacchino ¶¶ 11-12 (comparing NERA Stage B Report: Optimization of the SER and Cash and Recognized Prices dated 6 June 2003, at 2 (showing the VNR calculated as of 6 June 2003) (C-65) with NERA Stage B Report: Optimization of the SER and Cash and Recognized Prices dated 30 July 2003, at 2 (showing the

Consulting worked closely during this phase of the process, and officials from both EEGSA and the CNEE met regularly with the consultants to address any questions the consultants had.²⁵² According to Mr. Giacchino: “In some cases, after discussion, the CNEE withdrew its objection. In all instances, we were able to reach agreement with the CNEE as to what, if any, changes needed to be made on any particular point.”²⁵³

76. NERA’s study had calculated a VAD based on a VNR of US\$ 584 million, which would have resulted in revenue to EEGSA of approximately US\$ 133 million annually during the term.²⁵⁴ As Mr. Giacchino explains, the CNEE “was intent on decreasing the VAD” and proposed several methods of doing so.²⁵⁵ In an effort to reach agreement, EEGSA’s consultant made a number of changes to the study, which had the effect of decreasing the VAD.²⁵⁶ For example, while NERA’s model had included the cost of plastic protection on a number of copper cables,²⁵⁷ in its revised study NERA excluded from the VNR calculation the cost of such protection.²⁵⁸

77. The calculation of the Capital Recovery Factor or FRC, which determines how quickly the investor recovers its capital investment, also was a point of disagreement between the parties.²⁵⁹ NERA objected to the ToR’s use of an annuity formula to calculate the FRC. This formula was akin to a mortgage payment schedule where the overall payments remain constant over time, but the payment of principal (akin here to the return of capital) is small and increases

calculation of the VNR and excluding and explaining the exclusion of regulators from the calculation) (C-72)) (CWS-4).

²⁵² Giacchino ¶ 11 (CWS-4).

²⁵³ *Id.*

²⁵⁴ *Id.* ¶¶ 13, 73.

²⁵⁵ *Id.* ¶ 12.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* ¶ 13.

over time, whereas the payment of interest (akin here to the return on capital) is large and decreases over time.²⁶⁰ As Mr. Giacchino explains:

The CNEE wanted to utilize an annuity formula to calculate the FRC, which would provide a constant rate of return, but, as we explained in our report, would never allow the company to recover a large enough amount to recoup its investment.²⁶¹

78. Because the formula would be reset at the beginning of the next tariff period, applying this type of formula would never allow the return of capital portion to increase enough to allow EEGSA to recover its capital invested.²⁶² Likewise, the formula failed to account for the fact that capital would be reinvested, unlike in a mortgage where capital is simply repaid.²⁶³ As Mr. Giacchino explains, EEGSA nevertheless “agreed to use the annuity formula to calculate the FRC as long as the ultimate calculation of the VAD resulted in a revenue stream of at least US\$ 110 million.”²⁶⁴ This compromise avoided the need to constitute an Expert Commission to resolve the parties’ differences.²⁶⁵

79. NERA thus submitted a revised study, which used the annuity formula to calculate the FRC (which formula was abandoned by the CNEE in the next tariff period); the study produced a VNR of US\$ 584 million and a revenue stream of US\$ 110 million annually.²⁶⁶

²⁶⁰ Kaczmarek ¶ 89 (CER-2).

²⁶¹ Giacchino ¶ 13 (citing NERA Stage E Report: Distribution Added Value and Energy and Power Balance dated 30 July 2003, at 11-15 (C-75)) (CWS-4); *see also* Kaczmarek ¶ 90 (explaining that under the CNEE’s proposal, the return of capital would never increase sufficiently to fully return EEGSA’s investment because the return of capital factor would reset at the start of each tariff period) (CER-2).

²⁶² Giacchino ¶ 13 (CWS-4); Kaczmarek ¶ 90 (CER-2).

²⁶³ Kaczmarek ¶ 90 (CER-2).

²⁶⁴ Giacchino ¶ 13 (CWS-4).

²⁶⁵ Maté ¶ 4 (CWS-6); Calleja ¶ 10 (CWS-3).

²⁶⁶ NERA Stage E Report: Distribution Added Value and Energy and Power Balance dated 30 July 2003, Art. III, Chart 2 (C-75); *see also* Giacchino ¶¶ 13, 73 (CWS-4).

The CNEE accepted the revised study, and on 31 July 2003, published decrees setting EEGSA's tariffs in accordance with the study for the period covering 2003 to 2008.²⁶⁷

80. In the end, although the process was spirited, EEGSA was satisfied that the tariff review process had proceeded fairly. As Mr. Maté states: "The resulting VAD increased, although not to the extent that EEGSA and its consultant deemed appropriate in light of market conditions at that time. EEGSA nevertheless valued the fact that all of the parties had complied with and demonstrated respect for the process set out in the LGE."²⁶⁸ Similarly, EEGSA's former Manager Mr. Calleja explains:

[The] tariff went into effect in August 2003 and included a notable increase in the very low VAD that the CNEE had set during EEGSA's privatization. I considered this process a success, not only because EEGSA's revenue increased, but also because the parties maintained a constructive dialogue and complied with the procedures established under the LGE and its regulations for the first time.²⁶⁹

81. As a result of the VAD increase, in 2004, for the first time, EEGSA's return on invested capital fell within the range provided for by the LGE.²⁷⁰ Indeed, every year during the second tariff period EEGSA's return on invested capital ranged between 7% to 10% – within the range of 7% to 13% provided by the LGE.²⁷¹ During this tariff period, TECO received approximately US\$ 31 million in dividends.²⁷² As Mr. Kaczmarek notes, this was a far better

²⁶⁷ Resolution No. CNEE-66-2003 dated 30 July 2003 (C-78); Resolution No. CNEE-67-2003 dated 1 Aug. 2003 (C-79); *see also* Giacchino ¶ 13 (CWS-4); Calleja ¶ 10 (CWS-3); Gillette ¶ 18 (CWS-5).

²⁶⁸ Maté ¶ 4 (CWS-6).

²⁶⁹ Calleja ¶ 10 (CWS-3).

²⁷⁰ Kaczmarek ¶ 96, Figure 10 (CER-2).

²⁷¹ *Id.*; *see also* LGE, Art. 79 (setting the minimum and maximum real rate of return at 7% and 13% respectively) (C-17); Gillette ¶ 19 (stating that "[a]lthough still below the expected level that the company required to invest in DECA II, the cumulative returns did start approaching the 8% range of utility returns in the U.S. during the second VAD period") (CWS-4).

²⁷² Kaczmarek ¶ 80, Appendix 3 (showing that EEGSA distributed US\$ 129 million in dividends during the second tariff period) (CER-2).

result than the US\$ 2 million received during the prior period, but a “quite limited [amount] in comparison with the price [it] paid to purchase [its share of] EEGSA.”²⁷³

82. Overall, in the second period, the tariff-setting process worked as intended. The parties negotiated in good faith and actively engaged with one another to determine the applicable VAD and resulting tariffs. Neither party controlled the process or dictated the result. Consequently, TECO and its partners obtained the reasonable return on their investments that the LGE guaranteed. Moreover, EEGSA’s customers continued to benefit from a depoliticized process that compensated EEGSA for improving the quality of services.

83. The success of the second tariff period was not repeated during the next review period. Instead, as demonstrated below, Guatemala abrogated the letter and spirit of the LGE – and its promises to EEGSA’s foreign investors – by re-politicizing the tariff review process.

F. Guatemala Disregarded Every Aspect Of The Legal Framework In Unilaterally Setting An Unreasonably Low VAD Rate For The Third Tariff Period (2008-2013)

1. Guatemala Amended RLGE Article 98 To Grant Itself The Right To Rely On Its Own Tariff Study To Recalculate The Distributor’s VAD In Certain Circumstances

84. The first indication that Guatemala intended to re-politicize the tariff review process occurred in March 2007, shortly before EEGSA’s 2008-2013 tariff review was to commence. On 2 March 2007, the MEM unexpectedly amended RLGE Article 98 to grant the CNEE the right to rely on its own tariff study to recalculate the distributor’s VAD in certain circumstances.²⁷⁴ As set forth below and in the expert legal opinion of Professor Alegría,²⁷⁵ this amendment was unconstitutional because it not only contravened the plain language of the LGE, but also was inconsistent with the very purpose of the LGE, which, as set forth above, is to

²⁷³ *Id.* ¶ 80.

²⁷⁴ Amended RLGE Article 98 provides as follows: “In case of the Distributor’s failure to deliver the studies or the corrections to the same, the Commission shall be empowered to issue and publish the corresponding tariff schedule, based on the tariff study the Commission performs independently or performing the corrections to the studies begun by the distributor.” Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (C-104).

²⁷⁵ See Alegría ¶¶ 35-40 (CER-1).

establish a reliable, depoliticized tariff review process in which independent consultants calculate the VAD on the basis of purely economic and technical data.

85. In late 2006, the CNEE notified the electricity industry that it was contemplating amendments to the RLGE.²⁷⁶ In view of the potential impact of such amendments on the electricity sector, private companies in the industry united and published several open letters in major Guatemalan newspapers, requesting that the Government circulate the proposed amendments for comment before their enactment.²⁷⁷ As Mr. Calleja explains, at the time, the MEM and the CNEE were engaged in a public dispute regarding the proposed amendments to the RLGE, as they each had submitted competing proposals to the then President of Guatemala, Óscar Berger.²⁷⁸ In January 2007, the CNEE sent a letter to President Berger complaining that it “opposes the changes unilaterally introduced by the Ministry of Energy and Mines” on the ground that they would cause the CNEE’s powers to be “substantially diminished.”²⁷⁹ This led to the resignation of the then Minister of Energy and Mines, Luis Ortiz.²⁸⁰

86. On 8 February 2007, a new Minister, Carmen Urizar, was sworn into office.²⁸¹ Shortly thereafter, Minister Urizar announced that she would consult with the electricity industry regarding the proposed amendments to the RLGE.²⁸² As Messrs. Maté and Calleja explain, Minister Urizar subsequently circulated a draft Resolution with the proposed amendments,²⁸³ and

²⁷⁶ *Id.* ¶ 35.

²⁷⁷ *See id.* ¶ 35; Open Letters published by the Asociación Nacional de Generadores (ANG), Asociación Nacional de Comercializadores de Energía Eléctrica (ASCEE), Gremial de Grandes Usuarios attached to the Chamber of Industry, and the electricity distributors dated 21 Dec. 2006, 31 Jan. 2007, and 6 Feb. 2007 (C-103).

²⁷⁸ Calleja ¶ 12 (CWS-3).

²⁷⁹ Letter No. CNEE-13063-2007 from the CNEE to the President of Guatemala dated 22 Jan. 2007, at 2 (C-102); *see also* Calleja ¶ 12 (CWS-3).

²⁸⁰ Calleja ¶ 12 (CWS-3).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Letter from MEM to the CNEE dated 18 Jan. 2007, attaching draft resolution with proposed amendments to the RLGE (C-101); *see also* Letter No. CNEE-13063-2007 from the CNEE to the President of Guatemala dated 22 Jan. 2007 (C-102).

invited the private companies in the industry, including EEGSA, to submit their comments at a meeting with Minister Urizar and José Toledo, the President of the CNEE.²⁸⁴ Mr. Maté attended this meeting on EEGSA's behalf.²⁸⁵ As Mr. Maté explains, at the meeting, the proposed amendments to the RLGE were discussed, and members of the industry were given the opportunity to provide their comments and proposals regarding the draft Resolution.²⁸⁶ The main purpose of the proposed amendments, as Mr. Maté explains, was to foster new hydraulic and coal-based electricity generation to drive down Guatemala's generation costs, which, at that time of high oil prices, was determined by power plants operating on fuel.²⁸⁷ Neither the draft Resolution nor the discussions at the meeting, however, made any mention of proposed amendments to RLGE Article 98.²⁸⁸

87. On 2 March 2007, the MEM issued Government Accord No. 68-2007, which amended several provisions of the RLGE on the purported basis that it was "necessary to adapt the Regulations to the new electric market trends."²⁸⁹ Article 21 of the Accord amended the final paragraph of RLGE Article 98 to include the following provision:

In case of the Distributor's failure to deliver the studies or the corrections to the same, the Commission shall be empowered to issue and publish the corresponding tariff schedule, based on the tariff study the Commission performs independently or performing the corrections to the studies begun by the distributor.²⁹⁰

88. As Mr. Calleja explains, it was very surprising that, "without any opportunity for the industry to provide its comments, the Government made a major change to Article 98 that contemplated for the first time ever having the CNEE calculate the VAD based on its own study

²⁸⁴ Calleja ¶ 12 (CWS-3).

²⁸⁵ Maté ¶ 6 (CWS-6).

²⁸⁶ *Id.*

²⁸⁷ *Id.* ¶ 5.

²⁸⁸ *Id.* ¶ 6; Calleja ¶ 12 (CWS-3); *see also* Alegría ¶ 36 (CER-1).

²⁸⁹ Government Accord No. 68-2007 dated 2 Mar. 2007, Second Recital of the Preamble (C-104).

²⁹⁰ *Id.*, Art. 21; *see also* Alegría ¶ 36 (CER-1).

or its own corrections to the consultant’s study.”²⁹¹ Indeed, as Professor Alegría observes, “[n]owhere in the LGE is it contemplated that the CNEE may commission its own VAD study or set the tariff rates based on any study other than the one performed by the distributor’s Consultant.”²⁹² Amended RLGE Article 98, however, authorized the CNEE to issue the new tariff schedule for the distributor based on its own tariff study or its own corrections to the distributor’s study, if the distributor failed “to deliver the studies or the corrections to the same.”²⁹³

89. As Professor Alegría explains, the amendment to RLGE Article 98 would apply in two situations: (i) where the distributor failed to submit a tariff study, and (ii) where, after the distributor had submitted the tariff study and the CNEE had made its observations on the same, the distributor failed to send the corrections to the original tariff study.²⁹⁴ As the original RLGE Article 98 reflects, prior to this amendment, if a distributor failed to submit a tariff study or failed to respond to the CNEE’s observations by neglecting to send the corrections to the original tariff study, the existing tariffs would remain in place:

So long as the distributor does not deliver the tariff studies or does not perform the corrections to same, according to what is stipulated in the previous paragraphs, it may not modify its tariffs and the tariffs in effect at the time of the termination of the effective term of such tariffs shall continue to apply. Once the tariff studies are presented or the corrections are made, the definitive tariffs shall be published, which shall govern as of the first day of the month immediately following the one on which they are published. A delay in the publication shall not alter the effective period of the tariffs, which shall always begin to count down as of May 1. The

²⁹¹ Calleja ¶ 12 (CWS-3).

²⁹² Alegría ¶ 37 (CER-1).

²⁹³ Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (C-104); *see also* Alegría ¶ 37 (CER-1).

²⁹⁴ Alegría ¶ 37 (CER-1). As Professor Alegría explains, and as discussed further below, when RLGE Article 98 refers to the distributor’s obligation to “deliver the corrections” to the CNEE, this does not mean that the distributor is required to incorporate all of the CNEE’s observations into its tariff study, but refers instead to the distributor’s obligation to respond to the CNEE’s observations within 15 days. *See id.* ¶ 37 fn. 105.

retroactive application of tariffs shall not be permitted. The foregoing [is] without prejudice to the corresponding sanctions.²⁹⁵

As Professor Alegría explains, although the original RLGE Article 98 provided that the old tariffs would remain in effect if the distributor failed to deliver a tariff study or respond to the CNEE's observations, if this led to an undesirable result, the CNEE was not left without recourse.²⁹⁶ Under LGE Article 80, the CNEE already had the authority to fine a distributor for failing to abide by the provisions of the LGE,²⁹⁷ and the distributor thus had a significant financial incentive to prepare and deliver a tariff study and to respond to the CNEE's observations made to that study. Indeed, as Professor Alegría observes, he is not aware of any instance where a distributor in Guatemala has ever failed to present a tariff study or refused to respond to the CNEE's observations.²⁹⁸ As he notes, "[t]here thus does not appear to have been any problem that the Government was seeking to remedy by enacting the amendment to RLGE Article 98."²⁹⁹

90. Professor Alegría further observes that the amendment to RLGE Article 98 contravened the express provisions of the LGE and thus was unconstitutional under Guatemalan law.³⁰⁰ As Professor Alegría explains, in Guatemala, the Constitution is the supreme law of the land, and all statutes, regulations, and executive orders must conform thereto.³⁰¹ Pursuant to Article 183(e) of the Constitution, the President is authorized "[t]o approve, promulgate, execute, and cause the execution of the laws, to dictate decrees authorized by the Constitution, as well as the agreements, regulations, and orders for the strict execution of the laws, without altering their

²⁹⁵ RLGE, Art. 98 (C-21).

²⁹⁶ Alegría ¶ 38 (CER-1).

²⁹⁷ *Id.* After the distributor receives an order of non-compliance from the CNEE, fines may be assessed on a daily basis. *See* LGE, Art. 80 (C-17).

²⁹⁸ Alegría ¶ 38 (CER-1).

²⁹⁹ *Id.*

³⁰⁰ *Id.* ¶ 40.

³⁰¹ *See id.* ¶ 20; Political Constitution of the Republic of Guatemala, 31 May 1985, as amended by Legislative Decree No. 18-93 of 17 Nov. 1993 ("Constitution"), Art. 175 ("Constitutional hierarchy. No law may be contrary to the provisions of the Constitution. Laws that violate or distort the constitutional mandates are null ipso jure.") (C-11).

spirit.”³⁰² As a matter of Constitutional law, regulations that either are inconsistent with a statute or not authorized by a statute are invalid.³⁰³

91. The RLGE, as a regulation issued jointly by the President of Guatemala and the MEM pursuant to Article 183(e) of the Constitution and LGE Section VII, Article 4, thus may not be inconsistent with the LGE, a statute enacted by the Guatemalan Congress, and may not delegate powers to the CNEE that are not expressly authorized by the LGE or that are contrary to express provisions of the LGE.³⁰⁴ The amendment to RLGE Article 98, however, was “at odds with the LGE’s express provisions.”³⁰⁵ The LGE does not grant the CNEE the power to commission its own tariff study or the power to make its own corrections to the distributor’s study. To the contrary, LGE Article 75 provides that the CNEE “shall review the studies performed and may make comments on the same.”³⁰⁶ As Professor Alegría explains:

[If the Government] wanted to grant the CNEE the power in those circumstances to commission its own VAD, it could have sought to amend the LGE, specifically Articles 74 and 75. The Government, however, could not have accomplished these aims by amending the RLGE.³⁰⁷

92. Furthermore, the amendment to RLGE Article 98 undermined the object and purpose of the LGE. As set forth above and in the expert legal opinion of Professor Alegría,³⁰⁸ the LGE was enacted to establish a reliable, depoliticized VAD calculation process, in which various actors would provide input to calculate the VAD based on purely economic and technical data. As Professor Alegría explains, consistent with this goal, LGE Article 74 creates a system

³⁰² Constitution, Art. 183(e); *see also id.*, Art. 154 (“Officials are depositaries of authority, legally responsible for their official conduct, subject to the law and never above it.”) (C-11); Alegría ¶ 20 (CER-1).

³⁰³ *See* Alegría ¶ 20 (CER-1); Decree No. 2-89 of the Congress of the Republic, Law of the Judiciary Branch, entered into force on 31 Dec. 1990, Art. 9 (C-6).

³⁰⁴ Alegría ¶ 40 (CER-1).

³⁰⁵ *Id.*

³⁰⁶ LGE, Art. 75 (C-17).

³⁰⁷ Alegría ¶ 39 (CER-1).

³⁰⁸ *Id.* ¶ 27.

of checks and balances among the various actors that play a role in calculating the VAD.³⁰⁹ Thus, while the distributor (as opposed to the CNEE) is expressly empowered to “calculate the VAD components,” it must “calculate the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE].”³¹⁰ The amendment to RLGE Article 98 upsets this system of checks and balances by granting the CNEE the power, in certain circumstances, to commission its own tariff study and to publish the new tariff schedules based on that study, without any input from the distributor.

93. As Messrs. Maté and Calleja explain, following the enactment of Government Accord No. 68-2007, EEGSA seriously considered challenging the amendment to RLGE Article 98 in the Guatemalan courts.³¹¹ Mr. Calleja notes that EEGSA ultimately decided not to do so, however, because it “feared that the CNEE might resent any such challenge and be biased against EEGSA during the tariff review.”³¹² EEGSA’s lawyers also informed Mr. Calleja that no decision would be rendered in any judicial process against the amendment before the completion of the tariff approval process.³¹³ Moreover, as Messrs. Maté and Calleja explain, EEGSA fully intended to deliver the required tariff study and to respond to all of the CNEE’s observations; accordingly, at the time, they did not have any reason to believe that the amendment to RLGE Article 98 would ever be applied during the course of EEGSA’s forthcoming tariff review.³¹⁴ As set forth below, however, the CNEE later would interpret and apply amended RLGE Article 98 contrary to its plain meaning in order to deprive EEGSA of its rights under the law.

³⁰⁹ *Id.*

³¹⁰ LGE, Art. 74 (C-17); *see also* Alegría ¶ 27 (CER-1).

³¹¹ Maté ¶ 6 (CWS-6); Calleja ¶ 13 (CWS-3).

³¹² Calleja ¶ 13 (CWS-3); *see also* Maté ¶ 6 (CWS-6).

³¹³ Calleja ¶ 13 (CWS-3).

³¹⁴ Maté ¶ 6 (CWS-6); Calleja ¶ 14 (CWS-3).

2. The CNEE Issued Terms Of Reference That Contravened The Law and Undermined The Objective Of The Tariff Review Process

94. The CNEE delivered the terms of reference for the 2008-2013 tariff review to EEGSA by letter dated 30 April 2007.³¹⁵ As explained below and in the expert legal opinion of Professor Alegría, those terms of reference were an unlawful exercise of the CNEE's regulatory power, in violation of the LGE and RLGE.³¹⁶

95. The purpose of the terms of reference is to guide the consultant's preparation of its tariff study.³¹⁷ The CNEE must draft the terms of reference within the constraints of the law, which includes adhering to certain formulas in the RLGE regarding the calculation of the VAD.³¹⁸ The CNEE may not manipulate those formulas, draft the terms of reference to produce a result that is incompatible with the LGE's governing principle that the tariffs reflect the new replacement value of the assets and the operational and capital costs of a model efficient company, or otherwise draft the terms of reference to predetermine the outcome of the consultant's study, as any of these circumstances would compromise the independence of the consultant's study and contravene the letter and spirit of the LGE.³¹⁹

96. The terms of reference that the CNEE delivered to EEGSA on 30 April 2007 were not guidelines to guide the consultant's preparation of its study.³²⁰ Instead, the terms of reference contained specific criteria and formulas that not only differed radically from the methodology of the prior tariff review, but also had the effect of improperly reducing the VNR

³¹⁵ Alegría ¶ 41 (CER-1); Calleja ¶ 15 (CWS-3); Maté ¶ 8 (CWS-6); Letter No. CNEE 13680-2007, DMJU-NotaS-141 from the CNEE to EEGSA dated 30 Apr. 2007 (C-106).

³¹⁶ See Alegría ¶¶ 41-50 (CER-1); see also Calleja ¶¶ 15-22 (CWS-3); Maté ¶¶ 8-12 (CWS-6).

³¹⁷ Alegría ¶ 29 (CER-1); see also Calleja ¶ 19 (CWS-3).

³¹⁸ Alegría ¶ 29 (CER-1); LGE, Art. 74 (C-17); RLGE, Arts. 86-90, 97 (C-21).

³¹⁹ Alegría ¶¶ 24-25, 29 (CER-1).

³²⁰ See Maté ¶ 8 (CWS-6); Calleja ¶ 15 (CWS-3).

and incorrectly calculating the FRC so as to preordain a decrease in the VAD and the corresponding tariffs, in violation of law.³²¹

97. The CNEE also granted itself wide latitude under the terms of reference to stop the consultant's progress on its study or even to deem the study as "not received" under newly amended RLGE Article 98 so that it could rely on its own study to calculate the VAD, again in violation of law.³²² In Article 1.7.4 of the terms of reference, for example, the CNEE asserted the authority to discontinue the consultant's study if it determined that any stage of the study did not comply with the terms of reference.³²³ The CNEE also claimed that even if EEGSA, through its consultant, disagreed with the CNEE's observations to the study, EEGSA still "must redo the pertinent tasks to amend the objection as instructed and in the term established by CNEE."³²⁴ EEGSA then would have to justify its objections in writing to its own study to preserve the possibility of submitting those objections to an Expert Commission.³²⁵ Any delays resulting from the consultant having to revise its study in compliance with observations with which it disagreed, moreover, would not entitle EEGSA "to fail to meet the deadline for the delivery of the Tariff Study."³²⁶

98. Article 1.7.4 had both legal and practical consequences. The Article was legally objectionable because, as Professor Alegría explains, it subordinated the consultant's technical expertise to the CNEE's discretionary judgment and inverted the process for resolving discrepancies, in violation of LGE Article 75 and RLGE Article 98, by requiring the distributor to accept the CNEE's observations and incorporate them into its study before convening an

³²¹ CNEE Terms of Reference dated April 2007, enclosed with Letter No. CNEE-13680-2007 from the CNEE to EEGSA dated 30 Apr. 2007 ("April 2007 ToR") (C-106); *see also* Calleja ¶ 15 (CWS-3); Maté ¶ 8 (CWS-6).

³²² Alegría ¶¶ 41-43 (CER-1); Calleja ¶¶ 16-17 (CWS-3); Maté ¶ 8 (CWS-6).

³²³ April 2007 ToR, Art. 1.7.4 (further providing that any resulting delay would not entitle the distributor "to fail to meet the deadline for the delivery of the Tariff Study") (C-106); *see also* Alegría ¶¶ 41-43 (CER-1); Calleja ¶ 16 (CWS-3).

³²⁴ April 2007 ToR, Art. 1.7.4 (C-106); *see also* Alegría ¶ 44 (CER-1).

³²⁵ April 2007 ToR, Art. 1.7.4 (C-106); *see also* Alegría ¶ 44 (CER-1).

³²⁶ April 2007 ToR, Art. 1.7.4 (C-106).

Expert Commission.³²⁷ From a practical perspective, Mr. Calleja explains that if the CNEE could stop the consultant's progress on all further stage reports (many of which are based on the earlier stage reports) pending the consultant's revision of the stage report to incorporate all of the CNEE's observations, it would be very difficult, if not impossible, for the consultant to proceed with the study in an orderly manner and to deliver the final tariff study on time.³²⁸

99. In addition, in Article 1.9 of the terms of reference, the CNEE claimed that it could reject the consultant's study "as not received if, in its own judgment, the results requested in the ToR were not included, such that the Study may be deemed incomplete, or to provide a partial or distorted portrayal."³²⁹ Thus, the CNEE sought to position itself to ignore the distributor's study under the recently-amended RLGE Article 98 and to replace it with its own in circumstances not at all contemplated by the amendment simply by declaring a submitted study as "not received" based on the study's content.³³⁰ As explained by Professor Alegría, Article 1.9, like Article 1.7.4, accordingly was unlawful because the CNEE had no right under the law to intervene in or to influence, much less to ignore, the consultant's study just because it disagreed with it.³³¹ To the contrary, the LGE contemplated the possibility of disagreements between the CNEE and the distributor and provided that any such disagreements were to be resolved by an Expert Commission.³³²

100. Furthermore, Article 1.10 of the terms of reference required both the distributor and its consultant to participate in a public hearing where any interested party could comment on the study, and it empowered the CNEE to request modifications to the study based on the results

³²⁷ Alegría ¶ 44 (CER-1).

³²⁸ Calleja ¶ 16 (CWS-3).

³²⁹ April 2007 ToR, Art. 1.9 (C-106); *see also* Alegría ¶ 41 (CER-1); Calleja ¶ 17 (CWS-3).

³³⁰ *See* April 2007 ToR, Art. 1.9 (C-106).

³³¹ Alegría ¶¶ 42-43 (CER-1); *see also* Calleja ¶ 17 (observing that the CNEE's assertion of power was unlawful and "based on an erroneous reading of the new Article 98," because Article 98 did not empower the CNEE "to reject a timely-delivered study, or to regard it as 'not received' on the ground that the study did not provide the desired results") (CWS-3).

³³² Alegría ¶ 43 (CER-1).

of the public hearing.³³³ At any such public hearing, EEGSA and Bates White thus would have to confront citizens who would have a vested interest in paying lower tariff rates. As the Inter-American Development Bank observed in 2003, “Guatemala has no culture of public hearings,” and its “[e]xperience with CNEE-organized public hearings has been negative.”³³⁴ By requiring EEGSA and its consultant to confront and defend the tariff study before persons without relevant expertise to assess the study and who likely would have an interest adverse to the distributor’s, and by empowering itself to rely on the comments of those citizens as a basis to demand modifications to the study, the CNEE sought to politicize the process and undermine the objective and technical aims of the LGE.³³⁵

101. Given these serious risks to the legitimacy of the tariff review process, EEGSA filed an administrative appeal (*recurso de revocatoria*) on 8 May 2007, requesting the CNEE to revoke the terms of reference.³³⁶ Three days later, EEGSA submitted detailed comments on the terms of reference in which it proposed, among other things, to add a new article to clarify that the terms of reference were guidelines that were subject to and did not amend the LGE or the RLGE, and that, in any event, the consultant could deviate from the terms of reference if it provided a reasoned justification for doing so.³³⁷

102. On 15 May 2007, the CNEE summarily rejected EEGSA’s administrative appeal, arguing, in a single paragraph, that the appeal was untimely and could not be processed because the terms of reference were “not final.”³³⁸

³³³ April 2007 ToR, Art. 1.10 (C-106); see also Alegría ¶ 45 (CER-1); Calleja ¶ 19 (CWS-3).

³³⁴ Inter-American Development Bank, *Keeping the Lights on: Power Sector Reform in Latin America*, (2003), at 246 (C-61).

³³⁵ Alegría ¶ 45 (CER-1); Calleja ¶ 19 (CWS-3).

³³⁶ Alegría ¶ 46 (CER-1); Calleja ¶ 18 (CWS-3); Maté ¶ 9 (CWS-6); EEGSA Appeal to Revoke the Terms of Reference Issued by the CNEE in April 2007 dated 8 May 2007 (C-107).

³³⁷ Calleja ¶ 18 (CWS-3); EEGSA Comments to the Terms of Reference, enclosed with Letter No. GG-038-07 from EEGSA to the CNEE dated 11 May 2007, at 5 (proposing new Article 1.10) (C-108).

³³⁸ Alegría ¶ 46 (CER-1); Calleja ¶ 19 (CWS-3); Maté ¶ 9 (CWS-6); CNEE Resolution DMJ-Measure-543 dated 15 May 2007 (C-109).

103. On 29 May 2007, EEGSA filed a court action for legal protection (*amparo*).³³⁹ In its *amparo*, EEGSA explained that although the LGE provided for the consultant to prepare its own study, the terms of reference imposed all of the methodological and technical criteria and reduced the consultant to “a mere signatory of the study prepared by the [CNEE].”³⁴⁰ EEGSA further observed that, in contrast to the CNEE’s limited powers under the LGE to monitor the consultant’s progress and to submit comments on the study, the terms of reference established arbitrary stages to the study, each of which required the CNEE’s approval in order for the study to continue.³⁴¹ EEGSA observed, moreover, that while the LGE provided for an Expert Commission to resolve any disagreements, the terms of reference provided, in effect, that “if CNEE does not like the study, it considers it not delivered and issues its own VAD without any study.”³⁴² EEGSA also noted that, contrary to the LGE, the terms of reference called for public hearings, left the role of any Expert Commission unclear, and fundamentally altered the entire procedure under the LGE by requiring EEGSA to amend its study in accordance with all of the CNEE’s observations and to record any objections to those corrections before convening an Expert Commission.³⁴³ EEGSA thus requested the Court to void the terms of reference and, in doing so, to prevent the CNEE from obtaining “the VAD it wants, something the legislator wished to avoid.”³⁴⁴

104. The CNEE failed to comply with its obligation to respond to the *amparo* with a detailed report, and the Sixth Civil Court of First Instance thus granted EEGSA provisional constitutional protection and voided the CNEE’s terms of reference, pending the Court’s further

³³⁹ Alegría ¶ 47 (CER-1); Calleja ¶ 19 (CWS-3); Maté ¶ 9 (CWS-6); EEGSA *Amparo* Request to the First Civil Court dated 29 May 2007 (C-112).

³⁴⁰ EEGSA *Amparo* Request to the First Civil Court dated 29 May 2007, at 6 (C-112); *see also* Calleja ¶ 19.

³⁴¹ EEGSA *Amparo* Request to the First Civil Court dated 29 May 2007, at 6 (C-112).

³⁴² *Id.*; *see also* Alegría ¶ 47 (CER-1); Calleja ¶ 19 (CWS-3).

³⁴³ EEGSA *Amparo* Request to the First Civil Court dated 29 May 2007, at 6 (C-112); *see also* Calleja ¶ 19 (CWS-3).

³⁴⁴ EEGSA *Amparo* Request to the First Civil Court dated 29 May 2007, at 6 (C-112).

consideration of the matter.³⁴⁵ On 11 June 2007, after the first hearing in the *amparo* procedure, the same Court issued an order confirming the provisional order in EEGSA's favor.³⁴⁶

105. Ten days later, the CNEE prequalified six firms to act as EEGSA's consultant,³⁴⁷ thus establishing that each of the firms had "the solvency, capacity, suitability and independence of criteria to perform a Tariff Study, which is to say, impartiality."³⁴⁸ At EEGSA's request, each of the firms interested in bidding for the work submitted a bid that included a detailed analysis of the terms of reference.³⁴⁹ Bates White advised in its bid that numerous articles in the terms of reference contained impractical demands as well as flawed formulas and methodologies that had the effect of undervaluing the VAD by inappropriately decreasing the VNR and miscalculating the FRC.³⁵⁰ On 1 August 2007, EEGSA retained Bates White because, among other things, Bates White's representatives had ample experience, and its project director, Mr. Giacchino, had served as the project director of EEGSA's consultant, NERA, during the tariff review in 2003.³⁵¹

106. During this time, EEGSA participated in numerous meetings at the CNEE in an attempt to revise the terms of reference with the CNEE's new President, Carlos Colom (whose uncle, Álvaro Colom, was to become the next President of Guatemala), the CNEE's other two new directors, and its new tariff manager, Melvin Quijivix.³⁵² The CNEE agreed during these meetings to replace the objectionable Articles 1.7.4 and 1.9 of the terms of reference with new

³⁴⁵ Alegría ¶ 48 (CER-1); Calleja ¶ 20 (CWS-3); Maté ¶ 9 (CWS-6); Decision of the Sixth Civil Court of First Instance dated 4 June 2007 (C-114).

³⁴⁶ Alegría ¶ 48 (CER-1); Calleja ¶ 20 (CWS-3); Decision of the Sixth Civil Court of First Instance Confirming Amparo C2-2007-4329 dated 11 June 2007 (C-115).

³⁴⁷ Resolution No. CNEE-55-2007 dated 21 June 2007, at 8 (prequalifying PA Consulting Services, Quantum, Mercados Energéticos, Synex Ingenieros Consultores, Bates White, and Sigla/Electrotek) (C-117).

³⁴⁸ EC Report, at 2 (C-246).

³⁴⁹ Giacchino ¶ 15 (CWS-4).

³⁵⁰ Email from G. Israilevich (Bates White) to F. Oroxom (EEGSA) dated 29 June 2007, attaching Analysis of the Methodology of the ToR (C-119); *see also* Giacchino ¶¶ 16-17, 58-59.

³⁵¹ Calleja ¶ 23 (CWS-3); Maté ¶ 15 (CWS-6).

³⁵² *See* Calleja ¶¶ 20-21 (explaining that Mr. Quijivix was so inexperienced that the Minister asked him "to prepare a presentation to introduce Mr. Quijivix to basic concepts regarding the electricity industry") (CWS-3).

Articles 1.6.4 and 1.8.³⁵³ New Article 1.6.4 omitted the CNEE’s prior assertions that it could discontinue the study if it decided that a stage report did not comply with the terms of reference, and it clarified that EEGSA, through its consultant, would analyze the CNEE’s observations.³⁵⁴ New Article 1.8 omitted the CNEE’s prior assertions that it could deem the study “not received” under RLGE Article 98 if the CNEE determined that information was missing or disagreed with the result.³⁵⁵ New Article 1.8 likewise clarified, in accordance with the LGE, that “the distributor shall analyze said observations, make any corrections it deems appropriate and send the corrected final report of the study to the CNEE within fifteen (15) days of receiving the observations.”³⁵⁶ This made it clear that EEGSA’s consultant only needed to make the corrections that it deemed appropriate and that its corrected study thus did not need to incorporate all of the CNEE’s observations.³⁵⁷ As Professor Alegría explains, these amendments were necessary to reconcile the terms of reference with the LGE and RLGE.³⁵⁸

107. Even after the parties agreed on these points, however, the terms of reference still contained numerous objectionable articles concerning the applicable methodology.³⁵⁹ Because it was not possible to agree on amendments to all of these articles, EEGSA renewed its prior proposal to add a new article to clarify that the terms of reference were guidelines that were subject to and did not amend the LGE or the RLGE, and that the consultant could deviate from the terms of reference if it provided a reasoned justification for doing so.³⁶⁰ As explained by Mr. Calleja, it was essential to add a provision to this effect if the parties were to resolve the dispute

³⁵³ Calleja ¶ 21 (CWS-3); *see also* Maté ¶ 11 (CWS-6); Alegría ¶¶ 49-50 (CER-1).

³⁵⁴ *See* Calleja ¶ 21 (CWS-3); Resolution No. CNEE-124-2007 dated 9 Oct. 2007 (“October 2007 ToR”), Art. 1.6.4 (C-127); *see also* April 2007 ToR, Art. 1.7.4 (C-106).

³⁵⁵ Alegría ¶ 49 fn. 135 (CER-1); Calleja ¶ 21 (CWS-3); October 2007 ToR, Art. 1.8 (C-127); *see also* April 2007 ToR, Art. 1.9 (C-106).

³⁵⁶ October 2007 ToR, Art. 1.8 (C-127) (emphasis added).

³⁵⁷ Alegría ¶ 49 fn. 135 (CER-1); Calleja ¶ 21 (CWS-3).

³⁵⁸ Alegría ¶ 49 (CER-1); *see also* Calleja ¶ 21 (CWS-3).

³⁵⁹ Calleja ¶ 22 (CWS-3).

³⁶⁰ *Id.*

without returning to Court.³⁶¹ The CNEE eventually agreed to add this new article (Article 1.10). EEGSA thus withdrew its *amparo*, and the CNEE issued revised terms of reference with new Articles 1.6.4, 1.8, and 1.10 in a Resolution dated 9 October 2007.³⁶² Thus, in order to avoid defending its terms of reference in Court, the CNEE accepted that its terms of reference were subject to the LGE and RLGE in the legal hierarchy and, moreover, that it was not entitled to rely on amended RLGE Article 98 in order to commission its own study if it disagreed with the consultant's study.³⁶³

3. The CNEE Failed To Constructively Engage With EEGSA Or Its Consultant And Arbitrarily Invoked RLGE Article 98 To EEGSA's Detriment

108. Notwithstanding its agreement to amend the terms of reference as detailed above, the CNEE made no effort during the tariff review process to engage constructively with EEGSA or its consultant, Bates White. Instead, as explained below, the CNEE arbitrarily invoked RLGE Article 98 throughout the process in an unlawful effort to disregard Bates White's study and thereby determine the VAD without the participation of EEGSA or its consultant.

109. Bates White began its work on the first of the nine stage reports of its study – the Stage A report or “Demand Study” – on 1 August 2007, operating at that time based on the terms of reference from April 2007.³⁶⁴ The purpose of the Stage A report was to establish, among other things, the demand for the distributor's services, any projected change in demand, and whether any increased demand would be met through the existing network (vertical growth) or would require the network to expand to other service areas (horizontal growth).³⁶⁵ Bates White

³⁶¹ *Id.*

³⁶² *Id.*; Alegría ¶¶ 49-50 (CER-1); EEGSA Withdrawal of *Amparo* C2-2007-4329 dated 6 Aug. 2007 (C-124); October 2007 ToR (C-127).

³⁶³ Alegría ¶¶ 49-50 (CER-1).

³⁶⁴ Giacchino ¶¶ 15, 18 (CWS-4).

³⁶⁵ *Id.* ¶ 20.

submitted its Stage A report to EEGSA and the CNEE on 29 October 2007.³⁶⁶

110. Although the CNEE had only ten days to submit any comments to the Stage A report,³⁶⁷ the CNEE's letter to EEGSA dated 12 November 2007 contained no comments on the report.³⁶⁸ Rather than engage the Stage A report on the merits, the CNEE directed EEGSA and Bates White to prepare a presentation on the Stage A report that they were to deliver eight days later, on 20 November 2007, at "a high-level technical meeting with CNEE personnel and the consultant contracted to support CNEE in the supervision of such study."³⁶⁹

111. In the meantime, as Mr. Maté explains, following a bid process begun in July 2007, the CNEE entered into a contract with Sigla on 12 November 2007 to prepare its own tariff study, more than four months before EEGSA was even due to deliver its study to the CNEE.³⁷⁰ As Professor Alegría explains, the CNEE's hiring of Sigla to prepare its own tariff study was unlawful because, at that time, none of the conditions in amended RLGE Article 98 for the CNEE to perform its own tariff study had been or could have been met.³⁷¹ As Mr. Maté observes, the CNEE's commissioning of its own tariff study "was a clear indication that the CNEE would use every chance to accuse [EEGSA] of not submitting the study or the changes to the study."³⁷² EEGSA therefore undertook "to analyze every single aspect of the specifications set out in the ToR to meet every deadline to submit documents, to justify thoroughly any methodological change, and to address every formal issue that the CNEE might later use as an

³⁶⁶ *Id.* ¶ 21; Calleja ¶ 24 (CWS-3); Maté ¶ 15 (CWS-2); Letter from Bates White to the CNEE and EEGSA dated 29 Oct. 2007 (C-128).

³⁶⁷ October 2007 ToR, §1.6.5.2 (C-127).

³⁶⁸ *See* Letter No. CNEE-14986-2007 from the CNEE to EEGSA dated 12 Nov. 2007 (C-133).

³⁶⁹ *Id.*; *see also* Maté ¶ 15 (CWS-6).

³⁷⁰ Maté ¶¶ 13-14 (CWS-6); CNEE Accord No. 116-2007 dated 27 July 2007 (publishing a request for a firm to assist the CNEE in preparing its own VAD study) (C-122); Contract 11-189-2007 between the CNEE and Electrotek and Sigla dated 12 Nov. 2007 (C-132); *see also* Alegría ¶ 69 (CER-1).

³⁷¹ Alegría ¶ 69 (concluding that the CNEE "violated RLGE Article 98 by hiring Sigla to perform an independent tariff study before any of the conditions in RLGE Article 98 had actually occurred") (CER-1).

³⁷² Maté ¶ 14 (CWS-6).

excuse to disregard EEGSA's tariff study."³⁷³

112. At the meeting on 20 November, Bates White's project director, Mr. Giacchino, gave a presentation regarding the Stage A report via Skype, while representatives of EEGSA, the CNEE, and the CNEE's two consultants, Mercados Energéticos and Sigla, convened at EEGSA's offices.³⁷⁴ Following the meeting, neither the CNEE nor its consultants submitted any comments on Bates White's presentation or its Stage A report.³⁷⁵ Nor did the CNEE accept any of EEGSA's offers to hold additional meetings on Bates White's other reports, which were in progress, in notable contrast to the ongoing dialogue that the parties maintained during the tariff review in 2003.³⁷⁶

113. Having not received any comments from the CNEE on its presentation or Stage A report, Bates White began preparing its Stage B and C reports.³⁷⁷ Four weeks after its meeting, however, the CNEE informed EEGSA by letter dated 17 December 2007 that it did not consider the Stage A report to have been "received."³⁷⁸ The CNEE claimed that the report would not be deemed to have been received until EEGSA's authorized representative re-submitted the report by "formal delivery" with his notarized power of attorney, a copy of EEGSA's contract with Bates White, and all information provided by EEGSA to Bates White for the study.³⁷⁹ Thus, although the CNEE had no authority under the LGE or the RLGE or the terms of reference to reject a timely study or stage report as "not received," and although the CNEE had confirmed its receipt of the Stage A report (by stamping it as received) and had convened a meeting to discuss that very report, the CNEE waited nearly two months before raising formalities as the basis for

³⁷³ *Id.*

³⁷⁴ Giacchino ¶ 21 (further explaining that he had been informed that Mercados Energéticos was advising the CNEE with regard to issues concerning the rate of return and demand projections, while Sigla was advising the CNEE with regard to all other matters concerning the tariff study) (CWS-4); Calleja ¶ 24 (CWS-3).

³⁷⁵ Giacchino ¶ 22 (CWS-4).

³⁷⁶ *Id.* ¶ 25.

³⁷⁷ *Id.* ¶ 22.

³⁷⁸ Letter No. CNEE-15225-2007 from the CNEE to EEGSA dated 17 Dec. 2007 (C-134); *see also* Maté ¶ 16 (CWS-6); Calleja ¶ 25 (CWS-3).

³⁷⁹ Letter No. CNEE-15225-2007 from the CNEE to EEGSA dated 17 Dec. 2007, at 1-2 (C-134); *see also* Maté ¶ 16 (CWS-6); Calleja ¶ 25 (CWS-3).

not providing any comments on the Stage A report.³⁸⁰

114. Soon after the year-end holidays, the CNEE issued a Resolution dated 17 January 2008 containing the third and final set of revisions to the terms of reference.³⁸¹ The CNEE's revised terms of reference contained new methodologies and new delivery dates for each stage report, including for the previously-delivered Stage A report and the Stage B and C reports that Bates White had begun to prepare.³⁸² Given the CNEE's failure to provide any substantive comments on the Stage A report in the two and a half months prior to issuing the revised terms of reference, Bates White took the position that the Stage A report should be deemed approved.³⁸³ In order to cooperate to the fullest extent, however, and in order to ensure that the CNEE could not concoct a basis to disregard the study, Bates White agreed, at EEGSA's request, to revise the Stage A report in accordance with the revised terms of reference.³⁸⁴ Bates White thus had to employ a second – and, in Mr. Giacchino's professional opinion, inappropriate – method to calculate demand.³⁸⁵ As Mr. Giacchino explains, although Bates White thus had to perform far more work at a significantly greater cost to EEGSA, the additional calculations had no material effect on the results of the Stage A report or on the calculation of the VAD.³⁸⁶

115. In accordance with the schedule in the revised terms of reference, Bates White re-submitted the Stage A report, together with the Stage B report, on 25 January 2008.³⁸⁷ EEGSA's representative, Mr. Calleja, delivered original cover letters for both stage reports to the CNEE, and confirmed that both reports contained all of the information that Bates White had used to

³⁸⁰ See Calleja ¶¶ 25-26 (CWS-3).

³⁸¹ Resolution No. CNEE-05-2008 dated 17 Jan. 2008 (C-153); see also Giacchino ¶ 22 (CWS-4); Calleja ¶ 22 (CWS-3).

³⁸² Giacchino ¶ 22 (CWS-4).

³⁸³ *Id.*

³⁸⁴ *Id.* ¶¶ 22-23.

³⁸⁵ *Id.* ¶ 23.

³⁸⁶ *Id.*

³⁸⁷ *Id.*, Table 1; Calleja ¶ 26 (CWS-3); Maté ¶ 16 (CWS-6).

prepare them.³⁸⁸ Mr. Calleja also submitted a copy of EEGSA's contract with Bates White, as the CNEE previously had requested in its letter of 17 December 2007.³⁸⁹

116. In response, the CNEE sent a letter dated 30 January 2008, in which it repeated its prior claim that it had not received the Stage A or Stage B reports for the reasons set out in its letter of 17 December 2007.³⁹⁰ EEGSA's General Manager, Mr. Maté, viewed the CNEE's repeated claims that it had not "received" Bates White's reports – a term that, as Mr. Maté notes, did not even appear in the amended RLGE Article 98 – as evidence that the CNEE was determined to disregard Bates White's study.³⁹¹ EEGSA thus sent an immediate reply enclosing a copy of the notarized deed appointing Mr. Calleja to act on EEGSA's behalf, copies of the letters signed by Mr. Calleja delivering both stage reports (the CNEE had the originals), and a copy of the letter with the CNEE's stamp showing that it had received EEGSA's contract with Bates White.³⁹² EEGSA advised the CNEE that Mr. Calleja could re-sign any of the letters at the CNEE's offices to remove any alleged doubt about the authenticity of his signature.³⁹³ EEGSA further advised the CNEE that Bates White had assured EEGSA that the reports contained all of the underlying information in digital format, but that EEGSA would send any specific information that the CNEE deemed to be missing.³⁹⁴ As a matter of principle, however, EEGSA rejected the CNEE's suggestion that the CNEE had not received Bates White's Stage A and Stage B reports when there was "unquestionable evidence," including the CNEE's own receipt

³⁸⁸ Calleja ¶ 26 (stating that he retained a copy of each letter for EEGSA's files) (CWS-3); Maté ¶ 16 (CWS-6); Letter No. GG-07-2008 from EEGSA to the CNEE dated 25 Jan. 2008 (re-submitting the Stage A report) (C-156); Letter No. GG-08-2008 from EEGSA to the CNEE dated 25 Jan. 2008 (enclosing the Stage B report) (C-157).

³⁸⁹ Calleja ¶ 26 (CWS-3); Maté ¶ 16 (CWS-6); *see also* Contract between EEGSA and Bates White dated 23 Jan. 2008 (C-154); Letter No. GG-017-2008 from EEGSA to the CNEE dated 31 Jan. 2008, at 1 (noting the CNEE's stamp of receipt on the cover letter attaching the signed contract) (C-159).

³⁹⁰ Maté ¶ 16 (CWS-6); Letter No. CNEE-15504-2008 from the CNEE to EEGSA dated 30 Jan. 2008 (C-158).

³⁹¹ Maté ¶ 17 (CWS-6); *see also* Calleja ¶ 26 (explaining that he was "very surprised" by the CNEE's letter) (CWS-3).

³⁹² Maté ¶ 17 (CWS-6); Letter No. GG-017-2008 from EEGSA to the CNEE dated 31 Jan. 2008, at 1 (responding to "letter CNEE 15504-2008 received today, January 31, at 11:23 hours") (C-159).

³⁹³ Maté ¶ 17 (CWS-6); Letter No. GG-017-2008 from EEGSA to the CNEE dated 31 Jan. 2008, at 1 (C-159).

³⁹⁴ *Id.*

stamps, to prove that the CNEE in fact had received both reports.³⁹⁵

117. Unfortunately, the CNEE's efforts to disrupt Bates White's progress persisted.³⁹⁶ On 12 February 2008, three and a half months after its initial receipt of the Stage A report, the CNEE submitted its first comments on that report.³⁹⁷ The CNEE claimed that the Stage A report could not be used as a basis for subsequent stage reports because, in the CNEE's view, the report did not comply with the terms of reference.³⁹⁸ The CNEE characterized its comments to the Stage A report as mandatory "requirements" and declared that EEGSA had to "use the ranges defined by CNEE in the subsequent phases of the Study."³⁹⁹ In thus reverting to the position that it had taken in the first unlawful terms of reference, the CNEE once again contravened the LGE and RLGE, which provided for an Expert Commission to resolve any disagreements between the CNEE and the consultant, and ignored its own crucial modifications in Articles 1.6.4, 1.8, and 1.10 of the revised terms of reference.⁴⁰⁰

118. Although each of Bates White's stage reports already contained all of the required information, many of the CNEE's comments to those stage reports were demands for additional information.⁴⁰¹ Mr. Giacchino observes that, in his experience as a consultant in dozens of tariff reviews for both regulators and companies, no regulator has required as much information as the CNEE did from Bates White.⁴⁰² The CNEE also issued numerous directives for Bates White to

³⁹⁵ Maté ¶ 17 (CWS-6); Calleja ¶ 26 (CWS-3); Letter No. GG-017-2008 from EEGSA to the CNEE dated 31 Jan. 2008, at 1-2 (C-159).

³⁹⁶ See Calleja ¶ 27 (CWS-3); Maté ¶ 18 (CWS-6); Giacchino ¶ 27 (CWS-5).

³⁹⁷ Maté ¶ 18 (CWS-6); Letter No. CNEE-15597-2008 from the CNEE to EEGSA dated 12 Feb. 2008 (C-161).

³⁹⁸ Maté ¶ 18 (CWS-6); Calleja ¶ 27 (CWS-3); Letter No. CNEE-15597-2008 from the CNEE to EEGSA dated 12 Feb. 2008, at 10 (C-161).

³⁹⁹ Letter No. CNEE-15597-2008 from the CNEE to EEGSA dated 12 Feb. 2008, at 10 (C-161); see also Maté ¶ 18 (CWS-6); Calleja ¶ 27 (CWS-3).

⁴⁰⁰ Maté ¶ 18 (CWS-6); Calleja ¶ 27 (CWS-3).

⁴⁰¹ Giacchino ¶ 27 (CWS-4); see also, e.g., Letter No. CNEE-15597-2008 from the CNEE to EEGSA dated 12 Feb. 2008, at 3 (claiming that the Stage A report "failed to comply with the Terms of Reference insofar as the information provided in the report does not conform to the requirements set forth in the TOR") (C-161).

⁴⁰² Giacchino ¶ 27 (CWS-4).

perform calculations or to use criteria that were not contemplated in the terms of reference.⁴⁰³ In certain instances, Bates White revised its report as requested, although it at times noted that the requested calculation, while performed, was not required under the terms of reference.⁴⁰⁴ In other instances where the CNEE appeared to be dictating the result of the study, Bates White rejected the comment and provided a written justification for doing so.⁴⁰⁵ In the end, although the CNEE caused months of delay and substantial additional expense, Bates White finished all nine stage reports on time, and EEGSA delivered the complete study, along with revised versions of each stage report, to the CNEE on 31 March 2008, as scheduled.⁴⁰⁶

119. In light of the complex technical issues involved in the study, the CNEE had two months under the RLGE to analyze the study, to accept or reject it, and to proffer any pertinent observations.⁴⁰⁷ On 11 April 2008, only eleven days after EEGSA delivered the study, the CNEE issued Resolution 63-2008, through which the CNEE declared the study “inadmissible” and advised that EEGSA “must perform the corrections to same pursuant to the [CNEE’s] observations” therein “within a term of 15 days.”⁴⁰⁸ A great many of the CNEE’s observations in Resolution 63-2008, however, merely repeated the CNEE’s prior observations to the various stage reports without taking into account or even acknowledging Bates White’s responses.⁴⁰⁹

120. Four days later, on 15 April 2008, Enrique Moller, one of the CNEE’s directors, met EEGSA’s General Manager, Mr. Maté, for lunch.⁴¹⁰ Although Bates White in its study had

⁴⁰³ *See id.*

⁴⁰⁴ *Id.*; Calleja ¶ 27 (CWS-3); Maté ¶ 19 (CWS-6); *see also, e.g.*, Letter from Bates White to the CNEE and EEGSA dated 21 Feb. 2008, at 14 (C-163).

⁴⁰⁵ Giacchino ¶ 27 (CWS-4); Maté ¶ 19 (CWS-6); Calleja ¶ 27 (CWS-3).

⁴⁰⁶ Giacchino ¶ 27 (CWS-4); Maté ¶ 19 (CWS-6); Calleja ¶ 27 (CWS-3); Letter No. GG-045-2008 from EEGSA to the CNEE dated 31 Mar. 2008 (C-178).

⁴⁰⁷ Government Resolution No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Article 98 to provide that the CNEE, “within a term of two months, shall decide on the acceptance or rejection of the studies performed by the consultants, making the observations it deems pertinent”) (C-104).

⁴⁰⁸ Resolution No. CNEE-63-2008 dated 11 Apr. 2008, at 3 (C-193); *see also* Maté ¶ 20 (CWS-6); Calleja ¶ 28 (CWS-3).

⁴⁰⁹ Giacchino ¶ 27 (CWS-4).

⁴¹⁰ Maté ¶ 21 (CWS-6).

determined based on objective factors that the VAD was due to increase significantly, Mr. Moller asked whether EEGSA could accept a VAD that was 5% lower than the one in effect at that time.⁴¹¹ Mr. Maté told Mr. Moller that the proposed VAD seemed low and that he would need to analyze the issue and consult with his colleagues.⁴¹² With Mr. Perez due to visit the following week, EEGSA and the CNEE thus scheduled a meeting – the first since the videoconference in November 2007 regarding the Stage A report – to take place at the CNEE’s offices on 22 April 2008.⁴¹³

121. Based on its understanding that the CNEE would oppose for political reasons any increase to the current tariff, EEGSA proceeded to assess in anticipation of that meeting whether it would be possible to increase the VAD and to maintain the overall tariff.⁴¹⁴ Such a compromise would enable the CNEE to achieve a political victory by publicly announcing that tariffs would not increase, while EEGSA would receive a needed increase in the VAD and ensure that the CNEE did not set the VAD on its own, in violation of law.⁴¹⁵ At that time, the tariffs included monthly installments for deferred energy costs as a result of the CNEE’s failure to adjust annual electricity prices from 1998 to 2003, in violation of RLGE Article 89.⁴¹⁶ The last installment for the deferred energy costs was due in July 2008.⁴¹⁷ Given that the component of the tariffs relating to energy costs thus was due to decrease, EEGSA concluded that it could increase the VAD by that amount and still maintain the same tariff.⁴¹⁸ Mr. Maté and Mr. Perez delivered a presentation to this effect during a one-hour meeting on 22 April 2008 with all three directors of the CNEE.⁴¹⁹ At the end of the meeting, the CNEE’s directors said that they would

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.* ¶ 23.

⁴¹⁴ *Id.* ¶ 22; Calleja ¶ 29 (CWS-3).

⁴¹⁵ Calleja ¶ 29 (CWS-3).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ Maté ¶ 23 (CWS-6); Calleja ¶ 29 (CWS-3); *see also* Tariff Study Presentation dated 22 Apr. 2008, at 14 (explaining that the “proposal has no effect on tariffs”) (C-194).

analyze the presentation, which EEGSA provided in electronic format.⁴²⁰ The CNEE, however, did not respond to EEGSA's proposal.⁴²¹

122. In the absence of any negotiated agreement, EEGSA requested Bates White to revise its study to address the CNEE's observations in Resolution 63-2008.⁴²² EEGSA submitted Bates White's corrected study on 5 May 2008.⁴²³ In its corrected study of 5 May 2008, Bates White accepted some of the CNEE's observations and made corresponding changes to its various stage reports, and rejected other observations and provided its rationale for doing so.⁴²⁴ The most significant correction was Bates White's acceptance of the CNEE's observation objecting to Bates White's assumptions regarding undergrounding.⁴²⁵ The issue of undergrounding is notable because the cost of materials used for underground lines is greater than the cost of materials used for aerial lines, which means that an increase in undergrounding will lead to a corresponding increase in the VNR.⁴²⁶ In building a model distribution company to calculate the VNR, Bates White assumed in its 31 March 2008 study that the model company would "follow[] standard engineering practice and design and quality service norms in Guatemala."⁴²⁷ As Mr. Giacchino explains, EEGSA also had told him that certain municipalities had requested undergrounding and that the CNEE had agreed that EEGSA should carry out that work.⁴²⁸ In Resolution 63-2008 responding to Bates White's 31 March study, however, the CNEE changed

⁴²⁰ Maté ¶ 23 (CWS-6).

⁴²¹ *Id.*; see also Calleja ¶ 31 (CWS-3).

⁴²² Maté ¶ 24 (CWS-6); Calleja ¶ 31 (CWS-3).

⁴²³ Maté ¶ 25 (CWS-6); Calleja ¶ 31 (CWS-3); Giacchino ¶ 28 (CWS-4); Letter from Bates White to the CNEE and EEGSA dated 5 May 2008 (enclosing final corrected reports for Stages A to I and I.2) (C-195).

⁴²⁴ Maté ¶ 25 (CWS-6); Calleja ¶ 31 (CWS-3); Giacchino ¶ 28 (CWS-4); Letter from Bates White to the CNEE and EEGSA dated 5 May 2008 (enclosing final corrected reports for Stages A to I and I.2) (C-195); Letter from Bates White to the CNEE and EEGSA dated 5 May 2008 (C-207).

⁴²⁵ Giacchino ¶¶ 30-31 (CWS-4).

⁴²⁶ See generally Giacchino ¶ 30 (CWS-4); see also generally EC Report, at 73-74, Discrepancy C.3.f, Underground Facilities (C-246).

⁴²⁷ Giacchino ¶ 30 (CWS-4); Bates White Stage C Report: Optimization of the Distribution Grid dated 31 Mar. 2008, at 43, Table 15 (C-181).

⁴²⁸ Giacchino ¶ 30 (CWS-4).

its position regarding undergrounding.⁴²⁹ Accordingly, in its corrected study of 5 May 2008, Bates White vastly decreased the number of underground lines, providing for undergrounding only where there was insufficient space for aerial lines to be installed.⁴³⁰ As a result, Bates White established a VNR of US\$ 1.3 billion in its corrected study,⁴³¹ which reflected a decrease of more than 23 percent or US\$ 395 million from the VNR in its 31 March study.⁴³²

4. After Calling For An Expert Commission, Guatemala Undertook To Manipulate The Process To Its Advantage

123. On 13 May 2008, the CNEE sent an email to EEGSA indicating that the parties would need to convene a three-member Expert Commission, in accordance with LGE Article 75.⁴³³ As explained below, during the ensuing negotiations regarding the establishment of the Expert Commission, Guatemala, through both the CNEE and the MEM, undertook to manipulate the process to its advantage – first, by seeking to submit to the Expert Commission alleged discrepancies on issues that it had not raised in its prior comments; second, by seeking to grant itself the power to appoint two of the Expert Commission’s three members; and third, by seeking to grant itself (and not the Expert Commission) the ability to decide whether Bates White had incorporated the Expert Commission’s rulings into its study.

124. At the CNEE’s request, representatives of EEGSA and the CNEE met on 14 May 2008 to discuss the establishment of the Expert Commission, and the CNEE proposed a general

⁴²⁹ *Id.*; Resolution No. CNEE-63-2008 dated 11 Apr. 2008, at 9 (C-193).

⁴³⁰ Giacchino ¶ 31 (CWS-4); Bates White Stage C Report: Optimization of the Distribution Grid dated 5 May 2008, at 73-76 (C-198).

⁴³¹ Giacchino ¶ 29 (CWS-4); Bates White Stage D Report: Annuity of the Investment dated 5 May 2008, at 34 (C-199); *see also* Bates White Stage G Report: VAD Cost Components and Consumer Charges dated 5 May 2008, attachment, VAD Model 28Abr08.xls, Summary 2006 (C-202).

⁴³² Giacchino ¶¶ 29, 31 (noting the VNR of approximately US\$ 1.69 billion in the 31 March 2008 study) (CWS-4); Bates White Stage D Report: Annuity of the Investment dated 31 Mar. 2008, at 24 (C-182); *see also* Bates White Stage G Report: VAD Cost Components and Consumer Charges dated 31 Mar. 2008, attachment, VAD Model 29Mar08.xls, Summary 2006 (C-185).

⁴³³ Calleja ¶ 32 (CWS-3); Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 13 May 2008 at 0:34 GMT (C-208).

framework for the Expert Commission’s operation.⁴³⁴ Two days later, on 16 May, the CNEE notified EEGSA of Resolution 96-2008, in which the CNEE alleged that Bates White’s corrected study “ignor[ed] all of the observations” in the CNEE’s Resolution 63-2008 of 11 April 2008.⁴³⁵ The CNEE thus resolved to “establish the Expert Commission referred to in article 75 of the [LGE], which must decide on the discrepancies” between the corrected study and the observations in Resolution 63-2008.⁴³⁶

125. The CNEE’s list of alleged discrepancies in Resolution 96-2008 was overbroad. As set forth above and in the expert legal opinion of Professor Alegría, RLGE Article 98 provides for the following procedure: the consultant is to submit its study four months before the existing tariffs are due to expire; the CNEE is to submit observations on the study within two months; the consultant is to analyze those observations and correct its study within 15 days; and the Expert Commission is to resolve any discrepancies that “persist.”⁴³⁷ Thus, under RLGE Article 98, the Expert Commission is to resolve the discrepancies that result from the consultant’s decision to reject one or more of the CNEE’s observations to its study.⁴³⁸ The Expert Commission is not, however, to resolve issues that the CNEE failed to raise previously, because, as Professor Alegría notes, those issues could not be discrepancies that “persist” within the meaning of Article 98.⁴³⁹

126. The CNEE’s Resolution 96-2008 contravened this procedure. As that Resolution reflects, and as discussed above, Bates White submitted its study on 31 March 2008, the CNEE submitted its observations on 11 April 2008, and Bates White delivered its corrected study on 5

⁴³⁴ Calleja ¶ 32 (CWS-3); Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 15 May 2008 at 0:22 GMT (proposing framework for the rules) (C-210); *see also* Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 13 May 2008 at 0:34 GMT (requesting a meeting on 14 May) (C-208).

⁴³⁵ Resolution No. CNEE-96-2008 dated 15 May 2008, at 3 (C-209); *see also* Maté ¶ 28 (CWS-6); Calleja ¶ 29 (CWS-3).

⁴³⁶ Resolution No. CNEE-96-2008 dated 15 May 2008, Art. I (C-209); *see also* Maté ¶ 28 (CWS-6); Calleja ¶ 33 (CWS-3); Giacchino ¶ 32 (CWS-4).

⁴³⁷ Alegría ¶ 30 (CER-1); *see also* Government Resolution No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Article 98) (C-104).

⁴³⁸ Alegría ¶ 30 fn. 87 (CER-1).

⁴³⁹ *Id.*

May 2008.⁴⁴⁰ Under RLGE Article 98, the Expert Commission’s mandate thus should have been limited to resolving those discrepancies that resulted from Bates White’s rejection of the CNEE’s observations of 11 April. Resolution 96-2008, however, was not so limited. To the contrary, as Mr. Calleja explains, “[r]ather than focus on the observations that Bates White did not accept, as Article 98 required, the CNEE included . . . entirely new issues that it had never previously raised with EEGSA or Bates White.”⁴⁴¹ In violation of the established procedure, the CNEE thus sought to provide itself with the significant advantage of having the Expert Commission resolve discrepancies that Bates White had not had the opportunity to address.⁴⁴²

127. During their initial discussions, EEGSA and the CNEE agreed that the two party-appointed members of the Expert Commission should have prior knowledge of the tariff study and the dispute, as is standard in the industry.⁴⁴³ As both parties recognized, the issues were complex, and the Expert Commission would have to resolve the discrepancies within a very short timeframe.⁴⁴⁴ In addition, if the CNEE prevailed with regard to any of the discrepancies, Bates White would need to revise its study to comply with the Expert Commission’s ruling. Mr. Calleja thus informed the CNEE’s tariff manager, Mr. Quijivix, that EEGSA would appoint Mr. Giacchino of Bates White, and Mr. Quijivix said that the CNEE would appoint a representative

⁴⁴⁰ See Resolution No. CNEE-96-2008 dated 15 May 2008, at 3 (C-209); see also Calleja ¶ 36 (CWS-3); Letter No. GG-045-2008 from EEGSA to the CNEE dated 31 Mar. 2008 (C-178); Resolution No. CNEE-63-2008 dated 11 Apr. 2008 (C-193); Letter from Bates White to the CNEE and EEGSA dated 5 May 2008 (enclosing final corrected reports for Stages A to I and I.2) (C-195).

⁴⁴¹ Calleja ¶ 36 (CWS-3); see also Maté ¶ 29 (observing that the list of discrepancies in Resolution 96-2008 “included issues that the CNEE had not mentioned in its comments of 11 April 2008”) (CWS-6); Giacchino ¶ 32 (observing that Resolution 96-2008 not only repeated the CNEE’s observations in Resolution 63-2008, without taking into account Bates White’s responses, but also raised new objections) (CWS-4); see also, e.g., Resolution No. CNEE-96-2008 dated 15 May 2008, at 5 (objecting to the values used for the Costs of Engineering, Contingencies, Inserted Interests and Administrative Costs) (C-209); *id.* at 11 (objecting to the inclusion of benefits for EEGSA’s employees).

⁴⁴² Maté ¶ 29 (CWS-6); Calleja ¶ 36 (CWS-3).

⁴⁴³ Calleja ¶ 33 (CWS-3); see also Maté ¶ 37 (CWS-6); Giacchino ¶ 35 (explaining that, in his experience, “those persons who work on the tariff study are regularly appointed to such expert commissions that are charged with resolving disputes between the regulator and the regulated entity”) (CWS-4).

⁴⁴⁴ Calleja ¶ 33 (CWS-3); Maté ¶ 37 (CWS-6); Giacchino ¶ 35 (CWS-4); see also LGE, Art. 75 (requiring the panel of experts to “rule on the differences in a period of 60 days counted from its appointment”) (C-17).

of one of its consultants, Mercados Energéticos or Sigla.⁴⁴⁵ As Mr. Calleja explains, “[b]y having two party-appointed members who were familiar with the study and with the dispute between the parties, the Expert Commission would be positioned to resolve the dispute within the term allowed by the law,” and “[i]t also then would be possible for the consultant to prepare its final study even before 1 August, which was very important to the CNEE at the time.”⁴⁴⁶

128. Thereafter, on 19 May 2008, EEGSA sent the CNEE a first draft of proposed operating rules for the Expert Commission.⁴⁴⁷ As EEGSA’s proposal reflects, and as Mr. Calleja confirms, EEGSA agreed with several important principles in the CNEE’s proposed framework of 15 May.⁴⁴⁸ EEGSA and the CNEE agreed, for example, that the Expert Commission would render a decision on each individual discrepancy, that each such decision would be decided by simple majority, and that the member in the minority on any decision could submit a dissenting opinion.⁴⁴⁹ EEGSA and the CNEE further agreed that Bates White would perform any necessary changes to its study to ensure that the study complied with the Expert Commission’s decisions, and that this revised study would be the basis for the new tariffs.⁴⁵⁰

129. The parties did not agree, however, on which entity – the Expert Commission or the CNEE – should analyze Bates White’s revisions to determine whether they complied with the Expert Commission’s rulings.⁴⁵¹ The CNEE proposed that Bates White deliver its revised study to the CNEE, and the CNEE would decide whether Bates White had incorporated the Expert

⁴⁴⁵ Calleja ¶ 33 (CWS-3); *see also* Maté ¶ 37 (CWS-6); Giacchino ¶ 34 (CWS-4).

⁴⁴⁶ Calleja ¶ 33 (CWS-3); *see also* Maté ¶ 37 (CWS-6).

⁴⁴⁷ Calleja ¶ 33 (CWS-3); EEGSA Proposed Rules for the Expert Commission dated 19 May 2008 (C-211).

⁴⁴⁸ *See* Calleja ¶ 34 (CWS-3).

⁴⁴⁹ *Id.*; *see also* EEGSA Proposed Rules for the Expert Commission dated 19 May 2008, Rules 12-13 (C-211); Proposed Operating Rules attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 15 May 2008 at 0:22 GMT, “About the Discrepancies,” at 2 (C-210).

⁴⁵⁰ *See* EEGSA Proposed Rules for the Expert Commission dated 19 May 2008, Rule 14 (C-211); Proposed Operating Rules attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 15 May 2008 at 0:22 GMT, “About the Operation,” at 2 (C-210); Calleja ¶ 34 (CWS-3).

⁴⁵¹ Calleja ¶ 34 (CWS-3); Maté ¶ 35 (CWS-6).

Commission’s decision and, if so, would approve the revised study.⁴⁵² The CNEE thus undertook to empower itself to decide whether to approve or reject Bates White’s revised study, without any further review by the Expert Commission. EEGSA disagreed with the CNEE’s proposal to grant itself this final review because, as Mr. Calleja explains, the CNEE was a party to and not a judge of the dispute.⁴⁵³ If the CNEE could reject Bates White’s revised study, simply by asserting that Bates White had not complied with the Expert Commission’s decisions, there would be a potential for abuse that could defeat the purpose of having the Expert Commission decide on the discrepancies.⁴⁵⁴ In order to avoid this possibility, EEGSA maintained that only the Expert Commission could make the final determination as to whether Bates White had revised its study in accordance with the Expert Commission’s rulings.⁴⁵⁵ EEGSA thus proposed that “the Expert Commission shall verify that such modifications have been performed in accordance with what the Expert Commission itself resolved with respect to the specific observation and discrepancy that was resolved, and approve them.”⁴⁵⁶

130. After a meeting between EEGSA and the CNEE on 21 May 2008, the CNEE sent EEGSA another draft of the proposed operating rules in which the CNEE again proposed for Bates White to submit any revisions incorporating the Expert Commission’s decisions “to CNEE for its review and approval.”⁴⁵⁷ As Mr. Calleja explains, “the CNEE’s insistence that it should have the final say on this matter strongly suggested to EEGSA that the CNEE was looking for a way to reject the corrected study if the Expert Commission ruled in Bates White’s favor and against the CNEE.”⁴⁵⁸ EEGSA thus objected to the CNEE’s proposal and remained adamant that

⁴⁵² Proposed Operating Rules attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 15 May 2008 at 0:22 GMT, “About the Operation” ¶ 3 (C-210).

⁴⁵³ Calleja ¶ 34 (CWS-3); *see also* Maté ¶ 35 (CWS-6).

⁴⁵⁴ *See* Calleja ¶ 34 (CWS-3).

⁴⁵⁵ *Id.*; Maté ¶ 35 (CWS-6).

⁴⁵⁶ EEGSA Proposed Rules for the Expert Commission dated 19 May 2008, Rule 14 (C-211); *see also* Maté ¶ 35 (CWS-6); Calleja ¶ 34 (CWS-3).

⁴⁵⁷ Proposed Operating Rules for the Operation of the Expert Commission, Rule 13 (emphasis added), attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 21 May 2008 at 22:25 GMT (C-213); *see also* Calleja ¶ 35 (CWS-3).

⁴⁵⁸ Calleja ¶ 35 (CWS-3).

only the Expert Commission could decide whether Bates White's corrected study complied with each decision of the Expert Commission.⁴⁵⁹

131. By letter dated 23 May 2008, EEGSA also objected to the scope of Resolution 96-2008 because, as set forth above, the discrepancies therein included issues that the CNEE had not mentioned in its comments and Bates White thus had not addressed.⁴⁶⁰ EEGSA therefore opposed the CNEE's "unilateral and arbitrary" introduction of issues "that were not objected to at the proper time, becoming 'discrepancies' at [the CNEE's] own whim and without giving [Bates White] the possibility of addressing same."⁴⁶¹ Because there was no "adequate, effective and timely remedy at the local level to allow the correction of the indicated serious irregularities in a reasonable amount of time,"⁴⁶² EEGSA, while maintaining its objection, requested Bates White to analyze the new discrepancies, at further cost to itself, in order to ensure that the tariff review proceeded as scheduled and that there would be a record of Bates White's analysis if the Expert Commission ultimately was called upon to rule on these issues.⁴⁶³ EEGSA enclosed Bates White's responses to these discrepancies with its letter of 23 May.⁴⁶⁴

132. Also on 23 May, EEGSA and the CNEE met again and agreed to nine operating rules to propose to the Expert Commission, as well as to the rules regarding the makeup of the Expert Commission.⁴⁶⁵ Later that day, Mr. Quijivix of the CNEE circulated these rules by email with yellow highlighting and embedded comments to indicate that three other proposed operating

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* ¶ 36 (CWS-3); Maté ¶ 29 (CWS-3); Letter No. GG-064-2008 from EEGSA to the CNEE dated 23 May 2008 (C-215).

⁴⁶¹ Letter No. GG-064-2008 from EEGSA to the CNEE dated 23 May 2008, at 1 (C-215); *see also* Maté ¶ 29 (CWS-6); Calleja ¶ 36 (CWS-3).

⁴⁶² Letter No. GG-064-2008 from EEGSA to the CNEE dated 23 May 2008, at 1 (C-215).

⁴⁶³ Calleja ¶ 36 (CWS-3); Maté ¶ 29 (CWS-6); Giacchino ¶ 32 (CWS-4).

⁴⁶⁴ Letter No. GG-064-2008 from EEGSA to the CNEE dated 23 May 2008, at 3 (enclosing the consultant's observations, which "from a technical standpoint, rebut the recently listed CNEE objections") (C-215); *see also* Calleja ¶ 36 (CWS-3); Maté ¶ 29 (CWS-6); Giacchino ¶ 32 (CWS-4).

⁴⁶⁵ Calleja ¶ 37 (CWS-3); *see also* Maté ¶ 31 (CWS-6).

rules – rules 8, 9, and 12 – remained in dispute.⁴⁶⁶ The first rule in dispute provided that the Expert Commission would “render its decision in accordance with the Current Legal Framework of Guatemala.”⁴⁶⁷ As Messrs. Calleja and Maté explain, although EEGSA of course agreed with this principle, EEGSA feared that the CNEE would seek to support its generalized observations with new evidence and argument to which Bates White had not had the opportunity to respond.⁴⁶⁸ As the embedded comment to rule 8 reflects, EEGSA thus proposed that the Expert Commission also would base its decision on “the documentation exchanged in the process,” and that “[a]ny additional information must be agreed to by the three arbitrators.”⁴⁶⁹ The next rule in dispute provided that the Expert Commission would “address each of the discrepancies posed in Resolution CNEE-96-2008.”⁴⁷⁰ As the embedded comment to rule 9 reflects, EEGSA agreed that the Expert Commission could address each of those discrepancies, including those that were not raised at the proper time, provided that the Expert Commission also addressed EEGSA’s and Bates White’s replies thereto, which EEGSA had delivered earlier that day.⁴⁷¹ The third rule in dispute concerned which entity would determine whether Bates White’s revised study complied with the Expert Commission’s decisions.⁴⁷² The highlighting of rule 12 thus reflects EEGSA’s insistence that Bates White would submit its revised study incorporating the Expert

⁴⁶⁶ Calleja ¶ 37 (CWS-3); Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 23 May 2008 at 19:59 GMT (C-214).

⁴⁶⁷ Proposed Operating Rules for the Operation of the Expert Commission, Rule 8, attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 23 May 2008 at 19:59 GMT (C-214); *see also* Calleja ¶ 37 (CWS-3).

⁴⁶⁸ Calleja ¶ 37 (CWS-3); Maté ¶ 33 (CWS-6).

⁴⁶⁹ Proposed Operating Rules for the Operation of the Expert Commission, Rule 8, attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 23 May 2008 at 19:59 GMT (C-214); *see also* Maté ¶ 33 (CWS-6); Calleja ¶ 37 (CWS-3).

⁴⁷⁰ Proposed Operating Rules for the Operation of the Expert Commission, Rule 9, attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 23 May 2008 at 19:59 GMT (C-214); *see also* Maté ¶ 32 (CWS-6); Calleja ¶ 37 (CWS-3).

⁴⁷¹ Proposed Operating Rules for the Operation of the Expert Commission, Rule 9, attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 23 May 2008 at 19:59 GMT (C-214); *see also* Maté ¶ 32 (CWS-6); Calleja ¶ 37 (CWS-3).

⁴⁷² Proposed Operating Rules for the Operation of the Expert Commission, Rule 12, attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 23 May 2008 at 19:59 GMT (C-214); *see also* Maté ¶ 35 (CWS-6); Calleja ¶ 37 (CWS-3).

Commission’s decisions “to the EC [Expert Commission] for its review and approval,” rather than to the CNEE, as the CNEE continued to propose.⁴⁷³

133. While these issues remained unresolved, Guatemala continued its efforts to manipulate the process and to ensure a result in its favor by publishing Government Accord No. 145-2008, which added Article 98 *bis* to the RLGE.⁴⁷⁴ As explained by Professor Alegría, “Article 98 *bis* signaled yet another radical departure from the LGE,” this time by subverting the requirement in LGE Article 75 that the third member of the Expert Commission be appointed “by mutual agreement” of the parties.⁴⁷⁵ Article 98 *bis* instead required the parties to constitute the Expert Commission “within three days after notifying the discrepancies referred to in article 75,”⁴⁷⁶ and further provided that “[i]f the three-day term for the selection of the third member expires without an agreement by the parties,” then the CNEE shall send the dossiers on each proposed candidate “to the Ministry, for the latter to definitively select . . . the third member of the Expert Commission from among the proposed candidates.”⁴⁷⁷ Thus, under the new amendment, if the CNEE simply refused to agree with EEGSA on the third member of the Expert Commission, as LGE Article 75 required it to do, the Government could appoint the third member from the candidates proposed by the CNEE.⁴⁷⁸

134. As Professor Alegría explains, the LGE does not under any circumstance empower the MEM or any other actor to appoint the third member of the Expert Commission on its own, but rather is unequivocal that the parties must mutually agree on that appointment.⁴⁷⁹ Professor Alegría notes that whereas LGE Article 75 thus ensured “objectivity and equality

⁴⁷³ Proposed Operating Rules for the Operation of the Expert Commission, Rule 12, attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 23 May 2008 at 19:59 GMT (C-214); *see also* Calleja ¶ 37 (CWS-3).

⁴⁷⁴ Government Accord No. 145-2008 dated 19 May 2008, Art. 1 (adding Article 98 *bis* to the RLGE) (C-212); *see also* Alegría ¶¶ 52-57 (CER-1); Calleja ¶ 38 (CWS-3); Maté ¶ 38 (CWS-6). Although this Accord is dated 19 May 2008, it was not published until 26 May 2008.

⁴⁷⁵ Alegría ¶ 53 (CER-1); *see also id.* ¶¶ 54-57; LGE, Art. 75 (C-17).

⁴⁷⁶ Government Accord No. 145-2008 dated 19 May 2008, Art. 1 (C-212).

⁴⁷⁷ *Id.*

⁴⁷⁸ *See* Alegría ¶¶ 53, 55 (CER-1); Calleja ¶ 35 (CWS-3); *see also* Maté ¶ 38 (CWS-6).

⁴⁷⁹ Alegría ¶ 53 (CER-1).

among the parties,” Article 98 *bis* “improperly grant[ed] the Government authority to appoint two of the three members of the expert commission;” specifically, the CNEE could “reject the distributor’s proposed candidates, let three days pass, and then have the MEM appoint the third member from the candidates proposed by the CNEE.”⁴⁸⁰ Article 98 *bis* thus “alter[ed] the balance in favor of the Government” and “turn[ed] LGE Article 75 on its head” by providing a procedure that, as Professor Alegría explains, “would deprive the expert commission of its independence and undermine a key objective of the LGE, which is to grant neither the regulator nor the distributor the right to impose its will on the other but, instead, to have disputes resolved in a depoliticized process on the basis of economic, technical, and objective considerations by a three-member panel.”⁴⁸¹

135. Apart from contravening the express terms of the LGE and thus being unlawful, Article 98 *bis* could not, according to EEGSA, be applied in its case. As noted above, the CNEE notified EEGSA of the discrepancies on 16 May 2008,⁴⁸² and Article 98 *bis* provided the parties only three days from that date to agree on the third member of the Expert Commission.⁴⁸³ If the new Article 98 *bis* were to have applied, EEGSA and the CNEE thus would have had until only 19 May to reach agreement on the third member.⁴⁸⁴ Yet, as Mr. Calleja notes, Article 98 *bis* was not published until 26 May and was not due to enter into force until 27 May, so the deadlines set forth in Article 98 *bis* had lapsed by the time it was due to take effect.⁴⁸⁵ EEGSA explained this to the CNEE and made it clear that if the CNEE attempted to invoke Article 98 *bis* to appoint the Expert Commission’s third member, EEGSA would challenge its ability to do so in court.⁴⁸⁶ As Mr. Calleja recalls, “[t]he CNEE accepted that it was impossible to apply Article 98 *bis* in our

⁴⁸⁰ *Id.* ¶ 55.

⁴⁸¹ *Id.*

⁴⁸² See Calleja ¶ 33 (CWS-3); Maté ¶ 28 (CWS-6); Resolution No. CNEE-96-2008 dated 15 May 2008 (C-209).

⁴⁸³ Government Accord No. 145-2008 dated 19 May 2008, Art. 1 (C-212); see also Calleja ¶ 38 (CWS-3).

⁴⁸⁴ Calleja ¶ 38 (CWS-3).

⁴⁸⁵ *Id.* (describing Article 98 *bis* as a “midstream change”).

⁴⁸⁶ *Id.*

case and decided to continue with the procedure it had established thus far, so we succeeded in preventing the Government from intervening in the constitution of the Expert Commission.”⁴⁸⁷

136. Prior to a meeting with the CNEE on 28 May 2008, Mr. Calleja informed Mr. Quijivix that EEGSA had reviewed the CNEE’s candidates for the third member of the Expert Commission and noted that one of those candidates, Alejandro Sruoga, had worked for Carlos Bastos, the former Secretary of Energy of Argentina.⁴⁸⁸ Mr. Calleja relayed to Mr. Quijivix that Mr. Bastos was a man of great prestige in Argentina and that EEGSA held him in high regard based on a small project that he had done for EEGSA earlier that year.⁴⁸⁹

137. At the meeting on 28 May, the parties discussed the three operating rules that remained in dispute.⁴⁹⁰ The CNEE agreed to EEGSA’s proposals in the embedded comments to operating rules 8 and 9, subject to minor edits, and the parties then debated whether the Expert Commission or the CNEE would review and approve Bates White’s revised study.⁴⁹¹ As Mr. Calleja recalls, the discussion was intense and lasted for quite some time.⁴⁹² At one point, the CNEE’s directors withdrew to confer with the CNEE’s counsel, and after more than half an hour of private deliberations, they returned to inform EEGSA that the CNEE agreed to have the Expert Commission review Bates White’s revised study to determine whether it complied with the Expert Commission’s decisions.⁴⁹³ As the acting secretary, Mr. Quijivix thus removed all of the highlighting and the comments from the Word document on his computer, and he sent an email to Messrs. Calleja and Maté attaching the agreed operating rules and the agreed rules regarding the makeup of the Expert Commission.⁴⁹⁴ Mr. Calleja immediately forwarded that

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* ¶ 39; Maté ¶ 39 (CWS-6); *see also* Curriculum Vitae of Alejandro Valerio Sruoga, attached to Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 27 May 2008 at 9:37:11 GMT (C-216).

⁴⁸⁹ Calleja ¶ 39 (CWS-3).

⁴⁹⁰ *Id.* ¶ 40; *see also* Maté ¶ 31 (CWS-6).

⁴⁹¹ Calleja ¶ 40 (CWS-3).

⁴⁹² *Id.*

⁴⁹³ *Id.*; Maté ¶ 35 (CWS-6).

⁴⁹⁴ Calleja ¶ 40 (CWS-3); Email from M. Quijivix (CNEE) to L. Maté Sanchez and M. Calleja (EEGSA) dated 28 May 2008 at 11:21 GMT (C-217).

email to EEGSA's President, Mr. Perez, and a representative of EEGSA's Board of Directors, as well as separately to Mr. Giacchino, with a note that the parties had reached "[a]greement about the procedure regarding the operation of the Expert Commission."⁴⁹⁵

138. After agreeing to the operating rules, EEGSA and the CNEE discussed the third member of the Expert Commission.⁴⁹⁶ At the meeting on 28 May, the CNEE's President, Mr. Colom, proposed retaining Mr. Bastos of Argentina.⁴⁹⁷ Mr. Maté left to confer by phone with Mr. Perez, and returned a short time later to inform the CNEE that EEGSA agreed to the CNEE's proposal.⁴⁹⁸ Mr. Calleja then advised the CNEE's directors, as he previously had informed Mr. Quijivix, that Mr. Bastos had carried out a small project for EEGSA relating to the Wholesale Electricity Market, for which he was paid US\$ 18,000.⁴⁹⁹ The CNEE's directors said that they were aware of Mr. Bastos's work and that it did not present any problem.⁵⁰⁰

139. Later in May, Alejandro Arnau of the CNEE's consultant, Mercados Energéticos, called Mr. Bastos to explain that EEGSA and the CNEE were convening an Expert Commission to resolve disputes relating to the tariff study that had been submitted by EEGSA's consultant, Bates White.⁵⁰¹ Mr. Arnau stated that the CNEE and EEGSA each had appointed one expert and had discussed jointly appointing Mr. Bastos as the third expert, if he were interested.⁵⁰² Mr.

⁴⁹⁵ Email from M. Calleja to G. Perez and A. Martinez cc: M. Calleja and L. Maté Sanchez dated 28 May 2008 at 20:15 GMT (C-217); Email from M. Calleja to L. Giacchino dated 28 May 2008 (C-218); *see also* Calleja ¶ 40 (CWS-3); Giacchino ¶ 36 (CWS-4).

⁴⁹⁶ Calleja ¶ 40 (noting that he "never would have agreed on the third member without knowing whether the Expert Commission or the CNEE was going to confirm that the changes in the study had been made in accordance with the pronouncements of the Expert Commission") (CWS-3); *see also* Maté ¶ 38 (CWS-6).

⁴⁹⁷ Calleja ¶ 41 (CWS-3); *see also* Maté ¶ 39 (CWS-6).

⁴⁹⁸ Calleja ¶ 41 (CWS-3).

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*; Maté ¶ 39 (CWS-6). At the CNEE's request, EEGSA provided the CNEE with a copy of Mr. Bastos's report for EEGSA, as well as his invoices. *See* Calleja ¶ 41 (CWS-3); Maté ¶ 39 (CWS-6); Email from M. Calleja (EEGSA) to E. Moller (CNEE) dated 16 June 2008 at 19:54 GMT (C-233), attaching Carlos Bastos, *Analysis of the Application of the Mechanism of Supply to the Wholesale Electricity Market in Guatemala* dated Jan. 2008 (C-151).

⁵⁰¹ Bastos ¶ 5 (CWS-1).

⁵⁰² *Id.*

Bastos confirmed his interest and advised Mr. Arnau of his prior contacts with both parties, which Mr. Arnau said should not present a problem.⁵⁰³ Mr. Arnau then explained some of the discrepancies in general terms, as well as the timeframe for resolving the dispute, and Mr. Bastos confirmed that he was available.⁵⁰⁴ Mr. Arnau thus told Mr. Bastos that the parties would call him jointly, and that he would send Mr. Bastos the rules agreed between the parties.⁵⁰⁵

140. On 2 June 2008, Mr. Calleja forwarded the agreed rules from the meeting on 28 May to Mr. Bastos, and informed Mr. Quijivix of the CNEE that he had done so, as the CNEE had requested.⁵⁰⁶ Three days later, on 5 June, Messrs. Quijivix, Calleja, and Bastos held a teleconference during which the CNEE and EEGSA formally proposed to appoint Mr. Bastos as the third member and head of the Expert Commission.⁵⁰⁷ On that call, Messrs. Quijivix and Calleja confirmed to Mr. Bastos that his past work for EEGSA did not present any conflict, because that work had no direct link to EEGSA's operations and did not in any way relate to the calculation of the VAD.⁵⁰⁸ Messrs. Quijivix and Calleja reviewed each agreed operating rule one at a time with Mr. Bastos, and emphasized the need for the Expert Commission to issue its report by mid-July so that Bates White would have sufficient time to incorporate the Expert Commission's decisions into its revised study, as the new tariff schedule was to be published on 1 August 2008.⁵⁰⁹ The call ended with a request for Mr. Bastos to study the agreed operating

⁵⁰³ *Id.* ¶ 6. Specifically, Mr. Bastos explained to Mr. Arnau that he had presented his credentials to the CNEE to be pre-qualified with a group of Argentine professionals as a consultant for the 2003-2008 VAD tariff review, and that, with regard to EEGSA, he recently had prepared a report analyzing the Guatemalan wholesale electricity market and comparing it to those in Europe. Mr. Arnau said that Mr. Bastos's work for EEGSA was not likely to present a problem because it did not relate to EEGSA's VAD. *See id.*

⁵⁰⁴ *Id.* ¶ 7.

⁵⁰⁵ *Id.* ¶¶ 5, 7.

⁵⁰⁶ Calleja ¶ 42 (CWS-3); Bastos ¶ 8 (CWS-1); Maté ¶ 41 (CWS-6); Email from M. Calleja (EEGSA) to C. Bastos dated 2 June 2008 (C-220).

⁵⁰⁷ Bastos ¶ 8 (CWS-1); Calleja ¶ 42 (CWS-3); *see also* Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 5 June 2008 at 1:14 GMT (scheduling a meeting regarding "the matter of the telephone conference with Engineer Bastos") (C-222).

⁵⁰⁸ Bastos ¶ 10 (CWS-1).

⁵⁰⁹ *Id.* ¶ 9; *see also* Calleja ¶ 42 (CWS-3).

rules and to submit an economic proposal for his service, which would include the costs of any support staff.⁵¹⁰

141. On 6 June 2008, Mr. Bastos tendered an economic offer requesting US\$ 100,000 “to act as third expert of the Expert Commission constituted to resolve the discrepancies set forth in Resolution CNEE-96-2008 and EEGSA’s responses thereto.”⁵¹¹ Mr. Bastos confirmed in his offer that his “performance shall be subject to what is established in the Arbitration Rules that were delivered to me in a timely manner by you.”⁵¹² Later that day, the CNEE’s President, Mr. Colom, and EEGSA’s General Manager, Mr. Maté, notarized their formal agreement to establish the Expert Commission consisting of the CNEE’s appointee, Jean Riubrugent, a partner in the CNEE’s consultant, Mercados Energéticos; EEGSA’s appointee, Mr. Giacchino of Bates White; and Mr. Bastos “as the third member of the Expert Commission by mutual agreement.”⁵¹³ As the notarized agreement reflects, the Expert Commission thus constituted was “to decide on the discrepancies regarding the Distribution Value Added (VAD) Study.”⁵¹⁴

142. Subsequently, the CNEE and EEGSA signed separate contracts with Mr. Bastos in which each party agreed to pay half of his fee.⁵¹⁵ Both contracts expressly incorporated Mr. Bastos’s economic offer, which in turn incorporated the agreed operating rules, and the contract between EEGSA and Mr. Bastos reproduced the rules governing the Expert Commission’s

⁵¹⁰ Bastos ¶ 11 (CWS-1); *see also* Calleja ¶ 42 (CWS-3).

⁵¹¹ Letter from C. Bastos to EEGSA and the CNEE dated 6 June 2008 (C-225); *see also* Bastos ¶ 11 (CWS-1); Calleja ¶ 42 (CWS-3); Maté ¶ 42 (CWS-6).

⁵¹² Letter from C. Bastos to EEGSA and the CNEE dated 6 June 2008 (C-225).

⁵¹³ Notarized Record dated 6 June 2008, at 2-3, attached to Email from M. Quijivix (CNEE) to J. Riubrugent, L. Giacchino, and C. Bastos cc: M. Calleja dated 6 June 2008 (C-223); *see also* Maté ¶ 42 (CWS-6); Calleja ¶ 43 (CWS-3); Bastos ¶ 12 (CWS-1).

⁵¹⁴ Notarized Record dated 6 June 2008 at 2, attached to Email from M. Quijivix (CNEE) to J. Riubrugent, L. Giacchino, and C. Bastos cc: M. Calleja dated 6 June 2008 (C-223); *see also* Maté ¶ 42 (CWS-6); Calleja ¶ 43 (CWS-3).

⁵¹⁵ Contract between EEGSA and C. Bastos dated 26 June 2008, at 2 (C-238); Contract between the CNEE and C. Bastos dated 26 June 2008, at 5 (C-237); *see also* Bastos ¶ 16 (CWS-1); Maté ¶ 43 (CWS-6); Calleja ¶ 44 (CWS-3). Initially, the CNEE and EEGSA planned to sign one three-party contract with Mr. Bastos. At the signing, however, the CNEE requested separate contracts. EEGSA did not object, and both contracts were signed simultaneously at the CNEE’s offices. *See* Maté ¶ 43 (CWS-6); Calleja ¶ 44 fn. 96 (CWS-3).

work.⁵¹⁶ As explained above, these rules provided, among other things, that the Expert Commission would issue a final report ruling on each discrepancy; that the Expert Commission would adopt its decisions by simple majority; that a member could attach a dissenting opinion on any ruling; and that, upon receiving the Expert Commission's report from EEGSA, Bates White would make "all the changes requested in the EC's [Expert Commission's] decision, and remit the new version to the EC for its review and approval."⁵¹⁷ Thus, notwithstanding Guatemala's repeated efforts to manipulate the process to its advantage, a neutral, independent, and highly-qualified expert was appointed to serve as the third member of the Expert Commission, and the agreed-upon rules provided that Bates White would revise its study to incorporate the Expert Commission's decisions and that the Expert Commission would determine whether Bates White's revised study complied with its decisions.

5. The CNEE Unilaterally And Unlawfully Disbanded The Expert Commission And Set The New Tariff Schedule Based On Its Own Study

143. As set forth below, although the CNEE and EEGSA convened the Expert Commission to resolve their dispute relating to the VAD, the CNEE disregarded the legal framework and the agreed Operating Rules to set the VAD it wanted. First, after the Expert Commission had concluded its deliberations, the CNEE made public statements foreshadowing that the CNEE would not comply with an adverse decision. Then, after the Expert Commission ruled against the CNEE on key discrepancies, the CNEE unilaterally dissolved the Expert Commission and threatened its own appointed expert in order to prevent the Expert Commission from reviewing and approving Bates White's revised tariff study. Finally, when a majority of the Expert Commission confirmed that Bates White had, in fact, revised its study in accordance

⁵¹⁶ Contract between EEGSA and C. Bastos dated 26 June 2008, at 2-3 (listing the rules that "were agreed to by EEGSA and CNEE") (C-238); Contract between the CNEE and C. Bastos dated 26 June 2008, at 9 ("The following documents are part of the contract: . . . b) The economic offer made by the EXPERT and accepted by [CNEE].") (C-237); *see also* Calleja ¶ 44 fn. 97 (noting that certain agreed rules regarding the internal workings of the Expert Commission, for example with regard to the location of the Expert Commission's meetings, were not reproduced therein) (CWS-3); Maté ¶ 43 (CWS-6).

⁵¹⁷ Proposed Operating Rules for the Operation of the Expert Commission, Rules 9-12, attached to Email from M. Quijivix (CNEE) to L. Maté Sanchez and M. Calleja (EEGSA) dated 28 May 2008 at 11:21 GMT (C-218); Contract between EEGSA and C. Bastos dated 26 June 2008, at 3 (Rules 4-7) (C-238).

with the Expert Commission's Report, the CNEE nonetheless proceeded to publish the new tariff schedule based on its own tariff study, in violation of law and in disregard of the Expert Commission's ruling.

a. The Expert Commission Began Its Work In Accordance With The Agreed Operating Rules

144. As explained by Mr. Bastos, shortly after the Expert Commission was formally constituted on 6 June 2008, Mr. Bastos organized an initial meeting via Skype conference call with his fellow members on the Expert Commission.⁵¹⁸ During this initial meeting, the experts discussed how they would proceed to review and decide the discrepancies that had been submitted to them by the CNEE and EEGSA for resolution.⁵¹⁹ In view of the limited timeframe for preparing the Expert Commission's Report, Mr. Bastos proposed that Messrs. Riubrugent and Giacchino set out their positions regarding each of the discrepancies in writing and send them to him via email.⁵²⁰ Once Mr. Bastos had both of their positions on a particular discrepancy, he would circulate them, and the experts would debate the issues via Skype telephone conference.⁵²¹ In light of their discussions, Mr. Bastos would circulate his proposed resolution of the dispute, which he then would put to a vote.⁵²²

145. Messrs. Riubrugent and Giacchino both agreed to Mr. Bastos's proposed method of resolving the discrepancies.⁵²³ Given the number and complexity of the discrepancies, as well as the fact that Bates White was to deliver its revised tariff study incorporating any changes required by the Expert Commission's rulings in advance of the 1 August 2008 deadline to publish the new tariff schedule, Mr. Giacchino proposed that the discrepancies be decided in order of importance, with the most time-consuming discrepancies to be discussed and decided

⁵¹⁸ Bastos ¶¶ 12-13 (CWS-1); Giacchino ¶ 44 (CWS-4); Email from C. Bastos to J. Riubrugent and L. Giacchino dated 9 June 2008 (C-227).

⁵¹⁹ Bastos ¶ 14 (CWS-1); Giacchino ¶ 44 (CWS-4).

⁵²⁰ Bastos ¶ 14 (CWS-1); *see also* Giacchino ¶ 50 (CWS-4).

⁵²¹ Bastos ¶ 14 (CWS-1); *see also* Giacchino ¶ 50 (CWS-4).

⁵²² Bastos ¶ 14 (CWS-1); *see also* Giacchino ¶ 50 (CWS-4).

⁵²³ Bastos ¶ 14 (CWS-1); *see also* Giacchino ¶ 50 (CWS-4).

first.⁵²⁴ The experts agreed that they would decide the discrepancies that might require the greatest changes to Bates White's tariff study first.⁵²⁵ They further agreed that Mr. Giacchino would communicate to Bates White the Expert Commission's decision on each discrepancy as it was decided.⁵²⁶ As Messrs. Bastos and Giacchino explain, proceeding in this manner would allow Bates White to begin revising its tariff study while the Expert Commission was completing its work, and would enable the new tariff schedule to be published on time.⁵²⁷

146. Shortly after discussing these points, the experts notified the CNEE and EEGSA by letter dated 12 June 2008 that they had assumed their duties as members of the Expert Commission:

[W]e are hereby informing you that Messrs. Jean Riubrugent, Leonardo Rodolfo Giacchino and Carlos Manuel Bastos accept the office for which they have been appointed, and take possession of same, to form the Expert Commission, which shall decide on the existing discrepancies between CNEE and EEGSA regarding the Study of the Distribution Value Added of EEGSA (hereafter the 'Tariff Study') contained in Resolution CNEE 96-2008, as well as EEGSA's responses and those of its consultant.⁵²⁸

Messrs. Riubrugent and Giacchino also circulated spreadsheets with a proposed order for the discrepancies to be decided according to their importance.⁵²⁹ As Mr. Giacchino explains, he asked his colleagues at Bates White to prepare an estimate as to how long it would take to revise each aspect of the study, assuming that the Expert Commission ruled in the CNEE's favor with respect to that particular issue.⁵³⁰ Bates White then determined which discrepancies would be

⁵²⁴ Giacchino ¶ 39 (CWS-4); *see also* Bastos ¶ 14 (CWS-1).

⁵²⁵ Bastos ¶ 14 (CWS-1); Giacchino ¶ 46 (CWS-4).

⁵²⁶ Bastos ¶ 14 (CWS-1); Giacchino ¶ 46 (CWS-4).

⁵²⁷ Bastos ¶ 14 (CWS-1); Giacchino ¶ 46 (CWS-4).

⁵²⁸ Letter from J. Riubrugent, L. Giacchino, and C. Bastos to the CNEE and EEGSA dated 12 June 2008 (C-230).

⁵²⁹ Bastos ¶ 15 (CWS-1); Giacchino ¶ 45 (CWS-4); Email from J. Riubrugent to L. Giacchino and C. Bastos dated 12 June 2008 (C-228); Email from L. Giacchino to C. Bastos and J. Riubrugent dated 12 June 2008 (C-231).

⁵³⁰ Giacchino ¶ 39 (CWS-4).

most helpful to have resolved first, given the potential time involved to make the change and the impact on other parts of the study.⁵³¹ After receiving Mr. Riubrugent's proposal, Mr. Giacchino linked the two spreadsheets together so that the experts could easily identify and discuss the differences between the two proposals, as requested by Mr. Bastos.⁵³² The Expert Commission then held two meetings via Skype conference call on 13 and 16 June 2008 to review the discrepancies and determine the order in which they would be discussed and decided.⁵³³ Following these conference calls, the experts agreed on the order in which the Expert Commission would decide the discrepancies.⁵³⁴ As Mr. Giacchino explains, the experts grouped the discrepancies into nine categories (which included Models and each of the Stage A-G and I Reports),⁵³⁵ totaling 69 discrepancies.⁵³⁶

147. With respect to the preparation of the Expert Commission's Report, the experts agreed that all procedures and formalities would be duly followed.⁵³⁷ As Mr. Bastos explains, he recognized that Messrs. Riubrugent and Giacchino previously had been involved in the tariff review process as consultants.⁵³⁸ He therefore reminded them that, "as an expert on the Expert Commission, they had assumed a different role and asked them to provide their positions on the discrepancies as an expert."⁵³⁹ As Mr. Giacchino explains, after he was appointed by EEGSA to

⁵³¹ *Id.* As Mr. Giacchino explains, he and his colleagues also "determined that some of the work that would be required if the Expert Commission resolved certain issues in the CNEE's favor would be too great to wait to begin until the Expert Commission made that determination. So, for those issues, we decided that Bates White should do some recalculations in advance assuming that the Expert Commission ruled in favor of the CNEE so that the final calculations could be performed on time regardless of the manner in which the Expert Commission ruled." *Id.* ¶ 40.

⁵³² *Id.* ¶ 45; Email Chain Among Members of Expert Commission dated 13 June 2008 (C-232).

⁵³³ Giacchino ¶ 46 (CWS-4).

⁵³⁴ *Id.* ¶ 47; Email Chain Among Members of Expert Commission dated 23 June 2008, at 1-2 (C-236).

⁵³⁵ As Mr. Giacchino notes, the CNEE did not include discrepancies relating to the Stage H Report in its Resolution No. 96-2008. See Giacchino ¶ 48 fn. 113 (CWS-4).

⁵³⁶ *Id.* ¶ 48.

⁵³⁷ Bastos ¶ 17 (CWS-1).

⁵³⁸ *Id.* ¶ 14 fn. 11.

⁵³⁹ *Id.*; Email from C. Bastos to J. Riubrugent and L. Giacchino dated 16 June 2008 ("I see that you two play a double role, on the one hand, as involved consultants, in the case of Leonardo, in the preparation of the study and in Jean's case, as an assistant to CNEE in the formulation of observations. Your actions in those roles have

the Expert Commission, he duly separated himself from the Bates White team responsible for revising Bates White's tariff study and set up a separate electronic database for his work on the Expert Commission.⁵⁴⁰

148. With respect to the format of the Report, the experts agreed that the Report would be divided into two sections: an introductory section that would explain the general aspects and criteria followed by the Expert Commission, and a second section that would set forth the Expert Commission's decisions regarding each of the discrepancies at issue.⁵⁴¹ In addition, each expert was entitled to present a written dissenting opinion on any discrepancy, which would be attached to the Report in an appendix, if the dissenting expert so requested.⁵⁴²

149. The problem with many of the CNEE's observations, however, was that they were expressed in very general terms.⁵⁴³ As Mr. Bastos explains, for many discrepancies, the CNEE merely had indicated that Bates White had departed from the terms of reference, without explaining how Bates White had departed from the terms of reference, or whether such departure was justified.⁵⁴⁴ The experts thus agreed that, despite the general nature of many of the CNEE's observations, they needed to set out in their Report "whether the tariff study needed to be corrected in light of [their] decision on each discrepancy and, if it did, how it needed to be corrected."⁵⁴⁵

been fulfilled, in my opinion, and your opinions have been given in the different documents. The other role you have as experts members of the Commission is a new decision regarding each of the points under discussion, whether such new decisions coincide or not with the existing documents. In this regard it would be important for me to have a summarized presentation of your opinions as experts.") (C-236).

⁵⁴⁰ See Giacchino ¶ 38 (CWS-4).

⁵⁴¹ Bastos ¶ 17 (CWS-1).

⁵⁴² *Id.*

⁵⁴³ *Id.* ¶ 18; see also Giacchino ¶ 49 (CWS-4).

⁵⁴⁴ Bastos ¶ 18 (CWS-1); see also Giacchino ¶ 49 (CWS-4).

⁵⁴⁵ Bastos ¶ 18 (CWS-1).

150. As Mr. Bastos explains, once these preliminary issues were discussed and decided, the Expert Commission focused on resolving the discrepancies themselves and worked toward completing their Report by the agreed deadline of 24 July 2008.⁵⁴⁶

b. With The Expert Commission On The Verge Of Delivering Its Report, The CNEE Publicly Asserted That It Could Disregard The Expert Commission’s Ruling

151. In order to deliver the Report to the parties by the agreed deadline, the three members of the Expert Commission traveled to Guatemala, with Mr. Bastos and Mr. Riubrugent arriving on 20 July 2008 and Mr. Giacchino arriving on 22 July 2008.⁵⁴⁷ By that time, the Expert Commission had concluded its deliberations.⁵⁴⁸ With the Expert Commission on the verge of delivering its Report, the CNEE’s President, Mr. Colom, undermined the Expert Commission’s authority by publicly declaring, in violation of law and the agreed Operating Rules, that the Expert Commission’s decision would not be binding on the CNEE.⁵⁴⁹

152. On 23 July 2008, *Prensa Libre*, Guatemala’s second most widely-circulated newspaper, published an article entitled “Distribution Rate not yet determined,” reporting that EEGSA and the CNEE had appointed a council of experts to resolve the dispute regarding the VAD.⁵⁵⁰ The article quoted Mr. Colom as stating that the Expert Commission’s Report would be viewed as “recommendations,” and the CNEE “may obey them or not.”⁵⁵¹

153. The following day, a similar article appeared in *Siglo Veintiuno*, another leading Guatemalan newspaper.⁵⁵² That article noted that the Expert Commission was about to present its Report, and that “[t]he conclusions presented by the experts will be used for the directors of

⁵⁴⁶ *Id.* ¶ 19.

⁵⁴⁷ *Id.* ¶ 29; *see also* Giacchino ¶ 53 (explaining that it took “three long days to finish writing the report”) (CWS-4).

⁵⁴⁸ Giacchino ¶ 53 (CWS-4).

⁵⁴⁹ Maté ¶ 45 (CWS-6); Calleja ¶ 45 (CWS-3).

⁵⁵⁰ Eduardo Smith, “Distribution Rate not yet determined,” *Prensa Libre*, 23 July 2008, at 22 (C-242).

⁵⁵¹ *Id.*; *see also* Maté ¶ 45 (CWS-6); Calleja ¶ 45 (CWS-3).

⁵⁵² Fernando Quiñónez, “CNEE shall receive the expert report today,” *Siglo 21*, 24 July 2008, at 13 (C-243).

CNEE to resolve the setting of the VAD.”⁵⁵³ Like the article in *Prensa Libre*, however, this article also reported that Mr. Colom had declared “a few days ago that the report is not binding.”⁵⁵⁴

154. In response, and as reported in both newspapers, an EEGSA representative informed the media that the Expert Commission’s decision had to be respected, in accordance with law: “The message is simple, regardless of whether the council of experts increases, decreases or maintains the rate the same; what is important is that the law be respected.”⁵⁵⁵

c. The Expert Commission Issued Its Ruling, Which Largely Favored EEGSA and Bates White

155. On 24 July 2008, all three members of the Expert Commission met with representatives of the CNEE and EEGSA and informed them that they had completed their Report and would deliver it the next day.⁵⁵⁶ All three members then signed each page of the 208-page Report, as well as a letter dated 25 July 2008 delivering a copy of the Report to both the CNEE and EEGSA.⁵⁵⁷ As demonstrated below, the Report was largely favorable to EEGSA and Bates White and established that the VAD would increase significantly once Bates White revised its study to comply with the Expert Commission’s ruling.

156. The Expert Commission began its report by setting forth the legal and regulatory framework pursuant to which it was constituted⁵⁵⁸ and listing the 12 governing Operating Rules

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*; see also Calleja ¶ 45 (CWS-3).

⁵⁵⁵ Eduardo Smith, “Distribution Rate not yet determined,” *Prensa Libre*, 23 July 2008, at 22 (quoting EEGSA’s Assets and Commercial Manager, Jorge Alonso, who “underscored that the General Law of Electricity establishes the formation of a group of experts with one purpose, which is to issue results, which must be respected”) (C-242); see also Fernando Quiñónez, “CNEE shall receive the expert report today,” *Siglo 21*, 24 July 2008, at 13 (reporting that Mr. Alonso requested the CNEE to “respect the criteria of the experts in the determination of the tariff schedule”) (C-243); Calleja ¶ 45 (CWS-3).

⁵⁵⁶ Bastos ¶ 29 (CWS-1).

⁵⁵⁷ Letter from the Expert Commission to the CNEE and EEGSA dated 25 July 2008 (C-245), attaching Expert Commission Report dated 25 July 2008 (C-246); see also Bastos ¶ 29 (CWS-1); Giacchino ¶ 53.

⁵⁵⁸ See EC Report at 1-13 (C-246); *id.* at 1-4 (discussing various articles of the LGE and RLGE); *id.* at 7 (noting that “the yardstick competition method has been chosen, although with innovations”); *id.* (noting that in order to avoid one of the disadvantages of the yardstick approach, Guatemala had adopted a “variation of the

on which “the parties ha[d] agreed.”⁵⁵⁹ It made clear that its task was “to resolve the discrepancies” that had arisen between the parties.⁵⁶⁰ Specifically, it noted that “[t]hose observations made by CNEE, if not incorporated by the Consultant and therefore, if they persist, constitute discrepancies and must be resolved by the Expert Commission (articles 75 LGE and 98 RLGE).”⁵⁶¹ The Expert Commission then took note of the CNEE’s terms of reference for the study (referred to in the Report as “ToR”), observing that they contained express language stating that they were guidelines only and that the Consultant could deviate from them when justified.⁵⁶² In this regard, the Expert Commission made clear that “duly justified deviations allowed by the TOR must lead to an application of a methodology in the Tariff Study that best reflects the requirements of the LGE and RLGE.”⁵⁶³ Consequently, the Expert Commission summed up its task as such:

The issue is to discern whether the Consultant’s Tariff Study, considering the ToR as guidelines, has performed a task that is in accordance with the requirements of the Law and the Regulations, or otherwise determine if given the justifications of the deviations, CNEE maintained and certifies that the requirements of the ToR better reflect the requirements of the Law.⁵⁶⁴

157. In carrying out this task, the Expert Commission was able to resolve the discrepancies in an expeditious manner, because the parties had appointed two experts who

model company or ideal company, which . . . estimate[s] [] the costs that a hypothetical ideal company working in that market would have”).

⁵⁵⁹ *Id.* at 10.

⁵⁶⁰ *Id.* at 11 (noting that “the dictionary of the Royal Spanish Academy indicates that ‘to pronounce oneself’, in one of its connotations, implies to ‘determine’, ‘resolve.’ In other words, the function of the Expert Commission implies – as we have been seeing – to put an end to discrepancies (in the terms of Art. 75 of the LGE) – between CNEE and EEGSA. For that reason, the Expert Commission shall resolve the discrepancies considering the positions of the Parties, or adopting a third position besides those of the parties, always to the best of the knowledge and understanding of its members”).

⁵⁶¹ *Id.* at 3; *see also id.* at 4 (“If the Consulting Firm does not correct the report, and the differences persist such discrepancies must be resolved by an Expert Commission (EC).”).

⁵⁶² *Id.* at 11-13.

⁵⁶³ *Id.* at 12.

⁵⁶⁴ *Id.* at 13.

already were familiar with Bates White’s study.⁵⁶⁵ Moreover, it was evident to Mr. Giacchino that the CNEE benefitted from having appointed Mr. Riubrugent, who had advised the CNEE during the tariff review process, because, as Mr. Giacchino explains, “the CNEE had raised many objections to the Bates White report, but had not provided justifications for those objections or those justifications were not readily understandable.”⁵⁶⁶ Mr. Riubrugent thus was able to present the CNEE’s justifications and help explain the rationale for the CNEE’s objections.⁵⁶⁷

158. As the Report reflects, the Expert Commission decided 31 of the 69 discrepancies by unanimous decision.⁵⁶⁸ On multiple occasions, each of the party-appointed experts ruled against the party that had appointed it to the Expert Commission, evidencing the good faith and professionalism of the experts.⁵⁶⁹ Mr. Bastos, the third member and chair of the Expert Commission, thus observes that “the members of the Expert Commission made a concerted effort to reach consensus in the resolution of the disputes that had been submitted to us.”⁵⁷⁰ Mr. Giacchino similarly notes that, in his opinion, “the Expert Commission functioned very well,” their “discussions were cordial, and [they] communicated frequently.”⁵⁷¹ Although the Expert Commission ruled in the CNEE’s favor with regard to several discrepancies, the Report vindicated EEGSA and Bates White on key issues relating to the calculation of the VNR and the VAD. In particular, the Expert Commission rejected many of the CNEE’s observations to Bates White’s study that, if they had been accepted, would have cut by nearly half the return on the VNR that EEGSA could recover through the capital recovery factor and would have drastically

⁵⁶⁵ See Bastos ¶ 19 (CWS-1).

⁵⁶⁶ Giacchino ¶ 49 (CWS-4).

⁵⁶⁷ *Id.*

⁵⁶⁸ See generally EC Report (C-246); see also Giacchino ¶ 52 (CWS-4).

⁵⁶⁹ See, e.g., EC Report, Discrepancy 1 (Models), at 13-15 (in which Mr. Giacchino joined the other two experts in finding against EEGSA on a particular discrepancy) (C-246); see also Giacchino ¶¶ 54-57 (discussing various instances where both he and Mr. Riubrugent joined in a unanimous decision on a discrepancy that was not in favor of the party that had appointed the expert) (CWS-4); Bastos ¶ 19 (CWS-1).

⁵⁷⁰ Bastos ¶ 19 (CWS-1).

⁵⁷¹ Giacchino ¶ 52 (CWS-4). Mr. Giacchino further notes that “Mr. Bastos tried to achieve a unanimous decision on issues whenever possible.” *Id.*

lowered the VNR on which that recovery was calculated.⁵⁷² Thus, as Mr. Calleja observes, although the Expert Commission ruled in the CNEE's favor with regard to certain issues, "EEGSA and Bates White prevailed on the core disputes that had the greatest impact on the VAD."⁵⁷³

159. In one of its most critical rulings, the Expert Commission rejected the CNEE's manner of calculating the FRC. As explained above, using the cost of capital or WACC, the FRC is applied to the VNR through a formula to obtain an amount that is intended to allow the distributor to recover its investment and also permit it to obtain a 7%-13% real return on its investment.⁵⁷⁴ In the terms of reference, the CNEE provided a formula for the calculation of the FRC and assigned values to several variables in that formula,⁵⁷⁵ the result of which was to cut in half the investor's return on its capital investment.⁵⁷⁶ In its VAD study, Bates White indicated that it believed that there was a typographical error in the FRC formula and, thus, applied the formula ignoring a number "2" that was in the denominator.⁵⁷⁷ In response, the CNEE insisted that its formula was correct, but did not explain the rationale for dividing in half the return obtained from applying the formula.⁵⁷⁸

160. The Expert Commission ruled that the CNEE's formula in the terms of reference was correct, but that the CNEE erroneously had equated two variables in the formula, which had

⁵⁷² See generally Bastos ¶¶ 20-28 (CWS-1); Giacchino ¶¶ 54-62 (CWS-4); see also Calleja ¶ 46 (CWS-3).

⁵⁷³ Calleja ¶ 46 (CWS-3).

⁵⁷⁴ LGE, Art. 79 (C-17); Kaczmarek ¶ 41 (explaining that "a factor capturing some recovery of the regulatory asset base is included with the profit measure. The factor reflecting both a recovery of the regulatory asset base (*i.e.*, return of capital) and profit (*i.e.*, return on capital) is often referred to as the Capital Recovery Factor ("CRF").") (CER-2); Bastos ¶ 20 (observing that the FRC "is designed to ensure that the amounts recovered by the distributor allow it to obtain a return of its invested capital (amortization) and a return on its capital (profit).") (CWS-1).

⁵⁷⁵ Resolution CNEE-05-2008, Third Addendum, Terms of Reference dated 17 Jan. 2008, Art. 8.3 (providing that T_a (amortization period) is equal to T_o (weighted average useful life of asset)) (C-153); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 90 (C-246).

⁵⁷⁶ See Kaczmarek ¶ 121 Figure 15 (CER-2); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 90-93 (C-246); Bastos ¶¶ 21-22, fn. 23 (CWS-1); Giacchino ¶ 60 (CWS-4).

⁵⁷⁷ Giacchino ¶ 59 (CWS-4); Bastos ¶ 21 (CWS-1); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 90 (C-246).

⁵⁷⁸ EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 90 (C-246).

the effect of cutting by half the investor's return on capital.⁵⁷⁹ As Mr. Bastos explains, when he asked Mr. Riubrugent for an explanation of why the CNEE had applied the formula in such a manner, Mr. Riubrugent answered that a model efficient company would replace a portion of its assets every year so that at any one time the average age of its assets is approximately half of the asset's useful life.⁵⁸⁰ Mr. Riubrugent conceded that applying the formula in this manner was equivalent to depreciating the value of the asset base (or VNR) by 50%.⁵⁸¹ As Mr. Bastos explains, this approach to calculating the VNR was "at odds with the express terms of the law, which provided that the *new replacement value* of the assets should be used."⁵⁸²

161. Mr. Bastos did not agree entirely with Bates White's approach either, however.⁵⁸³ In its study, Bates White had applied the FRC to the VNR without taking into account any depreciation.⁵⁸⁴ Mr. Bastos determined that the asset base – or VNR – should be depreciated to the mid-point of the five-year tariff period.⁵⁸⁵ He recognized that the law requires the asset base to be valued as if it were new at the beginning of the tariff period.⁵⁸⁶ Because those new assets would be used during the five-year tariff period, he reasoned that, on average, they would be

⁵⁷⁹ See *id.* at 91-93.

⁵⁸⁰ Bastos ¶ 21 (CWS-1); see also EC Report, Annex 1, at 178 (C-246).

⁵⁸¹ Bastos ¶ 21 (stating that "Mr. Riubrugent considered that the formula of the ToR should be applied, recognizing that its application is equivalent to considering 50% of the VNR") (citation omitted) (CWS-1); EC Report, Annex 1, at 178 (Mr. Riubrugent stating that "[i]t is worth noting that the FRC established in the TOR of the CNEE is equivalent to recognizing a DORC [depreciated optimized replacement cost] equal to 50% of the VNR. In a 'mature' distribution company . . . the ages of the facilities are varied, with an essentially uniform statistical distribution, so that the aggregate value of the accumulated amortizations is close to half of the VNR") (C-246).

⁵⁸² Bastos ¶ 22 (emphasis in original) (CWS-1); see also *id.* ¶ 21 ("I must say that to follow the criterion of the CNEE amounts to considering the value of the assets depreciated by 50%."); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 92 (C-246).

⁵⁸³ Bastos ¶ 22 (CWS-1); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 92-93 (C-246).

⁵⁸⁴ See Giacchino ¶¶ 58-60 (CWS-4); Bastos ¶ 22 (CWS-1); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 89-90 (C-246).

⁵⁸⁵ Bastos ¶ 22 (CWS-1); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 92-93 (C-246).

⁵⁸⁶ Bastos ¶ 22 (CWS-1); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 92-93 (C-246).

about 2 ½ years old and, therefore, should be depreciated to the mid-point of the tariff term.⁵⁸⁷ As Mr. Giacchino explains, he disagreed with Mr. Bastos’s reasoning because the concept of using the VNR should not account for any depreciation of the assets.⁵⁸⁸ This is because the company will need to make capital expenditures to replace assets that are aging and so “the ratio between the VNR and the value of the asset base is 1 for every year, not ½.”⁵⁸⁹ Unable to convince Mr. Bastos, however, Mr. Giacchino ultimately agreed to join in the decision in order to obtain a majority.⁵⁹⁰

162. The Expert Commission thus ruled that the investor would receive a return on approximately 91% of the VNR.⁵⁹¹ As a point of comparison, if Bates White’s approach had been accepted in its entirety by the Expert Commission, EEGSA would have been entitled to receive a return on 100% of the value of the assets, whereas if the CNEE’s observations had been deemed correct, EEGSA would have been able to receive a return on only 50% of the value of the assets.⁵⁹² As Mr. Giacchino further explains, for an asset that has a useful life of 25 years, the capital recovery factor calculated in accordance with the Expert Commission’s decision is 13.33%, which comprises 4% capital recovery and a 9.33% return.⁵⁹³ Using Bates White’s approach, the FRC would be 14.14%, comprising the same 4% capital recovery, but a 10.14%

⁵⁸⁷ Bastos ¶ 22 (CWS-1); EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 92-93 (C-246).

⁵⁸⁸ Giacchino ¶¶ 59-60 (CWS-4).

⁵⁸⁹ *Id.* ¶ 59; *see also id.* (explaining that “for a newly built company, we start with the book value of the assets in the first year equal to its VNR. Then for subsequent years we subtract depreciation and add capital expenses, obtaining a value of the asset base for each period that is always equal to the previous period and the same as the new replacement value of the assets.”); *id.* (explaining that “if the ‘/2’ term were eliminated, the formula would be equivalent to that which had been proposed by NERA in 2003”); *id.* ¶ 58 (explaining that the “assumption in this approach is that the amount calculated as the replacement of the VNR is reinvested such that if there is no growth in demand, no technology changes and no change in process, the VNR remains the same each period”).

⁵⁹⁰ *Id.* ¶ 60.

⁵⁹¹ *Id.*

⁵⁹² *Id.*; *see also* Kaczmarek ¶ 117 (explaining that the ToR defined Ta/To/2 as equal to ½ or 50 percent) (CER-2).

⁵⁹³ Giacchino ¶ 60 (CWS-4).

return.⁵⁹⁴ By contrast, using the CNEE’s formula would result in an FRC of only 9.07%, with still the same 4% return of capital, but only a 5.07% return on capital, which is below the minimum 7% required under the LGE.⁵⁹⁵ In a crucial ruling, the Expert Commission thus rejected the CNEE’s methodology, which, as Mr. Bastos explains, would have had the effect of halving the VNR and reducing the tariff by approximately 30%.⁵⁹⁶

163. In another important decision, the Expert Commission unanimously ruled that Bates White was correct in calculating costs using prices from 2007, the most recent year, when they were available.⁵⁹⁷ The terms of reference provided that it was preferable that prices from the base year be used, defined the base year as 2006, and then directed that the prices be adjusted for inflation to make them current.⁵⁹⁸ Because the study took place in 2008, 2007 prices for most materials were available.⁵⁹⁹ And, because prices between 2006 and 2007 for materials used by distribution companies had increased by more than inflation, simply adjusting 2006 prices for inflation would have undervalued the asset base on which the distributor was to receive its return.⁶⁰⁰ Noting that the purpose of the VAD study was “to determine the cost of replacement of the grid of that model company under study,” the Expert Commission held that “the effective

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ Bastos ¶ 21 fn. 23 (CWS-1).

⁵⁹⁷ EC Report, Discrepancy B.1.b, Age of the Prices, at 32-33 (C-246); Giacchino ¶ 57 (CWS-1); Bastos ¶ 28 (CWS-1).

⁵⁹⁸ October 2007 ToR, Art. 1.2 (defining base year as 2006) (C-127); *id.*, Art. 3.3 (stating preference for prices based on base year); Resolution No. CNEE-05-2008 dated 17 Jan. 2008, Art. 8.2.2 (C-153); *see also* EC Report, Discrepancy B.1.b, Age of the Prices, at 33 (“CNEE disagrees with the Study because it does not comply with what is established in the Terms of Reference, since most of the quote and purchases support documentation continue to correspond to transactions performed in the year 2007 and not to what is required in relation to the use of prices from the base year”) (*quoting* CNEE observation) (C-246).

⁵⁹⁹ *See* EC Report, Discrepancy B.1.b, Age of the Prices, at 32 (“For the base year of a tariff review, typically, the last 12 months of available data are used. In the case of EEGSA, this practice implies using the year 2007, not 2006.”) (*quoting* Bates White’s observations) (C-246).

⁶⁰⁰ *See id.* (“The market data show that the prices have increased considerably in dollars, since the prior tariff review, including during the last year. . . . [U]sing prices of the year 2006 as stated by CNEE for all the prices, does not reflect the market trends and delivers a poor project representation of costs for the tariff period 2008-2013.”) (*quoting* Bates White’s observations).

prices for all goods and services must be taken at the latest possible time,”⁶⁰¹ thus rejecting the CNEE’s attempt to artificially decrease the VNR.

164. The Expert Commission also ruled in Bates White’s favor with regard to a dispute concerning the proper methodology for calculating the demand density in designing a model efficient grid.⁶⁰² As Mr. Bastos explains, to determine the assets needed by a model efficient company to service the distributor’s area, that area is first divided into zones characterized by density.⁶⁰³ For each zone, a determination is made regarding the assets needed in a portion of that zone, and those results are extrapolated.⁶⁰⁴ A dispute between the parties arose concerning the size of the area in each density zone from which the extrapolation would be made. The Expert Commission ruled that the methodology proposed by the CNEE in the terms of reference had the effect of underestimating the assets needed to service the area and, hence, undervaluing the VNR, whereas the method used by Bates White in its study more accurately comported with the LGE because it led “to an optimally adapted grid.”⁶⁰⁵

165. Although these three critical decisions all favored EEGSA, as noted, the Expert Commission also made some rulings that had the effect of decreasing the VNR and, thus, the VAD. For instance, as noted above, Bates White had lowered the VNR in its 5 May 2008 study from the earlier 31 March version by decreasing the amount of planned undergrounding to include only those areas where code standards required undergrounding due to insufficient clearance for aerial lines.⁶⁰⁶ The CNEE, however, maintained an objection to including in the VNR calculation any amount of undergrounding in excess of that which existed in EEGSA’s

⁶⁰¹ EC Report, Discrepancy B.1.b, Age of the Prices, at 33, 36 (C-246); *see also* Bastos ¶ 28 (CWS-1); Giacchino ¶ 57 (CWS-4).

⁶⁰² *See id.*, Discrepancy A.2.a, Spatial Unbundling of the Demand, at 16-29 (C-246).

⁶⁰³ Bastos ¶ 23 (CWS-1).

⁶⁰⁴ *Id.* ¶¶ 23-24.

⁶⁰⁵ *Id.* ¶ 26; EC Report, Discrepancy A.2.a, Spatial Unbundling of the Demand, at 17 (C-246).

⁶⁰⁶ Giacchino ¶ 31 (CWS-4); Bates White Stage C Report: Network Optimization dated 5 May 2008, at 73-76 (C-198).

network.⁶⁰⁷ Mr. Giacchino joined with the other members of the Expert Commission in ruling unanimously in favor of the CNEE's observation,⁶⁰⁸ and, thus, only the underground cables that existed at the time of the study could be included in the VNR.⁶⁰⁹

166. As Mr. Giacchino also explains, although the terms of reference for the 2003 tariff study expressly allowed the value of easements to be included in the VNR,⁶¹⁰ the terms of reference for the 2008 study disallowed their inclusion.⁶¹¹ The Expert Commission ruled 2 to 1 in the CNEE's favor on this discrepancy,⁶¹² thus requiring the elimination of the value of easements from the VNR calculation.

d. The CNEE Dissolved The Expert Commission And Prevented Its Appointed Expert From Completing His Work

167. The next step in the process of setting the VAD and tariffs was for Bates White to revise and re-submit its study in accordance with the Expert Commission's Report for the Expert Commission's review and approval, as set forth in the agreed Operating Rules.⁶¹³ In its letter delivering the Report on 25 July 2008, the Expert Commission thus requested the CNEE and EEGSA to notify Bates White of the Report so that Bates White could amend the study as necessary to comply with each ruling.⁶¹⁴ As explained below, although Bates White promptly

⁶⁰⁷ Resolution No. CNEE-96-2008 at 7-8 (C-209); EC Report, Discrepancy C.3.f, Underground Facilities, at 73 (C-246).

⁶⁰⁸ EC Report, Discrepancy C.3.f, Underground Facilities, at 74 (C-246).

⁶⁰⁹ As Mr. Giacchino notes, "ten kilometers of existing underground cables were not included in this calculation because the engineers optimized the existing 253 km to 243 km." Giacchino ¶ 67 fn. 145 (CWS-4).

⁶¹⁰ *Id.* ¶ 69; Resolution CNEE-No. 84-2002 dated 9 Oct. 2002 ("2002 ToR"), Art. D.3.c (C-58); *id.*, Art. E.6.a; *id.*, Art. E.6.b. The study prepared by PA Consulting for the CNEE in 2002 to determine transmission tariffs also took into account the value of easements. See Giacchino ¶ 69 (CWS-4).

⁶¹¹ Giacchino ¶ 70 (CWS-4); April 2007 ToR, Art. 4.6 (C-106); June 2007 ToR, Art. 4.6 (C-116); October 2007 ToR, Art. 3.6 (C-127).

⁶¹² EC Report, Discrepancy B.4.e, Costs of Easements, at 50-51 (C-246).

⁶¹³ See Giacchino ¶¶ 64-65 (CWS-4); Bastos ¶ 29 (CWS-1); Calleja ¶ 46 (CWS-3); Maté ¶ 47 (CWS-6); EC Report at 10 (C-246).

⁶¹⁴ Bastos ¶ 29 (CWS-1); Calleja ¶ 46 (CWS-3); Maté ¶ 47 (CWS-6); Letter from the Expert Commission to the CNEE and EEGSA dated 25 July 2008 (C-245).

revised its study, the CNEE arbitrarily and unlawfully dissolved the Expert Commission and made a veiled threat to its appointed expert to prevent the Expert Commission from having a quorum to review and approve the revised study.

168. Even before the Expert Commission delivered its Report, Bates White had substantially revised its study to comply with the Expert Commission's earlier rulings, as the Expert Commission had contemplated when deciding which discrepancies to resolve first.⁶¹⁵ As Mr. Giacchino explains, each member of the Expert Commission had realized that if Bates White did not begin revising its study as decisions on discrepancies were made, it never could finish its work in time for the Expert Commission to review the revised study before the deadline to set the new tariffs on 1 August 2008.⁶¹⁶ After the Expert Commission delivered its Report, Mr. Giacchino returned to the United States, and he and his colleagues worked through the entire weekend of 25-27 July to perform the remaining revisions and to link together all of the various models.⁶¹⁷

169. On Sunday 27 July, Mr. Giacchino delivered certain revised stage reports – each of which indicated the CNEE's observations on the issue, the Expert Commission's ruling on the issue, and where in the stage report that ruling was implemented – to Messrs. Bastos and Riubrugent so that they could begin their review.⁶¹⁸ On the afternoon of Monday 28 July, Mr. Giacchino emailed an official letter to the Expert Commission, copying the CNEE and EEGSA, by which he delivered Bates White's final revised study incorporating the Expert Commission's decisions on each discrepancy.⁶¹⁹ Mr. Giacchino received email confirmation that each email

⁶¹⁵ Giacchino ¶ 64 (CWS-4); *see also supra* II.F.5.a (explaining how the Expert Commission decided which discrepancies to resolve first).

⁶¹⁶ Giacchino ¶ 64 (CWS-4).

⁶¹⁷ *Id.* ¶ 65.

⁶¹⁸ *Id.*; Email from L. Giacchino to C. Bastos dated 27 July 2008 at 11:25 p.m. (C-248); Email from L. Giacchino to J. Riubrugent dated 28 July 2008 at 11:24 a.m. (C-252); *see also, e.g.*, Revised Stage A Report (C-255); Revised Stage B Report (C-256).

⁶¹⁹ Giacchino ¶ 65 (CWS-4); Email from L. Giacchino to C. Bastos, J. Riubrugent, and L. Giacchino cc: M. Quijivix (CNEE) and M. Calleja (EEGSA) dated 28 July 2008 at 21:49 GMT, attaching Letter from Bates White to the Members of the Expert Commission dated 28 July 2008 (C-253) and Bates White Revised Study

with each revised stage report was received by its intended recipients.⁶²⁰ EEGSA also delivered its own letter to the CNEE, together with a letter from Bates White, copies of the revised stage reports, and a CD with the backup files.⁶²¹ The CNEE stamped both letters to confirm its receipt of Bates White's revised study at 3:02 p.m. on 28 July 2008.⁶²²

170. Also on 28 July, EEGSA's former General Manager, Mr. Maté, spoke by telephone with Mr. Moller, one of the CNEE's directors, and explained to him that EEGSA's President, Mr. Pérez, had traveled to Guatemala and was ready to meet to finalize the tariffs.⁶²³ Mr. Moller promised to confer with his colleagues and to revert to Mr. Maté about a meeting.⁶²⁴ Mr. Moller did not, however, call back until the following day, after Mr. Maté learned of the CNEE's unilateral dissolution of the Expert Commission.⁶²⁵ Instead, as Mr. Maté explains, the CNEE sent notice of GJ-Measure-3121 (dated 25 July 2008), by which the CNEE unilaterally dissolved the Expert Commission on the alleged ground that the Expert Commission had finished its work.⁶²⁶ The CNEE also sent a letter dated 28 July 2008 to Mr. Bastos confirming receipt of the Expert Commission's Report on 25 July, thanking Mr. Bastos for his service, and

dated 28 July 2008 (C-255 – C-264); *see also* Bastos ¶ 31 (CWS-1); Calleja ¶ 46 (CWS-3); Maté ¶ 48 (CWS-6).

⁶²⁰ Giacchino ¶ 65 (CWS-4).

⁶²¹ Calleja ¶ 46 (CWS-3); Giacchino ¶ 63 (CWS-4); Maté ¶ 48 (CWS-6); Letter No. GG-073-2008 from EEGSA to the CNEE dated 28 July 2008, enclosing Letter from Bates White the CNEE and EEGSA cc: C. Bastos, J. Riubrugent, and L. Giacchino dated 28 July 2008 (C-254) and Bates White Revised Study dated 28 July 2008 (C-255 – C-264).

⁶²² Letter No. GG-073-2008 from EEGSA to the CNEE dated 28 July 2008, enclosing Letter from Bates White to the CNEE and EEGSA cc: C. Bastos, J. Riubrugent, and L. Giacchino dated 28 July 2008 (C-254) and Bates White Revised Study dated 28 July 2008 (C-255 – C-264).

⁶²³ Maté ¶ 48 (CWS-6).

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ Notification Document dated 28 July 2008, enclosing CNEE GJ-Measure-3121 dated 25 July 2008 (dissolving the Expert Commission because the Expert Commission's Report was "deemed received," and the Expert Commission thus had "met the purpose of its appointment") (C-247); *see also* Bastos ¶ 30 (CWS-1); Maté ¶¶ 48-49 (CWS-6); Calleja ¶ 47 (CWS-3).

terminating his contract with the CNEE.⁶²⁷ The CNEE stated that “the activities corresponding to the execution of such contract ended July 25, with the delivery of the referenced report, and therefore, we shall proceed with the processing of the corresponding payment.”⁶²⁸ Thus, although the Expert Commission had not yet reviewed Bates White’s revised study to determine whether it complied with its rulings, as it was bound to do under the agreed Operating Rules, the CNEE unlawfully and in violation of the Operating Rules ordered the Expert Commission to stop its work.⁶²⁹

171. The CNEE’s unilateral dissolution of the Expert Commission was unlawful because, as Professor Alegría explains, the parties jointly had appointed the Expert Commission, in accordance with LGE Article 75, and, thus, “neither the CNEE nor the distributor ha[d] the authority under the LGE to dissolve the Expert Commission unilaterally.”⁶³⁰ After calling the CNEE repeatedly on 28 and 29 July, Mr. Maté accordingly told Mr. Moller that EEGSA rejected the CNEE’s attempt to unilaterally dissolve the Expert Commission before it could determine whether the revised study complied with its rulings on each discrepancy.⁶³¹ Mr. Maté also repeated EEGSA’s request for a meeting to finalize the tariffs.⁶³² Mr. Moller again promised to consult with the other directors, but Mr. Moller never called back, no such meeting ever took place, and none of the CNEE’s directors answered or returned any further phone calls that week.⁶³³

172. The CNEE’s arbitrary actions led to uncertainty among the members of the Expert Commission, because, as Messrs. Bastos and Giacchino explain, they believed that they still had

⁶²⁷ Bastos ¶ 30 (CWS-1); Letter from the CNEE to C. Bastos dated 28 July 2008 (C-251); *see also* Giacchino ¶ 83 (CWS-4).

⁶²⁸ Letter from the CNEE to C. Bastos dated 28 July 2008 (C-251); *see also* Bastos ¶ 30 (CWS-1).

⁶²⁹ Calleja ¶ 47 (CWS-3); Maté ¶ 49 (CWS-6); Bastos ¶¶ 30-31 (CWS-1); *see also* EC Report, at 10 (setting forth the Operating Rules) (C-246); Proposed Operating Rules for the Operation of the Expert Commission, attached to Email from M. Quijivix (CNEE) to L. Maté Sanchez and M. Calleja (EEGSA) dated 28 May 2008 at 11:21 GMT, Rule 12 (C-218).

⁶³⁰ Alegría ¶ 60 (CER-1).

⁶³¹ Maté ¶¶ 48, 50 (CWS-6).

⁶³² *Id.* ¶ 50.

⁶³³ *Id.*

to review and approve Bates White’s revised study, in accordance with the Operating Rules.⁶³⁴ To that end, Mr. Giacchino had emailed his co-experts on 28 July to invite them to a presentation at Bates White’s office in Washington, D.C., where Bates White could answer any questions and explain how the revised study incorporated each ruling.⁶³⁵ Mr. Giacchino also had directed his secretary to make flight reservations for Messrs. Bastos and Riubrugent to fly from Buenos Aires to Washington on 29 July.⁶³⁶

173. After receiving notice of the CNEE’s decision to dissolve the Expert Commission, Mr. Giacchino requested the legal counsel of Ronny Patricio Aguilar, a Guatemalan attorney who specializes in administrative procedure and electricity law and who had worked extensively with and for the CNEE.⁶³⁷ In a legal opinion dated 29 July 2008, Mr. Aguilar advised that because the Expert Commission was established by a bilateral act, its functions could not be “modified, expanded, restricted or ended by a unilateral legal act, since the only form of restricting its activity shall be through a bilateral act of will, equal to that of its foundation.”⁶³⁸ Mr. Aguilar also noted that the Operating Rules required the Expert Commission to review Bates White’s revised study and that the Expert Commission had initiated this process, and he thus concluded that dissolving the Expert Commission would leave its work incomplete.⁶³⁹ Mr. Aguilar further advised that “[n]o member of the [Expert Commission] may incur civil or criminal liability by the mere fact of completing the mission entrusted to it.”⁶⁴⁰

⁶³⁴ See, e.g., Bastos ¶ 31 (stating, among other things, that he “was surprised by the CNEE’s dissolution of the Expert Commission and termination of [his] contract, as [his] understanding was that, under Rule 12 of the Operating Rules, the Expert Commission was to review and approve the corrected Bates White tariff study”) (CWS-1); see also Giacchino ¶¶ 82-84 (CWS-4).

⁶³⁵ Giacchino ¶ 82 (CWS-6); Bastos ¶ 31 (CWS-1); Email from L. Giacchino to C. Bastos and J. Riubrugent dated 28 July 2008 (C-266).

⁶³⁶ Giacchino ¶ 82 (CWS-6).

⁶³⁷ *Id.* ¶ 80; CV for Ronny Patricio Aguilar Archila, available at www.aczalaw.com/v2/ENG/rpaa.asp (noting past experience as administrative and legal counsel for the CNEE) (C-405).

⁶³⁸ Legal Opinion of Lic. Ronny Patricio Aguilar Archila dated 29 July 2008 (“Aguilar Op.”), at 6 ¶¶ 1, 3 (C-269); see also Giacchino ¶ 84.

⁶³⁹ Aguilar Op. at 6 ¶ 2 (C-269); see also Giacchino ¶ 84 (CWS-4).

⁶⁴⁰ Aguilar Op. at 6 ¶ 4 (C-269); see also Giacchino ¶ 84 (CWS-4).

174. Also on 29 July, EEGSA filed an *amparo* action requesting the Court to revoke GJ-Measure-3121 and to order the CNEE to comply with the Expert Commission’s rulings in its Report.⁶⁴¹ EEGSA contended in its *amparo* that the dissolution of the Expert Commission presented an imminent threat that the CNEE would further violate the LGE by disregarding the Expert Commission’s Report when it published the new tariffs on 1 August.⁶⁴²

175. Early in the afternoon of 29 July, Mr. Calleja notified all three members of the Expert Commission that EEGSA had taken legal action and that EEGSA’s filing of the *amparo* had the effect of suspending GJ-Measure-3121.⁶⁴³ EEGSA thus urged the Expert Commission to proceed with its task of analyzing Bates White’s revised study, in accordance with Operating Rule 12.⁶⁴⁴

176. Based on the advice of his legal counsel, Mr. Giacchino concluded that he had an obligation to meet with the other members of the Expert Commission to review Bates White’s revised study.⁶⁴⁵ Mr. Bastos reached the same conclusion based on his own legal counsel’s advice, as well as the fact that he was still bound by his contract with EEGSA.⁶⁴⁶ Like Mr. Giacchino, Mr. Bastos thus concluded that “not acting would lead to more serious consequences than acting in the context of a future ruling by a court on the obligation of the Expert Commission to continue its work.”⁶⁴⁷

⁶⁴¹ Calleja ¶ 47 (CWS-3); *see also* Alegría ¶ 71 (CER-6); EEGSA Amparo dated 28 July 2008 (C-249).

⁶⁴² EEGSA Amparo dated 28 July 2008, at 4 (C-249); *see also* Alegría ¶ 71 fn. 162 (noting that Guatemalan law allows for this type of *amparo* to prevent a possible abuse or violation of the law before it occurs) (CER-1).

⁶⁴³ Giacchino ¶ 85 (CWS-4); Bastos ¶ 32 (CWS-1); Letter No. GG-075-2008 from EEGSA to C. Bastos, L. Giacchino, and J. Riubrugent dated 29 July 2008 (C-270).

⁶⁴⁴ Calleja ¶ 47 (CWS-3); Bastos ¶ 32 (CWS-1); Letter No. GG-075-2008 from EEGSA to C. Bastos, L. Giacchino, and J. Riubrugent dated 29 July 2008 (C-270); *see also* Email from M. Calleja (EEGSA) to C. Bastos, L. Giacchino, and J. Riubrugent dated 30 July 2008, attaching Letter No. GG-077-2008 from M. Calleja to C. Bastos, L. Giacchino, and J. Riubrugent dated 30 July 2008 (C-276).

⁶⁴⁵ Giacchino ¶ 83 (CWS-4).

⁶⁴⁶ Bastos ¶ 32 (CWS-1).

⁶⁴⁷ *Id.*

177. While Mr. Bastos thus traveled to Washington as scheduled, Mr. Riubrugent informed Messrs. Giacchino and Bastos by email on 29 July that he could not travel that week due to prior commitments.⁶⁴⁸ Mr. Riubrugent also thanked Mr. Giacchino for sending the revised study and stated that he was “certain that [Bates White] had duly taken account of the [Expert Commission’s] decision, incorporating the decisions in the final version of the study.”⁶⁴⁹

178. At Bates White’s office on 30 July, Mr. Giacchino began to show Mr. Bastos how Bates White had incorporated the Expert Commission’s decisions into its revised study.⁶⁵⁰ During a lunch break, Mr. Bastos emailed a letter dated 29 July 2008 to his co-experts in a further attempt to convene a meeting of all three members of the Expert Commission.⁶⁵¹ In his letter, Mr. Bastos advised that, “as agreed by the parties” under Operating Rule 12, “the consultant shall perform all the changes requested in the Expert Commission’s decision and remit the new version to the Expert Commission for its review and approval.”⁶⁵² Mr. Bastos noted each expert’s duty to comply with this legal mandate.⁶⁵³ He also explained that the Court could rule against the CNEE and, if it did so, “the Expert Commission’s deadline to render a decision and complete the task would not be suspended due to the controversy.”⁶⁵⁴ Mr. Bastos thus concluded his letter, in his capacity as the coordinator of the Expert Commission, by summoning his co-experts to meet the next day, on 31 July, by phone or internet conference “to move forward in the analysis requested of us.”⁶⁵⁵

⁶⁴⁸ Email from J. Riubrugent to L. Giacchino and C. Bastos dated 29 July 2008 (C-268); *see also* Bastos ¶¶ 31-32 (CWS-1); Giacchino ¶ 82 (CWS-4).

⁶⁴⁹ Email from J. Riubrugent to L. Giacchino and C. Bastos dated 29 July 2008 (C-268); *see also* Bastos ¶ 31 (CWS-1); Giacchino ¶ 85 (CWS-4).

⁶⁵⁰ Bastos ¶ 32 (CWS-1); Giacchino ¶ 86 (CWS-4).

⁶⁵¹ Bastos ¶ 32 (CWS-1); Giacchino ¶ 86 (CWS-4); Letter from C. Bastos to J. Riubrugent and L. Giacchino dated 29 July 2008 (C-271).

⁶⁵² Letter from C. Bastos to J. Riubrugent and L. Giacchino dated 29 July 2008, at 1 (C-271); *see also* Bastos ¶ 32 (CWS-1); Giacchino ¶ 86 (CWS-4).

⁶⁵³ Letter from C. Bastos to J. Riubrugent and L. Giacchino dated 29 July 2008, at 1 (C-271).

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.*

179. That afternoon, Mr. Riubrugent emailed to confirm that he would indeed participate in the teleconference at 11:00 a.m. on 31 July.⁶⁵⁶ The Court, meanwhile, ordered the CNEE to “comply in full with the decision of the Expert Commission, allowing it to conclude its work, especially the final review of the changes presented to the Expert Commission by the Firm Bates White.”⁶⁵⁷ The Court further ordered the CNEE “to abstain from using mechanisms tending to manipulate, change or unilaterally interpret those changes already approved.”⁶⁵⁸ Mr. Calleja forwarded the Court’s order by email, also on 30 July, to all three members of the Expert Commission explaining that it now was “clear that the Expert Commission must complete its task, performing the review and approval of the Tariff Study modified by Bates White,” in accordance with Operating Rule 12.⁶⁵⁹

180. The very next day, however, the same Court sent notice of a new order dated 30 July 2008 in which it reversed its prior order of the same date and suspended its provisional relief.⁶⁶⁰ In highly suspicious circumstances – as explained further below, the CNEE already had published the new tariffs based on its own study before receiving notice of the Court’s second order – the Court concluded that it was “unable to hear and decide the merits of the case” because EEGSA had not exhausted its administrative remedies.⁶⁶¹

181. In another reversal, Mr. Riubrugent emailed Messrs. Bastos and Giacchino on 31 July to state that, in view of “the legal situation that ha[d] arisen” and the lack of clarity as to “the scope of the functions of the Expert Commission,” he would “not participate in the

⁶⁵⁶ Bastos ¶ 32 (CWS-1); Giacchino ¶ 87 (CWS-4); Email Chain from J. Riubrugent to C. Bastos and L. Giacchino dated 30-31 July 2008 (C-281).

⁶⁵⁷ First Court of the First Civil Instance Decision dated 30 July 2008, at 2 (C-275); *see also* Calleja ¶ 48 (CWS-3); Maté ¶ 52 (CWS-6); Alegría ¶ 71 (CER-1); *see also* Letter from the First Court of the First Civil Instance to the CNEE dated 30 July 2008 (reflecting CNEE’s receipt of this order on 30 July) (C-277).

⁶⁵⁸ First Court of the First Civil Instance Decision dated 30 July 2008, at 2 (C-275); *see also* Calleja ¶ 48 (CWS-3); Maté ¶ 52 (CWS-6); Alegría ¶ 69 (CER-1).

⁶⁵⁹ Letter No. GG-077-2008 from EEGSA to C. Bastos, J. Riubrugent, L. Giacchino dated 30 July 2008, attached to Email from M. Calleja (EEGSA) to C. Bastos cc: J. Riubrugent and L. Giacchino dated 30 July 2008 (C-276).

⁶⁶⁰ Letter from the First Court of the First Civil Instance to the CNEE dated 31 July 2008 (C-280); *see also* Alegría ¶ 72 (CER-1); Maté ¶ 52 (CWS-6); Calleja ¶ 51 (CWS-3).

⁶⁶¹ Resolution of the First Civil Court of First Instance dated 30 July 2008 (C-278).

teleconference meeting referred to in [his] previous email.”⁶⁶² Mr. Riubrugent also stated that he “must comply with the CNEE’s instructions,” which he transcribed as follows:

‘[I]n consultation with the Directorate of CNEE and the Legal Management, according to what was notified, you represent CNEE within the Expert Commission, and therefore you were contracted solely and exclusively until the decision of the Expert Commission was issued, according to Art. 75 of the General Electricity Law. Once the report has been delivered, you have no further responsibilities to the parties and your contract shall be paid according to the scope and clauses thereof. Otherwise, it could be considered in Guatemala to be an overstepping of bounds.’⁶⁶³

Thus, although Mr. Riubrugent previously had indicated that he was “certain” that Bates White’s revised study incorporated the Expert Commission’s decisions,⁶⁶⁴ the CNEE issued a veiled threat to prevent him from reviewing and approving that study. In addition to being inappropriate, the CNEE’s action contravened the LGE because, as Professor Alegría explains, party-appointed members of the Expert Commission, such as Mr. Riubrugent, “do not ‘represent’ the parties within the Expert Commission,” but rather “are meant to function as independent and impartial experts in deciding the discrepancies relating to the distributor’s VAD study.”⁶⁶⁵

182. At the time of the scheduled meeting on 31 July, Messrs. Bastos and Giacchino called Mr. Riubrugent by phone and Skype, in the presence of two witnesses, but Mr. Riubrugent did not answer.⁶⁶⁶ After conferring with their respective legal counsel, Messrs. Bastos and Giacchino rescheduled the meeting for 3:00 p.m. to provide Mr. Riubrugent another opportunity to participate so that the Expert Commission could proceed with a full quorum.⁶⁶⁷ Mr. Bastos

⁶⁶² Email Chain from J. Riubrugent to C. Bastos and L. Giacchino dated 30-31 July 2008 (C-281); *see also* Bastos ¶ 33 (CWS-1); Giacchino ¶ 88 (CWS-4); Maté ¶ 55 (CWS-6); Calleja ¶ 52 (CWS-3); Alegría ¶ 62 (CER-1).

⁶⁶³ Email Chain from J. Riubrugent to C. Bastos and L. Giacchino dated 30-31 July 2008 (C-281).

⁶⁶⁴ Email from J. Riubrugent to L. Giacchino and C. Bastos dated 29 July 2008 (C-268).

⁶⁶⁵ Alegría ¶ 63 (CER-1).

⁶⁶⁶ Giacchino ¶ 89 (CWS-4); Bastos ¶ 34 (CWS-1); Affidavit of Viviana Carla Muñoz and Carolina Czastkiewicz dated 31 July 2008 (C-283).

⁶⁶⁷ Giacchino ¶ 89 (CWS-4); *see also* Bastos ¶ 34 (CWS-1).

then emailed Mr. Riubrugent, copying Mr. Giacchino, to summon him to this meeting, by phone or Skype.⁶⁶⁸ At 3:00 p.m., Messrs. Bastos and Giacchino again attempted to contact Mr. Riubrugent by phone and Skype, in the presence of two witnesses, but Mr. Riubrugent again did not answer.⁶⁶⁹

183. Messrs. Bastos and Giacchino accordingly reviewed Bates White's revised study without Mr. Riubrugent.⁶⁷⁰ As they did so, the CNEE's Mr. Quijivix called Mr. Bastos to tell him that the Expert Commission had been dissolved and that he no longer could act as the third expert.⁶⁷¹ Rejecting the CNEE's further efforts to obstruct the Expert Commission's work, Mr. Bastos told Mr. Quijivix that he had been "appointed and hired as an expert by both parties, that EEGSA had insisted that the Expert Commission continue to operate, and that the Operating Rules established the same."⁶⁷² He and Mr. Giacchino thus proceeded to review Bates White's study, as the Operating Rules required.⁶⁷³

e. The Expert Commission Confirmed That Bates White's Revised Study Complied With The Expert Commission's Rulings

184. Bates White finished making its presentation concerning its revised study to Mr. Bastos on 31 July, after a day and a half of reviewing each revision in the study.⁶⁷⁴ That evening, both Mr. Bastos and Mr. Giacchino concluded that Bates White's revised study of 28 July 2008 fully incorporated each of the rulings in the Expert Commission's Report.⁶⁷⁵

⁶⁶⁸ Email from C. Bastos to J. Riubrugent cc: L. Giacchino dated 31 July 2008 at 1:00 p.m. (C-282); *see also* Giacchino ¶ 89 (CWS-4).

⁶⁶⁹ Giacchino ¶ 89 (CWS-4); Affidavit of Viviana Carla Muñoz and Carolina Czastkiewicz dated 31 July 2008 (C-283).

⁶⁷⁰ Giacchino ¶ 89 (CWS-4); Bastos ¶¶ 34-35 (CWS-1).

⁶⁷¹ Bastos ¶ 34 (CWS-1).

⁶⁷² *Id.*

⁶⁷³ *See* Giacchino ¶¶ 89-90 (CWS-4); Bastos ¶¶ 34-36 (CWS-1).

⁶⁷⁴ Giacchino ¶ 90 (CWS-4).

⁶⁷⁵ *Id.*; Bastos ¶¶ 35-36 (CWS-1).

185. As Mr. Giacchino explains, although the Expert Commission ruled in favor of Bates White on several key issues discussed above, it also ruled in favor of the CNEE on certain issues, which had the effect of decreasing the VNR in Bates White's 5 May 2008 study by approximately US\$ 248 million from US\$ 1.3 billion.⁶⁷⁶ Part of this decrease was attributable to the Expert Commission's unanimous ruling that, with regard to undergrounding, Bates White could only include underground cables that existed at the time of the study,⁶⁷⁷ which lowered the VNR by approximately US\$ 57 million.⁶⁷⁸ The VNR decreased by another US\$ 56 million due to the Expert Commission's 2-1 ruling that required Bates White to eliminate the value of easements.⁶⁷⁹ In addition, although the Expert Commission rejected the CNEE's method of calculating the FRC, as explained above, Bates White had to adjust the FRC to depreciate the VNR to the mid-point of the tariff period, which lowered the VNR by approximately US\$ 95 million.⁶⁸⁰ Finally, various rulings related to prices and the manner of calculating costs reduced the VNR by more than US\$ 130 million.⁶⁸¹ The VNR in the 28 July 2008 Bates White study thus was lowered to US\$ 1.053 billion.⁶⁸²

186. The VNR calculated by Bates White in accordance with the Expert Commission's rulings constituted a substantial increase from the VNR of US\$ 583.69 million on which the 2003 tariffs had been calculated.⁶⁸³ As Mr. Giacchino explains and Mr. Kaczmarek confirms,

⁶⁷⁶ See Giacchino ¶ 66 (CWS-4); compare "Modelo VAD 28Abr08.xls," tab "Resumen 2006," included in the Bates White Model delivered to the CNEE on 5 May 2008 (showing a VNR of US\$ 1,301,339,581) (C-206) with "Modelo VAD 28Abr08.xls," tab "Resumen 2006" included in the Bates White Model delivered to the CNEE on 28 July 2008 (showing a VNR of US\$ 1,052,960,646) (C-265).

⁶⁷⁷ As Mr. Giacchino notes, "ten kilometers of existing underground cables were not included in this calculation because the engineers optimized the existing 253 km to 243 km." Giacchino ¶ 67 fn. 145 (CWS-4).

⁶⁷⁸ *Id.* ¶ 67.

⁶⁷⁹ *Id.* ¶ 70; "Modelo VAD 28Abr08.xls," tab "Resumen 2006" included in the Bates White Model delivered to the CNEE on 5 May 2008 (C-206); see also EC Report, Discrepancy B.4.e, Costs of Easements, at 50-51 (C-246).

⁶⁸⁰ See Giacchino ¶ 72 (CWS-4); "Modelo VAD 28Abr08.xls," tab "Documentation," cell E9, included in the Bates White Model delivered to the CNEE on 28 July 2008 (C-265).

⁶⁸¹ Giacchino ¶ 71 (CWS-4).

⁶⁸² *Id.* ¶¶ 71-72.

⁶⁸³ See *id.* ¶ 73.

the increase in the VNR between the two tariff periods was attributable to several factors, was economically justifiable, and was to be expected. To compare the two VNRs, certain adjustments first need to be made to account for the fact that (i) the earlier VNR used April 2002 prices for materials and labor, whereas the later VNR used December 2006 prices for those items, and the cost of materials used in electricity distribution, particularly copper and aluminum, increased dramatically during that period, far outpacing the rate of inflation;⁶⁸⁴ (ii) working capital⁶⁸⁵ and easements⁶⁸⁶ were treated differently in the two periods; and (iii) various assets, such as regulators and certain protections for transformers, were included in the 2008, but not the 2003, VNR calculation.⁶⁸⁷ After adjustments for these differences are made, accounting for US\$ 311 million, an additional US\$ 81.5 million increase in the VNR between the two tariff periods can be explained by, among other things,⁶⁸⁸ (i) the fourfold increase in the price of oil

⁶⁸⁴ *Id.* ¶¶ 73-75 (stating that “there was a tremendous increase in the cost of raw materials” in the intervening period, “particularly copper and aluminum, which impacted the cost of electrical materials.”); Kaczmarek ¶¶ 105-106 (CER-2) (noting that in the intervening period, “actual inflation associated with constructing a distribution network increased at a substantially higher rate than general inflation”). The increase in cost for materials accounted for a US\$ 314.4 million increase in the VNR. Giacchino ¶ 75 (CWS-4); Kaczmarek ¶ 106 (CER-2).

⁶⁸⁵ Giacchino ¶ 78 (CWS-4). As Mr. Giacchino explains, working capital was included as an indirect cost in the 2003 tariff, but was included in the VNR calculation for the 2008 tariff. *Id.*; see also Kaczmarek ¶¶ 107-108 (CER-2). This difference in treatment accounted for a nearly US\$ 80 million increase in the VNR in 2008. Giacchino ¶ 78 (CWS-4); Kaczmarek ¶ 108 (CER-2).

⁶⁸⁶ The 2003 VNR included US\$ 48.5 million as the value of easements, but the Expert Commission disallowed the inclusion in the 2008 VNR of the value of easements. Giacchino ¶ 74 (CWS-4); *id.*, Figure 2; EC Report, Discrepancy B.4.e, Costs of Easements, at 49-51 (C-246).

⁶⁸⁷ For example, regulators were included in 2008, accounting for an increase in the VNR of US\$ 28 million; the cost to energize lines accounted for US\$ 10.2 million; and to comply with new standards, US\$ 16.9 million was included as the cost to protect overhead lines. Giacchino ¶ 79 (CWS-4); *id.* Figure 2. Additionally, protections in the BT transformers and certain materials were not included in 2003, amounting to US\$ 16.6 million. *Id.* ¶ 76 (CWS-4); *id.* Figure 2.

⁶⁸⁸ As Mr. Giacchino explains, different methodologies were used to conduct the two studies: NERA was required to use a top-down approach in 2002, whereas Bates White was required to use a bottom-up approach in 2008. Giacchino ¶ 81 (CWS-4). The consultant never will reach the exact same result using two different methodologies to construct a model efficient company. *Id.*

during this period, requiring increased investment to decrease energy losses;⁶⁸⁹ and (ii) a 23% increase in customer growth and a 9% expansion of the physical network.⁶⁹⁰

187. Following Bates White's presentation of its revised calculations, Messrs. Bastos and Giacchino both concluded that Bates White had revised its study and calculated the VAD in accordance with the Expert Commission's rulings on each dispute, and they both so advised the CNEE and EEGSA.⁶⁹¹ In a letter dated 1 August 2008, sent by email that day, Mr. Giacchino thus stated for the record that he had reviewed each document and file relating to the calculation of the tariff and had verified that "each and every one of the [Expert Commission's] requests, stemming from the resolution of all the disputes indicated by CNEE, have been fully met by Bates White."⁶⁹² Mr. Giacchino summarized the most relevant files and documents relating to each of the Expert Commission's rulings, and "firmly vouch[ed] for the tariff schedule presented by Bates White" in the revised study of 28 July.⁶⁹³

188. Mr. Bastos also sent a letter to the CNEE and EEGSA on 1 August 2008 in which he summarized the steps that he had taken since delivering the Expert Commission's Report and stated that, in his opinion, Bates White had revised its study in accordance with the Expert Commission's rulings on each discrepancy.⁶⁹⁴ Mr. Bastos explained that Bates White's model for the calculations consisted of 173 linked Excel Books, which each contained several spreadsheets with different steps leading to the final calculation of the VAD and the tariffs,⁶⁹⁵

⁶⁸⁹ *Id.* ¶ 80 (CWS-4); Kaczmarek ¶ 109 (CER-2). The increase in oil prices accounted for a US\$ 44.3 million difference between the 2003 and 2008 VNRs. Giacchino ¶ 80 (CWS-4).

⁶⁹⁰ Giacchino ¶ 77 (CWS-4); Kaczmarek ¶ 111 (CER-2). This growth accounted for a US\$ 37.2 million increase in the VNR between the two periods. Giacchino ¶ 77 (CWS-4); Kaczmarek ¶ 111 (CER-2).

⁶⁹¹ Giacchino ¶ 90 (CWS-4); Bastos ¶ 35 (CWS-1).

⁶⁹² Letter from L. Giacchino to the CNEE and EEGSA dated 31 July 2008, at 3 (also explaining for the record that Mr. Riubrugent did not allow the Expert Commission to have a full quorum), attached to Email from L. Giacchino to M. Quijivix (CNEE) and M. Calleja (EEGSA) dated 1 Aug. 2008 (C-284); *see also* Giacchino ¶ 96 (CWS-4); Maté ¶ 55 (CWS-6); Calleja ¶ 53 (CWS-3).

⁶⁹³ Letter from L. Giacchino to the CNEE and EEGSA dated 31 July 2008, at 3 (C-284).

⁶⁹⁴ Bastos ¶ 35 (CWS-1); Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, at 3-4, attached to Email from C. Bastos to M. Calleja (EEGSA) and M. Quijivix (CNEE) dated 1 Aug. 2008 (C-288).

⁶⁹⁵ Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, at 3 (C-288).

and that he was “able to verify that the modifications made by Bates White to its Tariff Study of July 28, 2008 follow the decisions of the Expert Commission.”⁶⁹⁶ To show that the corrections had been made, Mr. Bastos attached a chart to show, for each of the Expert Commission’s rulings that required a revision, where in the Excel spreadsheets Bates White had incorporated the revision into its model.⁶⁹⁷ Mr. Bastos concluded that “the result of the VAD calculated in [Bates White’s] Tariff Study of July 28, 2008, is indeed calculated with a model that incorporates the decisions made by the Expert Commission.”⁶⁹⁸

f. The CNEE Imposed The VAD And The Tariffs Based On Its Own Consultant’s Study, Which Contravened The Expert Commission’s Rulings

189. As explained above, by the time the new tariffs were due to go into effect, two members of the Expert Commission had notified the CNEE in writing that the VAD in Bates White’s revised study was calculated in accordance with the Expert Commission’s decisions and, thus, in accordance with law.⁶⁹⁹ As also explained above, although the CNEE had pressured its appointed member of the Expert Commission to prevent him from participating in this review, he too had expressed certainty that Bates White’s revised study incorporated each of the Expert Commission’s rulings.⁷⁰⁰ As demonstrated below, however, the CNEE arbitrarily disregarded Bates White’s revised study and imposed its own VAD, in violation of law and in contravention of the Expert Commission’s key rulings.

⁶⁹⁶ *Id.*; see also Bastos ¶¶ 35-36 (CWS-1).

⁶⁹⁷ Bastos ¶ 36 (CWS-1); Chart of Corrections Required by the Expert Commission (C-289), attached to Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008 (C-288).

⁶⁹⁸ Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, at 3-4 (C-288); Bastos ¶ 35 (CWS-1); see also Calleja ¶ 53 (CWS-3); Maté ¶ 55 (CWS-6).

⁶⁹⁹ See *supra* II.F.5.e; Bastos ¶¶ 35-36 (CWS-1); Giacchino ¶ 90 (CWS-4); Calleja ¶ 53 (CWS-3); Maté ¶ 55 (CWS-6); Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008 (C-288); Letter from L. Giacchino to the CNEE and EEGSA dated 31 July 2008 (C-284).

⁷⁰⁰ See *supra* II.F.5.d; see also Bastos ¶ 31 (CWS-1); Giacchino ¶ 85 (CWS-4); Email from J. Riubrugent to L. Giacchino and C. Bastos dated 29 July 2008 (C-268).

190. On 31 July 2008, the CNEE published Resolutions CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008, each of which was unlawful.⁷⁰¹ Under Resolution CNEE-144-2008, the CNEE approved the study of its own consultant, Sigla, and provided that that study “shall be the basis to issue and publish the tariff schedule” of EEGSA.⁷⁰² Under Resolutions CNEE-145-2008 and CNEE-146-2008, the CNEE established the tariffs and the periodic adjustment formulas for EEGSA’s customers, effective from 1 August 2008 to 31 July 2013, as calculated in Sigla’s study.⁷⁰³ Thus, the CNEE published the new VAD and the new tariffs on its own, without the participation of EEGSA, its prequalified consultant, or the Expert Commission, as EEGSA long had feared that the CNEE intended to do.⁷⁰⁴

191. The CNEE based each of these Resolutions on its assertion that the Expert Commission’s Report of 25 July 2008 had confirmed that Bates White’s study of 5 May 2008 had “failed to perform all the corrections pursuant to the [CNEE’s] observations” in Resolution CNEE-63-2008 of 11 April 2008.⁷⁰⁵ The CNEE thus took the position in these Resolutions that the parties had appointed the Expert Commission solely to confirm whether Bates White had accepted all of the CNEE’s observations.⁷⁰⁶ According to the CNEE’s view, it thus would make no difference at all if the Expert Commission agreed with Bates White that one – or even all but one – of the CNEE’s observations had been unfounded.⁷⁰⁷

⁷⁰¹ See Alegría ¶¶ 61, 64-69 (CER-1); see also Maté ¶ 53 (CWS-6); Calleja ¶¶ 49-50 (CWS-3).

⁷⁰² Resolution No. CNEE-144-2008 dated 29 July 2008, Art. I, at 4, (C-272); see also Alegría ¶ 61 (CER-1); Maté ¶ 54 (CWS-6); Calleja ¶ 49 (CWS-3).

⁷⁰³ Resolution No. CNEE-145-2008 dated 30 July 2008, Art. I, at 3-4 (C-273); Resolution No. CNEE-146-2008 dated 30 July 2008, Art. I, at 4 (C-274); see also Alegría ¶ 64 (CER-1); Maté ¶ 53 (CWS-6); Calleja ¶ 49 (CWS-3).

⁷⁰⁴ See *supra* II.F.1.-4; see also, e.g., Calleja ¶ 15 (explaining why, in his view, “from the very beginning, the CNEE’s strategy was to provide itself with a mechanism to determine the new VAD and the tariff without EEGSA’s or its consultant’s participation, in violation of law”) (CWS-3); Maté ¶ 14 (CWS-6).

⁷⁰⁵ Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 (C-272); see also CNEE Resolution No. CNEE-145-2008 dated 30 July 2008, at 3 (C-273); Resolution No. CNEE-146-2008 dated 30 July 2008, at 3 (C-274).

⁷⁰⁶ Alegría ¶ 67 (CER-1); Calleja ¶ 50 (CWS-3).

⁷⁰⁷ Calleja ¶ 50 (CWS-3).

192. The CNEE’s proffered justification for these Resolutions was manifestly incorrect for numerous reasons.⁷⁰⁸ First, as Professor Alegría explains, apart from being unconstitutional, as explained above, the CNEE erroneously construed amended RLGE Article 98.⁷⁰⁹ Amended Article 98 authorized the CNEE to establish the tariffs based on its own study in only two limited circumstances – first, where the distributor failed to deliver a study; and second, where the distributor failed to deliver corrections to its study based on the CNEE’s observations.⁷¹⁰ In this case, however, and as the CNEE’s Resolutions reflect, EEGSA delivered its consultant’s study (on 31 March 2008) as well as the corrections to that study (on 5 May 2008).⁷¹¹ Therefore, even if it were constitutional and able to be lawfully applied, amended RLGE Article 98 did not apply in EEGSA’s case, and the CNEE did not have the authority to commission its own tariff study and to rely on that study as the basis to establish the tariffs.⁷¹²

193. Second, the underlying premise of these Resolutions – that Bates White was required to accept all of the CNEE’s observations in Resolution CNEE-63-2008 – was false, as both RLGE Article 98 and the CNEE’s terms of reference reflect.⁷¹³ RLGE Article 98 – both before and after it was amended – provided that the distributor, through its consultant, “shall analyze the observations, perform the corrections to the studies and shall deliver them,” and that “[i]f discrepancies between the [CNEE] and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed.”⁷¹⁴ Article 1.8 of the CNEE’s terms of reference further provided that “[t]he Distributor shall analyze said observations, make any corrections *it deems*

⁷⁰⁸ See Alegría ¶¶ 61, 64-69 (CER-1); see also Calleja ¶ 50 (CWS-3).

⁷⁰⁹ Alegría ¶¶ 66-68 (CER-1).

⁷¹⁰ See *supra* II.F.1; see also Alegría ¶¶ 37, 66 (CER-1); Government Resolution No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Article 98) (C-104).

⁷¹¹ See Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 (C-272); Resolution No. CNEE-145-2008 dated 30 July 2008, at 3 (C-273); Resolution No. CNEE-146-2008 dated 30 July 2008, at 3 (C-274).

⁷¹² Alegría ¶ 66 (CER-1).

⁷¹³ *Id.* ¶ 67

⁷¹⁴ Amended RLGE Article 98 (C-105); RLGE, Art. 98 (C-21); see also Alegría ¶ 67 (noting that the original version of RLGE Article 98 and the amended version were consistent in this regard) (CER-1).

appropriate and send the corrected final report of the study to the CNEE.”⁷¹⁵ Both RLGE Article 98 and the CNEE’s own terms of reference thus expressly contemplated the possibility, as set out above, that the distributor would disagree with and reject one or more of the CNEE’s observations and that the parties accordingly would submit the resulting discrepancies to an Expert Commission that would act as the final arbiter of the dispute.⁷¹⁶

194. Third, the CNEE’s interpretation of RLGE Article 98 not only was contrary to the text of that article and to the terms of reference, but also rendered the provisions of the law relating to the Expert Commission meaningless. As Professor Alegría observes, if Article 98 required the distributor to accept all of the CNEE’s observations, as the CNEE alleged, “there would never be any reason for the appointment of an expert commission, as contemplated in LGE Article 75 and RLGE Article 98, because there would never be any discrepancies that persist between the CNEE and the distributor.”⁷¹⁷ As Professor Alegría explains, the CNEE thus contravened LGE Articles 74 and 75 and RLGE Article 98 when it disregarded the Expert Commission’s rulings on the discrepancies and instead relied on its own study – and, in effect, granted itself unchecked power – to set the tariffs.⁷¹⁸

195. Fourth, the CNEE’s purported reliance on the Expert Commission’s Report – by claiming that the Expert Commission had found discrepancies between Bates White’s May 2008

⁷¹⁵ October 2007 ToR, Art. 1.8 (emphasis added) (C-127); *see also id.*, Art. 1.10 (further providing that the terms of reference were guidelines that were subject to and did not amend the LGE or the RLGE, and that the consultant could deviate from the terms of reference if it provided a reasoned justification for doing so); Alegría ¶¶ 49-50 (CER-1); Calleja ¶ 21 (CWS-3).

⁷¹⁶ Alegría ¶ 67 (CER-1); *see also supra* II.F.1-2; Calleja ¶ 21 (CWS-3). The Expert Commission reached the same conclusion. *See* EC Report, Introduction, at 3 (“Those observations made by CNEE, if not incorporated by the Consultant and therefore, if they persist, constitute discrepancies and must be resolved by the Expert Commission (articles 75 LGE and 98 RLGE)”) (C-246).

⁷¹⁷ Alegría ¶ 67 (CER-1); *see also id.* (finding “no basis to interpret the distributor’s obligation to deliver the corrections to the CNEE in amended RLGE Article 98 as requiring the distributor to incorporate all of the CNEE’s observations”); Calleja ¶ 50 (explaining that “[the CNEE’s] absurd position turned the procedure regarding the Expert Commission under the LGE (and Article 1.8 of the terms of reference) entirely on its head,” because “[i]f Bates White had accepted all of the CNEE’s observations without disagreeing with any of them on 5 May 2008, the parties would have had no reason whatsoever to convene an Expert Commission”) (CWS-3).

⁷¹⁸ Alegría ¶ 68 (CER-1).

study and the CNEE's observations – was pointless.⁷¹⁹ As Mr. Calleja explains, the parties were fully aware that Bates White had not incorporated into its revised study all of the corrections that it would have needed to make had it accepted all of the CNEE's observations, and they thus appointed the Expert Commission to work for nearly two months “to resolve – not to confirm the existence of – the disagreements between Bates White and the CNEE.”⁷²⁰ To that end, and as Mr. Calleja further notes, the CNEE itself proposed in its first draft operating rules that the “EC shall decide the discrepancies and the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC.”⁷²¹ The Expert Commission thus understood that its task, as reflected in its Report, was to “resolve the discrepancies,”⁷²² and that Bates White would “perform all the changes requested in the EC's decision, and remit the new version to the EC for its review and approval.”⁷²³ Thus, as Mr. Calleja observes, the CNEE's position that the parties had appointed the Expert Commission merely to confirm the existence of discrepancies was “contrived” and “baseless.”⁷²⁴

196. Apart from being in violation of Guatemalan law for the reasons set forth above, the CNEE's publication of the new tariffs on the basis of its own consultant's study violated a Court order.⁷²⁵ As explained above, on 30 July 2008, a Guatemalan Court had ordered the CNEE to “comply in full with the decision of the Expert Commission, allowing it to conclude its work, especially the final review of the changes presented to the Expert Commission by the Firm Bates White,” and “to abstain from using mechanisms tending to manipulate, change or

⁷¹⁹ *Id.* at ¶ 67; Calleja ¶ 50 (CWS-3); Maté ¶ 54 (CWS-6).

⁷²⁰ Calleja ¶ 50 (CWS-3); *see also* Maté ¶ 54 (CWS-6); Alegría ¶ 68 (“Under LGE Article 75 and RLGE Article 98, the function of the expert commission is to resolve the discrepancies that persist between the CNEE and the distributor, after the distributor has responded to the CNEE's observations; its function is not to confirm whether or not the distributor has incorporated all of the CNEE's observations into its corrected tariff study.”) (CER-1).

⁷²¹ Proposed Operating Rules enclosed with Email from M. Quijivix (the CNEE) to M. Calleja (EEGSA) dated 15 May 2008 at 0:22 GMT at 2 (C-210); *see also* Calleja ¶ 5 (CWS-3).

⁷²² EC Report at 11 § 4.3 (C-246); *see also supra* II.F.5.c.

⁷²³ EC Report at 10 § 4.2, Rule 12 (C-246); *see also supra* II.F.5.c.

⁷²⁴ Calleja ¶ 50 (CWS-6); *see also* Maté ¶ 54 (CWS-6); *supra* II.F.5.b.

⁷²⁵ *See supra* II.F.5.d.

unilaterally interpret those changes already approved.”⁷²⁶ Although the Court later reversed that decision in a second order (also dated 30 July 2008), the CNEE did not receive notice of the second order until 31 July, after it already had published Resolutions CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008.⁷²⁷ The CNEE’s publication of the new tariff schedule while the Court’s prior order remained in force demonstrates that the CNEE either did not consider itself bound by the orders of Guatemala’s courts or knew that it could pressure the Judge into reversing her prior order.⁷²⁸

197. Furthermore, the CNEE’s new tariff schedule relied on a study that was prepared in violation of EEGSA’s procedural rights and contrary to the Expert Commission’s rulings.⁷²⁹ The CNEE retained Sigla to prepare its study in November 2007, more than four months before EEGSA was even due to deliver its own study.⁷³⁰ As Professor Alegría explains, this hiring was unlawful because, at that time, none of the conditions in Article 98 for the CNEE to perform its own study had been or could have been met.⁷³¹ Furthermore, as Messrs. Maté and Calleja explain, no one at EEGSA or Bates White ever was given the opportunity to review or to comment on Sigla’s study.⁷³² Thus, the careful balance between the regulator and distributor that the LGE safeguards was upended by the CNEE’s unilateral decision to publish the tariffs based on a study that it commissioned and in which the distributor played absolutely no role.

⁷²⁶ First Court of the First Civil Instance Decision dated 30 July 2008, at 2 (C-275); *see also supra* II.F.5.d; Calleja ¶ 48 (CWS-3); Maté ¶ 52 (CWS-6); Alegría ¶ 69 (CER-1).

⁷²⁷ Maté ¶ 53 (CWS-6); Calleja ¶ 49 (CWS-3); *see also* Letter from the First Civil Court of First Instance to the CNEE dated 31 July 2008 (reflecting the CNEE’s receipt of the second order on 31 July 2008) (C-280).

⁷²⁸ Maté ¶ 52 (CWS-6); Calleja ¶ 51 (CWS-3).

⁷²⁹ Calleja ¶ 49 (CWS-3); *see also* Maté ¶¶ 13-14 (CWS-6); Alegría ¶ 69 (CER-1).

⁷³⁰ Alegría ¶ 69 (CER-1); Maté ¶ 13 (CWS-6); *see also* CNEE Accord No. 116-2007 dated 27 July 2007 (publishing a request for a firm to assist the CNEE in preparing its own VAD study) (C-122); Contract 11-189-2007 between the CNEE and Electrotek and Sigla dated 12 Nov. 2007 (C-132)

⁷³¹ Alegría ¶ 69 (concluding that the CNEE “violated RLGE Article 98 by hiring Sigla to perform an independent tariff study before any of the conditions in RLGE Article 98 had actually occurred”) (CER-1).

⁷³² Calleja ¶ 49 (CWS-3); Maté ¶ 53 (CWS-6).

198. Substantively, Sigla’s study contravened the Expert Commission’s rulings on many of the most critical discrepancies that were decided in Bates White’s favor.⁷³³ As explained above, in a central discrepancy relating to the manner of calculating the FRC, the Expert Commission expressly rejected the CNEE’s position that the VNR should be depreciated by 50%.⁷³⁴ The Expert Commission ruled that the FRC formula set forth in the terms of reference was correct, but that the variables could not be assigned the values given them in the terms of reference because to do so would result in an FRC that contravened the LGE.⁷³⁵ Sigla’s study nevertheless adopted the CNEE’s FRC formula, including its assumptions regarding the values of the variables in that formula, and depreciated the VNR by 50%.⁷³⁶ Likewise, although the Expert Commission unanimously rejected the CNEE’s position that 2006 prices should be used in the VAD study and adjusted for inflation, rather than using the most recent 2007 prices that were available,⁷³⁷ Sigla used 2006 prices in its study.⁷³⁸ Furthermore, Sigla adopted a method of determining demand density at odds with the Expert Commission’s ruling on the discrepancy, which had the effect of undervaluing the assets needed to service EEGSA’s distribution area and, hence, unjustifiably decreasing the VNR.⁷³⁹

⁷³³ See Calleja ¶ 49 (CWS-3).

⁷³⁴ See EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 91-93 (C-246); see also Bastos ¶¶ 21-22 (CWS-1).

⁷³⁵ EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 91-93 (C-246); see also Bastos ¶¶ 21-22 (CWS-1).

⁷³⁶ Sigla Phase D, Investment Annuity, Distribution Value Added Component at 2 (showing formula used for calculating the FRC, including equating Ta (amortization period) with To (average useful life of the assets)) (C-267); *id.* (noting that it calculated the FRC “in accordance with the TdR [Terms of Reference]”) (emphasis added); Sigla Phase G, VAD Cost Components, Capital Costs, at 3 (describing that it applied the FRC formula as set forth in the Terms of Reference); see also Kaczmarek ¶¶ 13, 119, 122 (CER-2).

⁷³⁷ EC Report, Discrepancy B.1.b, Age of the Prices at 32-33 (C-246); see also Giacchino ¶ 57 (CWS-6); Bastos ¶ 28 (CWS-1).

⁷³⁸ Sigla Phase D, Investment Annuity, Distribution Value Added Component, at 1 (indicating that the VNR of the facilities for the base year 2006 was used) (C-267); Sigla Phase G, VAD Cost Components, Intro, at 1 (stating that base year 2006 prices are used) (C-267).

⁷³⁹ Compare Sigla Phase A, Demand Study, at 55 (explaining that Sigla calculated demand using grids of 100 x 100 meters) (C-267) with EC Report, Discrepancy A.2, Spatial Unbundling of the Demand, at 17 (explaining that Bates White’s study calculating demand using grids of 400 x 400 meters ensures that the demand is calculated correctly and rejecting the CNEE’s position that grids of smaller sizes should be used) (C-246) and Bastos ¶¶ 23-26 (CWS-1) (explaining the same).

199. These were three of what Mr. Bastos identified as the four “key discrepancies” that had the greatest impact on the VAD,⁷⁴⁰ and in each instance, the CNEE imposed a VAD and tariff in complete disregard of the Expert Commission’s ruling on the discrepancy.

6. Guatemala Rebuffed EEGSA’s Efforts To Remedy The Injustice Suffered And Retaliated Against EEGSA

200. Immediately following the CNEE’s publication of the new tariff schedule on 30 July 2008 based on Sigla’s study and in complete disregard of the Expert Commission’s rulings, EEGSA filed administrative appeals with the CNEE challenging Resolutions CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008,⁷⁴¹ as well as an *amparo* petition for constitutional relief.⁷⁴² Although Iberdrola, as EEGSA’s controlling and managing shareholder, took the lead in negotiating with the Government both during the tariff review process and thereafter, on occasion TECO’s executives visited Guatemala and would seek meetings with Guatemalan officials to discuss TECO’s investments in Guatemala, including EEGSA. Thus, when Mr. Gillette, the then President of TECO Guatemala, travelled to Guatemala soon after the new tariff schedule was published, he met with the CNEE and other Guatemalan officials in an effort to resolve the dispute.⁷⁴³ During these meetings, Mr. Gillette emphasized that TECO remained committed to Guatemala and wanted to remain in the country for the long term.⁷⁴⁴ On 15 August 2008, having not obtained any resolution, Mr. Gillette sent a letter to Guatemala’s President Álvaro Colom Caballeros, notifying him of the unilateral action taken by the CNEE in dictating

⁷⁴⁰ Bastos ¶¶ 20-28 (CWS-1). The fourth key discrepancy concerned undergrounding and was decided in the CNEE’s favor. *Id.* ¶ 27. As explained above, Bates White incorporated the Expert Commission’s decision regarding undergrounding into its revised 28 July 2008 report, which had the effect of decreasing the VNR by US\$ 57 million. Giacchino ¶ 67 (CWS-4).

⁷⁴¹ See Maté ¶ 59 (CWS-6); Calleja ¶ 54 (CWS-3); Alegría ¶ 73 (CER-1); Appeal to revoke by EEGSA against Resolution No. CNEE-144-2008 dated 1 Aug. 2008 (C-285); Appeal to revoke by EEGSA against Resolution No. CNEE-145-2008 dated 1 Aug. 2008 (C-286); Appeal to revoke by EEGSA against Resolution No. CNEE-146-2008 dated 1 Aug. 2008 (C-287).

⁷⁴² EEGSA *Amparo* Request against CNEE Resolution GJ-Providencia-3121 and Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008 dated 14 Aug. 2008 (C-291).

⁷⁴³ Gillette ¶ 23 (CWS-5).

⁷⁴⁴ *Id.*

EEGSA's VAD and urging him "to apply due process to establish realistic tariffs for the CNEE and EEGSA."⁷⁴⁵ As Mr. Gillette explained:

The new rates set by the CNEE are considerably lower than the old tariffs (in some instances over 60% lower), resulting in net loss for the company. This seriously threatens the financial subsistence of EEGSA, instability which will have significant consequences, not only for its investors, but for its customers (the citizens of Guatemala). Additionally, this action affects EEGSA's immediate ability to obtain credit from banks necessary for the expansion and improvement of the system.⁷⁴⁶

As Mr. Gillette recounts, despite TECO's efforts to reach an agreement, Guatemala was unwilling to negotiate regarding the VAD.⁷⁴⁷

201. Also in August 2008, EEGSA's representatives, Messrs. Maté and Calleja, met with the directors of the CNEE to discuss the possibility of negotiating a resolution of the dispute.⁷⁴⁸ The CNEE, however, refused to negotiate or discuss the tariffs.⁷⁴⁹ On 11 August 2008, Messrs. Maté and Calleja met with the Minister of Energy and Mines, Carlos Meany, in a further attempt to resolve the dispute.⁷⁵⁰ EEGSA's legal counsel, Juan Carlos Castillo, also participated in this meeting.⁷⁵¹ As Mr. Maté explains, Minister Meany listened to them, took notes, asked questions, and promised to get back to them.⁷⁵²

202. On 18 August 2008, Minister Meany summoned Mr. Maté to attend another meeting the following day.⁷⁵³ At Minister Meany's request, Mr. Maté attended this meeting

⁷⁴⁵ *Id.*; Letter from G. Gillette to President of Guatemala À. Colom Caballeros dated 15 Aug. 2008 (C-292).

⁷⁴⁶ Letter from G. Gillette to President of Guatemala À. Colom Caballeros dated 15 Aug. 2008 (C-292).

⁷⁴⁷ Gillette ¶ 23 (CWS-5).

⁷⁴⁸ Maté ¶ 61 (CWS-6); *see also* Calleja ¶ 54 (CWS-3).

⁷⁴⁹ Maté ¶ 61 (CWS-6); Calleja ¶ 54 (CWS-3).

⁷⁵⁰ Maté ¶ 62 (CWS-6).

⁷⁵¹ *Id.*

⁷⁵² *Id.*

⁷⁵³ *Id.* ¶ 63.

alone.⁷⁵⁴ Minister Meany was accompanied by the Deputy Minister of Energy and Mines, Romeo Rodriguez.⁷⁵⁵ During the meeting, Minister Meany asked Mr. Maté whether EEGSA was willing to negotiate an agreement with the CNEE regarding the VAD.⁷⁵⁶ Mr. Maté told Minister Meany that EEGSA was willing to negotiate, but that EEGSA had suspended its billing and was under pressure from Congress, the Attorney for Human Rights, and the media to agree to the tariffs imposed by the CNEE.⁷⁵⁷ As Mr. Maté explains, EEGSA had suspended billing while its administrative appeals were pending, because EEGSA did not want to re-bill its customers in the event that it prevailed in its challenges.⁷⁵⁸ Minister Meany told Mr. Maté that EEGSA should continue suspending its billing and that he would revert to him as soon as he had conferred with the President of Guatemala, who was returning that day from the United States, as well as with the President of the CNEE.⁷⁵⁹

203. The following day, Minister Meany called Mr. Maté to advise that the CNEE would not negotiate with EEGSA regarding the VAD.⁷⁶⁰ That same day, the MEM notified EEGSA of its rejection of EEGSA's administrative appeals to Resolutions CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008.⁷⁶¹ As those decisions reflect, the MEM did not address the merits of EEGSA's appeals, finding that the administrative acts at issue (*i.e.*, the CNEE's Resolutions) were not subject to challenge through administrative appeal, because the acts did not involve a "government act directed to a particular person per se," but rather were acts of a

⁷⁵⁴ *Id.*

⁷⁵⁵ *Id.*

⁷⁵⁶ *Id.*

⁷⁵⁷ *Id.*

⁷⁵⁸ *Id.* ¶ 60.

⁷⁵⁹ *Id.*

⁷⁶⁰ *Id.* ¶ 64.

⁷⁶¹ Ministry of Energy and Mines Decision No. 2557 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-145-2008) (C-293); Ministry of Energy and Mines Decision No. 2558 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-146-2008) (C-294); Ministry of Energy and Mines Decision No. 2559 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-144-2008) (C-295).

general nature affecting all “consumers of the final distribution of power, serviced by [EEGSA], without making any distinction in regard to them.”⁷⁶²

204. Under these circumstances, EEGSA began billing with the new tariff rates on 21 August 2008.⁷⁶³ EEGSA continued, however, to pursue its challenges to the new tariffs and the CNEE’s unlawful actions in the Guatemalan courts and, on 26 August 2008, EEGSA filed a second *amparo* petition for constitutional relief.⁷⁶⁴ Further, as Mr. Bastos explains, in order to allow for the possibility that the courts would uphold EEGSA’s challenges and direct the Expert Commission to reconvene, EEGSA and Mr. Bastos agreed to amend their contract.⁷⁶⁵ As the amended contract reflects, EEGSA paid nearly all of Mr. Bastos’s outstanding fees, but withheld a nominal amount that EEGSA agreed to pay if its court actions were successful and the Expert Commission were reconvened to review and formally approve (with the necessary quorum) Bates White’s revised tariff study.⁷⁶⁶

205. In a transparent attempt to stymie EEGSA’s efforts and apply pressure on it to accept the CNEE’s unlawful actions, on 26 August 2008, while EEGSA’s challenges were pending before the courts, the Prosecutor’s Office petitioned the Criminal Court to issue warrants to arrest two of EEGSA’s senior managers, including Mr. Maté, on patently baseless charges.⁷⁶⁷ The allegations giving rise to the arrest warrants were not new and previously had been rejected

⁷⁶² Ministry of Energy and Mines Decision No. 2557 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-145-2008) (C-293); Ministry of Energy and Mines Decision No. 2558 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-146-2008) (C-294); Ministry of Energy and Mines Decision No. 2559 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-144-2008) (C-295).

⁷⁶³ Maté ¶ 64 (CWS-6).

⁷⁶⁴ EEGSA *Amparo* Request against Resolution No. CNEE-144-2008 dated 26 Aug. 2008 (C-298).

⁷⁶⁵ Bastos ¶ 37 (CWS-1).

⁷⁶⁶ *Id.*; Modification to the Agreement for the Compensation of the Third Member of the Expert Commission between EEGSA and C. Bastos dated 3 Sept. 2008, at 2 (providing for full payment after “compliance with numeral 7 of the 4th clause of the Agreement, once the Expert Commission has been reinstated”) (C-302); *see also* Contract between EEGSA and Carlos Bastos dated 26 June 2008, Fourth Clause ¶ 7 (“EEGSA shall inform its consultant of the EC’s decision, and the consultant shall perform all the changes requested and remit the new version to the EC for its review and approval.”) (C-238).

⁷⁶⁷ Maté ¶ 71 (CWS-6); Calleja ¶ 55 (CWS-3).

by the Prosecutor's Office;⁷⁶⁸ they concerned trespassing charges in connection with EEGSA's installation of lines along a railway right of way.⁷⁶⁹ As Mr. Maté explains, these charges were groundless because (i) under the LGE, EEGSA has the right to place its lines on public property; (ii) the lines had been installed more than 50 years earlier when EEGSA was State-owned and, therefore, the lines and easements had been transferred when EEGSA was privatized; and (iii) because the lines had existed in place for more than 50 years, EEGSA would have gained a right to use the property as a result of adverse possession in any event.⁷⁷⁰ Three days after the Prosecutor made its petition, on 29 August 2008, the Criminal Court issued the arrest warrants.⁷⁷¹ At that time, Mr. Maté was out of the country.⁷⁷² Although the Criminal Court granted a provisional *amparo* and thus suspended the arrest warrant a few days later, on 4 September 2008,⁷⁷³ in view of the uncertainties in the country, Mr. Maté did not return to Guatemala.⁷⁷⁴ As Mr. Maté explains, because he was prevented from returning to Guatemala, the Board of Directors of EEGSA replaced him as General Manager of EEGSA in February 2009.⁷⁷⁵

206. The harassment of EEGSA's managers did not, however, end with Mr. Maté's departure. As Mr. Calleja testifies, on 1 September 2008, he appeared in Mr. Maté's place on a

⁷⁶⁸ Maté ¶¶ 70-71 (CWS-6); Prosecutor's Office Petition for Dismissal to the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment dated 5 Mar. 2008 (C-166).

⁷⁶⁹ See Maté ¶ 70 (CWS-6).

⁷⁷⁰ *Id.* In addition, as Mr. Maté explains, despite EEGSA's repeated complaints that another company was unlawfully distributing electricity to customers that EEGSA had the exclusive right to service, the Government refused to take action against the company or its officials, yet the Government filed baseless criminal charges against him. *Id.* ¶¶ 66-67.

⁷⁷¹ *Id.* ¶ 71; Official Letter No. 1967-2008 of the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment dated 29 Aug. 2008 (C-299).

⁷⁷² Maté ¶ 72 (CWS-6); Calleja ¶ 55 (CWS-3).

⁷⁷³ Maté ¶ 72 (CWS-6); Decision of the Third Chamber of the Court of Appeals, Amparo 52-2008 dated 2 Sept. 2008 (C-301). As Mr. Maté explains, despite opposition from the Attorney General, a definitive *amparo* suspending the arrest warrant was granted on 9 December 2008, and the case subsequently was dismissed on 4 May 2010 by the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment of the Municipality of Villa Nueva, Department of Guatemala. See Maté ¶ 72 (CWS-6).

⁷⁷⁴ Maté ¶ 72 (CWS-6).

⁷⁷⁵ *Id.* ¶ 1.

radio program to discuss the CNEE's unlawful actions and the severe economic consequences for EEGSA.⁷⁷⁶ When he returned to his car after giving the interview, he discovered that his car had been broken into and that his laptop computer had been stolen.⁷⁷⁷ He reported this matter to the security officials at the Spanish Embassy and was advised that the break-in appeared to be the work of professionals and had required someone to follow him.⁷⁷⁸ As Mr. Calleja explains, he was disturbed by this incident, and he and his family, as well as the other Spanish nationals at EEGSA, subsequently left Guatemala.⁷⁷⁹ EEGSA thus was left with no foreign management in the country.

207. On 15 May 2009, the Second Civil Court of First Instance granted EEGSA's *amparo* petition against Resolution CNEE-144-2008,⁷⁸⁰ finding that the CNEE had violated "the due process guaranteed by the Political Constitution of the Republic of Guatemala"⁷⁸¹ and had "acted outside the boundaries established in the General Law of Electricity and its Regulations."⁷⁸² In so ruling, the Court found that RLGE Article 98, on which Resolution CNEE-144-2008 was based, was limited to circumstances in which a distributor fails to submit a tariff study or the corrections to the same, circumstances that did not apply to EEGSA.⁷⁸³ As the Court observed, "the applicant did not fail to deliver the studies or corrections established in the law inasmuch as it complied with such requirements" on 5 May 2008, as recorded in EEGSA's letter GG-60-2008.⁷⁸⁴ The Court further rejected the CNEE's argument that EEGSA had not proceeded "to make the totality of the corrections it should have made."⁷⁸⁵ As the Court

⁷⁷⁶ Calleja ¶ 55 (CWS-3).

⁷⁷⁷ *Id.*

⁷⁷⁸ *Id.*

⁷⁷⁹ *Id.*

⁷⁸⁰ EEGSA *Amparo* Request against Resolution No. CNEE-144-2008 dated 26 Aug. 2008 (C-298); *see also* Alegría ¶ 74 (CER-1).

⁷⁸¹ Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-7964-2008, at 6 (C-328).

⁷⁸² *Id.* at 7.

⁷⁸³ *Id.* at 6.

⁷⁸⁴ *Id.*

⁷⁸⁵ *Id.*

observed, “such argument lacks validity given that the law foresees the possibility that the distributor does not agree with certain observations, which gives rise to the existence of discrepancies.”⁷⁸⁶

208. As Professor Alegría explains, the Court’s decision in this case is in line with his conclusion that “amended RLGE Article 98 does not grant the CNEE authority to prepare its own study and to set the tariff rates based on that study in circumstances where the distributor submitted a VAD study and the corrections to the study, and an expert commission is formed to resolve the discrepancies between the CNEE and the distributor.”⁷⁸⁷ As Professor Alegría notes, LGE Article 75 establishes the right of the distributor to have discrepancies resolved by an Expert Commission.⁷⁸⁸ Interpreting RLGE Article 98 to require the distributor to make all the changes requested by the CNEE in its observations thus “denies the distributor the due process to which it is entitled under the law.”⁷⁸⁹

209. On 31 August 2009, the Eighth Civil Court of First Instance granted EEGSA’s *amparo* petition against CNEE’s Resolution GJ-Providencia-3121, through which the CNEE had dissolved the Expert Commission.⁷⁹⁰ As that decision reflects, the Court found that, by dissolving the Expert Commission, the CNEE had violated EEGSA’s right of defense and the principles of due process and legality,⁷⁹¹ and thus ordered the CNEE “to issue a new resolution to replace the resolution in question, guaranteeing the right of defense and the principles of due process and legality, [and] allowing the Expert Commission to fulfill the purpose for which it was created in the first place.”⁷⁹² In so ruling, the Court observed that, pursuant to the Expert Commission’s Report, “twelve working or operating rules were set forth, which . . . were agreed

⁷⁸⁶ *Id.*

⁷⁸⁷ Alegría ¶ 74 (CER-1).

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.*

⁷⁹⁰ Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009 (C-330).

⁷⁹¹ *Id.* at 10; Alegría ¶ 80 (CER-1).

⁷⁹² Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009, at 11 (C-330).

by both parties, the last of which is rule No. 12, which states that the distributor shall inform its consultant of the decision of the [Expert Commission] who shall perform all of the changes requested by the decision of the Expert Commission, and remit the new version to the Expert Commission for its review and approval.”⁷⁹³ The Court further noted that this rule was “clear because it orders the distributor to inform its consultancy firm of the decision made by the Expert Commission and that this firm must introduce the changes requested in the decision issued by the Expert Commission for review and approval.”⁷⁹⁴

210. The Court found that, pursuant to Rule 12, when the CNEE received the “new corrected version of the study,” the CNEE “should have notified the Expert Commission or allowed [the] consultancy firm Bates White, LLC, to do so” so that the Expert Commission could “review the study and decide whether this version strictly complied with each requirement under the decision.”⁷⁹⁵ As the Court noted, “upon reviewing the new version of the study, the Expert Commission should have approved it and notified” the CNEE and EEGSA, and, after having done so, the CNEE should have “fixed the final tariffs for [EEGSA] based on the new amended version of the study prepared by Bates White, LLC, which already contained each one of the items in the decision issued by the Expert Commission.”⁷⁹⁶ As the Court concluded:

Procedural Rule No. 12 should be interpreted broadly, since it provides for all the steps to be taken until a final agreement is reached on a new tariff scheme; however, this procedure was halted with the resolution issued by the [CNEE] dissolving the Expert Commission, whereby a step was skipped and [EEGSA] was not notified of the decision made by the Expert Commission, thus breaching the working rules the parties had agreed to abide by, and further violating [Article] 75 of the General Electricity Law and [Article] 99 of its Rules. In view of the foregoing, this constitutional court concludes that the resolution issued by the

⁷⁹³ *Id.* at 8.

⁷⁹⁴ *Id.*

⁷⁹⁵ *Id.* at 9.

⁷⁹⁶ *Id.*

[CNEE] on July 25, 2008, added to file GTT-28-2008 GJ-Providencia-3121, violates the right of defense of the petitioner.⁷⁹⁷

211. The CNEE subsequently appealed both court decisions granting EEGSA's *amparo* petitions. By a three-to-two decision dated 18 November 2009, the Constitutional Court reversed the decision of the Second Civil Court, thus ending EEGSA's legal challenge to Resolution CNEE-144-2008.⁷⁹⁸ As the decision reflects, the majority concluded that, because only the CNEE has the legal authority to issue the tariff schedules, the Expert Commission's ruling was merely "illustrative" or "informative" in nature and thus could not be binding on the CNEE.⁷⁹⁹ In support of its conclusion, the Court relied on the meaning of the Spanish verb "*se pronunciará*," which appears in LGE Article 75, and found that it meant "to declare or express oneself in favor or against something."⁸⁰⁰ The Court concluded that the CNEE had "assumed its responsibility, which cannot be delegated, approving, based on its own studies deemed appropriate, the tariffs objected in the *amparo* action."⁸⁰¹

212. As Professor Alegría observes, the Court's decision was wrong and appears to have been "influenced by political considerations to prevent an increase in EEGSA's electricity tariffs, and was based on an incorrect interpretation of the law."⁸⁰² As Professor Alegría explains, the Court erroneously assumed that the ruling of the Expert Commission is equivalent to the issuance of the tariff schedules.⁸⁰³ The Court then "wrongly concluded that EEGSA could not have suffered any violation of due process by the CNEE's issuance of the tariff schedules based on its own study, because, according to the LGE, only the CNEE has the power to issue

⁷⁹⁷ *Id.*

⁷⁹⁸ Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009 (C-331); see also Alegría ¶ 75 (CER-1).

⁷⁹⁹ Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009, at 14-15 (C-331) (stating that "the General Electricity Law and the Regulation do not compel the [CNEE] to accept that decision as binding, because, given the nature of the experts' opinion, it is not binding upon the authority and does not oblige it to accept its terms to approve the tariffs at issue").

⁸⁰⁰ *Id.* at 14.

⁸⁰¹ *Id.* at 15.

⁸⁰² Alegría ¶ 75 (CER-1).

⁸⁰³ *Id.*

the tariff schedules.”⁸⁰⁴ The Expert Commission’s decision, however, “does not issue the tariff schedules, but rather resolves the discrepancies between the distributor and the CNEE with respect to the tariff study, on which the new tariffs are to be based.”⁸⁰⁵

213. Professor Alegría further observes that the Court’s interpretation of the Spanish verb “*se pronunciará*” is incorrect in light of the context and purpose of the LGE.⁸⁰⁶ As he explains, the use of the verb “*pronunciarse*” in LGE Article 75 does not indicate that the Expert Commission’s “pronouncement” is advisory or non-binding.⁸⁰⁷ Rather, “[t]he ordinary meaning of ‘*pronunciarse*,’ in view of the context and purpose of the LGE, particularly LGE Article 75, connotes the issuance of a final decision or resolution by the Expert Commission.”⁸⁰⁸ The dictionary definition relied on by the Court does not suggest otherwise.⁸⁰⁹ As Professor Alegría observes, “that definition suggests that the Expert Commission was empowered to issue a judgment regarding the discrepancies between the parties.”⁸¹⁰ As he further observes, the *Diccionario de la Real Academia Española* used by the Court contains six different definitions for the verb “*pronunciarse*,” including “to determine, to resolve” and “to publish a sentence or decision,” both of which connote a binding decision and both of which are apt considering that they apply when the verb “*pronunciarse*” “is used in the context of a decision made by a third party, as opposed to the context where an individual is ‘pronouncing’ his or her views on a topic.”⁸¹¹ As Professor Alegría further notes, the “latter definition is preceded by the abbreviation ‘Der.’ for ‘*derecho*,’⁸¹² which means that it is the definition used in a legal context,

⁸⁰⁴ *Id.*

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.* ¶¶ 76-78.

⁸⁰⁷ *Id.* ¶ 76.

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.*

⁸¹⁰ *Id.*

⁸¹¹ *Id.*; Dictionary of the Royal Spanish Academy (2001), fifth definition of “*pronunciar*” (C-50).

⁸¹² See Dictionary of the Royal Spanish Academy (2001), fifth definition of “*pronunciar*” (C-50).

thus making it clear that this definition, and not the Court’s chosen definition, is the most appropriate for interpreting terms in a Guatemalan statute.”⁸¹³

214. Moreover, as Professor Alegría observes, the verb “*pronunciarse*” in its different conjugations is used countless times in Guatemalan law in the context of the resolution of differences or issuance of a final decision or judgment, including the following examples: (i) Article 266 of the Guatemalan Constitution requires all courts to “pronounce” regarding claims of unconstitutionality;⁸¹⁴ (ii) Article 53 of the Guatemalan Civil and Procedural Code provides that if the judgment can only be “pronounced” with respect to several parties, they must all be party to the claim;⁸¹⁵ (iii) Article 197 of the Guatemalan Civil and Procedural Code provides that all judges and tribunals may perform certain evidence-gathering procedures before “pronouncing” their judgment;⁸¹⁶ (iv) Chapter VI of the Guatemalan Arbitration Law is entitled “Issuance of the Award and Termination of the Procedure” (“*Pronunciamiento del Laudo y Terminación de las Actuaciones*”);⁸¹⁷ and (v) Article 40, section 5 of the Guatemalan Arbitration Law provides that, in the award, the arbitrators shall “pronounce” regarding costs.⁸¹⁸

215. Furthermore, this interpretation comports with the CNEE’s own position in a 2003 court proceeding relating to the 2003-2008 tariffs.⁸¹⁹ As the CNEE stated in submissions to the Court in that unrelated matter, “[i]n the event of discrepancies, pursuant to Article 98 of the [RLGE] and [Article] 75 of the [LGE], an Expert Commission shall be constituted, which shall *resolve* [the discrepancies] in a term of 60 days.”⁸²⁰ In addition, the terms of reference for the

⁸¹³ Alegría ¶ 76 (CER-1).

⁸¹⁴ *Id.* ¶ 77; Constitution, Art. 266 (C-11).

⁸¹⁵ Alegría ¶ 77 (CER-1); Decree Law No. 107, Civil and Procedural Code dated 14 Sept. 1963, Art. 53 (C-2)

⁸¹⁶ Alegría ¶ 77 (CER-1); Decree Law No. 107, Civil and Procedural Code dated 14 Sept. 1963, Art. 197 (C-2).

⁸¹⁷ Alegría ¶ 77 (CER-1); Decree No. 67-95, Arbitration Law dated 17 Nov. 1995, Ch. VI (C-14).

⁸¹⁸ Alegría ¶ 77 (CER-1); Decree No. 67-95, Arbitration Law dated 17 Nov. 1995, Ch. VI, Art. 40 (C-14).

⁸¹⁹ Alegría ¶ 75 (CER-1); CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6 (C-81).

⁸²⁰ Alegría ¶ 75 (CER-1); CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6 (emphasis added) (C-81).

2003-2008 VAD tariff review, which were drafted by the CNEE in 2002, provided, in Article 6.5, that the discrepancies will be identified in each stage report and, if they persist in the final study, will be “*conciliadas*” or “reconciled” by the Expert Commission.⁸²¹ Moreover, as Professor Alegría explains, a contrary interpretation “would undermine the object and purpose of the LGE, which is to depoliticize the tariff process and to place the regulator and distributor on equal footing so that the tariffs will be set on the basis of objective and impartial criteria.”⁸²² To interpret RLGE Article 98 “as granting the CNEE the discretion as to whether to abide by the expert commission’s ruling vitiates the role of the expert commission and leaves the distributor at the mercy of the regulator, an outcome that the LGE was designed to prevent.”⁸²³

216. Two judges on the Constitutional Court wrote dissenting opinions, concluding that the CNEE had violated LGE Article 75 and RLGE Article 98 when it issued Resolution CNEE-144-2008.⁸²⁴ As reflected in the dissenting opinions, Magistrate Gladys Chacón Corado reasoned that allowing the CNEE to rely on its own tariff study when the distributor fails to make all of the corrections requested by the CNEE in its observations would defeat the objective of LGE Article 75 and the formation of the Expert Commission, whose purpose is to resolve the discrepancies between the CNEE and the distributor.⁸²⁵ Magistrate Chacón further observed that the CNEE’s argument that “it was authorized to use and approve an independent study, because, after the Experts’ Commission issued its opinion, the [CNEE] noticed that the distributor had not made all the corrections to the tariff study . . . lacks legal grounds.”⁸²⁶ As Magistrate Chacón noted, the CNEE had, in fact, issued a resolution establishing the Expert Commission, which

⁸²¹ Alegría ¶ 75 (CER-1); Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.6.5 (C-59).

⁸²² Alegría ¶ 78 (CER-1).

⁸²³ *Id.*; *see also id.* (stating that “[t]he most critical aspect of the LGE in ensuring the realization of these objectives is the provision providing that an expert commission will resolve any discrepancies that continue to exist between the regulator and distributor after the study has been presented and observations on that study have been made and responded to”).

⁸²⁴ Alegría ¶ 79 (CER-1); Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009, at 22-30 (C-331).

⁸²⁵ Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009, at 22-23 (C-331); Alegría ¶ 78 (CER-1).

⁸²⁶ Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009, at 23 (C-331).

expressly acknowledged “that there were corrections to be made that were not considered by the distributor.”⁸²⁷ Magistrate Chacón further noted that, “if the distributor were bound to make all the corrections, the discrepancies mentioned in [Article] 75 of the General Electricity Law would never arise, which . . . is a violation of the constitutional rights of the petitioner and hence, the amparo action should have been granted.”⁸²⁸

217. Magistrate Mario Pérez Guerra similarly opined that the CNEE cannot rely on the distributor’s failure to incorporate all of the CNEE’s observations as a justification for issuing the tariff schedules based on its own study.⁸²⁹ As Magistrate Pérez observed, the discrepancies between EEGSA’s original tariff study and the CNEE’s observations were the basis for the establishment of the Expert Commission; those discrepancies cannot “be a reason, at the same time, to state that the Distributor failed to comply with the procedure in the case at issue.”⁸³⁰ Magistrate Pérez further observed that, in the case at hand, “the Distributor was not in the position that grants the [CNEE] the power to prepare a tariff study on its own, hiring an independent Consultant,” because the Distributor, at that time, “did not incur the omission specified in the last paragraph of [Article] 98 which, in the opinion of the undersigned, takes place when, under this provision, the Distributor fails to send any study or correction within the prescribed terms.”⁸³¹

218. By decision dated 24 February 2010, the Constitutional Court similarly reversed the decision of the Eighth Civil Court, thus ending EEGSA’s legal challenge to CNEE Resolution GJ-Providencia-3121, dissolving the Expert Commission.⁸³² The Court wrongly ruled that the dissolution of the Expert Commission, after it already had issued its decision, could not have caused any injury to EEGSA, and that the Expert Commission’s decision was not

⁸²⁷ *Id.*

⁸²⁸ *Id.*

⁸²⁹ *Id.* at 24-30.

⁸³⁰ *Id.* at 29.

⁸³¹ *Id.*

⁸³² Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010 (C-345); *see also* Alegría ¶ 80 (CER-1).

binding on the CNEE because experts, under Guatemalan law, traditionally have been considered advisors rather than arbiters.⁸³³ The Court also made a reference to the decision issued by the Court on 18 November 2009, and included the same considerations.⁸³⁴ As Professor Alegría notes, “the two magistrates of the Constitutional Court who had dissented in the prior case were not chosen to form part of the Court in this case.”⁸³⁵

219. The Constitutional Court thus permitted the CNEE to leave in place the tariffs that it had set unilaterally on the basis of its own tariff study and without any input from the distributor, undermining the central purpose behind the LGE and the fundamental framework on which Claimant had relied when making its investment.⁸³⁶

7. The Unlawful And Unjustifiably Low VAD Was Economically Devastating For EEGSA’s Investors And Caused TECO To Sell Its Investment At A Substantial Loss

220. Had the Expert Commission’s rulings been accepted and the Bates White study used to set EEGSA’s tariffs, as it should have been, EEGSA’s VAD would have increased from approximately US\$ 178 million per year in 2007 (based on a VNR of US\$ 583.69 million) to approximately US\$ 232 million per year (based on a VNR of US\$ 1.053 million).⁸³⁷ By contrast, the VAD that Sigla calculated – and that the CNEE used to calculate the unlawfully imposed tariffs – was US\$ 85 million (based on a VNR of US\$ 465 million).⁸³⁸ As Mr. Kaczmarek pointedly notes, Sigla’s VNR was so divorced from reality as to lack credibility:

SIGLA’s VNR determination lacks economic justification. Five years earlier, in 2003, the CNEE had set the tariff based on a VNR

⁸³³ See Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 15-17 (C-345).

⁸³⁴ *Id.* at 15-16.

⁸³⁵ Alegría ¶ 80 (CER-1).

⁸³⁶ See *id.* at ¶ 81.

⁸³⁷ Giacchino ¶¶ 72-73 (CWS-4); Kaczmarek ¶¶ 102-103 (CER-2).

⁸³⁸ Sigla Stage G, VAD Cost Components, at 4 (C-267); Kaczmarek ¶¶ 114, 123 (further observing that, as a result of the CNEE’s unlawful conduct, EEGSA’s VAD “decreased significantly from the Second Rate Period to the Third Rate Period”) (CER-2).

of US\$ 584 million. Given the level of inflation that occurred with respect to the costs of constructing a distribution network (let alone the increase in general inflation) between 2003 and 2008, plus the increased size of the network, it defies economic logic that the VNR could actually decrease by approximately 20 percent.⁸³⁹

221. As Mr. Gillette notes, the VAD that the CNEE imposed upon EEGSA was “approximately 45% lower than the VAD for the prior tariff period.”⁸⁴⁰ Indeed, the CNEE itself touted the fact that the VAD imposed on EEGSA was lower than that applied in the First Rate Period (when EEGSA’s VAD was set based on data from El Salvador).⁸⁴¹ As a result of the unlawful VAD, EEGSA’s revenues fell by approximately 40 percent,⁸⁴² and TECO was denied its expected return on its investment.⁸⁴³ In 2009 and 2010, until TECO sold its investment in EEGSA, EEGSA’s nominal return on capital fell far short of its cost of capital, as determined by the CNEE.⁸⁴⁴

⁸³⁹ Kaczmarek ¶ 114 (CER-2); *see also id.* ¶ 13 (noting that Sigla’s VNR and FRC determinations were “neither [] rational or economically justified.”); *id.* ¶ 14 (stating that lowering the VAD to a level below that in place during the first tariff period “does not make economic sense given the expansion in the network and inflation that occurred over the intervening 10-year period.”); Calleja ¶ 49 (stating that the CNEE’s use of Sigla’s study “resulted in a decrease – rather than an increase – in the VAD, which was nonsensical”) (CWS-3).

⁸⁴⁰ Gillette ¶ 22 (CWS-5) (citing TECO Guatemala, Inc. Operations Summary for Periods Ended September 30, Board Book Write-up dated Oct. 2008, at 4-23 (C-303)); *see also* TECO Energy’s Form 10-K dated 26 Feb. 2009, at 49 (“The new lower VAD set by CNEE was, on average 50% below the prior level, essentially putting all of EEGSA’s earnings, which had previously averaged about \$ 10 million annually, at risk during the time this tariff remains in effect.”) (C-324); Callahan ¶ 5 (quoting same) (CWS-2).

⁸⁴¹ Colom Bickford, Carlos E., President of the CNEE, “*Evolución de la Metodología del Calculo Tarifario en Guatemala*” dated Apr. 2010, at 5 (C-348); *see also* Kaczmarek ¶ 123-124 (CER-2); *id.* ¶ 96 (showing that the first period returns were “consistently lower than the lower bound of 7 percent established by the regulatory framework”).

⁸⁴² Gillette ¶ 24 (CWS-5) (citing TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up dated Apr. 2009, at 4-17 (C-326)).

⁸⁴³ Gillette ¶ 22 (CWS-5) (citing TECO Guatemala, Inc. Operations Summary for Periods Ended September 30, Board Book Write-up dated Oct. 2008, at 4-23 (C-303)); *see also* TECO Energy’s Form 10-K dated 26 Feb. 2009, at 35 (“The lower VAD is expected to put all of the earnings from EEGSA to TECO Guatemala, which had previously averaged about \$ 10 million annually, at risk as long as the lower rates are in effect.”) (C-324); Callahan ¶ 5 (quoting same) (CWS-2).

⁸⁴⁴ Kaczmarek ¶ 185, Appendix 3.B (showing that EEGSA’s nominal cost of capital in 2009 and in 2010 (through October 21) was 6.9% and 5.5%, respectively, while the CNEE calculated EEGSA’s nominal cost of capital in 2008 to be 9.6%) (CER-2).

222. As Mr. Maté explains, with the low VAD in place, EEGSA's preliminary economic analysis revealed that EEGSA would incur losses and might have difficulties making payments on its debt, if operating and capital expenditures remained at existing levels.⁸⁴⁵ EEGSA thus adopted a "drastic plan cutting costs and investment,"⁸⁴⁶ leaving EEGSA unable "to operate at the level of service that the public had come to expect."⁸⁴⁷ Ms. Callahan, TECO's CFO, nevertheless questioned whether this action was sufficient and, specifically, whether the cost-cutting measures "were sustainable over the long term, as it is impossible for any company, especially one in the electricity distribution service, to postpone indefinitely capital expenditures."⁸⁴⁸ And although projections taking into account these cost-cutting measures indicated that EEGSA would be able to pay its creditors, Ms. Callahan remained concerned that "there may not be sufficient cushion to absorb operating outcomes less favorable than those forecast."⁸⁴⁹ As TECO reported at the time, "[t]he effect of the VAD more than offset the benefit of 28,000 additional customers, or 2.9% customer growth, higher energy sales, and cost control measures at EEGSA."⁸⁵⁰

223. Similar concerns were shared by the preeminent rating agencies. On 26 August 2008, five days after EEGSA began applying the new tariff rates, Standard & Poor's Rating Services downgraded EEGSA and listed it on its CreditWatch.⁸⁵¹ In downgrading EEGSA, Standard and Poor laid the blame squarely on the CNEE's unlawful tariffs:

The rating downgrade and CreditWatch listing reflect the announcement by the Electric Energy National Commission in Guatemala (CNEE) of the applicable tariffs for the 2008-2013 period, *establishing a value-added distribution (a component of the tariff that reimburses the distribution company for its investment)*

⁸⁴⁵ Maté ¶ 57 (CWS-6).

⁸⁴⁶ *Id.*; see also Gillette ¶ 24 (CWS-5); Callahan ¶ 6 (CWS-2).

⁸⁴⁷ Gillette ¶ 22 (CWS-5) (citing TECO Guatemala, Inc. Operations Summary for Periods Ended September 30, Board Book Write-up dated Oct. 2008, at 4-23 (C-303)).

⁸⁴⁸ Callahan ¶ 6 (CWS-2).

⁸⁴⁹ Callahan ¶ 6 (CWS-2).

⁸⁵⁰ TECO Energy's Form 19K dated 26 Feb. 2010, at 49 (C-346); Callahan ¶ 6 (quoting same) (CWS-2).

⁸⁵¹ Gillette ¶ 24 (CWS-5).

that is about 55% lower than EEGSA's tariffs for the previous period.

This change will result in deteriorated profitability and cash flow measures as well as limited liquidity during the second half of 2008 and going forward The rating on EEGSA is constrained by the inherent challenges associated with the operating environment in the Republic of Guatemala The rating also reflects the company's limited financial flexibility, given the undeveloped capital markets in Guatemala compared with distribution companies operating in countries with more developed financial markets.⁸⁵²

224. Almost four months later, on 11 December 2008, Moody's followed suit in downgrading EEGSA.⁸⁵³ Just like Standard & Poor, Moody's expressly blamed the CNEE's inadequate VAD:

The rating action is driven by the anticipated material deterioration in the near term of EEGSA's credit metrics, in the wake of the August 2008 tariff decision by the Comision Nacional de Electricidad y Energia ("CNEE") regarding the reduction of the Value Added of Distribution-charge ("VAD-charge") by 45% and the subsequent disputes among the CNEE and EEGSA. Historically, Moody's had considered the Guatemalan Regulatory framework to be relatively stable but still untested and developing. The untested characteristic has been highlighted by the outcome of the 2008 VAD-review process whereby certain mechanisms in the legislation were used for the first time, resulting in additional unresolved disputes. Furthermore, *the 2008 VAD-review raised concerns about the predictability and transparency of the process, and the overall supportiveness of the regulatory framework. Based upon the results of the VAD-review process, EEGSA's financial profile will deteriorate substantially from historical results due to a material weakening in its ability to recover operating costs and generate a sufficient rate of return.*⁸⁵⁴

⁸⁵² Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 (emphasis added) (C-297); Gillette ¶ 24 (quoting same) (CWS-5).

⁸⁵³ Gillette ¶ 25 (CWS-5).

⁸⁵⁴ Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (emphasis added) (C-305); Gillette ¶ 25 (quoting same) (CWS-5).

225. Having determined that TECO had suffered “significant financial losses” as a consequence of the arbitrary regulatory actions taken by the Government,⁸⁵⁵ TECO responded favorably when its partner, Iberdrola, approached it about the possibility of selling its troubled investment.⁸⁵⁶ Ms. Callahan and TECO’s CEO concluded that, “if [TECO] were able to take the cash from the sale and use it to retire debt, it would be a better use of the cash than continuing to collect disappointing returns on the investment in EEGSA,” further underscoring “how poorly the company’s investment in EEGSA was performing.”⁸⁵⁷ After thorough consideration, TECO concluded that “exiting the investment made sense, so long as the price (although less than it would have been but for the circumstances of the 2008-2013 VAD) was appropriate.”⁸⁵⁸

226. In mid-2010, Colombia’s Empresas Públicas de Medellín E.S.P. (EPM) indicated to Iberdrola that it was interested in purchasing EEGSA.⁸⁵⁹ EPM’s overture led TECO and its partners to negotiate DECA II’s sale to EPM.⁸⁶⁰ After weeks of negotiations, EPM sent TECO a binding offer letter to purchase DECA II for US\$ 605 million.⁸⁶¹ TECO’s share of the purchase price, based on its 30 percent equity interest in DECA II, was US\$ 181.5 million.⁸⁶² As Ms. Callahan explains:

TECO’s reason for selling its interest in EEGSA was that the investment’s financial performance had failed to meet expectations. To justify undertaking the increased risk of investing abroad, TECO expected that its returns on EEGSA would be greater than its returns on its Florida utilities. Following the imposition of the 2008-2013 VAD, it became clear to us that TECO could not achieve those expected returns. Given the Guatemalan Government’s refusal to negotiate with us regarding EEGSA’s VAD, TECO determined that it had no choice but to sell

⁸⁵⁵ Callahan ¶ 5 (CWS-2).

⁸⁵⁶ *Id.* ¶ 7-8.

⁸⁵⁷ *Id.* ¶ 8.

⁸⁵⁸ *Id.* ¶ 9.

⁸⁵⁹ *Id.* ¶ 10.

⁸⁶⁰ Callahan ¶ 10 (CWS-2).

⁸⁶¹ Letter from EPM to Iberdrola, TPS and EDP dated 6 Oct. 2010 (C-352); Callahan ¶ 11 (CWS-2).

⁸⁶² Callahan ¶ 11 (CWS-2).

its stake in EEGSA notwithstanding the fact that the sales price was lower than what we should have obtained had Guatemala acted in accordance with its law.⁸⁶³

On 21 October 2010, TECO and its partners in EEGSA entered into a stock purchase agreement with EPM whereby EPM purchased DECA II for the amount set forth in its binding offer letter.⁸⁶⁴

227. As shown by Mr. Kaczmarek in his Report and detailed further below, between 1 August 2008 (when the CNEE arbitrarily imposed its VAD on EEGSA) and 21 October 2010 (when TECO sold its interest in DECA II), TECO suffered lost cash flow as a result of the unlawful VAD in an amount of US \$ 17,806,000.⁸⁶⁵ In addition, TECO received nowhere close to the amount that it would have received for its shares in EEGSA had Guatemala not taken the unlawful action described in detail above. Upon selling its ownership interest to EPM on 21 October 2010, TECO consequently suffered losses in the amount of US\$ 219,288,000.⁸⁶⁶ Taking into account the time value and opportunity cost of money, TECO thus suffered damages of US\$ 249,524,000 as a direct result of Guatemala's unlawful measures.⁸⁶⁷

III. GUATEMALA VIOLATED ARTICLE 10.5 OF THE DR-CAFTA

228. As demonstrated above, the CNEE arbitrarily decided, for political reasons and in breach of its obligations under the LGE and RLGE, to impose its own tariff on EEGSA, thus contravening TECO's legitimate expectations that the CNEE would carry out its regulatory powers in accordance with the law. As demonstrated below, the Government's unlawful and arbitrary actions, in contravention of the Law and Regulations on which Guatemala induced TECO to invest, violated Guatemala's obligation under the DR-CAFTA to accord fair and equitable treatment to TECO's investment.

⁸⁶³ *Id.* ¶ 11 (internal footnotes and citations omitted).

⁸⁶⁴ Stock Purchase Agreement between Iberdrola, TPS, EDP, and EPM dated 21 Oct. 2010 (C-356); *see also* Minutes of TECO Energy, Inc. Board of Directors meeting dated 14 Oct. 2010, at 2 (approving the sale) (C-354); Callahan ¶ 11 (CWS-2).

⁸⁶⁵ Kaczmarek ¶ 224, Table 20 (CER-2).

⁸⁶⁶ *Id.*

⁸⁶⁷ *Id.*

A. Article 10.5 Of The DR-CAFTA Prohibits States From Frustrating An Investor’s Legitimate Expectations Or From Taking Arbitrary Measures Against A Protected Investment

229. Article 10.5 of the DR-CAFTA sets out the “minimum standard of treatment” that each State Party must accord to covered investments, such as EEGSA.⁸⁶⁸ Article 10.5 provides in full:

(1) Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

(2) For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

(3) A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Annex 10-B confirms that the customary international law minimum standard of treatment of aliens, as that phrase is used in Article 10.5, “refers to all customary international law principles that protect the economic rights and interests of aliens.”⁸⁶⁹

⁸⁶⁸ The Dominican Republic – Central America – United States Free Trade Agreement dated 5 Aug. 2004 (“DR-CAFTA”), Chapter Ten, Art. 10.5 (CL-1).

230. As the U.S. Government and commentators have observed, Article 10.5 of the DR-CAFTA is substantively identical to Article 1105 of the NAFTA.⁸⁷⁰ As explained below, the decisions of tribunals in NAFTA cases and other relevant cases establish that a State will be deemed to have violated the obligation to accord a foreign investor the minimum standard of treatment if it violates an investor's legitimate expectation on which the investor relied to make the investment, if it failed to act in good faith, or if it engaged in arbitrary conduct. While bad faith on the part of the State necessarily will establish a violation of the minimum standard of treatment, an investor need not demonstrate bad faith to engage the international responsibility of the State.

231. In the NAFTA case of *Mondev v. United States*,⁸⁷¹ for example, the tribunal found "no doubt" that the NAFTA's reference to the minimum standard of treatment refers to the standard under "customary international law as it stood no earlier than the time at which NAFTA came into force."⁸⁷² The tribunal noted in this regard the considerable development over time in both substantive and procedural rights under international law, as well as the concordant body of practice reflected in more than 2,000 investment treaties that "almost uniformly provide for fair

⁸⁶⁹ DR-CAFTA, Annex 10-B ("Customary International Law") (CL-1); see also Vienna Convention on the Law of Treaties, U.N. Treaty Series, vol. 1155, p. 331, done at Vienna on 23 May 1969, entered into force on 27 Jan. 1980, Art. 31(1)-(2) ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: . . .") (CL-2).

⁸⁷⁰ See, e.g., United States Trade Representative, The Dominican Republic – Central America – United States Free Trade Agreement: Summary of the Agreement, available at http://www.ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file74_7284.pdf (observing that the provisions of DR-CAFTA "reflect traditional standards incorporated in earlier U.S. investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties) and in customary international law") (CL-1); David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. Int'l & Comp. L. Rev. 331, 356-357 (2007) (CL-50); see also Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions, 31 July 2001, available at <http://www.state.gov/documents/organization/38790.pdf> (CL-55).

⁸⁷¹ *Mondev International Ltd. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/99/2, Award of 11 Oct. 2002 ("*Mondev v. United States*") (CL-31).

⁸⁷² *Id.* ¶ 125.

and equitable treatment of foreign investments.”⁸⁷³ The tribunal also observed that each State party to the NAFTA accepted that the minimum standard of treatment “can evolve” and “has evolved.”⁸⁷⁴ The tribunal in *Mondev* thus concluded that, in modern times, “what is unfair or inequitable need not equate with the outrageous or the egregious,” and “a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”⁸⁷⁵

232. In *ADF v. United States*,⁸⁷⁶ another NAFTA case, the tribunal concurred with and quoted extensively from the decision in *Mondev*.⁸⁷⁷ Like the tribunal in *Mondev*, the tribunal in *ADF* observed that “the customary international law referred to in Article 1105(1) is not ‘frozen in time’ and that the minimum standard of treatment does evolve,” so that the NAFTA incorporates “customary international law ‘as it exists today.’”⁸⁷⁸ The tribunal further observed that a State would be deemed to have violated the minimum standard of treatment if its measures were “idiosyncratic or aberrant and arbitrary.”⁸⁷⁹

⁸⁷³ *Id.* ¶¶ 116-117 (further observing that these treaties “will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law”); *id.* at ¶ 125 (emphasizing that “the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment”).

⁸⁷⁴ *Id.* ¶ 124; *see also id.* ¶ 119 (“The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.”).

⁸⁷⁵ *Id.* ¶ 116 (finding it “unconvincing to confine the meaning of ‘fair and equitable treatment’ . . . of foreign investments to what [that term] – had [it] been current at the time – might have meant in the 1920s when applied to the physical security of an alien”); *Chemtura Corporation v. Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Award of 2 Aug. 2010 ¶ 121 (observing that it could not “overlook the evolution of customary international law, nor the impact of BITs on this evolution”) (CL-14); *Merrill & Ring Forestry L.P. v. The Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Award of 31 Mar. 2010 (“*Merrill & Ring v. Canada*”) ¶ 193 (noting “a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community”) (CL-29).

⁸⁷⁶ *ADF Group Inc. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1, Award of 9 Jan. 2003 (“*ADF v. United States*”) (CL-4).

⁸⁷⁷ *Id.* ¶¶ 180-186.

⁸⁷⁸ *Id.* ¶ 179.

⁸⁷⁹ *Id.* ¶ 188.

233. The tribunal in *Waste Management v. Mexico*,⁸⁸⁰ a seminal case on the minimum standard of treatment, took note of the discussions of that standard in prior NAFTA cases and found that “despite certain differences of emphasis a general standard for Article 1105 [providing for the minimum standard of treatment] is emerging.”⁸⁸¹ In oft-cited remarks that have established the contemporary minimum standard of treatment in the context of foreign investment, the tribunal in *Waste Management* thus observed:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety. . . . In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.⁸⁸²

A State thus will be deemed to have violated its obligation to accord the minimum standard of treatment, including fair and equitable treatment, if it undertakes arbitrary measures or if it breaches representations on which the claimant reasonably relied when it made its investment.

234. Since *Waste Management*, numerous tribunals have affirmed these observations. In *Thunderbird v. Mexico*,⁸⁸³ for instance, the tribunal observed that “the concept of ‘legitimate expectations’ relates . . . to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”⁸⁸⁴ Based on the facts of that case, a majority of the

⁸⁸⁰ *Waste Management, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/3, Award of 30 Apr. 2004 (“*Waste Management v. Mexico*”) (CL-46).

⁸⁸¹ *Id.* ¶¶ 91-98.

⁸⁸² *Id.* ¶ 98.

⁸⁸³ *International Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA Chapter Eleven, UNCITRAL, Award of 26 Jan. 2006 (“*Thunderbird v. Mexico*”) (CL-25).

⁸⁸⁴ *Id.* ¶ 147; see also *Glamis Gold, Ltd. v. United States of America*, NAFTA Chapter Eleven, UNCITRAL, Award of 8 June 2009 (“*Glamis Gold v. United States*”) ¶ 627 (concurring with the decision in *Thunderbird*

tribunal concluded that the investor did not have any legitimate expectation and that Mexico thus was not liable.⁸⁸⁵ Writing separately, Professor Wälde observed that while “‘legitimate expectation’ is not explicitly mentioned” in the NAFTA or other investment treaties, it is “part of the ‘good faith’ principle which is a guiding principle (also a principle of international law) for applying the ‘fair and equitable treatment’ standard in Art. 1105, a standard that is repeated, more or less identically, in most of the other over 2500 investment treaties in force at present.”⁸⁸⁶ Although he disagreed with the disposition of the case, Professor Wälde thus concurred with the majority that “the principle of legitimate expectation forms part, i.e. a subcategory, of the duty to afford fair and equitable treatment under Art. 1105 of the NAFTA.”⁸⁸⁷

235. The tribunals in *Azurix v. Argentina*⁸⁸⁸ and *Siemens v. Argentina*,⁸⁸⁹ cases arising under the U.S.-Argentina BIT and the German-Argentina BIT, respectively, likewise found that the minimum standard of treatment under customary international law “has evolved,”⁸⁹⁰ with the *Azurix* tribunal observing that the standard is “substantially similar” to the standard of fair and equitable treatment.⁸⁹¹ Both tribunals found that the standard “does not require bad faith or

that a State would be deemed to have violated the minimum standard of treatment if it repudiated objective expectations that it had created in order to induce the investment) (CL-23); see also *id.* ¶ 621 (“agree[ing] with *International Thunderbird* that legitimate expectations relate to an examination under Article 1105(1) in such situations ‘where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct’”).

⁸⁸⁵ *Thunderbird v. Mexico* ¶ 166 (CL-25).

⁸⁸⁶ *International Thunderbird Gaming Corp. v. The United Mexican States, Separate Opinion of Thomas Walde* dated Dec. 2005 ¶ 25 (further observing that both parties and the tribunal “assume the existence of such a standard under Art. 1105,” and “can, correctly, rely on the recognition of ‘good faith’ principle – either as a separate obligation or . . . as a major interpretative principle that is applied ancillary to a principal obligation (such as ‘fair and equitable treatment’)”) (CL-24).

⁸⁸⁷ *Id.* ¶ 1.

⁸⁸⁸ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006 (“*Azurix v. Argentina*”) (CL-8).

⁸⁸⁹ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 Feb. 2007 (“*Siemens v. Argentina*”) (CL-44).

⁸⁹⁰ *Azurix v. Argentina* ¶ 361 (CL-8); *Siemens v. Argentina* ¶ 299 (CL-44); see also *id.* ¶¶ 295-297.

⁸⁹¹ *Azurix v. Argentina* ¶ 361 (CL-8); see also *id.* ¶ 364 (“The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same.”).

malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably.”⁸⁹² The tribunals concluded, moreover, that a State would be deemed to have violated the minimum standard of treatment if it frustrated “expectations that the investor may have legitimately taken into account when it made the investment.”⁸⁹³

236. In *BG Group v. Argentina*,⁸⁹⁴ a case arising under the U.K.-Argentina BIT, the tribunal concurred with the “unambiguous statement” in *Waste Management* that “commitments to the investor are relevant to the application of the minimum standard of protection under international law.”⁸⁹⁵ The tribunal concluded that the host State’s obligations accordingly “must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest.”⁸⁹⁶ The tribunal also held, “in concurrence with prior arbitral findings,” that “the violation of the standard of fair and equitable treatment does not require bad faith by the host State.”⁸⁹⁷

⁸⁹² *Id.* ¶ 372 (further observing that it would be “incoherent” to consider that a State party “has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious”); *Siemens v. Argentina* ¶ 299 (noting that bad faith is “not an essential element of the standard” under customary international law) (CL-44); see also *Glamis Gold v. United States* ¶ 616 (observing that bad faith is not required to find – but is “conclusive evidence” of – a violation of the fair and equitable treatment standard and that “an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation”) (CL-23); see also *id.* ¶ 627; *Cargill, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/05/2, Award of 18 Sept. 2009 (“*Cargill v. Mexico*”) ¶ 296 (finding that “the standard is not so strict as to require ‘bad faith’ or ‘willful neglect of duty,’” although “the presence of such circumstances will certainly suffice”) (CL-12).

⁸⁹³ *Azurix v. Argentina* ¶ 372 (CL-8); *Siemens v. Argentina* ¶ 299 (holding that “the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment.”) (CL-44).

⁸⁹⁴ *BG Group v. Argentina v. The Republic of Argentina*, UNCITRAL, Award of 24 Dec. 2007 (“*BG Group v. Argentina*”) (CL-9).

⁸⁹⁵ *Id.* ¶¶ 294, 296 (citing *Revere Copper and Brass, Inc. v. Overseas Private-Investment Corp.* for its observation that these principles are “particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action”).

⁸⁹⁶ *Id.* ¶ 298.

⁸⁹⁷ *Id.* ¶ 301.

237. The tribunal in *Biwater Gauff v. Tanzania*,⁸⁹⁸ which arose under the U.K.-Tanzania BIT, concurred with “a number of previous arbitral tribunals and commentators” that “the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”⁸⁹⁹ Relying on the decisions in *Mondev, Waste Management*, and *Thunderbird*, and “applying the general threshold as articulated (in particular) by the tribunal in *Waste Management*,” the tribunal in *Biwater Gauff* identified “Protection of legitimate expectations,” “Good faith,” and “Transparency, consistency, non-discrimination” as “Specific Components of the Standard.”⁹⁰⁰ With regard to the protection of legitimate expectations, the tribunal observed that “the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.”⁹⁰¹ With regard to good faith, the tribunal observed that “the standard includes the general principle recognised in international law that the contracting parties must act in good faith, although bad faith on the part of the State is not required for its violation.”⁹⁰² And with regard to transparency, consistency, and non-discrimination, the tribunal observed that “the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.”⁹⁰³

238. Similarly, in *Rumeli v. Kazakhstan*,⁹⁰⁴ a case arising under the Turkey-Kazakhstan BIT, the tribunal endorsed “the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in

⁸⁹⁸ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008 (“*Biwater Gauff v. Tanzania*”) (CL-10).

⁸⁹⁹ *Id.* ¶ 592.

⁹⁰⁰ *Id.* ¶¶ 596-599, 601-602.

⁹⁰¹ *Id.* ¶ 602.

⁹⁰² *Id.*

⁹⁰³ *Id.*

⁹⁰⁴ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008 (“*Rumeli v. Kazakhstan*”) (CL-39).

customary international law.”⁹⁰⁵ The tribunal further observed that each standard encompasses, among other things, four “concrete principles” – first, “the State must act in a transparent manner;” second, “the State is obliged to act in good faith;” third, “the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;” and fourth, “the State must respect procedural propriety and due process.”⁹⁰⁶

239. Again, in *Duke Energy v. Ecuador*,⁹⁰⁷ a case arising under the U.S.-Ecuador BIT, the tribunal noted “the evolution in the latest ICSID decisions,” and held that the standard for fair and equitable treatment under the BIT and the minimum standard of treatment under customary international law are “essentially the same.”⁹⁰⁸ The tribunal also concurred with the findings of earlier tribunals that “a standard of fair and equitable treatment in international law has indeed emerged,” and that an “essential element” of that standard is “a stable and predictable legal and business environment.”⁹⁰⁹ Tying this issue to another “important element of fair and equitable treatment,” the tribunal observed that “stability of the legal and business environment is directly linked to the investor’s justified expectations.”⁹¹⁰ In this context, the tribunal observed that a breach of an investor’s expectations would give rise to international liability if the expectations were legitimate and reasonable at the time of the investment, arose from conditions that the State offered to the investor, and were relied upon by the investor when it decided to invest.⁹¹¹ The tribunal in *Duke Energy* also concurred with the “consistent line of cases that a breach of fair and equitable treatment does not presuppose bad faith on the part of the State.”⁹¹²

⁹⁰⁵ *Id.* ¶ 611 (further observing that any difference “is more theoretical than real”).

⁹⁰⁶ *Id.* ¶ 609.

⁹⁰⁷ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 Aug. 2008 (“*Duke Energy v. Ecuador*”) (CL-19).

⁹⁰⁸ *Id.* ¶¶ 333, 335-337; *see also Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of 17 Mar. 2006 ¶ 291 (stating that “the difference between the Treaty standard . . . and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real”) (CL-42).

⁹⁰⁹ *Duke Energy v. Ecuador* ¶ 339 (CL-19).

⁹¹⁰ *Id.* ¶ 340.

⁹¹¹ *Id.*

⁹¹² *Id.* ¶ 341.

240. The NAFTA tribunal in *Cargill v. Mexico*, meanwhile, observed that a State would be deemed to have violated the minimum standard of treatment if its regulatory authority took arbitrary actions.⁹¹³ In that context, the tribunal in *Cargill* agreed with the International Court of Justice in the *ELSI* case that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law” – action that is “substituted for the rule of law” through “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”⁹¹⁴ The tribunal thus held that a State would be deemed to have violated the minimum standard if its action “constitutes an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.”⁹¹⁵

241. The findings of these various tribunals with regard to the minimum standard of treatment under customary international law were endorsed yet again as recently as last year in the NAFTA case of *Merrill & Ring v. Canada*.⁹¹⁶ In *Merrill & Ring*, the tribunal observed that, even if there were no “stand-alone obligations” under the NAFTA or international law regarding good faith and the prohibition of arbitrariness, “these concepts are to a large extent the expression of general principles of law and hence also a part of international law. . . . Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law.”⁹¹⁷ The tribunal also noted the “close connection” between these general principles of law and the “availability of a secure legal environment.”⁹¹⁸

⁹¹³ *Cargill v. Mexico* ¶¶ 291-293 (CL-12).

⁹¹⁴ *Id.* ¶ 291 (further observing that this holding of the International Court of Justice “has been accepted by at least two of the State Parties to the NAFTA as the ‘best expression’ of arbitrariness”).

⁹¹⁵ *Id.* ¶ 293.

⁹¹⁶ *Merrill & Ring v. Canada* (CL-29).

⁹¹⁷ *Id.* ¶ 187; see also *Glamis Gold v. United States* ¶ 625 (concluding that “arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals”) (emphasis omitted) (CL-23).

⁹¹⁸ *Merrill & Ring v. Canada* ¶ 187 (CL-29).

242. These observations are particularly relevant in this case because, as noted above, Article 10.5 of the DR-CAFTA encompasses “all customary international law principles that protect the economic rights and interests of aliens.”⁹¹⁹ Under the DR-CAFTA, each State party thus must comply with the general principles of law ensuring good faith, non-arbitrariness, and the provision of a stable and secure legal environment.

243. The tribunal in *Merrill & Ring* further observed that a State must not only respect these general principles of law, but also must “provide[] for the fair and equitable treatment of alien investors within the confines of reasonableness.”⁹²⁰ In reaching this conclusion, the tribunal in *Merrill & Ring* referred to the NAFTA decisions in *Mondev*, *ADF*, *Waste Management*, and *GAMI*, and found a “trend towards liberalization of the standard applicable to the treatment of business, trade and investments” that has “continued unabated over several decades and has not yet stopped.”⁹²¹ Taking note of prior NAFTA decisions that found that a State could not engage in “[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process,” the tribunal observed that “[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.”⁹²² The tribunal concluded that the applicable standard thus “protects against all such acts or behavior that might infringe a sense of fairness, equity, and reasonableness.”⁹²³

244. As this review of recent cases reflects, the minimum standard of treatment under customary international law has evolved and, in the context of foreign investment, has converged in substance with the standard of fair and equitable treatment. Specifically, as demonstrated above, it now is axiomatic that a host State has legal obligations under the minimum standard of

⁹¹⁹ DR-CAFTA, Annex 10-B (“Customary International Law”) (CL-1).

⁹²⁰ *Merrill & Ring v. Canada* ¶ 213 (CL-29); see also *id.* ¶ 211 (finding that “fair and equitable treatment has become a part of customary law”).

⁹²¹ *Id.* ¶ 207.

⁹²² *Id.* ¶¶ 208, 210.

⁹²³ *Id.* ¶ 210.

treatment – and thus under Article 10.5 of the DR-CAFTA – to act in good faith, to refrain from exercising its regulatory powers arbitrarily, to provide a stable and secure legal and business environment, and to honor legitimate expectations that arose from conditions that it offered to induce the investor’s investment.

B. Numerous Tribunals Have Held The Host State Liable Where, As Here, The State Frustrated The Investor’s Legitimate Expectations Or Took Arbitrary Action Against The Investment

245. In accordance with the legal standard set out above, numerous tribunals have held the host State liable for a violation of its obligation to provide fair and equitable treatment where, as here, the State breached the investor’s legitimate expectations or took arbitrary measures against the investment.

246. In *OEPC v. Ecuador*,⁹²⁴ for example, OEPC entered into a contract with a State-owned company to explore for and produce oil, following many years in which OEPC had carried out these same activities under service agreements.⁹²⁵ Pursuant to the contract, OEPC invested in Ecuador’s oil pipeline, and the tax authorities reimbursed OEPC for payments of VAT, just as the authorities had done under the prior service agreements.⁹²⁶ After two years, however, the tax authority reinterpreted the contract and the tax law, and denied all further reimbursements and required the return of prior reimbursements.⁹²⁷ The tribunal observed that the FET provision in the BIT was “not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment.”⁹²⁸ The tribunal concluded that Ecuador’s change in the framework under which the

⁹²⁴ *Occidental Exploration and Production Co. v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award of 1 July 2004 (“*OEPC v. Ecuador*”) (CL-34).

⁹²⁵ *Id.* ¶¶ 1-2, 26.

⁹²⁶ *Id.* ¶¶ 2, 26, 32.

⁹²⁷ *Id.* ¶¶ 3, 32.

⁹²⁸ *Id.* ¶ 190; *see also id.* ¶ 191 (finding that although “there is not a VAT refund obligation under international law . . . there is certainly an obligation not to alter the legal and business environment in which the investment has been made”).

investment was made and operated gave rise to a violation of its obligation to accord fair and equitable treatment under the U.S.-Ecuador BIT.⁹²⁹

247. Similarly, *CME v. Czech Republic*⁹³⁰ also involved a State's violation of the fair and equitable treatment obligation through its frustration of the investor's legitimate expectations and failure to provide a predictable and stable regulatory regime. In that case, the Czech Media Council proposed and approved an arrangement whereby CME would invest in a joint venture that would operate a television station, and a Czech partner in the joint venture nominally would hold title to the requisite license.⁹³¹ Although the joint venture thus did not hold legal title to the license, the partners agreed, with the Media Council's approval, that they would profit from the station's success in accordance with their equity interests in the joint venture.⁹³² The joint venture became the most profitable private television station in the Czech Republic, and CME eventually acquired 99 percent of the shares.⁹³³ At that point, the Media Council insisted that the joint venture could not use the license because, as the evidence showed, "Czech political circles looked with disfavour on permitting a company overwhelmingly owned by foreigners to obtain such substantial wealth from an investment in such a conspicuous Czech company using a broadcast License allocated by the State."⁹³⁴ Under acute political pressure, the joint venture capitulated to the Media Council's demands to agree that the Czech partner had contributed "know-how," rather than the "right to use" the license on an exclusive basis.⁹³⁵

248. The tribunal in *CME* observed that although "[r]egulatory measures are common in all types of legal and economic systems," the Media Council's actions could not be "characterized as normal broadcasting regulator's regulations in compliance with and in

⁹²⁹ *Id.* ¶¶ 184, 187.

⁹³⁰ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 Sept. 2001 ("*CME v. Czech Republic*") (CL-16).

⁹³¹ *Id.* ¶¶ 98-102.

⁹³² *Id.* ¶ 102.

⁹³³ *Id.* ¶¶ 103-106.

⁹³⁴ *Id.* ¶ 110; *see also id.* ¶ 99 (finding that "changing political winds prompted a reversal").

⁹³⁵ *Id.* ¶¶ 114-115.

execution of the law, in particular the Media Law.”⁹³⁶ Rather, the tribunal found that the Media Council’s actions were “designed to force the foreign investor to contractually agree to the elimination of basic rights for the protection of its investment.”⁹³⁷ Given that the treaty did “not allow reversal and elimination of the legal basis of a foreign investor’s investment,”⁹³⁸ the tribunal concluded that the Media Council’s actions violated the Czech Republic’s obligation to accord fair and equitable treatment by eviscerating “the arrangement upon [which] the foreign investor was induced to invest.”⁹³⁹ The tribunal also concluded that these same actions violated “the principles of international law assuring the alien and his investment treatment that does not fall below the standards of customary international law.”⁹⁴⁰

249. Argentina similarly was held liable in a series of cases for disregarding a tariff regime that it had implemented for the purpose of soliciting foreign investment in large State-owned utility companies. In those cases, Argentina undertook to induce foreign investment by enacting laws and regulations that guaranteed, among other things, that utility tariffs would be calculated every five years in U.S. dollars and then adjusted semi-annually based on the U.S. Producer Price Index.⁹⁴¹ Following the collapse of its financial markets in the late 1990s, however, Argentina decided to convert existing debt obligations from dollars into pesos at a one-

⁹³⁶ *Id.* ¶ 603.

⁹³⁷ *Id.* ¶ 603.

⁹³⁸ *Id.* ¶ 467.

⁹³⁹ *Id.* ¶ 611.

⁹⁴⁰ *Id.* ¶ 614. Although the tribunal in *Lauder v. Czech Republic* reached a contrary conclusion regarding the State’s liability on the same set of facts, the tribunal did not express any disagreement regarding the content of the fair and equitable treatment obligation. Rather, it found that the claimant had not established that the Media Council had acted in an inconsistent manner because, in the tribunal’s view, the Media Council’s actions “were aimed at *specifying*, not altering, the content of [the parties’] relationships in order to ensure a clear situation in observance of the Media Law.” *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of 3 Sept. 2001 ¶ 301 (CL-38); *see also id.* ¶¶ 295-34. The tribunal also concluded that the Media Council’s actions were not the proximate cause of the investor’s loss. *See id.* ¶¶ 234-235, 304.

⁹⁴¹ *See, e.g., LG&E Energy Corp., LG&E Capital Corp., and LG&E Int’l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 Oct. 2006 (“*LG&E v. Argentina*”) ¶¶ 35-52, 119 (CL-27); *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005 (“*CMS v. Argentina*”) ¶¶ 133, 137-138, 144, 161 (finding that the guarantees gave rise to legal rights and that “it was precisely because the right to tariff calculations in dollars was guaranteed that the privatization program was as successful as it was”) (CL-17).

to-one exchange rate (the so-called “pesification” of the dollar) and to discontinue any further reviews or adjustments of the existing tariffs.⁹⁴²

250. In the first of these cases, *CMS v. Argentina*,⁹⁴³ the tribunal found that Argentina had transformed the legal and business environment under which the investment was made by removing guarantees that “were crucial for the investment decision.”⁹⁴⁴ Finding “unequivocally” that “fair and equitable treatment is inseparable from stability and predictability,”⁹⁴⁵ the tribunal observed that a government’s disregard of its own legal framework is contrary to the “specific objective” of foreign investment law.⁹⁴⁶ The tribunal concluded that Argentina’s disregard of its legal framework relating to the tariffs thus violated its obligation to accord fair and equitable treatment under the U.S.-Argentina BIT.⁹⁴⁷ The tribunal also expressly noted that the same actions violated the minimum standard of treatment under customary international law because “the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary international law.”⁹⁴⁸

251. Based on similar facts, the tribunal in *LG&E v. Argentina*⁹⁴⁹ also found that Argentina violated its obligation to accord fair and equitable treatment under the U.S.-Argentina BIT by establishing – and then disregarding – “an attractive framework of laws and regulations that addressed the specific concerns of foreign investors with respect to the country risks involved in Argentina.”⁹⁵⁰ Specifically, the tribunal in *LG&E* found that it was “unfair and

⁹⁴² See, e.g., *LG&E v. Argentina* ¶¶ 63-71 (CL-27).

⁹⁴³ *CMS v. Argentina* (CL-17).

⁹⁴⁴ *Id.* ¶ 275.

⁹⁴⁵ *Id.* ¶ 276.

⁹⁴⁶ *Id.* ¶ 277.

⁹⁴⁷ *Id.* ¶ 281.

⁹⁴⁸ *Id.* ¶ 284.

⁹⁴⁹ *LG&E v. Argentina* (CL-27).

⁹⁵⁰ *Id.* ¶ 133.

inequitable” to disregard guarantees governing the calculation and adjustment of the tariffs in U.S. dollars, which were “very important to investors to protect their investment.”⁹⁵¹ Thus, although the tribunal “recognize[d] the economic hardships that occurred during this period, and certain political and social realities that at the time may have influenced the Government’s response to the growing economic difficulties,” the tribunal concluded that “Argentina went too far by completely dismantling the very legal framework constructed to attract investors.”⁹⁵²

252. Each subsequent tribunal in this series of cases reached the same conclusion. In largely overlapping discussions of the fair and equitable treatment claims, the tribunals in *Enron*⁹⁵³ and *Sempra*⁹⁵⁴ both found “beyond any doubt” that the pesification of the dollar and the freezing of the tariffs “substantially changed the legal and business framework under which the investment was decided and implemented.”⁹⁵⁵ Both tribunals concluded that even if Argentina “was guided by the best of intentions,” which there was “no reason to doubt,” Argentina still had failed to accord fair and equitable treatment.⁹⁵⁶ In *BG Group*,⁹⁵⁷ the tribunal found that Argentina violated the minimum standard of treatment under customary international law because its “derogation from the tariff regime, dollar standard and adjustment mechanism was and is in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment.”⁹⁵⁸ And in *National Grid*,⁹⁵⁹ the tribunal concluded that Argentina breached its obligation to accord fair and equitable treatment because “it fundamentally changed the legal

⁹⁵¹ *Id.* ¶ 134; *see also id.* ¶¶ 135-138.

⁹⁵² *Id.* ¶ 139.

⁹⁵³ *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007 (“*Enron v. Argentina*”) (CL-21).

⁹⁵⁴ *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 Sept. 2007 (“*Sempra v. Argentina*”) (CL-43).

⁹⁵⁵ *Enron v. Argentina* ¶ 264 (CL-21); *Sempra v. Argentina* ¶ 303 (CL-43).

⁹⁵⁶ *Enron v. Argentina* ¶ 268 (CL-21); *Sempra v. Argentina* ¶ 304 (CL-43).

⁹⁵⁷ *BG Group v. Argentina* (CL-9).

⁹⁵⁸ *Id.* ¶¶ 303, 307.

⁹⁵⁹ *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award of 3 Nov. 2008 (“*National Grid v. Argentina*”) (CL-33).

framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them.”⁹⁶⁰

253. The tribunal in *Azurix*,⁹⁶¹ an unrelated case against Argentina arising under the U.S.-Argentina BIT, concerned the arbitrary actions of provincial authorities in Argentina who intervened “for political gain” during a tariff dispute with ABA, which provided potable water and sewerage services.⁹⁶² As noted above, the tribunal held that the minimum standard of treatment under customary international law has evolved and is “substantially similar” to the standard under the BIT, and, in any event, that any difference had no material significance in light of the facts of that case.⁹⁶³ The tribunal found that Argentina’s provincial authorities publicly invited ABA’s customers not to pay their bills while ABA appealed the regulatory authority’s decision in the dispute, publicly pressured officials of the regulatory authority, required ABA not to apply the new tariff that resulted from the review, and restrained ABA from collecting certain payments from its customers.⁹⁶⁴ The tribunal concluded that these actions and the politicization of the tariff regime reflected “pervasive conduct of the Province in breach of the standard of fair and equitable treatment.”⁹⁶⁵

254. The case of *ADC v. Hungary*⁹⁶⁶ also concerned arbitrary regulatory action that led the tribunal to hold Hungary liable for failing to accord fair and equitable treatment. In that case, the claimants contracted, through a subsidiary, with a State agency to construct, renovate, and operate two terminals at the Hungarian International Airport. Soon after the claimants completed the construction and renovation works, however, the Ministry of Transport decreed that only a State entity could carry out operations at the airport, thus leading to the claimants’ ouster.

⁹⁶⁰ *Id.* ¶ 179.

⁹⁶¹ *Azurix v. Argentina (CL-8)*.

⁹⁶² *Id.* ¶ 144.

⁹⁶³ *See id.* ¶¶ 361, 364.

⁹⁶⁴ *Id.* ¶¶ 144, 319, 393.

⁹⁶⁵ *Id.* ¶¶ 375-377, 393.

⁹⁶⁶ *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 Oct. 2006 (“*ADC v. Hungary*”) (CL-3).

Hungary contended, among other things, that it had the right to regulate its own affairs, and that “by investing in a host State, the investor assumes the ‘risk’ associated with the State’s regulatory regime.”⁹⁶⁷ The tribunal rejected these arguments as “unacceptable” under “basic international law principles.”⁹⁶⁸ The tribunal observed that “while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries.”⁹⁶⁹ The tribunal further observed that while an investor must comply with domestic laws and regulations, it need not accept “whatever the host State decides to do to it.”⁹⁷⁰ The tribunal in *ADC* thus concluded that Hungary failed to accord fair and equitable treatment to the claimants’ investment.⁹⁷¹

255. In *PSEG v. Turkey*,⁹⁷² the tribunal likewise held Turkey liable based on its breach of the claimant’s legitimate expectations. Pursuant to an implementation contract with Turkey’s Ministry of Energy and Natural Resources, PSEG invested in a project to build a power plant. The parties, however, never agreed on the commercial terms of the project due, at least in part, to “serious administrative negligence and inconsistency,” including failures to address key points of disagreement or to review or respond to important communications; demands for a renegotiation of the implementation contract that “went far beyond the purpose of the Law and attempted to reopen aspects of the Contract that were not at issue” or within the Ministry’s authority; and “the ‘roller-coaster’ effect of the continuing legislative changes.”⁹⁷³ The tribunal found that each of these actions violated the FET provision. The tribunal affirmed the State’s obligation to ensure a stable and predictable business environment,⁹⁷⁴ finding that investors may rely “on ‘an assessment of the state of the law and the totality of the business environment at the time of the

⁹⁶⁷ *Id.* ¶ 424 (emphasis omitted).

⁹⁶⁸ *Id.* ¶¶ 423-424.

⁹⁶⁹ *Id.* ¶ 423.

⁹⁷⁰ *Id.* ¶ 424.

⁹⁷¹ *Id.* ¶ 476.

⁹⁷² *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 (“*PSEG v. Turkey*”) (CL-37).

⁹⁷³ *Id.* ¶¶ 246-250.

⁹⁷⁴ *Id.* ¶ 253.

investment.”⁹⁷⁵ The tribunal thus emphasized that, in Turkey’s case, “it was not only the law that kept changing but notably the attitudes and policies of the administration.”⁹⁷⁶ The tribunal therefore concluded that even if Turkey had acted in good faith, which there was “no reason not to believe,” Turkey had failed to accord fair and equitable treatment to the investment.⁹⁷⁷

256. In a similar vein, the tribunal in *Walter Bau v. Thailand*⁹⁷⁸ found that Thailand violated its obligation to accord fair and equitable treatment by arbitrarily decreasing toll payments on a tollway project. Thailand had solicited investment in this project because it lacked the resources to build the tollway on its own.⁹⁷⁹ In fact, the claimant needed to invest such large amounts that the project did not produce any return for several years, and the parties thus signed a second memorandum of agreement providing for toll increases to ensure a reasonable rate of return.⁹⁸⁰ Thailand subsequently claimed, however, that it could not increase tolls until after the removal of a ramp, which it refused to authorize while the claimant remained a shareholder in the project company.⁹⁸¹ After eight years of refusing to increase the tolls, Thailand’s Prime Minister publicly announced a decrease in the tolls.⁹⁸² The tribunal concluded that even though there was never a guarantee of any particular rate of return, the continued refusal to implement toll increases was “the culmination of a series of wrongful acts of the Respondent which converged when the Respondent decreased the tolls.”⁹⁸³

257. And, in *Biwater Gauff*,⁹⁸⁴ a case discussed above, the tribunal also based its finding of liability on arbitrary State action that breached the investor’s legitimate expectations.

⁹⁷⁵ *Id.* ¶ 255 (quoting *Saluka v. The Czech Republic* ¶ 301 (CL-16)).

⁹⁷⁶ *Id.* ¶ 254.

⁹⁷⁷ *Id.* ¶ 256.

⁹⁷⁸ *Walter Bau AG v. The Kingdom of Thailand*, Award of 1 July 2009 (“*Walter Bau v. Thailand*”) (CL-45).

⁹⁷⁹ *Id.* ¶ 12.2(a)-(b).

⁹⁸⁰ *Id.* ¶¶ 12.4(b), 12.14, 12.24.

⁹⁸¹ *Id.* ¶ 12.24.

⁹⁸² *Id.* ¶ 12.26.

⁹⁸³ *Id.* ¶¶ 12.2(g), 12.36; *see also id.* ¶ 12.44.

⁹⁸⁴ *Biwater Gauff v. Tanzania* (CL-10).

In that case, Tanzania solicited investment in water and sewerage services, and enacted legislation to establish an independent regulatory authority to regulate these activities. Rather than appoint the members of this regulatory authority, however, a Government minister took over the role and functions of regulator.⁹⁸⁵ Prior to forthcoming elections, this minister publicly announced the termination of the investor's contract, and within one month, the Government withdrew the investor's exemption on paying VAT and took other measures against the investor.⁹⁸⁶ The tribunal found that these actions violated the obligation to accord fair and equitable treatment,⁹⁸⁷ emphasizing that, "as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from [the investor's] legitimate expectation that an impartial regulator would be established to oversee relations" between its operating company and the local authorities.⁹⁸⁸

258. As shown above, tribunals routinely hold States liable for engaging in arbitrary regulatory conduct or for failing to honor the investor's legitimate expectations. As demonstrated below, Guatemala has violated its international obligation to accord TECO's investment fair and equitable treatment by engaging in arbitrary regulatory conduct and disregarding the legal and regulatory framework which it adopted to induce TECO's investment.

C. Guatemala Breached Its Treaty Obligation To Accord TECO's Investment Fair and Equitable Treatment When It Arbitrarily And In Complete Disregard Of Its Legal Framework Ignored The Expert Commission's Report And Set The Tariffs On The Basis Of Its Own Study

259. As demonstrated above, from the beginning of EEGSA's tariff review for the 2008-2013 period, Guatemala disregarded the very legal and regulatory framework that it had established to attract foreign investment in its electricity sector in order to prevent an increase in

⁹⁸⁵ *Id.* ¶ 110.

⁹⁸⁶ *Id.* ¶¶ 497, 501, 503, 511.

⁹⁸⁷ *Id.* ¶¶ 605.

⁹⁸⁸ *Id.* ¶ 615.

the VAD, which, for political reasons, Guatemala wanted to avoid at all costs.⁹⁸⁹ The CNEE thus arbitrarily and unlawfully imposed its own VAD, rather than the VAD that it was required to apply according to the law.⁹⁹⁰ In so doing, the CNEE deliberately ignored both the Expert Commission's Report and Bates White's revised tariff study, and instead relied on its own commissioned study, which neither EEGSA nor Bates White had been given the opportunity to review or comment on and which contravened several rulings of the Expert Commission.⁹⁹¹ The result was a VAD that did not provide EEGSA's foreign investors with a rate of return within the range guaranteed by the LGE.⁹⁹² Both the process and the result of the tariff review were unlawful and arbitrary, and contravened TECO's legitimate expectations that resulted from Guatemala's representations during the privatization process, as well as the laws that Guatemala adopted specifically to entice TECO's investment in EEGSA.

260. Like Argentina in the *CMS, LG&E, Enron, Sempra, BG Group*, and *National Grid* cases discussed above, Guatemala did "not have the economic-financial resources"⁹⁹³ to upgrade its electricity sector and thus undertook to induce much-needed foreign investment by establishing an attractive framework of laws and regulations that promised potential investors both legal stability and reasonable rates of return.⁹⁹⁴ Of paramount importance was the fact that the newly-adopted legal regime did not grant the regulator unfettered discretion to set the distributor's tariff rates.⁹⁹⁵ Consistent with Guatemala's goal of depoliticizing the tariff-setting process and fostering foreign investment, the LGE and RLGE established "a reliable VAD calculation process, in which various actors provide input to calculate a VAD based on economic

⁹⁸⁹ See *supra* II.F.

⁹⁹⁰ See *supra* II.F.5.

⁹⁹¹ See *supra* II.F.5.f.

⁹⁹² See *supra* II.F.7; *infra* IV.

⁹⁹³ LGE, Second Recital of the Preamble (C-17).

⁹⁹⁴ See *supra* II.A-B; Sales Memorandum, at 53 (noting that "[o]ne of the main goals of the incumbent administration is to attract foreign investment on the back of reforms designed to promote a free market and the privatization of state-controlled companies.") (C-29).

⁹⁹⁵ See *supra* II.B, II.C; Alegría ¶ 22 (CER-1).

and technical data.”⁹⁹⁶ Central to this structure was the role of the Expert Commission, which was to be the arbiter of disputes between the regulator and the distributor relating to the VAD so that the distributor would not be left at the mercy of the CNEE.⁹⁹⁷ As Guatemala recognized at the time of establishing its new legal and regulatory framework, absent this independent check on the Government’s rate-setting power, foreign investment would not have flowed to Guatemala’s electricity sector.⁹⁹⁸

261. With the enactment of the LGE, Guatemala represented that it would calculate the VAD on the basis of the new replacement value of the network assets of a model efficient company⁹⁹⁹ and guaranteed the distributor a rate of return of between 7% and 13% in real terms (*i.e.*, adjusted for inflation).¹⁰⁰⁰ These guarantees were not only adopted into law, but touted by Guatemala to foreign investors, including TECO, to induce their investment.¹⁰⁰¹ As demonstrated above, in deciding to invest in EEGSA, TECO relied on the new legal and regulatory framework established by Guatemala for its electricity sector, as well as on its expectation that Guatemala’s conduct following its investment in EEGSA would be fair and equitable.¹⁰⁰²

262. By adopting the legal and regulatory framework that it did, Guatemala was able to sell its 80% interest in EEGSA to the Consortium in 1998 for US\$ 520 million, an amount that far exceeded the US \$ 13.9 million that Price Waterhouse had concluded the company could

⁹⁹⁶ Alegría ¶ 27 (CER-1).

⁹⁹⁷ *See supra* II.B.2.

⁹⁹⁸ *See supra* II.A.-B.2.

⁹⁹⁹ *See supra* II.B.1; Kaczmarek ¶¶ 60, 80 (CER-2); Alegría ¶ 25 (CER-1); LGE, Art. 73 (C-17).

¹⁰⁰⁰ *See supra* II.B.1; Kaczmarek ¶ 77 (CER-2); Alegría ¶ 25 (CER-1); LGE, Art. 79 (C-17).

¹⁰⁰¹ *See supra* II.C; Empresa Eléctrica de Guatemala, S.A., Investors’ Profiles dated 17 Feb. 1998, at 9, 44 (C-26); Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998, at 9-10 (C-27); Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998, at 39 (C-28); Sales Memorandum, at 48-49 (C-29); Gillette ¶ 8 (CWS-5).

¹⁰⁰² *See supra* II.C; TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 7-3, 7-6 (C-32); EEGSA Privatization, Management Presentation dated 9 July 1998, at 4-5 (C-33); Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998, at 19 (C-28); Gillette ¶¶ 11, 13 (CWS-5).

obtain for 100% of its shares in 1991, if Guatemala chose to adopt a legal framework that would set tariffs on the basis of the value of the actual company's assets¹⁰⁰³ or the company's 1990 net book value of approximately US\$ 60 million.¹⁰⁰⁴ Of course, as Mr. Kaczmarek explains, this meant that the investors would need "to recover the much higher regulatory asset base"¹⁰⁰⁵ through higher electricity tariffs.

263. Having obtained the benefit of the bargain it struck, Guatemala began in 2007 to dismantle the very framework of laws and regulations that had induced TECO's investment in EEGSA through a series of arbitrary, unlawful, and abusive measures in order to control the tariff review process and reduce EEGSA's VAD, in contravention of TECO's legitimate expectations.

264. First, shortly before EEGSA's tariff review was to commence, the MEM amended RLGE Article 98 to grant the CNEE the right to rely on its own tariff study to calculate the VAD (i) where the distributor failed to submit a tariff study, and (ii) where, after the distributor submitted the tariff study and the CNEE had made its observations, the distributor failed to send the corrections to the original tariff study.¹⁰⁰⁶ As Professor Alegría explains, this amendment was "at odds with the LGE's express provisions," which provide that the distributor's consultant is responsible for preparing the tariff study,¹⁰⁰⁷ and thus was unconstitutional under Guatemalan law.¹⁰⁰⁸ Apart from its unconstitutionality, the amendment also upset the system of checks and balances established by the LGE for calculating the distributor's VAD, by granting the CNEE

¹⁰⁰³ See *supra* II.B.1, II.C; Kaczmarek ¶¶ 59, 64 (CER-2); Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991, at 26 (noting that "although based upon net asset value, EEGSA's stock would be worth approximately Q297.8 million (about \$59.6 million), a more appropriate valuation based upon earnings indicates a much lower value of approximately Q69.6 million (about \$13.9 million)") (C-7).

¹⁰⁰⁴ Kaczmarek ¶ 64 (CER-2); see also Giacchino ¶ 7 (CWS-4).

¹⁰⁰⁵ Kaczmarek ¶ 59 (CER-2); see also Giacchino ¶ 7 (CWS-4).

¹⁰⁰⁶ See *supra* II.F.1; Alegría ¶ 36 (CER-1); Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (C-104).

¹⁰⁰⁷ LGE, Art. 74 (providing that the distributor "shall calculate the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE]") (C-17); *id.*, Art. 75 (providing that the CNEE "shall review the studies performed [by the distributor's consultant] and may make comments on the same").

¹⁰⁰⁸ Alegría ¶¶ 20, 40 (CER-1) (explaining that regulations that are either inconsistent with a statute or not authorized by a statute are invalid).

the right, in certain circumstances, to commission its own tariff study and to publish the new tariff schedules based on that study, without any input from the distributor.¹⁰⁰⁹ Having the distributor’s consultant calculate the VAD was an integral part of the legal regime, which Guatemala specifically emphasized during EEGSA’s privatization, by stating in the Memorandum of Sale, for example, that “VADs must be calculated *by distributors* by means of a study commissioned from an engineering firm.”¹⁰¹⁰

265. While “[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged,”¹⁰¹¹ the amendment to RLGE Article 98 undermined the LGE’s objective of placing the regulator and the distributor on equal footing so that the tariff rates would be set on the basis of objective and impartial criteria.¹⁰¹² Moreover, the amendment ultimately was used by the CNEE to contravene the tariff review process set forth in the LGE – on which TECO had relied in deciding to invest in EEGSA – and to set its own irrationally low VAD based on a tariff study that the CNEE had commissioned as early as November 2007, several months before EEGSA was even scheduled to deliver its own tariff study.¹⁰¹³

266. The CNEE then deliberately drafted the terms of reference for EEGSA’s tariff study so as to require a reduction in the VAD, while expressly granting itself the right to interfere in and even stop the preparation of the consultant’s study, if the CNEE disagreed with its content.¹⁰¹⁴ As set forth above, those terms of reference were an unlawful exercise of the

¹⁰⁰⁹ *Id.* ¶ 39.

¹⁰¹⁰ Sales Memorandum, at 49 (emphasis added) (C-29); *see also* Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998, at 19 (noting that “[t]he tariff methodology is revised every five years by the CNEE. Any material change in tariff methodology must be supported by a study conducted by an internationally recognized independent consultant”) (C-28).

¹⁰¹¹ *Saluka v. Czech Republic* ¶ 305 (CL-42).

¹⁰¹² *Alegría* ¶ 78 (CER-1).

¹⁰¹³ *See supra* II.F.5.f; *Alegría* ¶ 69 (CER-1); Contract between the CNEE and Sigla dated 12 Nov. 2007 (C-132).

¹⁰¹⁴ *See supra* II.F.2.

CNEE's regulatory power, in violation of the LGE and RLGE.¹⁰¹⁵ When the CNEE eventually felt compelled to remove the most objectionable provisions from the terms of reference after EEGSA had obtained provisional relief in court,¹⁰¹⁶ the CNEE turned its attention to contriving other means by which to ensure that it could dictate the results of the tariff review process. Determined to disregard the distributor's consultant's study, it made no effort whatsoever to engage constructively with EEGSA or its consultant and, instead, arbitrarily invoked amended RLGE Article 98 throughout the process in an unlawful attempt to grant itself the right to calculate the VAD through its own commissioned study.¹⁰¹⁷

267. Unwilling to accept the result of an impartial study conducted on the basis of economic and technical criteria, the CNEE called for the constitution of an Expert Commission to resolve the parties' dispute, and the Government then undertook to manipulate that process. It did so in three ways – first, by submitting issues that it never previously had raised as purported discrepancies for the Expert Commission to resolve;¹⁰¹⁸ second, by adding Article 98 *bis* to the RLGE,¹⁰¹⁹ which granted the Government the authority to appoint two of the three members of the Expert Commission, thus subverting the requirement in LGE Article 75 that the third member of the Expert Commission be appointed “by mutual agreement of the parties;”¹⁰²⁰ and third, by seeking to reserve for itself, rather than the Expert Commission, the power to decide whether to approve Bates White's revised study.¹⁰²¹ As Professor Alegría explains, and as demonstrated above, each of these actions would have fundamentally altered the legal framework for the resolution of disputes relating to the VAD.¹⁰²² For example, if the CNEE's

¹⁰¹⁵ See *id.*; Alegría ¶¶ 41-45 (CER-2); see also Calleja ¶¶ 15-18 (CWS-3); Maté ¶¶ 8-9 (CWS-6).

¹⁰¹⁶ See *supra* II.F.2; Alegría ¶ 47 (CER-2); Calleja ¶ 20 (CWS-3); Maté ¶¶ 11-12 (CWS-6); Decision of the Sixth Civil Court of First Instance dated 4 June 2007 (C-114); Resolution of the Sixth Civil Court of First Instance Confirming Amparo C2-2007-4329 dated 11 June 2007 (C-115).

¹⁰¹⁷ See *supra* II.F.3.

¹⁰¹⁸ See *supra* II.F.4; Calleja ¶ 36 (CWS-3).

¹⁰¹⁹ See *supra* II.F.4; Government Resolution No. 145-2008 dated 19 May 2008, Art. 1 (adding Article 98 *bis* to the RLGE) (C-212); see also Alegría ¶¶ 51-53 (CER-1); Calleja ¶ 38 (CWS-3); Maté ¶ 38 (CWS-6).

¹⁰²⁰ See *supra* II.F.4; Alegría ¶¶ 53-57 (CER-1); Calleja ¶ 38 (CWS-3); LGE, Art. 75 (C-17).

¹⁰²¹ See *supra* II.F.4; Calleja ¶¶ 34, 37 (CWS-3).

¹⁰²² See *supra* II.F.4; Alegría ¶¶ 53, 65 (CER-1).

list of discrepancies had been accepted, EEGSA and Bates White would not have had an opportunity to address various issues before the Expert Commission rendered its ruling. EEGSA thus insisted that the Expert Commission also take into account the responses that Bates White prepared prior to the Expert Commission's commencement of its work.¹⁰²³ Applying Article 98 *bis*, moreover, would have "alter[ed] the balance in favor of the Government" and deprived the Expert Commission of its independence and neutrality, thus undermining "a key objective of the LGE, which is to grant neither the regulator nor the distributor the right to impose its will on the other but, instead, to have disputes resolved in a depoliticized process on the basis of economic, technical, and objective considerations by a three-member panel."¹⁰²⁴ EEGSA thus threatened court action if the CNEE undertook to apply LGE Article 98 *bis* to EEGSA's tariff review.¹⁰²⁵ Similarly, if the CNEE's proposed Operating Rules had applied, the CNEE could have decided to reject Bates White's revised study for any reason and without the further review of the Expert Commission.¹⁰²⁶ EEGSA thus insisted that only the Expert Commission have the power to decide in the end whether to approve Bates White's revised study.¹⁰²⁷ In each instance, the CNEE was thwarted by the prospect of legal action challenging what were indefensible positions, and the CNEE thus went through the motions of complying with the Expert Commission process, determined, however, to unlawfully and arbitrarily ignore the result of that process.

268. The CNEE thus dissolved the Expert Commission before it could review Bates White's revised study and thus complete its function in accordance with the agreed Operating Rules, and subsequently made veiled threats to its appointed expert to ensure that he would not participate in any further meetings of the Expert Commission to review that revised study.¹⁰²⁸ After two members of the Expert Commission notified the CNEE in writing that the VAD in

¹⁰²³ Calleja ¶¶ 36-37 (CWS-3); Mate ¶ 32 (CWS-6).

¹⁰²⁴ Alegría ¶ 55 (CER-1).

¹⁰²⁵ See *supra* II.F.4; Calleja ¶ 38 (CWS-3).

¹⁰²⁶ See *supra* II.F.4; Calleja ¶¶ 34, 37 (CWS-3).

¹⁰²⁷ See *supra* II.F.4; Calleja ¶¶ 34, 37, 40 (CWS-3).

¹⁰²⁸ See *supra* II.F.5.d; Email from J. Riubrgent to C. Bastos and L. Giacchino dated 31 July 2008 (C-281).

Bates White's revised study had been calculated in accordance with the Expert Commission's decisions,¹⁰²⁹ the CNEE arbitrarily and unlawfully disregarded Bates White's revised study and imposed a VAD based on its own commissioned study, on which EEGSA had had no input.¹⁰³⁰ The CNEE's actions in unilaterally dictating EEGSA's VAD rendered the Expert Commission process without purpose and resulted in EEGSA's tariff rates being set entirely at the discretion of the CNEE, in violation of law and contrary to TECO's legitimate expectations.

269. Like the Media Council's actions in *CME v. Czech Republic*, the CNEE's actions in the present case cannot be characterized as "normal . . . regulator's regulations in compliance with and in execution of the law."¹⁰³¹ To the contrary, the CNEE's actions first in attempting to control and manipulate EEGSA's tariff review process and then in unilaterally imposing a VAD on the basis of its own commissioned study, despite the ruling of the Expert Commission to the contrary, eviscerated the legal and regulatory framework that was established to foster foreign investment and upon which TECO relied in investing in EEGSA, and left EEGSA "at the mercy of the regulator, an outcome that the LGE was designed to prevent."¹⁰³²

270. As the tribunal affirmed in *PSEG v. Turkey*, the State has an obligation to ensure a stable and predictable legal and business environment in order that investors may rely "on 'an assessment of the state of the law and the totality of the business environment at the time of the investment.'"¹⁰³³ Guatemala, however, failed to ensure a stable and predictable legal and business environment for TECO's investment in EEGSA. As in *CMS v. Argentina*, where the tribunal found that Argentina had transformed the legal and business environment under which the claimant had invested by removing guarantees that "were crucial for the investment

¹⁰²⁹ Bastos ¶¶ 35-36 (CWS-1); Giacchino ¶ 90 (CWS-4); Calleja ¶ 53 (CWS-3); Maté ¶ 55 (CWS-6); Letter from C. Bastos to the CNEE and EEGSA, dated 1 Aug. 2008 (attached to Email from C. Bastos to M. Quijivix and M. Calleja dated 1 Aug. 2008) (C-288); Letter from L. Giacchino to the CNEE and EEGSA, dated 31 July 2008 (attached to Email from L. Giacchino to M. Quijivix and M. Calleja dated 1 Aug. 2008) (C-284).

¹⁰³⁰ See *supra* II.F.5.f; Resolution No. CNEE-144-2008 dated 29 July 2008, Art. I, at 3-4 (C-272); see also Alegría ¶ 61 (CER-1); Maté ¶ 53 (CWS-6); Calleja ¶ 49 (CWS-3).

¹⁰³¹ *CME v. Czech Republic* ¶ 603 (CL-16).

¹⁰³² Alegría ¶ 77 (CER-1).

¹⁰³³ *PSEG v. Turkey* ¶ 255 (CL-37).

decision,”¹⁰³⁴ Guatemala, by ignoring both the Expert Commission’s Report and Bates White’s revised tariff study and unilaterally dictating EEGSA’s VAD on the basis of its own commissioned study, on which EEGSA was given no opportunity to comment and which ignored the Expert Commission’s decisions, manifestly disregarded the system of checks and balances established by the LGE and RLGE for calculating the distributor’s VAD, and fundamentally altered the legal and business environment under which TECO had invested in EEGSA.¹⁰³⁵

271. Furthermore, as in *LG&E v. Argentina*, where the tribunal found that it was “unfair and inequitable” for Argentina to have disregarded guarantees governing the calculation and adjustment of the tariffs in U.S. dollars,¹⁰³⁶ it was unfair and inequitable for Guatemala to have disregarded express guarantees set out in the LGE and RLGE relating to the calculation and adjustment of EEGSA’s VAD. Moreover, as in *Walter Bau v. Thailand*, where Thailand unjustifiably decreased tolls leaving the investor without a reasonable rate of return on its investment,¹⁰³⁷ Guatemala wrongly refused to increase the VAD and condemned EEGSA to a rate of return that was economically unjustifiable.¹⁰³⁸ Even worse, unlike in *Walter Bau*, where the investor was not guaranteed any specific rate of return,¹⁰³⁹ the LGE guarantees the distributor a rate of return of between 7% and 13% and provides that the distributor’s return should be calculated on the new replacement value of a model efficient company’s assets.¹⁰⁴⁰ In violation of these express guarantees, the VAD imposed by the CNEE provided a return on the depreciated value of the network’s assets and, for this and other reasons, failed to provide EEGSA’s investors with a rate of return within the range guaranteed by the LGE.¹⁰⁴¹ Guatemala thus acted

¹⁰³⁴ *CMS v. Argentina* ¶ 275 (CL-17).

¹⁰³⁵ *See supra* II.C, II.F; *Alegría* ¶ 77 (CER-1).

¹⁰³⁶ *LG&E v. Argentina* ¶ 134 (CL-27).

¹⁰³⁷ *Walter Bau v. Thailand* ¶¶ 12.4(b), 12.14, 12.24 (CL-45).

¹⁰³⁸ *See supra* II.F.7; *see infra* IV.

¹⁰³⁹ *Walter Bau v. Thailand* ¶ 12.2(g) (CL-45).

¹⁰⁴⁰ *See supra* II.B.1.

¹⁰⁴¹ *See supra* II.F.5.c, II.F.5.f, II.F.7; *see infra* IV.

contrary to one of the critical promises on which TECO had relied in investing in EEGSA and which Guatemala itself had emphasized during its promotion of EEGSA's privatization.¹⁰⁴²

272. The CNEE's stated justification for its actions only underscores the arbitrary and unlawful nature of its actions. In its Resolutions, the CNEE stated that the Expert Commission's Report had confirmed that Bates White's 5 May 2008 tariff study had failed to perform all of the corrections required by the CNEE's observations and it was therefore entitled, in accordance with amended RLGE Article 98, to set the tariffs on the basis of its own commissioned study.¹⁰⁴³ The CNEE's actions were both unlawful and arbitrary. Amended RLGE Article 98 grants no such power to the CNEE, as explained above and in the expert legal opinion of Professor Alegría.¹⁰⁴⁴

273. The central premise underlying the CNEE's actions – that EEGSA was required under the law to incorporate all of the CNEE's observations into its tariff study – is wrong. As Professor Alegría explains, the LGE and RLGE clearly establish otherwise.¹⁰⁴⁵ The CNEE's interpretation makes the Expert Commission's role pointless; the parties resorted to an Expert Commission precisely because Bates White refused to incorporate all of the CNEE's observations into its study and, thus, there were discrepancies that needed to be decided.¹⁰⁴⁶ To constitute an Expert Commission to resolve those discrepancies only to ignore each of its decisions on the ground that the Expert Commission's only purpose was to verify that discrepancies existed makes a mockery of the process and renders useless one of the chief protections provided to distributors under the law.¹⁰⁴⁷ Nor would it make any difference if

¹⁰⁴² See *supra* II.C; Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998, at 19 (noting that that “[t]he new tariff package sets the discount rate between 7% and 13%,” with “[t]he initial discount rate set at 10%”) (C-28).

¹⁰⁴³ See *supra* II.F.5.f; Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 (C-272); see also Resolution No. CNEE-145-2008 dated 30 July 2008, at 3 (C-273); Resolution No. CNEE-146-2008 dated 30 July 2008, at 3 (C-274).

¹⁰⁴⁴ See *supra* II.F.1; see also *supra* II.F.5.f, II.F.6; Alegría ¶¶ 65-69 (CER-1).

¹⁰⁴⁵ Alegría ¶ 67 (CER-1).

¹⁰⁴⁶ See Maté ¶ 54 (CWS-6); Calleja ¶ 50 (CWS-3); Alegría ¶ 74 (CER-1).

¹⁰⁴⁷ See Alegría ¶ 74 (CER-1); Maté ¶ 54 (CWS-6); Calleja ¶ 50 (CWS-3).

amended RLGE Article 98 did, in fact, grant such power to the CNEE (which it does not): in that case, the enactment and application of that regulation to EEGSA's tariff review would have violated Guatemala's obligation to accord TECO's investment fair and equitable treatment for the very same reasons.

274. Indeed, the CNEE's reliance on the Sigla study in setting EEGSA's tariffs was rejected by the lower courts, which found that the CNEE's interpretation of amended RLGE Article 98 "lacks validity given that the law foresees the possibility that the distributor does not agree with certain observations, which gives rise to the existence of discrepancies."¹⁰⁴⁸ As the Second Civil Court of First Instance thus ruled, in relying on its own commissioned study to set EEGSA's tariff rates, the CNEE had violated "the due process guaranteed by the Political Constitution of the Republic of Guatemala"¹⁰⁴⁹ and "acted outside the boundaries established in the General Law of Electricity and its Regulations."¹⁰⁵⁰ The lower courts also rejected the CNEE's unilateral dissolution of the Expert Commission, finding that the CNEE had violated EEGSA's right of defense and the principles of due process and legality.¹⁰⁵¹

275. The Constitutional Court's reversal of these decisions was politically motivated. First, the Court upheld the CNEE's actions on the ground that the Expert Commission's decisions were not binding on the CNEE, a rationale on which the CNEE in its Resolutions had not even relied and, in fact, had implicitly rejected.¹⁰⁵² As Resolution CNEE-144-2008 reflects,¹⁰⁵³ far from claiming that the Expert Commission's decision was non-binding, the CNEE relied expressly on the Expert Commission's Report to purportedly confirm EEGSA's failure "to perform all the corrections pursuant to the observations indicated in Resolution

¹⁰⁴⁸ Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-7964-2008, at 6 (C-328).

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *Id.* at 7.

¹⁰⁵¹ Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009, at 10 (C-330); Alegría ¶ 80 (CER-1).

¹⁰⁵² Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009, at 14-15 (C-331); Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 16-17 (C-345); see also *supra* II.F.6; Alegría ¶ 74 (CER-1).

¹⁰⁵³ Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 (C-272).

CNEE-63-2008,” which it wrongly concluded gave it the right to base the tariffs on Sigla’s report.¹⁰⁵⁴ The Constitutional Court’s *ex post facto* justification for ignoring the Expert Commission’s Report is thus directly at odds with the justification put forth by the CNEE when it took its unlawful action.

276. As a NAFTA Chapter Eleven tribunal held, “[w]hat matters here in terms of timing is the position that the United States took at the time of enactment and contemporaneously or proximately therewith,” and “it is the United States’ conduct at the time that constitutes the relevant best evidence of its position.”¹⁰⁵⁵ Similarly, what is relevant here is the position that Guatemala took in issuing Resolution CNEE-144-2008, and not the *ex post facto* justification adopted by the Constitutional Court in upholding the CNEE’s arbitrary action. This principle has been affirmed by several ICSID tribunals, including in *ADC v. Hungary* and in *Rumeli v. Kazakhstan*, where the tribunal rejected the State’s *ex post facto* justifications for its actions.¹⁰⁵⁶

277. In any event, the Constitutional Court’s decision is so bereft of reason and contrary to the law that one can only conclude, as Professor Alegría does, that it was “influenced by political considerations to prevent an increase in EEGSA’s electricity tariffs”¹⁰⁵⁷ The Court rests its decision on its interpretation of the verb “*pronunciarse*,” – LGE Article 75

¹⁰⁵⁴ *Id.*

¹⁰⁵⁵ *Canfor v. United States; Tembec v. United States; Terminal Forest Products v. United States*, UNCITRAL (NAFTA), Decision on Preliminary Question dated 6 June 2006 ¶ 326 (CL-11).

¹⁰⁵⁶ *ADC v. Hungary* ¶ 262 (finding no contemporary evidence to support Hungary’s allegation that the ouster of the claimants from their operation of two terminals at the airport was the result of poor construction and renovation works, and thus rejected it as, at best, “a half-hearted *ex post facto* attempt at justification”) (CL-3); *Rumeli v. Kazakhstan* ¶ 617 (finding that the State-appointed working group improperly relied not only on the stated basis for the initial decision, “but also on various entirely different grounds than those forming the basis for the initial decision”) (CL-39).

¹⁰⁵⁷ Alegría ¶ 75 (CER-1). As reflected in reports of non-governmental organizations, Guatemala’s judicial system is highly susceptible to political influence and has been rated as “corrupt.” See, e.g., Transparency International, *Judicial corruption and the military legacy in Guatemala*, in GLOBAL CORRUPTION REPORT 211, 213 (2007) (C-100); International Commission of Jurists, *Attacks on Justice – Guatemala* 4 (2005) (C-90). With respect to Guatemala’s Constitutional Court, the International Commission of Jurists reported that, in 2006, the Constitutional Court was entirely re-appointed, “amid suspicions of political maneuvering and rigged appointments.” International Commission of Jurists, *Attacks on Justice – Guatemala* 4 (2005) (C-90).

provides that the Expert Commission “*se pronunciará sobre las discrepancias*”¹⁰⁵⁸ – and incorrectly concluded that the word connotes a non-binding decision.¹⁰⁵⁹ But, as explained by Professor Alegría, (i) the *Diccionario de la Real Academia Española* on which the Court relies contains an express definition for the word when it is used in a legal context – “to publish a sentence or decision” – which indicates that the decision is binding;¹⁰⁶⁰ (ii) other definitions of the word in that same dictionary, such as “to determine, to resolve,” likewise connote a binding decision;¹⁰⁶¹ and (iii) the word is used countless times in Guatemalan law, including in another provision of the LGE, and in each instance it refers to a decision that is binding.¹⁰⁶²

278. Moreover, Guatemala, in fact, represented – both to TECO and other foreign investors and in submissions to its own courts – that the Expert Commission’s ruling was binding. Specifically, in promoting EEGSA’s privatization, Guatemala informed potential investors, including TECO, that “in the event of discrepancy, a three-expert Commission will be convened *to resolve* the differences.”¹⁰⁶³ The CNEE similarly argued in an unrelated court proceeding that, “[i]n the event of discrepancies, pursuant to Article 98 of the [RLGE] and [Article] 75 of the [LGE], an Expert Commission shall be constituted which shall *resolve* [the discrepancies] in a term of 60 days.”¹⁰⁶⁴ In addition, the CNEE’s terms of reference for the

¹⁰⁵⁸ LGE, Art. 75 (C-17).

¹⁰⁵⁹ Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009, at 14-15 (C-331).

¹⁰⁶⁰ Alegría ¶ 76 (CER-1); Dictionary of the Royal Spanish Academy (2001), fifth definition of “*pronunciar*” (C-50).

¹⁰⁶¹ Alegría ¶ 76 (CER-1); Dictionary of the Royal Spanish Academy (2001), second definition of “*pronunciar*” (C-50).

¹⁰⁶² Alegría ¶ 77 (CER-1).

¹⁰⁶³ Sales Memorandum, at 49 (in Spanish, “*en caso de discrepancia se nombrará una Comisión de tres peritos para que resuelva sobre las diferencias*”) (emphasis added) (C-29).

¹⁰⁶⁴ CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5 (in Spanish, “*De existir discrepancia, según artículo 98 del [RLGE] y [artículo] 75 de la [LGE], debe formarse una Comisión Pericial, que resolverá [las discrepancias] en un plazo de 60 días*”) (emphasis added) (C-81); Alegría ¶ 75 (CER-1).

2003-2008 VAD tariff review provided that any discrepancies that persist will be “reconciled” by the Expert Commission.¹⁰⁶⁵

279. In accordance with fundamental principles of estoppel and waiver, Guatemala was not entitled to rely on its Court’s ruling that the Expert Commission’s decision was merely “illustrative” or “informative” in nature to set its own tariffs in disregard of the Expert Commission’s ruling. As the tribunal observed in *ADC v. Hungary*, “[a]lmost all systems of law prevent parties from blowing hot and cold.”¹⁰⁶⁶ Under the principle of estoppel, which “rest[s] on principles of good faith and consistency,”¹⁰⁶⁷ a party cannot change its position after it has “made or consented to a particular statement upon which another party relies in subsequent activity to its detriment or the other’s benefit.”¹⁰⁶⁸ This principle has been affirmed by the ICJ¹⁰⁶⁹ and various ICSID tribunals,¹⁰⁷⁰ and has been applied to preclude a party from “acting

¹⁰⁶⁵ Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.6.5 (in Spanish, “*conciliadas*”) (emphasis added) (C-59); Alegría ¶ 75 (CER-1).

¹⁰⁶⁶ *ADC v. Hungary* ¶ 475 (CL-3); see also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141 (Cambridge University Press 2006) (1958) (stating that the principle of estoppel demands that a party “not be allowed to blow hot and cold – to affirm at one time and deny at another”) (citation omitted) (CL-48).

¹⁰⁶⁷ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 644 (7th ed. 2008) (CL-53); see also D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL 176, 176 (1957) (noting that the basis of the rule of estoppel “is the general principle of good faith and as such finds a place in many systems of law”) (CL-49); ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 525 (Kluwer Law International 2009) (noting that “[e]stoppel operates to preclude a party from acting inconsistently where the result of the inconsistency would be to prejudice the other party”) (CL-47).

¹⁰⁶⁸ MALCOLM N. SHAW, INTERNATIONAL LAW 350 (4th ed. 1997) (CL-56); see also D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL 176 (1957) (“The rule of estoppel . . . operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.”) (CL-49).

¹⁰⁶⁹ See, e.g., *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* [1962] ICJ Rep. 6, 32 (holding that Thailand was “precluded by her conduct from asserting that she did not accept” a boundary that Thailand had observed and benefitted from for 50 years) (CL-13).

¹⁰⁷⁰ See, e.g., *ADC v. Hungary* ¶ 475 (CL-3); *Duke Energy Int’l Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award of 18 Aug. 2008 ¶ 231 (observing that “estoppel or the principle of consistency – has also been universally applied as a general legal principle, both in civil and international law, to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another”) (CL-20).

inconsistently where the result of the inconsistency would be to prejudice the other party.”¹⁰⁷¹ By having relied on its Court’s decision that the Expert Commission’s ruling has no binding force to enable the CNEE to impose its own tariffs on EEGSA, after previously stating the opposite in order to induce foreign investment, Guatemala is “blow[ing] hot and cold,” in violation of a long-established principle of international law, which requires parties to act consistently.¹⁰⁷²

280. In no uncertain terms, Guatemala’s actions in connection with EEGSA’s tariff review “infringe[d] a sense of fairness, equity and reasonableness,” in violation of the standard set forth by the NAFTA tribunal in *Merrill & Ring*.¹⁰⁷³ The CNEE’s actions in ignoring the decisions of the Expert Commission and Bates White’s revised study and, instead, basing the tariff rates on its own commissioned study that failed to adhere to the Expert Commission’s rulings and which EEGSA was not even accorded any opportunity to comment on, in the words of the *Cargill v. Mexico* tribunal, “constitutes an unexpected and shocking repudiation of [the LGE’s] policy’s very purpose and goals, or otherwise subverts a domestic law or policy for an ulterior motive.”¹⁰⁷⁴ Paralleling the acts of Tanzania in the *Biwater Gauff* case, Guatemala created the CNEE as a “functionally independent” body to assure potential investors that the tariff review process would be depoliticized and would result in economically justifiable rates, so Guatemala’s “failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from [the investor’s] legitimate expectation”¹⁰⁷⁵ TECO accordingly seeks an award from this Tribunal finding that Guatemala has breached its treaty obligation to accord its investment fair and equitable treatment and ordering Guatemala to compensate it for the damages it consequently suffered, as set forth below.

¹⁰⁷¹ ANDREW NEWCOMBE AND LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 525 (Kluwer Law International, 2009) (CL-47).

¹⁰⁷² *See, e.g.,* BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 141 (Cambridge University Press 2006) (1958) (CL-48).

¹⁰⁷³ *Merrill & Ring v. Canada* ¶ 210 (CL-29).

¹⁰⁷⁴ *Cargill v. Mexico* ¶ 293 (CL-12).

¹⁰⁷⁵ *Biwater Gauff v. Tanzania* ¶ 615 (CL-10).

IV. DAMAGES

A. TECO Is Entitled To Compensation In An Amount To Wipe Out All Of The Financial Consequences Of Guatemala's Breach Of Its Treaty Obligations

281. Apart from providing a *lex specialis* regarding the measure of damages in the event of a lawful expropriation,¹⁰⁷⁶ the DR-CAFTA does not contain any express language regarding the measure of damages for other violations of the Treaty, including its fair and equitable treatment provision. International law, which applies in such circumstances,¹⁰⁷⁷ is clear in this regard. As set forth by the Permanent Court of International Justice in the seminal *Chorzów Factory* case, damages must compensate for the injuries caused by the internationally-unlawful act and re-establish the status quo that would have existed but for the wrongful act:

The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.¹⁰⁷⁸

282. This principle of full reparation was adopted by the International Law Commission in Article 31 of its Articles on Responsibility of States for Internationally Wrongful

¹⁰⁷⁶ DR-CAFTA Art. 10.7.2-3 (CL-1).

¹⁰⁷⁷ *Id.*, Art. 10.22.1 (providing that “the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”); see also *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award of 13 Nov. 2000 ¶ 310 (“There being no relevant [damages] provisions of the NAFTA other than those contained in Article 1110 [concerning expropriation] the Tribunal turns for guidance to international law.”) (CL-41); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award of 21 Nov. 2007 ¶¶ 277-278 (“The NAFTA provides no further guidance as to the proper principles to measure damages and compensation . . . In the instant case, the principles upon which compensation should be awarded derive from the applicable international law rules.”) (CL-5); *Azurix v. Argentina* ¶¶ 421-422 (adopting the principle set forth in *Chorzów Factory* to compensate the claimant for a breach of the fair and equitable treatment standard after noting that NAFTA Chapter Eleven tribunals had done the same and that “the lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to the tribunals to determine it in light of the circumstances of the case taking into account the principles of both international law and the provisions of NAFTA”) (CL-8).

¹⁰⁷⁸ *Chorzów Factory (Ger. v. Pol.)*, Judgment No. 13 (Merits) of 13 Sept. 1928, P.C.I.J. Series A, No. 17 at 40 (1928) (“*Chorzów Factory*”) (CL-15).

Acts (“ILC Articles on State Responsibility”),¹⁰⁷⁹ and has gained broad acceptance in international decisions and awards.¹⁰⁸⁰ As the tribunal in *ADC v. Hungary* observed, “there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.”¹⁰⁸¹ Accordingly, as explained by the tribunal in *AAPL v. Sri Lanka*, “the amount of the compensation due has to be calculated in a manner that adequately reflects the full value of the investment lost as a result of said destruction and the damages incurred as a result thereof.”¹⁰⁸²

¹⁰⁷⁹ JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* (2005) (“ILC Articles on State Responsibility”), Art. 31(1) (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”) (CL-54); *id.*, Art. 36 cmt. 3 (“The fundamental concept of ‘damages’ is . . . reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.”) (quoting *Lusitania* case, UNRIAA, vol. VII (Sales No. 1956.V5), p. 32, at p. 39 (1923)).

¹⁰⁸⁰ See *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/02, Decision on Interpretation and on the Request for Provisional Measures of 7 Mar. 2011 ¶ 40 (finding the *Chorzów Factory* standard to be a “universally acknowledged standard”) (CL-7); *Rumeli v. Kazakhstan* ¶ 141 (“The general test of ‘full reparation,’ found in Article 31 of the ILC Draft Articles, can be simply stated. It is that classically formulated by the Permanent Court of International Justice in the *Chorzów Factory* Case”) (CL-40); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of 28 Mar. 2011 ¶ 149 (“It is generally admitted that in situations where the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT”) (CL-26).

¹⁰⁸¹ *ADC v. Hungary* ¶ 493 (CL-3).

¹⁰⁸² *Asian Agricultural Prods. Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990 ¶ 88 (CL-6); see also *ADC v. Hungary* ¶ 495 (providing that claimants should be awarded, “in the words of the *Chorzów Factory* decision, ‘payment of a sum corresponding to the value which a restitution in kind would bear’”) (CL-3); *Siemens v. Argentina* ¶ 352 (holding that “compensation must take into account ‘all financially assessable damage’ or ‘wipe out all the consequences of the illegal act’”) (CL-44); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 Aug. 2007 ¶ 8.2.7 (providing that “regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action”) (CL-18); *Biwater Gauff v. Tanzania* ¶ 774 (observing that “compensation is to cover ‘any financially assessable damage including loss of profits insofar as it is established’”) (CL-10); *Petrobart Ltd. v. the Kyrgyz Republic*, SCC Case No. 126/2003, Award of 29 Mar. 2005, at 77-78 (holding that “in so far as it appears that Petrobart has suffered damage as a result of the Republic’s breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred”) (CL-35).

283. As detailed below, and in accordance with this principle, TECO is entitled to damages in an amount (i) to recover its share of lost cash flow that its investment would have earned between 1 August 2008 (the date the CNEE imposed its tariffs) and 21 October 2010 (when TECO sold its investment) had EEGSA been able to collect the VAD to which it was entitled, plus (ii) the difference between the price for which TECO sold its shares and the amount that its shares would have been worth had Guatemala not breached its Treaty obligations, and (iii) pre- and post-award compounded interest at a commercially appropriate rate.

B. TECO Is Entitled To Recover Its Portion Of EEGSA’s Lost Cash Flow From August 2008 Until October 2010 As Well As An Amount To Compensate It For The Depressed Value At Which It Sold Its Shares In October 2010

284. In his Expert Report, Brent Kaczmarek, a Managing Director of Navigant Consulting, Inc., who is a Chartered Financial Analyst with vast experience serving as a financial, valuation, and damages expert, calculates the measure of damages that would place TECO in the financial position it would be in had Guatemala not violated its Treaty obligations.

285. To do this, Mr. Kaczmarek divides the calculation of TECO’s damages into two periods. For the first period, between 1 August 2008, when the CNEE imposed the Sigla tariffs, and 21 October 2010, when TECO sold its investment, TECO suffered lost cash flow as a result of the imposition of the unlawful tariffs.¹⁰⁸³ On 21 October 2010, EPM purchased TECO’s shares in EEGSA for their fair market value as of that date (which value would reflect the cash flows expected to be generated from the investment from that day forward). The second period of damage thus measures the lost value of TECO’s shares in EEGSA as a result of the imposition of the Sigla tariff.¹⁰⁸⁴ Mr. Kaczmarek uses the same approaches to project damages in both of these actual and “but for” scenarios, the only difference being that for the period measuring lost

¹⁰⁸³ See also, e.g., *LG&E v. Argentina* ¶ 59 (finding that “that the loss incurred by Claimants is the amount of dividends that they would have earned but for the abrogation of the basic guarantees”) (CL-28).

¹⁰⁸⁴ See also, e.g., *CMS v. Argentina* ¶ 422 (explaining the claimant’s approach of calculating its loss by comparing the share value under the actual regulatory environment with the higher share value it would have received if the regulatory environment had remained unchanged) (CL-17); *id.* ¶ 434 (approving the claimant’s approach for determining damages).

cash flow (*i.e.*, from 1 August 2008 to 21 October 2010), the actual performance of EEGSA does not need to be projected, as historical financial data is used.¹⁰⁸⁵

286. The VAD and tariff rates adopted by the CNEE on 1 August 2008 were those set forth in the Sigla study. Between August 2008 and July 2010, Mr. Kaczmarek relies on EEGSA's historical results for cash flows in the actual scenario.¹⁰⁸⁶ Beginning in August 2010, when historical results are no longer available, Mr. Kaczmarek uses the Sigla study as the basis for projecting actual cash flows.¹⁰⁸⁷ Thus, the projected cash flows derived from the Sigla study are used to determine lost cash flows starting in August 2010 and also are used as a basis for valuing EEGSA as of 21 October 2010 in the actual scenario. Likewise, Mr. Kaczmarek uses Bates White's final report dated 28 July 2008, which established the VAD and tariffs in accordance with the Expert Commission's rulings, as the basis for projecting what EEGSA's value would have been "but for" the unlawful measures.¹⁰⁸⁸

1. Accepted Valuation Methodologies Establish And Confirm The Actual Value of EEGSA And EEGSA's Value But For The Measures

287. To determine the value of EEGSA and, hence, TECO's 24% equity interest in EEGSA, Mr. Kaczmarek employed the three generally-accepted valuation methodologies for determining the fair market value of a business, namely, the discounted cash flow ("DCF") method, the comparable publicly-traded company approach, and the comparable transaction approach. The DCF method relies on projected cash flows. These projected cash flows serve a

¹⁰⁸⁵ For this same period, the value of EEGSA "but for" the measures needs to be projected because establishing the "but-for" value of EEGSA during this timeframe is not a matter of simply substituting the Bates White tariff calculation in the place of Sigla's tariff in the actual scenario. As explained above, as a result of the challenged measures, EEGSA took several cost-cutting measures. *See, e.g.*, Maté ¶ 57 (CWS-6); Gillette ¶ 24 (CWS-5); Callahan ¶ 6 (CWS-2). Had the Bates White tariff been adopted, these cost-cutting measures would not have been adopted and EEGSA's capital expenditures would have been greater than they were in the actual historical period. For this reason, the projected value of EEGSA from 1 August 2008 to 21 October 2010 includes increased capital expenditures and other variances from EEGSA's actual financials during that period apart from the revenue generated by the tariffs. *See* Kaczmarek ¶ 172 (Figure 22), ¶ 180 (Figure 25) (CER-2).

¹⁰⁸⁶ *See* Kaczmarek ¶ 153 (CER-2).

¹⁰⁸⁷ *See id.* ¶ 126.

¹⁰⁸⁸ *See id.*

dual purpose in the context of Mr. Kaczmarek’s calculations. First, they provide a basis for determining lost cash flows between August 2008 and October 2010. Second, they form the basis of the DCF valuations (actual and “but-for”) as of 21 October 2010. As explained by Mr. Kaczmarek:

[The DCF approach] is a practical implementation of the theoretical financial concept that an income-producing asset’s value is equal to the present value of the future cash flows produced by the asset. To implement the DCF Approach, the valuation practitioner first creates a projection of expected future performance of the business to be valued. Then, using the projected performance, the practitioner calculates the relevant cash flows, determines an appropriate discount rate, and discounts the future cash flows to present value.¹⁰⁸⁹

Indeed, there is a “broad consensus” that to “determine the loss, if any, of fair market value of an operating business entity, there is considerable merit in using the Discounted Cash Flow (DCF) method.”¹⁰⁹⁰ As the tribunal in *National Grid P.L.C. v. Argentina Republic* found, where there is a history of profitable operation and future cash flows can be projected with reasonable accuracy, the DCF method “has the advantage of realistically assessing the economic value of a going concern by relying on the stream of value that it can generate over its operative life.”¹⁰⁹¹

288. In its DCF model, Navigant projected the VNR for each year since the VNR is the basis for the investor’s return on and return of capital components of the VAD. Mr. Kaczmarek used the VNRs that were calculated by Bates White and Sigla for the year 2008 in its but-for and actual projections, respectively. Each of the tariff studies included projected capital expenditures

¹⁰⁸⁹ *Id.* ¶ 142.

¹⁰⁹⁰ *National Grid v. Argentina* ¶ 275 (CL-33); see also *Walter Bau v. Thailand* ¶ 14.22 (finding that “[i]f value and damages must be computed on the basis of what was legitimately expected at any given time, then the DCF method is the most reasonable one to apply”) (CL-45).

¹⁰⁹¹ *National Grid v. Argentina* ¶ 276 (CL-33); see also *CMS v. Argentina* ¶ 416 (noting that the tribunal “has no hesitation in endorsing [the DCF approach] as the one which is the most appropriate in this case. TGN was and is a going concern; DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets Finally, there is adequate data to make a rational DCF valuation of TGN.”) (CL-17).

during the tariff period.¹⁰⁹² Consistent with the methods used by Bates White and Sigla for calculating the VNR, Mr. Kaczmarek adjusted the VNR by adding the forecasted capital expenditures during each year of the third tariff period.¹⁰⁹³

289. To project the VAD income itself under both scenarios, Mr. Kaczmarek considered each of the four components that comprise that income. First, Navigant adopted the customer growth in accordance with the respective VAD studies.¹⁰⁹⁴ Mr. Kaczmarek also used the operational costs that were included in both VAD studies.¹⁰⁹⁵

290. A third component of the VAD income is compensation for energy losses. As of 2008, EEGSA had “one of the lowest loss percentages in Latin America - a loss rate similar to distributors in more developed countries.”¹⁰⁹⁶ As losses decrease, it becomes increasingly expensive to lower losses (some rate of loss is an inevitable consequence of the physics of transporting electricity).¹⁰⁹⁷ The distributor is compensated through the VAD for a certain level of losses (that which a model efficient company would have) and must absorb the cost of any losses in excess of that set amount.¹⁰⁹⁸ The target losses in each of the Bates White and Sigla studies were used in the “but-for” and actual model, respectively, and the Sigla study resulted in EEGSA absorbing a greater monetary loss as a result of uncompensated energy losses.¹⁰⁹⁹

291. The last component is the FRC. As described above, the Sigla report used the FRC formula that the CNEE advocated and which was rejected by the Expert Commission.¹¹⁰⁰

¹⁰⁹² Kaczmarek ¶ 162 (CER-2).

¹⁰⁹³ *Id.*

¹⁰⁹⁴ *Id.* ¶ 165.

¹⁰⁹⁵ *Id.* ¶ 166.

¹⁰⁹⁶ *Id.* ¶ 175.

¹⁰⁹⁷ Giacchino ¶ 80 (CWS-4); Kaczmarek ¶¶ 75, 167, 175 (CER-2); *see also generally* EC Report (Discrepancy E.5, Non-Technical Losses of Energy & Capacity), at 120-121 (C-246).

¹⁰⁹⁸ *See* Kaczmarek ¶¶ 169, 173 (CER-2).

¹⁰⁹⁹ *Id.* ¶ 169.

¹¹⁰⁰ *Id.* ¶¶ 122, 161; Sigla Phase D, Investment Annuity, Distribution Value Added Component at 2 (C-267); Sigla Phase G, VAD Cost Components Intro at 3 (C-267); *id.*, Capital Costs at 3.2.

That FRC formula results in reducing the return on capital component of the VNR by 50%.¹¹⁰¹ This formula was used in the actual scenario, while the Expert Commission's approved formula, which was incorporated into Bates White's final report, was used in the "but-for" scenario.¹¹⁰²

292. Finally, operating expenses, capital expenditures, and changes in working capital affect a company's cash flow and, thus, were projected in the DCF model.¹¹⁰³ For both operating and capital expenditures, in the case of the "but-for" scenario, forecasts made before the adoption of the challenged measures or the last year of actual data prior to the measures was used as the basis for the model, whereas actual expenditures and forecasts in Sigla's study were used for the actual scenario.¹¹⁰⁴ Working capital changes were forecast using historic data.¹¹⁰⁵

293. To discount the future cash flows in both models to present value, Mr. Kaczmarek used a discount rate of 8.80% in nominal terms, which was equal to the weighted average cost of capital ("WACC"), and is the appropriate measure for discounting cash flow to the company.¹¹⁰⁶ Unlike in many cases where there is a dispute concerning the proper discount rate to apply, this is not the case here because the CNEE itself calculated EEGSA's WACC for purposes of the 2008 VAD study.¹¹⁰⁷ Mr. Kaczmarek accordingly used that WACC and the methodology used by the CNEE and adjusted it to reflect a WACC as of 21 October 2010.¹¹⁰⁸ The DCF approach

¹¹⁰¹ Kaczmarek, Figure 15 (CER-2); EC Report (Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor), at 91-93 (C-246); Bastos ¶¶ 21-22 (CWS-1); Giacchino ¶¶ 58-60 (CWS-4).

¹¹⁰² Kaczmarek ¶ 164 (CER-2).

¹¹⁰³ *Id.* ¶¶ 171-181.

¹¹⁰⁴ *Id.* ¶¶ 172, 180.

¹¹⁰⁵ *Id.* ¶ 181.

¹¹⁰⁶ *Id.* ¶¶ 184, 195-196.

¹¹⁰⁷ *Id.* ¶ 185; Resolution No. CNEE-04-2008 dated 17 Jan. 2008, at 2 (establishing a WACC of 7% in real terms) (C-152). Prior to the Consultant's preparation of a VAD study, the LGE provides that the CNEE shall commission a firm to do a study to calculate the distributor's cost of capital. LGE Art. 79 (C-17). In accordance with the LGE, if the result of that study is a WACC that is either below 7% or above 13%, the actual WACC is replaced with the low or high point of the allowable range. *See id.*

¹¹⁰⁸ Kaczmarek ¶¶ 185-186 (CER-2).

yielded an enterprise value for EEGSA of **US\$ 1,451.4 million** in the “but-for” scenario and **US\$ 512.8 million** in the actual scenario.¹¹⁰⁹

294. Mr. Kaczmarek then applied a comparable company approach to value EEGSA by identifying comparable publicly-traded electricity distribution companies in Latin America.¹¹¹⁰ Because these companies were each publicly-traded, their share capital, share value, and debt value were readily ascertained, and these companies therefore could be valued based on publicly-available information.¹¹¹¹ After gathering and analyzing financial and operational data for these companies, Navigant assessed the comparability of each company with EEGSA as regards the number of customers, distribution network size, nature of business, and regulatory environment, among other things.¹¹¹² For those companies deemed most comparable to EEGSA, enterprise value to EBITDA (earnings before interest, taxes, depreciation, and amortization) ratios were calculated, and adjusted to account for differences between the subject company and EEGSA.¹¹¹³ These various ratios then were weighted based on the comparability of the company to determine the most appropriate ratio to use to value EEGSA.¹¹¹⁴ This approach yielded a value for EEGSA of **US\$ 1,340.5 million** in the “but-for” scenario, and **U.S. \$ 521.2 million** in the actual scenario.¹¹¹⁵

295. The comparable transaction approach is similar to the comparable company approach, except that it looks at transactions where a company comparable to EEGSA has been recently purchased in whole or in part, to glean a fair market value of the comparable company.¹¹¹⁶ Mr. Kaczmarek used the same methodology for calculating an implied value for EEGSA using this approach as he did when using the comparable company approach, namely, he

¹¹⁰⁹ *Id.* ¶ 197.

¹¹¹⁰ *Id.* ¶¶ 198-210.

¹¹¹¹ *See id.* ¶ 201.

¹¹¹² *Id.* ¶¶ 202-207, Table 11.

¹¹¹³ *Id.* ¶¶ 208-210.

¹¹¹⁴ *Id.* ¶ 210.

¹¹¹⁵ *Id.* ¶ 210, Table 14.

¹¹¹⁶ *Id.* ¶¶ 211-212.

made appropriate adjustments to the subject transactions, and weighted the results based on the similarities between EEGSA and the company subject to the transaction.¹¹¹⁷ This approach yielded a value of EEGSA of **US\$ 1,550.6 million** in the “but-for” scenario, and **U.S. \$ 602.9 million** in the actual scenario.”¹¹¹⁸

296. Because all three approaches resulted in a valuation of EEGSA in both scenarios within a reasonable range of one another, each approach serves to validate the reasonableness of Mr. Kaczmarek’s overall valuation. Based on Mr. Kaczmarek’s confidence in the data used in each of the three approaches, he assigned a weighted value of 60% to the DCF approach, 30% to the comparable company approach, and 10% to the comparable transaction approach,¹¹¹⁹ resulting of a final valuation for EEGSA on 21 October 2010 of **US\$ 1,428.1 million** in the “but-for” scenario and **US\$ 524.3 million** in the actual scenario.¹¹²⁰

297. Considering the financial performance of EEGSA in the actual and “but-for” scenarios, Mr. Kaczmarek calculated that TECO suffered loss cash flows in an amount of **US\$ 17.8 million** from 1 August 2008 until 21 October 2010.¹¹²¹

298. As of October 2010, Mr. Kaczmarek took the enterprise value of EEGSA calculated above in both the actual and “but-for” scenarios. Mr. Kaczmarek then subtracted EEGSA’s net debt as of 21 October 2010 to obtain the value of EEGSA’s share capital.¹¹²² Claimant’s equity investment (given its 24.26% stake in EEGSA) thus was valued at US\$ 106.0 million and US\$ 325.3 million in the actual and but-for scenarios, respectively, resulting in a **US\$ 219.3 million** loss to TECO in the fair market value of its shares as a result of Guatemala’s unlawful measures.¹¹²³

¹¹¹⁷ *See id.* ¶¶ 213-215.

¹¹¹⁸ *Id.* ¶ 216, Table 18.

¹¹¹⁹ *Id.* ¶ 218.

¹¹²⁰ *Id.* ¶ 218, Table 19.

¹¹²¹ *Id.* ¶¶ 155-156.

¹¹²² *Id.* ¶ 219.

¹¹²³ *Id.*

2. Critical Measures Validate Navigant's Valuation Conclusions

299. The fact that all three valuation approaches resulted in a fair market value for EEGSA's shares that were within a reasonable range of one another vouches for the reliability of the valuations undertaken by Navigant. Equally as important, three additional checks described below further confirm the reasonableness of Navigant's valuation and damages calculation.

300. First, TECO's internal rate of return ("IRR") on its investment in EEGSA further supports that Mr. Kaczmarek's damages calculation is conservative. If the IRR that is expected from a project does not exceed the cost of equity that must be invested into the project, the project is uneconomic.¹¹²⁴ Calculating the cost of equity for EEGSA was straightforward since the CNEE in 2008 calculated EEGSA's WACC at 7% (the very lowest range of that allowable under the LGE)¹¹²⁵ and the cost of equity component of that WACC to be 11.01%.¹¹²⁶ To calculate the equity returns over the life of the investment, Mr. Kaczmarek considered the equity investment that TECO made in EEGSA and TECO's return on capital, which includes all dividends and management fees received, as well as the amount TECO realized from the sale of its shares to EPM.¹¹²⁷ This yielded an IRR for TECO of a real (*i.e.*, adjusted for inflation) 0.6%.¹¹²⁸ That rate of return is far below the real cost of equity of 11.01% published by the CNEE, thus providing irrefutable evidence that the tariffs imposed by Guatemala caused severe economic damage to TECO, as those tariffs diminished EEGSA's value to such an extent that TECO was unable to recover from its investment anywhere near its cost of equity.¹¹²⁹

¹¹²⁴ *Id.* ¶ 228.

¹¹²⁵ LGE Art. 79 (C-17); Kaczmarek ¶ 231 (CER-2). The CNEE's calculation of EEGSA's cost of equity also was lower than that calculated by DECA II's advisors in 1998. *See* Kaczmarek ¶ 231 (CER-2).

¹¹²⁶ The nominal cost of equity was calculated to be 13.98%, which is equivalent to a real cost of equity of 11.01% at the relevant time in question. *See* Kaczmarek ¶ 231 (CER-2); Resolution No. CNEE-04-2008 dated 17 Jan. 2008 at 5 (C-152). The cost of equity will exceed the WACC because equity holders have residual claims to profits only after a company meets its debt obligations. *See* Kaczmarek ¶ 145(CER-2).

¹¹²⁷ Kaczmarek ¶ 230 (CER-2).

¹¹²⁸ *Id.* ¶ 230, Table 21.

¹¹²⁹ *See id.* ¶ 231.

301. To verify the reasonableness of its damages calculation, Mr. Kaczmarek added its damages to TECO of US\$ 249.5 million as of 1 September 2011 to the IRR calculation. Had TECO received the damages Mr. Kaczmarek calculated (including the calculated interest) in addition to the sales proceeds, TECO's real IRR would have been 7.7%.¹¹³⁰ This is *still* below the 11.01% cost of equity calculated by the CNEE, demonstrating that Navigant's "but-for" valuation is conservative.¹¹³¹

302. Second, the VNRs calculated by Bates White and Sigla serve to confirm the reasonableness of Navigant's valuation. As noted above, the FRC is applied to the VNR using the WACC. The WACC represents the distributor's cost of capital and also its return on capital and, as noted above, the LGE provides that the WACC used by the distributor in its VAD study must be between 7% and 13%.¹¹³² Because the WACC is equal to the distributor's cost of capital and its return on capital, the VNR should be equal to the fair market value of the company.¹¹³³

303. The 2010 VNR calculated from Bates White's 28 July 2008 final report is US\$ 1,214 million,¹¹³⁴ whereas Navigant determined a "but-for" enterprise value for EEGSA using the DCF Approach as of October 2010 of US\$ 1,451 million.¹¹³⁵ The cost of capital decreased between 2008 and 2010, however, as reflected by the fact that the WACC used in Bates White's report was 9.60%, and the WACC used by Mr. Kaczmarek to value EEGSA as of October 2010 was 8.80%.¹¹³⁶ To check whether the difference in the VNRs was due to the different WACC, Navigant discounted the cash flows in its "but-for" valuation using a 9.60% rate. This resulted in

¹¹³⁰ *Id.* ¶ 233.

¹¹³¹ *Id.* ¶ 233.

¹¹³² LGE Art. 79 (C-17).

¹¹³³ Kaczmarek ¶¶ 234-235 (CER-2).

¹¹³⁴ Bates White did not calculate a separate VNR for each year of the tariff period, so Navigant calculated a VNR for tariff year August 2010 to July 2011 based on the assumptions in Bates White's report. *See* Kaczmarek ¶ 236 fn. 211 (CER-2).

¹¹³⁵ *Id.* ¶ 196.

¹¹³⁶ *Id.* ¶ 236.

a “but-for” value for EEGSA of US\$ 1,288 million¹¹³⁷ This value is within 6% of the VNR value calculated by Bates White, thus confirming the dependability of Navigant’s valuation.

304. Similarly, Mr. Kaczmarek compared Sigla’s VNR of US\$ 496.6 million in tariff year 2011 with its actual scenario valuation of EEGSA using the DCF Approach of US\$ 512.8 million.¹¹³⁸ Adjusting the WACC in Navigant’s model to equate with the one used by Sigla two years earlier reduces Navigant’s valuation in the actual scenario to US\$ 456 million.¹¹³⁹ As Mr. Kaczmarek explains, Navigant expected that calculating EEGSA’s actual value using the CNEE’s WACC would result in a value that was lower than Sigla’s VNR because, as described above, Sigla used an FRC formula that reduced the investment’s return on capital.¹¹⁴⁰ Thus, the relationship between the Sigla VNR and Mr. Kaczmarek’s calculation of EEGSA’s actual value further demonstrates the reliability of Navigant’s valuation.¹¹⁴¹

305. Finally, the price for which DECA II was sold to EPM supports Navigant’s damages calculation. TECO received US\$ 181.5 million for its share of DECA II. Although the sales contract did not assign a value to each of DECA II’s companies,¹¹⁴² the evidence supports a finding that the implied enterprise value for EEGSA was US\$ 498 million.¹¹⁴³

306. As Mr. Kaczmarek explains, Navigant was able to allocate a portion of DECA II’s purchase price to EEGSA by comparing various financial measures of performance of DECA II’s subsidiaries taken from a contemporaneous DECA II management presentation.¹¹⁴⁴ These financial metrics showed that EEGSA accounted for 62.2% of the value of DECA II,

¹¹³⁷ *Id.*

¹¹³⁸ *Id.* ¶ 237.

¹¹³⁹ *Id.*

¹¹⁴⁰ *Id.*

¹¹⁴¹ *Id.* ¶¶ 237-238.

¹¹⁴² Stock Purchase Agreement among Iberdrola, TPS, EDP, and EPM dated 21 Oct. 2010 (C-356).

¹¹⁴³ Kaczmarek ¶ 241 (CER-2).

¹¹⁴⁴ *Id.* ¶ 239, Table 23.

which results in an implied value for EEGSA of US\$ 498 million.¹¹⁴⁵ Navigant’s calculation of EEGSA’s enterprise value as US\$ 524.3 million in the actual scenario is thus confirmed by the sale of DECA II to EPM.¹¹⁴⁶

C. Compensation Must Include Interest at an Appropriate Commercial Rate on the Principal Sum Running to the Date of Payment of the Award

307. To make TECO whole, it should be awarded both pre-award and post-award compound interest at an appropriate commercial rate, in this case equivalent to the yield on Guatemalan sovereign debt.

308. Consistent with the international law principle requiring full compensation, Article 10.26(1) of the DR-CAFTA provides for an award of monetary damages and any applicable interest.¹¹⁴⁷ Thus, where, as here, the award for damages quantifies the loss suffered and compensation due at a time before the award, interest should be awarded from the time damages are quantified (*i.e.*, pre-judgment interest) so that the claimant may recoup the time value of money. As the tribunal in *LG&E* explained:

Interest is due on the amount of dividends that Claimants would have received but for abrogation of the tariff regime minus the dividends actually received and is distinct from the dividends actually received. Lost dividends compensate Claimants for Argentina’s breach and interest compensates Claimants for the impossibility to invest the amounts due.¹¹⁴⁸

Similarly, compensation for the accrued losses during TECO’s ownership of EEGSA and the loss of share value will compensate TECO for Guatemala’s breach of the minimum standard of treatment, while interest from the date of those losses must be awarded to compensate TECO for the lost opportunity to invest the amounts due.

¹¹⁴⁵ *Id.* ¶ 240, Table 25.

¹¹⁴⁶ *Id.* ¶ 241.

¹¹⁴⁷ DR-CAFTA 10.26.1 (CL-1); *see also* ILC Articles on State Responsibility, Art. 38 (“1. Interest on any principal sum . . . shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result. 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”) (CL-54).

¹¹⁴⁸ *LG&E v. Argentina* ¶ 104 (CL-28).

309. As the ILC Articles on State Responsibility also recognize, to compensate the injured party, interest must run until the date the obligation to pay is fulfilled (*i.e.*, post-judgment interest).¹¹⁴⁹ In their recent survey on the topic, Sir Elihu Lauterpacht and Penelope Nevill likewise note that “[i]nternational courts and tribunals for the most part now award post-award interest, including the regional human rights courts, the European Union courts, and arbitral tribunals.”¹¹⁵⁰

310. The interest rate applied should “achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.”¹¹⁵¹ In accordance with this principle, TECO should be awarded interest at a rate of 5.7% to 7.0%, which equals the yield on Guatemala’s sovereign bonds.¹¹⁵² As Mr. Kaczmarek explains, “[t]his rate is a reasonable commercial rate of interest because the Measures have effectively turned Claimant into an unwilling lender to Guatemala. As such, Claimant should be entitled to the same rate of interest Guatemala pays to willing lenders.”¹¹⁵³

311. Finally, the interest awarded should be compounded annually. As Lauterpacht and Nevill explain:

More recently . . . it has become increasingly recognized that simple interest may not always ensure full reparation for the loss suffered and that the award of interest on a compound basis is not excluded. This is because modern financial activity, eg [*sic*] in relation to consumer and commercial bank loans and accounts,

¹¹⁴⁹ ILC Articles on State Responsibility, Art. 38 (CL-54). This general principle has been applied in countless contexts, including by the United Nations Compensation Commission. See Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 615 (2010) (“Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award”) (*quoting* Decision of the Governing Council of the United Nations Compensation Commission of 18 Dec. 1992, S/AC.26/1992/16) (CL-51).

¹¹⁵⁰ Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 617 (2010) (CL-51).

¹¹⁵¹ ILC Articles on State Responsibility, Art. 38 cmt. 10 (CL-54).

¹¹⁵² Kaczmarek ¶ 221, Table 20 (CER-2).

¹¹⁵³ *Id.* Alternative interest rates proposed by Navigant include the U.S. Prime Rate of interest plus two percent and LIBOR plus four percent. See *id.* ¶¶ 222-223.

normally involves compound interest. The reasoning behind this change in approach is that a judgment creditor promptly placed in the possession of the funds due would be able to lend them out or invest them at compound interest rates or, if forced to borrow as a result of the respondent's wrong, will do so at compound rates. It is therefore unreasonable to limit the interest to simple interest.¹¹⁵⁴

Indeed it is now recognized that “the balance of investment treaty tribunal practice has shifted towards awarding compound interest where requested by the claimant.”¹¹⁵⁵ In its report, Navigant, accordingly, has compounded interest annually, as is the practice in the market.¹¹⁵⁶

* * *

312. As shown above, between 1 August 2008 and 21 October 2010, EEGSA lost cash flow in the amount of US\$ 73 million and, as a consequence, TECO's lost cash flow reflecting its 24.3% interest in EEGSA was **US\$ 17.8 million**.¹¹⁵⁷ EEGSA's actual value as of 21 October 2010 when it was sold to EPM was US\$ 524.3 million, as compared with US\$ 1,428.1 million,

¹¹⁵⁴ Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 618 (2010) (CL-51).

¹¹⁵⁵ *Id.* at 620; see also F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U. C. DAVIS L. J. 577, 586 (1988) (“[O]n the basis of compelling evidence compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals.”) (CL-52); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 Aug. 2000 ¶ 128 (“So as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually.”) (CL-30); *Cargill v. Mexico* ¶ 544 (“With respect to interest, the Tribunal believes that Claimant is entitled to interest on this Award at a rate based upon the U.S. Monthly Bank Prime Loan Rate as Claimant has effectively loaned this sum to Respondent for the duration of this dispute. This interest shall be compounded annually and paid from 1 January 2008, until the date of this Award and thereafter until full payment is received.”) (CL-12); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Award in Respect of Damages 31 May 2002 ¶ 90 (“[T]he Tribunal awards interest on the principal sum at the rate of 5% per annum compounded quarterly as an appropriate rate . . .”) (CL-36); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award of 16 June 2010 ¶ 16-26 (“[I]t is clear from the legal materials cited by the Claimants (summarised above, to which several more could be added) that the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of ‘jurisprudence constante’ where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.”) (CL-22).

¹¹⁵⁶ Kaczmarek ¶ 224 (CER-2).

¹¹⁵⁷ *Id.* ¶¶ 155-156, 220.

which would have been its value but for the internationally unlawful measures taken by Guatemala;¹¹⁵⁸ TECO thus suffered damages related to its lost share value of **US\$ 219.3 million**.¹¹⁵⁹ TECO's lost cash flow and lost share value thus amount to **US\$ 237.1 million**. Interest at Guatemalan sovereign bond rates running from the end of each year for lost cash flow and 21 October 2010 for lost share value, compounded annually amounts to interest of **US\$ 12.4 million**,¹¹⁶⁰ resulting in total damages to TECO as of 1 September 2011 of **US\$ 249,524,000**.¹¹⁶¹

V. CONCLUSION

313. For the foregoing reasons, Claimant respectfully requests that the Tribunal issue an Award:

1. Finding that Respondent has breached its obligations under Article 10.5 of the DR-CAFTA;
2. Ordering Respondent to pay compensation to Claimant in the amount of US\$ 237.1 million;
3. Ordering Respondent to pay interest on the above amount at a reasonable commercial rate, compounded from 1 August 2008 until full payment has been made; and
4. Ordering Respondent to pay Claimant's legal fees and costs incurred in these proceedings.

¹¹⁵⁸ *Id.* ¶ 218, Table 19.

¹¹⁵⁹ *Id.* ¶¶ 219.

¹¹⁶⁰ *Id.* ¶ 224, Table 20.

¹¹⁶¹ *Id.* If interest is calculated at the U.S. Prime Rate plus two percent or LIBOR plus four percent, the alternative rates proposed by Navigant, *see id.* ¶¶ 222-223, then total interest payments would be between US\$ 9.5 million and US\$ 11.7 million, for total damages amounting to US\$ 246,634,000 or US\$ 248,812,000, respectively.

Respectfully submitted,



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