

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

**ICSID CASE No. ARB/10/23**

**TECO GUATEMALA HOLDINGS LLC**

**CLAIMANT**

**V.**

**REPUBLIC OF GUATEMALA**

**RESPONDENT**

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**REJOINDER**

**September 24, 2012**

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## **I. INTRODUCTION**

1. This Rejoinder by the Republic of Guatemala (*Guatemala*) is submitted in accordance with item 13 of the Minutes of the First Session of the Tribunal, and the agreement of the Parties confirmed by the Tribunal in the email of the Secretary of the Tribunal dated October 31, 2011. This Rejoinder responds to the Reply Memorial of TECO Guatemala Holdings, LLC (*TGH* or the *Claimant*) of May 24, 2012.<sup>1</sup>
2. Guatemala attaches to this Rejoinder the supplemental testimony of Messrs. Carlos Colom and Enrique Moller. In addition, it attaches the supplemental reports of Mr. Mario Damonte; of Messrs. Manuel Abdala and Marcelo Schoeters; and of Dr. Juan Luis Aguilar. Finally, attached hereto are five appendices, 45 factual exhibits numbered R-163 to R-208 and 14 legal authorities numbered RL-18 to RL-32.
3. This Rejoinder has been written in Spanish and translated into English. Therefore, in the event of any discrepancy or ambiguity, Guatemala requests that TGH and the Tribunal refer to the original Spanish version.

## **II. EXECUTIVE SUMMARY**

4. This dispute has its origins in the electricity distribution tariff review process proceeding for the 2008–2013 period for Empresa Eléctrica de Guatemala S.A. (*EEGSA*), carried out by the regulator of the electricity sector in Guatemala, the National Electricity Commission or *CNEE*. At the time of the tariff review in question, EEGSA was 80.8 percent owned by Distribución Eléctrica Centroamericana Dos, S.A. (*DECA II*),<sup>2</sup> a

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<sup>1</sup> As done in the Counter-Memorial, Guatemala uses the initials “TGH” to refer to the Claimant, and not “TECO,” to avoid confusion with other Teco group companies that are, or have been in the past, part of the corporate structure of this investment. As explained in the Counter-Memorial (*see* pars. 545-549), it is curious that TGH has preferred to use the reference “TECO” in its Memorial when in its Notice of Arbitration it chose to use “TGH.” This change leads to confusion about the identities of the companies in the group, and about the transfer of presumed legitimate expectations allegedly generated in 1998 when EEGSA was privatized, from which TGH intends to benefit, although TGH was only created in 2005. Guatemala uses the word “Teco” to refer to other companies in the group different from TGH.

<sup>2</sup> Of the remaining 19.2 percent of EEGSA’s shares, 14 percent are held by the Guatemalan State and 5.12 percent by private shareholders.

company owned by Iberdrola Energía S.A. (*Iberdrola*) as to 49 percent, TGH as to 30 percent and EDP Electricidad de Portugal, S.A. as to 21 percent.

5. Dissatisfied with the CNEE's application of the regulatory framework during the tariff review, EEGSA (through the decision of its controlling shareholders, including Iberdrola and TGH) petitioned the courts of Guatemala in August 2008 to review the decisions of the CNEE. The proceedings included extensive oral and written arguments, and even decisions favorable to EEGSA in the lower court proceedings.<sup>3</sup> In the final proceeding, the Constitutional Court of Guatemala ("the highest court in Guatemala responsible for resolving constitutional matters," as described by TGH<sup>4</sup>) rejected EEGSA's claim and confirmed that the CNEE's interpretation of the regulatory framework during EEGSA's tariff review was correct.<sup>5</sup>
6. Parallel to (and notwithstanding) the domestic judicial proceedings, Iberdrola initiated an ICSID arbitration against Guatemala in March 2009 under the Spain-Guatemala Treaty. As with its domestic claims, Iberdrola claimed that the CNEE had applied incorrectly the Guatemalan electricity regulatory framework in setting the tariffs of EEGSA for the 2008–2013 period.<sup>6</sup> Iberdrola alleged at the time that the regulator's supposedly faulty application of the regulatory framework had frustrated its expectations as a shareholder of EEGSA.<sup>7</sup> In that proceeding, Iberdrola filed a claim for expropriation and unfair and inequitable treatment, as well as a claim for denial of justice with respect to the Constitutional Court decisions cited above.<sup>8</sup> Iberdrola claimed US\$ 336 million.
7. On October 20, 2010, TGH initiated its arbitration proceeding against Guatemala under the DR-CAFTA Treaty (the *Treaty*), accusing Guatemala of violating the minimum standard of treatment under Article 10.5 of the Treaty. On the following day, October

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<sup>3</sup> See Section III.D below.

<sup>4</sup> Reply, par. 23.

<sup>5</sup> See Section III.D below.

<sup>6</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, Section II.

<sup>7</sup> *Ibid*, Section IV(4)4.3.

<sup>8</sup> *Ibid*.

21, 2010, the shareholders of DECA II (including TGH) sold their stake in EEGSA and its related companies in Guatemala. For their 80.2 percent holding, the DECA II partners received US\$ 605 million.

8. In light of the imminent multi-million dollar sale of their stake in EEGSA, both Iberdrola and TGH changed their message. Iberdrola reduced its claim in the arbitration proceeding in process at that time to US\$ 183 million (although it curiously maintained its expropriation claim). TGH, for its part, withdrew its “expropriation” claim under Article 10.7 of the Treaty, of which it had informed Guatemala in January 2009 in its “notice of intent to submit the dispute to arbitration.” TGH maintained its claim under Article 10.5 of the Treaty for a total of US\$ 243.6 million. The disproportionate nature of this claim is evidenced by the fact that, although it held a substantially smaller stake in EEGSA (30 per cent, versus 49 percent), TGH filed a claim for damages almost 35% greater than its partner Iberdrola.
9. As demonstrated by this chronology, unlike Iberdrola, TGH did not initiate its arbitration until the day before it sold its stake in EEGSA, which was more than two years after the occurrence of the supposedly illegal acts and almost 22 months after its “notice of intent.” In other words, TGH closely followed the development of the *Iberdrola* case, sold its “expropriated” stake in EEGSA for a multi million dollar figure and reserved this arbitration to obtain a double recovery. The opportunistic and speculative nature of this claim is evident.
10. Moreover, thanks to its cooperation agreement with Iberdrola, which granted it access to the documents that Guatemala had submitted in the *Iberdrola* arbitration, TGH was aware of Guatemala’s defense and adjusted its arguments accordingly. Thus, in its Memorial, TGH attempted to create new scenarios to conceal the irregularities committed by EEGSA during the tariff review, which had come to light in the *Iberdrola* case (for example, the “discount proposal” made by Mr. Pérez that is discussed below),<sup>9</sup> and persisted in making fallacious arguments that sought to give political color to the

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<sup>9</sup> See Section V.E.4 below.

measures taken by the regulatory entity, suggesting an arbitrariness that did not occur and that it never bothered to prove.

11. However, there is one thing that TGH has been unable to change *a posteriori*: the facts behind its claim. The facts, as has been seen, are identical to the facts in the *Iberdrola* case. The claim brought by TGH does not involve any new or different facts. And the claim filed by TGH, despite the unconvincing pretext of a claim under the Treaty, is only distinguished from Iberdrola's claim by the fact that the standard that can be invoked under the DR-CAFTA Treaty (the international minimum standard) is much more limited than the autonomous standard of fair and equitable treatment applicable to the *Iberdrola* case under the Spain-Guatemala Treaty.
12. Aware that its claims involve issues to be resolved exclusively by Guatemalan courts, TGH has now endeavored to re-label the facts by using a vocabulary that suggests a violation of international law. But as explained by the Tribunal in the case *Azinian v. México*, "*labeling is no substitute for analysis.*"<sup>10</sup> And despite the pretext that TGH attempts to assert, its case does not cease to be a regulatory claim under Guatemalan law.
13. TGH's Reply contributes no new element to its original claim. In fact, if the Reply does anything, it is to confirm that the dispute that TGH described in its Memorial is a mere disagreement over the interpretation of the Guatemalan regulatory system. To do so, TGH has had to resort to its expert on Guatemalan law (Dr. Alegría) and its regulatory/technical-financial expert (Dr. Barrera) in no fewer than 77 paragraphs of its Reply.<sup>11</sup> In essence, TGH's argument continues to be that:
  - (a) EEGSA and TGH interpreted the Guatemalan regulatory framework in a certain way;
  - (b) the CNEE interpreted the Guatemalan regulatory framework in another way;

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<sup>10</sup> *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, November 1, 1999, **Exhibit RL-2** (English version), par. 90.

<sup>11</sup> *See, e.g.*, Reply, pars. 55-57, 112-113, 116, 130-132, 161-163, 177-180, 191-205 and 313.

- (c) EEGSA, under the instructions of TGH and its other partners, submitted the dispute on the interpretation of the Guatemalan regulatory framework to the Guatemalan tribunals;
  - (d) The Guatemalan tribunals upheld the CNEE's interpretation of the regulatory framework;
  - (e) In response to the rejection of its claim in the local tribunals, TGH sought a new judge for its claim regarding the interpretation of the regulatory framework, and filed it with an international tribunal, seeking US\$ 243.6 million in compensation.
14. A regulatory dispute under local law, by itself, cannot constitute an international dispute under an investment treaty. This is even less so when, as in this case, the dispute has already been brought before all the judicial levels, including the highest judicial authority, the Constitutional Court. Otherwise, ICSID would be inundated with cases of foreign investors in regulated industries who were unhappy about not having succeeded in imposing their views on local regulatory entities. Fortunately, that has not happened. International case law has consistently rejected this type of legal action.<sup>12</sup> The legitimate interpretation of a regulation, a proper function of State agencies and institutions, cannot amount to an unfair and inequitable treatment of the investment by the host State, even when the result of that interpretation is unfavorable to the investor (and even less so a violation of the stricter standard applicable to this case: the international minimum standard of treatment).
15. It is a basic principle of international law that a disagreement over the interpretation and application of national law does not automatically become an international dispute. As the International Court of Justice has said in the decision rendered in the *Case Concerning Ahmadou Sadio Diallo*:

The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts.<sup>13</sup>

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<sup>12</sup> See Section IV.B below.

<sup>13</sup> *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Judgment, November 10, 2010, **Exhibit RL-15**, par. 70. The Court continues: "Exceptionally, where a



16. This line of reasoning also applies to disputes involving investment treaties. Similar reasoning has been expressed by the tribunals in *Encana v. Ecuador* and *SD Myers v. Canada* (“[The] tribunal does not have an open-ended mandate to second-guess government decision-making”), *Saluka v. The Czech Republic* (“The Treaty cannot be interpreted so as to penalize each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State”<sup>14</sup>) and *Glamis Gold v. United States*: (“It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency”<sup>15</sup>).
17. The Reply confirms that TGH is asking this Tribunal to (i) act as a sort of regulatory agency and repeat the 2008 to 2013 tariff review process step-by-step, and (ii) to act as an exceptional court of appeals for its legal claim. In essence, TGH is asking this Tribunal whether it agrees with its interpretation of the Guatemalan regulatory system. This is not the role of an international tribunal, as explained by the tribunals in *Azinian v. Mexico* and *Generation Ukraine v. Ukraine*.<sup>16</sup> In particular, the Tribunal in *Azinian* has said:

The possibility of holding a State internationally liable [...] does not, however, entitle a claimant to seek international relief of the national court decisions as though the international tribunal that is hearing the case has plenary appellate jurisdiction.<sup>17</sup>

18. The above analysis was upheld in its entirety by the final award of August 17, 2012, issued by the tribunal in the *Iberdrola* case. The tribunal in that case decided that it did

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State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.”

<sup>14</sup> *Saluka Investments B.V. v. Czech Republic* (UNCITRAL Case) Partial award, March 17, 2006, **Exhibit CL-42**, par. 442.

<sup>15</sup> *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, June 8, 2009, **Exhibit CL-23**, pars. 762, 779.

<sup>16</sup> *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, September 16, 2003, **Exhibit RL-6**, pars. 20, 33.

<sup>17</sup> *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, November 1, 1999, **Exhibit RL-2**, par. 99.

not have jurisdiction to hear Iberdrola's claim because it considered such a claim to arise under Guatemalan law and not international law. The tribunal said in *Iberdrola*:

[...] other than labeling the CNEE's conduct as being in violation of the Treaty, the Claimant did not present a dispute under the Treaty and international law, but rather a technical, financial and legal debate on the legal provisions of the respondent State.

[...]

The Tribunal does not find anything in the Claimant's allegations other than a discussion of local law, which it does not have the jurisdiction to consider and adjudicate as if it were a court of appeals [or] [...] as a regulatory authority, as an administrative entity.<sup>18</sup>

19. The decision in the *Iberdrola* case is examined below,<sup>19</sup> and it is, of course, of enormous significance for this Tribunal, because it was rendered by a tribunal made up of three jurists of renowned prestige and experience (Yves Derains, Eduardo Zuleta and Rodrigo Oreámuno), and because the facts in both cases are not just similar but are identical. They involve the same claim under Guatemalan law and identical technical-financial complaints. The *Iberdrola* decision is not particularly innovative but simply adheres to international case law on investment protection, accepted from *Azinian* onwards, a fact that has been recognized in the *Iberdrola* award. Under the circumstances of the present case, the only possible claim for TGH is one for denial of justice, as accepted by the tribunal in *Iberdrola*. But TGH does not present this claim.
20. TGH cites the substantive protection of Article 10.5 of the Treaty, although it deliberately continues to ignore the fact that this article guarantees the minimum standard of treatment of customary international law and not the more demanding one for the State: that of fair and equitable treatment separate from customary international law. TGH attempts to equate the two standards as if there were no difference, and continues to cite awards that apply the autonomous standard and not the international

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<sup>18</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, pars. 349, 354.

<sup>19</sup> See Section III below.

minimum standard, without indicating it.<sup>20</sup> That is not unintentional, because TGH is well aware that the minimum standard is not violated by the alleged regulatory irregularities (which in any event did not occur in this case) that essentially involve a dispute over the interpretation and application of a regulatory framework under national law.<sup>21</sup> The case law and the *opinio juris* of the States party to the Treaty have confirmed that they consider the minimum standard to be distinct from (and less demanding than) the standard of fair and equitable treatment, and to which the doctrine of the so-called “legitimate expectations” is not applicable.<sup>22</sup> They have also explained that the minimum standard is only violated in the event of manifest arbitrariness, clearly unjust measures and denial of justice.<sup>23</sup> The position of TGH, which relies on the doctrine of legitimate expectations, is not applicable in the context of the international minimum standard. Regardless, TGH is incapable of demonstrating any violation of legitimate expectations.<sup>24</sup>

21. In its desperate attempt to “dress” this dispute as an international claim, TGH takes up arguments against the 2007 reform of Article 98 of the RLGE and labels it as “unconstitutional.”<sup>25</sup> However, that is contradicted by its argument that in reality the alleged problem was that the CNEE interpreted and applied that provision incorrectly.<sup>26</sup> In addition, neither EEGSA nor any other distributor appealed that reform as being unconstitutional (which is logical because the reform is based on the principles of the LGE), and TGH itself only filed this arbitral claim in October 2010, which leaves this

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<sup>20</sup> Reply, pars. 238-244, 254-260.

<sup>21</sup> See Section IV.B below.

<sup>22</sup> *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Presentation of El Salvador under Art. 10.20.2 of the DR-CAFTA, January 2012, **Exhibit RL-28**; *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Presentation of Honduras under Art. 10.20.2 of the DR-CAFTA, January 2012, **Exhibit RL-27**; *Glamis Gold Ltd. v. United States of America*, Counter-Memorial of the United States, September 19, 2006, **Exhibit RL-20**, pp. 227-235; *Glamis Gold Ltd. v. United States of America*, Rejoinder of the United States, March 15, 2007, **Exhibit RL-21**, pp. 178-185.

<sup>23</sup> *Ibid.*

<sup>24</sup> See Section IV below.

<sup>25</sup> Reply, pars. 91-100.

<sup>26</sup> See Section IV.C.

amendment outside the scope of this Tribunal as being time-barred pursuant to the Treaty.<sup>27</sup> TGH insists on equating this regulatory reform (otherwise completely legitimate) with the cases involving the Argentine emergency laws, where the tariff regimes of the public services were completely abolished and the concessions and licenses had to be renegotiated.<sup>28</sup> This betrays the profound differences between this case and the so-called *Argentine cases*, which, moreover, were decided under the standard of fair and equitable treatment inapplicable to this case.

22. Guatemala must apologize in advance for the length of this brief given that, in an excess of prudence, it has made a great effort to refute each and every one of the fallacious technical and factual issues on which TGH bases its case. It does so to prove that the CNEE refused to be intimidated into accepting a tariff study that it was not in a position to verify pursuant to its regulatory obligations. However, to use the words employed in *Glamis Gold*, it does not fall to this international Tribunal to examine in depth the details and bases in domestic law, nor does it correspond to this Tribunal to substitute its own decision for the decision of the competent national agency (the CNEE) regarding an extensive technical case, especially not when the validity of the agency's decision has been upheld by the country's highest court, the Constitutional Court.
23. In this case there are some facts are sadly revealing of the way in which EEGSA and TGH attempted to impose their will on Guatemala. They also reveal the double message of TGH, between its allegations in this international arbitration proceeding and the conduct displayed by EEGSA in Guatemala.
24. Thus, while TGH in this arbitration proceeding requests defense for compliance with the regulatory framework, in practice, TGH and EEGSA have shown that their view of the regulatory framework is that it is a flexible tool that can be adapted to suit their needs. It

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<sup>27</sup> The reform of Art. 98 took place on March 5, 2007, but TGH did not file a claim against it under the Treaty until October 20, 2010 when it submitted the Notice of Arbitration. Its "notice of intent" of January 2009 did not refer to this reform. Under Art. 10.18.1 of the Treaty, "[n]o claim may be submitted to arbitration pursuant to this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged [...]." In other words, the claim of TGH against the reform of Art. 98 was time-barred at the time when TGH filed it.

<sup>28</sup> See Section IV.A.

is clear from the factual background of this case that the tariff studies prepared by EEGSA's consultant during the tariff review, which created increases in the VAD of up to 245 percent,<sup>29</sup> represented a pressure mechanism to seek to "agree upon" a tariff outside the regulatory framework that TGH now says that it wants to comply with rigorously. TGH has admitted that during the review process, EEGSA made an offer to replace those increases with an increase of 10 percent of its income.<sup>30</sup> TGH sought to portray this "offer," made in person by Mr. Gonzalo Pérez, Iberdrola's President in Latin America (and President of EEGSA), as a legitimate and transparent possibility. This supposedly transparent proposal was made at a meeting without any pre-established agenda, in person, through a document in a single copy, without any introductory or follow-up email, with no letterhead on the paper and without mentioning the actual names of the persons and companies involved.<sup>31</sup> TGH discusses secondary issues in an attempt to justify the legality of this proposal, but it avoids explaining the truly relevant issue: why would EEGSA have made such an offer if it truly believed that the tariff study it had prepared complied with the regulatory framework by proposing efficient tariffs? EEGSA and TGH are not charitable organizations and if the tariff study had been credible, there was no reason (nor a justification to their own shareholders) to offer a discount of this magnitude on the tariffs to be in effect for the following five years. Of course, the CNEE rejected this proposal as improper and outside of the regulatory framework.<sup>32</sup>

25. This is not the only contradictory message sent by TGH. In its attempt to camouflage its petition as a claim under the Treaty, TGH has "labeled" the conduct of Guatemala, stating for example that Guatemala decided "for entirely political reasons" to reduce the tariffs of EEGSA and that the court decisions rejecting the local claims were rendered by a "politically-motivated Constitutional Court that was intent on doing whatever [the

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<sup>29</sup> See Section V.E.5.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Mr. Pérez left the meeting empty-handed. This was because the CNEE insisted on the principles of the Rule of Law and on the appropriate and legitimate technical application of the regulatory framework. Mr. Pérez has not been called by TGH to testify in this arbitration.

Government] asked it to.” This is the message that TGH sends in this arbitration proceeding. The other message, the real one, is found in the Management Presentation of DECA II, made by the shareholders of EEGSA (including TGH), in which they openly propose the commission of an illegal act. As shown in this document (obtained during a document production in this arbitration proceeding), in 2010 TGH and its partners in EEGSA considered challenging the reform of Article 98 of the RLGE. Aware of the weakness of their legal arguments, they suggested attempting to use “political influences” on the Judicial Branch of Guatemala to obtain a “favorable” outcome in that action. The presentation speaks for itself:

We have concluded that the challenge [of unconstitutionality] is feasible. We are already working on arguments; we suggest the participation of 3 politically powerful attorneys in order to obtain a favorable decision.<sup>33</sup>

26. In its Reply, TGH has remained absolutely silent about this document. The contradiction in TGH’s messages is again apparent. This is the same shareholder that seeks to present itself in this arbitration as a good faith investor. The claim of unconstitutionality was not presented, undoubtedly because TGH and its partners realized that the Court does not allow itself to be influenced by political authorities (indeed the Court has ruled on several occasions against the Government in power in Guatemala<sup>34</sup>). It is noteworthy that TGH had no qualms in openly suggesting the commission of an illegal act of this nature in an internal presentation to its shareholders.
27. The contradictions continue. For example, in the statements by TGH’s General Manager in Guatemala, Mr. Víctor Urrutia. Consulted in July 2010 (a few months before the start of this arbitration) about a recent extension of TGH’s major contracts in the electricity generation sector, he indicated, in complete contradiction of TGH’s arguments in this arbitration, that:

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<sup>33</sup> Management Presentation by DECA II 2009, **Exhibit R-107**, January 14, 2010 (“Constitutional Court – Value-Added for Distribution (VAD)” sheet) (Emphasis added).

<sup>34</sup> See Counter-Memorial, pars. 451-455.

Teco Energy decided to go for the extension because “we continue to believe [Guatemala] it’s a market where there are clear rules and certainty.”<sup>35</sup>

28. TGH’s inconsistencies are also evidenced by the sale of EEGSA in 2010, one day after the start of this arbitration. After having told the Tribunal that “the long-term sustainability” of EEGSA was in “danger,” that its “operational viability” was “severely undermined,”<sup>36</sup> that its investment in Guatemala was in “grave danger,”<sup>37</sup> another foreign shareholder, EPM of Colombia, acquired control of EEGSA and its affiliated companies for US\$605 million (of which TGH received an amount close to—only for EEGSA—US\$121.5 million for its minority shareholding in accordance with the valuation prepared by TGH’s own economic advisor on the sale of those shares, Citibank).<sup>38</sup> This was after EEGSA’s owners (including TGH) presented this company to the buyer as “one of the best and most solid companies in the country.”<sup>39</sup> EEGSA was, therefore, neither unviable nor severely undermined, nor was it in grave danger, as TGH attempted to make this Tribunal believe, but on the contrary it was, in the words of TGH, one of the best and most solid companies in Guatemala.
29. In short, this dispute is what it has always been: a simple regulatory dispute that has been heard and resolved by domestic tribunals, and that TGH attempts to revive under the guise of an international claim. But that international claim is destined to fail because it is not the task of international tribunals to review the application of domestic regulations issued by competent local regulatory authorities, particularly when the regulator’s decisions have already been submitted for review at several court levels, up to the highest level, the Constitutional Court.
30. Taking into account that the facts in the case have already been amply presented, Guatemala first discusses in this Rejoinder the issues of admissibility and jurisdiction

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<sup>35</sup> “Price lowered on Tampa contract” *Prensa Libre*, July 12, 2010, **Exhibit R-125**.

<sup>36</sup> Notice of Arbitration, par. 69.

<sup>37</sup> Notice of Intent, Attachment 3 to the Notice of Arbitration, par. 28.

<sup>38</sup> Letter from Citibank to the Directors of Teco Energy, Inc., October 14, 2010, **Exhibit R-128**, p. 7 (C-1-01) sheets 7 and 8.

<sup>39</sup> Deca II – Management Presentation, September 2010, **Exhibit R-127**, p. 22.

(Section III), which should be sufficient for the Tribunal to conclude its analysis. However, *ex abundante cautela*, an analysis of TGH's substantive claims is included (Section IV) and finally, to demonstrate the true nature of TGH's claims under domestic law, and their total lack of merit, Guatemala responds in abundant detail to TGH's factual and technical allegations in Section V. In Section VI, Guatemala addresses the claims for damages filed by TGH.

### **III. AS IN THE *IBERDROLA* CASE, TGH'S CLAIM MUST BE REJECTED FOR LACK OF JURISDICTION**

#### **A. THE TRIBUNAL MUST DETERMINE WHETHER TGH'S CLAIM IS A CLAIM UNDER THE TREATY OVER WHICH IT HAS JURISDICTION *RATIONE MATERIAE***

31. TGH invokes Article 10.16.1 of the Treaty to submit this dispute to this Tribunal.<sup>40</sup> The relevant portion of this article establishes the following:

In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:

- (i) that the respondent has breached
  - (A) an obligation under Section A,
  - (B) an investment authorization, or
  - (C) an investment agreement;

32. TGH does not invoke sections B or C of this provision, only section A. According to this provision, TGH may only submit to arbitration a claim in which it is alleged that the Guatemalan state violated one of the investment protection standards established by the Treaty. In other words, Guatemala's consent to arbitration, and therefore the jurisdiction *ratione materiae* of this Tribunal, does not extend to just any type of claim; rather, it

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<sup>40</sup> Notice of Arbitration, par. 27.



encompasses only those claims that genuinely involve violations of the substantive provisions of the Treaty.<sup>41</sup>

33. In its Reply, TGH acknowledges that for this Tribunal to have jurisdiction, it must demonstrate that the facts are “capable” of constituting a violation of the Treaty, and specifically of the international minimum standard of treatment, which is the only protection of the Treaty that it invokes.<sup>42</sup> However, it is surprising how superficially TGH addresses this crucial issue; it devotes only five paragraphs out of a total of 321 to this issue in the Reply.<sup>43</sup>
34. The award in *Iberdrola*, a case factually identical to this one, demonstrates the importance of this issue. In *Iberdrola*, the applicable treaty was the Guatemala-Spain Bilateral Investment Treaty (BIT), which limits arbitration to “[a]ll disputes [...] concerning matters governed by this Agreement [the BIT.]”<sup>44</sup> In other words, according to the tribunal its jurisdiction was limited to disputes or disagreements “concerning violations of the substantive provisions of the treaty,”<sup>45</sup> which is also the case here. As described in greater detail below,<sup>46</sup> the tribunal rejected the idea that the claim, identical to the one presented by TGH before this Tribunal, was “a genuine claim” of violation of the treaty.<sup>47</sup> Therefore, the tribunal accepted the same jurisdictional objection that Guatemala raises in this case and unanimously rejected the claim for lack of jurisdiction, even ordering the claimant to pay all costs of the proceeding.
35. Therefore, despite the superficial manner in which TGH approaches the issue, this matter is of fundamental importance. In the words of the *Iberdrola* tribunal, “the

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<sup>41</sup> Counter-Memorial, pars. 47-78.

<sup>42</sup> Reply, par. 284.

<sup>43</sup> *Ibid*, pars. 283-287.

<sup>44</sup> Agreement between the Kingdom of Spain and the Republic of Guatemala for the Promotion and Reciprocal Protection of Investments, December 9, 2002, **Exhibit RL-18**, Art. 11.

<sup>45</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, par. 306.

<sup>46</sup> See Section III.D below.

<sup>47</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, par. 368.

analysis of jurisdiction must be done carefully, in each individual case, taking into account the respective treaty or instrument of expression of consent,”<sup>48</sup> given that, as that tribunal also said:

It is not enough [...] to label the interpretation by the CNEE or the courts as ‘arbitrary’ for the Tribunal to decide that there is a genuine claim that Guatemala violated the standard of fair and equitable treatment.<sup>49</sup>

36. This Tribunal must therefore look beyond the labels assigned by the Claimant and analyze the true nature of the claim in order to determine its jurisdiction *ratione materiae*. This is particularly appropriate when, as in the present case, there was no bifurcation of the proceeding between jurisdiction and merits. Given that the parties have already presented all of their arguments and evidence, the Tribunal has before it all the elements necessary to decide on the nature of the claim, as Audley Sheppard explains:

In both investment treaty cases and/or ICSID cases, the question arises as to what extent the tribunal should review the claimant’s factual and legal case for the purposes of establishing jurisdiction. This question does not arise when jurisdiction is joined with the merits, because in those circumstances the tribunal can assess jurisdiction in the context of all the evidence.<sup>50</sup>

37. Therefore, as the tribunal in *Iberdrola* held “beyond the qualification that the Claimant gave to the disputed matters,” it is necessary to examine what is referred to as “the substantive element of these issues”<sup>51</sup> in order to determine whether the tribunal has jurisdiction over the claim. In the words of other tribunals, it is necessary to determine “whether or not ‘the fundamental basis of a claim’ brought before the international

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<sup>48</sup> *Ibid*, par. 303, citing previous decisions of arbitration tribunals.

<sup>49</sup> *Ibid*, par. 368.

<sup>50</sup> A. Sheppard, “The Jurisdictional Threshold of a *Prima-Facie* Case” in P. Muchlinski, F. Ortino, and C. Schreuer, *The Oxford Handbook of International Investment Law* (2008) 932, **Exhibit RL-23**, pp. 941-942.

<sup>51</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, par. 351.

forum is autonomous of claims to be heard elsewhere.”<sup>52</sup> As in *Iberdrola*, an analysis of the substance of TGH’s claim should lead this Tribunal to reject TGH’s claim for lack of jurisdiction.

**B. TGH CONTINUES TO PUT FORTH A MERE REGULATORY DISAGREEMENT UNDER GUATEMALAN LAW**

38. TGH is aware of the jurisdictional flaws of its claim and, therefore, in the Reply it continues to disguise its claim as a Treaty claim. As with *Iberdrola*, TGH also resorts to set phrases, sensationalist expressions and labels such as “arbitrariness,” “mockery,” “repudiation,” “dismantle,” “destroy,” “deliberate,” “premeditated,” “flagrant,” or “clear” violation, “calculated and deliberate affront,” to describe the way in which the CNEE applied the Guatemalan electricity regulations, and dramatize and elevate the tone of the claim, making it appear more like a Treaty claim.<sup>53</sup> However, TGH continues to put forward nothing but an issue of Guatemalan domestic law—whether or not the CNEE correctly interpreted and applied the regulatory framework, and whether the VAD ultimately approved was correct according to that framework. These are the questions that this Tribunal is actually asked to decide, as if it were a Guatemalan court of third instance or a local administrative or regulatory authority. This is not the role of this Tribunal. In the words of the *Iberdrola* tribunal: “In the assertions by the Claimant, the Tribunal finds no more than a discussion of local law, which it does not have the jurisdiction to consider and adjudicate as if it were a court of appeals” or “as regulatory authority, as administrative entity.”<sup>54</sup>

39. TGH’s claims are the same as *Iberdrola*’s. They refer to the same facts, the same arguments regarding Guatemalan law, and identical technical-financial issues. It is revealing, for instance, how TGH starts its Reply with a lengthy discussion of how the Guatemalan electricity regulatory framework must be interpreted. TGH describes the

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<sup>52</sup> *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21) Award, July 30, 2009, **Exhibit RL-12**, par. 61.

<sup>53</sup> See, for example, Reply, pars. 3, 6, 89, 117, 160, 181, 190, 185, 208, 219, 220, 222, 228, 230, 237, 238, 245-247, 249, 251, 253, 262, 283, titles of sections III.A and III.A.3.b.

<sup>54</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, pars. 349, 354.

alleged “limited authorities in reviewing the distributor’s tariffs,” that “[t]he Expert Commission’s decisions [...] are binding” and how “the Value-Added for Distribution (VAD) would be calculated on the basis of the New Replacement Value,”<sup>55</sup> making frequent reference to the supplemental opinion on the interpretation of the Guatemalan regulatory framework submitted by its expert on Guatemalan law, Mr. Alegría, which is cited in no less than 53 paragraphs of the factual section of the Reply.<sup>56</sup> In another 24 paragraphs TGH cites another expert, Dr. Barrera, who purports to interpret the regulatory framework from a technical-financial point of view.<sup>57</sup> In other words, most of the factual section of TGH’s Reply is devoted to presenting its disagreement with the manner in which the CNEE interpreted specific legal, technical and financial aspects of the Guatemalan regulatory framework.

40. It is also indicative that the section of the Reply that attacks the conduct of the CNEE is entitled: “*EEGSA’s Tariff Review for the 2008-2013 Tariff Period was Conducted in Violation of the Regulatory Framework [...]*.”<sup>58</sup> The question at issue, therefore, is none other than whether the CNEE correctly interpreted and applied the domestic regulatory framework. Similarly, the issues address the CNEE’s interpretation of the regulatory framework as regards to: (1) its powers to approve the VAD and tariffs,<sup>59</sup> regarding which TGH alleges that the CNEE “arbitrarily invoked the amended version of RLGE Article 98;”<sup>60</sup> (2) the binding or non-binding nature of the Expert Commission’s report and the scope of its functions, in particular, whether that Commission had the power to approve

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<sup>55</sup> Reply, title of sections II.A.1.c and d, and II.A.2.

<sup>56</sup> *Ibid*, pars. 14, 15, 18, 21, 23, 26-30, 32-35, 39, 43-46, 50, 85-87, 91, 93-98, 109, 110, 123, 136, 137, 142-144, 148, 160, 167, 184-187, 189, 190, 210, 213-215, 224, 225.

<sup>57</sup> *Ibid*, pars. 55-57, 66, 72, 112, 113, 116, 132, 163, 177, 179, 180, 191-196, 199, 201, 202, 204, 205.

<sup>58</sup> *Ibid*, title of section II.E.

<sup>59</sup> *Ibid*, pars. 101-132, under the headings “[t]he CNEE’s Terms of Reference Contravened the LGE and RLGE and Undermined the Objective of the Tariff Review Process” and “[t]he CNEE Failed to Constructively Engage with EEGSA or its Consultant during the Tariff Review Process” (sections II.E.2 and 3 of the Reply).

<sup>60</sup> *Ibid*, par. 117.

the Bates White study that had supposedly been revised in accordance with its report;<sup>61</sup> and (3) technical and economic issues regarding the determination of the VAD.<sup>62</sup>

41. TGH criticizes the reform of RLGE Article 98 in March 2007<sup>63</sup> for being “unconstitutional.”<sup>64</sup> This contradicts its argument that the true problem was the CNEE’s incorrect interpretation and application of that provision (as noted in the preceding paragraph). In any event, neither EEGSA itself nor any other distributor ever challenged the reform as being unconstitutional, which is logical since the reform accorded with the LGE and the regulatory powers of the CNEE.<sup>65</sup> TGH itself never complained about that reform before this arbitration and did not even mention it in the detailed “notice of intent to submit the dispute to arbitration” that it sent to Guatemala on January 9, 2009, as required by the Treaty before this arbitration could be commenced. Moreover, even if TGH did wish to pursue a claim against the reform, that claim would be time-barred pursuant to Article 10.18.1 of the Treaty.<sup>66</sup> Neither EEGSA, nor TGH, nor any other distributor objected to the reform of RLGE Article 98 *bis* when it was adopted in May 2008.<sup>67</sup> Moreover, that article was not applied in this case, as TGH acknowledges.<sup>68</sup> The main theme behind TGH’s complaint, therefore, is still nothing but the way in which the CNEE applied the regulatory framework.

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<sup>61</sup> *Ibid*, pars. 133-199, under the headings “[a]fter Calling For an Expert Commission, Guatemala Undertook to Manipulate the Process to its Advantage” and “[t]he CNEE Unilaterally and Unlawfully Dissolved the Expert Commission and Set EEGSA’s New Tariff Schedules Based Upon Its Own its own VAD Study” (sections II.E.4 and 5 of the Reply).

<sup>62</sup> *Ibid*, pars. 191-207.

<sup>63</sup> Government Resolution 68-2007, March 2, 2007, published in the [newspaper] *Diario de Centro América* on March 5, 2007, **Exhibit R-35**.

<sup>64</sup> Reply, par. 91.

<sup>65</sup> *See* pars. 123-135 below.

<sup>66</sup> This provision establishes: “No claim may be submitted to arbitration pursuant to this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged [...]” The reform of Art. 98 took place on 5 March 2007, but TGH did not file a claim against it under the Treaty until 20 October 2010 when it filed the Notice of Arbitration. Its “notice of intent” of January 2009 did not mention this reform.

<sup>67</sup> Resolution 145-2008, July 30, 2008, **Exhibit C-273**.

<sup>68</sup> Memorial, par. 135.

42. TGH resumes the same regulatory discussion in the legal section of its Reply under the label of violation of the fair and equitable treatment standard.<sup>69</sup> For example, as regards to its legitimate expectations, TGH argues under the sensationalist heading “[t]he Respondent’s deliberate repudiation of its Legal and Regulatory Framework violated Claimant’s legitimate expectations”<sup>70</sup> that the CNEE disregarded the alleged limitations on its powers to set tariffs and determine the VAD, as well as the alleged binding nature of the Expert Commission’s report.<sup>71</sup> TGH also refers to the supposed arbitrariness and “deliberate repudiation or violation” by the CNEE of “critical elements of its own domestic legal or regulatory framework” as grounds for the supposed violation of the standard.<sup>72</sup> Aside from the qualifiers used, the issue is always the same: whether or not the CNEE abided by the regulatory framework in its interpretation and application of the same, regardless of whether its supposed errors are qualified as “repudiation,” “arbitrariness” or simply violations of the regulatory framework.<sup>73</sup>
43. In order to boost its claims of arbitrariness, TGH now cites certain emails exchanged between the CNEE and Mr. Jean Riubrugent, which according to TGH would suggest some kind of conspiracy by the CNEE against EEGSA.<sup>74</sup> As explained below, these exchanges are innocuous.<sup>75</sup> They involve: exchanges between the CNEE and Mr. Riubrugent in December 2007 and January 2008, when he was a consultant to the CNEE, to clarify a technical question in connection with the preparation of the Terms of Reference;<sup>76</sup> some exchanges of information and clarifications in order for the expert to have a better understanding of the position of the CNEE in the context of the Expert

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<sup>69</sup> Reply, section III.

<sup>70</sup> *Ibid*, section III.A.3.b.

<sup>71</sup> *Ibid*, pars. 261-271.

<sup>72</sup> *Ibid*, title of section III.A and title and contents of section III.A.2.

<sup>73</sup> *Ibid*, pars. 244-246, 248-253, title of section III.A.3.b.

<sup>74</sup> *Ibid*, pars. 4, 90, 116, 139-140, 170, 171, 216, 245, 252.

<sup>75</sup> *See* pars. 326-330 below.

<sup>76</sup> E-mails between M. Peláez and J. Riubrugent, various dates, **Exhibit C-567**; E-mails between J. Riubrugent and M. Peláez, December 13, 2007, **Exhibit C-490**.

Commission;<sup>77</sup> as well as questions he had about legal issues relating to the functions of the Expert Commission, including about the binding nature of the report and whether the Expert Commission was to conduct a second review and subsequent approval of the Bates White study.<sup>78</sup> There is nothing arbitrary in those emails; rather, they mostly involve technical discussions between the regulatory authority and its consultant or its party-appointed expert. With regard to the latter emails, it is absurd for TGH to argue that they demonstrate an attempt on the part of the CNEE to influence the Expert Commission. If anyone had attempted to influence the Expert Commission, it was EEGSA, which had appointed Mr. Leonardo Giacchino as a member of the Expert Commission despite the fact that Mr. Giacchino himself had authored the Bates White study that would be examined by the Commission.

44. The emphasis that TGH puts on these emails in order to give some credibility to its accusations of arbitrariness actually demonstrates the opposite: the lack of factual support to disguise the merely regulatory nature of the dispute. For example, the fact that TGH has no complaint against the opinion of the Expert Commission constitutes conclusive evidence that there was no arbitrariness in connection with Mr. Riubrugent's participation in the Expert Commission. If there had been arbitrariness and if the participation of Mr. Riubrugent had caused injury to TGH, TGH would undoubtedly have challenged the opinion of the Expert Commission. TGH, however, insists incorrectly that that opinion was binding and even contends that Bates White incorporated it into its July 28, 2008 study, for approval by the CNEE. This is untenable and, as has been demonstrated, false.<sup>79</sup>

45. TGH and its expert, Mr. Alegría, cannot change the facts through mere conjectures and unfounded allegations that “the CNEE [...] orchestrated the reduction of the electricity

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<sup>77</sup> E-mails between M. Peláez and J. Riubrugent, June 18, 2008, **Exhibit C-498**; E-mails between M. Peláez and J. Riubrugent, various dates, **Exhibit C-496**; E-mail from J. Riubrugent to M. Quijivix, July 11, 2008, **Exhibit C-501**; E-mail from J. Riubrugent to M. Quijivix, July 7, 2008, **Exhibit C-500**.

<sup>78</sup> E-mails between M. Quijivix, A. Brabatti and J. Riubrugent, June 23, 2008, **Exhibit C-499**; E-mails between M. Quijivix and J. Riubrugent, various dates, **Exhibit C-504**; E-mail from J. Riubrugent to M. Quijivix, August 2, 2008, **Exhibit C-505**.

<sup>79</sup> See Section V.E. below.

tariffs” together with the Constitutional Court, which upheld the decisions of the CNEE for “strictly political reasons,”<sup>80</sup> simply because TGH and its expert do not agree with way in which the CNEE interpreted the regulatory framework, or with the VAD that was approved for EEGSA, or with the decisions of the Constitutional Court. Unfounded accusations and conspiracy theories of this sort require much more than mere assertions. TGH’s accusations not only lack any support on the evidence, but also contrast with TGH’s own conduct, illustrated by a presentation in early 2010 by which the Board of Directors of DECA II proposed exerting unlawful pressure on the Constitutional Court in the context of a possible appeal to the scope of RLGE Article 98:

We have concluded that the challenge is feasible. We are already working on arguments; and we suggest the participation of 3 politically powerful attorneys in order to obtain a favorable decision.<sup>81</sup>

46. There was no political “orchestration” on the part of Guatemala, and TGH does not present even a shred of evidence in support of such theory. If there were any evidence, TGH would have presented a denial of justice claim in response to the decisions of the Court and the practices of the CNEE (a possibility which the tribunal recognizes and examines in *Iberdrola*<sup>82</sup>), something that, with good reason, TGH does not do. The tribunal in *Iberdrola* was clear in affirming that “[i]t is the opinion of the Tribunal that what the Claimant has set forth, and the Respondent is correct about this, is simply a disagreement over the procedure followed by the CNEE;”<sup>83</sup> and that with respect to the Constitutional Court’s decision “[t]he Tribunal does not find that the decision presents justified concerns about the appropriateness of the decision.”<sup>84</sup>
47. In sum, TGH’s claim is merely a claim regarding Guatemalan law and certain technical-financial related to the CNEE’s interpretation and application of certain aspects of the

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<sup>80</sup> Reply, pars. 4, 228, see also, pars. 91, 126, 209, 214; Alegría Rejoinder, **Appendix RER-6**, par. 87.

<sup>81</sup> 2009 Management Presentation by DECA II, **Exhibit R-107**, p. 17.

<sup>82</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, pars. 438-452.

<sup>83</sup> *Ibid*, par. 449.

<sup>84</sup> *Ibid*, par. 493.



electricity regulations. Moreover, such claim, has already been pursued by EEGSA and TGH in the Guatemalan courts.

**C. TGH, THROUGH EEGSA, HAS ALREADY LITIGATED THE SAME ISSUES ABOUT WHICH IT COMPLAINS IN THIS ARBITRATION IN THE COURTS OF GUATEMALA**

48. As Guatemala explained in its Counter-Memorial, EEGSA (with the approval of TGH as a partner holding 30% of the shareholdings of DECA II) resorted to the local tribunals to enforce its interpretation of the regulatory and contractual framework.<sup>85</sup> This was the correct legal route, given the Guatemalan legal and regulatory nature of its disagreement with the CNEE. The Guatemalan courts were available to hear EEGSA's claims and consider its position with respect to the CNEE, which they did in an independent and impartial manner (and, as TGH itself has noted, on at least four occasions, various tribunals of first instance upheld the position of EEGSA and TGH.)<sup>86</sup>
49. The local actions undertaken by EEGSA against CNEE Resolutions that are also the subject of the present claim were finally resolved by the Constitutional Court of Guatemala, a court that TGH describes in its Reply as "the highest court in Guatemala responsible for resolving constitutional matters."<sup>87</sup> Those cases involved detailed analyses of the parties' positions, including the opportunity for both parties to present evidence and make presentations at public oral hearings, with intervention by the public prosecutor's office and control bodies.<sup>88</sup> The actions developed as follows:
- (a) Motion for constitutional relief No. 37, filed on August 14, 2008<sup>89</sup> before the Eighth Civil Court of First Instance against the CNEE's decision of July 25, 2008 to dissolve the Expert Commission,<sup>90</sup> and against the CNEE Resolutions of

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<sup>85</sup> Counter-Memorial, pars. 449-454.

<sup>86</sup> Reply, pars. 209-210; Memorial, pars. 207, 209.

<sup>87</sup> *Ibid*, par. 23.

<sup>88</sup> See Constitutional Relief Proceedings Initiated by EEGSA against Actions of the CNEE, **Appendix R-V**.

<sup>89</sup> EEGSA's Motion for Constitutional Relief No. 37-2008, August 14, 2008, **Exhibit R-185**.

<sup>90</sup> GJ-Decision-3121 (File GTTE-28-2008), July 25, 2008, **Exhibit R-86**.

July 29 and 30, 2008, which approved the tariff study prepared by Sigla for EEGSA's tariff schedules.<sup>91</sup> By judgment of August 31, 2009, the Eighth Court granted constitutional relief and suspended the effects of the decision that dissolved the Expert Commission.<sup>92</sup> The CNEE appealed the court of first instance's judgment to the Constitutional Court, and by judgment of February 24, 2010 the Constitutional Court unanimously accepted the CNEE's appeal and overturned the lower court's judgment, thereby rejecting EEGSA's legal action.<sup>93</sup> In its judgment, the Constitutional Court held that:

- the regulations do not assign to the Expert Commission any function other than pronouncing itself on the discrepancies between the CNEE and the distributor;<sup>94</sup>
- The dissolution of the Expert Commission after it had already issued its pronouncement could not have caused harm to EEGSA;<sup>95</sup> and
- The pronouncement of the Expert Commission cannot be binding because of the advisory nature of expert reports under Guatemalan law and the non-delegable obligation and responsibility of the CNEE with respect to the adoption of the tariffs, in accordance with the principles of legality and public policy.<sup>96</sup>

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<sup>91</sup> Resolution 144-2008, July 29, 2008, **Exhibit R-95**; CNEE Resolution 145-2008, July 30, 2008, **Exhibit C-273**; CNEE Resolution 146-2008, July 30, 2008, **Exhibit C-274**. The motion for constitutional relief included a request "[t]hat the National Electric Energy Commission be condemned to pay losses and damages to compensate the serious impairment it caused by violating the constitutional and legal rights of Empresa Eléctrica de Guatemala, Sociedad Anónima, S.A., in open violation of the national and international provisions that protect its operation in the country." The motion also included a request for declaration of the "joint and several liability of the State of Guatemala and the National Electricity Commission, to compensate [EEGSA] for the losses and damages." EEGSA's Motion for Constitutional Relief No. 37-2008, August 14, 2008, **Exhibit R-185**, p. 20.

<sup>92</sup> Judgment of the Eighth Civil Court of First Instance, (Constitutional Relief 37-2008), August 31, 2009, **Exhibit C-330**.

<sup>93</sup> Judgment of the Constitutional Court, February 24, 2010, **Exhibit R-110**.

<sup>94</sup> *Ibid*, pp. 31-32.

<sup>95</sup> *Ibid*, p. 32.

<sup>96</sup> *Ibid*, pp. 32-34.

(b) Motion for constitutional relief No. 7964, filed on August 27, 2008 <sup>97</sup> against the CNEE Resolution of July 29, 2008, which approved the tariff study prepared by Sigla,<sup>98</sup> and the CNEE Resolution of July 30, 2008, approving the tariff schedules.<sup>99</sup> By judgment of May 15, 2009, the Second Civil Court of First Instance granted constitutional relief.<sup>100</sup> The CNEE appealed the court of first instance's judgment to the Constitutional Court and by judgment of November 18, 2009 the Constitutional Court accepted the CNEE's appeal, overturning the lower court's judgment and thereby denying the motion filed by EEGSA.<sup>101</sup> By majority decision, the Constitutional Court decided as follows:

- The CNEE is the only entity empowered to approve the tariffs and is not authorized to delegate this function;<sup>102</sup>
- The Expert Commission has the sole function of issuing a pronouncement on discrepancies between the VAD study submitted by the distributor and the Terms of Reference issued by the CNEE;<sup>103</sup>
- The regulatory framework does not provide for any additional function for the Expert Commission after it has issued its pronouncement;<sup>104</sup>
- Because of the advisory nature of expert reports under Guatemalan law and the responsibility of the CNEE to approve the tariffs, the pronouncement of the Expert Commission cannot be binding;<sup>105</sup> and

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<sup>97</sup> EEGSA's Motion for Constitutional Relief No. C2-2008-7964, August 27, 2008, **Exhibit C-298**.

<sup>98</sup> Resolution 144-2008, July 29, 2008, **Exhibit R-95**.

<sup>99</sup> *Ibid*; CNEE Resolution 145-2008, July 30, 2008, **Exhibit C-273**.

<sup>100</sup> Judgment of the Second Civil Court of First Instance, Constitutional Relief C2-2008-7964, May 15, 2009, **Exhibit C-328**.

<sup>101</sup> Judgment of the Constitutional Court, November 18, 2009, **Exhibit R-105**.

<sup>102</sup> *Ibid*, pp. 30-32.

<sup>103</sup> *Ibid*, pp. 23-26.

<sup>104</sup> *Ibid*, p. 25.

<sup>105</sup> *Ibid*, pp. 23, 31-32.

- The Court reaffirms the regulatory nature of the CNEE's function to approve the tariffs, which must reflect legal criteria, in particular, the costs, including the cost of capital; the Court, however, notes that this issue was not submitted for its decision.<sup>106</sup>

50. As emerges from the description of the local actions above, the issues debated in those cases were the same EEGSA tariff review-related issues that TGH has brought before this Tribunal. In the judgments rendered in those cases, the Constitutional Court decided on the disputed issues concerning the tariff review process, ruling in favor of the CNEE. As explained above and below, despite two reasoned judgments of the Constitutional Court rejecting its claims, TGH now presents the same claim under the guise of a Treaty claim to have this Tribunal act as a Guatemalan court of *last instance* in the matter.

**D. TGH'S CLAIM CANNOT BE CONSIDERED AS A TREATY CLAIM OVER WHICH THIS TRIBUNAL HAS JURISDICTION, AS CONFIRMED BY THE *IBERDROLA* AWARD**

51. As was demonstrated in the Counter-Memorial and is reiterated below, TGH's position on the regulatory, technical-financial and Guatemalan legal issues that constitute the substance of its claim is incorrect.<sup>107</sup> But what is most important for jurisdictional purposes is that a dispute to determine whether a regulator correctly interpreted and applied a regulatory framework in the exercise of its functions<sup>108</sup> (an issue, moreover, already resolved in the regulator's favor by the competent national courts) cannot give rise to a claim for violation of international investment protection standards. This dispute is merely about local law (whether or not the legal framework has been violated). In this kind of case, what the state must guarantee is that its tribunals are available and that their decisions do not deny justice to the investor, something that TGH is not seeking to hold Guatemala responsible for.

52. In other words, there is no conduct that violates the Treaty or international law that can be imputed to Guatemala as a state: the CNEE acted to the best of its knowledge and

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<sup>106</sup> *Ibid*, pp. 32-33.

<sup>107</sup> *See* Section V.E.

<sup>108</sup> Counter-Memorial, pars. 52-55.

understanding in the exercise of its duties as an independent regulatory authority in the tariff review process; EEGSA and TGH were allowed to disagree with the actions of the CNEE, and they in fact did so by challenging before the Guatemalan courts the alleged errors committed by the CNEE in interpreting and applying the regulatory framework. As explained above, that dispute was analyzed at two jurisdictional levels in Guatemala, and the final decisions of the Constitutional Court were favorable to the CNEE. TGH, however, does not challenge those decisions under international law (denial of justice).

53. Therefore, the issues of Guatemalan law have been resolved, as appropriate, by the local courts, and Guatemala has not been accused of violating the Treaty or international law for denial of justice. What TGH seeks is nothing more than a third opinion, now under the guise of a Treaty claim, but its claim continues to be what it has always been: a regulatory dispute with the CNEE that was adjudicated by the Guatemalan courts, which decisions have not been the subject of a claim by TGH. In sum, there are no claims against the Guatemalan state under the Treaty, but rather requests are made for (i) a review of the decisions of the Constitutional Court, that is, a new decision on the same questions of Guatemalan law or (ii) a new tariff review to be conducted by this Tribunal.
54. TGH asks this Tribunal to determine whether or not the CNEE complied with the regulatory framework. If the answer is yes, TGH's claim would disappear, that is, it would be exhausted together with the local law issue. There is, therefore, no real claim under international law independent of the one under Guatemalan law, and such claim has already been resolved by the Guatemalan courts. It is not a coincidence, therefore, that in its Reply, TGH discusses neither the applicable law nor the role that Guatemalan law must play in relation to international law. TGH does not do so because it would have to admit that its claim is not under international law.
55. All this has been made clear by the *Iberdrola* award. The tribunal in *Iberdrola* mentioned the numerous "labels"<sup>109</sup> and "characterizations"<sup>110</sup> used by Iberdrola, such

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<sup>109</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, pars. 327, 349, 353, 368.

<sup>110</sup> *Ibid*, pars. 323, 351, 356, 368.

as characterizing the actions of the CNEE as “aberrant,”<sup>111</sup> “arbitrary,”<sup>112</sup> “disregard for the legal framework,”<sup>113</sup> or “repudiation,”<sup>114</sup> “clear breakdown,”<sup>115</sup> “annulment,”<sup>116</sup> “destruction”<sup>117</sup> of the rights of EEGSA or of the “fundamental principles,” “governing principles” or “basic guarantees” of the regulatory framework “offered to investors.” The tribunal did not allow itself be confused by these epithets:

As the Tribunal affirmed and the case file demonstrates, despite the claimant’s characterization of the disputed issues, a substantial portion of those issues and, especially, of the disputes that the Claimant asks the Tribunal to resolve, relate to Guatemalan law. In the various briefs submitted during the arbitration, the Parties argued *in extenso* about the way in which specific provisions of Guatemalan law should be interpreted, particularly the provisions of the General Electricity Act (LGE) and the [Regulations (RLGE)].<sup>118</sup>

56. The essence of Iberdrola’s claim, which is the same as TGH’s, was thus a mere regulatory disagreement, which the tribunal summarized as follows:

The Tribunal, according to the claim filed by the Claimant, would have to act as regulatory authority, as administrative entity and as trial court, to decide the following matters, among others, in light of Guatemalan law:

[...]

b. The extent of the distributor’s participation in the VAD calculation (particularly, based on LGE Articles 74 and 75 and RLGE Articles 97 and 98) and if the consultant had the power to separate from the Terms of Reference.

c. The correct formula for calculating the VAD and in particular to define: (a) the VNR necessary to determine the remunerable capital

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<sup>111</sup> *Ibid*, pars. 323, 326.

<sup>112</sup> *Ibid*, pars. 180, 215, 228, 246, 247, 277, 282, 315, 326, 328, 338, 342, 367, 368.

<sup>113</sup> *Ibid*, pars. 329, 333.

<sup>114</sup> *Ibid*, pars. 378, 439.

<sup>115</sup> *Ibid*, par. 379.

<sup>116</sup> *Ibid*, pars. 330, 331, 379.

<sup>117</sup> *Ibid*, par. 383.

<sup>118</sup> *Ibid*, par. 351 (Emphasis added).

base; (b) the FRC that, multiplied by the VNR, results in the annual cost of capital; and (c) the energy losses. The above would require the Tribunal to determine whether the correct VAD was the result of the first study of Bates White, that of the second study of the same company, that determined by the Expert Commission, that defined by Sigla, that set by Estanga and Suárez, that set by Damonte or, even, that offered by Mr. Perez in the disputed meeting with EEGSA officials.

d. The correct interpretation of LGE Articles 73 and 79 that indicate the discount rate to be used to calculate the tariffs.

[...]

f. The correct interpretation of the rules concerning the contracting of tariff studies and whether those rules authorized the CNEE to contract its own tariff study, independent of the distributor's study.

g. The powers of the CNEE and, particularly, but not exclusively, if these powers were simply of supervision, with respect to the determination of the tariffs, or whether it was responsible for setting those tariffs.

h. Whether the pronouncement of the Expert Commission was binding, (as noted, this matter received extensive discussion based on the criteria of interpretation of Guatemalan law).

i. If there was an agreement between the CNEE and EEGSA on the operating rules of the Expert Commission. If so, whether that agreement was valid.

j. Whether the unilateral decision of the CNEE to dissolve the Expert Commission was legal.

k. If the conduct of the CNEE in rejecting the Claimant's consultant's study and accepting that of Sigla was legal.

[...] <sup>119</sup>

57. These are the same allegations made by TGH in this case, and which the *Iberdrola* tribunal characterized as a mere local regulatory dispute:

As can be observed in the various briefs and allegations made throughout this arbitration proceeding, the Claimant's assertion of the alleged violation by Guatemala of the Treaty's standards is based on

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<sup>119</sup> *Ibid*, par. 354. (Emphasis added).

the differences between EEGSA and the CNEE in interpreting the laws and regulations of the Republic of Guatemala and the financial formulas for calculating the Distribution Value Added (VAD), during the tariff review process for the five-year period of 2008–2013. Other than labeling the actions of the Respondent, the Claimant does not present a clear and concrete line of reasoning about which of the Republic of Guatemala’s sovereign acts could, in its opinion, constitute violations of the Treaty under international law. In the Claimant’s allegations, the Tribunal finds nothing more than a discussion of local law, which it does not have the jurisdiction to consider and adjudicate as if it were a court of appeals. [...]

[T]he Claimant, although it again cites the Treaty rules and refers to decisions of other international tribunals, continued to focus on the differences of interpretation, under Guatemalan law, of the issues mentioned so often in this award. The Tribunal reiterates that, beyond labeling the behavior of CNEE as violating the Treaty, the Claimant did not raise a dispute under the Treaty and international law, but a technical, financial and legal discussion on provisions of the law of the respondent State.

[...]

In summary, the Claimant requests the Tribunal to act as judge of instance to decide the debate that took place in accordance with Guatemalan law and to rule that it is right in its interpretation of each of the issues discussed, so that as from the decision of this Tribunal, the Claimant can construct and claim a violation of the standards of the Treaty.<sup>120</sup>

58. The tribunal clearly concluded that the claim was one of Guatemalan law and not international law, which is exactly the argument that Guatemala puts forward here:

The Tribunal reiterates that it agrees with the Republic of Guatemala in that:

*“... Iberdrola’s demand, based on whether or not the CNEE could reject the Bates White study or approve that of Sigla, whether or not it should delegate this function to the Expert Commission, or whether the technical aspects of VNR calculation and of the Capital Recovery Factor were successfully met, is based solely on the interpretation of Guatemalan regulation. Iberdrola’s claim is not, nor can be, therefore, a claim under international law.*

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<sup>120</sup> *Ibid*, pars. 349, 353-355. (Emphasis added).



*“... what Iberdrola is asking this Court is plainly and simply to decide which is the correct interpretation, that of Iberdrola and EEGSA on the one hand, or that of the CNEE, on the other, on specific issues of Guatemalan tariff review procedure. It also asks this Tribunal to re-do the tariff review as if it were a national regulatory agency. It is clear that such actions are completely outside the functions of an international tribunal.”<sup>121</sup>*

59. The tribunal concluded that Guatemalan law, not international law, was the applicable law:

The Claimant cannot validly assert that the national law of Guatemala must be taken as a fact in the dispute that it submitted to the Tribunal. The Claimant initiated this process for resolution of an issue of “law,” a series of differences over provisions of the Guatemalan legal system with respect to which there was, in its opinion, a mistaken interpretation on the part of the regulatory body and the Guatemalan legal system, which it now asks this Tribunal to review.<sup>122</sup>

60. Accordingly, the tribunal concluded that it did not have jurisdiction over such dispute, because otherwise “it would have to act as regulatory authority, as administrative entity and as trial court.”<sup>123</sup> It is notable that in *Iberdrola* the autonomous fair and equitable treatment standard was the one applicable; such standard subjects the conduct of the state to greater scrutiny by an international tribunal than the international minimum standard that is applicable in this case. Even so, the tribunal concluded that it did not have jurisdiction over the dispute:

It is apparent to the Tribunal that the dispute presented by the Claimant in this arbitration proceeding deals with Guatemalan national law and that the simple mention of the Treaty and Iberdrola’s characterization of the actions taken by Guatemala, in accordance with the standards of that Treaty, is not enough to convert the dispute into one over “issues regulated” by the Treaty. [...]

As stated by the Claimant, it is certain that the legality of the conduct of a State in light of its internal law does not necessarily mean that such conduct is legal under international law. But it is no less certain

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<sup>121</sup> *Ibid*, par. 370, citing the Respondent’s Post-Hearing Brief, pars. 2 and 3. (Underlining added, in italics in the original).

<sup>122</sup> *Ibid*, par. 365.

<sup>123</sup> *Ibid* par. 354.

that if the State acted by invoking the exercise of its constitutional, legal and regulatory authorities, through which it interpreted its internal laws and regulations in a particular manner, an ICSID tribunal, set up under the terms of the Treaty, cannot decide that it has jurisdiction to judge, according to international law, the interpretation that the State has given to its internal laws and regulations simply because the investor does not share it or considers it to be arbitrary or in violation of the Treaty.

Consequently, it is not enough for the Tribunal to be convinced by the claimant that the latter's interpretation of Guatemalan laws and regulations and of technical and economic models is the correct one and that the one adopted by the CNEE is mistaken. It is also not enough to label its own interpretation of the past history of the General Electricity Act (LGE) and the [Regulations] as "legitimate expectations," nor is it sufficient to characterize the interpretations of the regulatory body of Guatemala or the decisions of its courts, to persuade the Tribunal that it should resolve the dispute under local law as a violation of the Treaty. It is also not enough to label the interpretation of the CNEE or the courts as "arbitrary" for the Tribunal to decide that there is a genuine claim that Guatemala violated the standard of fair and equitable treatment or that a true international dispute existed with respect to an expropriation, because the Claimant believes that the financial criterion used by Bates White to calculate the Distribution Value Added (VAD) is the correct one and all the others (including the VAD proposed by one of the executives of EEGSA) are erroneous. Or that the interpretations of the LGE and the [Regulations], endorsed by the courts of Guatemala, are in violation of the Treaty because they do not coincide with those of Iberdrola. [...]

If the situation is as described in the preceding paragraphs and the regulatory body's interpretation was endorsed by the local tribunals, for this Tribunal to be able to come to a decision in this proceeding, the Claimant would have had to demonstrate, beyond the shadow of a doubt, that the actions of the courts violated the Treaty.<sup>124</sup>

61. Therefore, the tribunal readily accepted Guatemala's position that the dispute was a mere regulatory disagreement that does not qualify as a claim under the Treaty. TGH is certainly entitled to put forth a different interpretation of the regulatory framework than the one adopted by the CNEE; TGH, however, cannot argue that the CNEE did not act

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<sup>124</sup> *Ibid*, pars. 356, 367, 368, 371 (Emphasis added).

on the basis of its own interpretation of the regulatory framework, which was within its powers to do. Regardless of the sensationalist language used, such disagreement cannot automatically constitute unfair and inequitable treatment, and much less be contrary to the international minimum standard that is applicable in this case, in violation of an international treaty with Guatemala. This is instead an ordinary dispute between a regulator and a regulated party with respect to which the state's international duty is to ensure that its courts are made available and reach decisions without denying justice. TGH does not allege denial of justice, the only claim over which this Tribunal would have jurisdiction (and furthermore, the tribunal in *Iberdrola* was clear that there was no denial of justice in this case).<sup>125</sup>

**E. THE REMAINING JURISPRUDENCE CONFIRMS THAT TGH'S CLAIM IS NEITHER A VALID NOR ADMISSIBLE INTERNATIONAL CLAIM, AND THAT THIS TRIBUNAL LACKS JURISDICTION**

62. The *Iberdrola* award is the last link in a long list of decisions confirming that disputes of this nature cannot give rise to breaches of investment protection treaties (*BITs*), except where denial of justice has occurred. If this were not so, international tribunals would take on the role of appellate courts of the third or fourth instance in matters concerning domestic regulatory law. This is not the role of tribunals under BITs.
63. TGH has chosen not to address much of this precedent,<sup>126</sup> and admits that its response is "superficial"<sup>127</sup> with respect to the cases it does address. Instead, it merely asserts that these cases relate to different facts and that some of them concerned a concession or public service contract.<sup>128</sup> This is TGH's strategy to avoid the principle that clearly emerges from those precedents. *Iberdrola* attempted to do the same, but the tribunal in

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<sup>125</sup> *Ibid*, pars. 433-508.

<sup>126</sup> E.g., *Saluka Investments B.V. v. Czech Republic* (UNCITRAL Case) Partial Award, March 17, 2006, **Exhibit CL-42**.

<sup>127</sup> Reply, par. 247.

<sup>128</sup> *Ibid*.

that case did not hesitate to rely upon such precedent.<sup>129</sup> If TGH wanted an identical precedent, it now has one in the *Iberdrola* award.

64. The *Azinian v. Mexico*<sup>130</sup> award, to cite an example, is also directly applicable. In that case, in a section of the award entitled “[v]alidity of the [c]laim under NAFTA,”<sup>131</sup> the tribunal analyzed whether the claim qualified, as required by NAFTA Article 1116, as “a claim that another Party has breached an obligation under: [...] Section A” of NAFTA concerning substantive investment protections. In other words, the tribunal examined whether the dispute satisfied the same jurisdictional criteria contained in Article 10.16.1(a)(i)(A) of the Treaty. Moreover, that matter was not a mere contractual claim, rather the claimants complained of actions taken by the Naucalpan de Juárez Ayuntamiento in Mexico in an administrative compliance review proceeding regarding the collection and disposal of garbage, which culminated in the concession’s annulment.
65. There is no doubt that the principle enunciated in *Azinian* is directly applicable here, as confirmed by the tribunal in *Iberdrola* noting, which noted that it expressed a “line of thought, which this Tribunal shares.”<sup>132</sup>

If the situation is as described in the preceding paragraphs and the interpretation of the regulatory body was supported by the local tribunals, for this Tribunal to be able to resolve this process the Claimant should have demonstrated, beyond doubt, that the action of the courts violated the Treaty. As noted by the award in the case *Azinian v. Mexico*:

*"It is a fact of life everywhere that people can be disappointed in their dealings with public authorities, and this disappointment is repeated when national courts reject their claims...NAFTA is not intended to provide unrestricted protection to foreign investors against such disappointments,*

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<sup>129</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, pars. 369-372 and 418-421.

<sup>130</sup> *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, November 1, 1999, **Exhibit RL-2**, pars. 82-84, 87, 96-97, 99, 100.

<sup>131</sup> *Ibid*, title of Section VI.

<sup>132</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, par. 372.

*and none of its provisions can be understood otherwise... it is clear that to decide the plaintiffs are correct it is not sufficient that the Tribunal disagrees with the decision of the City Council. A public authority cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disauthorized at the international level.”*

[...]

Likewise, the case *Robert Azinian v. Mexico* is also relevant, in which the Tribunal ruled that:

“... a public authority can not be faulted for acting in a manner endorsed by its courts unless the courts themselves are discredited at the international level. Because the Mexican courts considered that the decision of the City Council to annul the Concession Contract was according to Mexican law regulating the public service concessions, the question is whether the decisions themselves of the Mexican courts violate Mexico’s obligations under Chapter Eleven [of the North American Free Trade Treaty].”<sup>133</sup>

66. In much the same way, the award in *Generation Ukraine v. Ukraine* is also directly applicable. Despite TGH’s assertion that that case concerned “minor”<sup>134</sup> regulatory issues, the investor’s project at hand was fully thwarted from moving forward, which has not even occurred in the present case. There is no doubt about the relevance of the *Generation Ukraine* award, as the *Iberdrola* tribunal notes:

In that same line of thought, which this Tribunal shares, the Tribunal in the case *Generation Ukraine v. Ukraine* - which discussed a claim under a BIT, because of regulatory acts of the municipality of Kiev - said:

*“... This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of the domestic courts and tribunals that are cognizant of the minutiae of the*

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<sup>133</sup> *Ibid*, pars. 371 and 421, citing *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, November 1, 1999, **Exhibit RL-2**, pars. 83-84 and 97 (Underlining added; italics in original).

<sup>134</sup> Reply, pars. 279-280.

applicable regulatory regime [...] the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the Ukrainian courts in a bona fide attempt to resolve these technical matters."<sup>135</sup>

67. As regards *EnCana v. Ecuador*, TGH argues that that case is different because it involved tax matters and the investor's operations were not affected.<sup>136</sup> EEGSA's operations are also perfectly intact at present; in any event, none of this affects the applicability of the principle enunciated by the tribunal distinguishing a mere regulatory dispute, which must be submitted to local courts, from a BIT claim:

[...] But there is nonetheless a difference between a questionable position taken by the executive in relation to a matter governed by the local law and a definitive determination contrary to law. In terms of the [treaty] the executive is entitled to take a position in relation to claims put forward by individuals, even if that position may turn out to be wrong in law, provided it does so in good faith and stands ready to defend its position before the courts. Like private parties, governments do not repudiate obligations merely by contesting their existence. [...]<sup>137</sup>

68. This principle was also enunciated in *Saluka v. Czech Republic*, which TGH does not discuss. That decision is doubly relevant since the tribunal applied the fair and equitable treatment rule, which is less deferential to the state than the international minimum standard applicable in this case:

[...] The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.

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<sup>135</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, pars. 372 and 418 (emphasis in original), citing *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, September 16, 2003, attached as **Exhibit RL-6**, par. 20.33.

<sup>136</sup> Reply, par. 247.

<sup>137</sup> *EnCana Corporation v. Republic of Ecuador* (LCIA Case No. UN3481, UNCITRAL Rules) Award, February 3, 2006, **Exhibit RL-9**, par. 194.

As the tribunal in *ADF Group Inc.* has stated with regard to the “fair and equitable treatment” standard contained in Article 1105(1) NAFTA:

something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements....

Quite similarly, the *Loewen* tribunal stated in the same legal context that whether the conduct [of the host State] amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against decisions of [the host State].<sup>138</sup>

69. With regards to the *ADF* case mentioned by the tribunal in the above-cited *Saluka* case, TGH states that it is irrelevant in that it relates to different facts,<sup>139</sup> which is obvious but nonetheless does not diminish the relevance of the decision, as evidenced by the fact that it is cited by other tribunals such as the one in *Saluka*.
70. The same is true of the *Feldman v. Mexico* award, in which the tribunal, despite unreasonable actions on the part of the Mexican tax authorities, affirmed that the dispute did not amount to a violation of the treaty given that it was a domestic law matter over which the local courts had jurisdiction and were available to decide:

Formal administrative procedures and the courts, according to the record, were at all times available to him, and have not been challenged here as being inconsistent with Mexico’s international law obligations.

[...]

Given as noted earlier that Mexican courts and administrative procedures at all relevant times have been open to the Claimant, [...] there appears to have been no denial of due

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<sup>138</sup> *Saluka Investments B.V. v. Czech Republic* (UNCITRAL Case) Partial Award, March 17, 2006, **Exhibit CL-42**, pars. 442-443.

<sup>139</sup> *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, January 9, 2003, **Exhibit CL-4**, par. 190; Reply, par. 247.

process or denial of justice there as would rise to the level of a violation of international law.<sup>140</sup>

71. Contrary to what TGH alleges,<sup>141</sup> the *ADF* and *Feldman* awards are relevant precisely because the claimants complained about the way in which the local authorities applied certain local regulations, which allegedly had a negative impact on their business, as in the present case. In much the same way, the *GAMI v. Mexico* award is also relevant precisely because, as TGH acknowledges,<sup>142</sup> the tribunal was not misled by the claimant's allegations of unjustified repudiation and arbitrariness caused by regulatory measures that allegedly violated Mexican law. The tribunal held:

GAMI has demonstrated clear instances of failures to implement important elements of Mexican regulations. It has adduced eminent evidence to the effect that the Mexican government is constitutionally required to give effect to its regulations. Claims of maladministration may be brought before the Mexican courts. Indeed as breaches of Mexican administrative law they could be brought nowhere else. [...].<sup>143</sup>

72. The tribunal in *GAMI* based its finding on the award in the *Waste Management v. Mexico* (*Waste Management II*) case, which TGH attempts to distinguish on the grounds that it relates to contractual issues.<sup>144</sup> The *GAMI* tribunal readily affirmed that while “Waste Management II involved contractual undertakings between a governmental authority and the investor,” “some elements of the analysis in Waste Management II are nevertheless instructive” for a regulatory matter.<sup>145</sup> For much the same reasons, the *Waste Management II* award is also relevant to this case insofar as it emphasized that a

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<sup>140</sup> *Marvin Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1) Final Award, December 16, 2002, **Exhibit RL-5**, pars. 134, 140.

<sup>141</sup> Reply, par. 278.

<sup>142</sup> Reply, par. 247.

<sup>143</sup> *GAMI Investments, Inc v. Mexico* (UNCITRAL Case) Final Award, November 15, 2004, **Exhibit RL-7**, par. 103.

<sup>144</sup> Reply, par. 277.

<sup>145</sup> *GAMI Investments, Inc v. Mexico* (UNCITRAL Case) Final Award, November 15, 2004, **Exhibit RL-7**, par. 100.



violation of local law “is not to be equated with a violation of Article 1105 [international minimum standard]” if “some remedy is open to the [claimant] to address the problem,” and if it is not possible to “discern in the decisions of the [local] courts any denial of justice.”<sup>146</sup> A claim of this sort is outside the jurisdiction of an international tribunal:

[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of *amparo* in respect of the decisions of the federal courts of NAFTA parties.<sup>147</sup>

73. TGH also criticizes Guatemala for relying on the *Parkerings v. Lithuania* award, again because of the alleged contractual nature of that dispute. The relevance of the reasoning of the tribunal in *Parkerings*, however, is not confined to contractual cases; for this reason it was affirmatively cited, for example, in the *Iberdrola* award.<sup>148</sup> As stated in *Parkerings*:

[...] [M]any tribunals have stated that not every breach of an agreement or of domestic law amounts to a violation of a treaty. For instance, in the *Saluka v. [Czech Republic]* case, the Tribunal stated:

The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State. [...] something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements [...].

[...] In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary. This preliminary determination is even more necessary if the parties to the contract have agreed on a specific forum for all disputes arising out of the contract. For the avoidance of doubt, the

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<sup>146</sup> *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, April 30, 2004, **Exhibit CL-46**, pars. 115, 130.

<sup>147</sup> *Ibid*, par. 129.

<sup>148</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, par. 420.

requirement is not dependent upon the parties to the contract being the same as the parties to the arbitration.

However, if the contracting-party is denied access to domestic courts, and thus denied opportunity to obtain redress of the injury and to complain about those contractual breaches, then an arbitral tribunal is in position, on the basis of the BIT, to decide whether this lack of remedies had consequences on the investment and thus whether a violation of international law occurred. In other words, as a general rule, a tribunal whose jurisdiction is based solely on a BIT will decide over the “treatment” that the alleged breach of contract has received in the domestic context, rather than over the existence of a breach as such.<sup>149</sup>

74. In support of its position, TGH cites the award in *Vivendi v. Argentina (Vivendi II award)* and the decision of the ICSID Annulment Committee in *Helnan v. Egypt*.<sup>150</sup> Neither of these decisions lends support to TGH. The *Vivendi II* award rejected Argentina’s argument that a fair and equitable treatment claim must be limited to denial of justice.<sup>151</sup> This does not, however, contradict Guatemala’s position. There are scenarios in which the standards of treatment under BITs may go beyond a denial of justice, but that is not so in the scenario at hand. *Vivendi II*, for instance, concerned governmental (and parliamentary) actions in Tucumán, over the course of several years, that:

[I]mproperly and without justification, mounted an illegitimate “campaign” against the concession, the Concession Agreement, and the “foreign” concessionaire from the moment it took office, aimed [...] at reversing the privatization.<sup>152</sup>

75. None of this has occurred in this case. It is true that TGH has attempted to raise the tone of this dispute by employing sensationalist words and phrases, yet the actual grounds of

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<sup>149</sup> *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8) Award, September 11, 2007, **Exhibit RL-10**, pars. 315-317. (Emphasis added).

<sup>150</sup> Reply, pars. 273, 280, 282.

<sup>151</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case No. ARB/97/3) Award, August 20, 2007, **Exhibit CL-18**, pars. 7.4.10-7.4.11.

<sup>152</sup> *Ibid*, par. 7.4.19.

the claim concern differences of interpretation between the investor and the regulator regarding certain aspects of the tariff review process that were submitted to the scrutiny of the local courts. There is no evidence of any campaign or political orchestration against EEGSA.

76. Similarly, the decision of the Annulment Committee in *Helnan* does not contradict Guatemala's position. One of the decisions of the *Helnan* Committee was that a ministerial decision that had downgraded the category of a hotel, destroying the investment as a result, could not be considered a violation of the BIT. The Committee did not annul this decision, but only the following paragraph of the award:

Helnan seeks annulment of the finding in paragraph 148 of the Award that:

The ministerial decision to downgrade the hotel, not challenged in the Egyptian administrative courts, cannot be seen as a breach of the Treaty by EGYPT. It needs more to become an international delict for which EGYPT would be held responsible under the Treaty.<sup>153</sup>

77. The Committee understood that this paragraph was incorrect in that it imposed "a requirement on the claimant to pursue local remedies before there can be said to have been a failure to provide fair and equitable treatment."<sup>154</sup> Guatemala's position is consistent with this decision. Guatemala does not propose that in order to constitute a valid international claim any state measure must first be challenged locally as suggested in the paragraph of the *Helnan* award cited above. The issue is that there cannot be a valid claim when, after analysis, it becomes evident that the claimant is attempting to submit to an international tribunal questions of domestic law that, moreover, have already been examined and decided by the local courts.

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<sup>153</sup> *Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19) Decision of the *ad hoc* Committee, June 14, 2010, **Exhibit CL-62**, par. 28.

<sup>154</sup> *Ibid*, par. 48.

78. In conclusion, TGH is incapable of presenting a real claim under the Treaty's international minimum standard, autonomous from the dispute concerning Guatemalan law and the technical-financial questions regarding the correct VAD for EEGSA in 2008, which has already been decided by the Constitutional Court as noted previously. Accordingly, and taking into account that the Treaty requires TGH's claim to genuinely relate to violations of the Treaty's substantive provisions (Article 10.16.1.(a)(i)(A) of the Treaty),<sup>155</sup> the Tribunal not only can, but must examine the fundamental basis of TGH's claim as a matter of jurisdiction, and it must reject such claim based on lack of jurisdiction without entering into the merits.

#### **IV. GUATEMALA HAS NOT VIOLATED THE INTERNATIONAL MINIMUM STANDARD OF TREATMENT UNDER ARTICLE 10.5 OF THE TREATY**

##### **A. TGH IGNORES THAT THE APPLICABLE STANDARD IS THE MINIMUM STANDARD OF TREATMENT UNDER CUSTOMARY INTERNATIONAL LAW**

79. As explained above, this Tribunal must reject TGH's claims for lack of jurisdiction. However, TGH's claims are completely baseless on the merits as well. However, TGH continues to ignore the fact that the substantive protection it invokes under Article 10.5 of the Treaty guarantees only the minimum standard of treatment under customary international law, rather than the more stringent standard of fair and equitable treatment that is independent of customary law. TGH attempts to equate these standards as if there were no difference between them.<sup>156</sup> Moreover, it continues to rely on awards that apply the autonomous fair and equitable treatment standard rather than the international minimum standard, without explanation.<sup>157</sup> This alone is sufficient to invalidate TGH's legal analysis.

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<sup>155</sup> Note that the applicable BIT in *Helnan*, between Denmark and Egypt, does not contain this requirement, but allows for any dispute "in connection with an investment" to be submitted to arbitration, as the *Ad hoc* Committee noted in paragraph 42 of the decision. *Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19) Decision of the *Ad hoc* Committee, June 14, 2010, **Exhibit CL-62**, par. 42.

<sup>156</sup> Reply, pars. 231-237.

<sup>157</sup> *Ibid*, pars. 238-244, 254-260.

80. Article 10.5 of the Treaty is clear with regard to the standard of treatment that state parties must observe, namely, the minimum standard of treatment under international law:
- i. Its heading is “Minimum Standard of Treatment;”
  - ii. Paragraph 1 specifies that this means “treatment in accordance with customary international law;”
  - iii. Paragraph 3 reiterates that “paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment;”
  - iv. Paragraph 3 also confirms that “[t]he concepts of ‘fair and equitable treatment’ [...] do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights;”
  - v. CAFTA-DR Annex 10-B makes clear that “‘customary international law’ generally and as specifically referenced in Articles 10.5, [...] results from a general and consistent practice of States that they follow from a sense of legal obligation.”
81. Instead of analyzing these provisions and admitting that the standard under the Treaty is the minimum standard of treatment, which is less rigorous for the state, TGH attempts to blur the distinction between this and the autonomous standard of fair and equitable treatment. For instance, TGH makes reference to an alleged evolution of minimum standard into the fair and equitable treatment standard, such that today both would be practically one and the same.<sup>158</sup>
82. It is important to note that CAFTA-DR is not an old treaty from 20, 30 or 40 years ago; it was signed in 2004 and entered into force for the United States and Guatemala in mid-2006. At that time, the debate regarding the content of the customary international law minimum standard of treatment, its alleged evolution, and fair and equitable treatment was fully fledged. Accordingly, the choice of the minimum standard was a conscious

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<sup>158</sup> *Ibid*, pars. 231–237.

and deliberate decision by the state parties to the Treaty—not coincidental or irrelevant, as TGH would have us believe. The parties wanted to ensure greater deference to their decisions and less interference on the part of international tribunals. As the tribunal explained in the *Suez et al. v. Argentina* cases:

[T]he Tribunal is of course bound by the specific language of each of the applicable BITs. With respect to the Argentina-France BIT, it is to be noted that the text of the treaty refers simply to “the principles of international law,” not to “the minimum standard under customary international law.” The formulation “minimum standard under customary international law” or simply “minimum international standard” is so well known and so well established in international law that one can assume that if France and Argentina had intended to limit the content of fair and equitable treatment to the minimum international standard they would have used that formulation specifically.

[...] The Tribunal therefore rejects the Respondent’s argument that the content of the fair and equitable treatment standard in the Argentina-France BIT is limited to the international minimum standard.<sup>159</sup>

83. In fact, the Treaty expressly adopts the limitation of the scope of the fair and equitable treatment standard to the international minimum standard as mentioned by the tribunal in *Suez*. It is notable that the language of Article 10.5 mirrors the text in the article concerning the minimum standard of treatment in the 2004 U.S. model BIT.<sup>160</sup> As is well known, with this language the United States sought to limit the level of protection guaranteed by the standard in response to expansive interpretations of the fair and equitable treatment standard in case law, particularly in the context of NAFTA. Consequently, this Tribunal must give full effect to the limits imposed by the Treaty language on the guarantee of fair and equitable treatment.

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<sup>159</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/03/19) and *AWG Group v. Argentina* (UNCITRAL Case), Decision on Liability, July 30, 2010, **Exhibit RL-16**, pars. 184–185; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentina* (ICSID Case No. ARB/03/17) Decision on Liability, July 30, 2010, **Exhibit RL-17**, pars. 177–178.

<sup>160</sup> U.S. Model BIT (2004), **Exhibit RL-19**, Art. 5.

84. In *Railroad Development Corporation v. Guatemala*, another case under CAFTA-DR, the U.S. Government submitted the following non-disputing party statement on the interpretation of Article 10.5:

These provisions demonstrate the CAFTA-DR Parties' express intent to incorporate the minimum standard of treatment required by customary international law as the standard for treatment in CAFTA-DR Article 10.5. Furthermore, they express an intent to guide the interpretation of that Article by the Parties' understanding of customary international law, *i.e.*, the law that develops from the practice and *opinio juris* of States themselves, rather than by interpretations of similar but differently worded treaty provisions. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets these requirements.<sup>161</sup>

85. Accordingly, as the U.S. Government has noted, it is for TGH to prove the content of the international minimum standard based on the “general and consistent practice of States that they follow from a sense of legal obligation,” as required by the text of the Treaty. TGH not only fails to meet this burden, but entirely ignores the practice and *opinio juris* of the state parties to the Treaty. As is clearly noted in the statements that El Salvador and Honduras submitted in *Railroad Development Corporation* and the position defended by the United States Government in *Glamis Gold*, the understanding of the state parties to the CAFTA-DR is that the minimum standard is separate from and less rigorous for the state than the standard of fair and equitable treatment. Moreover, the position of the state parties is that the doctrine of “legitimate expectations” is not applicable in the context of the minimum standard, and that this standard is breached only in cases in which there is manifest arbitrariness, blatantly unfair measures and denial of justice.<sup>162</sup>

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<sup>161</sup> *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Submission of the United States of America, January 31, 2012, **Exhibit RL-29**, par. 3.

<sup>162</sup> *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Submission of El Salvador under CAFTA-DR Art. 10.20.2, January 2012, **Exhibit RL-28**; *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Submission of Honduras under CAFTA-DR Art. 10.20.2, January 2012, **Exhibit RL-27**; *Glamis Gold Ltd. v. United States of America*, Counter-Memorial of the United States, September 19, 2006, **Exhibit RL-20**, pp. 227-235; *Glamis Gold*

86. TGH seeks to avoid the burden of proof imposed by the Treaty language —accepted and referred to by the United States Government itself as noted above—by making a vague allusion to the evolution of the minimum standard.<sup>163</sup> TGH does not mention that despite such evolution, the minimum standard continues to be distinct from and less rigorous than the autonomous fair and equitable treatment standard. In this regard, the recently released UNCTAD study on the fair and equitable treatment standard, following a detailed examination of the case law, observes:

A high threshold has been emphasized in the context of application of the minimum standard of treatment under customary international law. The classic early tests of the MST [minimum standard of treatment] required a violation to be “egregious” or “shocking” from the international perspective. Even though the world has moved on, and the understanding of what can be considered egregious or shocking has changed, these terms still convey a message that only very serious instances of unfair conduct can be held in breach of the MST.

[...]

A second approach, using a somewhat lower threshold, has been taken by tribunals applying an unqualified FET standard (the one not linked to the customary law MST). These tribunals have – albeit to a lesser extent – also tended to express a significant degree of deference for the conduct of sovereign States.<sup>164</sup>

87. Furthermore, in its recommendations on how to draft a fair and equitable treatment clause, UNCTAD explains:

A reference to the MST [minimum standard of treatment] assumes that tribunals examining FET claims will hold the claimant to this demanding standard. [...] [T]he main feature

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*Ltd. v. United States of America*, Rejoinder of the United States, March 15, 2007, **Exhibit RL-21**, pp. 178–185.

<sup>163</sup> Reply, pars. 234–235.

<sup>164</sup> United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5, 2012, **Exhibit RL-26**, pp. 86–87 (Emphasis added).



of this approach remains a high liability threshold that outlaws only the very serious breaches.<sup>165</sup>

88. Accordingly, setting aside the alleged evolution of the international minimum standard, as affirmed in the Counter-Memorial, it is clear that this standard is less demanding for states than the fair and equitable treatment standard and is breached only in cases of particularly egregious and serious conduct.<sup>166</sup>

89. This has been reaffirmed in jurisprudence.<sup>167</sup> For example, the tribunal in *Thunderbird v. Mexico* held:

Notwithstanding the evolution of customary law since decisions such as the *Neer* Claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.<sup>168</sup>

90. The requirement that conduct be egregious has been applied even more recently by tribunals such as *Glamis Gold v. United States*:

[T]o violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted

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<sup>165</sup> *Ibid*, pp. 105–106.

<sup>166</sup> Counter-Memorial, pars. 464–467.

<sup>167</sup> See, i.e., *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB[AF]/05/2) Award, September 18, 2009, **Exhibit CL-12**, par. 296; *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, June 8, 2009, **Exhibit CL-23**, pars. 616–617; *Genin et al. v. Republic of Estonia* (ICSID Case No. ARB/99/2) Award, June 25, 2001, **Exhibit RL-3**, pars. 365, 367.

<sup>168</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL Case) Award, January 26, 2006, **Exhibit CL-25**, par. 194 (Emphasis added).

international standards and constitute a breach of Article 1105(1).<sup>169</sup>

91. TGH accuses Guatemala of invoking the *Glamis Gold* award in order to “minimize the importance of arbitrariness.”<sup>170</sup> This could not be further from the truth. The question is what constitutes arbitrariness according to the customary international law minimum standard. What *Glamis Gold* and *Thunderbird* stand for, and which is also Guatemala’s position, is that under international customary law arbitrariness exists only when it is manifest, that is, when conduct is clearly unfair, or when the measures in question are blatantly or obviously without legal basis and were adopted in violation of due process. By contrast, there is no arbitrariness when the actions of a regulatory agency are merely irregular or against the law, and much less when the regulator’s position is well grounded, regardless of the extent to which an investor may disagree or even demonstrate that such position was incorrect (neither of which has occurred in this case).
92. In support of its position, TGH relies only on the award in *Merrill & Ring v. Canada*,<sup>171</sup> which the UNCTAD study rebuffs as follows:

The *Merrill & Ring* tribunal failed to give cogent reasons for its conclusion that the MST made such a leap in its evolution, and by doing so has deprived the 2001 NAFTA Interpretative Statement of any practical effect.<sup>172</sup>

93. Consequently, the international minimum standard is a more limited and restrictive guarantee than the autonomous standard of fair and equitable treatment. As the tribunal stated in *Saluka v. Czech Republic*:

[T]he minimum standard of “fair and equitable treatment” may in fact provide no more than “minimal” protection. Consequently, in order to violate that standard, States’

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<sup>169</sup> *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, June 8, 2009, **Exhibit CL-23**, pars. 616–617.

<sup>170</sup> Reply, par. 236.

<sup>171</sup> Reply, par. 234.

<sup>172</sup> United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5, 2012, **Exhibit RL-26**, p. 57.

conduct may have to display a relatively higher degree of inappropriateness.

[...] [I]nvestors' protection by the "fair and equitable treatment" standard is meant to be a guarantee providing a positive incentive for foreign investors. Consequently, in order to violate the standard, it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness.<sup>173</sup>

94. The content of the international minimum standard was identified as follows by the tribunal in *Cargill v. Mexico*:

To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal or procedure.<sup>174</sup>

95. In sum, according to the text of the Treaty, the jurisprudence, and the intent, practice and *opinio juris* of CAFTA-DR state parties, the international minimum standard is not the same as the fair and equitable treatment standard. The international minimum standard is more deferent to the state and censures only those acts that are particularly egregious or serious. Moreover, the doctrine of legitimate expectations has no application in the context of the minimum standard. These differences in relation to the autonomous fair and equitable treatment standard are critical for the correct application of the minimum standard. By ignoring this, TGH's analysis is fundamentally flawed.

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<sup>173</sup> *Saluka Investments B.V. v. Czech Republic* (UNCITRAL Case) Partial Award, March 17, 2006, **Exhibit CL-42**, pars. 292–293.

<sup>174</sup> *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB[AF]/05/2) Award, September 18, 2009, **Exhibit CL-12**, par. 296.

**B. THE INTERNATIONAL MINIMUM STANDARD DOES NOT PROTECT AGAINST MERE REGULATORY ACTIONS ALLEGEDLY CONTRARY TO DOMESTIC LAW, AS SUBMITTED BY TGH**

**1. The international minimum standard does not protect against mere regulatory actions**

96. As previously mentioned,<sup>175</sup> TGH relies on jurisprudence that does not apply the international minimum standard, but rather the autonomous fair and equitable treatment standard. These include at least the following thirteen awards: *CMS v. Argentina*, *LG&E v. Argentina*, *BG Group v. Argentina*, *CME v. Czech Republic*, *PSEG v. Turkey*, *Biwater Gauff v. Tanzania*, *ADC v. Hungary*, *Total v. Argentina*, *ATA Construction v. Jordan*, *Duke Energy v. Ecuador*, *Suez v. Argentina*, *National Grid v. Argentina*, and *Sempra v. Argentina*.<sup>176</sup> Apart from the fact that these awards do not support TGH's position, as previously set out and discussed again below,<sup>177</sup> the fact that TGH refers to these awards without disclosing that the minimum standard was not applied in any of them demonstrates the lack of support for its position. To the extent that TGH argues that these awards are relevant because in some of them the fair and equitable treatment rule

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<sup>175</sup> See par. 79 above.

<sup>176</sup> Reply, pars. 238–274. The provisions concerning fair and equitable treatment in the applicable treaties in these cases are cited in the awards themselves: *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8) Award, May 12, 2005, **Exhibit CL-17**, pars. 275–277; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Republic of Argentina* (ICSID Case No. ARB/02/1) Decision on Liability, October 3, 2006, **Exhibit CL-27**; *BG Group Plc. v. Republic of Argentina* (UNCITRAL Case) Final Award, December 24, 2007, **Exhibit CL-9**, pars. 174, 307, 309–310; *CME Czech Republic B.V. v. Czech Republic* (UNCITRAL Case) Partial Award, September 13, 2001, **Exhibit CL-16**, par. 24; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, January 19, 2007, **Exhibit CL-37**, par. 222; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, July 24, 2008, **Exhibit CL-10**, par. 522; *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd v. Republic of Hungary* (ICSID Case No. ARB/03/16) Award, October 2, 2006, **Exhibit CL-3**, par. 295; *Total S.A. v. Republic of Argentina* (ICSID Case No. ARB/04/1) Decision on Liability, December 27, 2010, **Exhibit CL-70**, par. 125; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2) Award, May 18, 2010, **Exhibit CL-58**; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, August 18, 2008, **Exhibit CL-19**, par. 313; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentina* (ICSID Case No. ARB/03/17) Decision on Liability, July 30, 2010, **Exhibit RL-17**, pars. 174–176; *National Grid P.L.C. v. Republic of Argentina* (UNCITRAL) Award, November 3, 2008, **Exhibit CL-33**, par. 170.

<sup>177</sup> Counter-Memorial, pars. 507–508, 569–575; see pars. 102, 103, 207–209 below.

contains a reference to “principles of international law,” its position is directly refuted by the same decisions it cites, such as *Vivendi II*:

Article 3 refers to fair and equitable treatment *in conformity with* the principles of international law, and not to the minimum standard of treatment. [...] The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone.<sup>178</sup>

97. Guatemala has in fact cited relevant precedent with regard to the international minimum standard.<sup>179</sup> Such precedent demonstrates that the minimum standard is not breached by alleged regulatory irregularities that constitute nothing more than a dispute regarding the interpretation and application of a domestic regulatory framework. In such cases, the standard affords the state a considerable margin of discretion. In the following sequence, Guatemala summarizes the previously cited jurisprudence:

- (i) *SD Myers v. Canada*. Claimant argued that Canada breached the minimum standard by imposing restrictions on the transport of environmentally harmful substances that caused damage to the claimant’s waste treatment business:

When interpreting and applying the “minimum standard”, a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.

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<sup>178</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Republic of Argentina* (ICSID Case No. ARB/97/3) Award, August 20, 2007, **Exhibit CL-18**, pars. 7.4.6–7.4.7 (Emphasis added). *See also Total S.A. v. Republic of Argentina* (ICSID Case No. ARB/04/1) Decision on Liability, December 27, 2010, **Exhibit CL-70**, pars. 125, 127.

<sup>179</sup> Counter-Memorial, pars. 468–486.

[...]

The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.<sup>180</sup>

- (ii) *Thunderbird v. Mexico*. Claimant alleged that a presumably illegitimate ban imposed by the government (the Department of the Interior, or SEGOB) on the gambling machines that the investor's local subsidiary sought to commercialize constituted a breach of the minimum standard:

In the present case, the Tribunal is not convinced that Thunderbird has demonstrated that Mexico's conduct violated the minimum standard of treatment, for the following reasons.

[...]

The Tribunal does not exclude that the SEGOB proceedings may have been affected by certain irregularities. Rather, the Tribunal cannot find on the record any administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment. [...] [I]t does not attain the minimum level of gravity required under Article 1105 of the Nafta under the circumstances.<sup>181</sup>

- (iii) *GAMI v. Mexico*. Claimant argued a breach of the minimum standard on the grounds that the Mexican authorities imposed a regulation concerning sugarcane production in an allegedly illegal manner.

GAMI has demonstrated clear instances of failures to implement important elements of Mexican regulations. It has adduced eminent evidence to the effect that the Mexican

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<sup>180</sup> *SD Myers Inc v. Canada* (UNCITRAL Case) First Partial Award, November 13, 2000, **Exhibit CL-41**, pars. 261, 263 (Emphasis added).

<sup>181</sup> *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL Case) Award, January 26, 2006, **Exhibit CL-25**, pars. 195, 200 (Emphasis added).

government is constitutionally required to give effect to its regulations. Claims of maladministration may be brought before the Mexican courts. Indeed as breaches of Mexican administrative law they could be brought nowhere else.<sup>182</sup>

- (iv) *ADF v. United States*. Claimant argued that the allegedly incorrect application of U.S. regulations in the context of a highway construction project constituted a breach of the minimum standard:

[E]ven if the U.S. measures were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1). An unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity. But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1), even under the Investor's view of that Article. That "something more" has not been shown by the Investor.<sup>183</sup>

- (v) *Genin v. Estonia*. Claimant argued that the allegedly illegal actions of the central bank in the context of the regulation of financial services constituted of a breach of the minimum standard:

[W]hile the Central Bank's decision to revoke the EIB's license invites criticism, it does not rise to the level of a violation of any provision of the BIT.

[...]

Article II(3)(a) of the BIT requires the signatory governments to treat foreign investment in a "fair and equitable" way. [...] Acts that would violate this minimum standard would include

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<sup>182</sup> *GAMI Investments, Inc v. United Mexican States* (UNCITRAL Case) Final Award, November 15, 2004, **Exhibit RL-7**, par. 103.

<sup>183</sup> *ADF Group Inc v. United States of America* (ICSID Case No. ARB[AF]/00/1) Award, January 9, 2003, **Exhibit CL-4**, par. 190.

acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith. [...]<sup>184</sup>.

98. In short, while a decision of a regulatory body may be subject to criticism or even be found to violate domestic law (which is not the case here), it cannot for these reasons alone constitute a breach of the international minimum standard. More is needed to constitute a breach. Governmental conduct falling far below international standards must have occurred, and internal remedies must have been unavailable or justice must have been denied. As the tribunal in *Glamis Gold* stated:

[T]he Tribunal first notes that it is not for an international tribunal to delve into the details of and justifications for domestic law. If Claimant, or any other party, believed that [the] interpretation of [the civil servant of] the undue impairment standard was indeed incorrect, the proper venue for its challenge was domestic court.

[...]

It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency.<sup>185</sup>

99. The award in *Cargill v. Mexico* also emphasizes this point by affirming that an action breaches the minimum standard if “the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure.”<sup>186</sup>
100. Even if the autonomous fair and equitable treatment standard were applicable (which is not the case here), it would not prohibit allegedly illegal conduct on the part of a regulator, as the following cases, which were decided under the autonomous standard, demonstrate:

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<sup>184</sup> *Genin et al. v. Republic of Estonia* (ICSID Case No. ARB/99/2) Award, June 25, 2001, **Exhibit RL-3**, pars. 365 and 367. (Emphasis added).

<sup>185</sup> *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, June 8, 2009, **Exhibit CL-23**, pars. 762, 779.

<sup>186</sup> *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, September 18, 2009, *Exhibit CL-12*, par. 296.



- (i) In *Saluka v. Czech Republic*, a case regarding allegedly illegal regulatory measures adopted by the Czech Republic's financial services regulator, the tribunal rejected the claim of unfair and inequitable treatment on the following grounds:

The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.<sup>187</sup>

- (ii) In *Parkerings v. Lithuania*, the claimant argued that the municipality had engaged in irregular conduct in the course of overseeing compliance with and the subsequent termination of an administrative contract; the tribunal rejected that this could constitute a breach of the fair and equitable treatment standard:

Fair and equitable treatment is denied when the investor is treated in such an unjust or arbitrary manner that the treatment is unacceptable from an international law point of view. Indeed, many tribunals have stated that not every breach of an agreement or of domestic law amounts to a violation of a treaty. [...] In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary.<sup>188</sup>

- (iii) In *MTD v. Chile*, in which the claimant's claim centered on an incorrect and thus unlawful interpretation by the Chilean authorities of certain urban planning laws, the tribunal held as follows with regard to the fair and equitable treatment standard:

[N]or should the vagueness inherent in such treaty standards as 'fair and equitable treatment' allow international tribunals to second-guess planning decisions duly made (as the decisions here were made) in accordance with that law.<sup>189</sup>

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<sup>187</sup> *Saluka Investments B.V. v. Czech Republic* (UNCITRAL Case) Partial Award, March 17, 2006, **Exhibit CL-42**, par. 442.

<sup>188</sup> *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8) Award, August 14, 2007, **Exhibit RL-10**, pars. 315–316.

<sup>189</sup> *MTD Equity Sdn Bhd and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, March 21, 2007, **Exhibit RL-22**, par. 107.

101. Rather than engage in a detailed examination of this case law, TGH responds in a “superficial” manner, as it admits itself,<sup>190</sup> claiming that the facts in these cases were different,<sup>191</sup> as if that were enough to undermine a clearly stated principle. TGH cannot deny that the jurisprudence has not found that the international minimum standard is breached when a state body or entity has acted in violation of domestic law, erred in the interpretation or application of a regulation, made questionable decisions, made wrong judgment calls, or adopted misinformed or misguided measures, if the aggrieved investor has had access to domestic remedies for such alleged irregularities. Nothing of this sort has taken place in this case; but even if it had, such actions would not even result in a breach of the fair and equitable treatment standard, which is a more stringent standard for the state, as the *Iberdrola* award explains:

It is not sufficient [...] for the claimant to convince the Tribunal that its interpretation of Guatemalan regulations and technical and economic models is correct and that the interpretation adopted by the CNEE is not [...] in order for the Tribunal to determine that there is a genuine claim that Guatemala breached the fair and equitable treatment standard [...].<sup>192</sup>

102. TGH cites precedents that, aside from the fact that they do not apply the minimum standard, do not even support its position. Among the cases cited are *Sempra v. Argentina*, *LG&E v. Argentina*, *National Grid v. Argentina*, *BG v. Argentina*, *Total v. Argentina* and both awards in *Suez et al. v. Argentina*.<sup>193</sup> As explained in the Counter-Memorial,<sup>194</sup> those decisions are irrelevant to this case. The question at issue in those cases was the compatibility with the applicable BITs of emergency legislative measures that completely dismantled public services tariff regimes. Argentina had unilaterally and completely changed the applicable tariff regime, imposed an indefinite tariff freeze, denied tariff adjustments for inflation or devaluation, and forced the renegotiation of all

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<sup>190</sup> Reply, par. 247.

<sup>191</sup> See Section III.E.

<sup>192</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, par. 368.

<sup>193</sup> Reply, pars. 255, 259, 263, 265, 266, 270, 271.

<sup>194</sup> Counter-Memorial, pars. 568–575.

concession and licensing agreements. The difference between those cases and the present one is vast, and proves precisely the opposite of what TGH is claiming. There is no treaty breach in cases such as the present one, which relate to a mere dispute over how certain provisions should be interpreted or applied in a tariff review. A breach was found in the cases concerning the Argentine emergency measures, because in those cases the government had adopted legislative measures that abolished the tariff reviews and the entire tariff regime.

103. TGH also cites other cases that apply the fair and equitable treatment standard as opposed to the minimum standard, and which also do not support its position. For instance, the measure found to violate the fair and equitable treatment standard in *ATA Construction v. Jordan*<sup>195</sup> was an amendment to Jordan’s arbitration law which terminated the investor’s right to resort to arbitration.<sup>196</sup> In *CME v. Czech Republic*,<sup>197</sup> another case pertaining to fair and equitable treatment and not the minimum standard, the conduct that resulted in a violation of the standard was a fundamental legislative change that rendered an agreement between the foreign investor and its local partner unlawful such that the contract had to be rescinded. In *PSEG v. Turkey*,<sup>198</sup> again a case decided under the fair and equitable treatment and not the minimum standard, the breach occurred as a result of the “‘roller-coaster’ effect of the continuing legislative changes” and because “the law kept changing continuously and endlessly” and in addition “the Constitutional Court decision upholding the rights acquired under a contract, [...] was simply ignored by MENR [the ministry] in its dealings with the Claimants,”<sup>199</sup> which led to the project’s cancellation. These cases are completely different from the present one.
104. TGH may choose to present these facts as it sees fit, but it cannot change them. Accordingly, TGH does not demonstrate that rights were cancelled, that continuous

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<sup>195</sup> Reply, pars. 243–244.

<sup>196</sup> *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2) Award, May 18, 2010, **Exhibit CL-58**, pars. 124, 126.

<sup>197</sup> Reply, pars. 238, 248, 274.

<sup>198</sup> *Ibid*, pars. 238, 275.

<sup>199</sup> *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, January 19, 2007, **Exhibit CL-37**, pars. 249, 250, 254.

legislative changes have taken place, or that decisions of the Constitutional Court were disregarded, since such events have not actually taken place. Much to the contrary, TGH's complaint is predicated on the fact that the CNEE sought to comply with and enforce the regulatory framework, and did not cede to the pressure from EEGSA and its shareholders Iberdrola and TGH to introduce modifications to the framework. The means that TGH and its fellow have used to achieve this goal have already been noted: for instance, to challenge the amendment of RLGE Article 98 the chosen path was "the participation of 3 politically powerful attorneys in order to obtain a favorable decision."<sup>200</sup> It is, therefore, clear that TGH, not the CNEE, was the one seeking to disregard the regulatory framework and the Constitutional Court decisions.

**2. TGH's complaints relate to mere disagreements concerning the interpretation and application of Guatemalan law, over which, moreover, TGH is wrong**

105. In order to impart some credibility to its case, TGH labels its claim in relation to the manner in which the CNEE interpreted and applied the regulatory framework as "the outright derogation of the basic premises of the legal and regulatory framework."<sup>201</sup> The following passage taken from the Reply is revealing:

Claimant's fair and equitable treatment claim does not arise from a mere difference of opinion between Claimant and the CNEE regarding the interpretation of Guatemalan law, or from mere "regulatory irregularities" in EEGSA's "ordinary dealings" with the CNEE. Rather, Claimant's claim arises from Guatemala's deliberate and calculated violation of critical elements of the legal and regulatory framework.<sup>202</sup>

106. This is a cosmetic maneuver. The facts reveal, at most, a disagreement relating to the scope of the RLGE, but TGH seeks to present them as something more by labeling them as a "deliberate and calculated violation of critical elements of the legal and regulatory framework." The following passage is illustrative:

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<sup>200</sup> 2009 Management Presentation by DECA II, **Exhibit R-107**, January 14, 2010 ("Constitutional Court – Value-Added for Distribution" sheet) (Emphasis added).

<sup>201</sup> Reply, par. 244. *See also* par. 238.

<sup>202</sup> *Ibid*, par. 230.

[t]he CNEE in this case manifestly disregarded critical aspects of the legal and regulatory framework under which Claimant's investment had been made, eviscerating the basic premises set forth in the LGE and RLGE regarding the calculation of the distributor's VAD and the procedure in place for resolving disputes concerning that VAD, and then unilaterally imposing an artificially low VAD that did not provide EEGSA's investors with a rate of return within the range expressly set forth in the LGE.<sup>203</sup>

107. On the one hand is the language used, for instance, that “the CNEE [...] manifestly disregarded critical aspects of the legal and regulatory framework [...] eviscerating the basic premises [...] and then unilaterally imposing [...],” and on the other hand what is really at issue, that is:
- a. The powers and responsibilities of the CNEE and the distributor in relation to the tariffs and VAD approval, including the reform of Article 98 of the RLGE, which TGH describes in the paragraph cited above as the “basic premises set forth in the LGE and RLGE regarding the calculation of the distributor's VAD”;
  - b. The binding or non-binding nature of the Expert Commission's report, as well as the scope of the Commission's duties, i.e., whether it had the authority to approve the tariff study, which TGH refers to as the “procedure in place for resolving disputes concerning the VAD;”
  - c. The power and responsibilities of the CNEE regarding the rejection of the Bates White study and approval of the Sigla study, which, in the words of TGH, is the CNEE's conduct in “unilaterally imposing [a] [...] VAD;”
  - d. Technical questions regarding the VAD that was ultimately approved by the CNEE, which are behind TGH's complaint of “an artificially low VAD that did not provide EEGSA's investors with a rate of return within the range expressly set forth in the LGE.”

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<sup>203</sup> *Ibid*, par. 246.

108. It is clear that these are regulatory questions: they relate to the manner in which the CNEE interpreted and applied certain aspects of the regulatory framework. To use the words of the tribunal in *Iberdrola*:

[B]eyond the qualification given by the Claimant with respect to the matters in dispute, the substantive part of these matters, and, primarily, of the disputes that the Claimant has requested the Tribunal to decide, concern [...] the manner in which certain provisions of Guatemalan law should have been interpreted, particularly the provisions of the LGE and RLGE [...] and in the technical and financial differences that existed for calculating the VAD and its components.<sup>204</sup>

109. TGH is wrong with respect to these questions, but even if it were right, it still would not have proven that there was a breach of the international minimum standard. As explained in the *Iberdrola* award: “It is not sufficient [...] for the claimant to convince the Tribunal that its interpretation of Guatemalan regulations and technical and economic models is correct and that the interpretation adopted by the CNEE is not [...] in order for the Tribunal to find that there is a genuine claim that Guatemala breached the fair and equitable treatment standard [...].”<sup>205</sup>
110. TGH’s claims are analyzed in greater detail below, where it is demonstrated that they stem from nothing but regulatory disagreements, with respect to which the CNEE, as the regulator, had not only the right, but the obligation to take a position, which it did to the best of its knowledge and belief, on well-founded grounds, and subject to the scrutiny of the Guatemalan courts. Accordingly, not even in theory there could there have been a breach of the minimum standard.

*a. Powers and responsibilities of the CNEE with regard to the tariffs and VAD approval*

111. TGH argues initially that the CNEE’s authority with regard to tariff matters, and particularly as regards the determination of the VAD, is limited, and would have been

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<sup>204</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**, pars. 351–352.

<sup>205</sup> *Ibid*, par. 368.

altered to the detriment of the rights of distributors with the amendment of RLGE Article 98 in March 2007.<sup>206</sup> However, it later contradicts itself when it argues that the CNEE “arbitrarily invoked the modified version of RLGE Article 98.”<sup>207</sup> That is to say, the criticism is not directed at the reform itself, but rather at the way the CNEE interpreted and applied RLGE Article 98.

112. In order to make clear TGH’s errors in interpreting the RLGE, the questions raised must be placed within the framework of, in the words of TGH, the “basic premises of the LGE and RLGE with respect to the distributor’s VAD calculation.”<sup>208</sup> Note that despite TGH’s emphasis on the “basic premises” of the regulatory framework, it did not refer even once in its Memorial to the fundamental provisions cited below. TGH has discovered these provisions in the Reply, after having read Guatemala’s Counter-Memorial. Instead, TGH has relied on two isolated provisions of the LGE: Articles 74 and 75, which, as interpreted by TGH, would transform the CNEE into a mere “supervisor” as regards the determination of the VAD, and would grant decision-making authority to the Expert Commission.<sup>209</sup>
113. In order to reach such a conclusion, TGH not only misinterprets those provisions, as will be seen below, but also ignores almost entirely the rest of the LGE and RLGE. First, the LGE and RLGE establish that the CNEE is responsible for compliance with and enforcement of the regulatory framework:<sup>210</sup>

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<sup>206</sup> Reply, pars. 30–36, 91–100 and 245; Government Resolution 68-2007, March 2, 2007, **Exhibit R-35**.

<sup>207</sup> Reply, par. 117.

<sup>208</sup> *Ibid*, par. 246.

<sup>209</sup> *Ibid*, pars. 28–51.

<sup>210</sup> LGE, **Exhibit R-8**; RLGE, **Exhibit R-36**. Unofficial English translation. In its original Spanish it reads:

LGE artículo 4:

Se crea la Comisión Nacional de Energía Eléctrica, en adelante la Comisión, como un órgano técnico del Ministerio. La Comisión tendrá independencia funcional para el ejercicio de sus atribuciones y de las siguientes funciones:

a) Cumplir y hacer cumplir la presente ley y sus reglamentos [...]

Reglamento artículo 3.- Responsables de su Aplicación

LGE Article 4:

The National Electricity Commission, hereafter the Commission, is established as the technical body of the Ministry. The Commission shall have functional independence in exercising its powers and the following functions:

a) Compliance with and enforcement of this law and its regulations [...]

RLGE Article 3.- Entities Responsible for their Application

The Ministry of Energy and Mines is the State agency responsible for applying the General Law of Electricity and these Regulations, through [...] the [CNEE] [...]

114. This responsibility naturally includes the duty to define electricity distribution tariffs. As stated in Article 4(c) of the LGE, the CNEE is responsible for:<sup>211</sup>

Defining the transmission and distribution tariffs subject to regulation in accordance with this law, as well as the methodology for calculation of the same.

115. As the text of this provision indicates, the CNEE also determines “the methodology for calculation of [the tariffs];” this is an important point, given that the methodology ultimately determines the result of the VADs and of the tariffs that are subsequently approved.<sup>212</sup> This is reiterated, for example, in Article 77 of the LGE (“the methodology for determination of the tariffs shall be revised by the Commission every [...] (5) years”) and in Article 74 (“the terms of reference of the study(ies) of the VAD shall be drawn up by the Commission.”). In other words, from the outset of the tariff review it is the CNEE

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El Ministerio de Energía y Minas es el órgano del Estado responsable de aplicar la Ley General de Electricidad y el presente Reglamento, a través [...] de la [CNEE] [...].

*See also* Aguilar Rejoinder, **Appendix RER-6**, pars. 22, 25, 29.

- <sup>211</sup> LGE, **Exhibit R-8**. Unofficial English translation. In its original Spanish language it reads:

Definir las tarifas de transmisión y distribución, sujetas a la regulación de acuerdo a la presente ley, así como la metodología para el cálculo de las mismas.

*See also* Aguilar Rejoinder, **Appendix RER-6**, pars. 18, 25.

- <sup>212</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 25, 26.



that makes the decisions; it decides in that initial phase how the VAD and tariffs are to be calculated.

116. The VAD is an essential component of the tariffs, and reflects the costs incurred in the distribution service, which the distributor has the right to recover through the tariff. The technical and financial criteria that the VAD must meet are defined in the following articles of the LGE:<sup>213</sup> Article 60 (“standard distribution costs of efficient companies”), Article 67 (definition of VNR for calculation of the VAD); Article 71 (definition of the VAD); Article 72 (“basic components” that “must be included in the VAD”); Article 73 (criteria for calculating the cost of capital as a basic element of the VAD). And in the RLGE:<sup>214</sup> Article 82 (costs to be included in the “supply costs,” i.e. distribution costs); Article 83 (unrecognized costs); Article 85 (projection of distribution costs for the 5-year period during which tariffs are in force); Article 90 (calculation of the energy loss factor, a component of the VAD); Article 91 (summary of the VAD definition).
117. As explained above in paragraph 113, it is the responsibility of the CNEE, as the regulator, to ensure compliance with these provisions, which establish in detail what should and should not be included in the VAD. Therefore, the CNEE must in each case approve a VAD that it deems to comply with the requirements established in the law, as set out in the following provisions:<sup>215</sup>
- LGE Article 60, which provides that “the costs inherent to distribution activities approved by the Commission [CNEE] must [...].”
  - LGE Article 61, which provides that “[t]he tariffs to users of the Final Distribution Service shall be determined by the Commission [CNEE] by adding the power and energy acquisition cost components [...] with the components of efficient costs of distribution to which the preceding article refers. [...]”;’
  - LGE Article 71, which establishes that “[t]he tariffs [for distribution] [...] shall be calculated by the Commission [CNEE] as the sum of the weighted price of all the distributor purchases, referenced to the inlet to the distribution network, and the Valued Added for Distribution –VAD;”

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<sup>213</sup> LGE, **Exhibit R-8**.

<sup>214</sup> RLGE, **Exhibit R-36**.

<sup>215</sup> LGE, **Exhibit R-8**; RLGE, **Exhibit R-36**.

- RLGE Article 82, which states “[t]he supply costs for the calculation of the Base Tariffs and per voltage level, shall be approved by the Commission [CNEE];”
- RLGE Article 83, defining costs that are not recognized in the calculus of the VAD, and providing that “costs that in the opinion of the Commission [CNEE], are excessive or do not correspond to the exercise of the activity,” “shall not be included as supply costs;”
- RLGE Article 92, which establishes that with regard to “the studies provided for under Article 97 of these Regulations,” the tariff studies completed by the distributor through its consultant that: “[...] [t]hese studies must be approved by the Commission[CNEE];”
- RLGE Article 99, which reads “[on]ce the tariff study referred to in the previous articles has been approved, the Commission [CNEE] shall proceed to set the definitive tariffs as of the date on which the final study was approved [...].”

118. At least eight provisions of the LGE and the RLGE establish that the CNEE approves the VAD; this is so because as the regulator in charge of complying with and enforcing the statute (LGE Article 4(a)) with responsibility for its application (RLGE Article 3), it is the CNEE’s job to ensure that the VAD that is approved complies with the requirements of the law.<sup>216</sup> This is an important point for understanding the regulatory framework.
119. TGH disregards this “basic premise,” to use its own words, by misinterpreting two articles of the LGE, i.e., Articles 74 and 75. These articles establish the procedure for calculating the VAD, which includes the preparation of a study by a consultant hired by the distributor following the Terms of Reference established by the CNEE, the possible submission of comments on such study on the part of the CNEE, and the possible preparation of a technical report by an Expert Commission. None of this means (and, of course, none of these provisions state) that the party that ultimately decides on the VAD is not the CNEE. An interpretation to that effect would directly contravene the basic regulatory principles that TGH claims to seek to enforce so vigorously.

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<sup>216</sup> Arts. 4(c), 60, 61, and 71 of the LGE, **Exhibit R-8**; Arts. 82, 83, 92, and 99 of the RLGE, **Exhibit R-36**; Aguilar Rejoinder, **Appendix RER-6**, pars. 22, 27, 29, and 31.

120. This is not a matter of defending, as TGH argues, an “unlimited discretion to determine the VAD” on the part of the CNEE.<sup>217</sup> This is by no means Guatemala’s view. What Guatemala *does* contest is that the CNEE can be relegated to a merely supervisory role while the Expert Commission assumes the role of the regulator. As the regulator, the CNEE must comply with its responsibilities; in this regard, after following the established procedure, which should lead to a correct decision, and taking into account the objective technical-financial criteria for the calculation of the VAD specified in the regulation, the CNEE has the power/responsibility to decide which VAD complies with the law.<sup>218</sup> This is a regulated power, subject to judicial control, as the Constitutional Court correctly stated in one of its judgments:

The National Electric Energy Commission’s role of fixing the tariff schemes is a legitimate power granted by the General Electricity Law in relation to which it fulfills a State function, as regulated in Articles 60, 61, 71 and 73 of the abovementioned law, which should moderate any excess in the exercise of discretion, since it refers to verifiable criteria stating that those tariffs “must be compatible with standard distribution costs of efficient companies,” structured “to promote equal treatment of consumers and economic efficiency of the sector”, that “the Value-Added for Distribution shall be related to the average capital and operations costs of a distribution network of an efficient company,” and, also, that the “cost of operation and maintenance must be in keeping with an efficient management of the aforementioned distribution network.” It is considered that setting tariffs, when the report by the Expert Commission has not been accepted as valid to guide this policy, cannot be, within its discretion, harmful or unreasonably arbitrary, as there are indicators of efficient operators as a reference, such as the one defined in Article 2 of the transitory dispositions of the Law, which made reference to the “values used in other countries applying a similar methodology”.<sup>219</sup>

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<sup>217</sup> Reply, par. 35.

<sup>218</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 22, 28, 29.

<sup>219</sup> Judgment of the Constitutional Court, November 18, 2009, **Exhibit R-105**, pp. 32–33 (emphasis added). Unofficial English translation. In its original Spanish language it reads:

Esa competencia de la Comisión Nacional de Energía Eléctrica de establecer los pliegos tarifarios, es una legítima potestad atribuida

121. This system—which is followed worldwide and is based on the premise that after following the established procedure and the objective criteria set forth in the law, regulatory bodies, in this case the CNEE, have the power to decide according to the best of their knowledge and belief—is in no way arbitrary or without limitations as alleged by TGH.
122. However, all of this is of no relevance to this Tribunal. What really matters is that TGH has submitted to this Tribunal a Guatemalan law dispute concerning the scope of certain provisions of the LGE and the RLGE. TGH interprets such provisions in its own way and states that they support its position. The CNEE interpreted the same provisions, along with others, and concluded that they supported its position. Aside from the words that TGH uses, words such as “arbitrariness,” “manipulation,” “mockery,” etc.,<sup>220</sup> what is before this Tribunal is a disagreement as to how certain LGE and RLGE rules must be interpreted and applied; this does not give rise to a violation of the minimum standard.

***b. The amendment of Article 98 of the RLGE***

123. Until 2007, Article 98 provided that, if the distributor failed to send the tariff studies for the calculation of the VAD or to correct them as required by the CNEE, “it shall not be able to modify its tariffs but shall continue to apply those in effect at the time said tariffs

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por la Ley General de Electricidad, con lo que realiza una función del Estado, y que, para su ejercicio, tiene el referente que le indican los artículos 60, 61, 71 y 73 de la citada ley, que debe moderar cualquier extralimitación discrecional, puesto que aluden a conceptos verificables de que tales tarifas "corresponden a costos estándares de distribución de empresas eficientes", que se estructuren "de modo que promuevan la igualdad de tratamiento a los consumidores y la eficiencia económica del sector", que "el Valor Agregado de Distribución corresponde al costo medio de capital y operación de una red de distribución de referencia" [...] Se estima que la fijación de tarifas, cuando el informe de la Comisión Pericial no ha sido aceptado como válido para orientar esa política, no puede ser, dentro de su discrecionalidad, ruinosa ni irracionalmente arbitraria, habiendo los referentes o indicadores de operadores eficientes, como el que condicionó en el artículo 2 transitorio de la Ley respectiva, que hizo alusión a "valores usados en otros países que apliquen similar metodología.

<sup>220</sup> For example, Memorial, pars. 269, 270, 272, and 273; Reply, par. 6.

expire.”<sup>221</sup> This could give rise to a perverse incentive for the distributor not to cooperate in the tariff review process so as to continue applying tariffs that might be more favorable than those resulting from a potential review.<sup>222</sup>

124. In 2007, the article was amended to provide that in such scenario “the Commission shall be empowered to issue and publish the corresponding tariff schedule based on a tariff study conducted by the Commission or on the basis of corrections to the studies commenced by the distributor.”<sup>223</sup> The following table compares the relevant parts of the two texts of Article 98 before and after the amendment:

ART. 98 - TEXT IN FORCE IN 2003	ART. 98 – 2007 AMENDMENT
<p>Article 98. Periodicity of Tariff Studies.</p> <p>[...] Until such time as the distributor sends the tariff studies or makes corrections to the same as stipulated in the preceding paragraphs, <u>it shall not be able to modify its tariffs but shall continue to apply those in effect at the time said tariffs expire [...].</u><sup>224</sup></p>	<p>Article 98. Periodicity of Tariff Studies.</p> <p>[...] In the case of the Distributor’s failure to send the studies or the corrections to the same, <u>the Commission shall be empowered to issue and publish the corresponding tariff schedule based on a tariff study conducted by the Commission or on the basis of corrections to the studies begun by the distributor.</u><sup>225</sup></p>

<sup>221</sup> Regulations to the Electricity Act, March 21, 1997, **Exhibit R-12**, Art. 98.

<sup>222</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 51.

<sup>223</sup> Government Resolution 68-2007, March 2, 2007, **Exhibit R-35**, Art. 21.

<sup>224</sup> Regulations to the Electricity Act (Extracts), March 21, 1997, **Exhibit R-12**, Art. 98. Hereinafter, the “RLGE (extracts).” Unofficial English translation. In its original Spanish language it reads:

Artículo 98.- Periodicidad de los Estudios Tarifarios.

[...] Mientras el distribuidor no envíe los estudios tarifarios o no efectúe las correcciones a los mismos, según lo estipulado en los párrafos anteriores, no podrá modificar sus tarifas y continuará aplicando las tarifas vigentes al momento de terminación del período de vigencia de dichas tarifas [...].

<sup>225</sup> Government Resolution 68-2007, March 2, 2007, **Exhibit R-35**, Art. 21. Unofficial English translation. In its original Spanish it reads:

Artículo 98.- Periodicidad de los Estudios Tarifarios.

[...] En caso de omisión por parte del Distribuidor de enviar los estudios o correcciones a los mismos, la Comisión quedará facultada para emitir y publicar el pliego tarifario correspondiente, con base en el estudio tarifario que ésta efectúe independientemente o realizando las correcciones a los estudios iniciados por la distribuidora.

125. The amended text is more in line with the regulatory powers of the CNEE and the principle established in the LGE that the tariffs must always reflect the distributors' efficient costs. The CNEE has always had the power and the responsibility to make tariff decisions, which includes ensuring that the VAD reflects the efficient costs of distribution.<sup>226</sup> The original text of Article 98 of the RLGE could result in a conflicting interpretation with respect to this premise, benefiting a distributor that does not cooperate in the tariff review process. Therefore, Article 98 was amended to better reflect the basic principles of the LGE and not the other way around, as alleged by TGH.<sup>227</sup>
126. As early as 2003, Article 99 of the RLGE was amended along the same lines.<sup>228</sup> The amendment clarified that no distributor could operate "without a valid tariff schedule." That is, once the prior tariff schedule had expired, the CNEE was required in the context of the five-year review to approve new tariffs in every case, except for reasons attributable to the CNEE itself. The following table compares the relevant parts of the two texts of Article 99:

ART. 99 - ORIGINAL 1997 VERSION	ART. 99 - 2003 AMENDMENT
<p><b>Art. 99: Application of Tariffs. [...]</b></p> <p><u>In the event that the Commission has not published the new tariffs, these may be adjusted by the distributors based on the adjustment formulas in effect, except as provided by the last paragraph of the preceding Article. The tariffs</u></p>	<p><b>Art. 99: Application of Tariffs. [...]</b></p> <p>If the Commission does not publish the new tariffs, the tariffs of the previous tariff schedule shall continue to apply, including their adjustment formulas. [...]</p>

<sup>226</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 53 and 62.

<sup>227</sup> Reply, pars. 93–98.

<sup>228</sup> Government Resolution No. 787-2003, December 5, 2003, published in the *Diario de Centro América* on January 16, 2004, **Exhibit R-30**, Art. 2.

<sup>229</sup> RLGE (extracts), March 21, 1997, **Exhibit R-12**, Art 99. Unofficial English translation. In its original Spanish language it reads:

Art. 99: Aplicación de las Tarifas. [...]

En caso que la comisión no haya publicado las nuevas tarifas, las mismas podrán ser ajustadas por los distribuidores en base a las formulas vigentes de ajuste, salvo lo previsto en el último párrafo del artículo anterior. Las tarifas se aplicarán a partir del 1 de mayo inmediato siguiente a la fecha de aprobación por la Comisión.

shall apply beginning on the 1 <sup>st</sup> of May immediately following the date of approval by the Commission. <sup>229</sup>	At no time shall electricity distribution to end-users be carried out without a valid tariff schedule in force. <u>If a distributor does not have a tariff schedule, the National Electricity Commission shall immediately issue and make effective a tariff schedule so as to comply with the aforementioned principle.</u> <sup>230</sup>
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127. Therefore, this amendment clarified that, except in situations attributable to the CNEE, no distributor could continue to apply the same tariffs. The 2003 reform was, however, partial. It failed to amend Article 98 of the RLGE, which continued to allow distributors to apply the old tariffs in certain cases in which the CNEE was not at fault, i.e., in situations in which the distributor had not cooperated in the review process. Such adjustment was made in 2007, and it clearly was a minor amendment which, moreover, had already been anticipated in 2003.
128. TGH's response to this point is confusing, but it seems to suggest that the two amendments are not related because the 2003 amendment was prompted by an action of *amparo* that had left EEGSA without a tariff schedule, which led to the clarification that the CNEE had the power to implement one.<sup>231</sup> This, however, is irrelevant. What is relevant is that the 2003 amendment to Article 99 of the RLGE made clear that the determination of the tariffs by the CNEE will not be paralyzed by events for which the CNEE is not responsible. Such reform, however, did not address Article 98 of the

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<sup>230</sup> Government Resolution No. 787-2003, December 5, 2003, published in the *Diario de Centro América* on January 16, 2004, **Exhibit R-30**, Art. 2. Unofficial English translation. In its original Spanish language it reads:

Art. 99: Aplicación de las Tarifas. [...]

En caso que la Comisión no haya publicado las nuevas tarifas, se seguirán aplicando las del pliego tarifario anterior con sus fórmulas de ajuste. [...]

En ningún caso la actividad de distribución final del servicio de electricidad puede llevarse a cabo sin pliego tarifario vigente. Dada la circunstancia en la que una distribuidora no cuente con un pliego tarifario, corresponde a la Comisión Nacional de Energía Eléctrica, emitir y poner en vigencia un pliego tarifario de manera inmediata, de forma que se cumpla con el principio ya enunciado.

<sup>231</sup> Reply, pars. 85–88.

RLGE, which continued to be susceptible of being interpreted in a manner that would paralyze the process in situations where the CNEE was not at fault, i.e., in the event the distributor failed to cooperate.

129. This last adjustment between the texts of Articles 98 and 99 of the RLGE was implemented in 2007, which also imposed an obligation on the CNEE as additional assurance for the distributors: that the CNEE must always decide based on a tariff study, either by correcting the tariff study of the distributor, if there is one that could be corrected, or by approving a study conducted by another prequalified consultant hired by the CNEE. The possibility of the CNEE relying on its own independent tariff study had, however, always existed as Article 5 of the LGE makes clear:

The Commission (CNEE) may obtain professional advice, opinions, and expert reports needed for the discharge of its functions.

130. This was always considered essential, as one of the drafters of the LGE, the Chilean expert, Mr. Bernstein, noted in 2002:

In order to exercise its oversight functions, the CNEE must have the ability to conduct a critical analysis of each step of the study developed by the Distributors, which, in practice, means conducting an independent study but with the same methodology.<sup>232</sup>

131. It is important to note that the 2003 and 2007 amendments to the RLGE did not give rise to any complaint whatsoever from any distributor, including EEGSA. TGH itself did not even mention in passing those amendments in its “notice of intent to submit the dispute to arbitration” of January 9, 2009, a prerequisite for commencing arbitration imposed the Treaty. Only now TGH has discovered the apparent injury that this amendment has

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<sup>232</sup> J.S. Bernstein, “Some Methodological Factors to Consider in the Terms of Reference for Distribution Value-Added Studies,” May 2002, **Exhibit R-23**, p. 2. Unofficial English translation. In its original Spanish it reads:

[EEGSA] se obliga a cumplir con todas las disposiciones previstas en la Ley General de Electricidad y su Reglamento o modificaciones que estos sufran y demás reglamentos y normas que sean de aplicación general [...].



caused, arguing that it is “unconstitutional,”<sup>233</sup> while such unconstitutionality has not been declared by a single judgment and TGH itself had not even considered filing such a challenge until 2010, in which occasion its assessment was that a “favorable ruling” could only be obtained if “politically” powerful attorneys were involved:

We have concluded that the challenge [on the unconstitutionality of Article 98 of the RLGE] is feasible. We are already working on arguments, and we suggest the participation of 3 politically powerful attorneys in order to obtain a favorable decision.<sup>234</sup>

132. In the end, EEGSA and TGH did not challenge the constitutionality of Article 98. The absence of such challenge is understandable since the amendment did not alter the regulatory principles contained in the LGE; rather, it is consistent with them. Moreover, it is standard in any jurisdiction for occasional amendments to be made to any regulation governing public services. It is in no way unusual that, as the authorities gain regulatory experience, provisions of the regulation are refined and harmonized in order to resolve any potential ambiguities, contradictions, or gaps in the law.<sup>235</sup>
133. In this respect, it is important to note that the Authorization Agreements themselves, which are the basis for the development of EEGSA’s activities in electricity distribution for a period of 50 years, not only foresee the possibility that the regulatory framework will be modified, but also impose an obligation on EEGSA to comply with any modifications:

[EEGSA] agrees to comply with all provisions of the General Electricity Act and the RLGE and/or any amendments to either of these, as well as with other regulations and standards that are generally applicable [...]<sup>236</sup>

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<sup>233</sup> Reply, par. 91 and pars. 92–100.

<sup>234</sup> Management Presentation by DECA II 2009, **Exhibit R-107**, p. 17 of the PDF.

<sup>235</sup> A number of examples were already cited in the Counter-Memorial, footnote 326.

<sup>236</sup> Authorization Agreement for the Departments [*administrative districts*] of Guatemala, Sacatepéquez, and Escuintla, entered into by EEGSA and the Ministry of Energy and Mines, May 15, 1998, **Exhibit R-17**, Clause 20 (emphasis added); Final Electricity Distribution Authorization Agreement for the Departments of Chimaltenango, Santa Rosa, and Jalapa, February 2, 1999, **Exhibit R-20**, Clause 20 (emphasis added). Unofficial English translation. In its original Spanish language it reads:

134. Therefore, TGH was always aware that legislative and regulatory changes could be implemented and that they would apply to it. Consequently, TGH cannot claim that it was injured on this basis.
135. In any event, a careful analysis of TGH's complaint reveals that TGH is not complaining about the reform of Article 98 as such, but rather that the CNEE, according to TGH, "arbitrarily invoked amended RLGE Article 98."<sup>237</sup> That is, TGH is complaining about the way in which the CNEE interpreted and applied Article 98 by approving the study of the consulting firm Sigla despite the opinion of the Expert Commission. Such complaint concerns the role of the Expert Commission, which is analyzed below. In any case, as explained above, a complaint as to the way in which the CNEE, in the exercise of its duties, and subsequently the Constitutional Court, also in the exercise of its duties, interpreted a specific aspect of the regulatory framework cannot give rise to a claim for violation of the international minimum standard.

*c. Role of the Expert Commission*

136. The heart of TGH's claim continues to be the role of the Expert Commission.<sup>238</sup> In its Reply, TGH summarizes its case in the following manner:

[T]his case concerns the CNEE's unjustified and arbitrary refusal to accept an increase in EEGSA's VAD and to proceed, in the face of the Expert Commission's adverse rulings, to impose its own reduced VAD on EEGSA in blatant violation of the very legal and regulatory framework that Guatemala had established to encourage foreign investment in its electricity sector.<sup>239</sup>

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[EEGSA] se obliga a cumplir con todas las disposiciones previstas en la Ley General de Electricidad y su Reglamento o modificaciones que estos sufran y demás reglamentos y normas que sean de aplicación general [...].

<sup>237</sup> Reply, par. 117.

<sup>238</sup> *Ibid*, pars. 158–199, 244–253, and 261–266.

<sup>239</sup> *Ibid*, par. 253.

137. Therefore, TGH's main point is that the Expert Commission's pronouncement was binding on the CNEE, which was required to use the Bates White study presumably corrected and approved by the Expert Commission, instead of the Sigla study, to define the tariffs. It is clear, therefore, that TGH's case concerns exclusively the way in which the regulatory framework is to be interpreted and applied, in particular, as it relates to the role of the Expert Commission; this does not give rise to a violation of the minimum standard. In any case, TGH's interpretation of the regulatory framework is wrong.
138. Considering the qualifiers that TGH uses in the passage cited above "unjustified and arbitrary refusal" and "blatant violation" of the regulation, anyone would expect that the regulatory framework was clearly structured as TGH contends. In other words, it would have been reasonable to assume that the LGE clearly establishes the binding nature of the Expert Commission's pronouncement, the power of the Expert Commission to approve the corrected tariff study, and the CNEE's role as mere enforcer of the Expert Commission's ruling.
139. Yet, the LGE does not say any of that. It addresses the role of the Expert Commission in an 8-word sentence contained in a single article of the LGE, Article 75. That sentence reads:

The Expert Commission shall pronounce itself [pronunciarse]  
on the discrepancies.

140. It takes a lot of imagination for these eight words to have the meaning that TGH claims they have. The reality is very different. The regulatory framework regulates the Expert Commission in little detail because its function is limited to providing technical advice.<sup>240</sup> It does not envisage any other role for the Expert Commission aside from the issuance of its pronouncement. That is to say, it does not grant the Expert Commission the power to approve the tariff study after issuing its pronouncement. It is the CNEE that approves the tariff studies, as both the LGE and the RLGE expressly state, and as is expected of a regulatory body that must ensure "[c]ompliance with and enforcement of

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<sup>240</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 37, 38, 41, and 45.

this law and its regulations” (Article 4(a) of the LGE) and is “responsible for [...] applying this law and its” (Article 3 of the RLGE).

141. The provisions that expressly establish the CNEE’s decision-making power/responsibility concerning the tariffs and the VAD, i.e., the distribution costs that are reflected in the tariff, have already been cited above.<sup>241</sup> There are at least eight relevant provisions: Article 4(c) of the LGE (“[t]he Commission shall have [...] the following functions: [...] c) Defining the transmission and distribution tariffs [...] as well as the methodology for calculation of the same”); Article 60 of the LGE (“The costs for the distribution activity approved by the Commission”); Article 61 of the LGE (“the tariffs [...] shall be determined by the Commission by adding the power and energy acquisition cost components [...] to the components of efficient costs of distribution”); Article 71 of the LGE (“the tariffs [...] shall be calculated by the Commission as the sum of the weighted price of all distributor purchases, referenced to the inlet to the distribution network, and the Value Added for Distribution - VAD”); Article 82 of the RLGE (“the supply costs for the calculation of the Base Tariffs and per voltage level shall be approved by the Commission”); Article 83 of the RLGE (“The following shall not be included as supply costs [...] costs that, in the opinion of the Commission, are excessive or do not correspond to the exercise of the activity.”); Article 92 of the RLGE (tariff studies “must be approved by the Commission”); Article 99 of the RLGE (“Once the tariff study referred to in the previous articles has been approved, the Commission shall proceed to set the definitive tariffs.”)
142. This power and responsibility of the CNEE concerning the tariffs and the determination of the VAD, including the approval of the tariff studies, is so clear and expressly stated that it would take much more than the sentence “The Expert Commission shall pronounce itself [pronunciarse] on the discrepancies” to refute it. The only accurate interpretation of that sentence, according to its literal sense and in the context of the LGE and the RLGE, is that the “Expert” Commission issues a technical opinion; such opinion may be relevant for the CNEE in making the right decision, but does not bind

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<sup>241</sup> See pars. 113–117 above.

the CNEE to accept the distributor's study, and certainly does not mean that the Expert Commission has the power to approve such study.<sup>242</sup> The role of the Expert Commission is to render an opinion regarding the discrepancies that arise from the comments on the distributor's study submitted by the CNEE in order to make that study compliant with the Terms of Reference. That opinion is an important factor that, along with others such as the distributor's study itself and the independent study commissioned by the CNEE, helps the CNEE in making decisions regarding the VAD. The Expert Commission's role is not to replace the CNEE.

143. First of all, the LGE does not contain any provision that specifically and expressly makes the Expert Commission's report binding for the determination of the VAD and the tariffs. Such provision would be absolutely necessary to make the Expert Commission's report binding, as it would impinge upon the powers of the CNEE as the regulator.<sup>243</sup>
144. A textual interpretation of Article 75 leads to the same conclusion. In accordance with the rules of interpretation applicable in the Guatemalan legal system, the *Diccionario de la Real Academia Española (RAE)* may be used as an aid in the textual interpretation of a rule.<sup>244</sup> The word "*pronunciarse*" in Article 75, a pronominal use of the word, means according to the RAE's Dictionary "[t]o declare or express oneself for or against somebody or something,"<sup>245</sup> and, according to the RAE's *Diccionario Panhispánico de Dudas*, "manifest an opinion on something."<sup>246</sup> None of these definitions makes reference to a binding decision. Moreover, the word "*pericial*" in Article 75 of the LGE derives from *perito*, a term that, according to the RAE's dictionary, means a "person who, possessing certain scientific, artistic and technical or practical knowledge, reports, under oath, to the judge on contentious issues as they relate to their special knowledge or

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<sup>242</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 47.

<sup>243</sup> See pars. 113–117 above; Aguilar Rejoinder, **Appendix RER-6**, pars. 38, 41, and 45.

<sup>244</sup> Judiciary Act, Decree 2-89, February 4, 2005, **Exhibit R-31**, Art. 11.

<sup>245</sup> *Diccionario de la Real Academia Española*, **Exhibit C-50**. In its original Spanish language it reads: "declararse o mostrarse a favor o en contra de alguien o de algo."

<sup>246</sup> Royal Spanish Academy, *Diccionario Pan-Hispánico de Dudas*, **Exhibit R-154**. In its original Spanish language it reads: "manifestar la opinión sobre algo."

experience.”<sup>247</sup> In short, a textual interpretation of the sentence “The Expert Commission shall pronounce itself [pronunciarse] on the discrepancies” leads to no other conclusion than that the Expert Commission has a merely advisory role.

145. Furthermore, in the Guatemalan system of civil procedure, an expert opinion is by definition of an advisory nature. As Mr. Aguilar explains:

The purely advisory role that experts have in the Guatemalan procedural order is expressly provided for in Article 170 of the Code of Civil and Commercial Procedure, which reads: **“Expert opinions, even if agreed upon, do not bind the judge, who must form his conviction after taking into account all the facts established as true in the proceedings.”**<sup>248</sup>

146. In addition, the duties of the Expert Commission are limited to pronouncing itself on the discrepancies; there is no provision granting the Expert Commission the power to approve the distributors’ tariff studies. This is in no way envisaged in any provision of the LGE. TGH argues that in this specific case the Expert Commission’s functions were expanded by means of supposed operating rules agreed upon between EEGSA and the CNEE, but that agreement (which in practical terms would have amended the LGE) did not exist, as is explained in further detail below.<sup>249</sup>
147. Therefore, even if the Expert Commission’s opinion were binding (which is not the case), it would be so only with respect to the resolution of the discrepancies, but nothing more. After the Expert Commission issues its opinion, the decision as to whether the distributor’s tariff study can be corrected or must be rejected in view of the deficiencies identified by the Expert Commission must necessarily fall to the CNEE. Otherwise, the CNEE would for all purposes delegate its regulatory duty to the Expert Commission—a

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<sup>247</sup> *Diccionario de la Real Academia Española*, definitions of the terms *acepción* [sense—Trans.] and *perito*, **Exhibit R-153**. In its original Spanish language it reads: “persona que poseyendo determinados conocimientos científicos, artísticos y técnicos o prácticos informa, bajo juramento, al juzgador sobre puntos litigiosos en cuanto se relacionan con su especial saber o experiencia.”

<sup>248</sup> Aguilar, **Appendix RER-3**, par. 49.

<sup>249</sup> See Section V.E below.

body whose existence is temporary (see par. 430 below)—which would be strictly prohibited under Guatemalan law. In the words of Mr. Aguilar:

In this case, the LGE was created by the Congress of the Republic of Guatemala and that body is the only body with authority to amend, modify or replace the LGE and its provisions, which includes, but is not limited to, the functions of the CP referred to in LGE Article 75.

As to authority to approve **regulations** implementing legislative acts, that authority belongs, pursuant to the provisions of Article 183(e) of the Political Constitution of the Republic of Guatemala, to the President of the Republic of Guatemala, who must issue regulations without altering the spirit of the law; such regulations must be countersigned by the Minister of the Ministry to which the law pertains. In this case, the RLGE was issued by the President of the Republic of Guatemala, duly countersigned by the Minister of the MEM, and such regulation may only be amended, modified or replaced by the President of the Republic of Guatemala. **No person or authority** other than the President of the Republic may issue rules, resolutions or provisions that amend, modify or replace the RLGE, including provisions that relate to the functions that the LGE and the RLGE assign to the CP referred to in LGE Article 75.

[...]

Such provision is **null and void**, because in addition to the fact that it was not issued by an authority with legislative or regulatory prerogatives to amend or implement the LGE and the RLGE, it **grants** the CP functions that are not provided for in the LGE. In fact, the authority granted to the CP to **review and approve** the amendments to the study of the components of the VAD introduced by distributor's consultant on account of the report of the CP **is not provided for in the LGE**. It is not possible to agree upon, much less to grant powers to the CP not provided for in the LGE or the RLGE through an operating rule.<sup>250</sup>

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<sup>250</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 63, 64, and 69.

148. By a majority of its members, the Constitutional Court decided that this interpretation was the correct one according to the fundamental principles of the regulatory framework and Guatemalan law:

The CNEE is a body elected by popular vote, with the power to set tariffs and the methodology for calculating them<sup>251</sup> and is responsible for approving tariffs;<sup>252</sup>

The setting of tariffs and the methodology for calculating them is not only a power, but also an obligation for which the CNEE is responsible under the law, and this responsibility cannot be delegated to any other body, given that, otherwise, the principle of legality and the principle of civil service;<sup>253</sup> and

Once the Expert Commission has issued its opinion, neither the LGE nor the RLGE provides for any additional duty for the Expert Commission.<sup>254</sup>

149. TGH and its expert Mr. Alegría make reference to the fact that the Chilean Electricity Law and its regulations “served as a model” for the LGE and that said Law provides for a binding decision by an expert commission in the context of the determination of the

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<sup>251</sup> Judgment of the Constitutional Court, February 24, 2010, **Exhibit RL-110**, p. 34. (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

La CNEE es un órgano integrado conforme un sistema de designación plural de la sociedad con facultades para fijar las tarifas y la metodología para su cálculo [...]

<sup>252</sup> Judgment of the Constitutional Court, November 18, 2009, **Exhibit R-105**, p. 31. Unofficial English translation. In its original Spanish language it reads: “y responsable de la aprobación de las tarifas.”

<sup>253</sup> *Ibid*, p. 29 (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

La fijación de las tarifas y de la metodología para su cálculo constituye no sólo una facultad, sino también una obligación de responsabilidad de la CNEE sujeta a la ley, que no puede ser delegada en ningún ente u órgano dado que lo contrario resultaría contrario al principio de legalidad y al principio de función pública.

<sup>254</sup> *Ibid*, p. 25; judgment of the Constitutional Court, February 24, 2010, **Exhibit R-110**, pp. 15–16. Unofficial English translation. In its original Spanish language it reads:

Una vez que ha emitido el pronunciamiento de la Comisión Pericial, ni la LGE ni el Reglamento prevén alguna otra función adicional para la Comisión Pericial.



VNR, a factor used in calculating the VAD.<sup>255</sup> Such argument proves Guatemala’s point rather than TGH’s.

150. In fact, the Chilean Law invoked by TGH provides that in case of discrepancies between the National Energy Commission and the distributors, a “panel of experts” will determine the VNR (Article 208 of the Chilean Law).<sup>256</sup> First of all, this process does not refer to the determination of the VAD, which is related to the VNR, but is not the same thing.<sup>257</sup> Second, the binding nature of the opinion of the panel of experts is established expressly in the text of the Law. Article 211 of the Chilean Law provides as follows:

The Expert Panel’s report will be pronounced exclusively over the aspects in which the discrepancy exists and shall favor one of the two alternatives at issue, being no halfway decision permitted. Such resolution shall be binding on all parties involved in the proceeding and shall not be subject to any type of court or administrative appeals, whether ordinary or extraordinary.<sup>258</sup>

151. Furthermore, the panel of experts created by the Chilean Law is permanent (Article 209) and subject to detailed regulations:

1. Composition (seven members), qualifications necessary for being a member of the panel, term of the position (six years),

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<sup>255</sup> Reply, pars. 45–46.

<sup>256</sup> Chilean General Electricity Act of May 2, 2007, **Exhibit C-482**, Art. 208 (“panel de expertos”).

<sup>257</sup> For purposes of [determining] the VAD in Chile, two studies are prepared, and in case of disagreement, the results are weighted, with 2/3 of the value being assigned to the regulator’s study and 1/3 to the distributor’s study. General Electricity Services Act DFL no. 1/1982, amended by Act 20,018 of 2006, September 13, 1982, **Exhibit R-2**, Art. 107.

<sup>258</sup> Chilean General Electricity Act of May 2, 2007, **Exhibit C-482**, Art. 211 (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

El dictamen del panel de expertos se pronunciará exclusivamente sobre los aspectos en que exista discrepancia, debiendo optar por una u otra alternativa en discusión, sin que pueda adoptar valores intermedios. Será vinculante para todos los que participen en el procedimiento respectivo y no procederá ninguna clase de recursos, jurisdiccionales o administrativos, de naturaleza ordinaria o extraordinaria.

quorum necessary for holding meetings, and incompetence (Article 209);

2. Administrative assistance and secretary of the panel (Article 210);
3. Manner of presenting discrepancies, procedure, deadlines, public hearing, binding decision, and means of appeal against the opinion (Article 211);
4. Costs and means of financing the activities of the panel, remuneration of panel members, headquarters, status of its members under administrative law, [and] responsibilities (Article 212).

152. The text of the preceding Chilean Law of 1982 and the Regulations of 1998 also established that “In the event of discrepancies, the companies may request that an expert commission be convened to determine the Replacement Value.”<sup>259</sup> Accordingly, the binding nature of the decision of the expert commission was explicit also in this version of the Law.

153. In sum, if the Chilean Law served as the model for the LGE, as TGH contends, then it must follow that by not adopting either the design or the language of the Chilean Law the Guatemalan legislators consciously decided not to make the Expert Commission’s opinion binding.

154. It seems that TGH bases its position on the fact that the word “*resuelva*”[resolves] instead of “*se pronunciará*”[shall pronounce itself] is used in connection with the role of the Expert Commission in one page of the Memorandum of Sale prepared by

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<sup>259</sup> General Electricity Services Act DFL no. 1/1982, **Exhibit R-2**, Art. 118; Regulations to the Chilean General Electricity Act, October 9, 1998, **Exhibit C-429**, Art. 314 (Emphasis added). In its original Spanish language, it reads: “De no existir acuerdo entre el concesionario y la Superintendencia, el VNR será determinado por una comisión pericial.”

Salomon Smith Barney.<sup>260</sup> It is clear, however, that said Memorandum does not say anything about the binding nature of the Expert Commission's opinion, or that said commission has the power to approve the tariff studies, or that said approval is binding on the CNEE. Quite the contrary, the Memorandum stresses the CNEE's powers to approve the VAD studies and to set tariffs. For example, the Memorandum explained to investors in unequivocal terms that the CNEE, as a technical and independent (in terms of functions and budget) body of the MEM, would be the regulatory and oversight entity of the sector having the power to enforce the LGE and set the tariffs.<sup>261</sup>

155. Given the lack of evidence to support its position, TGH is constrained to invoke in its favor a motion submitted in a judicial action by the CNEE in 2003 and an opinion of 2008 of a number of engineers in which the term "*resolverá*" [shall resolve] appears in reference to the Expert Commission, as well as the opinion of a Colombian engineer from 2002 and a newspaper article which uses the word "*arbitraje*" [arbitration] in connection with the subject.<sup>262</sup> None of this can credibly influence the interpretation of such an important aspect of the LGE. The LGE does not contain the word "*resolverá*," much less a reference to "*arbitraje*," nor does it (or any evidence presented by TGH) state that it is the Expert Commission's duty to approve the tariff study and that the CNEE is bound to use such study in setting the tariffs.
156. In short, TGH is wrong in asserting that the CNEE was mistaken in considering the Expert Commission's report as a technical opinion that did not require it to adopt the Bates White study corrected in accordance with that report, and in understanding that the functions of the Expert Commission did not include the final approval of that study.

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<sup>260</sup> Salomon Smith Barney, "EEGSA: Memorandum of Sale," May 1998, **Exhibit R-16**, p. 49.

<sup>261</sup> *Ibid*, pp. 54–55, where the following is explained:

Among other duties, the Commission is responsible for [...]setting the tariffs specified by law [...].The Commission, which is in theory a technical agency of the MEM with functional and budgetary independence, is the body responsible for regulating and overseeing the electricity sector. The Commission's duties are:: (1) (1) To see to the compliance of the Law [...], (4) To regulate transmission and distribution tariffs [...].

<sup>262</sup> Reply, pars. 48–51.

*d. Rejection of the Bates White study and approval of the Sigla study*

157. The Expert Commission concluded that the Bates White study did not incorporate all of the modifications legitimately required by the CNEE. For example, it was not auditable or traceable, as is explained below.<sup>263</sup> These were serious flaws because they actually prevented the CNEE from verifying the correctness of the study and, therefore, affected its reliability for purposes of setting the VAD and the tariffs. Therefore, the CNEE correctly understood that when the Expert Commission confirmed that the study did not incorporate all of the modifications that were legitimately required, pursuant to Article 98 of the RLGE it was for the CNEE to decide on the consequences of the Expert Commission's report and in particular, whether or not to make the required modifications to the Bates White study or to adopt the independent study conducted by the consultant hired by the CNEE.
158. The Constitutional Court ruled in favor of the CNEE's interpretation based on the fundamental premises of the LGE:

The attitude that the National Electricity Commission subsequently assumed, which was to order the act which is hereby challenged [the approval of the Sigla study], constitutes the core of the challenge regarding the procedure that is established by both the General Electricity Law as well as its Regulations; whereas the powers of this Commission to set the indicated tariffs (due to omission by the Distributor to make the corrections) is the principal argument to justify its actions.

[...] it must be established that, in this case, it is not determined in the General Electricity Law or in the Regulations that implement it, that the obligation to accept said report as binding is not imposed on the National Electricity Commission. Therefore, given the nature of the opinion of the experts, even when in agreement, the Expert Commission did not force the National Electricity Commission to accept its terms for approving the tariffs of the case.<sup>264</sup>

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<sup>263</sup> See Sections V.E.9.a and V.E.9.b below.

<sup>264</sup> Judgment of the Constitutional Court, November 18, 2009, **Exhibit R-105**, pp. 22–23. (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

Therefore, having accepted the procedure set forth in Articles 74 and 75 of the regulatory law, that was concluded with the opinion issued by the Expert Commission, which was not binding upon the authority, this commission assumed its responsibility, which cannot be delegated, approving the tariffs challenged in the *amparo* action, based on its own studies that it deemed appropriate.<sup>265</sup>

Expertise, known as wisdom, practice, experience or ability in science and art, has traditionally served as an aid used by authorities when making a decision regarding a certain matter. [...]. It follows that the authority is not obliged to abide by the expert opinion; particularly when, in any reasonable case, it has the power to resolve the matter; thereby forming its own judgment based on the facts or information gained from exercising competence and other aspects that contribute to a determination of the facts.<sup>266</sup>

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La actitud que posteriormente asumió la Comisión Nacional de Energía Eléctrica, que fue la de dictar el acto que por este medio se reclama [aprobación del estudio Sigla], constituye a médula de la impugnación respecto del trámite que establece tanto la Ley General de Electricidad como su Reglamento; en tanto que las facultades de ésta Comisión para fijar las indicadas tarifas (por omisión de la distribuidora de hacer las correcciones) es el argumento principal para justificar su actuación.

[...] debe establecerse que, en este caso, no se determina que en la Ley General de Electricidad y en el Reglamento que la desarrolla, se imponga a la Comisión Nacional de Energía Eléctrica la obligación de asumir con carácter vinculante dicho dictamen, por cuanto, dada la naturaleza de la opinión de los expertos, aun cuando sea concorde, no la obligaba a aceptar sus términos para aprobar las tarifas del caso.

<sup>265</sup> *Ibid*, p. 24 (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

Habiéndose dado por concluido el procedimiento establecido en los artículos 74 y 75 de la ley reguladora, que concluyó con el dictamen de la Comisión Pericial, el cual no era vinculante para la autoridad, ésta asumió su responsabilidad, que no tiene facultad para delegarla, aprobando, con base en los propios estudios que estimó pertinentes, las tarifas cuestionadas por medio del *amparo*.

<sup>266</sup> *Ibid*, p. 26 (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

La pericia, como sabiduría, práctica, experiencia o habilidad en una ciencia y arte, ha sido tradicionalmente un auxilio al que acude la autoridad que debe tomar una decisión respecto de determinada materia. [...] De ahí que [la autoridad] no tiene obligación de sujetarse al dictamen de los peritos, en particular cuando quien tiene la potestad, en todo caso razonable, de resolver, formando su propio juicio con base en los datos o información que conciernen

[...] Expecting the Expert Commission to decide a conflict and empowering it to issue a binding decision breaches the principle of legality [...] authorities may only do what the law allows them to do (Article 154 *ibidem*); so that they are limited strictly by the General Electricity Law, the power to approve tariff schemes pertains to the National Electricity Commission and in no way, either directly or indirectly, to an expert commission, whose nature has been considered.<sup>267</sup>

159. Therefore, there was nothing wrong with the CNEE's conduct. What TGH is now attempting to do through a claim of violation of the minimum standard is to reopen this issue as if this Tribunal were a Guatemalan court of third or fourth instance; given the regulatory nature of the claim, there is no basis for finding a violation of the minimum standard.
160. It must be pointed out that in the present case EEGSA and Bates White continuously sabotaged the tariff review process. For example, the first study, dated 31 March 2008, resulted in a 245% increase in EEGSA's VAD (that is, it resulted in a tariff three times higher). One month later, the second study determined a 184% increase in the VAD. Meanwhile, the Chairman of the Board of Directors of EEGSA, Mr. Gonzalo Pérez, made a rare visit to the CNEE, during which he indicated that EEGSA would accept a 10% increase in the VAD.<sup>268</sup> The CNEE could not rely on studies that resulted in such disparate conclusions and that were not in line with what EEGSA was willing to accept through direct "negotiation" with the CNEE.

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al ejercicio de su competencia y otros aspectos que contribuyan a determinar los hechos.

<sup>267</sup> *Ibid*, p. 29 (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

[...] Pretender que la Comisión Pericial pudiera tener una función dirimente de un conflicto y reconocerle competencia para emitir una decisión vinculante, es contrario al decantado principio de legalidad [...] [A]tenidos estrictamente a la Ley General de Electricidad, la facultad de aprobar pliegos tarifarios corresponde a la Comisión Nacional de Energía Eléctrica y de ninguna manera, directa o indirectamente, a una comisión pericial, cuya naturaleza ha sido considerada.

<sup>268</sup> See Section V.E.4 below.

161. This lack of reliability is also confirmed by the opinion of the Expert Commission, which concluded that the model and the database presented by Bates White were not auditable, lacked the necessary link and traceability,<sup>269</sup> as well as the supporting database.<sup>270</sup> In its opinion, the Expert Commission stated that “it should include the links between all the models constructed such that said calculations can be reproduced” and that they must be capable of “being corroborated by the CNEE.”<sup>271</sup> Moreover, the study did not contain the international reference prices that were necessary for the CNEE to evaluate the prices used by Bates White in the model.<sup>272</sup> The VNR was also overvalued.<sup>273</sup>
162. In light of the above, the CNEE concluded that it could not use the Bates White study to establish the VAD and tariffs. The CNEE rightly understood that the LGE not only allowed, but in fact required it to approve a tariff study that it considered reliable. The VAD approved by the CNEE was calculated following strictly technical criteria, based on a study by a prequalified independent consultant, the well-known company Sigla, which had worked for EEGSA in previous occasions to its satisfaction.<sup>274</sup> Therefore, TGH’s complaint regarding the rejection of the Bates White study and approval of the Sigla study is without merit.

*e. Calculation of the VAD*

163. TGH continues to complain that the VAD approved by the CNEE was too low and that the calculation contained technical-financial errors.<sup>275</sup> TGH is wrong. It is important to

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<sup>269</sup> Report of the Expert Commission, July 25, 2008, **Exhibit R-87**, pp. 15–17, 40–41, and 70–71.

<sup>270</sup> *Ibid*, pp. 40–41.

<sup>271</sup> *Ibid*, pp. 17 (Emphasis added).

<sup>272</sup> *Ibid*, pp. 33–36.

<sup>273</sup> See Report of the Expert Commission, July 25, 2008, **Exhibit R-87**, pp. 82–83 (Underground Networks), pp. 78–79 (Output by Transformer Substation), pp. 93–94 (Connections).

<sup>274</sup> Sigla S.A. – Electrotek S.A., Technical Offer to Participate in the Supervision of Load Characterization Studies (EEC) and the Components of the Value-Added for Distribution (EVAD), October 15, 2007, **Exhibit R-45**, pp. 46–47, (including a letter from Miguel Francisco Calleja, Manager of Planning and Control at EEGSA, to Luis Sbertoli, President of Sigla, October 13, 2005). *See also* Counter-Memorial, par. 322.

<sup>275</sup> Reply, pars. 200–207.

note that what TGH requests is that this Tribunal replace the CNEE and repeat the whole tariff review, as if it were a regulatory agency. This falls outside the competence of this Tribunal. Any supposed technical-financial errors committed by the CNEE or its independent consultants cannot constitute violations of the international minimum standard on the part of the Guatemalan State.

164. As stated in the Counter-Memorial, the calculation of the VAD is a complex technical operation that the LGE regulates as follows: it must reflect the “average cost of capital and operation of a benchmark efficient company operating in a given density area” (Article 71); it must include as its basic components the “[c]ost associated with the user, regardless of its demand for power and energy,” “[a]verage distribution losses,” “[c]osts of capital, operation and maintenance associated with distribution” as basic components (Article 72); the cost of capital is calculated based on the “New Replacement Value of an economically designed distribution network” (Article 73).<sup>276</sup>

**C. THE ALLEGATIONS OF ARBITRARINESS OF THE CNEE ARE MERE LABELS WITHOUT ANY BASIS WHATSOEVER**

165. One of the adjectives most favored by TGH to characterize the conduct of the CNEE is “arbitrariness.”<sup>277</sup> It is interesting that despite the use of such sensationalist terminology, TGH’s legal analysis of the concept of arbitrariness is limited to a single paragraph of the Reply,<sup>278</sup> in which it only seeks to respond to Guatemala’s arguments regarding the concept of arbitrariness as defined in the decision of the International Court of Justice (*ICJ*) in the *ELSI* case.
166. In that paragraph, TGH agrees with the concept of arbitrariness used in *ELSI*; TGH, however, does not appear to have understood the meaning of that concept. The ICJ stated as follows:

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<sup>276</sup> LGE, **Exhibit R-8**, Arts. 71–73; Counter-Memorial, par. 521.

<sup>277</sup> See, for example, Reply, paragraphs. 3, 8, 15, 89, 117, 160, 181, 228, 244–246, 249, 251, 253, 292, and section III.A.1.

<sup>278</sup> Reply, paragraph 237.



Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law [...].

Thus, the Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an "arbitrary" act.<sup>279</sup>

167. TGH does not analyze, or even cite, this passage. Note that arbitrariness relates to acts that do not respect the principles of the rule of law, or in other words, the principle that all public authorities are subject to the rule of the law; there is no arbitrariness when the acts of a public authority, though worthy of criticism, are taken in the context of a well-functioning legal system that provides appropriate legal remedies.
168. Furthermore, international case law rejects the possibility of speaking of arbitrariness in circumstances in which the attacked act of a public entity "*constituted the normal exercise of the regulatory duties*"<sup>280</sup>, or is "*the result of rational decision-making processes*"<sup>281</sup>, or has been undertaken "in the course of exercising its statutory obligations to regulate."<sup>282</sup> TGH does not analyze these precedents, or any of the factors that are relevant to determining arbitrariness.
169. As stated above and explained in a previous section,<sup>283</sup> the actions of the CNEE on which TGH bases its claim do not fall under any of these instances of arbitrariness:
- a. The CNEE acted in the normal exercise of its regulatory duties, powers and responsibilities;

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<sup>279</sup> *Elettronica Sicula S.p.A. (ELSI) (USA v. Italy)* [1989] ICJ Rep 15, July 20, 1989, **Exhibit RL-1**, paragraphs 128–129.

<sup>280</sup> *Ronald S. Lauder v. Czech Republic* (CNUDMI Case) Final Award, September 3, 2001, **Exhibit CL-38**, paragraph 255.

<sup>281</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (CIADI Case No. ARB/02/1) Decision regarding Liability, October 3, 2006, **Exhibit CL-27**, paragraph 158.

<sup>282</sup> *Genin et al. v. Republic of Estonia* (CIADI Case No. ARB/99/2) Award, June 25, 2001, **Exhibit RL-3**, paragraph. 370.

<sup>283</sup> See Section V.E below.

- b. Its decisions were the result of rational decision-making processes;
- c. The CNEE interpreted and applied the regulatory framework according to its best knowledge and belief, and subjected itself at all times to the principles of the rule of the law, and defended its position in the Guatemalan courts;
- d. The decisions of the CNEE were made in the context of a well-functioning legal system in which legal remedies were available; and
- e. The position of the CNEE was upheld by the Constitutional Court on the basis of Guatemalan law, in decisions that were well-reasoned and well-founded.

170. In short, to use the words of the ICJ in *ELSI*, there are no “marks of an ‘arbitrary’ act.”<sup>284</sup>

171. Aware of this, TGH now seeks to fabricate some purported arbitrariness based on e-mails exchanged between the CNEE and engineer Jean Riubrugent when he was its independent consultant for the tariff study and, later, a member of the Expert Commission. These messages do not contain anything questionable, as explained above and in greater detail below.<sup>285</sup>

**D. THE DOCTRINE OF LEGITIMATE EXPECTATIONS DOES NOT APPLY IN THE CONTEXT OF THE MINIMUM STANDARD, AND IN ANY CASE TGH DOES NOT DEMONSTRATE ANY VIOLATION OF LEGITIMATE EXPECTATIONS**

172. TGH states that Guatemala admits that the minimum standard censures violations of the legitimate expectations of the investor.<sup>286</sup> This is incorrect. As seen above,<sup>287</sup> the

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<sup>284</sup> *Elettronica Sicula S.p.A. (ELSI) (USA v. Italy)* 1989, ICJ Rep. 15, July 20, 1989, **Exhibit RL-1**, paragraph 129.

<sup>285</sup> See paragraphs 43, 326–330 below.

<sup>286</sup> Reply, par. 229.

<sup>287</sup> See pars. 79 *et seq.*

doctrine of legitimate expectations does not apply in the context of the international minimum standard, as the practice and *opinio juris* of the state parties to the Treaty demonstrates. In any case, TGH does not demonstrate any violation of legitimate expectations.

**1. TGH continues to assert legitimate expectations generated before it was created**

173. TGH seems surprised that Guatemala objected to its reference in the Memorial to alleged legitimate expectations that it purportedly acquired or that were generated at the time of the privatization of EEGSA, when TGH did not even exist. It states that “Respondent thus resorts to attacking Claimant for attempting to benefit from the legitimate expectations of its affiliated companies in the TECO group” and “[w]ithout cause, Guatemala attacks Claimant for using TGH and TECO interchangeably in its Memorial.”<sup>288</sup> With all due respect, Guatemala cannot be held responsible for the superficiality and frivolity with which TGH has treated this issue, particularly taking into account the centrality of the argument of legitimate expectations to TGH’s case. This is not a groundless attack.
174. It is worth reiteration of the facts. In its Notice of Arbitration, TGH merely stated that its investment in EEGSA was “indirect,” without giving any explanation or providing any supporting documentation in this regard.<sup>289</sup> In its Memorial, TGH did not even mention this issue. However, during the document request process, Guatemala discovered that TGH was only created in 2005 and that it only acquired its indirect interest in EEGSA in that same year. Guatemala called TGH’s attention to this fact and requested additional documentation, which TGH refused to produce. Only when Guatemala requested the Tribunal to intervene did TGH agree to produce any documents, citing “inadvertent misstatements” when stating that it had owned its interest in EEGSA since 1998.<sup>290</sup>

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<sup>288</sup> Reply, par. 8 and note 1354.

<sup>289</sup> Notice of Arbitration, pars. 14, 26.

<sup>290</sup> Letter from White & Case to Freshfields dated January 13, 2012, **Exhibit R-148**.

175. In light of this, Guatemala demonstrated that the purported expectations of TGH in 1998, on which most of its claim is based, were not only completely unfounded, but also could not be such because at that time TGH had not even been created. For example, using the definitions “Claimant” and “TECO” used by TGH to refer to itself:<sup>291</sup>

- (a) “in the late 1990s, Guatemala sought and obtained from Claimant [...]”<sup>292</sup>;
- (b) “Claimant [TGH] decided to invest in EEGSA as part of a consortium [...]”<sup>293</sup>;
- (c) “In April 1998, Salomon Smith Barney prepared a Preliminary Information Memorandum [...], which was sent to the strategic investors, including TECO [TGH]”<sup>294</sup>;
- (d) “TECO [TGH] was interested in investing in EEGSA and ‘believed that its privatization [...]’”<sup>295</sup>;
- (e) “[t]he laws [...] were central to [TGH’s] decision to participate in the bid to privatize EEGSA [...]”<sup>296</sup>;
- (f) “TECO [TGH] performed extensive due diligence [...]”<sup>297</sup>;
- (g) “[I]n promoting EEGSA’s privatization, Guatemala informed potential investors, including TECO [TGH], [...]”<sup>298</sup>

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<sup>291</sup> According to par. 1 of the Memorial, Claimant is also referred to as “TECO” in the Memorial.

<sup>292</sup> Memorial, par. 3.

<sup>293</sup> Memorial, par. 45.

<sup>294</sup> *Ibid.*, par. 49.

<sup>295</sup> *Ibid.*, par. 56.

<sup>296</sup> *Ibid.*, par. 57. See the version of the Memorial in English, in which it is clear that “our decision” refers to Teco.

<sup>297</sup> *Ibid.*, par. 59.

<sup>298</sup> *Ibid.*, par. 278.

176. In fact, all of the expectations that TGH alleges to have had with respect to the regulatory framework (which are completely mistaken) are based on its purported understanding of such framework in 1998 and on the purported assurances or promises given to TGH when EEGSA was privatized. This is clearly impossible.
177. In its Reply, TGH responds that this is not important because TGH is part of the Teco Group and, therefore, the expectations that other companies of the group had in 1998 were automatically and retroactively transferred to TGH when it was created in 2005.<sup>299</sup> However, given the importance of the concept of legitimate expectations, a much detailed and careful analysis than this is required.
178. The issue of when and how a company acquires certain knowledge or such knowledge can be attributed to it (for example, an expectation) is a complex legal issue that is even more complex when it relates to the transfer of such knowledge. In normal circumstances, a company is attributed the knowledge of the bodies that, according to the company's bylaws and domestic corporate law, make decisions that are binding on the company, or the knowledge of duly appointed agents and delegates. The issue is very simple. If TGH did not exist in 1998, it could not have acquired any expectation at that time. No one could have transferred or imparted such expectation or knowledge to it, however mistaken it may have been. It was also impossible to attribute such knowledge or expectation to it based on its mere participation in the same company group, which participation did not even materialize until seven years later. As noted above, knowledge is acquired, attributed, and transferred through the company bodies, and must be proved. A simple reference to being a member of a group cannot exclude this analysis. TGH's theory would require inquiring and demonstrating what the expectations were of each company of the group in relation to the investment in Guatemala, including the parent company, because according to TGH all of these companies could have transferred expectations to TGH and to all the group companies. This would lead to an absurd line of inquiry.

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<sup>299</sup> Memorial, pars. 267-271.

179. TGH refers to cases in which it was held that an investor could have legitimate expectations even without having participated in the initial investment.<sup>300</sup> While this is right, it must be noted that such expectations were, in all cases, only those demonstrably created in the investor in question at the time it made its investment (in the case of TGH, in 2005), not those of the original investor that was not a party in the process. The case law is clear in that the legitimate expectations that are protected by international law are those of each investor at the time they have made their investment.<sup>301</sup> The problem is that TGH has only invoked expectations purportedly generated in 1998.
180. In *Total v. Argentina*, for instance, it was held that the claimant could not have had any legitimate expectations that derived from the tender process years before the investment was made. In the words of the tribunal:

The Tribunal does not need to analyse the import of those provisions because Total did not take part in the bidding process in December 1992. Therefore, on the basis of the legal principles highlighted above, Total cannot invoke the Bidding Rules as a promise on which it could have relied when it invested in the gas sector in 2001. The situation of Total is, therefore, different from that of the foreign investors who had participated in the privatization and, consequently, invoked their reliance on the bidding rules in other disputes.<sup>302</sup>

181. Although this is obvious, TGH insists in arguing that its expectations purportedly derived from “specific representations” made by Guatemala “during EEGSA’s privatization process in 1998,”<sup>303</sup> such position must be rejected.

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<sup>300</sup> *Ibid*, par. 270.

<sup>301</sup> *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8) Award, September 11, 2007, **Exhibit RL-10**, par. 331.

<sup>302</sup> *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Liability, December 27, 2010, **Exhibit CL-70**, par. 148.

<sup>303</sup> Reply, par. 268.

**2. In any case, TGH's argument of legitimate expectations has no legal or factual support**

***a. The fair and equitable treatment standard does not protect expectations other than those based on specific commitments of legal stability, which do not exist here***

182. TGH has yet to provide a single example of a case in which the international minimum standard was applied and in which a violation of the standard was found on the basis of a breach of legitimate expectations. It continues to refer to precedent on the fair and equitable treatment standard that is independent from customary international law.<sup>304</sup> TGH argues that there is no difference between the minimum standard and the fair and equitable treatment standard, but this is incorrect, as explained above.<sup>305</sup> Guatemala reiterates that the doctrine of legitimate expectations does not apply in the context of the international minimum standard. The analysis in this section is, therefore, without prejudice to Guatemala's position on this subject.

183. Furthermore, as demonstrated by Guatemala in the Counter-Memorial,<sup>306</sup> the autonomous fair and equitable treatment standard (which is not the relevant standard in this case) does not protect any expectation of the investor. In particular, it does not protect the mere ordinary expectations of an investor that a public authority will not breach an administrative contract or will not commit any irregularity in applying the regulatory framework. Nothing of the sort has occurred in this case, but what is important is that these are questions of domestic law which are to be resolved by the national courts. Otherwise, any regulatory or contractual breach, or small amendment of a regulation, would automatically constitute a violation of international law. International protections would become nothing more than the mere application of domestic law, and any adjustment or evolution to a regulatory framework would be prevented. The case law cited above, regarding the fact that a mere domestic unlawful

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<sup>304</sup> *Ibid*, pars. 254–260.

<sup>305</sup> *See* pars. [79] *et seq.*

<sup>306</sup> Counter-Memorial, pars. 460–467.

act by a regulator does not give rise to a breach of the international minimum standard and the fair and equitable treatment rule, is clear in this regard.

184. It is worth recalling *Parkerings v. Lithuania*, in which the tribunal held:

It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfillment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law. Indeed, the party whose contractual expectations are frustrated should, under specific conditions, seek redress before a national tribunal. As stated by the Tribunal in *Saluka*, “[t]he Treaty cannot be interpreted so as to penalise each and every breach by the Government of the Rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.”<sup>307</sup>

185. The legitimate expectations that are protected by the obligation of fair and equitable treatment are something else. They arise from specific guarantees or commitments given by the state not to alter the legal framework in force at the time the investment is made. The most classic example is a legal stability clause in the contractual arrangements that serve as the basis for the investment. In the words of the tribunal in *Parkerings*:

It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. [...]

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<sup>307</sup> *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8) Award, September 11, 2007, **Exhibit RL-10**, pars. 344. (Underlining added, italics in the original). See also *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, June 18, 2010, **Exhibit RL-14**, pars. 335–337.



[...] an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.<sup>308</sup>

186. This is fully applicable to the case at hand. The doctrine of legitimate expectations does not apply to cases of regulatory breaches (which, furthermore, have not occurred in this case), but to cases involving fundamental changes in the legal framework that infringe upon specific commitments of legal stability normally contained in a stability clause.
187. TGH replies that legitimate expectations can be generated by the regulatory framework alone. This is incorrect. In the absence of stability clauses, legitimate expectations can arise only out of specific commitments or promises made to the investor not to alter the regulatory framework. As the tribunal stated in *EDF v. Romania*:

The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.

Further, in the Tribunal's view, the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors.<sup>309</sup>

188. The tribunal in *AES v. Hungary* ruled in the same way in a dispute related to electricity generation. In *AES*, the claimants argued that the adoption of two decrees that changed the existing regime and established controlled prices had frustrated their expectations and violated the fair and equitable treatment standard. In the words of the tribunal:

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<sup>308</sup> *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8) Award, September 11, 2007, **Exhibit RL-10**, pars. 332–333 (Emphasis in the original).

<sup>309</sup> *EDF Services (limited) v. Romania* (ICSID Case No. ARB/05/13) Award, October 8, 2009, **Exhibit RL-13**, pars. 217–218.

A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.

[...]

In this case, however, the Tribunal observes that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur.

[...]

In these circumstances, absent a specific commitment from Hungary that it would not reintroduce administrative pricing during the term of the 2001 PPA, Claimants cannot properly rely on an alleged breach of Hungary's Treaty obligation to provide a stable legal environment based on the passage of Act XXXV and the Price Decrees. This is because any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times.<sup>310</sup>

189. TGH cites the award in *Total v. Argentina* in support of its position that “no such specific guarantee is necessary for a fair and equitable treatment standard violation.”<sup>311</sup> But, like in the awards cited above, the tribunal in *Total* also stated that specific commitments are required:

[S]ignatories of such treaties do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it [...] [T]he legal regime in effect in the host country at the time of the investment is not *per se* covered by a “guarantee” of stability due to the mere fact that the host country entered into a BIT with the country of the foreign investor. A specific provision in the BIT itself or some “promise” of the host State, are required to this effect so rendering such an expectation legitimate [...]Representations made by the host State are enforceable and justify the

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<sup>310</sup> *AES Summit Generation Limited and AES-TISZA ERÖMŰ KFT v. Hungary* (ICSID Case No. ARB/07/22) Award, September 23, 2010, **Exhibit RL-24**, pars. 9.3.29, 9.3.31, 9.3.34.

<sup>311</sup> Reply, pars. 258 and 260, 263.

investor's reliance only when they are made specifically to the particular investor [...] legislative provisions, regulations of a unilateral normative or administrative nature, not so specifically addressed, cannot be construed as specific commitments that would be shielded from subsequent changes to the applicable law.

[...]

In light of the above principles, the Tribunal does not agree with Total's argument that the legal regime (the pricing rules) that Argentina changed was the object of a "promise" by Argentina that was binding on Argentina, and on which Total was entitled to rely ("legitimate expectations") as a matter of international law. It is immaterial in this respect whether or not the "radical" changes in the Electricity Law regime that Total complains of are also in breach of Argentina's law and/or represent a use by SoE of its power in disregard of the Electricity Law.<sup>312</sup>

190. TGH also refers to the award in *Suez v. Argentina*.<sup>313</sup> It is notable how TGH omits the part of the citation that is not favorable to it because it completely contradicts its position. TGH says that the tribunal in the case of *Suez v. Argentina* specifically stressed the fact that the Claimant "attached great importance to [Guatemala's] tariff regime ... and the regulatory framework. Indeed, [its] ability to make a profit was crucially dependent on it."<sup>314</sup> This is purportedly a citation from the *Suez* award. But notice what TGH omits from the passage (the underlined portion):

[T]he Claimants attached great importance to the tariff regime stipulated in the Concession Contract and the regulatory framework. Indeed, their ability to make a profit was crucially dependent on it.

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<sup>312</sup> *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) Decision on Liability, December 27, 2010, **Exhibit CL-70**, pars. 309, 310. *See also* pars. 117, 119, 120 regarding measures related to the gas sector.

<sup>313</sup> Reply, par. 259.

<sup>314</sup> *Ibid*, par. 263 citing *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, July 30, 2010, **Exhibit RL-17**, par. 212.

191. The passage omitted by TGH is fundamental. In all Argentine cases relating to the emergency legislation that abolished the tariff regimes for public services, the tribunals linked the concept of legitimate expectations to the “specific commitments” that resulted from including the fundamental elements of the regulatory framework in the concession contracts (which incorporated, for example, all of the principles that were applicable to the tariff review), in the bidding terms pursuant to which the investors acquired their interests in the local companies, the explanatory circulars that the Government sent to investors in response to their specific questions about the tariff reviews, etc.
192. For example, the complete paragraph from which TGH extracts the above citation reads as follows:

The Concession Contract and the legal framework of the Concession described above clearly meet the conditions proposed in the cases just referred to. They set down the conditions offered by the Province at the time that the Claimants made their investment; they were not established unilaterally but by the agreement between the Provincial authorities and the Claimants; and they existed and were enforceable by law. Like any rational investor, the Claimants attached great importance to the tariff regime stipulated in the Concession Contract and the regulatory framework. Indeed, their ability to make a profit was crucially dependent on it. The importance of the tariff regime was underscored even before the bidding took place, as shown *inter alia* by the clarifying circulars [*circulares aclaratorias*] issued by the Province in response to questions raised by bidders concerning the terms of the Article 11.4.4.2 of the Model Contract concerning tariff revisions, particularly with respect to changes in exchange rates and financial costs. These expectations of the Claimants were later included in the Concession Contract, a document which certainly reflects in detail the Claimant’s legitimate expectations, as well as those of the Province. In view of the central role that the Concession Contract and legal framework played in establishing the Concession and the care and attention that the Province devoted to the creation of that framework, the Claimant’s expectations that the Province would respect the Concession Contract throughout the thirty-year life of the Concession were legitimate, reasonable, and justified. It was in reliance on that legal framework that the Claimants invested substantial funds in the Province of Santa Fe. And the Province certainly

recognized at the time it granted the Concession to the Claimants that without such belief in the reliability and stability of the legal framework the Claimants – indeed any investor – would never have agreed to invest in the water and sewage systems of Santa Fe.<sup>315</sup>

193. Therefore, far from supporting its position, this decision is unfavorable for TGH. In *Suez*, the tribunal assigned “great” importance to the guarantees expressly contained in the concession contract and did not base its conclusion regarding expectations merely on the regulations.
194. More recently, in the *EDF et al. v. Argentina* award, also concerning the impact of Argentine emergency measures on a concession regarding electricity transmission and distribution, the tribunal held that Argentina had violated the fair and equitable treatment standard by failing to abide by “specific commitments” concerning the calculation of the tariffs in dollars. According to the tribunal:

Had the provisions in the Currency Clause [of the Concession Contract]<sup>316</sup> not existed, pesification and failure to restore the economic balance might not have figured as unfair and inequitable treatment.<sup>317</sup>

195. Other awards, the majority of which are selectively cited by TGH, also refer to the specific commitments contained in the concession contracts, and not exclusively to the regulation, as a source of legitimate expectations.<sup>318</sup> Academic commentary is also clear. Professor Moshe Hirsh, for example, explains:

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<sup>315</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, July 30, 2010, **Exhibit RL-17**, par. 212. (Emphasis added).

<sup>316</sup> *EDF International S.A., SAUR International, León Participaciones Argentinas v. Argentine Republic* (ICSID Case No. ARB/02/23) Award, June 11, 2012, **Exhibit RL-30**, par. 81.

<sup>317</sup> *Ibid*, par. 1010. The “Currency Clause” was part of Sub-Exhibit 2 of the Concession Contract. *See* par. 81.

<sup>318</sup> *See, e.g., CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, May 12, 2005, **Exhibit CL-17**, pars. 133, 277; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability, October 3, 2006, **Exhibit CL-27**, pars. 119-120; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17) Award, June 21, 2011, **Exhibit RL-31**, pars. 320-325.

Investors' expectations created by contractual, semi-contractual arrangements, promissory statements or specific representations may generate 'legitimate expectations' protected by the FET principle. The host state's regulatory measures alone are insufficient in forming legitimate expectations protected by FET clauses.<sup>319</sup>

196. In the present case, there is no specific promise or commitment that was reneged by Guatemala on which TGH could rely upon. Much to the contrary, aside from the fact that in this case there has been no modification of any basic premise of the regulatory framework, in the Agreements under which EEGSA operates, EEGSA, and therefore TGH, fully accepted all legislative and regulatory changes:

[It] agrees to comply with all the provisions set forth in the General Law of Electricity and its Regulations or modification they suffer and the other regulations and provisions that generally apply [...].<sup>320</sup>

197. The key questions here are what are the legitimate expectations that TGH claims to have, and from which specific commitments granted by Guatemala do they arise? Interestingly, a description or listing of these expectations cannot be found anywhere in the entire Reply.
198. In the section devoted to its legitimate expectations, TGH provides only one basis for such expectations regarding the tariff regime:

*Memorandum of Sale*: discussed, *inter alia*, the tariff calculation regime and the role of the Expert Commission,

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<sup>319</sup> M. Hirsch, "Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law" (2011) 12:6 The Journal of World Trade Investment and Trade 783, **Exhibit RL-25**, p. 784.

<sup>320</sup> Authorization Agreement for the Departments of Guatemala, Sacatepéquez and Escuintla, entered into between EEGSA and the Ministry of Energy and Mines, May 15, 1998, **Exhibit C-31**, Clause 20; Final Electricity Distribution Authorization Agreement for the Departments of Chimaltenango, Santa Rosa and Jalapa, February 2, 1999, **Exhibit R-20**, Clause 20 (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

[S]e obliga a cumplir con todas las disposiciones previstas en la Ley General de Electricidad y su Reglamento o modificaciones que estos sufran y demás reglamentos y normas que sean de aplicación general [...].

noting that “VADs must be calculated by distributors by means of a study commissioned [by] an engineering firm,” and that 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.”<sup>321</sup>

199. In other words, all of the expectations that TGH says it has with regard to the supposedly limited authority of the CNEE and the binding role of the Expert Commission go back to a Sales Memorandum prepared by a bank several years prior to its incorporation as a company that says that “VADs must be calculated by distributors by means of a study commissioned [by] an engineering firm,” and that 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.”
200. Notably, these excerpts from the Sales Memorandum do not state that the authority of the CNEE with respect to tariffs is limited and that the Expert Commission has the power to issue binding decisions or to approve the tariff studies. Much to the contrary, the Memorandum is clear about the power of the CNEE to approve the VAD studies and set tariffs.<sup>322</sup>
201. TGH alleges that it understood, based on this documentation and on the regulatory framework in general, that the Expert Commission’s report was binding and that the CNEE could not disregard the study produced by the distributor’s consultant. However, Guatemala cannot be blamed if TGH (or rather, another Teco group company) wrongly interpreted the regulatory framework. No specific assurances were given by any

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<sup>321</sup> Reply, par. 264.

<sup>322</sup> Salomon Smith Barney, “EEGSA: Sales Memorandum,” May 1998, **Exhibit R-16**, p. 55, where it explains:

The basic functions of the [CNEE] are, among other things, [...] to set the tariffs as determined by law [...]. The Commission, formally a specialized group under the MEM [Ministry of Energy and Mines] which has operational and budgetary independence, is the regulatory and supervisory entity for the electricity sector. The basic functions of the Commission are: (1) to enforce the law [...], (4) to regulate tariffs for transmission and distribution [...].

Guatemalan agency that the legal framework would be interpreted in the way that TGH interprets it in this arbitration.

202. The expectations held by TGH could not have been based on the regulatory framework either, since there is nothing in it that would support TGH's alleged expectations. It is also worth noting that despite the fact that TGH alleges that the Teco group had conducted a process of due diligence on the Guatemalan regulatory framework,<sup>323</sup> when Guatemala requested the documentation gathered through such process,<sup>324</sup> TGH did not submit one single document from the supposed due diligence conducted at the time it made its investment in 2005 or from the time when other companies of the group bought a stake in EEGSA in 1998.<sup>325</sup> It is unusual that a sophisticated American company would not have sought legal advice when making an investment of this magnitude.
203. Despite this, TGH insists that the "Claimant necessarily had expectations at the time of its investment, which it drew from the legal and regulatory framework." This begs the question: What was TGH's understanding of LGE Article 4(c), which provides that "the [CNEE] shall have [...]the following functions [...] c) Defining the transmission and distribution tariffs, [...] as well as the methodology for calculation of the same"? And LGE Article 60, which establishes that the CNEE approves "costs for the distribution activity" (the VAD)? And LGE Article 61 that reads "tariffs [...] shall be determined by the Commission by adding the power and energy acquisition cost components [...] with the components of efficient costs of distribution" (the VAD)? Or what about LGE Article 71 that provides that "[T]he tariffs [...] shall be calculated by the Commission as the sum of the weighted price of all the distributor purchases, referenced to the inlet to

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<sup>323</sup> TGH argued that "[i]n addition to analyzing the new legal and regulatory framework established by Guatemala for its electricity sector, TECO performed extensive due diligence." Memorial, par. 59. *See also* Gillette, **Appendix CWS-5**, par. 8.

<sup>324</sup> *See* Letter from Freshfields to White & Case dated November 7, 2011, **Exhibit R-142**, Documentation A.2.

<sup>325</sup> Also notice that, according to the public tender procedure for EEGSA shares, interested companies could conduct consultations or request clarification with regard to the regulatory framework applicable to the activity. Teco did not find it necessary to conduct any consultations or make any comments regarding the role of the regulator and/or its powers and attributes. Neither did it conduct any consultation regarding the role of the Expert Commission, the nature of its opinion or the procedure to be followed after such opinion was issued (*see* Counter-Memorial, par. 228)



the distribution network, and the Value-Added for Distribution (VAD))”? And what was its understanding of RLGE Article 82 (“supply costs for the calculation of the Base Tariffs and per voltage level, shall be approved by the Commission”)”? Did it ever consider the meaning of RLGE Article 83, which states that “[t]he following shall not be included as supply costs [...] costs that in the opinion of the Commission [the CNEE] are excessive or do not correspond with the exercise of the activity”? Did it question RLGE Article 92 which establishes that the tariff studies “must be approved by the Commission”? And RLGE Article 99 that reads “once the tariff study referred to in the previous articles has been approved, the Commission shall proceed to set the definitive tariffs”? On what basis did it believe that by stating “the Expert Commission shall pronounce itself on the discrepancies” LGE Article 75 creates an arbitral tribunal whose decisions are binding as regards the approval of the distributor’s tariff study?

204. It seems that TGH has never asked itself any of these questions. If it has ever done such inquiry, of which there is no evidence, and if upon doing so it concluded that the powers of the CNEE were limited and that the Expert Commission had a binding role in the approval of the VAD, then it was materially mistaken, given that the regulatory framework states nothing to this effect, but rather the opposite.<sup>326</sup> TGH cannot now blame Guatemala for its own mistakes. Guatemala has made no specific commitment that would support TGH’s interpretation of the regulatory framework.

***b. The fair and equitable treatment standard censures only fundamental departures from the regulatory framework that violate legitimate expectations, which has not occurred in this case***

205. TGH does not provide a response to Guatemala’s argument that the doctrine of legitimate expectations not only requires specific commitments in order for such expectations to form (which do not exist in this case), but that the frustration of such expectations requires that the legal framework be fundamentally destroyed, which has also not occurred here. TGH simply does not address this issue.

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<sup>326</sup> See pars. 113-117 above.

206. It is nonetheless worthwhile to review this aspect of the doctrine of legitimate expectations given that TGH cites awards where this principle was established, but appears not to have realized its significance. Such awards concern the cases that arose out of the adoption of the emergency legislation in Argentina in 2002. In those cases, the claimants complained about the destruction by emergency legislation of fundamental aspects of the regulatory and contractual framework applicable to the public utilities sector in Argentina, including the electricity transmission and distribution service. Argentina had passed legislation abolishing the provisions regarding the calculation of tariffs for public utilities and their review in the event of devaluation and inflation. This is clearly a much more serious scenario than the one at issue in this case. TGH's claim concerns a dispute over the interpretation and scope of certain rights of the distributor (and the regulator) in the context of a tariff review, not their abolition.
207. The awards issued so far on these questions demonstrate that only those measures that destroy a fundamental aspect of the legal framework are capable of violating the legitimate expectations of an investor. In *CMS*, for example, the tribunal said:

The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustment mechanisms, unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant.

[...]

It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.<sup>327</sup>

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<sup>327</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, May 12, 2005, **Exhibit CL-17**, pars. 275, 277 (Emphasis added).

208. Along the same lines, in *LG&E v. Argentina*, the tribunal found that Argentina had violated the fair and equitable treatment standard by introducing fundamental changes to the regulatory and contractual frameworks, which frustrated the legitimate expectations of the investor:

Specifically, it was unfair and inequitable to pass a law discarding the guarantee [...] that the tariffs would be calculated in U.S. dollars and then converted into pesos. [...]

Argentina acted unfairly and inequitably when it prematurely abandoned the PPI tariff adjustments and essentially froze tariffs [...] it refused to resume adjustments, [...] History has shown that the PPI adjustments that were supposed to be postponed have been abandoned completely and are now being “negotiated” away.

[...]

Likewise, the Government’s Resolution No. 38/02 issued on March 9, 2002, which ordered ENARGAS to discontinue all tariff reviews and to refrain from adjusting tariffs or prices in any way, also breaches the fair and equitable treatment standard.

[...] But here, the tribunal is of the opinion that Argentina went too far by completely dismantling the very legal framework constructed to attract investors.<sup>328</sup>

209. Likewise, the award in *BG Group v. Argentina* states:

Argentina [...] entirely altered the legal and business environment by taking a series of radical measures, starting in 1999 [...] Argentina’s 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. In doing so, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.

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<sup>328</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability, October 3, 2006, **Exhibit CL-27**, pars. 134, 136, 138-139 (Emphasis added).

[...]

[...] [t]he Emergency Law and subsequent legislation were enacted to promote a new deal with the licensees, impeding the application and execution of the original Regulatory Framework. [...]

In summary, [...] Argentina fundamentally modified the investment Regulatory Framework [...].<sup>329</sup>

210. It is thus clear that the fair and equitable treatment standard only censures fundamental changes to the legal framework. There is no violation of legitimate expectations in a case in which at most there was a violation of the regulatory framework (which TGH has not demonstrated), or when at most there were some partial amendments to the regulatory framework which in no way derogate or abolish the basic premises of that framework.
211. The only reforms undertaken in this case were those regarding RLGE Articles 98 and 98 *bis*. These modifications did not alter the substance of the original legal framework nor the nature, attributes or role of the CNEE as TGH alleges.<sup>330</sup>
212. The reform of RLGE Article 98 was discussed in detail above.<sup>331</sup> As regards Article 98 *bis*, as explained in the Counter-Memorial and below, this article filled a gap in the legal framework and, more importantly, as TGH recognizes<sup>332</sup> this Article was not applied by the CNEE in the 2003 tariff review.<sup>333</sup> Up until the reform, the mechanism of the Expert Commission could be blocked if the parties (the CNEE and the distributor) could not come to an agreement regarding the third member of the Expert Commission. To resolve this problem, the reform provided that each party is required to nominate three candidates who meet certain criteria for independence from the parties. If the parties are not able to reach an agreement regarding the appointment of the third member, the

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<sup>329</sup> *BG Group Plc. v. Argentine Republic* (UNCITRAL Case) Final Award, December 24, 2007, **Exhibit CL-9**, pars. 307, 309-310 (Emphasis added).

<sup>330</sup> Reply, pars. 239, 240.

<sup>331</sup> See Section I.A.2.b.

<sup>332</sup> Memorial, par. 135.

<sup>333</sup> Reply, pars. 74, 354; Memorial, par. 135.

Ministry of Energy and Mines appoints the third member from among the persons nominated by the parties.

213. This reform does not contradict the principles of the LGE, particularly because the Expert Commission has a technical and advisory function; it is the CNEE that has the power to make decisions. In any event, Article 98 *bis* was not applied to EEGSA in the present case and, therefore, could not have caused any harm to it.

**V. SUBSIDIARILY, THE DISPUTE RAISED BY TGH IS VOID OF ANY FACTUAL OR ECONOMIC MERIT**

**A. IN ITS CLAIM, TGH SELECTIVELY APPLIES THE LEGAL FRAMEWORK INSTEAD OF ANALYZING IT IN ITS ENTIRETY**

214. As explained in the Counter-Memorial, a principle objective of privatizing the Guatemalan electricity distribution sector in the mid-1990's was the depoliticization the tariff-setting process.<sup>334</sup> With this in mind, the new regulatory framework established a careful balance between private sector interests and the State's inherent need to regulate an essential public utility such as electricity distribution. As Guatemala discussed, TGH's claim failed to analyze the regulatory framework, particularly with respect to the distribution of authority among the key players in the electricity sector.<sup>335</sup> It also noted TGH's distorted vision of the model company system, the foundation of the distribution service regulation.<sup>336</sup>

215. In its Reply, TGH presents a still-distorted description of the regulatory framework. TGH continues to sidestep the relevant issues and instead insists on making a partial and case-by-base analysis of the regulatory framework in order to (a) justify the irregular conduct of EEGSA and consultant Bates White during the 2008 tariff review, and (b) limit the authority that the LGE bestows upon the regulator. In essence, TGH attempts to portray the LGE regulatory framework as a mechanism in which the regulator lacks any

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<sup>334</sup> Counter-Memorial, par. 159.

<sup>335</sup> Counter-Memorial, par. 138.

<sup>336</sup> *Ibid*, par. 138.

real power to enforce the law, and instead presents a system in which tariffs can be “negotiated” by the regulated. TGH disregards the fact that the distribution of electricity is an essential public utility existing within the framework of a natural monopoly<sup>337</sup> and that, therefore, it requires regulation and proper control on the part of the State.

**1. TGH’s analysis disregards the delegation of authority and obligations to the CNEE under the electricity regulatory framework**

**a. *The creation of the CNEE as a technical and independent body for regulating the electricity sector was central to the new regulatory system***

216. As discussed in the Counter-Memorial, the objective of creating the CNEE during the electricity reform was to establish a technical and apolitical regulator that would be responsible for setting tariffs according to clear legal provisions.<sup>338</sup> This implied a radical change from the former system, in which there was no regulator and in which tariffs were, in practice, set by the President of the Republic based on his own criteria, as authorized by Civil Code Article 1520.<sup>339</sup> The preamble (*Considerandos*) of the LGE made it clear that the primary aim in creating the regulatory body was to create a “a qualified technical commission selected from among those proposed by the nation’s sectors most interested in developing the electricity subsector”:<sup>340</sup> (i) universities; (ii) the Ministry of Energy and Mines (the MEM); and (iii) the market agents, including electricity distributors (such as EEGSA).<sup>341</sup>

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<sup>337</sup> As Mr. Colom explains, electric energy distribution activity in Guatemala constitutes a natural monopoly, due to the inherent characteristics of the service, as only one company can satisfy the market demand at a lower unitary cost than a system whereas two companies coexist in free competition. Carlos Eduardo Colom Bickford witness statement, Chairman of the National Electric Energy Commission, January 24, 2012 (hereinafter *Colom*), **Appendix RWS-1**, par. 28-29.

<sup>338</sup> Counter-Memorial, pars. 149–150, 155, 159. See CNEE Technical Rules of the Distribution Service, published in the *Diario de Centro América* on April 11, 1999, **Exhibit R-164**, p. 2 of the Advisory Opinion.

<sup>339</sup> Counter-Memorial, par. 149.

<sup>340</sup> LGE, last recital, October 16, 1996, **Exhibit R-8**, p. 1

<sup>341</sup> LGE, Art. 5, October 16, 1996, **Exhibit R-8**; RLGE, Art. 30(d) and (e) **Exhibit R-36**. To enhance its independence, members of the Board of Directors are replaced every five years, and their terms do not coincide with that of the President of the Republic (Counter-Memorial, par. 60).

217. The framework of the LGE established a technical regulatory body with the independence necessary to exercise its authority. Thus, the LGE stressed this attribute in the very article creating the CNEE, Article 4, which reads: “The Commission shall have functional independence in exercising its authority [...]”<sup>342</sup> In order to reinforce the CNEE’s independence, the RLGE made it clear that, in addition, the CNEE would have its own budget, which also gave it financial independence.<sup>343</sup> In considering the *amparo* filed by EEGSA against the 2008 tariff schedule set by the CNEE, the Constitutional Court described the CNEE’s institutional role within the new regulatory framework of the LGE as different than the prior system, in the following words:

It must be taken into account that Article 1520 of the Civil Code [...] which empowered the Executive Body to fix certain tariffs [...] this power now being vested in the National Electricity Commission, which is not unilaterally formed by the Executive Body, but, based on a plural appointment system from society, the three members that comprise it will be appointed “from each one of the panels of three candidates, one from each panel, which shall be proposed by: 1) the Presidents of the country’s Universities; the Ministry [of Energy and Mines], and the Agents in the wholesale market (Article 5 of the General Electricity Law) [...]”<sup>344</sup>

218. In its Reply, TGH asserts that a depoliticization of the tariff-setting process “would require more than simply creating the CNEE as a technical regulatory body” as it would also be necessary to establish a new legal and regulatory framework to lend “legal certainty” and prevent arbitrary Government interference.<sup>345</sup> According to TGH, since the LGE establishes “functional independence” instead of “structural independence” of the CNEE, the CNEE remained subject to the control of the MEM, which could affect

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<sup>342</sup> LGE, Art. 4, October 16, 1996, **Exhibit R-8**; Daily Record of the Sessions of the Congress of the Republic of Guatemala, October 16, 1996, p. 112, **Exhibit R-9** (Emphasis added).

<sup>343</sup> RLGE Art. 29 established that “The Commission shall have functional independence, its own budget and exclusive funds [...]” RLGE, **Exhibit R-36**, Art. 29 (Emphasis added).

<sup>344</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, **Exhibit R-105**, p. 23–24.

<sup>345</sup> Reply, par. 15.

its decisions.<sup>346</sup> As discussed below, TGH's argument is based on an unnatural and erroneous interpretation of the letter and spirit of the LGE.<sup>347</sup>

219. Based upon the report prepared by Chilean engineers Bernstein and Descazeaux for the reform of the Guatemalan electricity sector, TGH points to the alleged need to prevent arbitrary interference by the Government in setting tariffs.<sup>348</sup> TGH refers to the recommendations by Messrs. Bernstein and Descazeaux to (a) create a "Committee formed by the Ministers of Finance and of Energy and Mines" to "supervise" an external tariff study and (b) allow the resolution of disputes to be "given to arbitrating courts appointed by the parties."<sup>349</sup> Based on this assertion, TGH asserts that Messrs. Bernstein and Descazeaux "did not recommend the creation of a technical regulatory body with discretion to set the tariffs and to determine the distributor's VAD," but rather recommended that disputes arising in connection with tariffs be resolved by "arbitrating courts."<sup>350</sup> This is incorrect. As explained below, although the spirit of the LGE adopted the recommendation of Messrs. Bernstein and Descazeaux to avoid political interference in setting tariffs, the legislative technique adopted was different from that proposed by the Chilean experts.
220. In fact, TGH disregards the obvious fact that, when the Guatemalan legislature approved the LGE, the final text contained significant differences from the recommendations of Messrs. Bernstein and Descazeaux. Thus, instead of forming a "political" Committee consisting of the Ministries of the Treasury and Energy as the Chilean experts had recommended, the LGE created an independent technical body having specific authority and obligations in the tariff-setting process (the CNEE).<sup>351</sup> This is confirmed by Mr.

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<sup>346</sup> Reply, pars. 19, 23, 27.

<sup>347</sup> See also Aguilar Rejoinder, **Appendix RER-6**, pars. 4,5,12-17.

<sup>348</sup> Reply, par. 17; JS Bernstein and JJ Descazeaux, "Restructuring the Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms: Final Report," June 1993, **Exhibit R-3**.

<sup>349</sup> Reply, par. 17.

<sup>350</sup> Reply, par. 17; JS Bernstein and JJ Descazeaux, "Restructuring the Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms: Final Report," June 1993, **Exhibit R-3**, p. 34.

<sup>351</sup> Counter-Memorial, pars. 149–150, 155, 159. The LGE prescribes that the CNEE Board of Directors must consist of university professionals of recognized standing specializing in the subject of electricity and of



Aguilar, who explains that the LGE did not contain the recommendations of Messrs. Bernstein and Descazeaux<sup>352</sup> in the sense of considering “a specific intervention [...] by a high level ad-hoc Government entity, for example, a Committee formed by the Ministers of Finance and of Energy and Mines to supervise a tariff outside study [...].”<sup>353</sup> In addition, the technical and independent nature of the CNEE (which an “ad-hoc Government entity” would clearly not have had) meant that CNEE’s authority and obligations in the LGE went far beyond the mere task of “supervising” the tariff studies.<sup>354</sup> As Mr. Aguilar explains, under the LGE, the CNEE was conceived as the cornerstone of the electricity sector, with functional and economic independence, with a host of powers including, in particular, that of defining the tariff calculation methodology for fixing the tariffs themselves (see pars. 225 et seq. below).<sup>355</sup>

221. Finally, the LGE did not establish “arbitrating courts” to resolve disputes, as Messrs. Bernstein and Descazeaux suggested. Instead, the LGE provided for the formation of an expert commission, constituted by a body of “experts” that would serve to inform the decision of the CNEE in the process of its legal mandate of setting tariffs.<sup>356</sup> According to the language of Article 75, which was ultimately adopted in the LGE, and as Mr. Aguilar explains, the Expert Commission does not constitute an arbitral court nor is its function, according to LGE Article 75, to resolve disputes.<sup>357</sup>
222. It is worth pausing to consider the reference to the “expert commission” contained in LGE Article 75<sup>358</sup> (as opposed to “arbitrating courts” suggested by Messrs. Bernstein and Descazeaux in their recommendations). This reference is particularly illustrative of

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recognized reputation LGE, Art. 5(2), **Exhibit R-8**. Regarding CNEE’s independence, see pars. 225–227 below.

<sup>352</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 7, 8.

<sup>353</sup> JS Bernstein and JJ Descazeaux, “Restructuring the Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms: Final Report,” June 1993, **Exhibit R-3**, p. 34.

<sup>354</sup> See Counter-Memorial, par. 171.

<sup>355</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 4-6, 11-18, 25, 26.

<sup>356</sup> LGE, Art. 75, **Exhibit R-8**; Aguilar Rejoinder, **Appendix RER-6**, pars. 32, 37, 40-41, 44.

<sup>357</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 41, 43. See also par. 428 and below.

<sup>358</sup> *Ibid.*

the legislature's intent with regard to the powers delegated to the CNEE under the LGE. The original LGE draft set forth, on one hand, the current Article 75, which referred to an "expert commission" and, on the other hand, contained two provisions that explicitly mentioned proceedings "of arbitration." One of these provided for a complete arbitration proceeding for resolving certain disputes related to easements which, in six articles, governed in great detail how it would be conducted, including the designation of arbitrators and the third member and the requirements that these had to meet, a description of the proceeding, the content of the tribunal's decision, possible appeals from the decision, etc.<sup>359</sup> In addition to this proceeding, the original draft included a second "arbitration" proceeding, in this case to resolve disputes between participants in the Wholesale Electricity Market.<sup>360</sup> It is clear, then, that when the authors of the LGE draft (and, by extension, the legislature when the LGE was approved) wished to include an arbitration proceeding in the Law, they called it by its name: arbitration. If their intention had been for the expert commission from the current LGE Article 75 to have the same scope, they would have said so. But the text and context of Article 75 confirm that this was not their intention (see above in p.139). This is consistent, moreover, with the position taken by Mr. Aguilar in his second expert Report. Mr. Aguilar, who was commissioned by USAID as an advisor specializing in Guatemalan law to help Mr. Bernstein during the development of the draft law, notes in his latest expert report:

[A]s legal advisor of Mr. Juan Sebastian Bernstein, participated directly in the drafting process of the LGE and can state, with absolute certainty, that it was not the intention of the advisors of the LGE to grant the CP the powers of an arbitral tribunal. Nor was their intention to grant the CP

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<sup>359</sup> USAID, "Draft General Electricity Act and its RLGE", April 4, 1995, **Exhibit R-6**, Arts. 4 to 9 of the Annex to the Bill titled *Provisions on Easements*. This section of the bill was not included in the approved version of the LGE, although it was replaced by a single article (Art. 8) that, by reference, incorporated the arbitration proceeding established in Guatemalan arbitration law.

<sup>360</sup> *Ibid*, Art.74:

Conflicts or disputes that may arise pursuant to applying this Law, these regulations or statutes shall be submitted to an arbitration proceeding when they cannot be resolved by the MM board.

powers to issue resolutions that are binding for the CNEE or for the distributor.<sup>361</sup>

223. TGH also mentions in its Reply the Report of the Congressional Committee that recommended the approval of the draft LGE, yet it selectively cites certain passages, including a reference to the declared objective of the LGE to “provide legal certainty to public and private investment in the [electricity] subsector” in order to avoid “political interference.”<sup>362</sup> However, TGH fails to cite the fundamental passage of this Report, in which the duties and powers of the regulator are described.<sup>363</sup> The passage omitted by TGH reads:

[...] The National Electricity Commission’s proposal will intervene within the strict framework of its functions, in order to ensure compliance with the Law and [...]; it shall define those transmission and distributions tariffs that, by social imperative, must be subject to regulation, establishing in any case the methodology for calculating them.<sup>364</sup>

224. Consequently, it is clear that neither the Bernstein and Descazeaux report nor the Congressional Committee report support TGH’s position to limit the authority of the CNEE. On the other hand, they demonstrate the legislature’s clear intention to create the CNEE as a technical body and to give it the authority necessary to ensure compliance with the Law.
225. As previously explained, TGH further argues that the CNEE, according to the approved text of the LGE, “[was included as] an agency under the Ministry of Energy and Mines

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<sup>361</sup> Aguilar Rejoinder , par.43, **Appendix RER-6** (emphasis in the original); Reply, par. 141.

<sup>362</sup> Reply, par. 19.

<sup>363</sup> Counter-Memorial, pars. 149–150, 155, 159. See CNEE Technical Rules of the Distribution Service, published in the *Diario de Centro América* on April 11, 1999, **Exhibit R-164**, p. 2 of the Advisory Opinion.

<sup>364</sup> *Ibid.* Unofficial English translation. In its original Spanish language it reads:

[...] La propuesta de la Comisión Nacional de Electricidad intervendrá en el estricto marco de sus funciones, que la Ley determina, para que esta se cumpla, para velar por el cumplimiento de las obligaciones [...]; definirá aquellas tarifas de transmisión y distribución que por imperativo social deben sujetarse a regulación, estableciendo en todo caso la metodología para el cálculo de las mismas.

(the ‘MEM’))” instead of being an autonomous body.<sup>365</sup> Although TGH acknowledges that the LGE established the CNEE as a body having “functional independence” from the MEM, it then states that “the CNEE depends upon the MEM and is subject to the superior authority of the MEM.”<sup>366</sup> Thus, according to TGH, this means that the MEM is authorized to “modify any resolutions issued by the CNEE.”<sup>367</sup> Although the hierarchical relationship exists, contrary to what is inferred by TGH this does not invalidate the “functional independence”, which TGH acknowledges was specifically provided for the CNEE in the LGE. On the other hand, as Mr. Aguilar explains, expressly including this formulation (“functional independence”) means that, in practice, the MEM is prevented from interfering in the decisions made by the CNEE.<sup>368</sup> Mr. Aguilar explains that the LGE further enforces this independence through the process of designating the CNEE members; only one member is designated by the MEM while the other two members are proposed by the rectors of the country’s universities and the other by the Wholesale Market Agents, who do not form part of the political power structure.<sup>369</sup> This process guarantees the CNEE’s independence from political power in its decision-making, which are made by a majority. In addition, as Mr. Aguilar explains, the LGE created the CNEE as a financially independent body that has its own budget,<sup>370</sup> whose income derives from applying a rate to the monthly electricity sales of each distribution company equivalent to point three percent (0.3%) of the total electricity distributed during the corresponding month, multiplied by the price per kilowatt-hour of the Guatemala City residency tariff, and which does not originate from the common fund or depend on the central government. Furthermore, the CNEE has a free hand in making decisions about its income, including the salaries of its members and civil servants.<sup>371</sup>

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<sup>365</sup> Reply, par. 22.

<sup>366</sup> *Ibid*, par. 23; Alegría Reply, Appendix **CER-3**, par. 13.

<sup>367</sup> *Ibid.*; Alegría Reply, Appendix **CER-3**, par. 14.

<sup>368</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 4-5, 13, 15-17.

<sup>369</sup> *Ibid*, pars. 5(b), 11–12.

<sup>370</sup> *Ibid*, par. 1, 14.

<sup>371</sup> *Ibid*, par. 14.

226. Even more importantly, the Guatemalan Constitutional Court itself has studied this CNEE-MEM relationship and has pointed out that the CNEE’s “functional independence” ensures that there is no “relationship of subordination” with the Ministry given the “absolute independence of judgment” of its directors. The Court has stated that:

[...] With regard to the National Electricity Commission, one notices the following: a) it was created by the *Ley General de Electricidad* [General Electricity Law (LGE)] [...] as a technical body of the Ministry of Energy and Mines, but one that has functional independence in exercising its authority (LGE Article 4); b) it has been vested with a specific scope of authority in terms of electricity, so that it may make final decisions on an exclusive and permanent basis [...]; c) it does not have a subordinate relationship with the Ministry because it was assigned functional independence, it makes decisions by a majority of its members and has absolute independence of judgment in the latter in its duties (Article 5); d) it has its own allocated budget and exclusive funds [...].<sup>372</sup>

227. In addition, this argument’s lack of basis is evident given that TGH is incapable of referring to a single instance in which the MEM has interfered with a decision made by CNEE in the more than 15 years of the CNEE’s existence. This is simply because it has never occurred. Moreover, TGH has not provided any evidence that casts doubt upon the CNEE’s independence from political power in general, whether before, during, or after

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<sup>372</sup> Appeal of Amparo Decision, Constitutional Court, Case File No. 221-2000, June 13, 2000; Clause II in Sáenz Juárez Rejoinder, **Exhibit R-167**, p. XIX–XX. Unofficial English translation. In its original Spanish language it reads:

[...] En el caso de la Comisión Nacional de Energía Eléctrica se advierte lo siguiente: a) fue creada por la Ley General de Electricidad [...] como un órgano Técnico del Ministerio de Energía y Minas, pero con independencia funcional para el ejercicio de sus atribuciones (artículo 4 de la Ley General de Electricidad); b) tiene encomendadas competencias específicas en materia de electricidad, para que en forma exclusiva y permanente tome decisiones definitivas [...]; c) no tiene relación de subordinación con el Ministerio porque se le asignó independencia funcional, toma de decisiones por mayoría de sus miembros e independencia absoluta de criterio de estos últimos en sus funciones (artículo 5); d) tiene asignado presupuesto propio y fondos privativos [...].

See also, for example, Appeal of Amparo Decision, Constitutional Court, May 30, 2000, Case No. 222-2000, Whereas Clause II, **Exhibit R-166**, p. XXV–XXVI.

EEGSA's tariff review process in 2008. Nor has TGH cared to explain how a body largely consisting of two-thirds of appointees made by the universities and the distributors—including EEGSA—could supposedly respond to the interests of the Executive Branch, which only has the right to propose and appoint one of three members of the CNEE's Board of Directors. Guatemala, however, has indeed submitted evidence to the contrary. As explained in the Counter-Memorial, the CNEE together with EEGSA, has challenged the Human Rights Ombudsman judicially and the President of the Republic politically in defending the tariff increases granted to EEGSA by the CNEE in 2010.<sup>373</sup> These facts invalidate any allegation of CNEE's collusion with Guatemala's political powers and confirm its technical and independent nature.

*b. TGH provides no legal grounds to justify its argument that the CNEE's authority in the tariff review process should be restricted*

228. In its Counter-Memorial, Guatemala explained exhaustively the nature of the CNEE's authority derived from the general authority established in LGE Article 4(c), which imposed obligations upon the CNEE to issue the calculation methodology for the tariff studies (the terms of reference) and to define the distribution tariffs.<sup>374</sup> This article reads:

4. The Commission shall have [...] the following functions: [...]  
 c) Defining the transmission and distribution tariffs subject to regulation in accordance with this law, as well as the methodology for calculation of the same.<sup>375</sup>

229. As previously explained,<sup>376</sup> the LGE and RLGE contain the principle of LGE Article 4(c) in several other articles, which reflect the CNEE's key duty to define methodology and tariffs. Thus, LGE Articles 61, 71, and 77 state:

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<sup>373</sup> With the same Board of Directors serving when the 2008–2013 tariff review was carried out (*See* Counter-Memorial, par. 452).

<sup>374</sup> Counter-Memorial, pars. 57, 60, 160–171, 229, 511.

<sup>375</sup> LGE, Art. 4(c), **Exhibit R-8** (emphasis added). Unofficial English translation. In its original Spanish language it reads:

4. La Comisión tendrá [...] las siguientes funciones: [...]  
 c) Definir las tarifas de transmisión y distribución sujetas a regulación, de acuerdo a la presente ley, así como la metodología para el cálculo de las mismas.

Article 61: The tariffs to users of the Final Distribution Service shall be determined by the Commission by adding the power and energy acquisition cost components [...] with the components of efficient costs of distribution to which the preceding article refers [...].<sup>377</sup>

Article 71: The tariffs 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 Valued-Added for Distribution (VAD). [...].<sup>378</sup>

Article 77: The methodology for determination of the tariffs shall be revised by the Commission every five (5) years [...] The regulations shall indicate the time periods for the performance of the studies, their review, presentation of comments [...].<sup>379</sup>

230. The LGE bestows the authority/obligation upon the CNEE to determine the methodology for calculating the tariff and the tariffs, in a manner that is not arbitrary, but rather embodies a basic function of a technical regulator to establish the rules and procedures that must guide the calculation of tariffs. Thus, the LGE very precisely establishes the criteria that must guide the CNEE in defining this methodology. As

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<sup>376</sup> See pars. 113-117.

<sup>377</sup> LGE, Art. 61, **Exhibit R-8** (emphasis added). Unofficial English translation. In its original Spanish language it reads:

Artículo 61: Las tarifas a usuarios de Servicio de Distribución Final serán determinadas por la Comisión a través de adicionar las componentes de costos de adquisición de potencia y energía [...] con los componentes de costos eficientes de distribución a que se refiere el artículo anterior. [...].

<sup>378</sup> *Ibid.*, Art. 71 (emphasis added). Unofficial English translation. In its original Spanish language it reads:

Artículo 71: Las tarifas a consumidores finales de Servicio de Distribución final, en sus componentes de potencia y energía, serán calculadas por la Comisión como la suma del precio ponderado de todas las compras del distribuidor, referidas a la entrada de la red de distribución, y del Valor Agregado de Distribución -VAD-. [...].

<sup>379</sup> *Ibid.*, Art. 77 (emphasis added). Unofficial English translation. In its original Spanish language it reads:

Artículo 77: La metodología para la determinación de tarifas serán revisadas por la Comisión cada [...] (5) años [...]. El reglamento señalará los plazos para la realización de los estudios, su revisión, formulación de observaciones [...].

Guatemala explained in its Counter-Memorial,<sup>380</sup> CNEE must guarantee that the tariff reflects:

- The cost of purchasing energy and capacity by the distributors on the basis of freely-negotiated prices; and
- The operation and capital cost of an efficient company or VAD.

231. With respect to the VAD, LGE Article 71 precisely defines which costs must be approved by the CNEE in order to determine the tariffs: only the “standard distribution costs of efficient companies.”<sup>381</sup> On the same basis, the RLGE specifically defines which costs should not be acknowledged,<sup>382</sup> giving the CNEE the discretionary authority to reject those costs that it considers excessive or inappropriate to the activity.<sup>383</sup>

232. In the Reply, TGH appears to accept the CNEE’s authority in relation to setting tariffs when it acknowledges that “the CNEE is the regulatory entity charged with calculating and publishing the distributor’s tariffs”<sup>384</sup> and even points out “the CNEE’s broad power to determine the distributor’s tariffs under LGE Article 4(c).”<sup>385</sup> However, TGH tries to downplay this authority in its Reply by stating that its existence “does not mean ipso facto that the CNEE has the power and the discretion to determine the distributor’s

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380 Counter-Memorial, pars. 162.

381 LGE, Art. 60, **Exhibit R-8** (Emphasis added); *See also* RLGE, Art. 84, **Exhibit R-36**, (Emphasis added).

382 RLGE, Art. 83 reads:

Unrecognized Costs. The following shall not be included as supply costs for the calculation of the Base Tariffs: financial costs, equipment depreciation, costs related to generation assets owned by the Distributor, costs associated with the public lighting installations, loads due to excess demand over the demand contracted, established in the Specific Regulations of the Wholesale Market Administrator, any payment that is additional to the capacity agreed in the capacity purchase contracts and other costs that, in the opinion of the Commission, are excessive or do not correspond to the exercise of the activity.

RLGE, Art. 83, March 2, 2007, **Exhibit R-36** (Emphasis added).

383 Regarding applying Art. 83 to the tariff review process, see par. 238 et seq.

384 Reply, par. 29.

385 *Ibid*, par. 31.



VAD.”<sup>386</sup> According to TGH’s argument, the “broad” authority of the CNEE would be limited by the role that LGE Article 74 assigns to the Distributor in calculating the components of the VAD by means of a study carried out by its external consultant.<sup>387</sup> Thus, TGH tries to minimize the CNEE’s duty in this matter using a bold semantic argument: by referring to “[d]efining the [...] distribution tariffs,” Article 4(c) would be referring to a sort of general attribution of tasks (and, an immaterial one for TGH), which would leave the VAD calculation process outside its scope—regardless of the fact that this is one of the most essential components of the distribution tariff that the CNEE must calculate.<sup>388</sup> According to TGH (citing its witness Mr. Calleja), with respect to the VAD, the CNEE must simply “use it” to “structure a set of rates for each awardee.”<sup>389</sup> Thus, according to TGH, the CNEE is excluded from any function related to determining the VAD, as a consequence of the statement in the LGE that “calculating” the VAD corresponds to the prequalified consultant. In addition, TGH denies that LGE Article 83 gives the CNEE the responsibility of determining the costs that are to be included in the VAD. According to TGH, RLGE Article 83 does not apply to calculating the VAD, but rather to “other unrelated costs.”<sup>390</sup> As explained below, TGH’s arguments contain serious inaccuracies and misdescriptions of the regulatory framework.

(a) TGH’s attempt to limit CNEE’s authority over calculating the VAD is contrived and contrary to the LGE

233. First, Guatemala agrees with Claimant that the LGE establishes that it is the distributor, through its consultant, that carries out the tariff study for the VAD.<sup>391</sup> This provision is set out in LGE Article 74 and corresponds to the simple fact that, in principle, it is the distributor who is in the best position to access the information and documentation

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<sup>386</sup> *Ibid.*

<sup>387</sup> Reply, par. 30; Alegría Reply, par.18, **Appendix CER-3**.

<sup>388</sup> *Ibid*; *Ibid*, par. 22.

<sup>389</sup> Calleja Reply, , par. 4, **Appendix CWS-9**; Reply, par. 31.

<sup>390</sup> Reply, par. 33; Alegría Reply, par. 24–25, **Appendix CER-3**.

<sup>391</sup> Counter-Memorial, par. 62, 194; Colom, pars. 41 and 61, **Appendix RWS-1**; Colom Supplemental Statement, par. 7, **Appendix RWS-4**.

necessary to carry out this study.<sup>392</sup> However, what TGH chooses to ignore is that the distributor's consultant's study must be carried out according to the methodology defined by the CNEE.<sup>393</sup> The consultant, therefore, has no discretionary authority to calculate the VAD; rather it must do so according to the methodology established in the terms of reference established by the CNEE itself. As Mr. Colom explains, "once [the Terms of Reference are] issued and final, the distributor is required to adjust its tariff to meet the specifications set forth in the ToR [Terms of Reference]."<sup>394</sup> Mr. Aguilar also confirms this in his supplemental report, in which he explains that the distributor does not determine the components of the VAD nor does it have the authority to do so.<sup>395</sup> In this regard, Mr. Aguilar asserts that although the task of studying VAD components is entrusted, in principle, to an engineering firm prequalified by the CNEE, the CNEE is the party that must ensure that the VAD ultimately approved is legal.<sup>396</sup>

234. The final part of LGE Article 74 (conveniently omitted by TGH when citing this Article in its Reply) upon which TGH bases its argument, points out that "[...]The terms of reference [that is, the methodology] 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."<sup>397</sup> To ensure compliance, the legal framework grants the regulator the authority to review the study, make comments, make decisions as to whether or not the consultant's studies are appropriate, reject costs that are excessive or inappropriate for the activity and approve studies.<sup>398</sup> The diligence of the regulator's control is based on the technical nature of CNEE, backed by the advice it receives from a pre-qualified independent consultant.<sup>399</sup>

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<sup>392</sup> Counter-Memorial, par. 194; Colom, par. 51, **Appendix RWS-1**.

<sup>393</sup> LGE, Arts. 4(c), 74, 77, **Exhibit R-8**. Aguilar Rejoinder, **Appendix RER-6**, pars. 26-27; Colom, par. 41 and 61, **Appendix RWS-1**; Colom Supplemental Statement, par. 9, **RWS-4**.

<sup>394</sup> Colom, pars. 41, 61, and 63, **Appendix RWS-1**; Colom Supplemental Statement, par. 9, **RWS-4**.

<sup>395</sup> Aguilar Rejoinder, pars. 21, 62, **Appendix RER-6**.

<sup>396</sup> *Ibid.*, pars. 22, 28, 29.

<sup>397</sup> LGE, Art. 74, **Exhibit R-8** (emphasis added); Aguilar Rejoinder, par. 25-26, **Appendix RER-6**.

<sup>398</sup> *Ibid.*, Arts. 60, 61, 75; RLGE, Arts. 83, 92, 98, 99, **Exhibit R-36**.

<sup>399</sup> LGE, Art. 5, **Exhibit R-8**; RLGE, Art. 98, March 2, 2007, **Exhibit R-36**; and JS Berenstein "Some Methodological Issues to Consider in the Terms of Reference for the Value-Added for Distribution Studies, May 2002, **Exhibit R-23**, p. 2.

And this control must ensure that the tariff study (and the tariff) resulting from it reflects only costs that are: (i) efficient; (ii) not excessive; and (iii) related to the activity of electricity distribution.<sup>400</sup> Thus, any cost that does not meet these conditions and is included by the distributor’s consultant in its tariff study must be rejected by the CNEE.

235. TGH cannot seriously argue that, at the time of investing, it understood CNEE’s general authority established in Article 4(c) incorrectly, since the LGE and the RLGE were in force when TGH invested in Guatemala.<sup>401</sup> As previously explained,<sup>402</sup> Guatemala cannot be liable for the negligence—admitted by TGH—<sup>403</sup> in not having conducted an adequate “due diligence” of the regulatory framework at the time of its investment.
236. It must be stressed that the CNEE’s function according to the LGE in setting tariffs is a matter that has been studied by the Guatemalan Constitutional Court in its judgments related to the *amparos* filed by EEGSA against the tariff schedule set by the CNEE in 2008. The Court has stated:

The scope of authority held by the National Electricity Commission in setting the tariff schedules is a legitimate power granted by the General Electricity Law, whereby it performs a function of the Government and which, in exercising it, is guided by Articles 60, 61, 71, and 73 of said law, which must moderate any discretionary overstepping since they refer to verifiable concepts inasmuch as these tariffs “correspond to standard distribution costs of efficient companies,” that they are structured “so that they promote the equal treatment of consumers and the economic efficiency of the sector,” that “the Distribution Value Added corresponds to the average capital and operating cost of a distribution

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<sup>400</sup> RLGE, Arts. 83 and 84, March 2, 2007, **Exhibit R-36**. See also Aguilar Rejoinder, **Appendix RER-6**, par. 22, 23, 29(b).

<sup>401</sup> Salomon Smith Barney, “EEGSA: Memorandum of Sale”, May 1998, **Exhibit R-16**, pp. 54–55, which explains:

The basic functions of the [CNEE] are, among others, [...] setting the tariffs determined by Law [...]. The Commission, formally a technical body of the MEM having functional and budgetary independence, is the regulatory and oversight agency for the electricity sector

<sup>402</sup> See par. 202 above.

<sup>403</sup> See par. 134 below.

network of a benchmark efficient company” and, furthermore, that the "operating and maintenance cost will correspond to the efficient management of the benchmark distribution network.<sup>404</sup>

[...] [A]ccording to the [LGE] and the RLGE, the only applicable norms [in this sector], in the current Guatemalan legal system, the [CNEE] has the duty, as the sole entity responsible, for setting distribution tariffs and approving tariff studies [...], which constitutes a non-delegable public function [...].<sup>405</sup>

237. In conclusion, TGH’s semantic argument that attempts to differentiate between the CNEE’s authority concerning “tariffs” from the authority concerning the “VAD” is implausible because it strips the content from the various provisions of the LGE that flow from the “broad authority” of Article 4(c) which are consistent with the LGE. It is unreasonable to assert that the LGE has assigned authority to the CNEE to define both the calculation methodology and the tariffs themselves and to reject non-efficient costs, to then take that authority away from it when reviewing whether its fundamental

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<sup>404</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, **Exhibit R-105**, p. 32 (emphasis added).

<sup>405</sup> Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, **Exhibit R-110**, p. 34 (emphasis added). Unofficial English translation. In its original Spanish language it reads:

Esa competencia de la Comisión Nacional de Energía Eléctrica de establecer los pliegos tarifarios, es una legítima potestad atribuida por la Ley General de Electricidad, con lo que realiza una función del Estado, y que, para su ejercicio, tiene el referente que le indican los artículos 60, 61, 71 y 73 de la citada ley, que debe moderar cualquier extralimitación discrecional, puesto que aluden a conceptos verificables de que tales tarifas "correspondan a costos estándares de distribución de empresas eficientes", que se estructuren "de modo que promuevan la igualdad de tratamiento a los consumidores y la eficiencia económica del sector", que "el Valor Agregado de Distribución corresponde al costo medio de capital y operación de una red de distribución de una empresa eficiente de referencia", y, asimismo, que el "costo de operación y mantenimiento corresponderá a una gestión eficiente de la red de distribución de referencia .

[...] [S]egún lo disponen la [LGE] así como su respectivo Reglamento, única normativa aplicable dentro del ordenamiento jurídico guatemalteco vigente, compete a la [CNEE], como único ente responsable, la función consistente en la fijación de las tarifas de distribución y la aprobación de los estudios tarifarios [...] lo que constituye una función pública [...] indelegable.

component (the VAD) has been calculated correctly, according to the Terms of Reference established by the same CNEE.<sup>406</sup>

(b) LGE Article 83 grants specific authority to the CNEE to reject excessive costs within the calculation framework for the VAD

238. In its Counter-Memorial, Guatemala explained that the powers granted to the CNEE by the LGE included the power to reject costs that were excessive or inappropriate for the activity that may have been included in the consultant's tariff study.<sup>407</sup> This general power is established in LGE Article 60 and developed in RLGE Article 83, as follows:

LGE Article 60:

[...] The costs for the distribution activity approved by the Commission shall correspond to standard distribution costs of efficient companies.

RLGE Article 83: Unrecognized Costs.

The following shall not be included as supply costs for the calculation of the Base Tariffs: financial costs, equipment depreciation, costs related to generation assets owned by the Distributor, costs associated with public lighting installations, loads due to excess demand over the demand contracted, established in the Specific Regulations of the Wholesale Market Administrator, any payment that is additional to the capacity agreed in the capacity purchase contracts and other

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<sup>406</sup> Note that TGH itself acknowledges that the VAD constitutes an essential element of the tariff in several passages in its Reply, to wit: “[...]although EEGSA’s cash flows were negative, EEGSA continued to make the required investments in its distribution network during this initial tariff period, as it anticipated that its revenue and cash flows would increase significantly in the next tariff review, when its tariffs would be based upon a VAD study conducted in accordance with the criteria set forth in the LGE and RLGE”; Reply, par. 77. (Emphasis added). “[...]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 LGE Art. 79”; Reply, par. 79. “On 1 August 2003, the CNEE thus published EEGSA’s new tariff rates for the 2003-2008 tariff period based upon the VAD calculated in NERA’s VAD study pursuant to LGE Arts. 71-79. EEGSA’s new tariffs included a notable increase in the VAD [...]” Reply, par. 83. (Emphasis added).

<sup>407</sup> Counter-Memorial, par. 166.

costs that, in the opinion of the Commission, are excessive or do not correspond to the exercise of the activity.<sup>408</sup>

239. In its Reply, TGH argues the supposed inapplicability of RLGE Article 83 in calculating the VAD, asserting that the article does not apply to the distributor's VAD-related costs, but rather to "other unrelated costs." TGH cites LGE Article 71, which defines the "Base Tariffs" for end consumers of the final distribution service and calculates them as the sum of: (i) the adjusted price of all of the distributor's power and energy purchases (which TGH refers to as "the first component of the Base Tariffs") and (ii) the VAD (which TGH defines as the "second component of the Base Tariffs").<sup>409</sup> According to TGH, RLGE Article 83 "does not confer to the CNEE the 'discretion to reject costs that it considers inappropriate or excessive' in the distributor's VAD study," since RLGE Articles 79 to 90 would only apply to the "first component of the Base Tariffs" and not to the second component," meaning the VAD.
240. TGH's analysis is incorrect and results from misreading the LGE and RLGE. One must first note that neither TGH nor Mr. Alegría explain, beyond making a mere allegation, the basis they use for asserting that RLGE Articles 79 to 90 only apply to all of the purchases of the power of the energy of the distributor (or to the "first component of the Base Tariffs," according to TGH) and not to the VAD. This is simply <sup>because</sup> there is no

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<sup>408</sup> RLGE, Art. 83, **Exhibit R-36**. (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

LGE, artículo 60:

[...] Los costos propios de la actividad de distribución que apruebe la Comisión deberán corresponder a costos estándares de distribución de empresas eficientes.

Reglamento, artículo 83: Costos No Reconocidos:

No se incluirán como costos de suministro, para el cálculo de las Tarifas Base: los costos financieros, depreciación de equipos, los costos relacionados con las instalaciones de generación que posea el Distribuidor, los costos asociados a instalaciones de alumbrado público, las cargas por exceso de demanda respecto a la contratada que se establezcan en el Reglamento Específico del Administrador del Mercado Mayorista, todo pago adicional a la potencia convenida en los contratos de compra de potencia, y otros costos que a criterio de la Comisión, sean excesivos o no correspondan al ejercicio de la actividad.

<sup>409</sup> Reply, par. 34.

such basis. In fact, RLGE Chapter III, which runs from Article 79 to 99, is titled “Maximum Distribution Prices” and its articles, including Article 83, apply to the calculation of the VAD.<sup>410</sup> In addition, as indicated in the preceding paragraph, TGH agrees that the definition of “Base Tariff” in LGE Article 71 includes its two components (energy purchases + VAD). Therefore, it is logical that, when RLGE Art. 83 refers to unrecognized costs in calculating the Base Tariff (“[t]hey shall not be included as supply costs in calculating the Base Tariffs [...]”) it is including the unrecognized costs of the VAD, the second component of the Base Tariffs.<sup>411</sup> The falseness of the argument put forward by TGH is evidenced by considering that, according to Article 83, one of the costs that will not be considered included in calculating the Base Tariff is “equipment depreciation” and the “costs associated with street lighting installations,” which are concepts directly related to distribution activity and only make sense in the context of the VAD study.<sup>412</sup>

241. This argument of TGH is also surprising because it involves an argument that has clearly been prepared for this arbitration. The CNEE has historically referred to RLGE Article 83 as one of the bases for the CNEE to issue the methodology for the various distributors to conduct their study (including in the Terms of Reference of the EEGSA tariffs reviews of 2003 and 2008)<sup>413</sup> without ever having received any comments from EEGSA or any other distributors that this article would not apply within this context.

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<sup>410</sup> For example, RLGE Art. 79, also titled “Maximum distribution Prices”, is applied to design Tariff structures, and through part (b) “Peak Power Charge”, necessarily includes the distribution charges (VAD) for the medium and low voltage (CDMT and CDBT). The contrary would imply to assert that the tariff would only cover the generation costs and not the VAD, which is evidently incorrect. RLGE Art. 79 also refers to LGE Arts. 77 and 78, which specifically mention the methodology to calculate the VAD and the adjustment formulas. Meanwhile, RLGE Art. 89 “Base Tariffs Calculation and Application”, also refers to the VAD, when there is a reference to CDMT and CDBT whenever mentioned in subsection (a) of parts 2 and 3.

*See* Aguilar Rejoinder, par. 23 **Appendix RER-6**; Resolution CNEE 145-2008, July 30, 2008, published in “el Diario de Centro América” July 31, 2009, **Exhibit C-273**; Tariff schedule CNEE-146-2008, **Exhibit R-184**; RLGE, Arts. 79, 89, **Exhibit R-36**; LGE, Arts. 77, 78, **Exhibit R-8**.

<sup>411</sup> Reply, par. 34.

<sup>412</sup> Aguilar Rejoinder, par. 23, **Appendix RER-6**.

<sup>413</sup> In the Terms of Reference for the creation of the Value-Added for Distribution Study for the Empresa Eléctrica de Guatemala S.A. Resolution CNEE-88-2002, October 23, 2002, is clarified that “those Terms of Reference are mainly asserted in the General Electricity Law Arts. [...] 83 [...],” Art. A.2.3, **Exhibit R-**

242. In conclusion, contrary to the assertions made by TGH in its Reply, the functions that the LGE assigns to the CNEE in Article 4(c) and related articles cannot be transferred to the distributor, its consultant or to the Expert Commission of LGE Article 75. TGH's artificial interpretation which attempts to limit CNEE's authority makes no sense within the context of an LGE that established a technical and independent CNEE and, as a consequence, assigned to it the authority and obligation to: (i) determine the methodology for calculating tariffs by issuing the Terms of Reference for each tariff review; (ii) verify that the costs to be reflected in the tariff are efficient; (iii) not include in the tariffs costs that it does not consider reasonable or applicable to the sector; (iv) approve the VAD studies; and (v) determine the tariffs themselves.

*c. The distributor is obligated (and not simply authorized) to include the corrections requested by the CNEE in order to make the tariff study conform to the Terms of Reference*

243. Guatemala explained in its Counter-Memorial that, pursuant to the LGE, the CNEE would exclusively define the methodology for the tariff study, which is reflected in the Terms of Reference passed by official resolution.<sup>414</sup> Once established, it is compulsory for the Distributor and its consultant to follow the Terms of Reference in preparing the tariff study and the Terms of Reference cannot be amended, except by the CNEE.<sup>415</sup> Once the distributor delivers the tariff study to the CNEE, the RLGE grants the CNEE the authority to “approve” or “reject” the tariff study if it considers that it does not follow the methodology established in the Terms of Reference.<sup>416</sup> In the event that the CNEE, with the assistance of its external consultants, shows that the distributor's tariff study strays from the Terms of Reference or contains errors, and makes comments on the study, the distributor must make the indicated corrections to the study and re-send it

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**25;** Terms of Reference for the creation of the Value-Added for Distribution Study for the Empresa Eléctrica de Guatemala S.A. Resolution CNEE-124-200782-86, January, 2008, Art. 1.3, **Exhibit R-53**, where it is established that “[...] The currents Terms of Reference are based in RLGE Arts. [...] 82 and 86 [...].”

<sup>414</sup> Counter-Memorial, pars. 316 (d) and 347

<sup>415</sup> *Ibid*, par. 208

<sup>416</sup> *Ibid*, par. 203.



to the CNEE within fifteen days.<sup>417</sup> This issue is governed by RLGE Article 98 (second paragraph) and Article 99 (second paragraph), which reads:

The Distributor, through its consultant company, shall analyze the comments, implement the corrections to the studies and send them to the Commission within the term of fifteen days after receiving the comments. [...]. Once the tariff study referred to in the previous articles has been approved, the Commission shall proceed to set the definitive tariffs [...].<sup>418</sup>

244. As Guatemala indicated in its Counter-Memorial, Article 98 establishes the obligation and not the option for the consultant to incorporate corrections in order for the study to conform to the Terms of Reference.<sup>419</sup> However, in its Reply, TGH continues to assert that the distributor's consultant has the discretion whether or not to incorporate the changes requested by the CNEE, and thereby fails to take into account the RLGE text. TGH again refers to Article 1.8 of the 2008 Tariff Review's Terms of Reference, which indicated that the distributor's consultant had to make the corrections to the tariff study that it might deem "pertinent."<sup>420</sup> TGH conveniently tries to isolate the text "that it considers pertinent" from its legal context in order to argue that the consultant did not have the obligation to incorporate the corrections from the CNEE's comments.<sup>421</sup>
245. As indicated in the Counter-Memorial, this is incorrect.<sup>422</sup> It is clear that, within the context of a tariff review, what this expression means is that once CNEE makes comments (for example, that the study is untraceable, or does not contain reference prices), the consultant will adopt the measures it deems pertinent in order to comply

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<sup>417</sup> Aguilar Rejoinder par. 26, 27, **Appendix RER-6**

<sup>418</sup> RLGE, Arts. 98-99, **Exhibit R-36** (Emphasis added).

<sup>419</sup> Counter-Memorial, pars. 204–205, 207, 275, 313, 330, 347.

<sup>420</sup> Reply, par. 39–41 and 108; Calleja Reply, par. 19, **Appendix CWS-9**; Maté Reply, par. 14, **Appendix CWS-12**. *Also see* the Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 124-2007, January, 2008, Art. 1.8, **Exhibit R-53**.

<sup>421</sup> Reply, par. 40.

<sup>422</sup> Counter-Memorial, par. 313.

with the CNEE's comments.<sup>423</sup> This interpretation is the only one compatible with the obligation set forth in RLGE Article 98 that the consultant "shall make the corrections"<sup>424</sup> and with LGE Article 75.<sup>425</sup> The Guatemalan Constitutional Court has ruled in this regard in studying the appeals filed by EEGSA in relation to the 2008 tariff schedule, clearly explaining that:

[...] once the comments have been received, the consultant firm has a period of fifteen days to make the formulated corrections to the studies originally conducted and return the now-corrected study to the National Electricity Commission.<sup>426</sup>

246. This interpretation is not the creation of Guatemala or the CNEE; rather, it stems from LGE's fundamental principle, which imposes the duty upon the CNEE to ensure that the approved VAD conforms to the Law. With that aim in mind, the LGE assigns to the CNEE the authority to establish the tariff calculation methodology and to supervise the studies (through its comments), when consultant firms do not follow the methodology or commit errors. Note that TGH fails to mention that even if the wording of Article 1.8 of the Terms of Reference could give rise to any interpretation, Article 1.10 of the same Terms of Reference states that, in the event of a conflict between the Terms of Reference and the RLGE, the latter prevails.<sup>427</sup> Thus, Article 1.8 of the Terms of

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<sup>423</sup> This means that the consultant is free to decide the "pertinent" manner in which the changes must be incorporated in the study, but not to choose not to incorporate them.

<sup>424</sup> Counter-Memorial, par. 313; *See* Colom, par. 44, **Appendix RWS-1**; RLGE, **Exhibit R-36**, Art. 98. ("The Distributor, through the consultant firm, shall study the comments, make corrections to the studies and send them to the Commission within a period of fifteen days of receiving the comments").

<sup>425</sup> Counter-Memorial, par. 313.

<sup>426</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, **Exhibit R-105**, pp. 17(e). Unofficial English translation. In its original Spanish language it reads:

[...] una vez recibidas las observaciones, la empresa consultora cuenta con un plazo de quince días para efectuar las correcciones que le fueron formuladas a los estudios originalmente realizados y devuelve [sic] el estudio ya corregido a la Comisión Nacional de Energía Eléctrica.

<sup>427</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 124-2007, January 2008, **Exhibit R-53**, Art. 1.10.

These terms of reference do not constitute a legal or regulatory amendment, therefore in the event of a conflict between any of the provisions of these terms

Reference must necessarily be construed in light of the CNEE's duty established by RLGE Article 98 and not, as TGH claims, as a discretionary right belonging to the distributor and its consultant.

247. Perhaps the clearest evidence of TGH's opportunistic stance is that during the previous tariff review in 2002, EEGSA itself accepted its duty (and not its discretion) to correct the study according to the CNEE's comments. The relevant section of the Terms of Reference of this review, which EEGSA did not object to, read:

A.6.4. In the event that the intermediate results should be objected to by the CNEE, the CONSULTANT shall redo any such works as appropriate in order to remedy said objection, as directed and within the term established by the CNEE.<sup>428</sup>

248. Thus, Article A.6.4 of the Terms of Reference clearly established that EEGSA's consultant should correct the VAD study in order to incorporate all of the CNEE's comments.<sup>429</sup> In its Reply, TGH acknowledges this fact, but then tries to alter it by arguing that Article A.6.5 of those Terms of Reference would have granted EEGSA and its consultant firm the right to oppose the CNEE's comments, in which case, the Expert Commission potentially could have (as an Expert Commission was never created for that 2002 review) the right to "reconcile the differences between the parties, by determining which party's position was correct."<sup>430</sup> This is false, as the "conciliation" (in practice the pronouncement) supposedly assigned to the Expert Commission under Article A.6.5 would be precisely to determine whether or not the tariff study was corrected or not according to the CNEE's comments. The consultant in any case was obliged to incorporate the observations of the CNEE. The best evidence for this point comes from

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of reference and the Law or the Regulation the latter's provisions shall prevail, applying the principle of legal hierarchy in all cases. Likewise, any omission in these terms of reference, related to aspects defined in the Law and the Regulation on the subject of tariffs shall be construed as included in the ToR..

<sup>428</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 88-2002, October 23, 2002, **Exhibit R-25**, Art. A.6.4.

<sup>429</sup> *Ibid.*

<sup>430</sup> Reply, par. 41.

EEGSA's own explanation during its administrative appeal of the Terms of Reference of the 2003 Review, when TGH complained about the provisions in Article A.6 as follows:

[...] Section A.6, in open contradiction to the cited article, requires the presentation of reports, the staged review of the [consultant's] study, the staged provision of the comments [by the CNEE] and the compulsory incorporation by the consultant firm of such comments [...]<sup>431</sup>

249. It must be highlighted that the administrative appeal was voluntarily dismissed by the EEGSA soon after notice was given,<sup>432</sup> and Article A.6 (in particular, Article A.6.4) kept its original wording, establishing the “compulsory compliance” by the consultant firm with the CNEE's comments. Indeed, EEGSA's dismissal of this appeal demonstrates EEGSA's agreement with the provision. Thus, it is clear that TGH's argument regarding this issue is not only contrary to the LGE, but also contradictory to EEGSA's own conduct during the previous tariff review.

*d. The Expert Commission pronounces itself as to whether or not the changes made by the distributor's consultant firm to the tariff study properly conform to the Terms of Reference*

250. Once the distributor delivers the corrected tariff study, LGE Article 75 establishes that if discrepancies concerning the incorporation of CNEE's comments in the study between CNEE and the distributor persist, the parties must agree to appoint an Expert Commission.<sup>433</sup> According to LGE Article 75, it is the Expert Commission's duty to

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<sup>431</sup> Administrative Court Proceedings started by EEGSA against Decision of the Ministry of Energy and Mines No. 562, dated February 24, 2003. June 6, 2003, **Exhibit R-169**. Unofficial English translation. In its original Spanish language it reads:

A.6.4. Cuando los resultados intermedios sean objetados por la CNEE, la CONSULTORA deberá rehacer las labores que sean del caso, a fin de enmendar la objeción según lo que instruya y en el plazo que establezca la CNEE.

<sup>432</sup> Voluntary Dismissal of the Administrative Court Proceedings started by EEGSA against Decision of the Ministry of Energy and Mines No. 562, dated February 24, 2003 134-02 Of. y Not. 2nd Memorial 2681, First Administrative Court, September 3, 2003, **Exhibit R-171**.

<sup>433</sup> Counter-Memorial, par. 206. LGE Art. 75 reads:

The Commission shall review the studies conducted and may make comments on them. In the event of discrepancies made in writing, the Commission and the distributors must agree on the appointment of an Expert Commission

pronounce itself [*pronunciarse*] on discrepancies. In its Counter-Memorial, Guatemala explained how, in view of the consultant's duties "to make" the corrections required by the CNEE in order to adjust the study to the Terms of Reference (RLGE Article 98), the only discrepancies that could be addressed by the Expert Commission are: (i) whether or not the distributor has made the changes; or (ii) whether the changes have been made correctly.<sup>434</sup>

251. TGH and its witnesses argue that, if the distributor's consultant was obliged to include the CNEE's comments, there would not be "discrepancies" for the Expert Commission under Article 75. This is incorrect. Under the LGE system, discrepancies arise when the distributor's consultant firm fails to incorporate the CNEE's comments or incorporate them incorrectly. Therefore the Expert Commission's role is to determine whether the CNEE's comments are incorporated (or incorporated correctly) in accordance with the Terms of Reference..

**2. TGH's analysis disregards the fact that the principal objective of the model company system is to establish efficient tariffs**

252. In its Counter-Memorial, Guatemala explained in detail how tariffs are calculated under the model company [*empresa modelo*] system adopted by the LGE.<sup>435</sup> In particular, Guatemala explained how, using the model company system, it is necessary to define a base of optimized assets assessed at their New Replacement Value (VNR) and then use this value to calculate efficient tariffs.<sup>436</sup> In its Reply, TGH nevertheless asserts that Guatemala "chose" to adopt the model company system and calculate the capital base based on the VNR method in order to increase EEGSA's value during privatization.<sup>437</sup> According to TGH, the regulatory regime established tariffs to remunerate TGH

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having three members: one appointed by each party and the third by mutual agreement. The Expert Commission will pronounce itself on the discrepancies within a period of 60 days from the time it is constituted.

(LGE, **Exhibit R-8**, Art. 75).

<sup>434</sup> *Ibid*, par. 207.

<sup>435</sup> Counter-Memorial pars. 174–191.

<sup>436</sup> Counter-Memorial pars. 183–185.

<sup>437</sup> Memorial par. 43; Reply par. 53, 55–56; Kaczmarek, par. 59, **Appendix CER-2**; Barrera pars. 28–29, 60 **Appendix CER-4**.

throughout the concession as if EEGSA's assets were new, that is to say without taking account of depreciation or the actual condition of the assets in service into consideration.<sup>438</sup> In other words, TGH hopes to have this Tribunal endorse its interpretation that the model company system can be used by governments as a tool to obtain a kind of loan from investors, who would pay a false price for the company, and that the tariff would be remunerate them in the future, regardless of the service made available to the user. Clearly, this is not the aim of the model company system nor was it TGH's interpretation of the framework at the moment it invested in EEGSA, as explained in Section B.2 below.

253. As Mr. Mario Damonte explains, the model company system—or incentive model—and the calculation of the capital base based on the VNR system, is the result of a regulatory trend tending to ensure efficient tariffs.<sup>439</sup> The VNR system selected by Guatemala is nothing more than a way of assessing or restating the gross capital base, upon which amortization and the investor's return will later be calculated.<sup>440</sup> The VNR method of assessing the capital base is considered more efficient than the accounting assessment that adjusts the capital base for the inflation rate because it not only restates the capital base at market prices but also optimizes it by including in this value only amounts corresponding to optimum (not actual) assets and only optimum (and not actual) technologies.<sup>441</sup> The aim of this method is to create an incentive for the investor to gradually replace its network with an optimum one in order to be able to approach the costs of the model company and thereby increase its return. This is because, according to the model company system, the investor's return is calculated based on the optimum capital base, rather than the actual capital base. If the investor does not make the

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<sup>438</sup> Memorial pars. 34-35.

<sup>439</sup> Damonte, pars. 49–50, **Appendix RER-2**; See also JA Lesser and LR Giacchino, *Fundamentals of Energy Regulation* (1st ed. 2007) (Extract), **Exhibit R-34**, pp. 100–101; Damonte Rejoinder, pars. 18-19, **Appendix RER-5**.

<sup>440</sup> Damonte Rejoinder, pars. 38–42, **Appendix RER-5**.

<sup>441</sup> Damonte, pars. 31 and 39–43 and Chapter 7.1, **Appendix RER-2**. As Mr. Damonte explains, depending on the type of optimization used, the differences between the actual and the optimized network may range between 5 and 30 percent. See also Damonte Rejoinder, par. 40, **Appendix RER-5**. See also Counter-Memorial pars. 183–184, 186–187.

necessary improvements, its costs will not be as optimum as those recognized by the regulations and, therefore, its return will be lower.<sup>442</sup>

254. It is indisputable that the model company regulations adopted by Guatemala and other Latin American countries tend to maximize efficiency. The interpretation that TGH gives to it, however, would lead to the opposite. If the tariff allows the investor to recuperate the value of assets as if they were new, regardless of the actual condition of the network or of its investments in it as TGH claims, there would clearly be no incentive for efficiency.
255. TGH's interpretation is based on the deliberate confusion it and its experts create in wrongly asserting that the tariff remunerates the capital base valued according to the method of VNR or "at its New Replacement Value."<sup>443</sup> As explained in detail in the Counter-Memorial<sup>444</sup> and explained in Section V.E.2.b below, this is technically and economically incorrect. Once the gross capital base has been calculated at its VNR, the regulation takes into account the network's actual state of wear by paying the investor based on the capital base net accumulated depreciation.<sup>445</sup> Thus, the investor has the incentive to gradually replace assets at the end of their useful lives and thereby increase its capital base with optimum assets in order to approach the state of the model company.

## **B. TECO GROUP'S DECISION TO INVEST IN EEGSA**

### **1. TGH wrongly categorizes the guarantees of the electricity regulatory framework at the time of Teco group's investment in Guatemala**

256. As indicated in the Counter-Memorial, in April 1998, Guatemala initiated its international promotion for the privatization of EEGSA. The documents prepared during this process included the Informational Sales Memorandum and the Terms of Reference

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<sup>442</sup> Damonte Rejoinder, par. 25, **Appendix RER-5**.

<sup>443</sup> Reply pars. 54–55; Barrera pars. 28–29, 45, **Appendix CER-4**; Kaczmarek II, par. 187, **Appendix CER-5**.

<sup>444</sup> Counter-Memorial, pars. 183–184.

<sup>445</sup> Damonte Rejoinder, pars. 104–105, **Appendix RER-5**.

for the national and international public offering, which summarized, among other things, the provisions of the legal and regulatory framework that Guatemala has described in detail in its Counter-Memorial.<sup>446</sup> In particular, Guatemala pointed out that the tariffs would not be set on the distributor's actual costs, but rather based on the theoretical costs of a "highly-efficient 'model company.'"<sup>447</sup> Guatemala also stressed that the CNEE was a technical and independent body (in terms of function and budget) of the MEM, the sector's regulatory and supervisory body, which had the power to "set the tariffs determined by Law."<sup>448</sup>

257. TGH disputes these arguments in its Reply. On the one hand, it states that Guatemala "deliberately conflates the CNEE's power to determine the distributor's tariffs with the process for calculating the distributor's VAD, treating these issues as if they were one and the same."<sup>449</sup> To this end, TGH refers to selected extracts from the Informational Sales Memorandum which, according to TGH, would prove "that (i) the VAD would be calculated by *distributors* by means of a study performed by an engineering firm; (ii) the CNEE's powers with respect to the calculation of the VAD would be limited to dictating that the VAD studies be grouped by density, and to reviewing and making observations on the VAD studies; and (iii) in the event of discrepancies, an Expert Commission would be convened to *resolve* the differences."<sup>450</sup> TGH also states that "the TECO group of companies did consider and rely upon the fact that Guatemala had established the

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<sup>446</sup> Counter-Memorial, pars. 225–229. EEGSA, "Selection Criteria for the Financial Consultant", 1997, **Exhibit R-11**; EEGSA, "Internal Memorandum: Financial Advisor Qualification", December 5, 1997, **Exhibit R-14**; Salomon Smith Barney, "EEGSA: Memorandum of Sale", May 1998, **Exhibit R-16**; Salomon Smith Barney, "Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 88-2002", January 28, **Exhibit C-25**; EEGSA, "Terms of Reference for the nacional and international public offerings for the sale of the strategic package within the process of social capitalization and sale of State Shares in EEGSA", April 1998, **Exhibit R-15**; Empresa Eléctrica de Guatemala S.A., Roadshow presentation, May 1998, **Exhibit C-28**.

<sup>447</sup> Counter-Memorial, par. 225.

<sup>448</sup> Salomon Smith Barney, "EEGSA: Sales Memorandum," May 1998, pp. 54, **Exhibit R-16**.

<sup>449</sup> Reply, par. 60.

<sup>450</sup> *Ibid.*



efficient model company approach when deciding to invest in EEGSA.”<sup>451</sup> As explained below, TGH’s arguments contain serious inaccuracies.

258. Firstly, it must be reiterated that the authority that the LGE assigns to CNEE with respect to setting tariffs necessarily include determining the VAD, one of its principal components, such as has been explained in detail above.<sup>452</sup> The selection of quotes from the Sales Memorandum that TGH presents fail to mention that the Memorandum itself explained to investors in unequivocal terms that the CNEE, a technical and independent body, would be the sector’s regulatory and supervisory body having authority to enforce compliance with the LGE and fix the tariffs.<sup>453</sup> Therefore, it is clear that these aforementioned quotes should not be read in isolation, but rather in light of the principle set forth in the Memorandum itself, in which the authority of the CNEE is described generally.
259. Within this context, Guatemala has already confirmed that, the LGE effectively establishes a specific procedure for calculating the VAD, which is first undertaken by the distributor’s consultant.<sup>454</sup> This in no way affects the authority that the LGE provides the CNEE to set tariffs.<sup>455</sup> It has also been shown that the CNEE’s powers under the LGE are not limited, as TGH claims, to “dictating that the VAD studies be grouped by density, and to reviewing and making observations on the VAD studies.”<sup>456</sup> In addition, the reference to the Expert Commission pronouncing itself on discrepancies (in the text

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<sup>451</sup> *Ibid*, par. 65.

<sup>452</sup> *See* par. 230 et seq.

<sup>453</sup> Salomon Smith Barney, “EEGSA: Memorandum of Sale,” May 1998, pp. 54–55, **Exhibit R-16** which explains:

Among other duties, the Commission is responsible for [...]setting the tariffs specified by law [...].The Commission, which is in theory a technical agency of the MEM with functional and budgetary independence, is the body responsible for regulating and overseeing the electricity sector. The Commission’s duties are:: (1) (1) To see to the compliance of the Law [...], (4) To regulate transmission and distribution tariffs [...].

<sup>454</sup> *See* par. 233 et seq.

<sup>455</sup> Reply, par. 60.

<sup>456</sup> *See* par. 86 et seq.

of the Memorandum prepared by bankers - “resolves”) must also be construed within the general regulatory framework under which the CNEE has the obligation to establish the methodology and tariffs according to the law. Therefore, it is not Guatemala that is confusing matters, but rather it is TGH that now attempts to resort to technicalities or isolated extracts to avoid applying the regulatory framework as specified at the time that it made its investment.

260. Within that context, it is surprising that TGH complains that “Guatemala also did not represent to potential investors that the distributor would be required to incorporate the CNEE’s observations.” As has been explained above, this was expressly established in RLGE Article 98 (“The Distributor, through the consultant company, shall analyze the comments, implement the corrections to the studies and send them to the Commission within the term of fifteen days after receiving the comments.”<sup>457</sup>). EEGSA accepted this in the Terms of Reference for the 2002 tariff review (“In the event that the intermediate results should be objected to by the CNEE, the CONSULTANT shall redo any such works as appropriate in order to remedy said objection, as directed and within the term established by the CNEE”).<sup>458</sup> The Constitutional Court upheld this interpretation in its decision of February 2009.<sup>459</sup>
261. It is also necessary to remember that, according to the public offering procedure for EEGSA’s shares, interested companies could raise enquiries or request clarification regarding the applicable regulation.<sup>460</sup> However, the Teco group did not consider it necessary to raise any enquiry or make any comment whatsoever regarding the role of the regulator and/or its authority and duties.<sup>461</sup> It likewise did not make any

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<sup>457</sup> RLGE, Art. 98, **Exhibit R-36**. (Emphasis added).

<sup>458</sup> Terms of Reference for Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 88-2002, October 23, 2002, Art. A.6.4, **Exhibit R-25**.

<sup>459</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, pp. 17(e), **Exhibit R-105**.

<sup>460</sup> Counter-Memorial, par. 228.

<sup>461</sup> Guatemala asked TGH to produce the material prepared by the company within the context of the EEGSA due diligence, thereby confirming that no questions had been raised by the Consortium in this regard. *See* Freshfields letter to White & Case dated November 7, 2011, **Exhibit R-142**; White & Case letter to Freshfields dated November 18, 2011, **Exhibit-143**; Freshfields letter to White & Case dated

enquiry regarding the role of the Expert Commission, the nature of its pronouncement or the procedure to be followed once that pronouncement was given.<sup>462</sup> As explained above, despite the fact that TGH claimed that it had carried out a due diligence process on the Guatemalan regulatory framework,<sup>463</sup> when Guatemala asked for the documentation from the due diligence in its request for documents,<sup>464</sup> TGH was incapable of producing a single document.<sup>465</sup> Thus, it remains clear that TGH's argument that it understood the legal framework to limit the authority of CNEE was prepared specifically for this arbitration.

262. Beyond the fact that TGH now attempts to present its own theory of how the electricity regulatory system functions in Guatemala, Guatemala cannot be responsible for TGH's lack of due diligence at the time of its investment. If TGH had any question regarding how the legal framework functioned, it should have noted it at the time. Both the legal framework and the promotion material described above were available to TGH when it made its investment, and the contents thereof made clear the following essential characteristics of the system:

- The CNEE was a body acting independently from the Government;<sup>466</sup>

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December 29, 2011, **Exhibit R-145**; White & Case letter to Freshfields dated January 3, 2012, **Exhibit R-146**.

<sup>462</sup> Despite everything, TGH is now trying to base its claim against Guatemala on the supposed binding nature of the Expert Commission's pronouncement. *See* Memorial, par. 270 and Reply, par. 37. As explained above, this is not only contrary to the letter and spirit of the LGE, but the Constitutional Court itself, precisely at the request of EEGSA, has confirmed that the Expert Commission's pronouncement is not binding upon CNEE (see Section 49 above).

<sup>463</sup> TGH argued that "[i]n addition to analyzing the new legal and regulatory framework established by Guatemala for its electricity sector, TECO performed extensive due diligence", Memorial, par. 59. *See also* Gillette, par. 8, **Appendix CWS-5**.

<sup>464</sup> *See* Letter from Freshfields to White & Case of November 7, 2011, Documentation A.2, **Exhibit R-142**.

<sup>465</sup> Also note that according to the procedure for the public offering of the EEGSA shares, the interested companies could make enquiries or request clarifications regarding the regulatory framework applicable to the activity. TGH did not consider it necessary to make any enquiry or comment whatsoever regarding the role of the regulator and/or its powers and authority. Nor did it make any enquiry whatsoever regarding the role of the Expert Commission, the nature of its pronouncement or the procedure to follow after said pronouncement was issued (see Counter-Memorial, par. 228)

<sup>466</sup> LGE, Arts. 4, 5, **Exhibit R-8**; RLGE, Arts. 29, 30(d) and (e), **Exhibit R-36**; Salomon Smith Barney, "EEGSA: Memorandum of Sale," May 1998, **Exhibit R-16**, pp. 2, 11, 54, 55.

- The CNEE would define the methodology for calculating the tariffs;<sup>467</sup>
- The CNEE would review this methodology every five years;<sup>468</sup>
- The CNEE would prepare the Terms of Reference for calculating the VAD, to which distributors could object via administrative and then judicial channels;<sup>469</sup>
- The CNEE would define the electricity distribution tariffs according to the terms of the LGE, which would reflect the costs of an efficient company, this being strictly the economic cost of acquiring and distributing electrical energy;<sup>470</sup>
- The CNEE would engage professional consultants to perform its duties and especially to define tariffs;<sup>471</sup>
- The CNEE would prequalify consultants for the preparation of VAD studies;<sup>472</sup>
- The CNEE would oversee and comment on the tariff study of the VAD prepared by the distributor;<sup>473</sup>

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<sup>467</sup> LGE, Arts. 4(c) and 61, **Exhibit R-8**; RLGE, Art. 97, **Exhibit R-36**; Salomon Smith Barney, “EEGSA: Memorandum of Sale,” May 1998, **Exhibit R-16**, Appendix A, Arts. 4(c), 61, and 77 and Appendix B, Art. 29.

<sup>468</sup> LGE, Art. 77, **Exhibit R-8**; Salomon Smith Barney, “EEGSA: Memorandum of Sale,” May 1998, Appendix A, Art. 77 and Appendix B, Art. 95, **Exhibit R-16**.

<sup>469</sup> LGE, Art. 74, **Exhibit R-8**; RLGE (Extracts), Art. 98, **Exhibit-12**; RLGE, Art. 98, **Exhibit R-36**; Salomon Smith Barney, “EEGSA: Memorandum of Sale,” May 1998, Appendix A, Art. 74 and Appendix B, Art. 98, **Exhibit R-16**.

<sup>470</sup> LGE, Arts. 71, 76, and 61, **Exhibit R-8**; Salomon Smith Barney, “EEGSA: Memorandum of Sale,” May 1998, Appendix A, Art. 71 and Appendix B, Art. 84, **Exhibit R-16**.

<sup>471</sup> *Ibid.* Art. 5; RLGE, Art. 32, **Exhibit R-36**; Salomon Smith Barney, “EEGSA: Memorandum of Sale,” May 1998, Appendix B, Art. 32, **Exhibit R-16**.

<sup>472</sup> RLGE, Art. 97, **Exhibit R-36**; Salomon Smith Barney, “EEGSA: Memorandum of Sale,” May 1998, Appendix A, Art. 74 and Appendix B, Art. 97, **Exhibit R-16**.

- The distributor would be obligated to make the corrections in order to make its consultant's tariff study conform to the Terms of Reference;<sup>474</sup>
- In the event that the tariff study was rejected and discrepancies persisted, the Expert Commission would pronounce itself on whether the distributor's study conformed to the Terms of Reference;
- The CNEE would approve or reject the VAD tariff study prepared by the distributor after reviewing the Expert Commission's pronouncement;<sup>475</sup>
- Once the study had been approved by the CNEE, the CNEE itself would define the tariffs;
- Tariffs defined by the CNEE would be applicable for five years;<sup>476</sup>
- The distributor had to fulfill all obligations under the LGE, the RLGE and their subsequent amendments.<sup>477</sup>

263. This interpretation of the regulatory framework has been upheld by the Constitutional Court,<sup>478</sup> the ultimate interpreter of the Constitution and the Law in Guatemala or, as TGH defines it, "it is the highest Guatemalan court in charge of constitutional

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<sup>473</sup> LGE, Arts. 74 and 75, **Exhibit R-8**; Salomon Smith Barney, "EEGSA: Memorandum of Sale," May 1998, Appendix A, Arts. 74 and 75, **Exhibit R-16**.

<sup>474</sup> Salomon Smith Barney, "EEGSA: Memorandum of Sale," May 1998, Appendix B, Art. 98, **Exhibit R-16**.

<sup>475</sup> LGE, Art. 77, **Exhibit R-8**; RLGE, Art. 98 **Exhibit R-36**.

<sup>476</sup> Salomon Smith Barney, "EEGSA: Memorandum of Sale," May 1998, Appendix A, Art. 78 and Appendix B, Art. 98, **Exhibit R-16**.

<sup>477</sup> Authorization Agreements for the departments of Guatemala, Sacatepéquez and Escuintla, signed by EEGSA and the Ministry of Energy and Mines, May 15, 1998, Clause twenty, **Exhibit R-17**.

<sup>478</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009 pp. 5, 16, 17, 23–26, 30, 32, **Exhibit R-105**; Decision of the Constitutional Court, Case File 4255-2009, February 24, 2010, pp. 5, 6, 17, 23, 24, 31, 32, 34, **Exhibit R-110**.

matters.”<sup>479</sup> And it was based on this regulatory framework that Teco group made its investment in EEGSA.

**2. TGH’s assertion to the effect that the price paid by EEGSA reflected tariffs that would compensate the investor as if it had acquired and maintained a totally new network is false and biased**

264. TGH explained initially in its Memorial that the value offered by TGH and its partners in the EEGSA bidding was “extremely high” when compared with the company’s book value.<sup>480</sup> As Mr. Kaczmarek explained, that was due to the fact that the model company system adopted by Guatemala enabled the country to receive income above the value of its assets.<sup>481</sup> In its Counter-Memorial, Guatemala showed that TGH (and its expert) had not provided any evidence contemporaneous to Teco’s investment in EEGSA to prove that position, and that such a position was not logical.<sup>482</sup> Guatemala then explained that, if the premise advanced by TGH were valid, a state could “inflate” the sale value of a company, promising income that bears no relation to the service that the company would be able to provide, charging customers, via the tariff, to reimburse the amount paid by the investor.<sup>483</sup> As discussed above, TGH’s argument was contrary to the model company system, a system designed precisely to control excessive tariffs that could result from the investor’s monopoly position, and to reduce the costs and encourage the efficiency of the actual company.<sup>484</sup> In its Reply, TGH argues that “the TECO group of companies did consider and rely upon the fact that Guatemala had established the efficient model company approach when deciding to invest in EEGSA.”<sup>485</sup> According to TGH, Teco acted based on Guatemala’s implementation of a regulatory regime that used the criterion of the model company, and on the premise that regulated assets of the “efficient network” would be calculated as a function of the “new replacement cost” of

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<sup>479</sup> Reply, par. 23.

<sup>480</sup> Kaczmarek, **Appendix CER-2**, par. 62.

<sup>481</sup> Kaczmarek, **Appendix CER-2**, par. 62.

<sup>482</sup> Counter-Memorial, par. 236

<sup>483</sup> *Ibid*, par. 237

<sup>484</sup> See Section V.A.2

<sup>485</sup> Reply, par. 65.

the assets.<sup>486</sup> However, TGH, does not cite (because it cannot) a single contemporaneous document that materially supports that interpretation, but rather concentrates all its efforts on justifying its position through after-the-fact opinions of its technical experts and its witness, Mr. Gillette.<sup>487</sup>

265. The reality is that the actual documents that reflect Teco Group's motivation for investing in EEGSA and its offering price for that transaction include many justifications, but none of them refers materially to (i) the expectations for a remuneration based on the new value of the assets, (ii) the model company system or VNR, or (iii) future tariff increases, as TGH conveniently claims to present now in this arbitration.<sup>488</sup> The specific reasons for investing in EEGSA, as reflected in the Book of Minutes of the Management Board of Teco of July 1998, are the following and in this specific order:

- “EEGSA is the principal electric distribution company in Guatemala, a country that is key to TPS's Central American strategy, and TECO Energy's “beachhead” in the region.”<sup>489</sup>
- “EEGSA represents an excellent opportunity to expand and consolidate TPS's presence in the region. Guatemala is the largest market in Central America, with a population of over 11 million people, a rapid economic growth rate, and an even more rapid electricity demand growth rate. The total Central American market of 32 million people may within the next decade receive electricity through a regionally interconnected system. Controlling ownership of EEGSA would provide significant

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<sup>486</sup> *Ibid.*

<sup>487</sup> Kaczmarek, **Appendix CER-2**, par. 62; Kaczmarek Reply **Appendix CER-5**, par. 187; Barrera **Appendix CER-4**, pars. 45-46; Gillette Reply, **Appendix CWS-5**, par. 12; Gillette Reply, **Appendix CWS-11**, par. 2.

<sup>488</sup> Reply, par. 65.

<sup>489</sup> “TECO Energy, Inc., Action regarding the privatization of an electricity service company in Guatemala,” Book of Minutes of Administrative Board, July 1998, **Exhibit C-32**, page 1 (Emphasis added).

opportunities for growth within Guatemala, while functioning as a springboard for additional expansion throughout the region..”<sup>490</sup>

- “TPS has a very solid understanding of EEGSA, its assets and its management, developed through the ownership of the Alborada and San Jose projects. Such an understanding allows TPS to envision the opportunities for additional growth of the EEGSA customer base, per-customer-usage rates, as well as cost-cutting opportunities which would increase profitability.”<sup>491</sup>
- “Ownership in distribution assets in Guatemala is of strategic importance to TPS, because distribution investments (i) offer significant market share; (ii) enhance the ability to vertically integrate; and (iii) provide broadier opportunities for growth, including the important ability to create it.”<sup>492</sup>
- “Participation in a distribution system is of particular strategic importance in Guatemala because TPS has existing investments in power generation in this country. In contrast with the opportunities to build generation assets, this is a one time opportunity to acquire the largest distribution company in Central America.”<sup>493</sup>
- “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.”<sup>494</sup>

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<sup>490</sup> *Ibid.*

<sup>491</sup> *Ibid*, page 2.

<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*

<sup>494</sup> *Ibid*, page 3.



- “Founded in 1894, EEGSA is the largest distribution company in Guatemala and all of Central America. Guatemala has one of the lowest electricity per capita consumption rates in Latin America, and thus the opportunity for growth appears substantial. Guatemala’s energy demand has grown at an average rate of over 8 percent during the past seven years. Growth is projected to continue at this pace for several years, supported by the reactivation of the economy – largely a result of the Peace Treaty and the Guatemalan Government’s economic and political modernization – and significant pent-up demand. EEGSA is well positioned to serve this growth.”<sup>495</sup>
- “EEGSA and/or the owners of EEGSA will not be prohibited from participating and/or acquiring the INDE shares once these are offered for sale through a privatization process expected to occur within the next few years.”<sup>496</sup>
- “Under the Law, the shareholders of EEGSA or EEGSA itself, through an affiliate, may participate in either electricity generation or transmission activities without any limitation. EEGSA’s ability to vertically integrate and achieve relative market importance in the region are critical investment considerations. Guatemala has the most technically diversified electricity generation market in the region, with access to liquid fuels, coal, geothermal and hydro resources. National electricity coverage is approximately 50 percent..”<sup>497</sup>
- “The scenario for the EEGSA business model will assume conservative figures for growth potential and necessary capital expenditures. The bid price is are based upon this scenario.”<sup>498</sup>

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<sup>495</sup> *Ibid.* page 2.

<sup>496</sup> *Ibid.*

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*, page 4.

- “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.”<sup>499</sup>
- “TPS recommends board approval for TPS participation in the EEGSA privatization bid. The purchase of this ownership interest in EEGSA would enhance our ability to vertically integrate our position in Guatemala and provide added protection to our existing projects there. It would also position TPS to have a stake in the distribution and generation of electricity as well as other end-use businesses, not only in Guatemala but in all of Central America as electrical integration in the region evolves. In addition, the Project itself provides very significant long-term earnings through the potential opportunities for both **cost-cutting and growth, which can potentially enhance our returns.** This one-time opportunity to acquire the EEGSA distribution company is a positive fit with the long-term strategies of TECO Energy.”<sup>500</sup>

266. A mere reading of these reasons confirms that TGH’s arguments that it paid a “high” price because it expected to receive tariff compensation for the new value of the assets, are false. It is clear that if—as TGH claims—that was the main justification for the offered price, it would have at least been discussed and reflected in the corporate documents. But there is no evidence that there was any substantive discussion about it. In any event, even if the reasons cited by TGH were true (which they are not), they would have no relevance to this claim. The price paid by an investor in a public bidding is part of the risk that the investor assumes, and they cannot in any way result in a penalization of consumers.<sup>501</sup>

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<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid*, page 6.

<sup>501</sup> Counter-Memorial, par. 240.

267. But the Teco Group had other reasons to invest in EEGSA. As reflected in the discussions, it expected to obtain a return through “cost savings,” “increase in demand,” and “synergies” derived from other businesses within the Teco Group in the country and in the region. Even more important, the recommendation to make the investment was made based on a base case model that provided a rate of return calculated by the Teco Group and that, contrary to what TGH is arguing, did not forecast tariff increases, but rather a reduction in tariffs in real terms.<sup>502</sup> We develop these arguments in the following sections.
268. In its Reply, TGH argues that the main reason for the Teco Group to invest in EEGSA “was not the potential for synergies,” but rather considered “whether the investment presented a favorable rate of return,” while “these synergies were not taken into account in the price offered by the bidding Consortium.”<sup>503</sup> Therefore, TGH concludes by maintaining that those synergies were not decisive in Teco’s decision to invest in EEGSA and nor did they have any effect on the price paid for that investment.<sup>504</sup>
269. The statements made by TGH are false. TGH has acknowledged, on various and repeated occasions, the relevance of such synergies in its decision to invest in EEGSA. The very reference that TGH and Mr. Gillette make to the management presentation for the privatization of EEGSA in July 1998, which repeats on several occasions the

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<sup>502</sup> Dresdner Kleinwort Benson Valuation Model, **Exhibit R-160**, page 43, section c. Tariff calculation variables (A3-09.pdf or TGH-551). TGH implicitly recognizes the weakness of its arguments when, by way of argument in favour, it argues through its expert, Dr. Barrera, that it was reasonable that the tariffs “were likely to increase in the future.” This argument not only contradicts the contemporary investment documents prepared by TGH’s advisors – the Dresdner Kleinwort Benson model – rather TGH’s own expert, Mr. Kaczmarek, recognizes that the expectation that the tariffs will increase did not have stronger support, since “one could not expect there to be a consistent trend in the tariffs,” due to the “unknown impact of inflation, technology, and commodity prices.” Mr. Kaczmarek, **Appendix CER-5**, par. 173

<sup>503</sup> In his Reply testimony, Mr. Gillette tries to offer an alternative explanation for his reference to “synergies” in his first statement, which he now defines as “non-quantifiable savings in time and effort that a company obtains when it makes a second investment in the same foreign country.” According to Gillette, this definition differs from “as that term is commonly understood in the context of a merger or an acquisition” [by means of which] [...]there are synergies because some functions become redundant [and] [...] cost-savings can be achieved.” Based on that, Mr. Gillette, tries to play down the importance of the synergies existing between EEGSA and the investments of TECO Energy, pointing out that Teco would be a minority partner in EEGSA and that it would not operate the company. Reply Memorial, par. 62 and 64; Gillette Reply, **Appendix CWS-11**, par. 5.

<sup>504</sup> Reply, pars. 62-64

relevance of the synergies for the investment, merely confirms the importance of those synergies in the investment decision.<sup>505</sup> The presentation refers to the fact that “TPS has existing facilities, relationships and offices in Guatemala;” emphasizing that the investment in EEGSA would offer “additional protection for the existing investments,” and that it “would provide for diversification of earnings sources in Central America.”<sup>506</sup> Only at the end did that presentation indicate the recommendation to submit the offer “based upon the Base Case Model achieving a minimum acceptable IRR under base case conditions after all key assumptions have been verified,”<sup>507</sup> which of course does not in any way detract from the emphasis placed on synergies throughout that presentation. It is significant that, although in his Reply testimony, Mr. Gillette attempts to play down the importance of synergies, he himself ends up emphasizing their value when he says that “if we had been presented with an opportunity to invest in another Latin American country and that investment could be expected to obtain returns in line with EEGSA’s expected returns, we would have favored investing in EEGSA, as we already had invested in Alborada and San José”<sup>508</sup> and that “the privatization of EEGSA provided increased security to [the investments in Alborada and San José]”<sup>509</sup> and that “by obtaining a stake in EEGSA, we hoped to ensure the establishment of good relations between EEGSA and our generation plants.”<sup>510</sup> Thus, while Mr. Gillette recognizes the existence of those synergies, he diverges by noting that those synergies “[are] not quantifiable” or do not “achieve any costs-savings,” something that is obviously false, as analyzed below.

270. That is directly contradicted by the recommendation of the Management Board in 1998, which directly tied the existing synergies with the “opportunities for additional growth”

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<sup>505</sup> *Ibid*, par. 63; Mr. Gillette’s Reply, **Appendix CWS-11**, par. 7. The document referred to is Empresa Eléctrica de Guatemala S.A., Privatization Management Presentation, July 9, 1998, **Exhibit C-33**, page 19.

<sup>506</sup> Reply, par. 63. (Emphasis added).

<sup>507</sup> *Ibid.*; Empresa Eléctrica de Guatemala S.A., Privatization Management Presentation, 9 July 1998, **Exhibit C-33**, page 21.

<sup>508</sup> Gillette Reply, **Appendix CWS-11**, par. 5.

<sup>509</sup> *Ibid.*

<sup>510</sup> *Ibid.*

of the EEGSA customer base, per-customer-usage rates, as well as cost-cutting opportunities which would increase profitability” and “broader opportunities for growth.”<sup>511</sup> It is obvious that these justifications are not only quantifiable, but they have a considerable value in an investment like TGH’s investment in EEGSA.

271. TGH also argues that the synergies between EEGSA and Teco Group’s other investments did not provide the basis for the price offered by the Consortium, since the two other partners of the Consortium (Iberdrola and EDP) did not have such synergies.<sup>512</sup> TGH’s defense seems to require that Guatemala prove the specific motivations of Iberdrola and EDP when investing in EEGSA, and to explain the purchase value of their offered shares, something that is clearly incorrect. TGH thereby seeks to distract attention from the irrefutable fact that, for Teco in particular, the proven existence of those synergies was reflected in the company’s acquisition price.

**C. THE VAD FOR THE PERIOD 1998–2003 ALLOWED EEGSA SATISFACTORY FINANCIAL PERFORMANCE**

272. In its Memorial, TGH had argued that, in spite of having reduced its costs and losses and having grown, EEGSA “did not prosper” financially during the first five-year period after the bidding.<sup>513</sup> TGH argued that this was due to the increase in the cost of oil, the devaluation of the currency in 1999 and the “low” tariffs established in 1998<sup>514</sup> which, according to TGH, caused EEGSA in 1999 and 2000 to generate negative cash flows and in 2001 negative net profits.<sup>515</sup> Mr. Kaczmarek notes that the return on the investment made during the first five-year period was between 4 and 6 percent (below the 7 percent “guaranteed” by the LGE<sup>516</sup>) and thus the 1998 tariffs were very low.<sup>517</sup> In

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<sup>511</sup> TECO Energy, Inc., Action regarding the privatization of an Electric Utility in Guatemala, Board Book Write-up, July 1998, **Exhibit C-32**, page 2 (Emphasis added).

<sup>512</sup> Reply, par. 64.

<sup>513</sup> Memorial, pars. 68-69.

<sup>514</sup> *Ibid.*, par. 69.

<sup>515</sup> Memorial, par. 69.

<sup>516</sup> Kaczmarek, **Appendix CER-2**, par. 96. We note that, in the Memorial, TGH incorrectly reports the conclusions of its expert, referring to 3 and 4 percent instead of 4 and 6 percent (Memorial, par. 69).

<sup>517</sup> Giacchino, **Appendix CWS-4**, par. 5; Memorial, par. 69.

its Counter-Memorial, Guatemala explained that EEGSA's tariffs for the period 1998-2003 were set before the bidding process based on a technical study conducted by Synex under the auspices of the World Bank.<sup>518</sup> In other words, Teco learned of those tariffs before deciding on its investment in EEGSA. Guatemala also explained that the increases in oil prices and the devaluation of the currency in 1999 were offset by the periodic adjustments that occur in every five-year period according to the mechanisms of the regulatory framework.<sup>519</sup> Guatemala explained that even TGH itself acknowledged, in 2000, its satisfaction with the results obtained by EEGSA.<sup>520</sup> This is remarkable since it would be unreasonable to expect a public services company like EEGSA to generate profits within the first or second year since privatization, since this type of investment generates long-term results, as Teco's own Board of Directors acknowledged.<sup>521</sup> Furthermore, Guatemala explained that the LGE only recognizes a profitability level on the capital base of the model company, and not on the actual investment or the price paid by the investor.<sup>522</sup> In any event that, because it is a long-term investment, the profitability between 7 percent and 13 percent forecast in the LGE was to be analyzed over the period of the concession and not just over a five-year period.<sup>523</sup>

273. In its Reply, TGH continues to argue that EEGSA's provisional VAD for the tariff period 1998-2003 "financially crippled the company"<sup>524</sup> and emphasizes the "significant

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<sup>518</sup> Counter-Memorial, par. 245.

<sup>519</sup> *Ibid.*, par. 245.

<sup>520</sup> Guatemala showed in its Counter-Memorial that TGH admitted having received a little more than US\$ 2 million in dividends for its 24% equity interest in the company in the period 1998-2003 and that EEGSA distributed dividends for about US\$ 9 million in the same period, which by itself shows the excellent results achieved by TGH at the start of a 50-year contract. That was confirmed in the Book of Minutes of Management Board of Teco in January of 2000 in which we read "EEGSA overall income was higher than plan[ned]." See Counter-Memorial, par. 249.

<sup>521</sup> *Ibid.*, par. 247; TECO Energy, Inc., Action regarding the privatization of an Electric Utility in Guatemala, Board Book Write-up, July 1998, **Exhibit C-32**, page 6 (see "Conclusion and Recommendation").

<sup>522</sup> Counter-Memorial, par. 248 and see section V.A.2 above.

<sup>523</sup> As to the Kaczmarek analysis presented by TGH to give support to its argument, Guatemala has already referred to the fact that it completely ignores the restructuring of activities of EEGSA, and therefore is not reliable. Counter-Memorial, par. 248; M Abdala and M Schoeters, **Appendix RER-1**, par. 87; Kaczmarek, **Appendix CER-2**, pars. 95-96.

<sup>524</sup> Reply Memorial, II.C.

cash flow constraints during the first five-year tariff period due to EEGSA's provisional tariffs, rapid increases in fuel costs, and the devaluation of Guatemala's currency in 1999.”<sup>525</sup> In the Reply TGH criticizes that the VAD for that tariff period was not calculated according to the procedure stipulated in LGE Articles 71 to 79, but rather pursuant to the Temporary Provisions of the LGE Article 2, which determines that the CNEE was supposed to set EEGSA's VAD based on “values used in other countries that apply a similar methodology,” as it lacked sufficient information to conduct a VAD study. TGH also questions whether the CNEE and its consultant Synex used comparable data from El Salvador to calculate EEGSA's VAD for the study in question, which supposedly led to tariffs that were “too low” 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 [EEGSA's] privatization.”<sup>526</sup> Lastly, TGH, through Mr. Kaczmarek, again emphasizes that the return on the investment in the first five-year period was between 4 and 6 percent, which would be under the 7 percent that, according to TGH, “the LGE guarantees.”<sup>527</sup> TGH's assertions are erroneous.

274. As the witness Mr. Moller indicated in his first statement, during EEGSA's tariff-setting process of 1998 (which occurred before the company's bidding process, when the company was still owned by the State), the prevailing principles required the distribution tariff to be subject to strictly technical criteria, so that EEGSA's future buyers would have a realistic indication of the tariff levels that the company would obtain in the future. In other words, the fundamental question to be emphasized here is that EEGSA was sold “with an effective tariff schedule” that the buyers never questioned (until this arbitration). It was evident that, through an artificial increase in the tariff for the period 1998-2003, the State of Guatemala could have obtained a higher price in the privatization of EEGSA. However, to avoid creating false expectations in the future investors, the tariffs were set based on the tariff study that was entrusted to the

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<sup>525</sup> *Ibid*, par. 69

<sup>526</sup> *Ibid*, par. 70; Memorial, par. 67; Maté, **Appendix CWS-6**, par. 3.

<sup>527</sup> Reply Memorial, par. 70; Kaczmarek, **Appendix CER-2**, par. 96. We again note that TGH incorrectly reports the conclusions of its expert, referring to 3 and 4 percent instead of 4 and 6 percent (Memorial, par. 69 and Reply Memorial, par. 70).

consultant Synex, thereby observing the principle of the LGE that the tariffs must strictly reflect the cost of the system.<sup>528</sup> Therefore, any claim that TGH might now make against the 1998-2003 tariff schedule is out of time.

275. Furthermore, TGH's argument is inconsistent with the Book of Minutes of Management Board of Teco of July 1998,<sup>529</sup> which stated that "[t]he tariffs of EEGSA will be restructured in accordance with the Law. The new tariffs, valid for a period of five years, were issued on 22 June 1998, with methodologies that closely follow the tariff regimens of Chile, Argentina and El Salvador."<sup>530</sup> Those do not seem to be the words of an investor that is complaining about the tariff schedule, in spite of the fact that, after that arbitration, it opportunistically decided to change its position.
276. TGH also states mistakenly that the return on the investment made by TGH in the first five-year period was between 4 and 6 percent, which would be below the 7 percent that, according to TGH, "the LGE guarantees." In that regard, it is fitting to remember that, as the experts Abdala and Schoeters have indicated, what the LGE and the model company system establish is that the set tariffs must give the distributor the possibility of accessing a rate of return between 7 and 13 percent over the VNR and not over the purchase price as TGH claimed.<sup>531</sup>

**D. THE 2003–2008 TARIFF REVIEW REVEALED THE CNEE'S NEED TO HAVE ITS OWN PARALLEL TARIFF STUDY**

277. In January of 2003, Guatemala started the first tariff review for the three largest distributors in Guatemala—EEGSA, Deorsa and Deocsa—pursuant to the new legal framework of 1998.<sup>532</sup> To conduct this tariff review, the CNEE hired Chilean consultant

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<sup>528</sup> Witness statement of Mr. Enrique Moller, Director of CNEE, January 24, 2012 (hereafter *Moller*), **Appendix RWS-2**, par. 28

<sup>529</sup> Counter-Memorial, par. 230. *See also* TECO Energy, Inc., Action regarding the privatization of an Electric Utility in Guatemala, Board Book Write-up, July 1998, **Exhibit C-32**.

<sup>530</sup> Counter-Memorial, par. 230. *See also* TECO Energy, Inc., Action regarding the privatization of an Electric Utility in Guatemala, Board Book Write-up, July 1998, **Exhibit C-32**.

<sup>531</sup> Ms Abdala Schoeters, **Appendix RER-1**, pars. 7 and 39.

<sup>532</sup> Counter-Memorial, par. 250.



Mr. Bernstein, one of the authors of the LGE's original draft (and the person responsible for setting the tariffs for the first five-year period through the consultant Synex), and requested that he analyze the methodology to be used in the Terms of Reference for the tariff review of the second five-year tariff period for the electricity distribution companies.<sup>533</sup> Mr. Bernstein's analysis emphasized the need for the CNEE to hire an external expert to conduct an independent tariff study concurrently with the distributor's study in order to undertake a critical analysis of such study.<sup>534</sup> The same recommendation had been suggested by Mr. Leonardo Giacchino (EEGSA's consultant during the 2003 and 2008 tariff reviews and witness in this arbitration), in an article he wrote in 2000. In this article, Mr. Giacchino emphasized the importance of regulators hiring external experts in order to have the necessary technical support to evaluate distributors' tariff studies.<sup>535</sup> Hence, following Mr. Bernstein's recommendations,

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<sup>533</sup> *Ibid*, par. 250. See also JS Bernstein "Some Methodological Issues to Consider in the Terms of Reference for Value-Added for Distribution Studies," May 2002, **Exhibit R-23**.

<sup>534</sup> As Mr. Bernstein explained at that time:

The VAD are calculated by the Distributors through a study requested from a consultant company pre-qualified by CNEE. that shall comply with the methodology established by the Commission in the reference terms of said studies (Art 74 of the Law). However, CNEE may raise comments on the obtained values and, if the discrepancies persist, an Expert Committee, composed of 3 members (Art 75 of the Law) will be established. In order to exercise its control functions, CNEE shall be able to carry out a critical analysis of every step of the study commissioned by the Distributors, which implies, in practice, to carry out of an independent study, but implementing the same methodology.

Regarding the Terms of Reference, Mr. Bernstein mentioned the clear benefits to the CNEE of comparing the results of the distributor's study with the regulator's study:

[T]o establish the terms of reference and calculation methodology precisely enough as to a) appropriately reflect the concepts of VAD contained in the Law and its Regulations, avoiding imprecisions that may be used to exaggerate the distribution costs, b) be able to compare the numeric intermediate and final results reached in the studies of the Distributors and of the Regulator, and be able to establish the causes of those differences [...]

JS Bernstein "Some Methodological Issues to Consider in the Terms of Reference for the Value-Added for Distribution Studies," May 2002, **Exhibit R-23**, page 2 (Emphasis added).

<sup>535</sup> Mr. Giacchino indicated:

The regulated tariff review caused most of the problems with the new regulatory frameworks to become apparent. Regulators and regulated

Guatemala hired the external consultant firm PA Consulting but, due to budgetary issues, PA Consulting did not prepare a parallel tariff study, which would have been preferable, but rather reviewed the successive stage reports of the tariff study.<sup>536</sup> EEGSA, for its part, hired the team of Mr. Leonardo Giacchino, of NERA Economic Consulting (*NERA*) to conduct the tariff study. EEGSA also hired the Argentine consultant firm Sigla S.A./Electrotek (*Sigla*), to prepare the Load Characterization study, an important component of the tariff study.<sup>537</sup>

278. Mr. Colom explains in his witness statement that, when he first addressed the tariff reviews of EEGSA, Deorsa and Deocsa in 2008, he met with the CNEE staff to consider the lessons learned during the 2003 tariff review.<sup>538</sup> Mr. Colom confirmed that, without an expert to conduct an independent study for the 2003–2008 review (as recommended by Mr. Bernstein) the CNEE had faced significant challenges in its ability to supervise the NERA study.<sup>539</sup> The reasons are obvious: while the CNEE could make specific comments on the distributor’s study, it did not have an independent study to serve as a benchmark against which it could compare the results of the distributor’s study. The EEGSA tariff review in 2003 resulted in an increase in EEGSA’s VAD which, in low voltage rose from US\$ 6.63/kW-month to US\$ 7.48/kW-month (an increase of 12.83 percent) and in medium voltage went from US\$ 5.10/kW-month to US\$ 8.71/kW-month

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utilities had difficulty agreeing on certain details, such as values of regulated assets, recalculation of original tariffs, the value of the efficiency factor in price cap regimes, and the improvement in quality of service.

Each of these issues will continue to cause friction, especially in countries that have not yet had tariff reviews (eg, Mexico, El Salvador, Guatemala and Panama). To simplify the tariff review, each country should make its regulatory decisions more transparent. Some are already working toward this goal, developing measures such as regulatory accounting, service quality standards, and reports by outside experts.

L Giacchino, et al., “Key regulatory concerns in Latin America energy, telecoms and water sectors in Latin America” (2000) *Privatization International: Utility Regulation 2000 Series* (Vol. 2) Latin America, **Exhibit R-21**, page 1 (Emphasis added).

<sup>536</sup> Counter-Memorial, par. 255.

<sup>537</sup> *Ibid*, par. 256.

<sup>538</sup> Colom Supplemental Statement. **Appendix RWS-4**, par. 20

<sup>539</sup> *Ibid*

(an increase of 70.78%).<sup>540</sup> As Mr. Damonte explained in his initial report, the results of that tariff review made EEGSA's tariffs very disproportionate to the average throughout Latin America.<sup>541</sup>

279. TGH, quoting its witnesses, Messrs. Maté and Calleja, maintains that the CNEE and EEGSA worked in a "climate of collaboration" during the 2003–2008 review<sup>542</sup> and denies that the support obtained from CNEE's external consultants of the CNEE "was limited to an analysis of the stage reports in the tariff study". TGH also denies that consultant "did not analyze the distributor's tariff study in full nor conduct a parallel study."<sup>543</sup> Messrs. Calleja and Giacchino add, to that effect, that "for EEGSA's 2003-2008 tariff review, the CNEE not only received funding from USAID to retain PA Consulting as its external consultant, but the CNEE established a Technical Committee to supervise the tariff review process [...]."<sup>544</sup>
280. What Messrs. Calleja and Giacchino fail to mention in their witness statements is that the appointed "Technical Committee" consisted of only one civil servant of the CNEE (the Tariff Manager), and that the other two members belonged to CNEE's external technical consultants, that is PA Consulting.<sup>545</sup> This "Technical Committee" was in charge of a large number of tasks related to the ongoing tariff review.<sup>546</sup> Guatemala is not aware of whether the working relationship between EEGSA and the CNEE during the 2003 tariff review was cordial or not, but TGH cannot deny something which is evident: there was an enormous imbalance between CNEE's technical team and

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<sup>540</sup> Counter-Memorial, par. 258; Kaczmarek, **Appendix CER-2**, par. 98

<sup>541</sup> Damonte **Appendix RER-2**, pars. 251-256. Regarding TGH's criticisms of Mr. Damonte's benchmarking see Section V.E.11 further below and Damonte Rejoinder. **Appendix RER-5**. Section 3.5.3.

<sup>542</sup> Reply, par. 79; Maté, **Appendix CWS-6**, par.4; Calleja, **Appendix CWS-3**, par. 10; Giacchino, **Appendix CWS-4**, par. 10.

<sup>543</sup> Reply, par. 80; Counter-Memorial, par. 255.

<sup>544</sup> Reply, par. 82.

<sup>545</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A. CNEE Resolution 88-2002, October 23, 2002. **Exhibit R-25** (Emphasis added). Art. A.7.1. See also Colom Supplemental Statement, **Appendix RWS-4**, par. 22.

<sup>546</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A. CNEE Resolution 88-2002, October 23, 2002. **Exhibit R-25** (Emphasis added). Art. A.7.2. See also Colom Supplemental Statement, **Appendix RWS-4**, par. 22.

EEGSA's technical team during the 2003 tariff review. The consequences of that imbalance were obvious: the CNEE was limited in its ability to review the voluminous information from the distributor regarding the justification of the reference prices for setting the VNR.<sup>547</sup> As Mr. Colom explains, it was precisely due to that imbalance that the CNEE decided in 2007 to increase the staff base of the Tariffs Division and to create two Departments and a Unit with their own staff for the tariff reviews.<sup>548</sup> Also, the CNEE hired Sigla (which, as pointed out, had advised EEGSA in the previous tariff review), so that, as a prequalified external consultant of the CNEE, it could not only support EEGSA's tariff review, but produce an independent tariff study. Thus, for the 2007 tariff study, the CNEE had at least 16 technicians of its own working full-time on tariff matters, in addition to the members of its consultant, Sigla. With this arrangement, the regulator had the necessary resources to perform its functions correctly, reducing the risk of information asymmetry or resource inequality vis-à-vis the distributors. As Messrs. Moller and Colom explain, the above was accomplished by investing funds from the CNEE's own budget, and logically it resulted in an increased control over the work of the distributor and its consultant as compared with the prior review.<sup>549</sup>

281. Therefore, it is understandable that Messrs. Maté and Calleja's indicate their preference for working with a smaller regulatory control team, such as in 2003. But this cannot be a criticism of the fact that the CNEE sought to improve the quality standards of the tariff review process, to make sure that the resulting tariffs actually reflected the efficient cost of the distribution service, as required by the LGE.

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<sup>547</sup> Colom, **Appendix RWS-1**, par. 49; Colom Supplemental Statement, **Appendix RWS-4**, par. 23.

<sup>548</sup> It included, first, the Tariff Adjustment Department made up of six (today they are seven) professionals in charge of reviewing and conducting the analyses for the periodic adjustments (quarterly, semi-annual and annual) in the distribution tariffs and conducting the studies for calculating the compensation of the transmission network. Second, the Tariff Studies Department in charge of analyzing the stage reports that each distributor submits in the course of conducting its tariff study every five years and coordinating, reviewing and monitoring the tasks performed by the outside consultants that assist the CNEE. This department is made up of five professionals and three technicians, who do the analysis of the distribution network, field audits and oversight activities. They in turn coordinate the execution of the supporting tariff studies. Third, the Unit of the Uniform System of Accounts made up of two professionals in charge of analyzing the financial and technical information submitted by the distributors. (See Colom, **Appendix RWS-1**, par. 26.)

<sup>549</sup> Colom, **Appendix RWS-1**, par. 26; Moller, **Appendix RWS-2**, par. 40

**E. THE TARIFF REVIEW PROCESS FOR THE PERIOD 2008–2013**

**1. EEGSA used the *amparo* against the Original Terms of Reference of April 2007 as a pressure tool to get concessions from the CNEE, complaining of the same provisions that it had accepted in the Terms of Reference of the 2003 tariff review**

282. In its Counter-Memorial, Guatemala explained that, in order to produce the Terms of Reference for the 2008–2013 tariff review, the technical teams of the CNEE consulted with regulatory entities of Chile, Peru and Argentina, and hired Peruvian and Argentine technical experts to advise it.<sup>550</sup> That advice included the joint review of various components of the Terms of Reference so that they would conform to the LGE and RLGE’s criteria, as well as regulatory practice in other countries.<sup>551</sup> As a result of that task, the 2008-2013 Terms of Reference were published by the CNEE through official letter CNEE-13680-2007 of April 30, 2007 (the *Original Terms of Reference*).<sup>552</sup> In May 2007, EEGSA, exercising its right, objected to those Terms of Reference administratively and then judicially through an *amparo*, which suspended the tariff review process.<sup>553</sup> As Guatemala explained in its Counter-Memorial, EEGSA used its *amparo* against the Original Terms of Reference as a pressure point to get concessions from the CNEE, complaining in 2007 about the same provisions in the Terms of Reference that the company had accepted in the 2003 tariff review.<sup>554</sup> Moreover, a mere review of EEGSA’s *amparo* reveals that the distributor ignored the LGE’s elementary principles, including the legal authority of the CNEE to set the methodology for the tariff review and declare the study “admissible or inadmissible” if that methodology was

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<sup>550</sup> The CNEE hired Edwin Quintanilla Acosta and Miguel Révolo, respectively General Manager and Manager of Regulation of Electricity Distribution of the regulatory body and supervisor of the activities of electricity, hydrocarbons, natural gas and mining of Peru, who had just participated in the tariff review in their country. It also hired the Argentinian consultant Alfredo Campos, electromechanical engineer, dedicated to independent consultancies, and with experience in the Latin American electricity sector. (see Counter-Memorial, par. 289)

<sup>551</sup> Counter-Memorial, pars. 289

<sup>552</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 13680-2007, 30 April 2007, **Exhibit R-38**.

<sup>553</sup> Counter-Memorial, pars. 299

<sup>554</sup> *Ibid*, pars. 303-305, particularly, see comparative chart in par. 301.

not followed.<sup>555</sup> As Guatemala pointed out, as a result of the *amparo* filed by EEGSA and in order to be able to advance with the strict deadlines of the tariff review, the CNEE decided to incorporate certain changes requested by EEGSA that did not affect the principles of the LGE or the powers or obligations that the LGE assigns exclusively to the CNEE.<sup>556</sup>

283. In its Reply, TGH argues that EEGSA opposed the articles of the 2003-2008 Terms of Reference which were equivalent to the articles of the 2007 Original Terms of Reference motivating its *amparo*.<sup>557</sup> TGH further indicates that, when challenging the Original Terms of Reference, “EEGSA did not ignore the basic principles of the LGE [...] to the contrary, EEGSA sought to give effect to the regulatory framework under which EEGSA had been acquired.” TGH in its Reply accepts that “some of the provisions of the [Original Terms of Reference] were similar to provisions of the [2003-2008 Terms of Reference]” but, according to TGH, “the impact of those provisions was fundamentally different in view of amended RLGE Article 98, which entered into force shortly before the [Original Terms of Reference] were issued by the CNEE on 30 April 2007” and that, according to TGH, gave the CNEE “a basis to deem the consultant’s study ‘not received’ so that the CNEE could disregard the consultant’s study and therefore set EEGSA’s tariffs as it pleased”<sup>558</sup> As discussed below, TGH’s arguments are false.

***a. The Terms of Reference for the 2002 tariff review reflected the CNEE’s authority under the regulatory framework and were accepted by EEGSA and TGH***

284. In its Reply, TGH argues that EEGSA did indeed raise complaints regarding the Terms of Reference in 2002,<sup>559</sup> and refers to two documents which it alleges to be representative of EEGSA’s complaints against the Terms of Reference for the period

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<sup>555</sup> *Ibid*, pars. 303-304.

<sup>556</sup> *Ibid*, pars. 306-318.

<sup>557</sup> Reply, par. 104.

<sup>558</sup> Reply Memorial, par. 105.

<sup>559</sup> *Ibid*.

2008-2013. As shown below,<sup>560</sup> TGH deliberately failed to discuss the administrative appeal against these Terms of Reference which it lodged and then withdrew. Instead, the first document it introduces, referred to by TGH in this arbitration as “EEGSA’s Comments on the 2002 Terms of Reference (ToR)” (**C-440**), reflects comments in track changes to what appears to be a draft, in Word format, of the 2003 Terms of Reference. The evidentiary value of this document must necessarily be discounted: it does not contain a date (although TGH gives it a date of “Feb 2002” in its list of documents);<sup>561</sup> it does not have a letterhead, is not signed, does not identify its author and contains no proof that it was sent by EEGSA or received by the CNEE. The second document is a note sent to the CNEE on September 27, 2002 by PA Consulting, the CNEE’s consultant firm during the 2002 tariff review. In the note, PA Consulting disputes certain comments made by EEGSA regarding the Terms of Reference in question (different from the note mentioned previously as Exhibit C-440).<sup>562</sup> From PA Consulting’s note, it is impossible to determine whether EEGSA questioned—even in this informal manner—Articles A.6.2, A.6.3, A.6.4, A.6.7 and A.6.8 of the 2003 Terms of Reference, equivalent to Articles 1.7.4 and 1.9 of the Original Terms of Reference of 2007, to which EEGSA objected in its *amparo*.<sup>563</sup> Instead, the note from PA Consulting (presented by TGH in this arbitration) denounces EEGSA’s attempt to disregard the tariff review functions assigned to the CNEE by law, thereby demonstrating EEGSA’s absolute disregard for the legal framework since 2002. In this note, the consultants from PA Consulting comment that:

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<sup>560</sup> See par. 284.

<sup>561</sup> TGH’s conduct in relation to this document (**Exhibit C-440**) demonstrates the Claimant’s bad faith. As opposed to its customary practice concerning the other exhibits cited throughout its Reply, TGH fails to indicate the date of **Exhibit C-440** at the bottom of the page when referring to it in the Reply and only dates it as “Feb 2002” in the document index. As explained below (footnote), this corresponds to the fact that TGH is trying to present this document as the root of the comments of CNEE’s consultant, PA Consulting, in **Exhibit C-447** of September 27, 2002. It is implausible for PA Consulting to take five months to respond to the consultant’s comments, which confirms the falsehood of these comments.

<sup>562</sup> TGH presents the PA Consulting note as a response to **Exhibit C-440**, despite the fact that the PA Consulting note is dated nearly 7 months after the date that TGH assigns it to Document **C-440** (referred to as “Feb 2002” in the index). See footnote 561 above.

<sup>563</sup> See *Amparo* filed by EEGSA with the First Civil Court of May 29, 2007, **Exhibit C-112**.

[...] [I]n general terms, it is our view that EEGSA's document goes beyond what could be described as "comments" and stands as a true revision of the ToR, changing substantive aspects relating to the control methods and providing a restrictive interpretation of the CNEE's powers and responsibilities. The document goes as far as to establish time periods to be complied with by the CNEE, as well as commitments and definitions that are neither provided for in the General Electricity Law [LGE] nor supported by the applicable legal framework. EEGSA boldly cuts out the CNEE's power to raise objections, a power that is provided for in the LGE itself.

[...] EEGSA restricts the CNEE's requests for information, requiring that they be duly justified, but failing, however, to state who is to provide such justification or how it is to be provided. [...] This suggestion by EEGSA introduces a strong limitation of the possibility of accessing information, which possibility plays an essential role given the imbalance between the controller and the parties subject to control. The suggested restriction is inadmissible, given the powers vested in the CNEE under the Law with respect to requests for information, in general, and tariff reviews, in particular, are concerned.

[...] EEGSA is proposing to eliminate any possibility to have the documentation submitted replicated, *i.e.* those necessary to verify the calculation process. This is essential in order to replicate the process, detect errors and, as the case may be, redo the study. [...] Moreover, given our preceding discussion of the CNEE's legal powers in the course of the review, the requested change cannot be allowed.

[...] EEGSA is seeking to eliminate the CNEE's power to object to the study's partial or final findings, substituting it with the power to "make observations". This is not in line with the CNEE's responsibility [...]

[...] EEGSA seeks to avoid submission of basic information used for SER determination not be submitted to the CNEE. This is inadmissible as such information is the basis for the study.



[...] EEGSA seeks to assign to the Consultant the power to determine the value of the useful life of the facilities. It is our view that, at most, the Consultant can propose values for approval by the CNEE.

[...] EEGSA's interpretation is that the CNEE must conduct at least two studies to define the actualization rate [...] [but] it seeks to incorporate into the ToR provisions that do not exist in the Law or the Regulation to the effect that "once the DISTRIBUTOR has been notified of the actualization rate by the CNEE, the distributor may submit its observations thereon within a period not to exceed 15 calendar days. The CNEE shall rule thereon within no more than 15 calendar days from receipt of the distributor's observations." Apparently, EEGSA is taking on the regulator's role in proposing time periods for definitions for which no provision is made in the Law and which are inadvisable.

[...] EEGSA intends for the Consultant to define the annual reduction factor that reflects the effect of economies of scale and efficiency improvements. This factor should be assessed and defined by the CNEE. At most, the Consultant could make suggestions or recommendations.<sup>564</sup>

285. As evidenced by this document, EEGSA already showed a complete disregard for the legal framework of the tariff review in 2002, by trying (1) to avoid delivering information that would allow the regulator to carry out adequate control; and (2) to assign authority to itself and to its consultant firm in the tariff review process that the LGE attributed to the CNEE.
286. There is an important detail in this question, which TGH and its witnesses fail to mention: EEGSA did indeed file an appeal against the resolution that approved the 2003 Terms of Reference, complaining about some of the same provisions, that [TGH] would later complain of in 2007.<sup>565</sup> Such action was withdrawn by TGH a few weeks after it

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<sup>564</sup> Note from PA Consulting to the CNEE of September 27, 2002, **Exhibit C-447**.

<sup>565</sup> Administrative Court Proceeding of started by EEGSA against Decision of the Ministry of Energy and Mines No. 562, dated February 24, 2003, **Exhibit R-169**.

was filed.<sup>566</sup> Obviously, TGH and its witnesses are aware of this fact and have failed to mention it during the discussions on this matter. The effect of this withdrawal is key: far from complaining about the 2003 Terms of Reference, it means that EEGSA consented to and accepted their content.

287. The CNEE ultimately maintained the text of the Terms of Reference unchanged and, in the final approved version (applied without further questions), the regulator's basic authority was maintained during the tariff review process for the 2003-2008 period. EEGSA accepted the legality of these Terms of Reference by refraining from filing an appeal against them, and the review was conducted in a normal manner. TGH itself specifically accepts this point when it states in its Reply that "EEGSA's tariff review for the 2003-2008 tariff period was conducted in accordance with the requirements of the LGE and the RLGE." These Terms of Reference established, in particular:

- the CNEE's authority to request information and suspend the tariff study if it does not adhere to the Terms of Reference;<sup>567</sup>
- the distributor's obligation, through its consultant firm, to correct the tariff study as requested by the CNEE to bring it in compliance with the Terms of Reference;<sup>568</sup> and

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<sup>566</sup> Voluntary Dismissal of the Administrative Court Proceedings started by EEGSA against Decision of the Ministry of Energy and Mines No. 562, dated February 24, 2003 134-02 of and Nov. 2<sup>nd</sup> Memorial 2681, First Contentious Administrative Court, September 3, 2003, **Exhibit R-171**.

<sup>567</sup> Arts. A.6.2. and A.6.3. of the 2003-2008 Terms of Reference stated:

A.6.2. [In submitting the reports], the CNEE has the legal authority to request additional information and to discontinue hearing any subsequent implementation of the STUDY if, in its own reasoned, explicit and justified opinion, it was being carried out while disregarding, deviating from or failing to comply with these Terms of Reference.

A.6.3. In the event that the CNEE detects variations from the theoretical, methodological or procedure guidelines determined in these Terms of Reference, it shall object to the continuation of the STUDY. [...]

<sup>568</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 88-2002, October 23, 2002, **Exhibit R-25**. (Emphasis added).

Art. A.6.4. of the 2003-2008 Terms of Reference stated:

- the distributor's obligation to include supporting information for the tariff study and submit a traceable study.<sup>569</sup>

288. In sum, the text of the 2003-2008 Terms of Reference and their acceptance by EEGSA are the best evidence that EEGSA was already aware of and had accepted CNEE's authority under the legal framework before the 2007 tariff review arose, as explained in the following section.

***b. EEGSA used the amparo against the Terms of Reference as a tool for applying pressure to obtain concessions from the CNEE, objecting to the same provisions that it had accepted in the 2003-2008 tariff review in disregard of the basic principles of the LGE***

289. Equally unavailing is TGH's argument that it presented an *amparo* against the 2007 Original Terms of Reference to "attempt to apply the regulatory framework pursuant to which the company had been acquired."<sup>570</sup> As previously explained, EEGSA (and TGH) had accepted these same provisions without objection in the 2003 Terms of Reference, which granted the CNEE equal or greater regulatory powers over EEGSA's tariff study as the 2007 Original Terms of Reference (even using the same language).<sup>571</sup> As explained below, the *amparo* against the Original Terms of Reference was used by EEGSA as a pressure point for obtaining additional concessions from the CNEE.

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A.6.4. When the intermediate results are objected to by the CNEE, the CONSULTANT must redo the work in question in order to address the objection as instructed and by the deadline set by CNEE.

<sup>569</sup> *Ibid*, Arts. A.6.7. and A.6.8. of the 2002 Terms of Reference read:

A.6.7. These Terms of Reference establish that the Tariff Study that the DISTRIBUTOR must send for the CNEE's consideration shall consist of the full set of Reports and Results set forth herein. If any one of these is missing, the CT shall so inform the DISTRIBUTOR and, until such time as the missing information is received, the CNEE shall consider, for the purposes of the provisions of RLGE Art. 98, that the Tariff Study has not yet been submitted for the CNEE's consideration. [...]

A.6.8. The CNEE may also consider the Tariff Study not to have been accepted if, in its own judgment and subject to consultation with the CT, the Reports and Charts mentioned in the preceding points omit the results requested in these Terms of Reference so that the Tariff Study can be considered incomplete or as presenting a partial or distorted view.

<sup>570</sup> Reply, par. 106.

<sup>571</sup> *Also see* Counter-Memorial, pars. 300-305; particularly the comparative graphic in par. 301.

290. EEGSA's *amparo* against the Original Terms of Reference is, in itself, a revealing document. In it, EEGSA not only rejects a methodology that had already been accepted by EEGSA itself in the 2003 review, but questioned the basis of the regulatory framework of the electricity sector pursuant to which TGH and its associates had decided to invest in 1998.<sup>572</sup> For example, EEGSA indicated that it was the responsibility of its consultant firm to prepare the tariff study "using the technical and methodological criteria it deems adequate and reasonable in conducting the work requested of it,"<sup>573</sup> thereby disregarding CNEE's legal power to establish the methodology and declare the study "appropriate or inappropriate" ("accept or reject" in the original wording of the RLGE) in the event that it did not conform to the Terms of Reference.<sup>574</sup> Moreover, the *amparo* included accusations against the CNEE, including that it had "abused its power"<sup>575</sup> in the Original Terms of Reference by defining the useful life of the installations as 30 years (Section 6.5), which is precisely the same number of years mentioned in the 2003 review (Section D.4.2) and to which objections had never been raised.<sup>576</sup> The *amparo* also classified Section 1.6 of the Original Terms of Reference, which established that the ownership of the tariff study belonged indistinctively to CNEE and to EEGSA as a "violation of property rights" and "confiscation."<sup>577</sup> However, EEGSA appeared to forget that Article A.5 of the 2003-

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<sup>572</sup> Letter from PA Consulting to the CNEE, September 27, 2002. **Exhibit C-447**.

<sup>573</sup> Motion for constitutional relief filed by EEGSA against the Terms of Reference, Motion for constitutional relief C2-2007-4329, May 29, 2007, **Exhibit C-112**, p. 8 (Emphasis added).

<sup>574</sup> RLGE, Art. 98, **Exhibit R-36**; LGE Arts. 4(c), 77 and 78, **Exhibit R-8** (CNEE is the only party that reviews the methodology for setting the tariffs).

<sup>575</sup> EEGSA's interpretation resulted, conversely, in the distributor and the consultant firm acquiring the power to "determine" the Terms of Reference, a matter that distorted the balance of powers conferred by LGE to the CNEE, on one hand, and to the distributor and its consultant on the other.

<sup>576</sup> Motion for constitutional relief filed by EEGSA against the Terms of Reference, Motion for constitutional relief C2- 2007-4329, May 29, 2007, **Exhibit C-112**, p. 21; Terms of Reference for the Performance of the Value-Added Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 13680-2007, April 30, 2007, **Exhibit R-38**, section 6.5; Terms of Reference for the Performance of the Value-Added Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 88-2002, October 23, 2002, **Exhibit R-25**, section D.4.2.

<sup>577</sup> Motion for constitutional relief filed by EEGSA against the Terms of Reference, Motion for constitutional relief C2-2007-4329, May 29, 2007, **Exhibit C-112**, p. 16.

2008 Terms of Reference had already established, in practically the same terms that the tariff study “belongs indistinctively to CNEE and to EEGSA.”<sup>578</sup>

291. In conclusion, EEGSA’s principal arguments made in its *amparo* were neither technical nor methodological, but legal, aimed at obtaining general authorization from the courts to deviate from the Terms of Reference at its discretion. EEGSA’s questioning of the CNEE’s authority at the very start of the tariff review process—authority that it had accepted in 2002—foreshadowed the hostility and uncooperativeness that the CNEE would face from EEGSA during this review.

*c. EEGSA’s amparo against the Original Terms of Reference was not based on the potential effect of the amended Article 98*

292. In its Reply, TGH concludes by accepting that “some of the provisions of the [Original Terms of Reference] were similar to provisions of the [2003 Terms of Reference],” but then posits that “the impact of those provisions was essentially different, given the amended text of RLGE Article 98, which took effect soon after the CNEE issued the [Original Terms of Reference] on April 30, 2007.” Thus, according to TGH, “[w]hile in 2002 the CNEE had few incentives to deem EEGSA’s study as ‘not received’ because its prior tariff schedule would simply remain in effect, this was not the case in 2007, when the CNEE did indeed have cause to consider the consultant’s study as ‘not received’ in order to dismiss it and thereby set EEGSA’s tariffs as it pleased.”<sup>579</sup> Thus, according to TGH, EEGSA would have accepted the CNEE’s authority in the 2003-2008 Terms of Reference but, in view of the amendment of Article 98, it decided to question the 2007 Original Terms of Reference. As explained below, this argument was evidently prepared for the purposes of this arbitration and does not hold up to the least scrutiny.

293. First, if what Messrs. Maté and Calleja say were true—that the interaction between the Terms of Reference and the new Article 98 especially concerned them<sup>580</sup>—it is clear that

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<sup>578</sup> Terms of Reference for the Performance of the Value-Added Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 88-2002, October 23, 2002, **Exhibit R-25**, point A.5.

<sup>579</sup> Reply, par. 105

<sup>580</sup> *Ibid.*

what they should have done was challenge the amendment of Article 98. But they did not do so, nor did the other distributors controlled by foreign shareholders (Deorsa and Deocsa).<sup>581</sup> And the reason they did not do so is because the amended Article 98 and the Terms of Reference neither added to nor removed anything that was not already within the authority assigned to the CNEE by the LGE. The Original Terms of Reference, in keeping with the 2003-2008 Terms of Reference, simply applied the tariff review procedure according to the general regulatory framework.

294. Secondly, the documentary record confirms that the interaction between the text of Article 98 and the Original Terms of Reference did not cause EEGSA any special concern. On the one hand, the *amparo* against the Terms of Reference is not based on the amendment of Article 98, since there is no reference criticizing that amendment.<sup>582</sup> This is confirmed by the document containing EEGSA's comments on the Original Terms of Reference of May 2007, in which there is no reference to the amendment of Article 98 to justify the requested changes.<sup>583</sup> Nor does TGH present any legal opinion contemporaneous with the reform that evaluates the supposed interaction between the text of Article 98 and the Original Terms of Reference. In fact, this matter was never mentioned by EEGSA as of special concern.
295. In reality, it involves another argument, opportunistically prepared by TGH as a result of its review of the *Iberdrola* case. Conclusive proof of this, as discussed in the context of Guatemala's objections to jurisdiction,<sup>584</sup> is that, in the "notice of intention to submit the dispute to arbitration" sent [by TGH] to Guatemala on January 9, 2009 (before beginning the written exchanges in the *Iberdrola* case), the detailed factual summary of the dispute that TGH presented **did not include a single reference to the amendment of Article 98**. Only after having reviewed the exchanges between the parties in the *Iberdrola* case did TGH present this argument in its Notice of Arbitration in October

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<sup>581</sup> Counter-Memorial, par. 283.

<sup>582</sup> *Amparo* against the Terms of Reference, *Amparo* C2-2007-4329, May 29, 2007, **Exhibit C-112**

<sup>583</sup> Note No. GG-038-07 from EEGSA to the CNEE attaching EEGSA's Comments on the Terms of Reference, May 11, 2007, **Exhibit C-108**.

<sup>584</sup> See par. 41 above.

2010. In any case, in the *Iberdrola* decision, the Tribunal ultimately rejected any notion of the relevance of this amendment.<sup>585</sup>

296. Finally, we address TGH’s argument that the CNEE had “incentives” under the Original Terms of Reference to reject the distributor’s tariff study and set tariffs “as it pleased.”<sup>586</sup> This accusation is unfounded and opportunistic. Neither TGH nor its witnesses present any supporting evidence, and they ignore that the tariff review of the other electricity distributors (also controlled by foreign shareholders) were carried out under similar Terms of Reference and pursuant to the amended Article 98, without any suggestion of the conspiracy theories now presented to the Tribunal. In effect, as Mr. Colom explains, the CNEE also commissioned independent tariff studies from the consultant Sigla for the Deorsa and Deocsa tariff reviews in order to have a benchmark when reviewing those distributors’ studies. Nonetheless, contrary to what occurred with EEGSA, these distribution companies followed the legal procedure and complied with the applicable Terms of Reference, and the CNEE had no need to use the parallel study to set their respective tariffs.<sup>587</sup> Thus, it is clear that TGH’s accusations are without foundation

**2. EEGSA accepted without question the Final Terms of Reference for the 2008-2013 Tariff Review**

**a. *The Final Terms of Reference for the 2008-2013 tariff review preserved the CNEE’s authority in the tariff review process***

297. As discussed in the Counter-Memorial, a Guatemalan lower court of justice had ordered, on a preliminary basis and without analyzing the merits of EEGSA’s *amparo*, a stay of the effects of the Original Terms of Reference pending a decision on the merits of the petition.<sup>588</sup> Recognizing that the delays in resolving the merits would make it impossible to approve the Terms of Reference within the legal timeframe, the new Board of

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<sup>585</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, August 17, 2012, **Exhibit RL-32**

<sup>586</sup> Reply, par. 105

<sup>587</sup> Colom Supplemental Statement, **Appendix RWS-4**, par.12.

<sup>588</sup> *Amparo* against the Terms of Reference, *Amparo* C2-2007-4329, May 29, 2007, **Exhibit C-112**.

Directors of the CNEE accepted certain changes so that EEGSA would discontinue its *amparo*. As Mr. Colom explains, this was decided on the grounds of practicality, in order to move ahead with the tariff review process and prevent its suspension until the courts and even the Constitutional Court issued a decision on the merits several months later, which would prevent the CNEE from determining the new tariff schedule until then.<sup>589</sup> To review the Original Terms of Reference, the CNEE decided to engage Messrs. Alejandro Arnau and Jean Riubrugent from the prequalified consulting firm Mercados Energéticos to bring specialized external consulting services to the Tariff Division. As Guatemala explained, as a result of this analysis, the CNEE decided to include certain changes requested by EEGSA that did not affect the principles of the LGE or the authority of the CNEE.<sup>590</sup> These changes included eliminating the reference in Article 1.8 under which the study would be considered “not received” if the consultant omitted the “requested results” (despite the fact that the same provision had been accepted by EEGSA in the 2003-2008 revision). However, the CNEE confirmed the requirement that the consultant make the requested corrections, as explained above

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<sup>589</sup> Colom, **Appendix RWS-1**, par. 66; Colom Supplemental Statement, **Appendix RWS-4**, par. 26.

<sup>590</sup> *Inter alia*, the following changes were introduced:

- The period for complying by submitting the tariff studies pursuant to the RLGE was established as that for delivering the full study and not for the stage reports;
- The public hearing stage was eliminated because, although it contributed towards the transparency of the process, and the CNEE considered it good regulatory practice, it was not provided for in the LGE or the RLGE. It was preferable to accept EEGSA’s objection so as not to further delay the tariff review (Letter from Miguel Francisco Calleja to José Toledo Ordoñez, May 11, 2007, **Exhibit C-108**, p. 5)
- The capital recovery formula was modified, as had been suggested on the occasion of EEGSA’s tariff review in 2003 by Mr. Giacchino himself (the NERA consultant at that time), thereby changing from a constant capital method to a constant depreciation method (*See* G Berchesi and L Giacchino, National Economic Research Associates, “*Informe de Etapa E: Valor Agregado de Distribución and Balance de Potencia and Energía*” [Stage Report E: Value Added for Distribution and Power and Energy Balance], June 27, 2003, reviewed on July 30, 2003, **Exhibit R-170** p. 7). For this review, the assets of the distributors (EEGSA, Deorsa and Deocsa) were considered depreciated by 50 percent (*See* Resolution CNEE-5-2008, **Exhibit R-54**, January 17, 2008, Art. 8.3.); and
- An addendum to Art. 1.5 of the Terms of Reference was made that established the consultant’s obligation to maintain independent professional judgment from the distributor that engaged him or her. (Terms of Reference for the Value Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 124-2007, January 2008, **Exhibit R-53**, Art. 1.5)



when discussing the text of this Article.<sup>591</sup> Likewise, a provision was added, Article 1.10, which established that EEGSA's consultant could, on an exceptional basis, deviate from the Terms of Reference as long as there were justified reasons for this, which had to be explained to the CNEE by the consultant.<sup>592</sup> The justifications would allow the CNEE to study the matter and decide whether the deviation was reasonable and therefore whether it was acceptable or not to the CNEE in order to modify the Terms of Reference.

298. In its Reply, TGH disagrees with this analysis and, citing its witnesses, states that “[u]nder Article 1.10, the CNEE did not have the power to “approv[e]” the consultant’s deviation from the [Terms of Reference]; rather, Article 1.10 provides that the CNEE may make observations with respect to whether such deviation is justified under the LGE and RLGE” and that, in the event that the parties do not agree “as to whether any such deviation was justified, an Expert Commission would be appointed to resolve that discrepancy.”<sup>593</sup> This analysis is incorrect since it disregards, once again, the most basic premises upon which the regulatory framework of the electricity sector in Guatemala is based and the documentary record that reflects the discussions that resulted in Clause 1.10 of the Terms of Reference.

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<sup>591</sup> See above at par. 243.

<sup>592</sup> Terms of Reference for the Value Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 124-2007, January 2008, **Exhibit R-53**, Art. 1.10:

These [Terms of Reference] show the guidelines to follow in performing the Study and for each one of its described and defined Stages and/or studies. Should there be any variations in the methodologies presented in the Study's Reports, they must be fully justified, the CNEE will make the observations it deems necessary concerning the variations, verifying their coherence with the Study's guidelines.

These terms of reference do not constitute a legal or regulatory amendment, therefore in the event of a conflict between any of the provisions of these terms of reference and the Law or the Regulation the latter's provisions shall prevail, applying the principle of legal hierarchy in all cases. Likewise, any omission in these terms of reference, related to aspects defined in the Law and the Regulation on the subject of tariffs shall be construed as included in the [Terms of Reference].

<sup>593</sup> Alegría Reply, **Appendix CER-3**, paragraph 60; *also see* Calleja Reply, **Appendix CWS-9**, paragraph 20; LGE, **Exhibit R-8**, Art. 75.

299. First, it is appropriate to remember the legal framework governing this matter. As has already been mentioned previously, the LGE expressly states that it is the CNEE who defines the methodology for calculating the distribution tariffs.<sup>594</sup> The Guatemalan Constitutional Court has expressly stated that that authority cannot be delegated by the CNEE and cannot be exercised by the distributor, its consultant, or the Expert Commission.<sup>595</sup> Guatemala explained in its Counter-Memorial that the discussions among the parties regarding the text of Article 1.10 of the Terms of Reference evidenced that the CNEE never attempted to assign its authority by means of Article 1.10 and informed EEGSA to this effect.<sup>596</sup> The wording of the Article created some disagreements between EEGSA and the CNEE at the time. As Mr. Colom explains, while EEGSA claimed that the consultant was allowed to decide whether or not it wanted to adhere to the Terms of Reference approved by the CNEE,<sup>597</sup> the CNEE was neither prepared nor legally able to renounce its specific legal authority.<sup>598</sup> The contrast between EEGSA's proposal and the text approved by the CNEE for this article is illustrated by its very text:

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<sup>594</sup> See above at 225 *et seq.*

<sup>595</sup> See above at 236.

<sup>596</sup> Counter-Memorial, pars. 314-315.

<sup>597</sup> Colom **Appendix RWS-1**, pars. 69-71, 107-109 Letter from Miguel Francisco Calleja to José Toledo Ordoñez, May 11, 2007, **Exhibit C-108**, p. 5.

<sup>598</sup> Colom Supplemental Statement, **Appendix RWS-4**, pars. 6-8.

Terms of Reference Article 1.10	
EEGSA's Proposal <sup>599</sup>	Approved Text <sup>600</sup>
These [Terms of Reference] show <u>general guidelines</u> to be followed by the distributor and the consultant in each of the Stages and/or studies that have been described and defined. Consequently, the consultant may vary, in a justified manner, the methodologies presented in each of the studies to be performed, based on its knowledge and experience.	These [Terms of Reference] set forth the guidelines to follow in preparation of the Study, and for each one of its Stages and/or described and defined studies. In the event of deviations in the methodologies set forth in the Study Reports, which <u>must be fully justified</u> , the CNEE shall make such <u>observations regarding the changes as it deems necessary, confirming that they are consistent with the guidelines for the Study.</u>

300. The above comparison clearly shows that the CNEE rejected EEGSA's proposed position, and instead selected a text that safeguarded the CNEE's exclusive ability to determine the methodology for the tariff study as prescribed by the LGE. As Mr. Colom explains in his supplemental witness statement, the final text of this article reflected the following:

<sup>599</sup> Letter from Miguel Francisco Calleja to José Toledo Ordoñez, May 11, 2007, **Exhibit C-108**, p. 5. Unofficial English translation. In its original Spanish language, it reads:

Los presentes TdR muestran los lineamientos generales orientativos a seguir por la distribuidora y por el consultor en cada una de las Etapas y/o estudios descritos y definidos. En consecuencia, el consultor puede variar, de forma justificada, las metodologías presentadas en cada uno de los estudios a realizar, en base a su conocimiento y experiencia.

<sup>600</sup> Addendum to the Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., Resolution CNEE-124-2007, October 11, 2007, **Exhibit R-44**, Art. 1.10. Unofficial English translation. In its original Spanish language, it reads:

Los presentes TdR muestran los lineamientos a seguir en la realización del Estudio y para cada una de sus Etapas y/o estudios descritos y definidos. De existir variaciones de las metodologías presentadas en los Informes del Estudio, las mismas deben estar plenamente justificadas, la CNEE realizará las observaciones que considere necesarias a las variaciones, verificando su consistencia con los lineamientos del Estudio.

- (a) *First*, the CNEE removed the allusion to “general or orienting” guidelines. The clear intention of the final wording of Article 1.10 is that the Terms of Reference were guidelines “to be followed” and binding upon the consultant (unless the CNEE were to authorize the consultant to deviate from them);
- (b) *Second*, the CNEE removed the authority that EEGSA’s proposal would grant the consultant to alter the methodology on its own account and without consultation. The proposal that “the Consultant may be” was amended to a far more limited provision, “in the event of deviations,” which clearly denotes the exceptional character of these deviations;
- (c) *Third*, if the consultant were to propose a variation, it was to be “fully justified,” thereby establishing a requirement greater than if it were merely “justified”; and
- (d) *Fourth* – and above all — the CNEE had to verify by means of its comments that the methodological variations were in keeping with the methodological guidelines contained in the Terms of Reference.<sup>601</sup>

301. Notwithstanding that the above comparison leaves no doubt as to the intention and scope that the parties gave to Article 1.10, witnesses Messrs. Calleja and Maté indicate that they “categorically disagree” with this analysis, which they consider “erroneous.”<sup>602</sup> Nonetheless, beyond these statements, both Messrs. Calleja and Maté conveniently choose not to discuss the process of negotiating this clause (as described above) in their statements. This is particularly telling of Mr. Calleja, who, on behalf of EEGSA, proposed the text of the clause that was later rejected by the CNEE.<sup>603</sup> Thus it is of no surprise that TGH has likewise decided to completely disregard this discussion in the Reply.<sup>604</sup> TGH prefers instead to defer to its legal expert, who notes that it was permissible to deviate from the Terms of Reference because “no provision of the LGE or of the [RLGE] requires that VAD studies adhere to the letter of the Terms of Reference.”<sup>605</sup> As Mr. Aguilar explains, this is a misrepresentation of the letter and spirit of the LGE.<sup>606</sup> According to the LGE, the CNEE is charged with “defining” the

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<sup>601</sup> Colom, **Appendix RWS-1**, par. 71; Colom Supplemental Statement, **Appendix RWS-4**, par. 33

<sup>602</sup> Calleja Reply, **Appendix CWS-9**, par. 20; Maté Reply, **Appendix CWS-12**, par. 13.

<sup>603</sup> Letter from Miguel Francisco Calleja to José Toledo Ordoñez, May 11, 2007, **Exhibit C-108**, p. 5.

<sup>604</sup> Reply, pars. 102 *et seq.*

<sup>605</sup> Alegría Reply, **Appendix CER-3**, par. 62.

<sup>606</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 26, 27.

methodology for calculating the tariffs, the calculation of which is first accomplished by the distributor's consultant in its tariff study. This is the general legal principle under the LGE and the RLGE,<sup>607</sup> as was explained to those investing in EEGSA<sup>608</sup> and as has been confirmed by the Constitutional Court.<sup>609</sup>

302. In any case, it must be stressed that the tariff study that EEGSA presented was far from adhering to the "letter" (using the words of Mr. Alegría) of the methodology established in the Terms of Reference. EEGSA's consultant resorted to Article 1.10 of the Terms of Reference to reject 85 of the 125 comments on deviations from the methodology made by the CNEE,<sup>610</sup> another point conveniently disregarded by TGH in its Reply. Thus, EEGSA's consultant disregarded the CNEE's exclusive authority to establish the study's methodology pursuant to the LGE.
303. For that same reason, it is unavailing for TGH to argue that "the CNEE's own consultants expressly acknowledged that the CNEE's [Terms of Reference] are subject to the provisions of the LGE and the [RLGE] and that they should be used as guidelines in order for the distributor's consultant to carry out its VAD study and, therefore, they may be modified."<sup>611</sup> This is another misrepresentation put forth by TGH. As Mr. Colom confirms in his second witness statement, the tariff study methodology was clearly subject to the provisions of the LGE and the RLGE and, for that very reason, Article 1.10 confirmed: (i) the CNEE's authority to verify the consistency of any change to the Terms of Reference; and (ii) the principle of the hierarchical prevalence of the Law in the event of any possible conflict.<sup>612</sup> Mr. Colom confirms that at no time did this attempt

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<sup>607</sup> LGE, **Exhibit R-8**, Arts. 4(c) and 61; RLGE, **Exhibit R-36**, Art. 97;

<sup>608</sup> Salomon Smith Barney, "EEGSA: Memorandum of Sale", May 1998, **Exhibit R-16**, Appendix A, Arts. 4(c), 61 and 77 and Appendix B, Art. 29.

<sup>609</sup> Judgment of the Constitutional Court, Consolidated Cases Files 1836-1846-2009, November 18, 2009, **Exhibit R-105**, pp. 23-24.

<sup>610</sup> Colom, **Appendix RWS-1**, par. 108.

<sup>611</sup> Reply, par. 111.

<sup>612</sup> Colom **Appendix RWS-1**, par. 69; Colom Supplemental Statement, **Appendix RWS-4**, par.28. Point 1.10 of the Terms of Reference established:

[...] These terms of reference do not constitute a legal or regulatory amendment, therefore in the event of a conflict between any of the

to give the distributor's consultant the authority "to consequently modify" the methodology. In order to preserve the balance of power provided by the Law, any change in the Terms of Reference had to be approved by the CNEE.<sup>613</sup> As Mr. Aguilar explains, the CNEE and not the consultant (or the Expert Commission) must decide whether the Terms of Reference can be changed.<sup>614</sup>

304. In conclusion, TGH cannot attempt to justify the irregular conduct of EEGSA and its consultant in their disregard of the tariff calculation methodology as it is at odds with the clear text of the legal framework and the Terms of Reference.

***b. The final Terms of Reference of the tariff review for 2008-2013 accepted by EEGSA clearly established that EEGSA's returns would be calculated based on capital net of depreciation***

305. In its Reply, TGH asserts that the final version of the January 2008 Terms of Reference violated the basic principles of the LGE by calculating EEGSA's return on a capital-base net of accumulated depreciation, thereby cutting EEGSA's return in half.<sup>615</sup>
306. First, it must be stressed that TGH made no comment to nor filed any complaint regarding this provision of the Terms of Reference. This element alone is sufficient indication that TGH's arguments are groundless. If it were true that the Terms of Reference, as published, reduced EEGSA's return by half and contravened the terms of the LGE, it is clear that EEGSA would have objected to them. We note that TGH has made no such allegation nor submitted any documentation whatsoever evidencing that this issue was even considered within the company. The reason is clear. The Terms of Reference not only comport with the regulatory framework, but also the basic principles of regulatory economics.

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provisions of these terms of reference and the [LGE] or the [RLGE] the latter's provisions shall prevail, applying the principle of legal hierarchy in all cases. Likewise, any omission in these terms of reference, related to aspects defined in the [LGE] and the [RLGE] on the subject of tariffs shall be construed as included in the [Terms of Reference].

<sup>613</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 28.

<sup>614</sup> *Ibid.*

<sup>615</sup> Reply, par. 112.

307. As previously explained, the VNR method, as TGH’s experts well recognize, “values” the capital base at its new replacement value.<sup>616</sup> This valuation method of the capital base is used instead of other methods, such as the book value, which adjusts the value of the capital base for inflation.<sup>617</sup> TGH tries to confuse the Tribunal by using the VNR concept and, in particular, the word “new” from that acronym, to argue that EEGSA should be granted a return on capital based on the “new” value of all installations.<sup>618</sup> This argument is incorrect and is based on an incomplete interpretation of the tariff calculation process: as it has been explained, the model company and the VNR method that make it possible to calculate the updated value of the gross capital base, meaning before depreciation, is only the first step in the process of calculating the cost of capital according to the efficient model company.<sup>619</sup>
308. As explained in the Counter-Memorial,<sup>620</sup> once the value of the asset or capital base has been calculated, it is necessary to calculate the capital cost. This represents the portion of the VAD that remunerates the capital invested by the investor and comprises two elements.<sup>621</sup>

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<sup>616</sup> Reply, par. 112, Kaczmarek II, **Appendix CER-5**, par. 85 (“The LGE used the terminology (in English) of “**New Replacement Value**.” As valuation professionals, the inclusion of the adjective **new** conveys the notion that the assets are *supposed to be valued* as if new [...])” (Emphasis added). Also see Barrera, **Appendix CER-5**, par. 28 (“the VNR corresponds to the total costs that the company would incur *if it were to replace the assets comprising its network with new assets*.”) (Emphasis added). Also see JA Lesser and LR Giacchino, *Fundamentals of Energy Regulation* (1st ed. 2007) (Extract), **Exhibit R-34**, p. 108. In this section of their book, Giacchino correctly defines the VNR and the model company as a way of ‘valuing’ the capital base.

<sup>617</sup> Damonte Rejoinder, **Appendix RER-5**, pars. 87–92.

<sup>618</sup> Reply, pars. 112–116; Barrera, **Appendix CER-4**, par. 28; Kaczmarek II, **Appendix CER-5**, par. 85.

<sup>619</sup> See JA Lesser and LR Giacchino, *Fundamentals of Energy Regulation* (1st ed. 2007), **Exhibit R-34**, p. 108. In this section of their book, Giacchino correctly defines the VNR and the model company as a way of ‘valuing’ the capital base.

<sup>620</sup> Counter-Memorial, pars. 181–182.

<sup>621</sup> Damonte, **Appendix RER-2**, par. 64.

- depreciation, which allows the investor to recover the capital invested, establishing a reserve fund that can eventually be used to replace the asset once its useful life has expired;<sup>622</sup> and
- return, which compensates the investor for the opportunity cost of his capital, by means of profits.<sup>623</sup>

309. In order to calculate the investor's remuneration for the capital invested, meaning the cost of capital, the following is used: (i) the capital base which, in the case of the LGE, is represented by the VNR; (ii) optimized and depreciated (considering accumulated depreciation during the elapsed useful life of the facilities); and (iii) applying a discount rate defined by the regulator. LGE Article 73 provides:

The cost of capital [...] shall be calculated as the constant annuity of cost capital corresponding to the New Replacement Value of an economically designed distribution network.<sup>624</sup> The annuity shall be calculated on the basis of the typical useful life of the distribution facilities and the discount rate [...].<sup>625</sup>

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<sup>622</sup> Damonte, **Appendix RER-2**, par. 64.

<sup>623</sup> Damonte, **Appendix RER-2**, par. 64.

<sup>624</sup> Meaning optimum.

<sup>625</sup> LGE, **Exhibit R-8**, Art. 73 (Emphasis added). Unofficial English translation. It its original Spanish it reads:

El costo de capital [...] se calculará como la anualidad constante de costo de capital correspondiente al Valor Nuevo de Reemplazo de una red dimensionada económicamente . La anualidad se calculará con la vida útil típica de las instalaciones de distribución y la tasa de actualización [...].

Along this same line, Art. 67 provides:

The investment annuity shall be calculated based on the New Replacement Value of the optimally designed facilities, using the discount rate that is used in the calculation of the tariffs and a useful life of thirty (30) years.



310. Contrary to TGH's assertions,<sup>626</sup> the LGE does indeed state that, in order to pay a return on the investor's capital, the cost of capital is calculated on the depreciated VNR. The LGE provides that the cost of capital is calculated as the "annuity" of the cost of capital, based on the "useful life of the distribution facilities" (this phrase would have no purpose if one were to assume the replacement of all assets every five years, regardless of their useful life, which could be up to 30 years). Thus, the annuity to which the LGE refers is the installment the investor receives yearly by way of remuneration and consists of: (i) depreciation (repayment of capital installments); and (ii) the return (payment of income), based on the useful life of the asset, meaning, taking into consideration its condition.
311. The Terms of Reference, which were accepted by TGH, reflected this calculation in the following capital recovery factor formula:

$$\text{Capital Recovery Factor [FRC]} = \underbrace{\left( \frac{1}{T_o} + \frac{r * (T_a / T_o)}{2 * (1 - g)} \right)}_{\substack{\text{Depreciation} \\ \text{depreciación}}} \left. \vphantom{\frac{1}{T_o} + \frac{r * (T_a / T_o)}{2 * (1 - g)}} \right\} \begin{array}{l} \text{Return} \\ \text{retorno} \end{array}$$

Weighted useful life of assets  
 $T_o$  = Amortization period  
 $T_a$  = Adjustment rate defined by the CNEE  
 $r$  = Corporation Income Tax **da por la CNEE**  
 $g$  = Depreciation of the capital base (established in 2008 by the CNEE at 50 percent)  
 $2$  = depreciación de la base de capital (determinada en 2008 por la CNEE en un 50 por ciento)

312. The concept established in the LGE and contained in the Terms of Reference only mirrors the basic concepts of economic theory. As Kahn explains in his classic book on regulatory economics, the return is always calculated based on the portion of the investment net of depreciation:

The return to capital, in other words, has two parts: the return of the money capital invested over the estimated economic life

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<sup>626</sup> Reply, par. 112.

of the investment and the return (interest and net profit) on the portion of the investment that remains outstanding. The two are arithmetically linked, since according to the usual (but not universal) regulatory practice the size of the net investment, on which a return is permitted, depends at any given time on the aggregate amount of depreciation expense allowed in the previous years—that is, the amount of investment that remains depends on how much of it has been recouped by annual depreciation charges previously.<sup>627</sup>

313. In words of another reputed economist, David Johnstone:

[O]nce a depreciation expense is recognized, the owner is ‘paid out’ that amount and hence does not earn a regulated WACC return on it any more.<sup>628</sup>

314. Mr. Giacchino himself, EEGSA’s consultant in the tariff review and TGH’s witness in this arbitration, explains in his book *Fundamentals of Energy Regulation*, clearly and conclusively (and in open contradiction of his assertions during the tariff review and in his witness statements),<sup>629</sup> that the investor’s return is calculated on the basis of depreciated assets, meaning net accumulated depreciation.

315. Thus, in defining the return on capital in his book, Giacchino explains that it is calculated on the depreciated capital base:

#### Return on Capital Assets

When an investor makes his funds available to a firm, he is forgoing the option of using those funds for some other purpose (either current consumption or another investment). He is also putting his funds at some risk. Together, these considerations define the investor’s

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<sup>627</sup> AE Kahn, *The Economics of Regulation, Principles and Institutions* (1996) Vol. 1, (extract), **Exhibit R-7**, p. 32 (Emphasis added).

<sup>628</sup> D. J. Johnstone, “Replacement Cost Asset Valuation and the Regulation of Energy Infrastructure Tariffs: Theory and Practice in Australia,” University of Bath, January 2003, **Exhibit R-168**, p. 9 (Emphasis added).

<sup>629</sup> Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., Stage D Report: Annuity of Investments, March 31, 2008, **Exhibit R-61**, p. 7; Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., corrected, May 5, 2008, **Exhibit R-69**, p. 7; Giacchino, **Appendix CWS-4**, par. 17 (“the concept of VNR does not account for any depreciation of the model company’s asset base.”).

*opportunity cost* [...] The regulated firm's overall return on its capital asset is typically calculated by multiplying its allowed rate of return (i.e., its WACC) by the rate base (i.e., net asset base plus working capital)

#### Net Asset Base

The *net asset base* is the non-depreciated value of the assets that are used in providing utility services to ratepayers. It equals the value of the assets minus accumulated depreciation

[...]

[R]evenue requirements are based on a regulated firm's operating expenses, including depreciation expenses associated with its capital investments and a return on the undepreciated remainder, which forms the rate base.<sup>630</sup>

316. In describing the type of valuation that must be made of the capital base (original or replacement cost), Giacchino illustrates the concept using the following example:

For example, suppose a natural gas pipeline company invested \$100 million 20 years ago to build a new pipeline for its system. That \$100 million represents the *original cost* of the pipeline investment. Under the regulatory compact, the pipeline company is allowed to earn a fair rate of return on that \$100 million invested. Suppose that the pipeline has an expected life of 40 years and half of the original investment, \$50 million, has been depreciated. If the appropriate rate of return was 10% the pipeline should earn \$5 million (10% x \$50 million) on the undepreciated portion of the investment.<sup>631</sup>

317. When referring to the depreciations, Mr. Giacchino similarly explains, as follows:

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<sup>630</sup> JA Lesser and LR Giacchino *Fundamentals of Energy Regulation* (1st ed. 2007) (Extract), **Exhibit R-34**, pp. 56–57 and 99 (Emphasis added). In addition, in describing the costs to be recouped by the investor, Giacchino explains:

The cost of doing business will also include a fair return on the firm's undepreciated capital investment, which is called the rate base, including interest payments on short- and long-term debt and a return on equity capital.

<sup>631</sup> *Ibid*, p. 48.

The accountant's perspective is the most relevant for establishing a regulated firm's overall revenue requirement. Under the accountant's perspective, depreciation implies a systematic allocation of plant and equipment costs [...] that are expensed at a rate consistent with that utility plant's useful life. This allows the regulated firm to fully recover the cost of its capital investment and earn a return on the net, undepreciated portion of the utility plant, called net asset base

[...]

[A] regulated firm's *rate base* (RB) equals the depreciated value of utility plant and equipment. This is just the original cost (i.e., what the firm paid at the time it was purchased) less the aggregate (called *accrued*) depreciation. Thus, we can write  $RB = OC - BR$ , where OC is original cost and BR equals total accrued depreciation (called *book reserve*). For example, if an asset's original cost was \$100 and the firm has depreciated \$20 of the asset, then the book reserve is \$20 and the rate base is \$80.

Over time, the firm's existing plant and equipment age, the depreciated value of that equipment decreases, just like the depreciated value of a car decreases over time. As the firm's asset base decreases, it earns fewer total dollars in return on its capital investment.<sup>632</sup>

318. In his book, Giacchino also provides the mathematical formula that represents the revenue requirement components of a regulated firm. This formula is expressed as follows:

The revenue requirement can be expressed in mathematical form as:

$$RR = O\&M + A\&G + T + D + (WACC \times RB)$$

where:

**RR** is the revenue requirement;

**O&M** is operation and maintenance expenses;

**A&G** is administration and general expenses;

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<sup>632</sup> *Ibid*, pp. 55 and 92 (Emphasis added).

**T** is taxes;

**D** is depreciation;

**WACC** is the weighted average cost of capital; and

**RB** is the rate base that is equal to the gross value of assets minus accumulated depreciation plus working capital.<sup>633</sup>

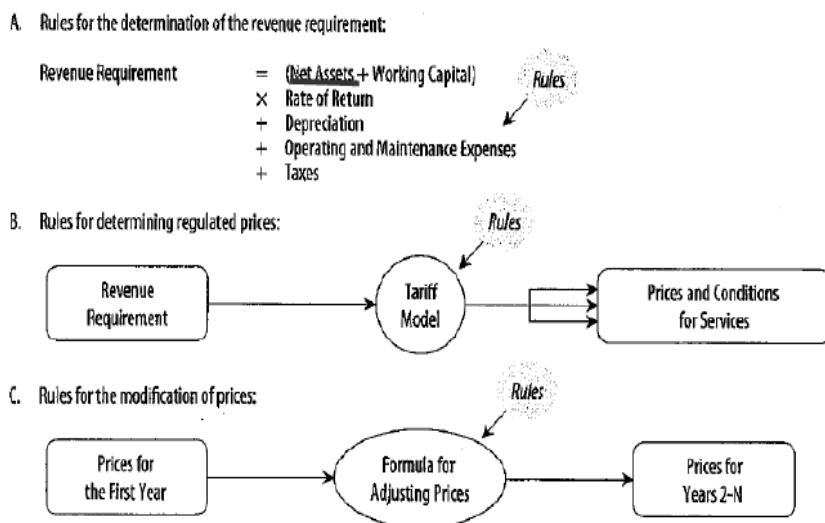
319. Finally, to clear up any doubt regarding how to apply these principles to Guatemala, it is worth mentioning that Giacchino expressly makes it clear that the aforementioned regulatory principles are shared by all regulatory frameworks in determining regulated tariffs:<sup>634</sup>

All regulatory frameworks share the same structure to determine regulated prices. In general, a simple set of rules determines regulated prices, as shown in Figure 4-1:

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<sup>633</sup> *Ibid*, p. 51 (Emphasis added).

<sup>634</sup> *Ibid* p. 64. In his first report, Mr. Kaczmarek explains that the definition of the VNR and the application of the FRC is similar in several other Latin American countries, e.g., Chile (Kaczmarek **Appendix CER-5, par. 59**). As Mr. Damonte explains, the definition of the cost of capital established in the LGE of Guatemala is identical to the definition that is applied in Chile, Peru and El Salvador, to cite the clearest and most important cases. In all these countries, income is calculated based on the capital-base net of depreciation (Damonte Rejoinder, **Appendix RER-5**, Section 3.2.1.1.). As Mr. Damonte also explains, contrary to the arguments made by Mr. Giacchino, in the 2003 tariff review, EEGSA's return was also calculated on the depreciated capital base (Damonte Rejoinder, **Appendix RER-5**, Section 3.2.2.2.).



320. Consequently, it is clear that Giacchino himself provides conclusive support to the arguments of Guatemala explained above.

321. Aware of the weakness of his argument, TGH’s expert Mr. Kaczmarek asserts that it is necessary under the Guatemalan regulatory system to remunerate the investor based on the gross value of its assets because the regulation does not provide the investor with income to replace the existing assets. According to TGH, the investor must, therefore, be remunerated based on the gross value of the capital base and “it will replace the assets as necessary.”<sup>635</sup> Mr. Barrera explains:

The VNR method assumes that as the assets comprising the regulatory asset base **depreciate**, they are simultaneously replaced.<sup>636</sup>

322. Thus it is not TGH’s position that the capital base does not depreciate. TGH agrees that the assets do depreciate, but fictitiously assumes that the investor “automatically replaces” all of those depreciated assets and, therefore, must obtain remuneration for those theoretical new investments.<sup>637</sup> Now, in a regulatory system that does not set

<sup>635</sup> Reply, par. 113, Kaczmarek, **Appendix CER-5**, par. 71–86, Barrera, **Appendix CER-4**, par. 28–29.

<sup>636</sup> Barrera, **Appendix CER-4**, par. 29 (Emphasis added).

<sup>637</sup> Damonte Rejoinder, **Appendix RER-5**, pars. 132–135.

minimum obligatory investment targets, TGH's proposal would mean that the investor would receive a return on investments not yet made, while trusting the investor to make those investments and replace the obsolete assets when it deems necessary. Clearly this regulatory approach has little to do with a system of incentives provided by the model company regulation.

323. As Mr. Damonte explains,<sup>638</sup> according to the Guatemalan regulatory system, the investor receives payment of the amortization of its investment and can decide whether to keep it for itself or to reinvest it in the service in order to replace the assets that may be becoming obsolete. Once these assets are replaced, the reinvested capital increases the “net” base capital and generates both a return and amortization. However, if the investor decides not to invest in replacements, logically no return payment is made nor is any amortization generated over these investments not made. This way, the investor has a real incentive to reinvest in the service and thereby (i) increase the capital base upon which its return will be calculated and (ii) improve its assets so that they come closer to those of the model company.
324. Mr. Kaczmarek argues that under the system established in the Terms of Reference, the investor would never be allowed to recoup the value of its investment. In particular, he asserts that investing under these terms would be like investing in a bond that only pays interest and does not allow recovery of the principal.<sup>639</sup> This is incorrect insofar as if it is not necessary to replace the assets; the investor can keep the payment received for itself. If, however, it is necessary to reinvest part or all of the payment in order to renew the assets and, at the end of the concession, it has not been possible to repay what has been reinvested, the investor may still recover the amount reinvested through payment of the residual value established in Article 57 of the LGE:

Once the authorization ends, the rights and assets of the authorization shall be auctioned off publicly as an economic unit in a period of one hundred and eighty

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<sup>638</sup> *Ibid*, par. 406.

<sup>639</sup> Reply, par. 114, Kaczmarek, **Appendix CER-5**, par. 39.

(180) days. From the amount obtained at the auction, the Ministry will deduct the expenses incurred and the debts of the former holder, and **the balance will be turned over to the latter.**<sup>640</sup>

325. It is clear that if, as TGH suggests, EEGSA should be remunerated based on (i) the gross value of the assets,<sup>641</sup> (ii) in addition to receiving payment for their amortization and, (iii) at the end of the concession, receive the residual value of those assets, EEGSA would be greatly over-compensated.<sup>642</sup>
326. Recognizing the weakness of its argument, TGH tries to cast doubt over the CNEE's seriousness in adopting in the final Terms of Reference the formula for recovering capital proposed by its consultant Mr. Riubrugent. Based on an e-mail from Riubrugent to the CNEE, TGH argues that the reason for Riubrugent's recommendation of the "steady state" model for calculating the FRC—which presumes amortization of the capital base at 50 percent—is that it is the model whereby a lower tariff is obtained.<sup>643</sup> TGH further refers to a question that Ms. Peláez asked the CNEE on January 8, 2008, requesting Mr. Riubrugent to explain the concept of the "2" in the formula.<sup>644</sup> Based on this exchange and on the fact that the CNEE would publish the ToR two weeks later,

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<sup>640</sup> LGE, **Exhibit R-8**, Art. 57 (Emphasis added). ). Unofficial English translation. In its original Spanish, it reads:

Una vez terminada la autorización, los derechos y los bienes de las autorizaciones serán subastados públicamente como una unidad económica, en un plazo de ciento ochenta (180) días. Del valor obtenido en la subasta, el Ministerio deducirá los gastos incurridos y las deudas que tuviere el ex-titular y el saldo le será entregado a éste.

<sup>641</sup> Damonte Rejoinder, **Appendix RER-5**, par. 33. This over-remuneration is clearly shown in Mr. Damonte's report, in which he uses an example to show that calculating the return on the gross VNR as proposed by Iberdrola results in an over-estimate of the cash flow for the 30 years of the assets' useful life by 23.36 percent. This is without considering the residual payment under LGE Art. 55..

<sup>642</sup> *Ibid*, par. 178.

<sup>643</sup> Reply, par. 116.

<sup>644</sup> Chain of e-mail from J. Riubrugent to M. Peláez, M. Quijivix, M. Pérez Yat and A.García, December 13, 2007, **Exhibit C-490**.



TGH asserts that “it is clear that the CNEE itself did not understand the theoretical underpinning of the FRC calculation that it sought to impose upon EEGSA.”<sup>645</sup>

327. Firstly, it is important to point out that what this exchange actually demonstrates is the CNEE’s commitment to a solid technical process. The CNEE not only engaged a consultant to study the matter and advise it but also, instead of limiting itself to accepting the formula proposed by its consultant outright, the CNEE assured itself that it understood the theoretical underpinning for its proposed approach. To this end, Mr. Riubrugent not only explained the use of the “2” in his answer to this e-mail cited by TGH in its Reply,<sup>646</sup> but he also provided an extensive report to explain the issues involved.<sup>647</sup> In addition, the fact that it was the consultant, Mr. Riubrugent, who proposed this formula and who had to explain its basis to the CNEE, discredits TGH’s arguments that the CNEE designed this FRC with a view to reducing EEGSA’s tariff.
328. Secondly, as can be seen from the e-mail exchanges between the CNEE and Mr. Riubrugent,<sup>648</sup> the true reason for his suggestion of the “steady state” model for calculating the FRC was its simplicity in computing the accumulated depreciation of different assets in different conditions, having different useful lives, which therefore, had to be replaced at different times. As Mr. Riubrugent explains, the “steady state” model was simpler than the alternative, the “perpetual service” model, since it provides for a stable service with renewal requirements that are always the same:

A more simple approach to calculate the effect of the income tax on net revenue is to consider the company is in a "stable status." This means that a stable permanent service is offered, with service assets of uniformly allotted ages, and therefore, with renewal requirements (annual investments) that are always the same. [...] According to this model, with

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<sup>645</sup> Reply, par. 116.

<sup>646</sup> Chain of e-mail from J. Riubrugent to M. Peláez, January 9, 2008, **Exhibit C-567**.

<sup>647</sup> Annuity Calculation over the VNR Considering the Effect of the Tax Shield of Tax on Gains by the Authorized Accounting Amortization, December 2007, **Exhibit R-175**.

<sup>648</sup> Chain of e-mails from J. Riubrugent to M. Peláez, M. Quijivix, M. Pérez Yat and A.García, December 13, 2007, **Exhibit C-490**.

WACC after tax equivalent to 7%, the Capital Recovery Formula (FRC) corresponding to the annuity of capital cost (ACC) is 8.53%.<sup>649</sup>

329. Furthermore, as this explanation clearly shows, the method proposed by the consultant provided a return on the capital base of 7 percent (the minimum required by the RLGE, which requires a return between 7 and 13 percent on the capital base). In addition, as Mr. Riubrigent clearly explained to the CNEE, “it must be noted that by adopting  $T_a=T_o$ , the greatest possible capital cost for this company model is observed.”<sup>650</sup> It was on these bases and not to reduce the tariffs on a discretionary basis as TGH claims, that the CNEE accepted this methodology.<sup>651</sup>
330. Finally, it is important to mention that the level of depreciation of the capital base of 50 percent established in the capital recovery formula recommended by Riubrigent and incorporated by the CNEE in the final Terms of Reference was applicable to all distributors and not just to EEGSA. Other distributors, such as Deorsa and Deocsa, who did not agree with the level of depreciation established in the Terms of Reference, simply approached the CNEE and submitted accounting information that justified that, in order to reflect the real depreciation of their assets, the “2” had to be replaced by 1.73.<sup>652</sup> This request was granted without further resistance from the CNEE.<sup>653</sup> However, Bates White insisted on calculating the return based on the non-depreciated capital base which, as previously explained, is contrary to basic economic principles.<sup>654</sup> Bates White simply chose to consider the “2” to be a “typographical error” in the Terms of Reference and refused to offer any alternative to the level of depreciation proposed in

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<sup>649</sup> Calculation of the Annuity on the VNR Considering the Effect of the Tax Shield placed on Income by the Authorized Accounting Amortization, December 2007, **Exhibit R-175**, p. 2, (Emphasis added).

<sup>650</sup> Chain of e-mails from J. Riubrigent to M. Peláez, January 9, 2008, **Exhibit C-567**.

<sup>651</sup> Bates White, Value-Added for Distribution Study for EEGSA: Phase C Report: Optimization of the Network, February 29, 2008, revised on March 31, 2008, **Exhibit R-179**, p. 92.

<sup>652</sup> Witness Statement of Enrique Moller, Director of the National Electricity Commission of Guatemala, January 24, 2012 (hereinafter **Moller Supplemental Statement**), **Appendix RER-5**, par. 389.

<sup>653</sup> Quantum and Union Fenosa, DEOCSA, Stage G Report: Cost Components of the VAD and Consumer Charges, November 2008, **Exhibit R-98**, Section 4.1; Damonte Rejoinder, **Appendix RER-5**, par. 389.

<sup>654</sup> Bates White, Distribution Value Added Study for EEGSA: Phase D Report: Investment Annuity, February 29, 2008, revised March 31, 2008, corrected May 5, 2008, **Exhibit R-69**, p. 9.

the Terms of Reference.<sup>655</sup> As explained in detail below,<sup>656</sup> even the Expert Commission understood that the return must be calculated based on the capital-base net depreciation.

331. Based on the foregoing, it is clear that the final Terms of Reference, which established a system of remuneration based on the depreciated value of the capital base, reflected the basic principles of the LGE and regulatory economics. This is the true reason that EEGSA did not challenge them at the time.

### **3. It was EEGSA and its consultant firm that refused to work constructively with EEGSA during the tariff review**

332. In its Counter-Memorial, Guatemala noted that it was essential for EEGSA to deliver tariff-related information in advance of its stage reports, not only for the CNEE to study the distributor's report, but also for the consultant firm Sigla to prepare its parallel tariff study.<sup>657</sup> Guatemala further explained how EEGSA refused, since the start of the tariff review, to submit the required information despite the fact that this was a specific requirement of the Terms of Reference.<sup>658</sup> In its Reply, TGH attempts to defend itself on this point by accusing the CNEE of alleged uncooperativeness.<sup>659</sup> In view of the lack of evidence to support this argument, TGH again refers to the formal issues that delayed the CNEE's formal acceptance of the Stage A and B Reports by the CNEE, an entirely minor issue within the context of the tariff review that was of no consequence.<sup>660</sup> TGH also reiterates its complaint that the CNEE only held one meeting with EEGSA and its consultant firm (in November 2007) to discuss the tariff study being prepared. As explained below, TGH is mistaken, and its complaints are groundless. On the contrary,

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<sup>655</sup> *Ibid*, p. 11.

<sup>656</sup> *See* Section V.E.9.c below.

<sup>657</sup> Counter-Memorial, par. 327.

<sup>658</sup> The CNEE requested EEGSA the submission of the information that would constitute the *input* for carrying out the Tariff Study, EEGSA disregarded the aforementioned requests and did not deliver the information or else delivered it partially or past the deadline. *See, e.g.*, letters from the CNEE to EEGSA, **Exhibits R-41, R-43, R-47, R-48, R-49**; for more examples and details, *see* **Appendix R-III**.

<sup>659</sup> Reply, par. 117-122

<sup>660</sup> *Ibid*, par. 117-118.

the facts and evidence demonstrate that it was EEGSA that systematically refused to collaborate with the CNEE during the tariff review process.

*a. TGH's arguments regarding the CNEE's alleged uncooperativeness are implausible*

333. First, TGH complains that the CNEE refused to acknowledge receipt of Stage A and B Reports because, as evidenced in the CNEE's letter to EEGSA of December 17, 2007, they did not satisfy the formal requirements for submission (as TGH explains it, "EEGSA's authorized representative had not submitted the [stage] report by 'formal delivery' with a notarized power of attorney, a copy of EEGSA's contract with Bates White and all information furnished by EEGSA to Bates White."<sup>661</sup> As Mr. Colom confirms in his supplemental witness statement, this request simply reflects the requirements set forth in applicable regulations, which EEGSA was perfectly familiar with because it had dealt with the regulator throughout the past decade.<sup>662</sup> These requirements, as TGH accepts, included (i) proof of legal capacity (the "notarized power of attorney") described in RLGE Article 142,<sup>663</sup> (ii) a copy of the EEGSA-Bates White contract and (iii) the supporting information, all contained in the Terms of Reference.<sup>664</sup>

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<sup>661</sup> *Ibid*, par. 117-118 and Note No. the CNEE-15225-2007 from the CNEE to EEGSA, December 17, 2007, pp. 1-2, **Exhibit C-134**.

<sup>662</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 62.

<sup>663</sup> RLGE Art. 142 states:

**Art. 142: How to Handle Contact with the Commission:** Contact with the Commission may be conducted in person or through an authorized representative. Legal representatives may provide evidence of their status by means of authenticated photocopies of the documentary evidence justifying said status ..."

RLGE, **Exhibit R-36**, Art. 142 (Emphasis added).

<sup>664</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., Resolution the CNEE-124-2007, **Exhibit R-53**. The relevant parts of Arts. 1.5 and 1.6.5.1 state:

[...] which must establish the Distributor Company's and the Consultant Firm's commitment to:

1) Accept, comply with and implement the ToR.

2) Send the CNEE a copy of all documentation and information used to conduct the Study in each one of the phases or stages. In addition to the information that the CNEE requests directly, the Distributor Company

TGH complains that the CNEE insisted on these requirements to EEGSA in its note of January 31, 2008.<sup>665</sup> However, as Mr. Colom explains in his supplemental witness statement, TGH fails to mention that CNEE's insistence was founded in EEGSA's persistent failure to meet these legal requirements! The note in question, dated January 31, 2008, specifically points out to EEGSA that "it reiterates the request made in [the Terms of Reference] and in [the note dated December 17, 2007]," and makes another detailed request to meet the aforementioned requirements.<sup>666</sup>

334. Consequently, although TGH does not explain why EEGSA decided to comply with these legal requirements as recently as the end of January 2008, it was logical for the CNEE to insist on its request for legal compliance, no matter how formalistic EEGSA might consider it. It is clear that, as a government body, the CNEE is under the obligation to comply with and enforce compliance with administrative regulations in relation to any submissions made to it. Its civil servants would have run the risk of incurring personal liability had they failed to do so. In any case, as Mr. Colom explains, two things became clear from the delay in acknowledging receipt of Stage A and B

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must send the CNEE a copy of all of the information they send or transfer to the Consultant Firm.

3) Provide free access at all times to the CNEE in all aspects related to the Study, in the manner in which it requests it. The reports, spreadsheets, documents related to Study, activities, optimization criteria, mathematical models, etc. must be included so that the CNEE may perform the supervision, control and analysis activities during and after its development. The CNEE shall be given copies of all the information used in the required formats, both in print and in editable digital files that allow the CNEE to replicate the calculations.

The Distributor Company must give the CNEE a copy of the contract signed with the Consultant Firm, within five (5) days of it being signed, including the financial acknowledgements that are agreed, and of the notarized deed referred to in the second paragraph of this section.

[...]

Art. 1.6.5.1:

The Distributor must submit the corresponding stage report in accordance with the provisions of Number 1.4 of these ToR.

*Also see paragraphs 336-339 below.*

<sup>665</sup> Reply, par. 117-122

<sup>666</sup> Note No. the CNEE-15504-2008 from the CNEE to EEGSA, January 30, 2008, **Exhibit C-158**.

Reports: (i) it was solely attributable to EEGSA's negligence in meeting its obligations under the Law and the Terms of Reference; and (ii) it did not cause EEGSA any material damage during the ongoing tariff review process.<sup>667</sup> Thus, TGH's claim in this regard is irrelevant.

335. Secondly, the alleged lack of meetings between EEGSA and the CNEE that TGH claims is simply false. The CNEE Board of Directors or its Tariff Management met on numerous occasions with EEGSA during the tariff review process—as TGH acknowledges—for example, to discuss possible modifications to the RLGE,<sup>668</sup> to discuss modifications to the Terms of Reference<sup>669</sup> or to form the Expert Commission and discuss the possibility of agreeing to operating rules.<sup>670</sup> With regard to the technical tariff review process, on November 21, 2007 the CNEE Tariff Division held a meeting with EEGSA and its consultant firm, Sigla, to discuss issues related to the tariff study.<sup>671</sup> Thereafter, according to the Terms of Reference, Bates White was to submit nine preliminary stage reports before submitting its full tariff study.<sup>672</sup> The Terms of Reference did not provide for additional meetings; instead, the CNEE was to issue written comments on each stage report so that the distributor's consultant firm could amend any possible deviation from the Terms of Reference as soon as possible.<sup>673</sup>

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<sup>667</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 35.

<sup>668</sup> Reply, par. 99.

<sup>669</sup> Memorial, paragraph 106.

<sup>670</sup> Memorial, pars. 128-130, 132, 137; Reply, par. 147; Calleja Reply, **Appendix CWS-9**, par. 33; Maté Reply, **Appendix CWS-12**, par. 24.

<sup>671</sup> In particular: (i) demand characteristics within the concession area; (ii) identifying geographic areas where users had similar consumption habits and projecting growth in demand; (iii) defining Urban Centers; and (iv) establishing the means to identify the users in the commercial base (or the posts of the Network base) found within each Center. Counter-Memorial, par. 326; Colom, **Appendix RWS-1**, par. 85.

<sup>672</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., the CNEE Resolution 124-2007, January 2008, **Exhibit R-53**, Art. 1.4.

<sup>673</sup> Colom, **Appendix RWS-1**, pars. 41, 84. Although this mechanism imposed a great workload on the CNEE Tariff Division, it was designed to introduce predictability and speed to the tariff review and is conclusive evidence of the dedication and earnestness with which the CNEE reviewed EEGSA's tariff study. It is also important to point out that EEGSA objected to the submission of stage reports and insisted that only a final study had to be submitted (*See* Letter from Miguel Francisco Calleja to José Toledo Ordoñez, May 11, 2007, **Exhibit C-108**, p. 3). However, since it was essential for the CNEE to

EEGSA not only issued these comments promptly, but also, in view of the complexity of the process, the CNEE granted EEGSA all of the extensions requested for delivering six of the nine stage reports.<sup>674</sup>

*b. It was EEGSA that refused to collaborate with the CNEE during the tariff review*

336. TGH's arguments related to the CNEE's alleged lack of cooperation are nothing more than a "smoke screen" to cover EEGSA's conduct during the tariff review, which began with its illegitimate objections to the Terms of Reference and continued with the distributor's systematic refusal to submit information to the CNEE. The CNEE's need to have this information in time was not a minor issue. As explained in the Counter-Memorial,<sup>675</sup> in order to have a proper point of reference (*benchmark*) for monitoring the stage reports and the tariff study that Bates White would prepare for EEGSA, the CNEE (as per the RLGE) had to have its own stage reports and tariff study as prepared concurrently by its prequalified consultant firm Sigla. In order to prepare these reports, Sigla had to have basic information from the distributor. Thus, Sigla needed the same information that was available to Bates White. To this end, the Terms of Reference contained the specific obligation to submit information prior to receipt of the stage reports in Article 1.6.5:

**1.6.5.** [...] The Distributor must submit to the CNEE, prior to each stage report, the base information conveyed to the consultant in order to prepare each phase of the study, on the date that it is conveyed to the consultant.<sup>676</sup>

337. As Mr. Colom explains,<sup>677</sup> this obligation was later reiterated in the correspondence from the CNEE to EEGSA, in which the CNEE clearly stated its need to verify the

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analyze them to be able to carry out a more efficient review, the stage reports were kept in the Terms of Reference.

<sup>674</sup> Colom, **Appendix RWS-1**, par. 86 (*see* table).

<sup>675</sup> Counter-Memorial, pars. 260, 280.

<sup>676</sup> Terms of Reference for the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., the CNEE Resolution-124-2007, January 2008, **Exhibit D-53** (Emphasis added).

<sup>677</sup> Colom Supplemental Statement, **Appendix R-4**, pars. 35-36.

accuracy of the supporting information furnished before the stage reports were submitted.<sup>678</sup> As Mr. Colom explains, the order of submitting supporting information had been agreed upon between the CNEE and EEGSA in August 2007.<sup>679</sup> There, it was arranged that the latter would submit the information in two Blocks: “Block 1”<sup>680</sup> information had to be submitted by EEGSA no later than September 4, 2007;<sup>681</sup> and “Block 2”<sup>682</sup> information had to be furnished no later than September 25, 2007.<sup>683</sup>

338. Even though it was clear to both parties that the supporting information had to be delivered to the CNEE before starting the stage report, EEGSA systematically failed to fulfill this obligation, delivering information incompletely and after the deadline. In its Counter-Memorial, Guatemala cited, by way of example, EEGSA’s letter of September 17, 2007 in response to a request for geographic reference and grid distribution information made by the CNEE, which clearly shows EEGSA’s unwillingness to submit

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<sup>678</sup> Letter from Mr. Carlos Colom Bickford to Mr. Luis Maté, the CNEE-14676-2007 / DMT-NoteS-457, October 3, 2007, **Exhibit R-174**, p. 2:

Given that this information [of Block 1] is essential for the appropriate supervision of the tariff studies, by means of the present, EEGSA is hereby notified that it must submit all outstanding Block 1 information (mentioned previously) by October 5 of this year at the latest.

<sup>679</sup> Colom Supplemental Statement, **Appendix R-4**, par. 35; Letter from Mr. C Colom to Mr. Luis Maté (EEGSA), the CNEE-14425-2007 / DMT NoteS-424, August 17, 2007, **Exhibit R-172**, pp. 1 and 9:

[...] it was agreed [between the CNEE and EEGSA] to make a request to [EEGSA] for the Supporting Information for the execution of the Tariff Study by means hereof, which shall be supervised by the CNEE in accordance with the Powers it is granted by the Law [...] The information must be presented to the CNEE on the dates shown below: 1. Block 1 delivery. Supporting Information. September 4, 2007; 2. Block 2 delivery, Supporting Information. September 25, 2007.

<sup>680</sup> Block 1 (Market Information, Distribution Grids Information – Physical Information) included the commercial databases, the client-grid connection, electricity purchases and power losses.

<sup>681</sup> Letter from Mr. Carlos Colom Bickford to Mr. Luis Maté, (EEGSA), the CNEE-14425-2007 / DMT NoteS-424, August 17, 2007, **Exhibit R-172**, p. 9. the CNEE granted EEGSA an extension to submit Block 1 information until September 14, 2007. Letter from Mr. Carlos Colom Bickford to Mr. Luis Maté, the CNEE-14602-2007 / DMT Note 446), September 6, 2007, **Exhibit R-173** (granting the extension).

<sup>682</sup> Block 2 (Cost Information) included the request for cost information for exploitation, operation and maintenance and construction units, among other data.

<sup>683</sup> Letter from Mr. C Colom to Mr. Luis Maté (EEGSA), the CNEE-14425-2007 / DMT NoteS-424, August 17, 2007, **Exhibit R-172**. the CNEE granted EEGSA an extension to submit Block 2 information until October 22, 2007; Letter from Mr. Carlos Colom Bickford to Mr. Luis Maté, the CNEE-14676-2007 / DMT-NoteS-457, October 3, 2007, **Exhibit R-174**.



information.<sup>684</sup> TGH attempts to downplay these instances of non-compliance in its Reply through its witness Mr. Maté, who states that “this letter does not reflect EEGSA’s uncooperative attitude but shows that EEGSA submitted to the CNEE all of the available information.”<sup>685</sup> This is false. Note, for example, that in the Reply, Mr. Maté observes that “the requested information [in the letter] concerning the ‘urban’ and ‘rural’ did not exist, as there was no such distinction made between urban and rural zones by Guatemalan legislation or by EEGSA.”<sup>686</sup> What is certain is that the urban/rural classification is defined in the Technical Standards for the Distribution Service [Spanish

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<sup>684</sup> EEGSA letter of September 2007 in response to the CNEE’s request for information, the relevant part of which reads:

In response to your official letter the CNEE-14425-2007, DMT-Notes-424, attached, I send you the Georeferential Information about the Distribution Network of EEGSA [...]  
 Connection from the hook-up post up to the TC. **Not available.** C. Energy purchases over five years ... **not available.** [...] i. HV line length. **Not available.**  
 [...] Average length between urban posts, ...**not available** Average length between rural posts, ...**not available**  
 Number of posts urban LV, ...**not available**  
 Number of posts rural LV, ...**not available**  
 [...] Length average operable urban section, ...**not available**  
 Length average operable rural section, ...**not available**  
 [...] Average length between urban posts, ...**not available** Average length between rural posts ...**not available**  
 [...] Number of rural posts ...**not available**  
 [...] Number of junctions per km...**not available**  
 [...] Number of connected customers ...**not available** Average length LV feeder ...**not available** Number of terminals...**not available**  
 Number of junctions ...**not available**  
 [...] High-voltage injection point. **Not available.**  
 [...] All with primary voltage in 13.2 kV/7.62 kV, usage factor **not available.**

Letter from Carlos Fernando Rodas to Carlos Colom Bickford (GAC-P&N-C-338-2007), September 17, 2007, **Exhibit R-42** (Emphasis added).

In May 2007, EEGSA refused to submit this information. *See* Letter from Mr. Miguel Calleja to Mr. José Toledo Ordoñez, May 11, 2007, **Exhibit C-108**, p. 7, says in the relevant section: “Georeferenced Information: Comment: The information must be limited to the information available from the company [...] There is no available information about the coordinates of the users themselves [...]”.

<sup>685</sup> Maté Reply, **Appendix CWS-12**, par. 16.

<sup>686</sup> Reply, par. 121; Maté Reply, **Appendix CWS-12**, par. 16.

acronym: NTSD] that had been in effect since the first tariff schedule and which were applicable to EEGSA.<sup>687</sup> Article 1, entitled “Definitions,” reads:

**Rural Service:** Any electric energy service that a Distributor provides to a User located in population centers do not meet the conditions of Urban Service.

**Urban Service:** Any electric energy service that a Distributor provides to a User located in population centers that are departmental or municipal seats or, failing that, in population centers integrated into the above, in which the distance between Service Connections for such service is less than fifty meters.<sup>688</sup>

339. Perhaps the best proof that EEGSA consciously decided not to collaborate with the CNEE in the tariff review process is that after the sale of TGH’s share in EEGSA to its new operator, Empresas Públicas de Medellín (EPM), and within the context of this tariff review, the company’s attitude changed radically. The new operator has shown a readiness to collaborate and has provided the information that the subsidiary possesses, including, in particular, the user’s geo-referential data, as well as additional classifications that the previous operator had refused to provide not long before.<sup>689</sup>

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<sup>687</sup> The CNEE Technical Rules of the Distribution Service, published in the *Diario de Centro America* on April 11, 1999 and which are applicable to the Agents and the Members of the Wholesale and End Users Market of the Electricity Distribution Service. Technical Rules of the Distribution Service. **Exhibit R-165**, Arts. 1, 2 and 3.

<sup>688</sup> Technical Distribution Service Rules (TDSS), **Exhibit R-165**, Art. 1. In addition, to implement the quality standards of the quality index report set forth in Art. 55 TDSS for disruptions, they must be submitted with an urban/rural breakdown, *Ibid*, Art. 55. Unofficial English translation. In its original Spanish language it reads:

**Servicio Rural:** Es todo servicio de energía eléctrica que un [d]istribuidor presta a un [u]suario ubicado en poblaciones que no cumplan con las condiciones de [s]ervicio [u]rbano.

**Servicio Urbano:** Es todo servicio de energía eléctrica que un [d]istribuidor presta a un [u]suario, ubicado en poblaciones que son cabeceras departamentales o municipales o, en su defecto, en aglomeraciones poblacionales o núcleos integrados a las anteriores, en los cuales la distancia entre las [a]cometidas de estos servicios es menor a cincuenta metros.

<sup>689</sup> Letter from Carlos Rodas to Ms. Carmen Urizar (GPC-442-2012), September 17, 2012, **Exhibit R-206** to which EPM attaches a disc, containing, among other things, the “users’ geo-referential information”, something that the company allegedly did not have only five year ago. *See* footnote 684.

340. Consequently, it is clear that the excuses made by witness Mr. Maté do not justify EEGSA's refusal to cooperate by submitting information that was essential for the CNEE to perform its supervising duty. In particular, as Mr. Colom explains in his supplemental witness statement, the letter of September 17 did not represent an isolated instance of EEGSA's lack of cooperation; rather there were many other similar breaches by the distributor, some of which are listed in the table below:<sup>690</sup>

Date	Reference	Description	Extract
September 12, 2007	<b>Ref. GG-083-2007 (R-41)</b>	The CNEE's objection regarding the unwillingness of EEGSA and BW to provide requested data	“With regard to Block 2, which is data regarding costs and not necessary for defining the rankings it is <u>absolutely impossible to obtain it as requested by the 24th of this month. Said data is part of the tariff study and a consultant has been hired for this purpose. It will be delivered as the study is conducted to the the CNEE's prequalified consultant</u> ” (Emphasis added)
September 19, 2007	<b>Ref. GGI-237-2007 (R-43)</b>	The CNEE's objection regarding the unwillingness of EEGSA and BW to provide requested data	“[T]he breakdown of technical and non-technical losses is not available, nor do we have data on power losses. All we have is the data on total network power losses for the last four years.” (Emphasis added)
November 20, 2007	<b>the CNEE-15049-2007 (R-47)</b>	The CNEE's objection noting that the data received is insufficient and present several problems	“Upon analyzing the data submitted, we have found various compilation problems caused by the data presentation method, specifically for network data and user commercial databases [...] The data [...] presents significant gaps during the period between August 1998 and September 2007. [...] The table that connects the user ID to the pole ID contains incomplete data.”
December 17, 2007	<b>the CNEE 15218-2007 / GTTE Note S - 32 (R-48)</b>	The CNEE's objection regarding the fact that the deadline for submitting data had expired	“[EEGSA] promised to send the data in question within no more than two weeks [...] Said deadline has now expired and it has failed to submit said data to the National Electricity Commission (the CNEE).”
December 18, 2007	<b>the CNEE-15216-</b>	Notification from the CNEE informing	“With regard to the base data submitted to the Study Consultant who is to determine the Value-Added for

<sup>690</sup> Colom Supplemental Statement, **Appendix RWS-4**, pars. 36.

	<b>2007 (R-49)</b>	EEGSA that the base data it submitted is incomplete	Distribution (VAD) hired by the Distributor; said data has not been submitted in its entirety to the CNEE; although it has been established on several occasions that the Distributor's consultant firm (Bates White) has data that was never sent to the CNEE."
January 30, 2008	<b>the CNEE 15504- 2008 / GTTE Note S- 60 C-158</b>	Note from the CNEE requesting supplemental information for the reports sent in official letters GG-07-2008 and GG-08-2008	"[...] We hereby reiterate our request [...] of December 20, 2007 [...] requesting from EEGSA [...]: 1) The formal submission of the Stage Report by EEGSA's appointed representative for the Value- Added for Distribution VAD) Study. Said submission must be accompanied by the corresponding copy of the notarial instrument of said representative's appointment as legal representative. 2) Copy of the agreement signed by and between EEGSA and the Bates White Consulting Firm, effectively confirming the effects of the agreement, as required by the Terms of Reference of the Study. 3) Copy of all data provided to the Consulting Firm by EEGSA [sic] for the purpose of conducting the Study."

341. The letters described in the preceding table demonstrate that the CNEE insisted on obtaining the necessary information that would allow it to perform its duty responsibly. No distributor complained that the CNEE was "asking for too much information" as TGH now tries to say through Mr. Giacchino.<sup>691</sup> The CNEE had a function to carry out pursuant to the LGE during the tariff review, and had demonstrated sufficient flexibility with EEGSA to allow it to rectify its breaches. As Mr. Colom explained in his original witness statement, despite the fact that EEGSA failed to meet the agreed deadlines for submitting Block 1 and Block 2 information, the CNEE agreed to grant extensions in order to gain access to the pending information.<sup>692</sup> Even so, EEGSA continued to refuse to submit the required information, this being clear evidence of its lack of cooperation with the CNEE's procedure.

342. Finally, TGH complains in its Reply that the CNEE made comments on the study submitted by EEGSA on March 31, 2008 in "just eleven days," therefore declaring it

<sup>691</sup> Giacchino Reply. **Appendix CWS-10**, par. 15.

<sup>692</sup> Colom, **Appendix RWS-1**, par. 86.

inappropriate.<sup>693</sup> What TGH fails to explain is that the EEGSA tariff study submitted on March 31 was simply a collection of the stage reports that EEGSA had submitted according to the schedule established in the Terms of Reference. The CNEE had already studied these stage reports and made comments.<sup>694</sup> To the CNEE's surprise, the tariff study of March 31, 2008 had simply integrated the stage reports already submitted to the CNEE and contained very few of the amendments requested in due course by the regulator; therefore, there was no need for additional time for review.<sup>695</sup>

**4. EEGSA, through its Chairman, attempted to negotiate new tariffs with the CNEE, outside the regulatory framework and in disregard of its tariff study, presenting a “discount offer” not provided for by Law**

343. As Guatemala explained earlier in its Counter-Memorial, several weeks after submitting the CNEE's comments on the EEGSA tariff study of March 31, 2008 (proposing an increase in the VAD of 261.88 percent for low voltage and 83.56 percent for medium voltage), the CNEE received a request for a meeting (without an agenda) from Mr. Gonzalo Pérez, Chairman of the EEGSA Board and President of Iberdrola for Latin America, who was based in Mexico.<sup>696</sup> As Guatemala has explained, at this meeting, held on April 22, 2008, Mr. Pérez distributed a presentation explaining that the new tariff study which Bates White was preparing (to be presented on May 5, 2008) would include an “estimated compensation increase of 100 percent”<sup>697</sup> and this same presentation contained an offer to be applied “outside the study” that reduced the 100 percent increase proposed by the consultant in its next study to 10 percent, which could be implemented without a corresponding tariff increase, according to Pérez.<sup>698</sup> As Mr. Colom said, Mr. Pérez himself indicated during the meeting that the study that Bates White was about to present was “worthless,”<sup>699</sup> proof of which Mr. Colom noted in his

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<sup>693</sup> Reply, par. 119; the CNEE Resolution 63-2008, April 11, 2008, **Exhibit R-63**.

<sup>694</sup> Colom, **Appendix RWS-1**, pars. 88, 89, 94-95, 98.

<sup>695</sup> *Ibid* par. 100,

<sup>696</sup> *Counter-Memorial*, par. 336-338.

<sup>697</sup> Presentation on Tariff Study Income Requirements, **Exhibit R-65**, p. 8. (Emphasis added).

<sup>698</sup> *Ibid*, p. 12-13.

<sup>699</sup> Colom, **Appendix RWS-1**, par. 103. Colom Supplemental Statement, **Appendix RWS-4**, par. 54.

copy of the presentation (which TGH obtained through its associate Iberdrola and presented in this arbitration).<sup>700</sup> Naturally, the proposal was rejected by the CNEE, as it was not authorized to “negotiate” a distribution tariff outside the study.<sup>701</sup>

344. Mr. Pérez’s proposal first arose in the ICSID arbitration case filed by *Iberdrola* against Guatemala in 2009. Guatemala denounced this irregular proposal in its Counter-Memorial in those arbitration proceedings, as Iberdrola had failed to refer to it in its Memorial. Based on the precedent of the *Iberdrola* case, TGH set the stage and made reference to Mr. Pérez’s proposal in its Memorial, attaching the same copy of the presentation introduced by Guatemala in the *Iberdrola* case (which includes the handwritten note of Mr. Colom cited in the preceding paragraph).<sup>702</sup> In its Memorial, TGH tried to present the “outside-the-study” proposal made in person by the EEGSA Chairman as a legitimate and transparent possibility.<sup>703</sup> In its Counter-Memorial, Guatemala referred to the serious irregularities entailed in Mr. Pérez’s “discount offer” made in an in-person meeting lacking any pre-established agenda, in a document of which there was only one copy, with no e-mail by way of introduction or follow-up, without using letterhead and without mentioning the real names of the people and companies involved.<sup>704</sup> In its Reply, TGH has not refuted (because it cannot) these arguments, instead it has stressed the supposed legality of EEGSA’s conduct in presenting this proposal.<sup>705</sup>
345. Indeed, TGH and its witness Mr. Maté insist that the source of Mr. Pérez’s proposal was an alleged offer made by Mr. Moller at a lunch held on April 11, 2008. According to TGH, during this lunch, Mr. Moller asked Mr. Maté, (General Manager of EEGSA) whether EEGSA would accept a 5% lower VAD than the one in force, and EEGSA

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<sup>700</sup> *Ibid*, par. 103.

<sup>701</sup> Counter-Memorial, par. 343. Colom Supplemental Statement, **Appendix RWS-4**, par. 55; Moller Supplemental Statement, **Appendix RWS-5**, par. 11.

<sup>702</sup> Colom, **Appendix RWS-1**, par. 103.

<sup>703</sup> Memorial, par. 121.

<sup>704</sup> Counter-Memorial, par. 340 ; Colom Supplemental Statement, **Appendix RWS-4**, par. 51.

<sup>705</sup> *Ibid*, par. 340.

responded with the April 22 counterproposal to the CNEE.<sup>706</sup> As Mr. Moller previously explained and now reiterates in his supplemental witness statement, this is absolutely false.<sup>707</sup> Mr. Moller has explained that he lunched several times with Mr. Maté—always at Mr. Maté’s invitation—but that he would never have made this type of proposal, which contravened the technical tariff-setting procedure established under the LGE.

346. Other than the statements of witnesses Messrs. Calleja and Maté (prepared for this arbitration), there is no evidence in the record of Mr. Moller’s alleged proposal. Given the high volume of e-mails at EEGSA, one would expect that this type of proposal would have been discussed at an executive level; however, there is no written record (an e-mail, a memo, between Mr. Maté and Mr. Calleja, or from Mr. Maté to his superior, Mr. Pérez) from the time of the alleged proposal.
347. Mr. Maté acknowledges that Mr. Moller’s alleged proposal “is written in [his] statement” alone, which is clear evidence that this argument was prepared in an attempt to legitimize the irregular conduct of EEGSA’s representatives, including Mr. Maté himself.
348. Such a proposal would directly undermine the modernization and expansion of the CNEE’s Tariff Division, the focus of efforts by Mr. Moller and his colleagues to ensure technical support for the tariff review process.<sup>708</sup> Furthermore, as Messrs. Colom and Moller explained in their witness statements, beyond the illegality of “negotiating” a proposal of this kind, as of the date of this meeting (April 2008), the CNEE had no parameter for evaluating the reasonableness of a proposal of this kind since the tariffs studies assigned to its independent consultants were not yet ready.<sup>709</sup>
349. TGH also insists that the proposal presented by Mr. Pérez “was in no way secret,” and that EEGSA was not “interested in an improper or illegal agreement.”<sup>710</sup> In addition, its

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<sup>706</sup> Reply, par. 124; Maté Reply, **Appendix CWS-12**, par. 17.

<sup>707</sup> Moller, **Appendix RWS-2**, par. 37; Moller Supplemental Statement, **Appendix RWS-5**, par. 8.

<sup>708</sup> Moller, **Appendix RWS-2**, par. 38; Moller Supplemental Statement, **Appendix RWS-5**, par. 12.

<sup>709</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 53.

<sup>710</sup> Reply, par. 124; Maté, **Appendix CWS-6**, par. 22.

witness Mr. Maté tries to downplay this proposal, arguing that Mr. Colom's "insinuations" were "curious" regarding the fact "that there was something underhanded about the meeting because there was no agenda and no letterhead on the presentation," because EEGSA's meeting with the CNEE "was not secret: it was attended by each of the three directors of the CNEE and the President and General Manager of EEGSA, at the CNEE's offices."<sup>711</sup> In this respect, it is clear that the presence of CNEE civil servants at a pre-established meeting without an agenda neither adds to nor removes the irregularity of the proposal, because these civil servants did not know of the business to be discussed. And as indicated, the lack of letterhead is just one noteworthy characteristic of the presentation; in addition, there was only a single copy of the document, without an e-mail by way of introduction or follow-up, and no mention of the real names of the people and companies involved (referring solely to "Distributor" and to "Consultant"). It is clear that this conduct is inconsistent with a belief in the legality of this proposal. When questioned in this respect at the final hearing of the *Iberdrola* case, Mr. Maté gave an explanation which requires no further comment:

Q. Is there some reason that this document is not on EEGSA or Iberdrola letterhead?

A. Absolutely none, really. Well, because blank paper was used in printing it.

Q. Blank paper was used in printing it.

A. Yes, that was what was in the printer, and it was printed out. But there is no reason. [...].

Q. Can you show me where in this document there is a reference to EEGSA, that uses the word "EEGSA" in this document, in the 15 pages [...] of this presentation [...] Where is EEGSA mentioned?

A. Well, you see, strangely, strangely now that you say it, I actually don't know where [...].<sup>712</sup>

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<sup>711</sup> Maté Reply, Appendix **CWS-12**, par. 19

<sup>712</sup> *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/05) Witness statements of Mr. Luis Maté, Tr., Day Two, 373:17–374:14. **Exhibit R-202**. Unofficial English translation. In its original Spanish language, it reads:

P ¿Hay alguna razón porque no consta el membrete de EEGSA o de Iberdrola en este documento?

R Pues absolutamente ninguno. Pues porque se utilizó papel en blanco para imprimirlo.

P Se utilizó papel en blanco para imprimirlo.



350. In another extract from his statement, Mr. Maté argues that “no one ever indicated to him that the CNEE did not have authority to negotiate EEGSA’s tariffs, as Colom now asserts.”<sup>713</sup> And, once the meeting ended, the CNEE Directors told him that “they would study EEGSA’s presentation,” but he never received a response from the CNEE regarding his proposal.<sup>714</sup> Mr. Maté’s arguments, besides being untruthful, do nothing more than confirm his ignorance of how the regulatory framework of the electricity sector in Guatemala functions. As Mr. Colom explains, the reason the CNEE did not have authority to “negotiate” EEGSA’s distribution tariff in the tariff review process was simply because such negotiation was not provided for nor permitted under the LGE.<sup>715</sup> Mr. Colom explains that Mr. Maté’s assertion that the CNEE’s Directors promised to consider the proposal is untrue.<sup>716</sup> As Mr. Colom explains, Mr. Pérez’s proposal could not even be considered—and was, in fact, disregarded by the CNEE—because it was contrary to the LGE’s mandate, which established a technical process for reviewing tariffs.<sup>717</sup> With respect to the lack of response to the proposal, as Mr. Colom explains, Mr. Pérez’s proposal placed the CNEE Board in a very uncomfortable position since its negotiation or acceptance was entirely beyond its powers and the provisions of

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R Sí, era el que estaba en la impresora y se imprimió. Pero no hay ninguna razón. [...].

P ¿Usted puede indicarme en este documento dónde consta una referencia a EEGSA, que utiliza la palabra EEGSA en este documento, en las 15 páginas [...] de esta presentación? [...] ¿dónde se menciona EEGSA?

R Pues mire, curiosamente, curiosamente ahora que usted lo dice efectivamente no sé dónde [...].

<sup>713</sup> Reply, par. 127; Maté, **Appendix CWS-6**, par. 23.

<sup>714</sup> Reply, pars. 119 and 127; Maté, **Appendix CWS-6**, par. 23.

<sup>715</sup> Colom Supplemental Statement, **Appendix RWS-4**, pars. 55.

<sup>716</sup> *Ibid.*

<sup>717</sup> *Ibid.*

the LGE.<sup>718</sup> As Mr. Colom explains, the most appropriate response under these circumstances was silence.<sup>719</sup>

351. In addition, TGH, through its witness Mr. Maté, denies the fact that Mr. Pérez stated during the meeting that the upcoming Bates White tariff study of May 5th was “worthless.”<sup>720</sup> This is false. As explained in the Counter-Memorial and as Mr. Colom confirms in his supplemental statement, not only did Mr. Pérez make this statement during this meeting, but (in view of the surprise it caused him, as Mr. Pérez had commissioned that study), Mr. Colom transcribed what Mr. Pérez said on his copy of the presentation:

EEGSA: (that the study performed by the EEGSA consultant was useless).<sup>721</sup>

352. Mr. Maté’s generic denial does not suffice to invalidate the documentary evidence—the handwritten note contained in the copy of the presentation that TGH itself has presented in this arbitration.
353. Finally, TGH attempts to justify the legality of its proposal by pointing to an unrelated incident in which TGH incorrectly involves Mr. Colom, who was the General Manager of INDE at the time.<sup>722</sup> TGH refers to a letter addressed to the CNEE jointly by Mr. Otto Girón, manager of ETCEE (transmission company and subsidiary of INDE), and Leonel Santizo, General Manager of Trelec (transmission company for the DECA II group, operated by Iberdrola), in which the two transmission companies gave the CNEE a

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<sup>718</sup> As previously explained (Counter-Memorial, par. 343), once the tariff schedule was established, the Distributor could, on its own account and at its own risk, decide to charge lower tariffs; however, that is not something that the distributor negotiates in advance with the CNEE, but rather is at the distributor’s sole discretion.

<sup>719</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 55.

<sup>720</sup> Colom, **Appendix RWS-1**, par. 103; Maté Reply, **Appendix CWS-12**, par. 19.

<sup>721</sup> See handwritten note in the Presentation on Tariff Study Income Requirements, April 22, 2008, **Exhibit R-65**, p. 8; Colom **Appendix RWS-1**, par. 103; Colom Supplemental Statement, **Appendix RWS-4**, par. 54. Unofficial English translation. In its original Spanish language, it reads: “no servía para nada”.

<sup>722</sup> Calleja Reply, **Appendix CWS-9**, par. 30; Maté Reply, **Appendix CWS-12**, par. 18. Also see Reply, par. 125.

discount proposal for its tolls in the electricity transmission system.<sup>723</sup> In this respect, it is first necessary to highlight what is evident: INDE did not send the letter that TGH presents, it is not signed by Mr. Carlos Colom nor does it mention his name.<sup>724</sup> Mr. Colom explains, however, that even if the letter were to involve INDE (which it does not), this comparison is completely inapplicable given the differences in the roles of the different entities:

The comparison that Mr. Calleja attempts to make is invalid, since INDE and its subsidiaries are regulated companies (and not regulatory bodies), and are for-profit enterprises that are in competition with other companies in the development and operation of the electric energy system. In fact, INDE operates as a public holding company of three companies generating, marketing and transporting energy (the latter being ETCEE). The CNEE, on the other hand, is the regulatory body responsible for the electricity sector. Therefore, it is clear that the two bodies have completely different functions, just as the President of the CNEE and the General Manager of the INDE have completely different responsibilities.<sup>725</sup>

354. It is clear that the context and circumstances in the two situations could not be more dissimilar.
355. It is worth repeating yet again that TGH (as with Iberdrola in the previous arbitration) has conveniently avoided presenting Mr. Pérez to explain, as a witness, what led him to make such a discount offer. The motivation, in any case, is clear. On March 31, EEGSA had presented a clearly overvalued tariff study (245 percent increase in the VAD) for the sole purpose of paving the way for the “negotiation.” Now threatening a 100 percent increase in the next study, Mr. Pérez proposed only a 10 percent increase as an offer that the CNEE *could not refuse*.<sup>726</sup> In sum, this demonstrates not only EEGSA’s lack of respect for the rule of law, but also the unreliability of the results of the Bates White

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<sup>723</sup> *Ibid.*

<sup>724</sup> Note 0-553-170-2005 from TRELEC and ETCEE to the CNEE, May 9, 2005, **Appendix C-91**, pp. 3-4.

<sup>725</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 56.

<sup>726</sup> Tariff Study Presentation: Requirement for Joining, April 22, 2008, **Exhibit C-194**, p. 13.

tariff studies. If these tariff studies had been reliable, how could Mr. Pérez justify to his shareholders the relinquishment of at least 90 percent of their income? There would be no possible justification.

**5. The May 5 study reflected an increase in VAD of 184 percent vis-à-vis the “offer” of 10% provided by Mr. Perez only days prior**

356. In its Counter-Memorial,<sup>727</sup> Guatemala explained that on May 5, 2008, only a few days after Mr. Pérez’s visit, Bates White submitted a second version of its tariff study as Mr. Pérez had anticipated. To the surprise of the CNEE, however, the Bates White study of May 5 did not show a 100 percent increase in the VAD as Mr. Pérez had threatened, but rather an increase of 184 percent. Furthermore, as explained in detail in the Counter-Memorial,<sup>728</sup> the study incorporated barely 40 of the 125 corrections ordered by the CNEE in its comments on the May 31 study. Bates White justifies its failure to make the corrections required by the regulatory framework with a blatant misinterpretation of Article 1.10 of the Terms of Reference, according to which Bates White had the freedom to apply its own methodological criteria. Nonetheless, as Guatemala previously explained, this article only allowed Bates White to change the methodology established in the Terms of Reference with the agreement of the CNEE.<sup>729</sup> To illustrate how the May 5 study seriously breached the Terms of Reference, we need only mention that the models were still “not auditable,” the justification of the efficient prices still omitted domestic and international comparators, there was no benchmarking or database systemization, and the construction units still were not optimal.
357. In its Reply, TGH maintains that even if these defects were present, they are not “relevant” because they were submitted to the Expert Commission and, where necessary, were corrected in its July 28 study.<sup>730</sup> Beyond the fact that, as explained in Section V.E.10 below, these mistakes were not corrected in the July 28 study, contrary to what TGH maintains, the study of May 5 is indeed relevant. TGH is seeking to evade

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<sup>727</sup> Counter-Memorial, pars. 349-350.

<sup>728</sup> *Ibid*, pars. 344-348.

<sup>729</sup> *Ibid*, par. 346.

<sup>730</sup> Reply, par. 129.

the fact that, after submitting a proposal for negotiating a 10 percent increase to the VAD, its study now required a 184 percent increase. TGH does not even attempt to explain this inconsistency, because it cannot do so.

358. Bates White's insistence that it could object to the CNEE and refuse to submit auditable information or justify efficient prices until such time as the Expert Commission told it otherwise<sup>731</sup> (which it ultimately did) demonstrates TGH's lack of good faith. Bates White was aware that the CNEE would have neither the time nor the opportunity to audit the information submitted after the Expert Commission's pronouncement, nor could the CNEE establish whether the prices submitted were efficient with regard to domestic and international comparators. This also begs the question why, if Bates White was supposedly able to satisfy these requirements in July, it was unwilling to satisfy them in May when the CNEE required it to do so.

*a. The May 5 model was not auditable and the traceability requirement was reasonable*

359. As previously explained in the Counter-Memorial,<sup>732</sup> the role of the CNEE is to analyze whether the distributor's tariff study complies with the Terms of Reference established at the outset of the review process. In order for the CNEE to meet its legal obligation, the information contained in the distributor's study must be auditable, understandable and capable of analysis by third parties that did not carry out the study, such as the CNEE and its advisors.<sup>733</sup> The traceability of the Model is imperative, as it allows the regulator to audit the calculations made and to verify that the tariff study in fact establishes an efficient tariff.<sup>734</sup>
360. To understand the importance to the regulator of having traceable models, it is important to understand how a model is built. As Mr. Damonte explains it:

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<sup>731</sup> *Ibid*, pars. 129–130.

<sup>732</sup> Counter-Memorial, par. 201.

<sup>733</sup> *Ibid*, par. 202; Damonte Expert Report, **Appendix RER-2**, par. 94; LGE Art. 75, **Exhibit R-8**; Colom Witness Statement, **Appendix RWS-1**.

<sup>734</sup> Damonte Expert Report, **Appendix RER-2**, par. 94.

A model built in Excel is made up of one or more spreadsheets that contain equations that link a set of input cells with another set of output cells, or results, using different algorithms and parameters. Thus, the model allows any user to recalculate results by changing only the value of the input cells and/or the parameters.<sup>735</sup>

361. The traceability of the Models enables the regulator to audit the calculations made and to verify that the tariff study in fact calculates an efficient tariff:

[...] By auditing the model, it can be tested whether this reflects a result in accordance with the regulatory framework, the rules of the art in economic, regulatory and engineering questions. Auditing a model means being able to check the calculations presented in the spreadsheets of the model from the “baseline data” to the final result, in order to verify the logic of the calculation. [...] Auditing the calculations requires two elements. First a full linkage of the cells containing the data in the spreadsheets; and second, that the model is properly documented, containing calculation memories and valid supports of all data input as well as of all the parameters involved in the calculation process. [...] The task of auditing Excel spreadsheet calculations is performed with a tool built into the Excel spreadsheet itself. To audit a cell that contains a calculation involving other cells, it is necessary to be in the cell and then activate the button to audit the preceding cells, at which the software generates arrows that lead to the preceding cells with which it is linked. The same can be done with the cells that depend on this. If the references are in another spreadsheet, it is necessary to also open that other form to monitor the calculation. [...] Once it is clear how the cells, and if necessary the spreadsheets, are linked to each other, it is necessary to check whether if that linkage is correct. For that it is necessary to have a document showing the algebraic formulas used, with the corresponding explanation, inference and fundamentals.<sup>736</sup>

362. Here, it is important to clarify two concepts explained by Mr. Damonte. The first consists of the “linking” of the model, that is, the link between the cells themselves and,

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<sup>735</sup> *Ibid*, par. 97.

<sup>736</sup> *Ibid*, pars. 98–102 (Emphasis added).

in turn, between the various spreadsheets. The linking of the model is important as it allows the logic of the cells to be followed. Only if all cells and spreadsheets are mutually linked do the fields update themselves automatically when one of the cells is modified. This linking is what enables adjustments to be made to the model in order to run sensibilities. The second concept, related to but not the same as linking, is the traceability or auditability of the model. In order to be able to trace or audit the model, on one hand, the spreadsheets must be linked, and on the other hand, each cell in each spreadsheet must contain the formulas used for each calculation, as well as its supporting data. Although a model may be linked, if it does not contain justification for the calculations made (for example, if it contains values “pasted” without any explanation) there is no way for a third party to verify the reasonability and accuracy of its calculations.

363. Mr. Giacchino acknowledges that the tariff studies submitted to the CNEE, including the May 5, 2008 study, were not linked: “[i]n its study, Bates White had not linked the models for several reasons.”<sup>737</sup> Mr. Damonte also confirms that the models utilized in the Bates White tariff study of May 5, 2008, were not auditable because, among other things, the information needed to verify the formulas had not been submitted:

The models submitted by BW consist of a large number of Excel spreadsheets, the cells of which are used to calculate values that belong not only to cells in the spreadsheet itself but also to dozens of other spreadsheets. Upon review of the model, the following difficulties in auditing it are noted. First, the Excel spreadsheets corresponding to the “models” used in the 5/5/2008 BW study were not fully linked, as L. Giacchino himself acknowledges in his second witness statement, saying that “it was not possible to link the model because several people were working simultaneously in several different countries in order to complete the study prior to the submission deadline.” The consequence of this is that auditing those spreadsheets becomes exceptionally complex and uncertain, and in many cases impossible, where, for example, values were “pasted.” Second, BW has not provided

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<sup>737</sup> Giacchino, **Appendix CWS-4**, par. 54.

calculation worksheets or supporting documentation for the majority of the formulas used, particularly as to issues relating to optimization of the model, making it impossible to audit whether its Excel models work on the basis of an optimization model as the regulations require. Therefore, it is not possible to confirm whether the model adheres to the Terms of Reference required by the CNEE for the Tariff Calculation. Finally, in many cases, the cells do not contain algebraic formulas or links to other cells, but only “pasted” values, without sufficient support for their values, and in many cases without any identification. In such cases, there is no way to audit the origin or the basis of that value.<sup>738</sup>

364. In its Reply, despite insisting upon the irrelevance of the May 5 study and its traceability, TGH attempts to justify the inauditability of its Model. In particular, Mr. Giacchino bases the lack of traceability on: (i) the use of four groups of professionals; (ii) the lack of time; (iii) the assumption that the models could be explained to the CNEE at a meeting; (iv) that it was not required by the Terms of Reference; and (v) that the usefulness of fully linking the model was limited given that the memory restrictions of the computer equipment prevented the simultaneous operation of all the spreadsheets.<sup>739</sup> Moreover, TGH argues that Mr. Damonte stated in his first report that in order to be able to “conduct the audit of such “Models,” all the spreadsheets involved must be kept open,” but that “given the large number of spreadsheets” that made up the “Model” and the size of the files, the simultaneous operation of all of these files was not possible.”<sup>740</sup> TGH thus argues that Mr. Damonte had admitted that it was not possible to operate all the files until Excel 2010 was available.<sup>741</sup> As explained below, each of these excuses lacks foundation.

365. In the first place, contrary to what TGH alleges, the requirement to submit linked models such that the calculations could be reproduced was clearly stated in the Terms of Reference:

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<sup>738</sup> Damonte Rejoinder, **Appendix RER-5**, pars. 165–167.

<sup>739</sup> Giacchino, **Appendix CWS-4**, par. 54.

<sup>740</sup> Damonte, **Appendix RER-2**, footnote 41.

<sup>741</sup> Reply, par. 130



“The CNEE shall be given copies of all information used, in the required formats, both in print and in editable digital files that allow the CNEE to replicate the calculations.”<sup>742</sup>

“[S]o that the CNEE may verify the process or load the information into spreadsheets and/or databases and eventually perform sensitivity analysis by changing the used variables.”<sup>743</sup>

“This Report must contain at least the following [...] the corresponding models which would allow the CNEE to verify and reproduce the process [...].”<sup>744</sup>

366. Were there any doubt, the comments made by the CNEE to Bates White’s tariff studies clearly expressed the importance of having auditable models. For example, the CNEE explained to Bates White in its comments on stages C and E that:

“[T]he respective calculation reports and models should be sent (with magnetic support, without protection and with the respective links) to enable the CNEE to reproduce and

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<sup>742</sup> Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., Resolution CNEE 124-2007, January 2008, **Exhibit R-53**, point 1.5(3) (Emphasis added). Unofficial English translation. In its original Spanish language, it reads:

Deberá entregarse copia a la CNEE de toda la información utilizada en los formatos requeridos, tanto en forma impresa como en archivos digitales modificables que permitan a la CNEE replicar los cálculos.

<sup>743</sup> *Ibid*, point 1.64 (Emphasis added). Unofficial English translation. In its original Spanish language, it reads:

[D]e manera que la CNEE pueda verificar el proceso o cargar la información en hora de cálculo y/o bases de datos y eventualmente realizar análisis de sensibilidad mediante la modificación de las variables utilizadas

<sup>744</sup> *Ibid*, point 4.6 (Emphasis added). Unofficial English translation. In its original Spanish language, it reads:

Este Informe deberá contener como mínimo lo siguiente [...] los correspondientes modelos que permitan a la CNEE verificar y reproducir el proceso [...].

validate the analysis performed. An explanation of each and every one of the adopted criterion should also be included.”<sup>745</sup>

“[...] Some values included in the spreadsheet lack any formulas or origin, thus preventing the verification of the methodology applied to them. All values should be justified and the CNEE should be able to replicate them in order to emulate the results obtained by Distributor.”<sup>746</sup>

367. Further, the excuse given by TGH—that the usefulness of linking was limited because, without having Excel 2010, memory restrictions “prevented the spreadsheets from being opened all at once”<sup>747</sup>—warrants no consideration. As Mr. Damonte explains, it was absolutely possible to simultaneously open and work with two spreadsheets with a well-built Model, even without Excel 2010.<sup>748</sup> Such simultaneous work was made impossible only because of the structure of the Bates White “Model,” which consisted of 163 large spreadsheets that were created with two different versions of Excel (2003 and 2007).<sup>749</sup> Excel 2010 would not have solved the serious errors in the Bates White “Model” given the pasted values and other characteristics that impeded the traceability of the model.

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<sup>745</sup> See, e.g., Letter from Mr. C. Colom Bickford to Mr. L. Maté (Stage C), March 14, 2008, **Exhibit C-169**, pp. 6–7. Unofficial English translation. In its original Spanish language it reads:

[D]ebe enviarse la respectiva memoria de cálculo, y modelos (en medio magnético, sin protección y con los correspondientes vínculos) para que CNEE pueda reproducir y validar los análisis efectuados, debe incluirse también, la justificación de todos y cada uno de los criterios adoptados.

<sup>746</sup> See Letter from Mr. C. Colom Bickford to Mr. L. Maté (Stage E), March 25, 2008, **Exhibit C-176**, p. 1 (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

[...] Algunos de los valores presentados en la planilla de cálculo, no poseen las fórmulas ni el direccionamiento de las celdas de las mismas, impidiendo la verificación de la metodología aplicada en los mismos. Es necesario que todos los valores estén justificados y que los valores sean replicables, con el objetivo de que la CNEE pueda emular los resultados obtenidos por la Distribuidora.

<sup>747</sup> Reply, par. 130.

<sup>748</sup> Damonte, **Appendix RER-5**, par. 266

<sup>749</sup> *Ibid*, par. 268.

368. Finally, it is inexcusable (i) to imply that the CNEE could carry out its function as auditor by attending a meeting at which models would be explained to it; and (ii) to prevent the regulator from carrying out its legal duties due to the consultant's lack of time and team structure.
369. The reasonableness of the traceability requirement obvious to any expert in the field. Furthermore, as explained further below, it was unanimously confirmed by the Expert Commission itself, of which Giacchino was a member.<sup>750</sup> Thus, it is clear the inauditable nature of the Bates White study had a specific objective: to force the CNEE to approve the study without proper verification of its content.

***b. Bates White did not submit two international reference prices as required under the ToR***

370. As indicated by Guatemala in its Counter-Memorial, Bates White systematically disregarded its obligation to submit a complete price database that included, *inter alia*, (i) international reference prices, and (ii) a structure that was easily auditable, despite the fact that it was a specific requirement in the Terms of Reference, reiterated through numerous comments from the CNEE on the Bates White reports.<sup>751</sup>
371. Mr. Giacchino himself admits that there was a requirement to provide international reference “prices”<sup>752</sup> yet he justifies his own non-compliance, asserting that the requirement “is often impossible to carry out”<sup>753</sup> and that “the price methodology suggested by the CNEE in the Terms of Reference was economically unsound.”<sup>754</sup> As previously explained, the opportunity to challenge the methodology of the Terms of Reference is offered prior to the commencement of the tariff review. Once finalized,

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<sup>750</sup> Report of the Expert Commission, July 25, 2008, **Exhibit R-87**, p. 17.

<sup>751</sup> Counter-Memorial, pars. 395, 419, 515.

<sup>752</sup> Giacchino, **Appendix CWS-4**, par. 17.

<sup>753</sup> *Ibid.*

<sup>754</sup> Giacchino Supplement, **Appendix CWS-10**, par. 34.

Bates White was to abide by the final Terms of Reference as published, unless the CNEE otherwise agreed.

372. The fact that Bates White provided much of the information in PDF files, or even in image files of scanned invoices or purchase orders, made it difficult and even impossible to process the information received. The purpose of a database containing prices and costs is to allow them to be processed electronically, as Mr. Damonte explains:

The problems that arose due to the lack of electronic databases in suitable format were varied in nature, ranging from the simple absence of information to the impossibility of reading it, not just electronically but even the illegibility of scanned photocopies. Additionally there were also difficulties in linking different data types, such as material numbers with invoice numbers, with purchase order numbers, or budget numbers.<sup>755</sup>

373. Bates White's submission of information in PDF form clearly evidences the lack of effort to facilitate the CNEE's duties to review and monitor the study. Mr. Damonte explains this as follows:

The importance of having a Database with both prices and costs lies with the ability to process them electronically. The fact that a significant portion of the information is supplied in PDF files, or even image files of scanned invoices or purchase orders, hindered and even blocked the necessary processing required.<sup>756</sup>

*c. The construction units were not optimal*

374. As Mr. Damonte pointed out, the Bates White New Replacement Value of May 5, 2008 was not optimized and contained an "enormous overestimation of the VNR that BW carried out in all categories of the study."<sup>757</sup> In its Counter-Memorial, Guatemala provided some examples to illustrate the over-dimensioning, unreasonableness and lack

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<sup>755</sup> Damonte, **Appendix RER-2**, par. 129; see also Damonte Rejoinder, **Appendix RER-5**, par. 172.

<sup>756</sup> Damonte Rejoinder, **Appendix RER-5**, par. 171.

<sup>757</sup> *Ibid*, par. 192.

of optimization of the construction units of the May 5, 2008 Bates White tariff study.<sup>758</sup> In its Reply, TGH limits its discussion to its partial elimination of underground networks in its May 5 Study<sup>759</sup>.

375. As explained in the Counter-Memorial, Bates White sought to calculate a VNR based on a much longer length of underground networks than its actual network, with a much higher value compared to aerial networks.<sup>760</sup> Contrary to what TGH alleges, not only did the regulatory framework prohibit this, nor did municipalities require the substitution of aerial networks for underground networks. It is therefore no surprise that TGH has not submitted any document to support the stance maintained by the witness, Mr. Giacchino.<sup>761</sup>
376. The following communications between the CNEE and EEGSA clearly show that EEGSA knew since its first submitted stage report (and not since April 2008 as TGH alleges)<sup>762</sup> that the regulatory framework in Guatemala would not allow for the inclusion of underground networks:

Communication	Position regarding inclusion of underground networks
<b>Bates White Stage Report</b>	“An underground system was adopted.” <sup>763</sup>
<b>Comments by the CNEE on the Stage Report</b>	[T]he second paragraph of Article 52 provides that: “The successful bidder <u>must provide service through air lines</u> [...] The criterion used by the Distributor to account for underground installations [...] <u>does not comply with provisions set forth in the General Electricity Law. As a consequence, the inclusion in the study of all the underground</u>

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<sup>758</sup> Counter-Memorial, pars. 403-410.

<sup>759</sup> Reply, par. 131.

<sup>760</sup> Counter-Memorial, pars. 403-405.

<sup>761</sup> Reply, par. 131.

<sup>762</sup> *Ibid.*

<sup>763</sup> Memo from M. Calleja to C. Colom and Memo from L. Giacchino to C. Colom and M. Calleja, attaching the Bates White Stage C Report: Optimization of the Distributor Network, February 29, 2008, **Exhibit R-178**, p. 4

	<u>distribution installations suggested to be taken into account in the VNR is not feasible.</u> <sup>764</sup>
March 31, 2008 Bates White Tariff Study	LGE Article 52 exempts the concessionaire from building underground networks when they are not recognized by tariffs. <u>This article entails a minimum obligation</u> (construction of aerial networks) by the distributor. <sup>765</sup>
the CNEE Resolution 63-2008	<u>[The underground facilities] were not registered during the onsite inspection</u> of the Sample audited, performed by the CNEE and EEGSA personnel, straying from what is set out in the Terms of Reference. <sup>766</sup>
May 5, 2008 Bates White tariff study	LGE Article 52 exempts the concessionaire from building underground networks when they are not recognized by tariffs. <u>This article entails a minimum obligation</u> (construction of aerial networks) by the distributor, but it does not prohibit the use of other technologies. <sup>767</sup>
the CNEE Resolution 96-2008	[the CNEE] disagrees with the inclusion of the underground facilities required by the Distributor. <sup>768</sup>

377. Given the persistence of these (and many other) deviations from the Terms of Reference, the CNEE had no other choice but to reject the May 5 Bates White tariff study.

## 6. The procedure before the Expert Commission complied with the provisions of the LGE

### a. *The Expert Commission was to limit its role to determining whether the distributor's study complied with the Terms of Reference established by the CNEE*

378. As explained in the Counter-Memorial, after the CNEE rejected the May 5 Bates White tariff study for failure to abide by the Terms of Reference, and due to ongoing differences between the parties, the CNEE, through Resolution 96-2008 dated May 15,

<sup>764</sup> Letter from Mr. Carlos Colom Bickford to Mr. Luis Maté, GTTE-MemoS S-438, March 14, 2008, **Exhibit C-169**, p. 3.

<sup>765</sup> Bates White, Distribution Value-Added Study for Empresa Eléctrica de Guatemala, S.A., Stage C Report: Network Optimization, February 29, 2008, revised on March 31, 2008, **Exhibit C-181**, p. 92.

<sup>766</sup> the CNEE Resolution 63-2008, **Exhibit R-63**, p. 9-10.

<sup>767</sup> Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., corrected on May 5, 2008, **Exhibit R-69**, p. 120.

<sup>768</sup> the CNEE Resolution 96-2008, May 15, 2008, **Exhibit R-71**.

proceeded to constitute the Expert Commission as provided for under LGE Article 75.<sup>769</sup> Pursuant to the LGE, such an opinion was limited to determining whether the distributor's study complied with the Terms of Reference established by the CNEE.<sup>770</sup>

379. In its Reply, TGH reasserts that the Expert Commission was not “limited to determining whether the Terms of Reference had been properly applied in the distributor’s study”<sup>771</sup> and, citing Mr. Alegría, indicates that such body had power to resolve “any discrepancies or differences between the parties with respect to the calculation of the VAD components in the distributor’s VAD study.”<sup>772</sup> Mr. Alegría also states that the Expert Commission was not limited to resolving whether the distributor had correctly implemented the amendments requested by the CNEE, “but could also consider whether the CNEE’s corrections should be implemented at all, in view of the Terms of Reference and the provisions of the LGE and RLGE.”<sup>773</sup> TGH also alleged that, pursuant to the contract between Mr. Bastos and the CNEE, Mr. Bastos was required to “‘verify the correct application of the methodology and criteria established in the Terms of Reference’ in EEGSA’s VAD study, indicating his ‘position in relation to each discrepancy set forth in Resolution the CNEE-96-2008; as well as on the responses to [the] same from’ EEGSA and “‘understand and apply the applicable legislation on the points under discrepancy identified precisely in Resolution the CNEE-96-2008, and the replies to [the] same by [EEGSA] and its Consultant’ and ‘[i]ssue his decision on the discrepancies, according to current law and the Terms of Reference approved by the CNEE’.”<sup>774</sup> According to TGH, these contractual provisions only made sense because the function of the Expert Commission was not “limited to determining whether the ToR

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<sup>769</sup> Counter-Memorial, par. 351.

<sup>770</sup> *Ibid.*

<sup>771</sup> Reply, par. 137.

<sup>772</sup> *Ibid.*, par. 136; Alegría Reply, **Appendix CER-3**, par. 31.

<sup>773</sup> Reply, par. 137; Alegría Reply, **Appendix CER-3**, par. 36.

<sup>774</sup> Reply, par. 136.

had been properly applied in the in the distributor's study."<sup>775</sup> As explained below, the allegations made by TGH are inaccurate.

380. First, given the consultant's obligation under the regulatory framework to "incorporate" the corrections required by the CNEE such that the study would comply with the Terms of Reference (RLGE Article 98), the only discrepancies that could remain for consideration by the Expert Commission are: (i) whether the distributor made the corrections; or (ii) whether the corrections were properly implemented.<sup>776</sup> Thus, the Expert Commission is not only barred from modifying the Terms of Reference, but it also lacks the authority to question or alter its content, just as it cannot approve or reject the distributor's study; and/or approve the tariffs. For this reason, it must be clarified that Resolution 96-2008 (which provided for the formation of the Expert Commission) at no time supported TGH's assertion that the Expert Commission could go beyond determining whether the distributor correctly applied the Terms of Reference. In the operative part of that Resolution, the function of the Expert Commission is defined as "[v]erifying the correct application of the Terms of Reference of the Value-Added Distribution Study approved by the National Electric Energy Commission."<sup>777</sup> Neither the Terms of Reference nor the LGE or the RLGE establish any other task for the Expert Commission. In other words, the scope of work for the Expert Commission is defined in a manner that is consistent with the legal framework on the whole. Guatemala has already explained that the CNEE cannot delegate its functions related to the tariff review, as confirmed by the Constitutional Court.<sup>778</sup> Thus, the Expert Commission cannot go beyond its functions by rendering its pronouncement and invading the functions reserved for the CNEE. If it does so, its pronouncement, or the parts thereof that go beyond the Expert Commission's powers, may not be considered by the CNEE

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<sup>775</sup> *Ibid*, par. 137; Contract between Carlos Bastos and the CNEE, June 26, 2008, **Appendix R-85**, clauses 3 and 4, items d) and e).

<sup>776</sup> Counter-Memorial, par 207.

<sup>777</sup> the CNEE Resolution 96-2008, May 15, 2008, **Exhibit R-71**, p. 3.

<sup>778</sup> Counter-Memorial, pars. 125(a), 172(b) and 173; Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, **Exhibit R-110**, p. 34.



as they are in breach of the LGE and RLGE.<sup>779</sup> The Expert Commission’s scope of work is thus clearly defined.

381. In this context, Mr. Alegría’s statement regarding the functions of the Expert Commission which, according to him, “may [also] concern whether the CNEE corrections should be implemented at all,” lacks any legal foundation and Mr. Alegría offers no support for such statement.<sup>780</sup> As Mr. Aguilar explains, RLGE Article 98 establishes the consultant’s obligation to incorporate the CNEE’s comments, as was previously accepted by EEGSA in the 2002 tariff review. To grant the Expert Commission the authority to decide whether those comments should be implemented or not is inconsistent with RLGE Article 98.<sup>781</sup>
382. Secondly, the language of the contract between Mr. Bastos and the CNEE provides no support for TGH’s argument regarding the alleged “lack of sense” in limiting Bastos’ functions as a member of the Expert Commission.<sup>782</sup> TGH provides a selective reading of that contract, clause three of which gives a general description of the function of the expert, indicating that he must “verify the correct application of the methodology and criteria established in the Terms of Reference.”<sup>783</sup> This is fully consistent with the task ordered by Resolution CNEE-96-2008 to verify whether or not the tariff study incorporated the CNEE’s comments regarding the Terms of Reference.<sup>784</sup> Clearly, the

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<sup>779</sup> Counter-Memorial, par. 210.

<sup>780</sup> Reply, par. 137; Alegría Reply, **Appendix CER-3**, par. 36.

<sup>781</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 27.

<sup>782</sup> Reply, par. 137.

<sup>783</sup> Contract between Carlos Bastos and the CNEE, June 26, 2008, **Appendix R-85**, Clause 3:

In his conduct as “EXPERT” he must verify the correct application of the methodology and criteria established in the Terms of Reference [...] in the Distribution Value Added Study of Empresa Eléctrica de Guatemala, Sociedad Anónima, indicating his position in relation to each discrepancy set forth in Resolution CNEE-96-2008; as well as on the responses to same from Empresa Eléctrica de Guatemala, Sociedad Anónima, and its Consultant.

(Emphasis added).

<sup>784</sup> CNEE Resolution 96-2008, May 15, 2008, **Exhibit R-71**.

consultant had to abide by clause four (cited by TGH) of the contract to do so, because this task made it necessary “to understand and apply the applicable legislation on the points under discrepancy identified precisely in Resolution the CNEE-96-2008.”<sup>785</sup> By reading the contract as a whole, both clauses of the contract between Mr. Bastos and the CNEE are fully compatible with the guidelines established in Resolution 96-2008, which describe the function of the Expert Commission.

383. Despite the fact that the mandate of the Expert Commission was limited to deciding whether the consultant’s study complied with the Terms of Reference, the Expert Commission in effect exceeded its functions in its pronouncement of July 25, 2008.<sup>786</sup> In this arbitration proceeding, Mr. Bastos, who presided over the Expert Commission, attempts to justify this by expanding the scope of work for the experts.<sup>787</sup> Besides the fact that his opinion is inevitably partial, Mr. Bastos, an Argentine engineer, is not qualified to give a legal opinion regarding the scope of functions of the Expert Commission under the electricity legal framework of Guatemala. In this respect, it should be recalled that the highest court in Guatemala has already defined the role and scope of the Expert Commission, which aligns with Guatemala’s position in this arbitration and directly contradicts the arguments put forward by TGH, Mr. Bastos and Mr. Alegría.<sup>788</sup>

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<sup>785</sup> Reply, par. 137; Contract between Carlos Bastos and the CNEE, June 26, 2008, **Appendix R-85**, clause 4, subsections d) and e).

<sup>786</sup> Counter-Memorial, pars. 401 and 606. For example, the Expert Commission exceeded its mandate by suggesting in its pronouncement an alternative capital recovery formula from the one established in the Terms of Reference, a fact acknowledged by Mr. Bastos in the witness statement rendered in the arbitration proceedings initiated by *Iberdrola* (an excerpt that was removed from the witness statement given by Mr. Bastos in this arbitration proceeding). *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/05), Witness Statement of Carlos Bastos, May 13, 2009, **Exhibit R-102**, par. 44.

<sup>787</sup> Bastos Reply, **Appendix CWS-7**, par. 10; Bastos, **Appendix CWS-1**, par. 18.

<sup>788</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, **Exhibit R-105**, pp. 13 and 17(f); Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, **Exhibit R-110**, p. 16.

***b. The Expert Commission, a temporary and private body, was neither independent nor impartial***

384. In its Counter-Memorial, Guatemala explained that the LGE establishes the Expert Commission as a private, contingent and temporary body. At the time of EEGSA's tariff review, the law did not create requirements of impartiality or independence for any of its members.<sup>789</sup> That is how EEGSA appointed Mr. Giacchino, author of the tariff study under review, as its representative on the Expert Commission,<sup>790</sup> and the CNEE appointed Mr. Jean Riubrugent, who had been advising it on specific issues related to the analysis prepared by Sigla.<sup>791</sup> Likewise, the parties appointed Mr. Carlos Bastos as the third member, who had also disclosed that EEGSA was his client, for whom he conducted a study on the wholesale electricity market in Guatemala several months before.<sup>792</sup> As explained below, the behavior of the two parties in the appointment of the members of the Expert Commission clearly demonstrated that neither believed that such Commission would be independent or impartial.<sup>793</sup>
385. In its Reply, TGH seeks to assign an independent and impartial nature to its members,<sup>794</sup> even presents that entity as a body with greater powers than the CNEE regarding the setting of tariffs.<sup>795</sup> TGH therefore criticizes the fact that Mr. Riubrugent had been in contact with the CNEE during his position as expert and cites e-mails exchanged between Mr. Riubrugent and Ms. Marcela Peláez, an advisor to the Tariff Division of the CNEE, in which the expert asks her questions and requests information regarding specific matters such as "information 'about EEGSA's actual monomial purchase prices'" or about the Financial Statements of EEGSA in order to have a better

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<sup>789</sup> Counter-Memorial, pars. 352 and 565.

<sup>790</sup> Colom, **Appendix RWS-1**, par. 116.

<sup>791</sup> *Ibid.*, par. 117.

<sup>792</sup> Witness statement of Carlos Bastos, September 21, 2011 (hereinafter **Bastos**), **Appendix CWS-1**, par. 10.

<sup>793</sup> See pars. 393-396

<sup>794</sup> Reply, par. 138

<sup>795</sup> *Ibid.*, par. 137.

understanding of the tariff study under analysis.<sup>796</sup> TGH seeks to present these exchanges of a technical nature in a negative light in its Reply.<sup>797</sup> TGH's arguments disregard the reality of the legal framework and distort the facts surrounding the formation of that Expert Commission.

386. In the first regard, the Expert Commission is a temporary and private entity,<sup>798</sup> with minimum regulation in the LGE and RLGE.<sup>799</sup> Neither the LGE nor the RLGE required that the members of the Expert Commission be impartial or independent. On that basis, the parties accepted members of the Expert Commission that were not independent of the parties. Still, this is not the main reason that the LGE limits the role assigned to the Expert Commission. The principle reason is the lack of accountability of its members for their actions once their work [on the Commission] is completed. In other words, they pronounce themselves, collect their fees and that is where their responsibility ends. This is in clear contrast to the position of the CNEE's Directors, to whom the LGE assigns specific powers and makes them personally liable for their actions in the exercise of their duties.<sup>800</sup> Consequently, TGH's proposal that the Expert Commission assumes powers that the LGE grants to the CNEE exclusively<sup>801</sup> is illogical, precisely because of the careful procedure established in the LGE for the selection and control of its Board of Directors.

387. TGH attempts to rebut this point on "independence and impartiality" with the witness statement of Mr. Bastos, who asserts that as President of the Expert Commission, "he had understood" that Messrs. Giacchino and Riubrugent "[...] had assumed [as experts on the Expert Commission] a different role in the tariff review process" and that "they

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<sup>796</sup> *Ibid*, pars. 139-140.

<sup>797</sup> *Ibid*.

<sup>798</sup> Counter-Memorial, par. 210.

<sup>799</sup> At the time of EEGSA's tariff review, the Expert Commission was mentioned two times in the LGE (**Exhibit R-8**, Arts. 75 and 77) and once in the Amended Regulations of the General Law of Electricity (**Exhibit R-36**, Art. 98).

<sup>800</sup> LGE, **Exhibit R-8**, Art. 5.

<sup>801</sup> Counter-Memorial, par. 137.

needed to act as independent experts [...].”<sup>802</sup> In the same sense, Mr. Giacchino now alleges that “[...] there was a clear understanding [among the members of the Expert Commission] that each of us would act independently and would not engage in separate communications with EEGSA or the CNEE, respectively, about the Expert Commission’s deliberations or decisions.”<sup>803</sup> However, Messrs. Giacchino and Bastos fail to indicate the source of such agreement. The only contemporary evidence that Messrs. Giacchino and Bastos provide is an e-mail of June 16, 2008 from Mr. Bastos to his colleagues on the Expert Commission (Messrs. Giacchino and Riubrugent) in which, according to Mr. Bastos, it is understood that the parties have one role as consultants and another as “experts” on the Expert Commission.<sup>804</sup> TGH distorts the meaning of this message in order to infer that the parties (i.e., the CNEE and EEGSA) had agreed that the role of the experts on the Expert Commission would be “independent or impartial.”<sup>805</sup> Based on that, TGH also asserts in its Reply that Mr. Riubrugent did not act with impartiality in the Expert Commission, given the continuous contact with the CNEE, and cites in that regard the e-mail exchanges between Mr. Riubrugent and Ms. Marcela Peláez, of the CNEE’s Tariff Division.<sup>806</sup> TGH indicates—in supposed contrast—that Mr. Giacchino “during the Expert Commission’s process, distanced [himself] from the Bates White team that was implementing the Expert Commission’s decisions and joined the Expert Commission’s decisions in favor of the CNEE on a number of issues.”<sup>807</sup> Finally, TGH also criticizes the fact that Sigla, the CNEE’s consultant in charge of producing the independent tariff study, “prepared [a Supporting Report] for him [Mr. Riubrugent],”<sup>808</sup> which was not distributed to the other members of

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802 *Ibid*, par. 138; Bastos Reply, **Appendix CWS-7**, par. 11.

803 Counter-Memorial, par. 138; Giacchino Reply, **Appendix CWS-10**, par. 23.

804 E-mail from C. Bastos to J. Riubrugent and L. Giacchino on June 16, 2008, **Exhibit C-236**, p. 7. *See* section IV.A.6.a with respect to the role of “experts” for the members of the Expert Commission.

805 Reply, par. 138

806 *Ibid*, pars. 139-140.

807 *Ibid*, par. 141.

808 *Ibid*, par. 139; Additional Sigla Report for the CNEE’s Representative on the Expert Commission, dated May 27, 2008, **Exhibit C-494**.

the Expert Commission.<sup>809</sup> Once again, the analysis of EEGSA is fraught with serious inaccuracies and inaccurate premises.

388. First, it must be clarified that the party-appointed experts (Messrs. Giacchino and Riubrugent) never agreed to limit their contact with their appointing parties nor did they consider themselves to be “independent and impartial,” as TGH now claims. Other than the statements of Messrs. Bastos and Giacchino prepared for this arbitration,<sup>810</sup> there is no contemporary evidence on record that this was the case. The language of the June 16, 2008 e-mail from Mr. Bastos to his colleagues on the Expert Commission at no time tries to limit the communication between the parties or to indicate that the experts would act in an “independent or impartial” manner. Mr. Bastos himself acknowledges in that e-mail that both experts (Messrs. Giacchino and Riubrugent) had worked for the parties in connection with the tariff study and highlights the “double role” they had on the Expert Commission.<sup>811</sup> The reference to such “double role” seeks to differentiate the work as consultant from the work as party-appointed expert, but in no way implies that Messrs. Giacchino and Riubrugent agreed to limit their contact with the parties or that they considered themselves to be “independent and impartial,” something that would be illogical given the background of Messrs. Giacchino and Riubrugent. Any

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<sup>809</sup> Reply, par. 139.

<sup>810</sup> Bastos Reply, **Appendix CWS- 7**, pars. 11-13; Giacchino Reply, **Appendix CWS- 10**, pars. 23-24.

<sup>811</sup> The relevant paragraph states:

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 the CNEE in the formulation of observations. Your actions in those roles have 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. It would be convenient for you to send me these opinions as we deal with each issue, and therefore, and it just dawned on me, you should also propose an agenda of issues to discuss and the time to dedicate to each.

E-mail from C. Bastos to J. Riubrugent and L. Giacchino on June 16, 2008, **Exhibit C-236**. See section IV.A.6.a regarding the role of “experts” for the members of the Expert Commission.

understanding to the contrary would have been specifically clarified. The opportunistic attempt by TGH to try to present this relationship in a different light lacks any basis whatsoever.

389. In line with this, it should also be clarified that the CNEE and EEGSA never agreed to refrain from unilateral communications with their appointed experts, nor that such experts were considered “independent and impartial.” TGH attempts to support this argument (solely) on the above-mentioned e-mail of June 16, 2007 from Mr. Bastos.<sup>812</sup> However, this e-mail not only does not say what TGH attempts to make it say, but, in addition, it was not sent to or agreed to with the CNEE or EEGSA.
390. TGH’s alleged criticism of the CNEE for communicating unilaterally with Mr. Riubrugent (upon the request of the expert) evidences the double standard of conduct that governs TGH’s allegations. It was precisely EEGSA that unilaterally communicated with Mr. Bastos while discussing the operating rules in order to send him operating rules that had not even been agreed upon by the parties (see paragraph 415 below).<sup>813</sup>
391. In conclusion, as is characteristic of TGH’s allegations in this arbitration, TGH does not refer to any direct or primary source to support its arguments. TGH also disregards the foundational laws and documents by which the CNEE and EEGSA were to abide by throughout the Expert Commission process, namely:
- LGE Article 75
  - RLGE Article 98
  - Resolution the CNEE-96-2008, which ordered the formation of the Expert Commission
  - The Notarial Letter of Appointment of the Expert Commission executed by the representatives of EEGSA and the CNEE

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<sup>812</sup> E-mail from C. Bastos to J. Riubrugent and L. Giacchino on June 16, 2008, **Exhibit C-236**.

<sup>813</sup> Counter-Memorial, pars. 369-372.

392. Not one of the documents listed above establishes a requirement of impartiality or independence for the members of the Expert Commission.<sup>814</sup> TGH provides no evidence of even a discussion between the CNEE and EEGSA regarding the impartiality or independence of the members of the Expert Commission. This is because, as Mr. Colom explains, two things were clear for the CNEE when the Expert Commission was formed:

- (a) The opinion of the Expert Commission, while important for evaluating the consultant's tariff study, was not binding on the CNEE, which retained the power for setting the tariff assigned to it by the LGE,<sup>815</sup> as explained above; and
- (b) Although the Expert Commission could be classified as a technical body, it would not be an independent or impartial body.<sup>816</sup>

393. The very formation of the Expert Commission demonstrates that the CNEE undertook a leading role in the tariff procedure. As Mr. Colom explains, the CNEE would have never accepted an Expert Commission of a binding nature with Mr. Bastos as a member of it,<sup>817</sup> and obviously, Mr. Giacchino lacked any independence or impartiality.<sup>818</sup> As explained below, Mr. Bastos did not guarantee sufficient impartiality and Mr. Giacchino was not in a position equal to Mr. Riubrugent's position in terms of his interest in the approval of a tariff study that he himself had prepared.

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<sup>814</sup> RLGE Art. 98 bis was incorporated into the RLGE in May 2008 during the process of selecting of members of the Expert Commission and did include the impartial and independent nature of the President of the Expert Commission. This article was not in force and was not applied to that tariff review. If it had been applied, Mr. Bastos could not have acted as President of the Expert Commission, as the new regulation excluded the eligibility of any candidate who may have had relationships with businesses in the electricity sector within the five years prior to his appointment (as had been the case with Mr. Bastos, who worked with Iberdrola barely six months before his appointment to the Expert Commission). Ministry of Energy and Mines Governmental Resolution 145-2008, May 19, 2008, **Exhibit R-72**.

<sup>815</sup> Colom, **Appendix RWS-1**, pars. 116, 120, 121 and 137; Counter-Memorial, pars. 125(d), 126(c), 211-213, 501-509.

<sup>816</sup> Colom, **Appendix RWS-1**, par. 121; Counter-Memorial, pars. 352 and 357.

<sup>817</sup> Colom, **Appendix RWS-1**, par. 121.

<sup>818</sup> Colom Supplemental Statement, **RWS-4**, par. 39.



394. With regard to Mr. Bastos, it must be remembered that EEGSA was his client. Only six months prior to his appointment to the Expert Commission, Bastos had prepared, upon the request of EEGSA, a study on the Wholesale Electricity Market in Guatemala.<sup>819</sup> His appointment as President of the Expert Commission despite his prior involvement with EEGSA only proceeded because of the conviction of the CNEE's Directors that the opinion of that Commission would not have binding effect.<sup>820</sup> Regarding Mr. Giacchino, it is even more evident that he had obvious motivation for obtaining the approval of the tariff study that he himself had prepared, namely:

- (a) He had a close business relationship with EEGSA, having been EEGSA's consultant in the preparation of its tariff study in 2003, in addition to having been a frequent consultant to Iberdrola (operator of EEGSA), in the tariff reviews for their subsidiaries in Brazil and Bolivia;<sup>821</sup>
- (b) He had a personal and professional interest in validating his own "independent opinion" through which he had ignored critical aspects of the methodology established by the CNEE, and which had given rise to several of the discrepancies on which he now had to pronounce itself. Thus he would be judge and party in his own case in violation of the most elementary premises of due process (*nemo iudex in causa sua*); and
- (c) He had a contractual obligation with EEGSA to "present and defend the Tariff Study, and in general pursue approval" of the tariff study "until final approval thereto is given by the CNEE"<sup>822</sup> (in spite of the fact that he now tries to argue that he did not sign that contract "individually" but rather as a member of Bates White).<sup>823</sup> How could he be independent in analyzing a study that he himself had prepared and in relation to which he had agreed to "defend and [...] pursue [its] approval?"

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<sup>819</sup> Bastos, **Appendix CWS-1**, par. 6.

<sup>820</sup> Colom, **Appendix RWS-1**, par. 121.

<sup>821</sup> Counter-Memorial, pars. 256 and 319.

<sup>822</sup> *Ibid*, par. 422.

<sup>823</sup> Reply, par. 141.

395. Notably, Mr. Giacchino misleadingly attempts to prove his impartiality by asserting that he issued decisions in favor of the CNEE in his capacity as member of the Expert Commission.<sup>824</sup> Mr. Giacchino decided in favor of the CNEE on 16 discrepancies, and against it on 56 occasions (equal to 80% of his votes cast).<sup>825</sup> Even more importantly, Mr. Giacchino fails to mention the fact that not one of his 16 votes favorable to the CNEE served to alter the balance in favor thereof,<sup>826</sup> given that on the 16 occasions that he voted in favor of the CNEE, the decision in question was made unanimously; therefore, the votes of Mr. Giacchino simply regarded decisions of the Expert Commission that regardless would have carried a simple majority of votes favorable to the CNEE.<sup>827</sup>
396. Thus it is evident that Messrs. Giacchino and Riubrugent did not share the same level of interest regarding Bates White's tariff study. Although Mr. Riubrugent understood his role as party-appointed expert, the debate affected Mr. Riubrugent only superficially, due to his limited participation in the preparation of the tariff study of Sigla<sup>828</sup> and the lack of any important connection with the CNEE. Messrs. Giacchino and Riubrugent also had a very different level of knowledge of the tariff study. While Mr. Riubrugent had only partial knowledge of the tariff study and did not rely on his own support to carry out his duties on the Expert Commission,<sup>829</sup> Mr. Giacchino, on the other hand, had prepared the EEGSA tariff study on which the Expert Commission had to pronounce itself.<sup>830</sup>

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<sup>824</sup> Giacchino , **Appendix CWS-10**, par. 25

<sup>825</sup> Transcript of the Hearing on Jurisdiction and Merits, *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, **Exhibit R-202**, Tr., Day Two, Bastos, 548, 15:14:39; 549, 15:16:14. Report of the Expert Commission, July 25, 2008, **Exhibit R-87**.

<sup>826</sup> See the table entitled "Unanimous Decisions of the Expert Commission Regarding Comments of the CNEE." *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/05), Witness Statement of Leonardo Giacchino, **Exhibit R-151**, par. 35.

<sup>827</sup> Report of the Expert Commission, July 25, 2008, **Exhibit R-87**, p. 12 ("The pronouncement of the EC shall be adopted by simple majority. The member in the minority may attach a brief dissenting from the pronouncement").

<sup>828</sup> Counter-Memorial, par. 323.

<sup>829</sup> *Ibid*, par. 352

<sup>830</sup> *Ibid*, par. 256.

397. TGH's criticism of the communications between the CNEE and Mr. Riubrugent ignores the fact that Mr. Giacchino himself acknowledged that he had a support team for his work as expert on the Expert Commission,<sup>831</sup> admitting that three consultants from his team at Bates White helped him during his work on the Expert Commission. Obviously, none of these people had executed a contract with the CNEE or EEGSA to act as "support for the Expert Commission," but they continued acting as (paid) consultants of EEGSA.<sup>832</sup>
398. Regarding TGH's criticism of the fact that Sigla, the CNEE's consultant, had prepared a Report to assist him in his role as expert on the Expert Commission, which was not distributed to the other members of the Expert Commission,<sup>833</sup> once again TGH's characterization of the facts is misleading. As Mr. Colom explains, the Report was provided with the objective of mitigating the natural imbalance in knowledge of the study that might have existed among the party-appointed experts on the Expert Commission (as it was expected that the distributor would appoint its consultant on an eventual Expert Commission).<sup>834</sup> Mr. Colom adds that it was reasonable for the CNEE's expert to rely on this support, which at no time was hidden.<sup>835</sup> The Report was provided for the first time in July 2007 in the Bidding Terms for the contracting of the CNEE's consultant, approved by the CNEE Resolution 116-2007, wherein it was established that the consultant was to provide "support to the CNEE's representative on the Expert

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<sup>831</sup> See footnote 8322.

<sup>832</sup> "Ah, yes, there were two—actually there was no one full time. There were two or three people depending on the time who were helping me to put together the Power Point presentation for the other members, and also provide support on the engineering part, because I am not an engineer, and there were technical type discussions for which I was not qualified to participate myself alone." "[...] they were providing me support to understand or to present information." "What I did at Bates White is that I opened a separate account where only I myself or those persons who were providing support to me could put in their times." Transcript of the Hearing on Jurisdiction and Merits, *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, **Exhibit R-202**, Tr., Day Two, Bastos, 538, 15:02:16; 539, 15:03:34; 540, 15:04:41.

<sup>833</sup> Reply, par. 139; Supplementary Report for the CNEE Representative on the Expert Commission, May 27, 2008, **Exhibit C-494**.

<sup>834</sup> Colom Supplemental Statement, **RWS-4**, par. 42.

<sup>835</sup> *Ibid.*

Commission.”<sup>836</sup> Likewise, Consulting Services Agreement No. 11-189-2007 between the CNEE and Sigla clearly stipulated in Clause 5.1 that the consultant was to “prepare a supplemental report for the CNEE’s representative on the Expert Commission.”<sup>837</sup> Because both CNEE Resolution 116-2007 and Agreement No. 11-189-2007 between the CNEE and Sigla/Electrode are public documents, EEGSA cannot allege that it was unaware that the CNEE’s expert had this report. Obviously, neither the CNEE nor Mr. Riubrugent (as party-appointed expert) had any obligation to discuss this document with the other members of the Expert Commission or with EEGSA.

399. It is therefore clear that the Expert Commission was established as a temporary and private body, and that the appointment of the experts at no time contemplated the independence or impartiality of those experts. Nor was the restriction of communications between the party-appointed experts and the CNEE or EEGSA ever envisaged. This was entirely consistent with the nature of a technical advisory body as the Expert Commission was established under the LGE,<sup>838</sup> an issue that was confirmed by the Constitutional Court.<sup>839</sup>

*c. Amendment of Article 98 bis*

400. As Guatemala explained, in May 2008, once the CNEE and EEGSA had appointed their respective representatives of the Expert Commission, the parties had to agree on the

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<sup>836</sup> CNEE Resolution 116-2007, July 27, 2007, **Exhibit R-40**, p. 31, point 8.

<sup>837</sup> Contract No. 11-189-2007 between the CNEE and Sigla, November 12, 2007, **Exhibit C-132**, clause 5.1:

**5.1 Report supporting the CNEE representative appointed to the Experts’ Commission:** The Specialized Consultant shall prepare an executive report based on the reports on the final results of the ECC and EVAD calculations. In addition, it shall prepare a report supporting the CNEE’s representative appointed to the Expert Commission. Such report shall include such background information, result analyses, and comparative analyses as may be necessary to identify any substantial differences between the ECC and EVAD studies proposed by the Distributors and the analyses and/or Studies conducted by the CNEE.

<sup>838</sup> LGE, **Exhibit R-8**, Art. 75.

<sup>839</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, **Exhibit R-105**, p. 17; Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, **Exhibit R-110**

appointment of the third expert that would preside over the Expert Commission.<sup>840</sup> As Guatemala explained, the parties were unable to reach an agreement regarding the third member and it became evident that there was a gap in the RLGE (this being the first time the Expert Commission was constituted), which meant that if the parties did not agree on the third member of the Expert Commission, the proceedings would be blocked indefinitely.<sup>841</sup> Mr. Colom explained that the CNEE decided to propose an amendment to the RLGE, incorporating Article 98 bis, according to which the parties were to try to reach an agreement on a third expert within a term of three days, after which the MEM would appoint the third expert from among the candidates offered by each party.<sup>842</sup> Mr. Colom explained in his statement that the reform was aimed at filling the legal gap in the RLGE and was driven by the CNEE's concern about its ability to move forward with the tariff review to have a tariff schedule by the deadline.<sup>843</sup> However, as Mr. Colom explained, EEGSA rejected this solution and the CNEE agreed not to apply Article 98 bis to the review in progress.<sup>844</sup> In any case, Article 98 bis lost all relevance as the parties managed shortly thereafter to reach an agreement regarding the third member of the Expert Commission by appointing Mr. Carlos Bastos.<sup>845</sup>

401. While TGH has expressly recognized that Article 98 bis was not applicable to EEGSA,<sup>846</sup> it insists on highlighting this point, with the clear objective of drawing attention from the relevant discussion in this case. In its Reply, TGH alleges through its

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<sup>840</sup> Counter-Memorial, par. 353.

<sup>841</sup> *Ibid*, pars. 353-354; Colom, **Appendix RWS-1**, par. 119.

<sup>842</sup> Colom, **Appendix RWS-1**, par. 119.

<sup>843</sup> *Ibid*. Under this reform, both the CNEE and the distributor proposed three candidates for appointment as the third member of the Commission; each candidate must be a specialist in the field of electricity with a recognized reputation and cannot have had any relationship to entities or companies in Guatemala's electricity sector in the preceding five years. If the parties cannot agree on an expert within three days of submitting the candidates, it falls on the Ministry to select from among the parties' proposals. This measure guarantees a certain level of collaboration and cooperation with the process and would avoid possible actions that could halt the advancement of the process, in addition to guaranteeing that the candidates for the third member are independent and would meet the minimum requirements of suitability and experience in order to complete the task with which they are entrusted.

<sup>844</sup> Memorial, par. 135; Colom, **Appendix RWS-1**, par. 121.

<sup>845</sup> Counter-Memorial, par. 355.

<sup>846</sup> *Ibid*, par. 354; Colom, **Appendix RWS-1**, par. 119.

expert, Mr. Alegría, that “there is no ‘gap’ in the [RLGE].” According to Alegría, “if the CNEE and the distributor are unable to reach agreement on the third member of the Expert Commission, the CNEE would be unable to publish the distributor’s new tariff schedules, and the distributor’s previous tariff schedules would continue to apply, with the appropriate adjustments, pursuant to LGE Article 78 and amended RLGE Article 99.”<sup>847</sup> TGH then indicates that Guatemala’s argument that the proceedings would be “blocked indefinitely” due to the failure to establish an Expert Commission would be inconsistent with Guatemala’s position that the decisions of the Expert Commission are not binding and “have no effect upon the CNEE’s actions in setting the distributor’s tariff schedules.”<sup>848</sup> According to TGH, this would contradict Guatemala’s argument that the CNEE would have had in any case the discretion to proceed unilaterally to establish the distributor’s tariff schedules. The arguments of TGH misrepresent the position of Guatemala and are obviously wrong.

402. First, it is clear that there was a gap in the RLGE, inasmuch as the tariff review process was effectively blocked by the lack of agreement between the parties regarding the appointment of the third member of the Expert Commission. Neither TGH nor its expert questions this point. The solution that Mr. Alegría proposes (to continue applying the schedules from the previous review)<sup>849</sup> cannot be admitted, as it would completely dismiss the tariff review process underway for one year by the time the Expert Commission was formed. As Mr. Aguilar explains, neither the LGE nor the RLGE provided a solution in the event that the parties were unable to agree on the appointment of the third expert.<sup>850</sup> Further, explains Mr. Aguilar, the indefinite application of the previous schedules under LGE Article 78 and RLGE Article 99 could not resolve such problem (and Mr. Alegría does not provide any evidence to prove that this was the legislator’s intention), inasmuch such rules only provide a temporary solution under the LGE for emergency situations (e.g., if the CNEE fails in its legal obligation to publish

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<sup>847</sup> Reply, par. 142; Alegría Reply, **Appendix CER-3**, par. 66.

<sup>848</sup> Reply, par. 135.

<sup>849</sup> *Ibid*, par. 94; Alegría Reply, **Appendix CER-3**, par. 49.

<sup>850</sup> Aguilar, **Appendix RER-3**, par. 44; Aguilar Rejoinder, **Appendix RER-6**, par. 59.

the schedule on time.)<sup>851</sup> The reason for that, as Mr. Aguilar explains,<sup>852</sup> is that the foregoing produces a result undesired by the LGE: the indefinite application of inefficient tariffs,<sup>853</sup> which could harm consumers.<sup>854</sup> In that context, as Mr. Aguilar explains, TGH incorrectly attempts to apply LGE Article 78 and RLGE Article 99 to address the appointment of the third member of the Expert Commission.<sup>855</sup>

403. TGH misinterprets Guatemala’s position, arguing that it would be contradictory to the CNEE’s legal authorities for there to be a suspension until the appointment of the third appointee.<sup>856</sup> Under the LGE, the CNEE has the obligation to “compliance with and enforcement of this law”<sup>857</sup> which Mr. Aguilar explains would include its obligation to comply with the procedure established in the LGE for the tariff review.<sup>858</sup> Pursuant to LGE Article 75, in the event of discrepancies between the distributor and the CNEE, an Expert Commission is formed in order to issue an opinion on those discrepancies.<sup>859</sup> As Mr. Aguilar explains, the CNEE cannot ignore this procedure (even if the parties cannot agree on the third appointee) to instead proceed to dictate the tariffs directly.<sup>860</sup> Guatemala has never asserted that the Expert Commission is not a “necessary part” of the tariff review procedure, as TGH suggests.<sup>861</sup> On the contrary, as Mr. Colom explains, in the event of discrepancies, the CNEE must ensure that the Expert Commission is

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<sup>851</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 60.

<sup>852</sup> *Ibid*, par. 60; Amended Regulations of the General Law of Electricity, **Exhibit R-36**, Art. 99.

<sup>853</sup> The LGE and the RLGE establish, in several provisions thereof, that the term of validity of the tariff schedule is five years (*see* par. 479 below). The main reason for this is that under the efficiency principle by which the LGE is inspired, it is required that the tariff reflects the true and updated cost of the system (“efficient tariffs”). At the end of five years, the tariffs cease to be “efficient” and it is necessary to conduct a new tariff review in order to update them. The indefinite application of a tariff schedule beyond five years would go against the efficient company principle sought by the LGE.

<sup>854</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 60.

<sup>855</sup> *Ibid*, pars. 59, 60.

<sup>856</sup> Reply, par. 143.

<sup>857</sup> LGE, Art. 4, **Exhibit R-8**.

<sup>858</sup> Aguilar Rejoinder, **Appendix RER-6**, pars. 25, 60.

<sup>859</sup> LGE, Art. 75, **Exhibit R-8**.

<sup>860</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 60.

<sup>861</sup> Reply, par. 143.

established and pronounces itself, which the CNEE then takes into consideration in issuing the tariff schedule.<sup>862</sup> The Constitutional Court underlined the importance of complying with each step of the tariff review procedure established in the LGE and RLGE, confirming that the CNEE adhered to that procedure during EEGSA's tariff review.<sup>863</sup> Thus, it is clear that there is no contradiction in Guatemala's position; the Expert Commission must be established if discrepancies arise, but this in no way affects the authority of the CNEE.

404. In any case, it must be again recalled that TGH's reference to Article 98 bis is an attempt to make "noise" in this arbitration. TGH itself accepts that that reform was never applied to EEGSA, and thus complaints in this regard are not only baseless, but also irrelevant in this proceeding.<sup>864</sup>

**7. The operating rules were never agreed to by the CNEE and EEGSA**

***a. The negotiations between the CNEE and EEGSA to agree on the operating rules did not result in an agreement as the CNEE refused to cede its essential authorities to the Expert Commission***

405. As Guatemala explained in the Counter-Memorial, parallel to the setting up of the Expert Commission, the parties discussed the possibility of adopting administrative rules to govern its operation.<sup>865</sup> Such rules would establish how the Expert Commission would carry out its tasks; this being the first Expert Commission formed, there was no history to guide its operations.<sup>866</sup> Between May 14 and 28, 2008, the CNEE and EEGSA held several meetings to attempt to agree on operating rules. Guatemala explained that in the first written exchange on the matter, on May 14, 2008, the CNEE sent to EEGSA a proposed regulation of general application, which provided that the Expert Commission was "to pronounce itself on discrepancies," and that explicitly stated the non-binding

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<sup>862</sup> Colom, **Appendix RWS-1**, pars. 45-47.

<sup>863</sup> Decision of the Constitutional Court, consolidated case files 1836-1846-2009, **Exhibit R-105**, pp. 6, 16-17, 22-24, 32; Decision of the Constitutional Court, case file 3731-2009, February 24, 2010, **Exhibit R-110**, pp. 8, 22-24, 31-34.

<sup>864</sup> Reply, par. 133.

<sup>865</sup> Counter-Memorial, par. 358.

<sup>866</sup> *Ibid.*



nature of the pronouncement of the Expert Commission its first and last articles.<sup>867</sup> EEGSA opposed this proposed regulation<sup>868</sup> and suggested that the parties work to agree on specific rules rather than a general regulation, with which the CNEE concurred.<sup>869</sup> In a meeting held on May 19, 2008, Mr. Calleja produced a copy of the proposed rules presented by EEGSA,<sup>870</sup> in which it was mentioned that the Expert Commission would be charged with the “resolution of disputes” and that it would issue a “Ruling.”<sup>871</sup> The CNEE rejected that proposal as it was contrary to the LGE and the RLGE, which established that the Expert Commission had the mission of pronouncing itself on discrepancies and it was not a tribunal or body that was to settle disputes. EEGSA agreed to remove the word, which did not appear again in the various versions circulated between the parties.<sup>872</sup>

406. In addition, this proposal presented by EEGSA on May 19 was the first that included what would later be identified as rule 12, which established that, once the Expert Commission had pronounced itself, Bates White would have to correct the tariff study in accordance with the pronouncement, submit the study to the Expert Commission, so that the Commission could review it and confirm whether, in its opinion, that corrected study faithfully incorporated its pronouncements.<sup>873</sup> As Guatemala explained, the CNEE systematically rejected this rule given that it affected essential authorities of the CNEE and violated the procedure established in the LGE and the RLGE, which did not provide

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<sup>867</sup> Counter-Memorial, par. 360. E-mail from Melvin Quijivix to Miguel Francisco Calleja, attaching the proposed RLGE of the Expert Commission, May 14, 2008, **Exhibit R-70**.

<sup>868</sup> Reply, par. 145; Calleja Reply, **Appendix CWS-9**, par. 30; Maté Reply, **Appendix CWS-12**, par. 21.

<sup>869</sup> Counter-Memorial, par. 361

<sup>870</sup> Proposed rules for the Expert Commission, May 19, 2008, **Exhibit R-73**, rules 8, 12 and 13; Colom, **Appendix RWS-1**, pars. 125 and 126.

<sup>871</sup> *Ibid.*

<sup>872</sup> E-mail from Melvin Quijivix to Miguel Francisco Calleja, attaching the Operating Rules Proposed for the Operation of the Expert Commission, May 21, 2008, **Exhibit R-74**, E-mail from Melvin Quijivix to Luis Maté and Miguel Francisco Calleja, attaching the Proposed Operating Rules for the Expert Commission, May 23, 2008, **Exhibit R-75**; E-mail from Miguel Francisco Calleja to Leonardo Giacchino, attaching the Proposed Operating Rules for the Operation of the Expert Commission, May 28, 2008, **Exhibit R-77**; Colom, **Appendix RWS-1**, par. 126.

<sup>873</sup> Proposed Rules for the Expert Commission, May 19, 2008, **Exhibit R-73**, rule 14.

for any action or additional function for the Expert Commission after its pronouncement on the discrepancies.<sup>874</sup>

407. Guatemala explained that after the meetings between the CNEE and EEGSA, it was routine for Mr. Melvin Quijivix, as secretary of the meetings (as TGH accepts),<sup>875</sup> to circulate drafts of the “work in progress” rules under discussion (including the drafts of May 15, 21, 23 and 28, 2008) which would reflect the status of the discussions between the parties.<sup>876</sup> The draft of May 28 that Mr. Quijivix sent to Mr. Calleja was the last set of rules on which the parties tried to reach an agreement, unsuccessfully. In spite of the lack of agreement between the parties regarding the rules, on June 2, 2008 Mr. Calleja forwarded to the president of the Expert Commission, Mr. Bastos—unbeknownst to the CNEE, without notifying or copying it—the e-mail with the draft under discussion that Mr. Quijivix had sent to EEGSA on May 28.<sup>877</sup> In his e-mail, Mr. Calleja presented those rules to Mr. Bastos as if they had been the result of an official agreement between the CNEE and EEGSA,<sup>878</sup> which was false.
408. In its Reply, TGH indicates that “[w]hile EEGSA agreed to change the word ‘ruling’ to ‘pronouncement’ so as to incorporate the exact language of LGE Article 75 into the operating rules, a ‘pronouncement,’ as that word is used in Article 75, is binding.”<sup>879</sup> TGH again insists on the supposed mandatory nature that the operating rules have for the CNEE in the operation of the Expert Commission. In particular, TGH refers to the

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<sup>874</sup> Counter-Memorial, par. 359.

<sup>875</sup> Memorial, par. 137.

<sup>876</sup> Counter-Memorial, par. 365. E-mail from Mr. Melvin Quijivix to Mr. Francisco, attaching the proposed operating rules for the Expert Commission, May 15, 2008, **Exhibit R-181**; E-mail from Melvin Quijivix to Miguel Francisco Calleja, attaching the Operating Rules Proposed for the Operation of the Expert Commission, May 21, 2008, **Exhibit R-74**; E-mail from Melvin Quijivix to Luis Maté and Miguel Francisco Calleja, attaching the Proposed Operating Rules for the Expert Commission, May 23, 2008, **Exhibit R-75**; E-mail from Melvin Quijivix to Luis Maté and Miguel Francisco Calleja, attaching the Proposed Operating Rules for the Expert Commission, May 28, 2008, **Exhibit R-76** (this e-mail was later forwarded by Mr. Calleja to Mr. Pérez).

<sup>877</sup> Counter-Memorial, par. 369.

<sup>878</sup> E-mail from Miguel Francisco Calleja to Carlos Bastos, June 2, 2008, **Exhibit R-79**; Colom, **Appendix RWS-1**, par. 132. *See* Counter-Memorial, par. 369.

<sup>879</sup> Reply, par. 146.

draft of the rules under discussion circulated on May 15, 2008 by Mr. Quijivix in his capacity as secretary of the meetings.<sup>880</sup> Quoting Messrs. Calleja and Maté, TGH maintains that rule 3 of that draft—“[t]he EC shall give an opinion on 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, and must deliver it to CNEE, which shall review the incorporation of the decision of [EC], and shall approve the Tariff Study”<sup>881</sup>—is evidence that “the CNEE understood that the decision of the Expert Commission would be binding upon the parties.”<sup>882</sup> Finally, TGH continues to insist that the CNEE and EEGSA had reached a verbal agreement on rule 12 included in the draft of May 28, 2008, which was later communicated to Mr. Bastos in a joint telephone call with Messrs. Quijivix and Calleja.<sup>883</sup> As indicated below, the allegations of TGH regarding the discussions and understanding of the parties with respect to the operating rules are wrong.

409. Preliminarily, it should be clear that the operating rules never became more than a proposal discussed through the exchange of several drafts between the parties.<sup>884</sup> TGH knows this and does not present any evidence of agreement between the parties. TGH’s attempt to present e-mails from Mr. Quijivix<sup>885</sup> as an agreement between the parties are forced and do not reflect the nature of proceedings between the CNEE and EEGSA over the course of their 10 year regulatory relationship. As Mr. Colom confirms, those e-mails only presented the status of the discussions of the day, which Mr. Quijivix

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880 E-mail from Mr. Melvin Quijivix to Mr. Miguel Francisco Calleja, attaching the Proposed Operating Rules for the Expert Commission, May 15, 2008, **Exhibit R-181**.

881 E-mail from Mr. Quijivix to Mr. Calleja, May 15, 2008, Rule 3, **Exhibit R-181**.

882 Maté Reply, **Appendix CWS-12**, par. 22.

883 Reply, par. 147.

884 Counter-Memorial, pars. 366-368.

885 E-mail from Melvin Quijivix to Miguel Francisco Calleja, attaching the Operating Rules Proposed for the Operation of the Expert Commission, May 21, 2008, **Exhibit R-74**; E-mail from Melvin Quijivix to Luis Maté and Miguel Francisco Calleja, attaching the Proposed Operating Rules for the Expert Commission, May 23, 2008, **Exhibit R-75**; E-mail from Melvin Quijivix to Luis Maté and Miguel Francisco Calleja, attaching the Proposed Operating Rules for the Expert Commission, May 28, 2008, **Exhibit R-76** (this e-mail was later forwarded by Mr. Calleja to Mr. Pérez).

gathered in his capacity as “secretary” of the meetings.<sup>886</sup> In other words, the content of those e-mails in no way represented the CNEE’s agreement with these discussions, but rather its involvement in ongoing negotiations. As Mr. Colom explains, this type of agreement would only be valid if formally approved by the CNEE, as EEGSA would know perfectly well from its years of experience in dealing with the CNEE.<sup>887</sup> In that regard, a simple review of the exchanges between the parties suffices to show that they could never represent an “agreement” between the CNEE and EEGSA: they involved a set of rules that continue to change from one version to the next, without any declaration by the parties affirming whether or not they would apply.<sup>888</sup>

410. TGH argues that the replacement of the word “ruling” for “pronouncement” did not imply a non-binding Expert Commission opinion,<sup>889</sup> but this is contradicted by the context in which that change took place. A few days before (on May 14, 2008), the CNEE had sent EEGSA a draft regulation in which the non-binding nature of the Expert Commission’s pronouncement for the CNEE was made clear, reiterating the limits of LGE Article 75.<sup>890</sup> This is entirely consistent with Constitutional Court’s interpretation of the scope of the “pronouncement” of the “Expert” Commission. Despite its insistence on the supposedly binding nature of the “pronouncement,” TGH cannot ignore the fact that such an argument is contrary to the text and context of LGE Article 75, and was also

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<sup>886</sup> Colom, **Appendix RWS-1**, par. 125; Colom Supplemental Statement, **Appendix RWS-4**, par. 60.

<sup>887</sup> Colom, **Appendix RWS-1**, par. 129; Colom Supplemental Statement, **Appendix RWS-4**, par. 64.

<sup>888</sup> See par. 237 below.

<sup>889</sup> Reply, par. 146.

<sup>890</sup> Counter-Memorial, par. 360. E-mail from Melvin Quijivix to Miguel Francisco Calleja, attaching the proposed RLGE of the Expert Commission, May 14, 2008, **Exhibit R-70**. It is stated in these draft Regulations:

**Article 1.** Nature and functions. The Expert Commission is a body created in the Arts. 75 and 77 of the General Law of Electricity and the Art. 98 of Regulations of the Law, with limited competence, formed by three professional experts whose function is to **pronounce itself**, by non-binding reports, on those discrepancies that may arise due to the revision of the Five-Year Tariff Studies [...].

**Article 17.** The reports of the Expert Commission are not binding to all those participating in the respective procedure and no type of action, judicial or administrative, ordinary or extraordinary, **will proceed in its respect**.

(Emphasis added)

expressly rejected by the highest court in Guatemala charged with interpretation of the law.

411. Likewise, TGH's attempt to present the text of rule 3 of the draft of May 15 as the CNEE's tacit acceptance of the binding nature of the Expert Commission pronouncement is incredulous.<sup>891</sup> As explained, the May 15 document was a draft that merely reflects the discussions of the day, which was followed by three further drafts (May 21, 23 and 28, 2008), none of which mentioned rule 3 according to the terms of the May 15 draft.<sup>892</sup> Moreover, the text of rule 3 in the May 15 draft never mentions—as TGH claims<sup>893</sup>—the supposedly binding nature of the pronouncement; rather, it refers to the possibility—rejected in the end—that the distributor's consultants would incorporate the pronouncement in the distributor's study and then send it for evaluation by the CNEE.<sup>894</sup> Moreover, one day prior to the circulation of this draft (i.e., May 14), the CNEE itself had circulated a draft regulation, in which two of its 17 articles made it clear that the CNEE considered the pronouncement as non-binding.<sup>895</sup> Thus, even if the draft of May 15 reflected agreement on the part of the CNEE (which obviously it did not), rule 3 of that agreement could never be understood as endorsing a binding pronouncement by the Expert Commission.
412. As confirmed by Mr. Colom, all the drafts of the rules, circulated by Mr. Quijivix from May 14 until the last draft of May 28, are typical "*work in progress*" documents, each with a very similar format, reflecting slight changes after each meeting, and without any evidence of any agreement in that regard.<sup>896</sup> As Mr. Colom explains, he understood that

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<sup>891</sup> Reply, par. 145.

<sup>892</sup> Counter-Memorial, par. 365.

<sup>893</sup> Reply, par. 145.

<sup>894</sup> E-mail from Mr. Melvin Quijivix to Mr. Miguel Francisco Calleja, attaching the proposed operating rules for the Expert Commission Regulations, May 15, 2008, **Exhibit R-181**.

<sup>895</sup> Counter-Memorial, par. 360.

<sup>896</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 60. The drafts circulated between the parties that TGH tries to prevail, do not prove any agreement. Furthermore, although Mr. Quijivix is not an attorney, it should be noted that the text of these exchanges refers to the rules as "Proposals" in the header, which obviously does not mean "agreed final version." Also, in the "Subject" line of the May 21 and 28 e-mails, the term "Proposals" was specifically included, and furthermore that "Subject" line of the e-mails included some changes in each sending, which indicates that Mr. Quijivix did not just "forward" or "respond" to a

if the CNEE and EEGSA were to reach an agreement on the rules, it would be formally recorded in the notarial certificate constituting the Expert Commission, which would be executed.<sup>897</sup> As Mr. Colom indicates, EEGSA understood that an agreement of this type would need to be endorsed by the directors of the CNEE—who were personally negotiating the operating rules—and not by Mr. Quijivix.<sup>898</sup> It is illogical to suggest that the CNEE and EEGSA could make a “verbal” agreement regarding operating rules (particularly considering the CNEE’s suspicions due to the irregular behavior of EEGSA during the tariff review), as TGH falsely claims in its Reply.

413. Thus, TGH’s attempt to present the last e-mail sent by Mr. Quijivix on May 28 (which included the so-called rule 12) as a final agreement between the parties must be rejected.<sup>899</sup> Not only was Mr. Quijivix unauthorized to execute such an agreement,<sup>900</sup> but that draft still indicates its nature as a “proposal” in two instances—in the subject line and body of the e-mail—reflecting that the parties’ ongoing discussion of its content.<sup>901</sup> In addition, an agreement of this type would have to be formally documented in order to be valid. Even assuming—for the sake of argument—that Mr. Quijivix’s intention had been for this e-mail to conclude the negotiation process as a “final agreed version,”<sup>902</sup> it is clear that the e-mail would have so indicated, or that EEGSA would have at least responded to Mr. Quijivix making reference to that agreement. None of that occurred.<sup>903</sup>
414. The truth is that the parties never reached an agreement with regard to the so-called rule 12, as the CNEE rejected its inclusion in EEGSA’s draft of May 19, 2008, a fact

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prior e-mail, rather he again typed the text of the subject line, including the term “Proposals.” *See* the detailed analysis of these drafts in the Counter-Memorial, pars. 366-367.

<sup>897</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 64.

<sup>898</sup> *Ibid*, par. 64.

<sup>899</sup> Memorial, par. 137; Reply, par. 147.

<sup>900</sup> That task is the exclusive responsibility of the Board of Directors (*see* LGE, Art. 5, **Exhibit R-8**).

<sup>901</sup> E-mail from Miguel Francisco Calleja to Leonardo Giacchino, attaching the Proposed Operating Rules for the Expert Commission, May 28, 2008, **Exhibit R-77**.

<sup>902</sup> Reply, par. 147.

<sup>903</sup> Counter-Memorial, par. 368.

acknowledged by TGH.<sup>904</sup> As explained, that rejection of rule 12 was logical because allowing the Expert Commission review the study supposedly corrected by the distributor to confirm whether it conformed with its pronouncement would have inverted the roles of the CNEE and the Expert Commission in tariff-setting (authority that the CNEE exercised through the review and approval of the distributor's tariff studies). As the Constitutional Court has confirmed, "[E]xpecting the Expert Commission to decide a conflict and empowering it to issue a binding decision breaches the principle of legality that is characteristic of the Rule of Law [...], according to the General Electricity Law, the power to approve tariff schemes pertains to the National Electricity Commission and in no way, either directly or indirectly, to an expert commission [...]."<sup>905</sup>

415. As Guatemala has explained, despite the absence of agreement to the operating rules, Mr. Calleja sent a version of the operating rules to Mr. Bastos unbeknownst to the CNEE.<sup>906</sup> In an attempt to justify this procedural irregularity, Mr. Calleja as witness indicates that, after sending the e-mail to Mr. Bastos, "[I] informed Mr. Quijivix that I had done so."<sup>907</sup> That is false, as Mr. Colom confirms,<sup>908</sup> because if it had occurred, he would have been immediately informed of that by Mr. Quijivix. It should be noted that Mr. Calleja still has not explained how that contact took place, nor does he provide any evidence thereof.<sup>909</sup> Likewise, although Guatemala emphasized in its Counter-Memorial that Mr. Calleja failed to refer to this alleged communication with Mr. Quijivix in his witness statement in the *Iberdrola* case,<sup>910</sup> Mr. Calleja still does not explain the reason for that omission.

416. As Guatemala previously explained, a few days after the final meeting with EEGSA on May 28, the CNEE agreed to hold a conference call with EEGSA and Mr. Bastos in

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<sup>904</sup> Memorial, par. 129.

<sup>905</sup> Judgment of the Constitutional Court, November 18, 2009, **Exhibit R-105**, p. 29.

<sup>906</sup> Counter-Memorial, par. 383.

<sup>907</sup> Calleja, **Appendix CWS-3**, par. 42.

<sup>908</sup> Colom, **Appendix RWS-1**, par. 132.

<sup>909</sup> Counter-Memorial, par. 369; Calleja, **Appendix CWS-3**, par. 42.

<sup>910</sup> Counter-Memorial, par. 369

order to discuss administrative matters.<sup>911</sup> In that discussion, Messrs. Quijivix and Calleja informed Mr. Bastos about the operating rules discussed,<sup>912</sup> given that, as Mr. Colom affirms, they could be useful to the Expert Commission.<sup>913</sup> However, contrary to what TGH alleges, it was not indicated to Mr. Bastos that there was an agreement on rule 12.<sup>914</sup>

417. It is noteworthy that TGH insists on establishing a supposed agreement between EEGSA and the CNEE on the basis of conversations, e-mails with *work in progress* versions and alleged understandings never expressed during those discussions. The support provided would prove insufficient in the context of private party negotiations, and even more so in for a public entity such as the CNEE (especially considering that by 2008, EEGSA and its attorneys had been working with the regulatory authority for more than ten years). EEGSA was aware that the CNEE did not operate or make its decisions as a private entity does; rather, it is governed by precise rules of public law.<sup>915</sup> According to principles of public disclosure in Guatemala, the CNEE may only exercise its will through official resolutions (or through official minutes based on a resolution) executed by its directors and duly justified.<sup>916</sup> Thus, EEGSA was aware that any agreement with the CNEE would need to be formalized by a formal resolution or by direct reference thereto in order to be legally valid, especially in a matter of such importance. In its statement of facts, TGH conveniently omits this central point and fails to justify why there was no express agreement contained in the Notarial Certificate of Designation of the Expert Commission or in an official resolution of the CNEE.

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<sup>911</sup> *Ibid*, par. 370.

<sup>912</sup> Rules 1 to 11 of the operating rules incorporated matters of procedure entirely consistent with the stipulations of the LGE and the RLGE.

<sup>913</sup> Colom, **Appendix RWS-1**, par. 131.

<sup>914</sup> Reply, par. 152; Colom, **Appendix RWS-1**, par. 131; Colom Supplemental Statement, **Appendix RWS-4**, par. 63.

<sup>915</sup> Counter-Memorial, par. 371; Colom Supplemental Statement, **Appendix RWS-4**, par. 62; Colom, **Appendix RWS-1**, par. 129.

<sup>916</sup> Colom, **Appendix RWS-1**, par. 129. Colom Supplemental Statement, **Appendix RWS-4** par. 62. The CNEE only issues resolutions adopted by the majority of its members, pursuant to LGE Art. 5, and it cannot and must not be interpreted that an e-mail implies approval by the CNEE, an e-mail, which in any case does not even indicate that such approval was given and what it indicates is proposed text.



***b. The documentary record confirms that the parties did not consider there to be an agreement on the operating rules***

418. In order to establish the CNEE's alleged acceptance of the operating rules, TGH argues that "Mr. Bastos specifically referred to the operating rules in his financial proposal of June 6, 2008 to the parties, which he references and expressly incorporates in the contract between Mr. Bastos and the CNEE" and "[a]t no point did the CNEE complain or raise any issues with these references to the operating rules."<sup>917</sup> As explained below, TGH's assertion is false.
419. TGH's argument requires resorting to a third-party document in order to prove an alleged agreement between the CNEE and EEGSA. Even still, it is false. Mr. Bastos' economic proposal contains no apparent reference to the operating rules, much less a "specific" reference as TGH wrongly states.<sup>918</sup> The letter in question, sent by Mr. Bastos to Messrs. Miguel Calleja and Melvin Quijivix, is entitled "Economic offer" and contains Mr. Bastos' economic proposal for serving as expert on the Expert Commission. In the second paragraph, Mr. Bastos indicates that his performance would be subject to "Rules of Arbitration (sic) that [he] would receive shortly." In other words, Mr. Bastos' letter, the only documentary reference on which TGH bases the CNEE's alleged agreement to the operating rules, not only erroneously refers to "rules of arbitration," without explaining what document he is referring to, its date, who signed it or who would "send" it to him, but more importantly, does not even include those rules. Even if the CNEE's Board of Directors had taken note of this reference, it would never have understood to what Mr. Bastos was referring, given that the CNEE never knew that EEGSA sent a copy of the operating rules to Mr. Bastos; as explained above, that copy was sent unbeknownst to the CNEE.<sup>919</sup> Thus, TGH absurdly attempts to establish an

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<sup>917</sup> Reply, par. 152; Calleja Reply, **Appendix CWS-9**, par. 37

<sup>918</sup> See Letter from Carlos Bastos to Melvin Quijivix and Miguel Francisco Calleja, June 6, 2008, **Exhibit R-81**.

<sup>919</sup> Despite the vagueness of the language of the letter in question, in his witness statement in the *Iberdrola* case, Mr. Bastos suggests that this reference was precisely to the e-mail that Calleja circulated unbeknownst to the CNEE, entitled "Proposed Operating Rules for the Expert Commission." See *Iberdrola Energía, S.A. v. Republic of Guatemala (ICSID Case No. ARB/09/05)*, Witness Statement of Carlos Bastos, **Exhibit R-102**, par. 31. E-mail from Miguel Francisco Calleja to Carlos Bastos, June 2, 2008, **Exhibit R-79**. See par. 203.

agreement between EEGSA and the CNEE to the alleged operating rules through a document (i) issued by a third party (not EEGSA or the CNEE); (ii) not responded to by the CNEE; (iii) referring to unknown “Rules of Arbitration;” and (iv) trying to incorporate those rules by reference to “correspondence of the parties,” which, strictly speaking, was done without the knowledge of the CNEE.

420. Furthermore, it is important to note that Mr. Bastos’ economic proposal, attached as an appendix to his contract with the CNEE, was never analyzed or discussed between the parties before it was sent by Mr. Bastos.<sup>920</sup> Moreover, the text of the economic proposal shows that at the time of the offer, Mr. Bastos believed that the Expert Commission would finish its work with the issuance of the pronouncement, as he stated: “My performance [...] shall run [...] until the pronouncement of the Expert Commission [...].”<sup>921</sup> After that, Mr. Bastos was only available to the parties on a personal basis in order to provide clarifications or other tasks. If Mr. Bastos had thought that his mission as member of the Expert Commission would include a second round of review and approval of the final study, he would have included this in his offer. Of greater importance, however, is the fact that the contract between the CNEE and Mr. Bastos contains specific rules of procedure that must be followed, if applicable, with priority over any rule incorporated by double reference.<sup>922</sup>
421. Similarly, TGH alleges that in the e-mail of June 12, 2008, Mr. Bastos asked Messrs. Quijivix and Calleja if he could travel to Guatemala to attend the first meeting of the Expert Commission.<sup>923</sup> Mr. Bastos alleges that he asked “whether this would be in accordance with the ‘formal requirements.’”<sup>924</sup> TGH alleges that “Mr. Quijivix

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<sup>920</sup> This is what Mr. Bastos admitted during the hearing in the Iberdrola case; *see* Counter-Memorial, par. 380 and footnote 512.

<sup>921</sup> Letter from Carlos Bastos to Melvin Quijivix and Miguel Francisco Calleja, June 6, 2008, **Exhibit R-81**. *See* Counter-Memorial, par. 385.

<sup>922</sup> Contract between Carlos Bastos and the CNEE, June 26, 2008, **Exhibit R-85**, clause four.

<sup>923</sup> Reply, par. 153.

<sup>924</sup> Reply, par. 153; Bastos Reply, **Appendix CWS-7**, par. 4; E-mail from M. Quijivix to C. Bastos and M. Calleja on June 13, 2008, **Exhibit C-495**.

responded that the CNEE had no objection.”<sup>925</sup> According to TGH’s logic, Mr. Bastos, in referring to “the procedural formalities,” was referring to the operating rules allegedly agreed upon and the need for the three members of the Expert Commission to meet in Guatemala City, an obligation allegedly grounded in what TGH calls “Rules 1 and 2 of the Operative Rules.”<sup>926</sup>

422. The statement by Mr. Bastos in this regard is wrong. From a simple reading of the above-mentioned e-mail,<sup>927</sup> it can be seen that at no time is reference made to the “Operating Rules” to which Mr. Bastos alludes. The e-mail simply states: “[...] I could go to Guatemala on that date and therefore spare Leonardo and Jean from making the trip, provided my presence alone is enough to fulfill the formal requirements.” The text of the e-mail does not refer to what that procedure is, but even more importantly, the CNEE never objected to the Expert Commission establishing internal procedures—in fact, it suggested as much in its call with Mr. Bastos. What the CNEE could not accept were procedural rules that would modify the text of the law and the obligations of the regulatory authority (as with EEGSA’s so-called rule 12). TGH’s also falsely depicts Mr. Quijivix’s response to Mr. Bastos’ proposal, indicating that Mr. Quijivix responded that “the CNEE had no objection.”<sup>928</sup> In his e-mail of June 13, 2008, however, Mr. Quijivix simply responded: “[...] Next week we’ll be sending you the CNEE draft contract so that we can sign it during your visit to Guatemala. Regards. Melvin Quijivix.”<sup>929</sup> It is clear that TGH invents a statement by Mr. Quijivix that was never made in order to support its argument.

423. Mr. Bastos states that neither the CNEE nor EEGSA “ever told the Expert Commission that it was up ‘to the Expert Commission to decide on its procedures, as long as they respected the limitations provided by the parties.’”<sup>930</sup> Mr. Bastos also alleges that the

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<sup>925</sup> Reply, par. 153.

<sup>926</sup> *Ibid*, footnote 841.

<sup>927</sup> E-mail from Mr. Quijivix to C. Bastos and M. Calleja, June 13, 2008, **Exhibit C-495**.

<sup>928</sup> Reply, par. 153.

<sup>929</sup> E-mail from M. Quijivix to C. Bastos and M. Calleja on June 13, 2008, **Exhibit C-495**.

<sup>930</sup> Reply, par. 155; Bastos Reply, **Appendix CWS-7**, par. 6; Colom, **Appendix RWS-1**, par. 130;

Expert Commission understood that their conduct would be governed by the Operating Rules and that this was the reason why those rules were included in the Report of July 25, 2008 with the indication that “[t]he Parties have agreed on the following Expert Commission operating rules.”<sup>931</sup> Mr. Bastos, in support of these assertions, alleges that “Mr. Riubrugent, the CNEE appointee to the Expert Commission, never disputed this section of the Report or otherwise indicated that the Operating Rules had not been agreed between the parties.”<sup>932</sup> Mr. Bastos’ reference is mistaken, as it ignores Mr. Riubrugent’s lack of awareness of the discussions regarding the alleged operating rules and therefore operated under an erroneous understanding (as with Mr. Bastos) that the rules had been agreed to by the parties.

424. As Guatemala previously explained, the best evidence that the operating rules did not go beyond negotiation between the parties is that they were not incorporated into the Notarial Letter of Appointment of the Expert Commission (the *Notarial Letter of Appointment*) of June 6, 2008, the document that founded the Commission.<sup>933</sup> TGH, which conveniently disregarded this point in its Memorial, now alleges, through the statement of Mr. Calleja, that “[t]hat the Notice itself does not refer to the operating rules, which relate not to the appointment of the Expert Commission, but to how the Expert Commission proceedings would be conducted, does not support Mr. Colom’s assertion that the parties failed to reach agreement on the operating rules.”<sup>934</sup> Mr. Maté shares the same opinion.<sup>935</sup>
425. Unfortunately, neither TGH nor Messrs. Calleja and Maté explain their basis for asserting that the absence of operating rules into the Notarial Letter of Appointment “is useless” for proving the lack of agreement (while erroneous references in letters or vague assertions in e-mails of third parties “would be useful”). The Notarial Letter of

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<sup>931</sup> Reply, par. 155; Bastos Reply, **Appendix CWS-7**, par. 6; Expert Commission’s Report, dated July 25, 2008, **Exhibit R-87**, p. 10.

<sup>932</sup> Reply, par. 155; Bastos Reply, **Appendix CWS-7**, par. 6.

<sup>933</sup> Counter-Memorial, par. 373-375; Colom, **Appendix RWS-1**, par. 133; Notarial Certificate of Designation of the Expert Commission, June 6, 2008, **Exhibit R-80**.

<sup>934</sup> Reply, par. 156; Calleja Reply, **Appendix CWS-9**, par. 38.

<sup>935</sup> Maté Reply, **Appendix CWS-12**, par. 27.

Appointment is a document signed by the President of the CNEE, Mr. Colom, in representation of the CNEE's Board of Directors and by Mr. Luis Maté, General Manager of EEGSA, in representation of EEGSA,<sup>936</sup> in which both parties appointed their respective experts to form the Expert Commission and gave their approval so that Mr. Carlos Bastos would preside over the Expert Commission. It also establishes the objectives of that Expert Commission. Article One of the Notarial Letter of Appointment defined the mandate of the Expert Commission: "[...] to pronounce itself on the discrepancies regarding the Distribution Value Added [VAD] Study of Empresa Eléctrica de Guatemala, Sociedad Anónima, contained in resolution CNEE - ninety-six - two thousand eight (CNEE 96-2008) [...]."<sup>937</sup> The Notarial Letter of Appointment was the only official document issued by the parties in accordance with Resolution 96-2008, that had ordered the establishment of the Expert Commission. That Letter did not expressly or implicitly stipulate any function or task for the Expert Commission other than that of issuing a pronouncement on the discrepancies, nor did it make any mention of a second round of comments on the part of the Expert Commission. Nor does it make any reference to the operating rules, under any of its references or appointments. Clearly, they could not, as the parties had not agreed to any such rules, and rule 12 would have violated "what is set forth in article seventy-five (75) and ninety-eight (98) of the General Electricity Law and the RLGE respectively [...]."<sup>938</sup> This is confirmed given that on June 12, 2008, the three experts officially assumed their positions on the Expert Commission by way of a memo that confirmed their understanding of the scope of their task.<sup>939</sup>

426. In any event, one cannot lose sight of the fact that the operating rules, which had not gone beyond a discussion stage, could not amend the wording and spirit of the LGE, the RLGE or the Agreements. Furthermore, even assuming *arguendo* that the operating rules were applicable given their incorporation in the Expert Commission's

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<sup>936</sup> Notarial Letter of Appointment of the Expert Commission, June 6, 2008, **Exhibit R-80**.

<sup>937</sup> *Ibid*, Art. One.

<sup>938</sup> *Ibid*.

<sup>939</sup> Letter from Jean Riubrugent, Carlos Bastos and Leonardo Giacchino to Carlos Colom Bickford and Luis Maté, June 12, 2008, **Exhibit R-83**.

pronouncement (which is obviously not the case), the Expert Commission itself eventually diminished their value by failing to comply with several of them.<sup>940</sup>

## **8. The dissolution of the Expert Commission**

427. As explained in the Counter-Memorial, with the Expert Commission's issuance of the pronouncement, it completed its functions per the Notarial Letter of Appointment, and the CNEE proceeded to dissolve the Commission.<sup>941</sup> Thus, contrary to TGH's argument,<sup>942</sup> this action was not unlawful or arbitrary, but rather was fully consistent with LGE Article 75, which establishes that the Expert Commission would only issue a pronouncement on the discrepancies. Even the contract executed between EEGSA itself and Mr. Bastos provided for the payment of the final fee with the submission of this report.<sup>943</sup> In its Reply, TGH argues that the CNEE's dissolution of the Expert Commission was illegal because the CNEE had no authority to unilaterally dissolve the Commission.<sup>944</sup> TGH also questions this dissolution because the "corrected VAD study was to be reviewed and approved by the Expert Commission under rule 12."<sup>945</sup> As indicated below, TGH's analysis is wrong, especially because it omits any reference to the regulatory framework.

428. It is clear that TGH advances its case in disregard of the regulatory framework that regulates the Expert Commission. Nonetheless, it is necessary to review the regulation, as well as the history that preceded the formation of the Expert Commission in 2008. Such an analysis must start with the text of the LGE. Article 75, the only article in the LGE that describes the function of the Expert Commission, establishes that once the distributor submits the corrected tariff study, if discrepancies persist between the CNEE

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<sup>940</sup> Counter-Memorial, pars. 401 and 606.

<sup>941</sup> Counter-Memorial, par. 411. CNEE Resolution No. GJ-Decision 3121 (Dossier GTTE-28-2008), July 25, 2008, **Exhibit R-86**; Colom, **Appendix RWS-1**, par. 138.

<sup>942</sup> Memorial, par. 167.

<sup>943</sup> Counter-Memorial, par. 412.

<sup>944</sup> Reply, par. 167.

<sup>945</sup> *Ibid.*, par. 168.

and the distributor, the parties must agree on the appointment of an Expert Commission. This article reads:

The Commission shall review the studies performed and may make comments on the same. In case of discrepancies submitted in writing, the Commission 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 pronounce itself on the discrepancies in a period of 60 days counted from its appointment.<sup>946</sup>

429. Meanwhile, RLGE Article 98 bis also establishes that:

The Expert Commission shall pronounce itself on the discrepancies within a term of sixty (60) days after it is constituted. [...].<sup>947</sup>

430. From a combined reading of the corresponding LGE and RLGE articles, it is evident that in the event that the CNEE rejects the tariff study and the persistence of discrepancies, the Expert Commission will pronounce itself on those discrepancies within a term of 60 days. In the regulatory framework, there is no other function for the Expert Commission.<sup>948</sup> In line with this, on May 15, 2008, in view of the CNEE's rejection of the Bates White tariff study for its failure to adhere to the Terms of

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<sup>946</sup> LGE Art. 75, **Exhibit R-8**, (emphasis added). Unofficial English translation. In its original Spanish language it reads:

En caso de discrepancias formuladas por escrito, la [CNEE] y las distribuidoras deberán acordar el nombramiento de una Comisión Pericial de tres integrantes, uno nombrado por cada parte y el tercero de común acuerdo. La Comisión Pericial se pronunciará sobre las discrepancias, en un plazo de 60 días contados desde su conformación

<sup>947</sup> Government Resolution of the MEM [Ministry of Energy and Mines] 145-2008, May 19, 2008, **Exhibit R-72**, Art. 98 bis. (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

La Comisión Pericial se pronunciará sobre las discrepancias en un plazo de sesenta (60) días, contados desde su conformación [...]

<sup>948</sup> Aguilar Rejoinder, **Appendix RER-6**, par. 35.

Reference, the CNEE proceeded to form the Expert Commission via Resolution 96-2008.<sup>949</sup> The role of the Expert Commission was clearly enunciated in the text of that Resolution and was limited to determining the correct application of the Terms of Reference in the distributor's study:

[...] [V]erifying the correct application of the Terms of Reference (ToR) of the Distribution Value Added Study approved by the National Electric Energy Commission.<sup>950</sup>

431. Once the parties appointed the members of the Expert Commission, that entity was officially established and the CNEE and EEGSA signed the Notarial Letter of Appointment.<sup>951</sup> As explained in the preceding section, the Notarial Letter of Appointment was the only official document issued by both parties in compliance with Resolution 96-2008. In Article One, the mandate of the Expert Commission was clearly laid out:

The appearers state that the Expert Commission is constituted to pronounce itself on the discrepancies regarding the Distribution Value Added (VAD) Study of Empresa Eléctrica de Guatemala, Sociedad Anónima, contained in resolution CNEE – ninety-six – two thousand eight (CNEE-96-2008), as well as regarding the responses from Empresa Eléctrica de Guatemala, S.A. and its consultant for same, in accordance with what is set forth in article seventy-five (75) and ninety-eight (98) of the General Law of Electricity and the Regulations of the General Law of Electricity, respectively, which establish that in the event of discrepancies made in writing, the Commission and the distributors shall agree on the appointment of an Expert Commission [...].<sup>952</sup>

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<sup>949</sup> CNEE Resolution 96-2008, May 15, 2008, **Exhibit R-71**.

<sup>950</sup> *Ibid*, p. 3. Unofficial English translation. In its original Spanish language it reads:

[...][V]erificando la correcta aplicación de los Términos de Referencia (TdRs) del Estudio del Valor Agregado de Distribución aprobados por la Comisión Nacional de Energía Eléctrica.

<sup>951</sup> Notarial Letter of Appointment of the Expert Commission, June 6, 2008, **Exhibit R-80**.

<sup>952</sup> *Ibid*, Art. One (emphasis added). Unofficial English translation. In its original Spanish language it reads:



432. Consequently, neither the LGE nor the RLGE on the one hand, nor Resolution 96-2008 nor the Notarial Letter of Appointment, on the other, established any additional function for the Expert Commission other than that of pronouncing itself. Not one of these documents makes reference to operating rules of the Expert Commission, to a third version of the tariff study, or to a second pronouncement of the Expert Commission.<sup>953</sup>
433. Thus, when the CNEE received the pronouncement of the Expert Commission on Friday, July 25, 2008,<sup>954</sup> the CNEE confirmed receipt of that opinion<sup>955</sup> and declared that the Commission had completed the functions entrusted to it in the Notarial Letter of Appointment (which were the same as those provided for in the LGE, the RLGE and Resolution 98-2008) and proceeded to declare the dissolution of the Expert Commission:

[...] II) The report [...] is deemed received, and the pronouncement of the Expert Commission is deemed met; III) By virtue of having met the purpose of its appointment, the Expert Commission [...] is definitively dissolved [...].<sup>956</sup>

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Manifiestan los comparecientes que se conforma la Comisión Pericial para que se pronuncie sobre las discrepancias con el Estudio del [VAD] de [EEGSA] contenidas en la Resolución CNEE – noventa y seis – dos mil ocho (CNEE 96-2008) así como sobre las respuestas de [EEGSA] y de su consultor a la misma, conforme lo establecido en el artículo setenta y cinco (75) y noventa y ocho (98) de la [LGE] y el Reglamento [...] respectivamente, los cuales establecen que en caso de discrepancias formuladas por escrito, la [CNEE] y las distribuidoras deberán acordar el nombramiento de una Comisión Pericial [...]

<sup>953</sup> LGE Art. 75, **Exhibit R-8**; RLGE Art. 98, **Exhibit R-36**.

<sup>954</sup> Report of the Expert Commission, July 25, 2008, **Exhibit R-87**.

<sup>955</sup> The CNEE confirmed receipt of the Expert Commission's pronouncement through CNEE Resolution No. GJ-Providencia 3121 (Dossier GTTE-28-2008), July 25, 2008, **Exhibit R-86**; Colom, **Appendix RWS-1**, par. 138.

<sup>956</sup> CNEE Resolution No. GJ-Providencia 3121 (Dossier GTTE-28-2008), July 25, 2008, **Exhibit R-86** (Emphasis added). Unofficial English translation. In its original Spanish language it reads:

434. Furthermore, after providing notification of the dissolution of the Expert Commission, the CNEE informed the experts, Messrs. Jean Riubrugent and Carlos Bastos, that “the activities relating to the execution” of their respective contracts had been completed with the submission of the pronouncement, and that they would proceed to process payment for their respective fees as experts.<sup>957</sup>
435. TGH’s only complaint on this issue is that the CNEE, upon dissolving the Expert Commission, would have prevented it from complying with the provisions of rule 12.<sup>958</sup> This argument starts from a mistaken premise; as Guatemala explained,<sup>959</sup> the CNEE never accepted that rule, specifically because it incorporated into the proceeding a stage that was not provided for in the legal framework.
436. This issue, along with many others presented by TGH in this arbitration, has already been decided by the Guatemalan courts at the request of EEGSA. As the Constitutional Court of Guatemala explained very clearly in its judgment of November 18, 2009:

[T]he Expert Commission having issued an opinion on the items received for consideration [...], the process should have been deemed concluded to avoid falling into a vicious circle [...]

[H]aving accepted the procedure set forth in Articles 74 and 75 of the regulatory law, that was concluded with the opinion issued by the Expert Commission, which was not binding upon the authority, this commission assumed its responsibility, which cannot be delegated, approving the tariffs challenged in the *amparo* action, based on its own studies that it deemed appropriate.

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[...] II) Se tiene por recibido el informe [...] y se tiene por cumplido el pronunciamiento de la Comisión Pericial; III) En virtud de haber cumplido con el objeto de su nombramiento, se disuelve en definitiva la Comisión Pericial [...]

<sup>957</sup> Counter-Memorial, par. 413. The certificate of notification for the delivery of this document to Carlos Bastos was received at 1:40 p.m. on Monday, July 28. Jean Riubrugent received the notification at 1:45 p.m. the same July 28. Notice Forms issued by CNEE and letters from Carlos Colom Bickford to Jean Riubrugent and Carlos Bastos, July 28, 2008 **Exhibit R-92**.

<sup>958</sup> Reply, par. 157.

<sup>959</sup> See section IV.A.7

Neither the Law nor the Regulations mentioned above contain any provisions indicating any roles of the Expert Commission other than to issue an opinion, which was fulfilled by submitting it. It is not recognized [...] that the experts' activity should continue, which is why its dissolution was an innocuous consequence of the completion of its advisory role for the definition of the tariff [...] [T]he Expert Commission having submitted its report, and not having any further legal intervention in the procedure, its dissolution could not have caused the petitioner any damage.<sup>960</sup>

437. Thus, according to the Constitutional Court: (a) the LGE assigns to the CNEE, a technical body independent of the Executive, the authority to establish tariff schedules in accordance with the legal framework, for example Articles 60, 61, 71 and 73;<sup>961</sup> and (b) the Expert Commission, only issues a pronouncement in the event of discrepancies between the distributor and the CNEE regarding compliance of the VAD study with the Terms of Reference provided by the CNEE. The RLGE does not foresee any other

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<sup>960</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, pp. 23-26 (emphasis added), **Exhibit R-105**. Unofficial English translation. In its original Spanish language, it reads:

[A]l haberse pronunciado la comisión de peritos sobre los puntos sometidos a su dictamen [...] el proceso habría de tenerse por concluido, puesto que no podría caer en un círculo interminable [...]

[H]abiéndose dado por concluido el procedimiento establecido en los artículos 74 y 75 de la ley reguladora, que concluyó con el dictamen de la Comisión Pericial, el cual no era vinculante para la autoridad ésta asumió su responsabilidad, que no tiene facultad para delegarla, aprobando, con base en los propios estudios que estimó pertinentes, las tarifas cuestionadas por media del amparo. [...]

Ni la Ley ni el Reglamento citados contienen precepto alguno que indique otra función de la Comisión Pericial, más allá de su pronunciamiento, el cual con su entrega quedó cumplido; no se percibe [...] que la actividad Pericial debiera mantenerse vigente, por lo que su disolución resultaba ser una consecuencia inocua del agotamiento de su función dictaminadora o asesora para la definición tarifaria [...]. [A]l haber cumplido la Comisión Pericial con la entrega de su informe y no tener ya ninguna otra intervención legal en el procedimiento, ningún agravio podía causarle a la amparista la disolución de aquella.

<sup>961</sup> *Ibid.*, p. 32.

additional function for the Expert Commission once it has issued its pronouncement.<sup>962</sup> Therefore, the Court decided that it was not illegal to dissolve the Expert Commission once it had completed its task.<sup>963</sup>

438. In its Judgment of February 24, 2010,<sup>964</sup> in a proceeding also initiated by EEGSA, the Constitutional Court confirmed that the LGE did not grant the Expert Commission any other function than pronouncing itself on the discrepancies between the CNEE and the distributor. Thus, the Expert Commission completed its function once it submitted its pronouncement<sup>965</sup> and the dissolution of the Expert Commission that had completed its duties could not have caused harm to EEGSA.<sup>966</sup>

There does not exist, either in the Law governing the matter or in its respective Regulations—the sole provision within the Guatemalan legal framework applicable to this case—any provision that would assign to the Expert Commission another function beyond that of issuing its opinion on the discrepancies mentioned above. [...] [W]ith the submission of its respective opinion, the Expert Commission completed the function that the Law on the matter and its respective Regulations entrusted to it for such purpose. Therefore, having completing its legal function and because it was not a permanent Commission, but rather one of a temporary nature whose function to issue an opinion, by Law, must be used in the determination of tariffs by the authority with jurisdiction over them, and there being no other involvement in the proceeding, by Law, no harm could be caused to the petitioner from the dissolution thereof, inasmuch as the actions by the challenged authority were in accordance with the provisions in the Law [LGE] and the RLGE governing the matter.<sup>967</sup>

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<sup>962</sup> *Ibid.*, pp. 23-26.

<sup>963</sup> *Ibid.*

<sup>964</sup> Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, **Exhibit R-110**.

<sup>965</sup> *Ibid.*, p. 32.

<sup>966</sup> *Ibid.*

<sup>967</sup> *Ibid.* (emphasis added). Unofficial English translation. In its original Spanish language it reads:

No se advierte, tanto en la Ley que regula la materia como en su respectivo Reglamento – única normativa aplicable al caso dentro del ordenamiento jurídico guatemalteco vigente – norma alguna

439. Thus, in light of the evidence submitted, there is no doubt that, having issued its pronouncement, the CNEE's dissolution of the Expert Commission did not violate the legal framework, as the only function for which that Commission was responsible—that of issuing an pronouncement on existing discrepancies<sup>968</sup>—was complete.<sup>969</sup>

**9. The Expert Commission's pronouncement confirmed that the study of May 5 was not suitable for the determination of tariffs**

440. Having received the Expert Commission's pronouncement on July 25, 2008, the CNEE's Tariff Division team worked through the weekend in order to advise the CNEE's Board of Directors of their conclusions at the start of the day on Monday, July 28.<sup>970</sup> As established in the Counter-Memorial,<sup>971</sup> the Expert Commission's pronouncement had favored the CNEE on most of the discrepancies (58 percent).<sup>972</sup> In its Reply, TGH maintains that the pronouncements in favor of EEGSA carry more economic weight than those in favor of the CNEE, and that an internal presentation of the CNEE indicated that the pronouncements in favor of the CNEE regarding the

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que atribuya a la Comisión Pericial, otra función más allá que la de su pronunciamiento sobre las discrepancias ya referidas. [...] [C]on la entrega de su respectivo pronunciamiento, la Comisión Pericial cumplió con la función que la Ley de la materia y su respectivo Reglamento le encomendaran para el efecto. Por lo que al haberse agotado su función legal, no tratándose de una Comisión de tipo permanente, sino más bien de carácter temporal, cuya función dictaminadora, según la ley, debía servir para la definición tarifaria por la autoridad competente para ello, no teniendo ya ninguna otra intervención en el procedimiento, según la Ley, ningún agravio podía causarle a la amparista la disolución de aquella, siendo que el proceder de la autoridad impugnada se ciñó al procedimiento establecido en la Ley y el Reglamento que regulan la materia.

<sup>968</sup> See LGE Art. 75, **Exhibit R-8**; Amended Regulations of the General Law of Electricity, Art. 98, **Exhibit R-36**; Ministry of Energy and Mines Government Resolution 145-2008, May 19, 2008, Art. 98 bis, **Exhibit R-72**; Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, pp. 31-32, **Exhibit R-110**; Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009, November 18, 2009, pp. 23-26, **Exhibit R-105**.

<sup>969</sup> Report of the Expert Commission, July 25, 2008, **Exhibit R-87**.

<sup>970</sup> See Agenda of meetings held by the tariff division of CNEE between Friday 25 and Monday 28, July 25-28, 2008, **Exhibit R-88**; Colom Witness Statement, par. 139 **Appendix RWS-1**.

<sup>971</sup> Counter-Memorial, par. 416

<sup>972</sup> *Ibid*, par. 390.

underground networks and the optimization of the construction units would be offset by the adverse decision on the FRC [Capital Recovery Factor].<sup>973</sup>

441. That interpretation is incorrect. If TGH's theory were true, the Bates White VNR would not change in light of the Expert Commission's pronouncements. However, in their preliminary review over the weekend, the CNEE's internal teams estimated that the incorporation of the pronouncements into the study of May 5 would result in a decrease in the VNR of almost 50 percent (about US\$ 680 million).<sup>974</sup> The decline would be even steeper with the incorporation of certain pronouncements that were initially unquantifiable.

442. Having clarified this point, we will analyze below TGH's specific arguments regarding the most relevant pronouncements of the Expert Commission.

*a. The Expert Commission confirmed the need to have an auditable model*

443. As explained in the Counter-Memorial, the Expert Commission unanimously voted (including the vote of the study's author, Mr. Giacchino) that Bates White's models violated the requirement of auditability, as was required by the CNEE since the stage reports.<sup>975</sup> This pronouncement was vital for the CNEE because it validated the CNEE's need to answer to a challenge to the study, as it was the only entity accountable to third parties for the tariffs.

444. TGH admits that while it "may have been important" for the CNEE to have an auditable model, that pronouncement had no direct effect on the VNR or the VAD given that, in order to comply with this pronouncement, Bates White needed only to *link* the model and ensure its traceability in its upcoming July 28 submission.<sup>976</sup> These arguments do no more than underline the importance of this pronouncement. First, this pronouncement confirms that neither the CNEE nor the Expert Commission were able to audit the model

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<sup>973</sup> Reply, pars. 162-164.

<sup>974</sup> CNEE, Analysis of Expert Commission's Report, illustration 8, **Exhibit C-547**.

<sup>975</sup> Counter-Memorial, par. 394; Report of the Expert Commission, July 25, 2008, pp. 15-17, **Exhibit R-87**.

<sup>976</sup> Reply, par. 163.

and verify that it was optimal. Furthermore, given that the tariffs had to be published on August 1, even if Bates White corrected the model to make it auditable (which it did not), the CNEE no longer had the opportunity to audit the model and verify that it reflected an optimal VNR and VAD. Therefore, contrary to what TGH asserts, the economic impact of this pronouncement was not “nil” but rather, and even more concerning, it was undeterminable. Finally, the fact that Bates Whites, with the vote of Mr. Giacchino on the Expert Commission, only agreed to deliver an auditable model once the CNEE could no longer conduct an audit calls into question the trustworthiness of that consultant.

***b. The Expert Commission confirmed the need to have reference prices and an auditable database***

445. As explained in the Counter-Memorial, the Expert Commission pronounced itself in favor of the CNEE regarding the need to provide reference prices so that the CNEE could verify whether the VNR reflected efficient prices in compliance with the RLGE.<sup>977</sup> The Commission also expressly established that it was improper to set prices based on the distributor’s real prices. More importantly, the Commission expressed concern over possible overpricing due to collusion with local suppliers, and also over profit sharing with related companies.<sup>978</sup> As for requirement for a database that would allow for auditing the submitted prices, the Expert Commission also pronounced itself [*pronunciarse*] unanimously in favor of the CNEE.<sup>979</sup> With respect to the benchmarking study, the Expert Commission also pronounced itself unanimously in favor of the CNEE, requiring that Bates White compare costs with at least: (i) the ideal Company developed in the previous Tariff Study; (ii) the ideal Company developed in the present Tariff Study; and (iii) the actual Company.<sup>980</sup>

446. In its Reply, TGH insists upon the irrelevance of this pronouncement because it does not impact the VNR or the VAD, arguing that, “because the consultant needed to choose the

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<sup>977</sup> Counter-Memorial, pars. 395-397

<sup>978</sup> Report of the Expert Commission, July 25, 2008, p. 35, **Exhibit R-87**.

<sup>979</sup> *Ibid*, p. 41.

<sup>980</sup> *Ibid.*, p. 164.

lowest price shown, it remained to be seen whether the additional reference prices that needed to be included as a result of the ruling would be lower than the ones relied upon by Bates White in its prior study.”<sup>981</sup> As in the case of traceability, the mere fact that TGH recognized that the impact of the new reference prices remained to be seen demonstrates that the CNEE could not plainly accept such values without an audit. Furthermore, since Bates White supplied the reference prices after the Expert Commission’s pronouncement, the CNEE no longer had the time to audit and verify the efficiency of the prices applied in the model. Thus, the impact of this pronouncement was not nil as TGH alleges, but rather “uncertain.” Lastly, it is worth clarifying that Bates White’s persistent refusal to provide such basic information as reference prices until such time as it was impossible to audit that information is indication of the unreliability of the study.

*c. The Expert Commission confirmed that the return had to be calculated on the capital base (VNR) net of amortization*

447. Guatemala previously explained how Bates White’s insistence that the return be calculated on a gross capital base<sup>982</sup> was contrary to (i) the LGE; (ii) the basic principles of regulatory economics; (iii) the previous practice of the CNEE; and (iv) literature published on the subject by Mr. Giacchino himself.<sup>983</sup> The Expert Commission, as TGH admits,<sup>984</sup> confirmed that amortization had to be taken into account in order to calculate the return.<sup>985</sup>
448. In its Reply, TGH maintains that Guatemala cannot assert that the Expert Commission’s decision regarding the FRC was more favorable to the CNEE than to EEGSA,<sup>986</sup> because the Commission pronounced itself in favor of an amortization level of seven percent when the Terms of Reference had established 50 percent and EEGSA had

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<sup>981</sup> Reply, par. 163.

<sup>982</sup> Counter-Memorial, pars. 398-401.

<sup>983</sup> See Section III.E.2 (b) above.

<sup>984</sup> Memorial, par. 161, Reply, par. 163.

<sup>985</sup> Report of the Expert Commission, July 25, 2008, pp. 104-106, **Exhibit R-87**.

<sup>986</sup> Reply, par. 163.



requested zero.<sup>987</sup> With this explanation, TGH attempts to disregard the most relevant point made by the Expert Commission on this discrepancy.

449. As explained by Mr. Damonte, while the alternate formula<sup>988</sup> proposed by the Expert Commission violated the firm Terms of Reference and possessed serious technical errors that made it impossible to apply,<sup>989</sup> the key issue is that the Expert Commission rejected the theory endorsed by EEGSA, its consultant, and now TGH—that the return is calculated on the gross value of the assets. Thus, it can be concluded that the Expert Commission pronounced itself in greater favor of the CNEE.
450. In conclusion, the importance of the pronouncements in favor of the CNEE cannot be measured exclusively on the basis of their economic weight as TGH claims (although even under that criterion, the majority of pronouncements favored the CNEE), but also in terms of the significance of the incorrectness of Bates White’s position throughout the entire tariff review, including its impact on the CNEE’s ability to audit the Bates White study in a timely manner.

#### **10. The CNEE could not use the July 28 tariff study to fix the tariff schedule**

451. As explained in the Counter-Memorial,<sup>990</sup> on the morning of July 28, the Tariff Division team advised the CNEE’s Board of Directors of the outcome of the Expert Commission’s pronouncements and, in particular, that the Commission had mostly decided in favor of the CNEE. In view of that situation, the CNEE had two options: to correct the Bates White report of May 5, or use the report prepared by the consultant Sigla.<sup>991</sup>

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<sup>987</sup> Kaczmarek Reply Expert Report, par. 80, **Appendix CER-5**.

<sup>988</sup> As explained in detail in the Counter-Memorial and as Mr. Bastos admitted (par. 606), the Expert Commission exceeded the limits of its authority by proposing an alternative capital recovery formula to the one established in the Terms of Reference.

<sup>989</sup> Damonte Expert Report, Chapter 6.2, **Appendix RER-2**; Damonte Rejoinder Expert Report, par. 94, **Appendix RER-5**.

<sup>990</sup> Counter-Memorial, par. 417.

<sup>991</sup> *Ibid.*; Colom Witness Statement, par. 147, **Appendix RWS-1**.

452. In its Reply, TGH alleges that the CNEE decided against the incorporation of the Expert Commission's pronouncements into the May 5 study because this would create a value "25%" greater than the value calculated in the Sigla study.<sup>992</sup> TGH completely ignores the preliminary analysis by the CNEE, which estimated that it would take up to five weeks to incorporate certain pronouncements into the study,<sup>993</sup> which made it impossible to correct the study within the available time remaining.<sup>994</sup> Furthermore, given that the Bates White model was not "*linked*," it was impossible to incorporate certain changes and carry out a sensibility analysis in an efficient manner.<sup>995</sup> Lastly, the CNEE had requested that Bates White provide an auditable study for over seven months, and Bates White's refusal to provide it created doubts about the integrity of the study and the advisability of amending it. In light of the circumstances, the CNEE believed that it was most reasonable to set the tariffs on the basis of Sigla's VAD study.<sup>996</sup>
453. That same afternoon of July 28, after the CNEE decided to concentrate on the Sigla study, it received a new version of the Bates White study (neither contemplated by nor allowed under the LGE) that was supposedly corrected in response to the Expert Commission's pronouncements.<sup>997</sup> First, the VNR of this study was still US\$ 1.053 million. As explained in detail in the Counter-Memorial, the Tariff Division conducted a preliminary review and verified that the models were neither fully supported nor linked, and that the database was still a simple excel file without any automation to allow quick verification of the sources of efficient prices within the two remaining days.<sup>998</sup>
454. In its Reply, TGH alleges that it untrue that the CNEE conducted a preliminary review of the July 28 study but rather that the CNEE had decided to use the Sigla study as it led

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<sup>992</sup> Reply, par. 164

<sup>993</sup> CNEE, Analysis of Expert Commission's Report, illustrations 4 and 5, **Exhibit C-547**

<sup>994</sup> Colom Witness Statement, par. 145, **Appendix RWS-1**.

<sup>994</sup> *Ibid*, par. 146.

<sup>995</sup> *Ibid*, par. 149.

<sup>996</sup> *Ibid*.

<sup>997</sup> Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., Final Version, July 28, 2008, **Exhibit R-91**; Colom Witness Statement, par. 148, **Appendix RWS-1**.

<sup>998</sup> Counter-Memorial, par. 419; Colom Witness Statement, par. 149, **Appendix RWS-1**.

to lower tariffs.<sup>999</sup> Nonetheless, aside from the auditability problems that were immediately detected in the July 28 study (which were already sufficient to discard the study *in limine*), it was enough to compare the VNR of US\$ 1.053 million that supposedly took into account the Expert Commission's pronouncements with the US\$ 621 million that the CNEE had preliminarily calculated by incorporating the quantifiable pronouncements into the May 5 study.<sup>1000</sup> This vast difference of US\$ 432 million left no doubt that Bates White had not correctly incorporated the pronouncements. Likewise, as TGH admits, several of the pronouncements implied that the CNEE would need to review new information provided by Bates White on July 28.<sup>1001</sup> By this stage, such a task was impossible. That was the precise intent of EEGSA (and TGH)—that the CNEE determine tariffs based on the July 28 study without the opportunity to verify the results.

*a. The “approval” by Mr. Bastos and Mr. Giacchino do not validate the July 28 study*

455. TGH insists in its Reply that the study of July 28 included “all” of the pronouncements.<sup>1002</sup> As evidence of this, TGH takes shelter in the supposed “approval” of the study by Messrs. Bastos and Giacchino.<sup>1003</sup> In its Counter-Memorial, Guatemala explained that, despite the dissolution of the Expert Commission, and despite Mr. Bastos’ understanding that he would not approve the Bates White study, Mr. Giacchino convinced Mr. Bastos to give a form of “approval” to the Bates White study.<sup>1004</sup>
456. Beyond the legal irrelevance of this “approval,” it is clear that this approval lacks any validity at all. Mr. Giacchino was the author of the study; ergo it is unnecessary to analyze the objectivity of his “approval.” With respect to Mr. Bastos, he explained that he verified “together with Mr. Giacchino” the incorporation of all of the Expert

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<sup>999</sup> Reply, par. 174.

<sup>1000</sup> CNEE, Analysis of Expert Commission’s Report, illustration 6, **Exhibit C-547**

<sup>1001</sup> Reply, par. 163.

<sup>1002</sup> *Ibid*, par. 177.

<sup>1003</sup> *Ibid*, par. 175.

<sup>1004</sup> Counter-Memorial, pars. 421-422.

Commission's pronouncements.<sup>1005</sup> In fact, his letter to the CNEE "approving" the study of July 28, Mr. Bastos included a significant reservation, confirming that it was impossible for him to verify the study in full:

The extension and complexity of the model itself prevent me from following in detail all the steps of the calculations performed. Nevertheless, it is possible to state that the result of the VAD calculated in its Tariff Study of July 28, 2008, is indeed calculated with a model that incorporates the decisions made by the Expert Commission.<sup>1006</sup>

457. As is evident from this letter, Mr. Bastos only held himself responsible for reviewing whether the pronouncements were incorporated into the model, but he is uncertain of the manner in which those pronouncements were incorporated, and of the accuracy of the calculations. Although Mr. Bastos affirms that he specifically verified "exactly where in the Excel spreadsheets each correction had been incorporated into the model," it is obvious from the text of his declaration that Mr. Bastos did not verify—because it was impossible—whether the corrections had been correctly incorporated or whether the calculations reflected those changes.<sup>1007</sup> It is sufficient to give one example to understand the scope of Mr. Bastos' approval.
458. As previously explained, the Expert Commission's Pronouncement No. B.1.a required the presentation of international reference prices in order to verify the efficiency of the prices applied in the Bates White model. In order to verify that the Bates White model of July 28 in fact included efficient prices, Mr. Bastos would have had to print one PDF

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<sup>1005</sup> *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/05), Witness Statement of Carlos Bastos, pgss. 20-21, **Bastos Réplica, CWS-7**.

<sup>1006</sup> Letter from Carlos Bastos to Carlos Colom Bickford and Luis Maté, August 1, 2008, p. 4, **Exhibit R-97** (emphasis added). Also see Transcript of the final hearing in ICSID Case No. ARB/09/5 (extracts), Tr., Day Two, Bastos, 635:3-9, **Exhibit R-140**. Unofficial English translation. In its original Spanish language, it reads:

La extensión y complejidad del modelo en sí mismo me impiden seguir en detalle todos los pasos del cálculo que se efectúa. No obstante es posible afirmar que el resultado del VAD calculado en su estudio está calculado con un modelo que incorpora las decisiones tomadas por la Comisión Pericial

<sup>1007</sup> *Ibid.*

page (which supposedly contained the 498 required prices)<sup>1008</sup> and check, one by one, the prices contained in the database against those included in the Bates White model to determine whether the most efficient prices were adopted. Even worse, he did not have at his disposal an automated database, as the Expert Commission had required.<sup>1009</sup> It is clear that Mr. Bastos during his two days of “review” could do nothing else but “validate” what Mr. Giacchino told him had been prepared. Hence, this approval could not in any way be, as TGH alleges, “binding” on the CNEE or oblige it to fix tariffs on the basis of this study.<sup>1010</sup>

*b. The study of July 28 did not incorporate all of the Expert Commission’s pronouncements*

459. As explained in detail in the Counter-Memorial, in addition to the preliminary review conducted by the CNEE prior to setting tariffs on the Sigla study, the CNEE subsequently forwarded the Bates White study of July 28 for review by the independent consulting firm Mercados Energéticos. This consultant too confirmed that the study of July 28 did not incorporate all of the Expert Commission’s pronouncements.<sup>1011</sup> Among other problems, Mercados Energéticos pointed out that the Models could not be traced or audited and that they lacked the support required.<sup>1012</sup> As Mercados Energéticos confirmed, Bates White presented numerous spreadsheets that had some relationship

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<sup>1008</sup> Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., Final Version, July 28, 2008, Stage B, p. 78, **Exhibit R-91**. (The design of the Bates White model required 166 major materials, and each major material required three reference prices).

<sup>1009</sup> Although the Expert Commission required that the data in the database had to be “able to be corroborated by the CNEE,” the July 28 database was entirely inauditable. During the hearing in the Iberdrola case, Mr. Giacchino admitted that in this final version of the study, the price database “was not electronically linked,” and his only excuse was that this “takes a long time.” Transcript of the Hearing on Jurisdiction and Merits, *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Tr., Day Two, pp. 477:7-12, Giacchino **Exhibit R-202**.

<sup>1010</sup> Counter-Memorial, par. 427

<sup>1011</sup> Mercados Energéticos, “Review of EEGSA’s Value-Added for Distribution Study in Relation to the Opinion of the Expert Commission,” July 2009, pp. 5-6 and 13, **Exhibit R-103**. See also Witness Statement of Alejandro Alberto Arnau Sarmiento, Mariana Álvarez Guerrero and Edgardo Leandro Torres of Mercados Energéticos Consultores S.A., January 24, 2012 (*Mercados Energéticos*), **Appendix RWS-3**.

<sup>1012</sup> Mercados Energéticos, “Review of EEGSA’s Value-Added for Distribution Study in Relation to the Opinion of the Expert Commission,” July 2009, pp. 5 and 13, **Exhibit R-103**. See also Mercados Energéticos, **Appendix RWS-3**.

between them, but that did not represent an integrated and orderly model that would permit proper auditing.<sup>1013</sup> For example, for Stage C, the consulting firm submitted a description of the supporting files, but the supporting files had no relationship with the calculation spreadsheets or with the supporting files actually sent.<sup>1014</sup> In addition, they found pasted values, and formulas that could not be understood. From their complete review of the study, Mercados Energéticos concluded that it did not reflect 64 percent of the Expert Commission’s pronouncements.<sup>1015</sup>

460. TGH engaged the services of Dr. Barrera to conduct, among other things, an analysis of the study of July 28. Dr. Barrera concludes that “each” of the pronouncements had been incorporated “entirely.”<sup>1016</sup> According to TGH, Dr. Barrera confirmed that “the relevant calculations are verifiable through links in accordance with the Expert Commission’s decision.”<sup>1017</sup> However, it is sufficient to read that expert’s own report to see that this is untrue. Dr. Barrera openly admits that he needed Mr. Giacchino’s help to understand Bates White’s Excel model of July 28, explaining that “[a]s part of our analysis of the 28 July 2008 Bates White Excel model submitted to the CNEE, we consulted with Dr. Leonardo Giacchino, the author of the Bates White studies”<sup>1018</sup> and that “[t]his process [the review of the July 28 tariff study] was facilitated by our consultations with Dr. Giacchino.”<sup>1019</sup> This admission leaves no doubt that a third party could not comprehend the July 28 study without Mr. Giacchino’s assistance. It is clear that this does not meet the requirements of the Terms of Reference nor of the Expert Commission.

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<sup>1013</sup> Mercados Energéticos, “Review of EEGSA’s Value-Added for Distribution Study in Relation to the Opinion of the Expert Commission,” July 2009, p. 28, **Exhibit R-103**. See also Mercados Energéticos, **Appendix RWS-3**.

<sup>1014</sup> *Ibid.*

<sup>1015</sup> Mercados Energéticos, “Review of EEGSA’s Value-Added for Distribution Study in Relation to the Opinion of the Expert Commission,” July 2009, p. 6, **Exhibit R-103**.

<sup>1016</sup> Barrera Expert Report, Section 3, **Appendix CER-4**.

<sup>1017</sup> *Ibid*, par. 74.

<sup>1018</sup> *Ibid*, par. 69.

<sup>1019</sup> *Ibid*, par. 74.

461. Mr. Barrera also criticizes the Mercados Energéticos’ conclusions regarding the July 28 study.<sup>1020</sup> Further, TGH alleges that Mercados Energéticos is an expert (not a witness) that is not independent as it was engaged after the tariff review.<sup>1021</sup> First of all, it is necessary to state that it is true, and was never concealed by Guatemala, that Mercados Energéticos was engaged after the close of the tariff review. Facing threats of arbitration, the CNEE decided to engage the services of external consultants in order to objectively analyze the study of July 28 in detail with proper time.<sup>1022</sup> The fact that Guatemala decided to offer those consultants as witnesses in this arbitration so that they could confirm the conclusions of their report and, if necessary, be cross-examined by TGH, does nothing more than make Guatemala’s position more transparent.
462. Mercados Energéticos, however, was recently engaged by EEGSA as their consultant for the 2013-2018 tariff review. In particular, we note that Mr. Arnau (a witness for Guatemala in this arbitration) has been hired as the “project manager” for EEGSA’s tariff review.<sup>1023</sup> In view of this engagement, and despite Guatemala’s repeated pleas, Mercados Energéticos has given notice that it cannot continue to serve as witness in this arbitration proceeding.<sup>1024</sup> Although Guatemala cannot provide a supplemental witness statement from Mercados Energéticos to reply to each of Dr. Barrera’s allegations, the reality is that EEGSA’s decision to engage Mercados Energéticos to perform its tariff review only confirms the consultant’s seriousness, suitability and independence. Nonetheless, Mr. Damonte affirmed in his first expert report, and confirms in his Supplemental report, his own conclusions regarding Bates White’s failure to incorporate all of the pronouncements into the July 28 study. According to Mr. Damonte, that study is overestimated by at least US\$ 424 million.<sup>1025</sup>

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<sup>1020</sup> Reply, pars. 178-179; Barrera Expert Report, par. 66, **Appendix CER-4**.

<sup>1021</sup> *Ibid.*, par. 178.

<sup>1022</sup> Mercados Energéticos, “Review of EEGSA’s Value-Added for Distribution Study in Relation to the Opinion of the Expert Commission,” July 2009, **Exhibit R-103**.

<sup>1023</sup> Letter from Mr. Carlos Fernando Rodas (EEGSA) to Ms. Carmen Urizar de CNEE (GSJ-DJC-17-2010), August 30, 2012, **Exhibit R-205**.

<sup>1024</sup> Communication from Alejandro Arnau to Rodolfo Salazar, August 27, 2012, **Exhibit R-207**.

<sup>1025</sup> Damonte Rejoinder Expert Report, par. 271, **Appendix RER-5**.

463. Based on the foregoing, it is clear that the Expert Commission could not use the July 28 study to determine the tariffs applicable to the 2008-2013 five-year period.<sup>1026</sup>

**11. The CNEE's decision to set tariffs based on the Sigla study adhered to the terms of the LGE**

464. Given that Bates White's study could not be adapted and the July 28 study did not incorporate the Expert Commission's pronouncements, the CNEE finally approved the Sigla tariff study on Tuesday, July 29,<sup>1027</sup> after the Tariff Division team submitted an analysis of the Sigla study to the Board of Directors based on two legal opinions and two technical opinions.<sup>1028</sup> The CNEE proceeded to issue Resolution CNEE 144-2008 approving the use of the Sigla study to set the tariff schedule<sup>1029</sup> and on July 30, 2008 the CNEE approved the new tariff schedules for EEGSA for the 2008-2013 five-year period, which were published the next day, July 31 and entered into effect on August 1, thus meeting all the deadlines established by the LGE.<sup>1030</sup> As Guatemala previously explained, the tariffs established on the basis of the Sigla study were reasonable,

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<sup>1026</sup> Counter-Memorial, par. 426.

<sup>1027</sup> Counter-Memorial, par. 419; Colom Witness Statement, par. 149, **Appendix RWS-1**. As previously explained, two further reports from external experts appointed by the CNEE to analyze in detail the supposed compliance of the Bates White study of July 28 with the Expert Commission's pronouncements confirmed the non-incorporation of a great quantity of pronouncements. Mercados Energéticos Witness Statement, **Appendix RWS-3**; Damonte Expert Report, **Appendix RER-2**.

<sup>1028</sup> CNEE, Department of Tariff Studies, Technical Opinions on the Tariff Structure for the Users not Affected by EEGSA's Social Tariff EEGSA's Social Fee for the five-year period 2008-2013, p. 15, **Exhibit R-93**:

**Recommendations**

Based on the technical analysis of the above we recommended, with the prior relevant legal analysis, the repeal of resolutions CNEE-66-2003, CNEE-67-2003 and CNEE-69-2008; and the issuing of the base tariff schedules [...] in accordance with the results obtained from the Study performed by the association [SIGLA] and approved by the [CNEE] through Resolution CNEE-144-2008.

CNEE, Legal Department, GJ-Opinion-1287 and GJ-Opinion-12-88 Base Terms for the EEGSA Non-social Tariff and Base Terms for the EEGSA Social Tariff, July 29, 2008, **Exhibit R-94**.

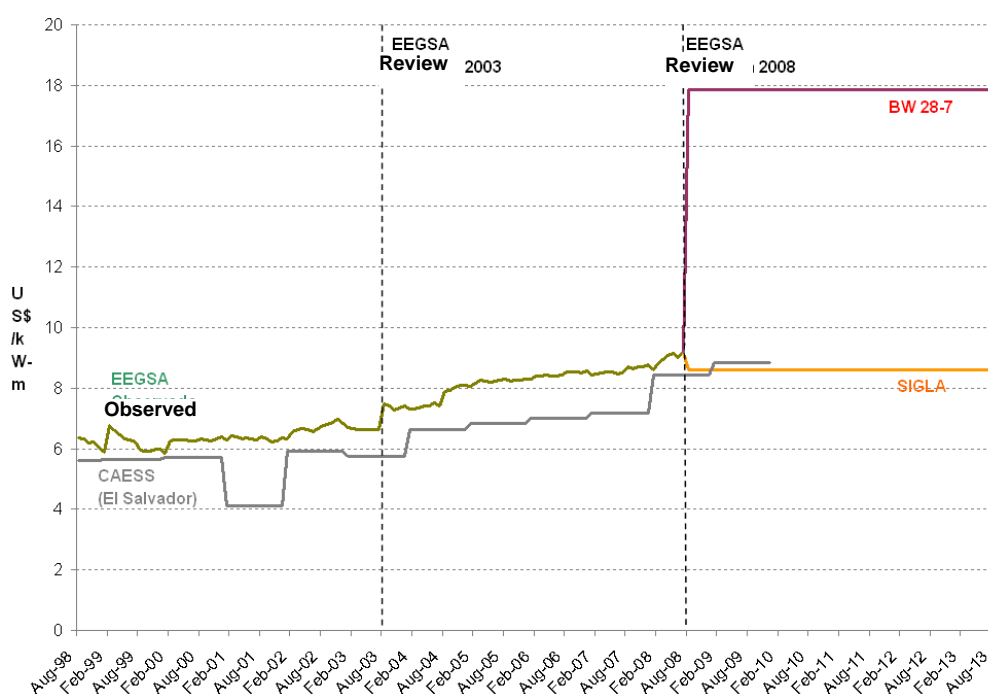
<sup>1029</sup> Resolution No. CNEE-144-2008, July 29, 2008, **Exhibit R-95**.

<sup>1030</sup> RLGE Art. 98, **Exhibit R-12**.



inasmuch as they reflected the efficient cost of the electricity distribution service.<sup>1031</sup> In particular, Guatemala illustrated how the VAD calculated by Sigla is consistent with the VAD calculated by CAESS, the El Salvadorian distributor most comparable to EEGSA.<sup>1032</sup> The following graph shows this consistency for low voltage usage, and also illustrates the disproportionate nature of the VAD proposed by EEGSA in its July 28 study:

**VAD Low Voltage (LV) - EEGSA v. CAESS (El Salvador)**<sup>1033</sup>



465. In its Reply and in the reports of Messrs. Kaczmarek and Barrera, TGH tries to demonstrate that the VAD calculated by Sigla was unjustified from a financial and engineering point of view.<sup>1034</sup> TGH's position, however, is based upon on a fundamental error, which is to assume that the Sigla study had to reflect the Expert Commission's

<sup>1031</sup> Counter-Memorial, Section III.F.14.

<sup>1032</sup> Damonte Expert Report, **Appendix RER-2**, par.234.

<sup>1033</sup> M. Abdala and M. Schoeters Expert Report, Section IV.2.2, **Appendix RER-1**.

<sup>1034</sup> Reply, pars. 191-194; Barrera Expert Report, Section 6, **Appendix CER-4**; Kaczmarek Expert Report, pars. 86-87, **Appendix CER-5**.

pronouncements, including those that breached the Terms of Reference.<sup>1035</sup> As already explained in detail, the Expert Commission was exclusively established for the purpose of verifying whether Bates White had incorporated the comments made by the CNEE into the tariff study so that it would comply with the Terms of Reference.<sup>1036</sup> It is important to bear in mind that neither the Expert Commission nor Bates White had the authority to amend the Terms of Reference once approved. The only authority competent to change them was the CNEE. Given that Sigla, as opposed to Bates White, built their tariff study on the basis of the final Terms of Reference, the pronouncement of the Expert Commission was entirely inapplicable to Sigla.

466. Mr. Barrera questions, in particular, the fact that Sigla did not apply the FRC established by the Expert Commission which determined a capital base amortization level of seven percent. Not only was the Expert Commission's pronouncement not applicable to Sigla, the Expert Commission also exceeded its legal authority by proposing an alternative capital recovery formula to the one established in the approved Terms of Reference. Even if the pronouncement were legally applicable (which Guatemala denies), Mr. Damonte and Messrs. Abdala and Schoeters have demonstrated that the formula proposed by the Expert Commission had serious technical defects that made its application impossible.<sup>1037</sup> As already explained above,<sup>1038</sup> the CNEE changed the amortization level applied to the capital base of companies Deorsa and Deocsa based upon their request and supporting documentation. In the absence of that information from EEGSA, the Terms of Reference remained determinative for EEGSA's tariffs. That is what Sigla applied.

467. Mr. Damonte responds to each of the merely technical issues raised by Dr. Barrera regarding the Sigla study.<sup>1039</sup> For the purposes of this Rejoinder, however, it is sufficient

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<sup>1035</sup> Reply, par. 191.

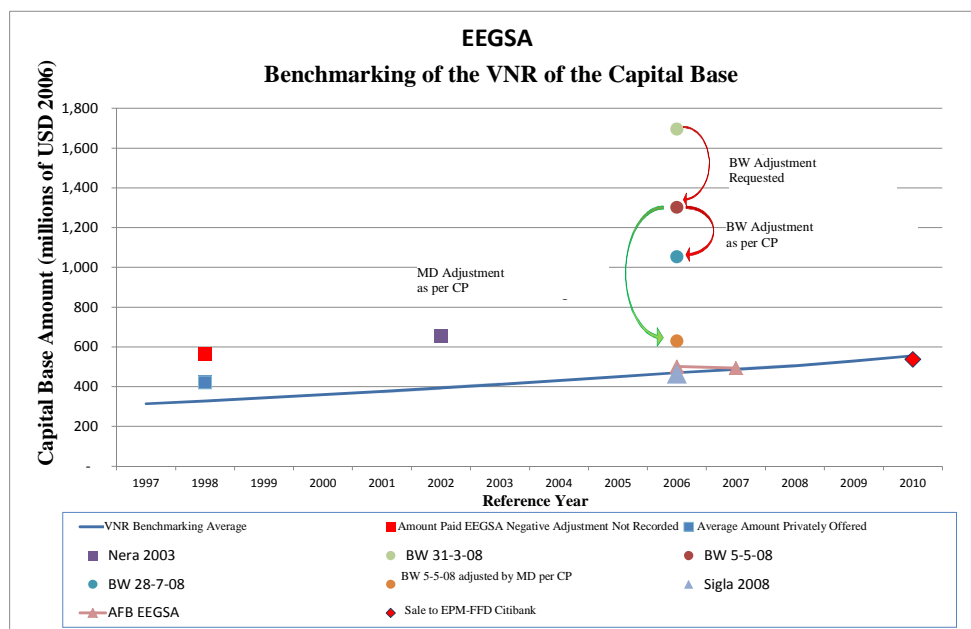
<sup>1036</sup> See Section V.E.6.a, above.

<sup>1037</sup> Damonte Rejoinder Expert Report, par. 386, **Appendix RER-5**; Abdala and Schoeters Expert Report, par. 67, **Appendix RER-1**.

<sup>1038</sup> See par. 330, above.

<sup>1039</sup> Damonte Rejoinder Expert Report, pars. 204-212 and 278-283, **Appendix RER-5**.

to compare Sigla’s VNR with those of the other companies in the region to understand that Sigla’s results are reasonable while Bates White’s results are quite disproportionate from the regional average. That clearly appears in the benchmarking study performed by Mr. Damonte by comparing the VNRs of 67 companies in the region:



468. Whilst in the 2008 Sigla study the VNR is one percent below the regional average, in the July 28 Bates White study, the VNR is 124 percent above that average!<sup>1040</sup>
469. In an effort to discredit this telling evidence, Dr. Barrera questions the benchmarking methodology used by Mr. Damonte.<sup>1041</sup> In particular, Dr. Barrera argues that benchmarking is not a technique that can be independently used to determine the cost of capital recovery. As Mr. Damonte explains, this criticism is inapplicable and evidences Dr. Barrera’s lack of comprehension of such a study. Mr. Damonte’s benchmarking simply does not compare cost of capital but rather compares VNRs.<sup>1042</sup>

<sup>1040</sup> Damonte Expert Report, par. 252, **Appendix RER-2**. We note that the price paid for EPM – FFD in accordance with to Citibank’s valuation, coincides almost exactly with the VNR of the representative standard company in the sample (it is only three percent less). *Id.*

<sup>1041</sup> Barrera Expert Report, Section 5, **Appendix CER-4**.

<sup>1042</sup> Damonte Rejoinder Expert Report, par. 329, **Appendix RER-5**.

470. Dr. Barrera also argues that benchmarking studies are normally done between companies of the same country, only and he criticizes the formula used by Mr. Damonte as being too simple. Although it is true that it is preferable to use companies from the same country, in situations (such as the present one) in which there are no comparable local companies, it is perfectly acceptable to take international samples, especially regional ones, and make necessary adjustments to properly compensate for differences in labor costs and exchange rates, as Mr. Damonte did.<sup>1043</sup> Regarding the formula used, as Mr. Damonte explains, the fact that he used a simple formula such as the Cobb-Douglas model does not show weakness in his benchmarking, but rather strength. The Cobb-Douglas formula is in fact the formula *most* often used in econometrics to estimate production or cost factors. Provided that the econometric parameters are within adequate ranges and that explanations are sufficient, it is the best formula that can be used.<sup>1044</sup>
471. Dr. Barrera also questions the sample of companies used by Mr. Damonte because some companies are smaller than EEGSA and other companies are larger.<sup>1045</sup> First, it must be noted that EEGSA is among the six middle companies of the sample. Second, the nature of distribution businesses means production performance does not change significantly with size therefore the results submitted are still completely valid.<sup>1046</sup> Dr. Barrera likewise argues that many of the companies in the sample are not appropriate for comparison with EEGSA as they do not use the “VNR method” to determine the capital base value. The most relevant case is that of Brazil, for which Dr. Barrera states that the method used is optimized replacement cost and depreciated replacement cost. As Mr. Damonte explains in detail, the values included in the benchmarking study are those corresponding to capital base without depreciation, that is, gross. Therefore, they are perfectly comparable with those of EEGSA since they are valued with a VNR criterion, optimized and before depreciation.<sup>1047</sup>

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<sup>1043</sup> *Ibid.*, pars. 330-331.

<sup>1044</sup> *Ibid.*, pars. 332-348.

<sup>1045</sup> Barrera Expert Report, pars. 237-238, **Appendix CER-4**.

<sup>1046</sup> Damonte Rejoinder Expert Report, paragraph 365, **Appendix RER-5**.

<sup>1047</sup> *Ibid.*, pars. 364-378.

472. In sum, it is clear that TGH fails to refute the very clear evidence Guatemala has submitted to demonstrate that Sigla tariffs are not only in line with those of El Salvador, a company used in the privatization as reference to fix EEGSA's tariffs, but also that its VNR is consistent with the average VNRs of 67 companies in the region. Even if some of Dr. Barrera's criticisms of Mr. Damonte's benchmarking were legitimate (which Guatemala has proven not to be the case) this would not undo the fact that the VNR sought by EEGSA in its July 28 study and applied by TGH in its damages calculation is grossly disproportionate with any regional average (by over 124 percent).

**12. The 2008–2013 tariffs, fixed in conformity with the LGE, attracted buyers for TGH shares**

473. In its Counter-Memorial, Guatemala noted that after the issuance of the new tariff schedule, TGH received US\$ 605 million for 100 percent of DECA II shares (this price included the buyer's assumption of the debt of DECA II and its subsidiaries).<sup>1048</sup> Even more relevant, by selling control of EEGSA to another foreign investor, EPM, the Consortium members characterized the company as no less than: "EEGSA, one of the best and most solid companies in the country."<sup>1049</sup> Likewise, buyers praised the acquired company and confirmed that they had purchased the company on the basis of the tariffs established by the CNEE without expecting additional tariff increases.<sup>1050</sup>

474. In its Reply, however, TGH argues that, due to the 2008–2013 tariff schedule, TGH had to sell a business that was in trouble.<sup>1051</sup> As evidence that they had decided to sell as a consequence of the alleged measures, TGH cites the text of the minutes of the Board of

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<sup>1048</sup> Counter-Memorial, pars. 445–448. In the case of EEGSA, the assumed debt was US\$ 87.6 million. *See* Binding Offer submitted by Empresas Públicas de Medellín, E.S.P. to Iberdrola Energía, S.A., TP de Ultramar LTD and EDP—Energías de Portugal, S.A. (version with omissions), October 6, 2010, **Exhibit C-352**, Exhibit 2.

<sup>1049</sup> Deca II – Management Presentation, September 2010, **Exhibit R-127**, p. 22

<sup>1050</sup> "We won't wave a flag, we respect people's roots," *Prensa Libre*, October 23, 2010, **Exhibit R-133**, and letter from EPM to Iberdrola regarding the non-binding offer, July 26, 2010, **Exhibit R-126**. It should be clarified that TGH's acceptance of the offered price was based on a favorable opinion issued by Citi, its financial advisor, which excluded any tariff increases prior to 2014 (*see* Letter from Citi to the Directors of Teco Energy, Inc., October 14, 2010, **Exhibit R-128**).

<sup>1051</sup> Reply, par. 219.

Directors' meeting approving the sale. Those minutes read as follows: "the Guatemalan government regulator, acting outside the process prescribed in the Guatemalan electricity law, imposed a significant reduction of the tariff rate for distribution (VAD) on EEGSA in its rate case in August 2008, the subject of the CAFTA claim..."<sup>1052</sup> First of all, it is clear that the minutes of TGH's Board of Directors' meeting of October 14, 2010 were prepared after TGH had sent its Notice of Intent on January 9, 2009 and just before this arbitration case started on October 20, 2010. Thus those minutes took into account the arguments that TGH would make in this proceeding, which were explicitly mentioned in the minutes. Second, the evidence also shows that TGH sold its stake in EEGSA due only to the company's interest in focusing on its generation assets and not because of the alleged measures adopted by Guatemala.<sup>1053</sup> In the same context, TGH's partners, Iberdrola and EDP, confirmed to their shareholders that the sale of EEGSA responded exclusively to corporate policies that had nothing to do with EEGSA's tariff review process in 2008.<sup>1054</sup>

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<sup>1052</sup> Reply, par. 222.

<sup>1053</sup> Teco Press Release, "TECO Energy reports third quarter results," October 28, 2010, **Exhibit R-134**, p. 1.

<sup>1054</sup> Iberdrola explained to its shareholders that the sale of EEGSA was due to the need to ensure that there was capital available to make investments in Mexico and Brazil:

The objective of IBERDROLA is to focus on its Latin American presence in Mexico and Brazil, which have become key countries in the future growth of the Group, as this is one of the most dynamic regions of the world [...].

The sale of investee companies in Guatemala is defined in IBERDROLA's investment plan, the purpose of which is to maintain the Group's financial strength, optimize capital structure and ensure the pace of investments committed to the markets.

The operation transaction is in addition to others announced in 2010 by IBERDROLA [...] in the United States, [...] in Chile, and in [Guatemala].

Press Release of Iberdrola Energía S.A., October 22, 2010, **Exhibit R-132** (Emphasis added).

For its part, EDP explained that the sale was in line with its strategy to divest non-strategic assets which the company could not control. EDP told its investors:

475. TGH argues that as a result of the tariffs established for 2008–2013, EEGSA received substantially less than what it should have received had the July 28 study been approved.<sup>1055</sup> As explained in detail in Section V.E.10 above, the July 28 study was not contemplated within the regulatory framework and reflected a VNR and VAD that were highly overvalued and were thus not suitable for setting tariffs.
476. As further evidence of the supposed effect of the 2008–2013 tariffs on its investment, TGH refers to the reduction in the ratings that EEGSA received from rating agencies after the tariffs were approved in 2008.<sup>1056</sup> What TGH conveniently does not report is that EEGSA’s ratings actually improved substantially since the issuance of these reports even though there was no change in the tariffs. Indeed, international risk analysts have recognized the negative impact of the high degree of litigiousness of Iberdrola and TGH in the management of EEGSA. Thus, the rating agency Moody’s has upgraded the rating of EEGSA’s prospects as a result of the “expected harmony” between the company and the CNEE, especially “given the litigious relationship that had developed between EEGSA’s previous owners” and the regulator.<sup>1057</sup> The rating upgrade caused by the departure of Iberdrola and TGH only confirms the veracity of Guatemala’s assertions regarding the litigious and abusive attitude adopted by EEGSA under the control of its shareholders during the tariff review process.
477. The reality is that, as indicated by Mr. Victor Urrutia, Manager of Teco Guatemala, in July 2010, “[Guatemala] is a market where the rules are clear [and] there is certainty.”<sup>1058</sup> In its Reply, TGH devotes four paragraphs, plus the support provided by an expert (Mr. Alegría) and a witness (Mr. Gillette), to try to explain the inexplicable:

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The sale of these assets is in line with EDP’s strategy of divesting non-core assets, such as minority stakes with no synergies with other assets in EDP and where EDP cannot have a relevant role in the management of the company.

Press Release of EDP: “EDP sells its stake in DECA II,” October 21, 2010, **Exhibit R-130**.

<sup>1055</sup> Reply, par. 221.

<sup>1056</sup> Reply, pars. 218–219.

<sup>1057</sup> “Moody’s notes improved relationship between EEGSA and regulator.” Business News Americas, December 14, 2010, **Exhibit R-208**.

<sup>1058</sup> “Price lowered on Tampa Contract,” *Prensa Libre*, July 12, 2010, **Exhibit R-125**.

that what its manager said to the press is not really true. According to TGH, that statement had been made only to try to “save” one of their investments in the Alborada electric power plant that allegedly had been the subject of unfair and wrongful treatment by Guatemala.<sup>1059</sup> Inasmuch as this arbitration proceeding is not the place to discuss the measures alleged by TGH in relation to this electric power plant, for which, moreover, TGH has not made any claim, Guatemala will limit itself to presenting two reflections to this Tribunal. First, the statement by Mr. Urrutia is very clear and leaves no room for doubt. Second, and even more importantly, if it is true, as alleged by TGH, that the Teco Guatemala Manager made false public statements for the sole purpose of “reaching an agreement” with the CNEE, this admission alone should be sufficient proof of the lack of seriousness and credibility of any assertion by TGH or its representatives.

**13. TGH’s allegation that there was no obligation to publish the Tariff Schedule before August 1, 2008 is false**

478. The LGE states that the tariff schedules must reign for a period of five years.<sup>1060</sup> At various points in its Reply, TGH questions whether the LGE imposes upon the CNEE the obligation to approve tariff schedules every five years, and in particular whether there was an August 1, 2008 deadline for the CNEE to set EEGSA’s tariff schedule.<sup>1061</sup> According to TGH, this obligation should not exist because the LGE and the RLGE provide in their Articles 78 and 99 respectively that, if the new tariff schedule has not been published by the expiration date of the tariff schedule, the CNEE can continue to apply the previous tariff schedule with its own adjustment formulas.<sup>1062</sup> TGH’s argument is false.
479. First, it must be said that the LGE and the RLGE clearly set out in several provisions that the effective period of the tariff schedule is five years.<sup>1063</sup> The main reason for this

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<sup>1059</sup> Reply, par. 227.

<sup>1060</sup> Counter-Memorial, pars. 174, 229, 267.

<sup>1061</sup> Reply, pars. 159–160.

<sup>1062</sup> *Ibid*, pars. 87–88 and 160

<sup>1063</sup> LGE, **Exhibit R-8**, Art. 77: “The methodology for determination of the tariffs shall be revised by the Commission every five (5) years [...]” RLGE, **Exhibit R-36**, Art. 84. Effective Term of the Tariffs. The supply costs for the calculation of the Base Tariffs shall be calculated every five years and shall be based



is that, under the principle of efficiency that underpins the LGE, the tariff must reflect the current actual cost of the system, including new technologies that have emerged that enable greater efficiency and economies of scale and allow for a reduction in real terms of the VAD. This obviously cannot happen with the ongoing application of an out-of-date tariff schedule, even if adjustment formulas (which have nothing to do with efficiency principles) are applied. While it establishes that the tariff period is in effect for five years, the last sentence of RLGE Article 98 (conveniently omitted by TGH) sets forth the general principle in its last sentence as to when the new schedule must enter into effect:

The schedule approved and published by the Commission shall govern as of the first day of the expiration of the prior tariff schedule.<sup>1064</sup>

480. The RLGE, however, provides for a contingency solution if the tariff schedule has expired and a new schedule has not been approved and published (for example, because the courts have halted its publication, or because the CNEE has not fulfilled its legal obligation to publish the schedule on time). This is precisely what is contemplated in RLGE Article 99, which permits ongoing application of tariffs from the previous five-year period, with their adjustment formulas, if the Guatemalan authorities fail to publish the new tariff schedule. What TGH fails to indicate is that, even in such cases, these tariffs are applicable only for nine months after the expiration of the period of validity of the tariff schedule. The reason is simple; as explained by Mr. Colom, the LGE does not encourage inefficient tariffs and Article 99 is an emergency and undesired solution, given that the obligation of the CNEE is to publish the tariff schedule every five years.

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on the structure of an efficient company; RLGE, **Exhibit R-36**, Art. 95. Approval of Tariffs. The tariffs to users of the Final Distribution service, their adjustment formulas, the tariff structures determined as a function of such tariffs, the disconnect and reconnect charges, shall be approved every five years, and shall be effective for such period [...]". (Emphasis added).

<sup>1064</sup> RLGE, Art. 98, **Exhibit R-36**. Unofficial English translation. In its original Spanish text it reads:

El pliego aprobado y publicado por la Comisión regirá a partir del primer día del vencimiento del pliego tarifario anterior.

481. The interplay of RLGE Articles 98 and 99 on this issue is a common legislative technique. Article 98 states the general rule (the tariffs should govern from the expiration of the previous tariff schedule), and Article 99 provides for a contingency solution in the event that the general rule is not observed (the continuation of the previous tariff schedule adjusted for a maximum of 9 months). This is because, as set forth in the same RLGE Article 99, “at no time shall electricity distribution to end-users be carried out without a valid tariff schedule being in force”<sup>1065</sup>. As is evident, if TGH’s argument that the CNEE was not obligated to publish the schedule on August 1, 2008 is accepted,<sup>1066</sup> the last sentence of Article 98 would have no legal effect, as the provisions of Article 99 would become the general rule.
482. The best evidence of the understanding of this obligation is reality. As Mr. Colom confirms in his Supplemental statement, the CNEE (and all participants in the review process) always understood that the setting of the five-year tariff schedule is an obligation, the breach of which the Directors are accountable.<sup>1067</sup> Proof of this is that, as confirmed by Mr. Colom, never in the history of the CNEE has the extra period of Article 99 been resorted to in order to set a tariff schedule.
483. In addition, as Mr. Colom confirmed, despite the fact that TGH now seeks to deny it,<sup>1068</sup> all those involved in the review process were aware of the requirement to publish the tariffs on August 1, 2008. This is confirmed by Mr. Bastos in his witness statement:

My financial proposal, which was incorporated into my contract with the CNEE, was for the entire work of the Expert Commission. It was clear to me from my discussions with Messrs. Quijivix and Calleja that the Expert Commission’s work would be finished once EEGSA’s new tariff schedule was published, which was scheduled for August 1, 2008.<sup>1069</sup>

484. In his statement, Mr. Calleja confirms the statement of Mr. Bastos:

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<sup>1065</sup> *Ibid*, Art. 99.

<sup>1066</sup> Reply, par. 160.

<sup>1067</sup> Colom Supplemental Statement, **Appendix RWS-4**, par. 50.

<sup>1068</sup> *Ibid*.

<sup>1069</sup> Bastos Reply, **Appendix CWS-7**, par. 7 (Emphasis added).

EEGSA seriously considered challenging Government Accord No. 68-2007 following its enactment, but ultimately decided not to do so, because we did not want to strain our relationship with the CNEE prior to EEGSA's 2008–2013 tariff review. I also was informed by EEGSA's lawyers that a final decision would not have been rendered on any judicial challenge before the completion of EEGSA's tariff review process on August 1, 2008.<sup>1070</sup>

485. For his part, Mr. Maté has confirmed the same understanding in his witness statement in the *Iberdrola* case:

Given that the Expert Commission had 60 calendar days from June 16, 2008 but the tariffs in effect at that time expired on July 31, both parties agreed to request that the Expert Committee attempt to issue its opinion in sufficient time so as to establish the new tariffs in accordance with such opinion before August 1, 2008.<sup>1071</sup>

486. Thus, it is clear that the experts on the Expert Commission, EEGSA representatives themselves, and the witnesses in this arbitration all share the same understanding as the parties: that there was an obligation on the part of the CNEE to publish the tariffs on August 1, 2008. Although RLGE Article 99 included a provision in the event that the tariffs had not been published, the implementation of this contingency procedure already assumed a breach on the part of the CNEE of its obligations to approve the new tariff schedules within the period provided for under the LGE.

**F. TGH INSISTS ON TRYING TO “POLITICIZE” THIS CURRENT DISPUTE IN ORDER TO RAISE IT TO THE INTERNATIONAL PLANE**

487. In its Counter-Memorial, Guatemala denounced the attempts by TGH to give a political flavor to this dispute that it obviously does not have, in order to give it an international tinge.<sup>1072</sup> Thus, in its Memorial TGH had presented a distorted story referring to

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<sup>1070</sup> Calleja Reply, **Appendix CWS-9**, par. 10 (Emphasis added).

<sup>1071</sup> Iberdrola Energía S.A. v. Republic of Guatemala (ICSID Case No. ARB/09/05 Casio), Witness Statement of Luis Maté, par. 32, **Exhibit R-149**.

<sup>1072</sup> Counter-Memorial, pars. 31–33.

Guatemala’s pressuring and harassment of EEGSA and its executives.<sup>1073</sup> Guatemala explained how the arrest warrant against two EEGSA executives issued by a remote provincial court of first instance as a result of a complaint from an individual had been immediately (two days after issuance) revoked by the Court of Appeals in Guatemala City.<sup>1074</sup> Guatemala also explained that the CNEE’s Directors had themselves been the object of similar complaints, which obliged them to make themselves available to the court when required, in the hope that they would be dismissed in due time.<sup>1075</sup> Also, TGH’s desperate attempt to raise this dispute to the international plane included an unusual claim that was intended (by mere allegation, without a shred of evidence) to link the theft of a laptop from Mr. Calleja’s car in Guatemala City to action on the part of the Government.<sup>1076</sup> TGH did not present any substantial evidence in its Memorial to prove its “political” allegations, and neither has it done so in the Reply.

488. In its Reply, TGH tries again. Although it barely refers to the theft of Mr. Calleja’s laptop, TGH again emphasizes the arrest warrant against two of its executives, requesting that Guatemala explain the reasons why the “Attorney General’s Office” asked for such a warrant.<sup>1077</sup> It also adds a new politically tinged argument, this time, in relation to the decision of the Constitutional Court of February 24, 2010, which reversed the decision of the Eighth Civil Court.<sup>1078</sup> In this regard, Mr. Alegría argues that “the two judges of the Constitutional Court who cast a dissenting vote in the earlier case [i.e. the first decision of the Constitutional Court, on November 18, 2009],<sup>1079</sup> were not

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<sup>1073</sup> Memorial, pars. 200–219

<sup>1074</sup> Counter-Memorial, pars. 456–457

<sup>1075</sup> *Ibid.*, par. 458.

<sup>1076</sup> Memorial, par. 206.

<sup>1077</sup> Reply, par. 212.

<sup>1078</sup> *Ibid.*, par. 210

<sup>1079</sup> Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2009 November 18, 2009, **Exhibit R-105**.

selected to be part of the Court hearing the latter case [on February 24, 2010].”<sup>1080</sup> Again, TGH’s arguments are not only unconvincing but, as explained below, also false.

489. Regarding the alleged criminal charges filed against two of EEGSA’s executives in Guatemala, because of certain private complaints by a generating company, TGH requests that Guatemala explain the reasons why the “Attorney General’s Office” would have petitioned the Amatitlán Court for the arrest warrants.<sup>1081</sup> First, it should be noted that the alleged “Attorney General’s Office” that TGH refers to is actually an agency of the City Prosecutor’s Office, in other words a decentralized and local entity. Also, it is worth reiterating that there are a number of things that TGH fails to clarify: for example, that when the aforementioned arrest warrant was issued, the VAD tariff schedules had already been in effect for almost a month. Furthermore, the complaint in question was one of many complaints initiated by this private entity, and they also affect the CNEE officers, as explained by Mr. Moller.<sup>1082</sup> Finally, the key issue in this matter, which TGH fails to explain adequately, is that the arrest warrant in question was withdrawn by the Court of Appeals in Guatemala City within two days of its issuance.<sup>1083</sup> Thus it is wrong for TGH to present such an action as politically tinged and connected to this dispute, when the evidence (acknowledged by TGH itself)<sup>1084</sup> shows that it was an isolated event, driven by a local prosecutor’s office in a provincial court, which took place when EEGSA’s tariff schedules were already in effect, and that in any case was straightened out by the courts of Guatemala City with surprising procedural promptness. In any case, as explained in the Counter-Memorial and as was also the experience of the CNEE’s own directors,<sup>1085</sup> the duty to submit to judicial proceedings is an inevitable consequence of living under the rule of law and performing public service functions.

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1080 Alegria, **Appendix CER-1**, par. 80.

1081 Reply, par. 208.

1082 Moller **Appendix RWS 2**, par. 51.

1083 Decision of the Third Chamber of the Court of Appeals, Amparo 52-2008 of September 2, 2008, **Exhibit C-301**.

1084 See Maté, **Appendix CWS-6**, pars. 71–72.

1085 Counter-Memorial, par. 458.

TGH's opportunistic argument in this regard is a poor attempt to politicize a technical dispute, and it should be rejected.

490. Second, it is incorrect for TGH to allege that two of the judges of the Constitutional Court (according to TGH, Mr. Mario Pérez Guerra [Roldán] and Ms. Gladys Chacón Corado), who cast dissenting votes in the decision of [November 18, 2009], “were not selected” to be part of the Constitutional Court that heard the appeal against the decision in the second trial, which was resolved by that Court in the decision of February 24, 2008.<sup>1086</sup> In the first place, this allegation contains a serious material falsehood. It is not true that Judge Mario Pérez Guerra Roldán—who in the decision of November 18, 2009 cast a dissenting vote on procedural grounds<sup>1087</sup>—was absent from the decision of February 24, 2010. As evidenced by the signature page of the decision of February 24, 2010, Mr. Pérez Guerra Roldán voted in that decision, and did so against EEGSA unanimously with the other judges.<sup>1088</sup>

491. So, the only judge who did not sign the second judgment was Ms. Gladys Chacón Corado, but her absence was not out of the ordinary. The judges of the Constitutional Court are not “elected” by a higher authority as TGH misleadingly suggests, rather there is a system of appointing incumbent and alternate judges, common to most legal systems in the world. Indeed, according to the Law of Constitutional Relief, Habeas Corpus and Constitutionality (LAEPC),<sup>1089</sup> there is no requirement that all judgments of the Constitutional Court must be signed by the incumbent judges, as the alternate judges can be called upon to fill absences and temporary vacancies of the incumbent judges. In the case of Ms. Chacón Corado, her temporary absence was noted in the decision of the Constitutional Court, prior to the decision of February 24, 2010, whereby her alternate,

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<sup>1086</sup> Reply, par. 210.

<sup>1087</sup> It should be clarified that the dissenting vote of Mr. Pérez Guerra Roldán in the decision of November 18 was based on procedural issues, as this judge acknowledged in his vote that he shares the view that it is the [CNEE] that is empowered to determine the tariffs to electricity service end-users and that the ‘opinion’ of the Expert Commission is not binding. See Decision of the Constitutional Court, November 18, 2009, **Exhibit R-105**.

<sup>1088</sup> Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, **Exhibit R-110**, p. 37.

<sup>1089</sup> Decree No. 1-86, Amparo, Habeas Corpus and Constitutionality Act, January 8, 1986, Arts. 150 and 179, **Exhibit R-163**.

Mr. Vinicio Rafael García Pimentel, was authorized to be a part of the quorum of the Constitutional Court for that decision.<sup>1090</sup>

492. In conclusion, TGH continues to present facts in a misleading or directly false manner in order to give the false impression of a politically-motivated persecution of EEGSA, orchestrated by the Government. Again, the lack of a concrete basis for its allegations is easily exposed.

## **VI. TGH HAS NOT SUFFERED ANY LOSS**

493. The Tribunal should dismiss TGH's claim, first because the Tribunal lacks proper jurisdiction, and even if there were jurisdiction to hear the merits, TGH has not presented a single violation of the single standard it invokes: the international minimum treatment standard. Furthermore, TGH incorrectly interprets, as a matter of domestic law, the regulatory framework applicable to the tariff review.
494. However, even if TGH had a point (which it does not), TGH cannot present any demonstrable loss, as explained in the Counter-Memorial and is reiterated below.<sup>1091</sup> Proof that TGH suffered no loss is that the market in October 2010 confirmed a sale price for TGH's shares in EEGSA that did not differ significantly from the amount that TGH would have obtained in the absence of the alleged measures.
495. The key issue between the parties in the calculation of the alleged losses is the value that EEGSA and of TGH's shareholding in EEGSA would have had had the CNEE had not used the Sigla study to set tariffs. This is the so-called value in the *but for* scenario. The alleged losses are calculated by subtracting this value from the so-called value in the actual scenario. Both parties in practice agree on what the actual value is, in particular because the "at arm's length" sale of EEGSA to a third party is the best reference for

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<sup>1090</sup> Decision of the Constitutional Court, Case File 3831-2009, February 24, 2010, **Exhibit R-110**, p. 2.

<sup>1091</sup> Counter-Memorial, pars. 591–626; Mr. Abdala and Mr. Schoeters Expert Report, **Appendix RER-1**.

that value.<sup>1092</sup> Therefore, the question to be considered is why there are differences in the *but for* scenario.

496. In his supplemental expert report, TGH's expert Mr. Kaczmarek calculates the *but for* value and the alleged loss, in a self-referencing manner, assuming axiomatically and without question that its position on technical and financial aspects of the tariff review were correct. TGH has not presented any alternative calculation that could verify their analysis, unlike Messrs. Abdala and Schoeters who presented the RAB as verification of the VNR corrected by Mr. Damonte.<sup>1093</sup>

497. Therefore, TGH's calculated alleged loss suffers from fundamental flaws that render it invalid, which contain the same basic mistakes in TGH's interpretation of the regulatory framework. These mistakes result in a highly overestimated VNR and a conceptually incorrect FRC, inasmuch as it excessively remunerates EEGSA and TGH. All this results in a VAD and therefore tariffs that are much higher than the correct ones. Messrs. Abdala and Schoeters of Compass Lexecon provide corrections, as well as alternative valuation methods that prove the practical non-existence of any alleged losses. These points are developed below.

**A. THE BUT FOR CALCULATION BY MR. KACZMAREK IS SELF-REFERENCING AND HAS NO REAL TECHNICAL-FINANCIAL SUPPORT**

498. According to TGH, the CNEE should have approved the tariffs based upon the Bates White tariff study of July 28, 2008 instead of the Sigla study. Consequently, its expert Mr. Kaczmarek calculates the *but for* value of TGH's shareholding in EEGSA, i.e. the value without the measures of which the CNEE is accused, on the basis of that study.<sup>1094</sup> In its Memorial, TGH gave no technical or financial explanation as to why the Bates

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<sup>1092</sup> Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**, par. 32.

<sup>1093</sup> *Ibid*, pars. 24, 45–50.

<sup>1094</sup> Mr. Kaczmarek Reply Expert Report, **Appendix CER-5**, pars. 56–103; Mr. Kaczmarek Expert Report, **Appendix CER-2**, par. 153 and Chapter IX.



White study of July 28, and not the Sigla study, was the correct one.<sup>1095</sup> It took the Bates White study and went no further.

499. In its Counter-Memorial, Guatemala exposed this obvious deficiency: the absence of any technical or financial support that could justify the adoption of the Bates White study.<sup>1096</sup> TGH realized this and, in its Reply, has submitted the expert report of Mr. Barrera to justify this approach. But the inevitable conclusion of this exercise should be noted: the Barrera report is a preconceived analysis: it starts from the result, the Bates White study of July 28, and constructs a tailor-made analysis to support it. It is no coincidence that Mr. Barrera limits himself to making a staunch and uncritical defense of the Bates White study.
500. Therefore, TGH continues to accept the Bates White study of July 28 as an untouchable dogma upon which the 2008 tariffs should have been set. There is no truly genuine analysis of its validity, nor a “fallback” position nor the slightest questioning of that study. Then, also without questioning, Mr. Kaczmarek uses the same study as his basis for determining the *but for* value of TGH’s shareholding. In other words, the exercise is entirely self-referencing: the Bates White study is the undisputed input, and there is no independent technical and financial exercise that could prove that this study and consequently Mr. Kaczmarek’s valuation is correct.
501. As explained by Messrs. Schoeters and Abdala, in their report:

The reasons provided by NCI [Kaczmarek] to continue using a VNR that is too high and an inappropriate [FRC], which fails to accurately calculate the effect of depreciations, seem to adjust to its legal interpretation of the claim, which determines the alleged damages under a tariff setting that follows the Bates White study of July 2008, irrespective of whether or not such study includes valid, full or reasonable recommendations from the regulatory or economic viewpoint. Amongst the multiple arguments raised by NCI, we found no valid explanation from the regulatory or economic viewpoint that upholds the reasonability of the recommendations

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<sup>1095</sup> Counter-Memorial, par. 522.

<sup>1096</sup> *Ibid.*

deriving from the application of the Bates White study of July 2008.<sup>1097</sup>

502. TGH's position stands in stark contrast to that of Guatemala and its independent experts, Mr. Damonte of Quantum, and Messrs. Abdala and Mr. Schoeters. Instead of blindly adopting the position of the CNEE and the Sigla study, Mr. Damonte reconsiders the Bates White tariff study issued in accordance with the provisions of the regulatory framework at May 5, 2008, and corrects it to address the Expert Commission opinion and other deficiencies. On this basis, Messrs. Schoeters and Abdala conduct their valuation of TGH's shareholding based upon the tariffs that would have applied in a *but for* scenario.<sup>1098</sup>
503. Consequently, the analysis by Messrs. Abdala and Schoeters is not self-referencing, but rather based on the technical and financial analysis of Mr. Damonte, entirely independent of the CNEE's position in the tariff review. On that basis, experts Messrs. Abdala and Schoeters conclude that the value of TGH's shareholding in a *but for* scenario is virtually equivalent to (i) the value obtained by applying tariffs according to the Sigla study and (ii) the value that TGH obtained in selling its shares to EPM in October 2010. This conclusion establishes the reasonableness of the tariffs approved by the CNEE using the Sigla study and that, if there is any loss, it is almost nil.<sup>1099</sup>

**B. MR. KACZMAREK'S CALCULATION IS BASED ON AN OVERVALUED VNR AND AN INCORRECT FRC**

504. By accepting the Bates White study of July 28 without question, Mr. Kaczmarek's calculation replicates the same mistakes found in that study, mainly the overvalued VNR and an incorrect FRC. These two issues are essential as they render the VAD, and therefore the tariff level that Mr. Kaczmarek considers in his projections for the *but for* scenario, completely incorrect and useless.
505. As Messrs. Abdala and Schoeters explain in their second report regarding the VNR:

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<sup>1097</sup> Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**, par. 6.

<sup>1098</sup> *Ibid.*, pars. 20–31.

<sup>1099</sup> *Ibid.*, pars. 15, 41–44.

As regards the asset base value, NCI interprets that the VNR of US\$ 1,102.2 million as of December 2006 calculated by Bates White in July 2008 is the adequate VNR that the CNEE should have adopted had the measures not been implemented. We disagree with this opinion. As shown by engineering expert Mario Damonte, the VNR of that exercise has errors and omissions in the implementation of the opinion provided by the Expert Commission (“EC”) and, thus, the CNEE could not have used it as a valid and reasonable alternative to set tariffs. The VNR presented by NCI in its two reports and used as base scenario in its damage model exceeds the VNR calculated by Damonte by 67%, which mainly causes the Value-Added for Distribution (“VAD”) calculated by NCI in its *but-for* valuation exercise to be 96% and 44% higher than our calculations for low voltage and medium voltage, respectively.<sup>1100</sup>

506. Regarding the FRC, the error in the Bates White study of July 28 adopted by Mr. Kaczmarek is assuming that EEGSA can receive returns regardless of the real depreciation of the VNR, calculating only the depreciation for the five-year period, which over-compensates EEGSA and TGH. As Messrs. Abdala and Schoeters explain:

Considering only the expected depreciation of the five-year period, instead of the accumulated depreciation of assets upon review, results in a CRF that overestimates the company’s investment throughout the useful life of its assets. This can be easily shown through the net present value test (“NPV”). This simple test establishes that the NPV of the tariffs to be received by the regulated company during the useful life of its assets is, *ex ante*, equal to the initial VNR. Using the NPV test, we showed in our First Report that the scheme proposed by the EC overcompensates the investor.<sup>1101</sup>

507. Mr. Damonte explains these errors in detail in his report, as has already been explained above.<sup>1102</sup>

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<sup>1100</sup> *Ibid.*, par. 4.

<sup>1101</sup> *Ibid.*, par. 29.

<sup>1102</sup> See Section V.E.10.

**C. IF MR. KACZMAREK’S MISTAKES ARE CORRECTED, THE ALLEGED LOSSES DISAPPEAR**

508. By correcting the above errors in Mr. Kaczmarek’s analysis, the alleged losses identified by this expert—both lost “historical flows” for the period August 2008 to the sale in October 2010 and the future losses for the supposed decrease in value of TGH’s shareholding due to lower inflows from that point forward—virtually disappear.

509. Messrs. Abdala and Schoeters illustrate the result of the adjustments in the following table:<sup>1103</sup>

EEGSA Valuation (as of 21-Oct-10)	But-For	Actual	
		FFD Citibank	EBITDA pro-rata
Enterprise Value	594.9	582.0	518.2
EEGSA Net Debt	87.6	87.6	87.6
Equity Value	507.3	494.4	430.6
Equity Value of TGH (24.26%)	123.1	120.0	104.5
<b>Cash Flows to TGH</b>			
Historical Cash Flows	13.8	24.4	24.4
Future Cash Flows	123.1	120.0	104.5
<b>Total</b>	<b>136.9</b>	<b>144.3</b>	<b>128.8</b>
<b>Total Alleged Damage to TGH</b>		<b>0.0</b>	<b>8.1</b>

510. As can be seen, the alleged loss would range from between zero and US\$ 8.1 million. As is also observed, in the short-term, namely with respect to the historical flows between August 2008 and October 2010, EEGSA and TGH not only have not suffered losses, but rather have experienced increased inflow. The reason is simple: in the actual scenario EEGSA invested less, making greater funds available for shareholders. As Messrs. Abdala and Schoeters explain:

The main reason why the alleged historical damage is negative is that, as we explained in our First Report,

<sup>1103</sup> Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**, par. 78, Table VI.

from the effective date of the new tariff schedule in August 2008, the investment expenses incurred by EEGSA significantly decreased, thus creating considerable cash savings. During the first two regulatory years (from August 1, 2008 to July 31, 2010), total investments according to the financial statements, were at least US\$ 33.9 million lower than those estimated by Sigla for those two years (and, therefore, than those compensated through the tariffs). If this figure is multiplied by TGH's share of 24.26%, we conclude that TGH had an investment "saving" of US\$ 8.2 million. This saving explains a large portion of the US\$ 10.6 million of negative historical damage.

[...] Thus, what this result, which NCI considers anomalous, explains is that the company under the actual scenario decided to invest much less than it used to and less than what had been estimated in the tariff studies. While we cannot determine whether the shareholders' decision to leave the business was a consequence of the alleged measures, as claimed by NCI, if that was the case, it should come as no surprise that shareholders maximized their returns by distributing the cash available (i.e., dividends) instead of investing in the network.<sup>1104</sup>

511. In order to provide the Tribunal an objective parameters to judge the reasonableness of the results obtained by Messrs. Abdala and Schoeters, these experts compare the tariffs determined in their valuation with (i) those of a comparable company in El Salvador, and (ii) the tariff-based accounting method.<sup>1105</sup> Mr. Kaczmarek devotes barely two pages to these two parameters, essentially without refuting the analysis of Messrs. Abdala and Schoeters.<sup>1106</sup>
512. In their supplemental report, Messrs. Abdala and Schoeters present an additional proof of reasonableness by calculating the IRR [internal rate of return] prospectively at the

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<sup>1104</sup> *Ibid.*, pars. 70–71.

<sup>1105</sup> *Ibid.*, pars. 41–50.

<sup>1106</sup> Mr. Kaczmarek Reply Expert Report, **Appendix CER-5**, pars. 166–173.

time of the 2008 tariff review which results in a value of 7.3%, in line with the regulatory requirement of 7%.<sup>1107</sup>

**D. MR. KACZMAREK’S VALUATION BY COMPARABLES IS PROFOUNDLY WRONG**

513. Mr. Kaczmarek again commits fundamental errors in his valuation by comparables that he uses in support of his calculation of alleged losses. Among his basic mistakes are: (i) considering a reduced number of observations; (ii) using remote comparables having different characteristics than EEGSA; and (iii) averaging the results by giving greater weight to higher-value samples in order to intentionally create an outcome that is also artificially higher for EEGSA. Finally, the use of the EBITDA obtained by Mr. Kaczmarek through his valuation by FCF [Free Cash Flow], which is over-valued, further increases the result of his valuation by comparables.
514. Mr. Abdala and Mr. Schoeters illustrate the ease with which the study can be corrected simply by, for example, excluding one or two samples, as shown in the following table:<sup>1108</sup>

Valuation Method	EEGSA Enterprise Value	
	NCI	Removal of Highest Observations
		1 obs.      2 obs.
<b>Publicly-Traded Companies</b>	1,528.3	1,086.9      693.5
<i>Change</i>		-29%      -55%
<b>Transactions</b>	1,767.9	1,392.5      1,040.0
<i>Change</i>		-21%      -41%

515. In other words, the results can easily vary between 41% and 55%; ergo Mr. Kaczmarek’s analysis lacks credibility.

<sup>1107</sup> Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**, pars. 65–67.

<sup>1108</sup> Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**, par. 35, Table II.

516. Messrs. Abdala and Schoeters illustrate the ease with which the study can be corrected using the median of the sample presented by Mr. Kaczmarek and using the EBITDA of the valuation by corrected FCF. After these corrections, the results are in line with the valuation by corrected FCF by Messrs. Abdala and Schoeters. These results are presented in the following table:<sup>1109</sup>

Scenario	Ref.	EEGSA Enterprise Value			
		Comparable Public Companies		Comparable Transactions	
		NCI	Corrected	NCI	Corrected
But-For Scenario					
Multiple	[a]	8.14x	6.63x	9.42x	7.36x
EEGSA EBITDA	[b]	187.7	85.9	187.7	85.9
Enterprise Value	[c]=b*a	1,528.3	569.8	1,767.9	632.5
Actual Scenario					
Enterprise Value	[d]	521.2	518.2	602.8	518.2
Alleged Future Damage to TGH	[e]=(c-d)*24.26%	244.4	12.5	282.7	27.7
Alleged Historical Damage to TGH	[f]	21.1	(10.6)	21.1	(10.6)
Total Alleged Damages to TGH	[g]=e+f	265.5	2.0	303.8	17.2

**E. MR. KACZMAREK'S IRR IS ALSO INCORRECT. CALCULATED CORRECTLY, EEGSA'S IRR IS CONSISTENT WITH THE REGULATORY FRAMEWORK**

517. Mr. Kaczmarek tries to prove that in order for TGH to obtain an internal rate of return (IRR) of around 7%, as required by the regulatory framework according to Mr. Kaczmarek himself, the tariffs should have been those in the Bates White study of July 28; but that, without them the IRR is close to zero.<sup>1110</sup> Mr. Kaczmarek's analysis is completely incorrect, for several key reasons that Messrs. Abdala and Schoeters have identified in their report:<sup>1111</sup>

- (a) Mr. Kaczmarek refers to an IRR of the shareholder, which the regulatory framework simply does not contemplate. The regulatory framework refers to an IRR of the distributor, in this case EEGSA;

<sup>1109</sup> *Ibid.*, par. 39, Table III.

<sup>1110</sup> Mr. Kaczmarek Reply Expert Report, **Appendix CER-5**, pars. 142–161.

<sup>1111</sup> Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**, pars. 51–67.

- (b) Mr. Kaczmarek includes not only the activities that are compensated with the VAD but also includes activities that are not covered by the regulatory framework under discussion, that is, unregulated activities, so they are unrelated to the alleged measures;
- (c) Mr. Kaczmarek calculates the IRR from 1998, and therefore covers a period for which the EEGSA results cannot be attributed to the CNEE's 2008 tariff review that is at issue in this case;
- (d) Mr. Kaczmarek takes into account, for his IRR, the price offered in the tender, when nothing in the regulatory framework permits this. The regulatory framework refers to the return on the VNR, which is a totally different concept from the price paid in the privatization of EEGSA. If the latter was too high, this is a business risk not attributable to the CNEE.

518. By making these very simple corrections, it becomes clear that EEGSA's IRR is in line with the regulatory framework given the parameters used by Messrs. Abdala and Schoeters, yet in Mr. Kaczmarek's analysis (in other words had the tariffs of the Bates White study of July 28 been applied) the IRR would have been more than twice as high.<sup>1112</sup>

Prospective Internal Return Rate	Capital Base	
	VNR Damonte	RAB
<b>But-For Scenario</b>		
A&S Valuation Model	7.3%	7.6%
NCI Valuation Model	16.0%	16.6%

<sup>1112</sup> *Ibid.*, Table V.



**F. PRE- AND POST-AWARD INTEREST**

519. Mr. Kaczmarek objects to the application of the risk-free rate from the time that TGH disposed of its indirect shareholding in EEGSA. Messrs. Abdala and Schoeters explain clearly why this ought to be the applicable rate:

From the valuation date onwards, we consider appropriate to update the alleged damage using the risk-free rate because we understand that TGH voluntarily disposed of its indirect participation in EEGSA and, therefore, was not exposed to the risk of operating the company from then onwards [...]

[...]

NCI argues that a higher rate than the risk-free rate should be used to update the historical and future flows of the valuation. For the period in which claimants were subject to EEGSA's operating risk (i.e., before selling their share), we have no theoretical disagreements with NCI. However, if the Claimant sold its share in the business voluntarily, we do not believe it is adequate to apply a risk-adjusted rate, because from October 2010 onwards the Claimant was not subject to the risks of the electricity distribution business in Guatemala. Also uncertain is whether, in the absence of the alleged measures, Claimant would now still have a participation in EEGSA. Since Claimant willingly decided to cease being exposed to EEGSA's risks, it is not entitled to obtain returns related to the operation of an electric power distribution company.

As regards post-award interest, we disagree with NCI's suggestion that interest should include a premium for the risk of collection. We understand that even when from the economic perspective there might be an alleged risk of failure to collect the award, such risk is not generally taken into account when setting this rate.<sup>1113</sup>

## **VII. PRAYER FOR RELIEF**

520. The Republic of Guatemala respectfully requests that this Tribunal:

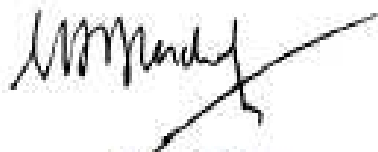
- (a) DECLARE that it does not have jurisdiction over the dispute submitted by TGH and/or that TGH's claim is inadmissible;

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<sup>1113</sup> *Ibid.*, pars. 81, 83, 84.

- (b) Alternative to (a) above, REJECT each and every one of TGH's claims on the merits;
- (c) GRANT any other compensation to Guatemala that the Tribunal deems to be opportune and appropriate; and
- (d) ORDER that TGH pay all the costs of this proceeding, including the costs of Guatemala's legal representatives, with interest.

Respectfully presented by the Republic of Guatemala on September 24, 2012.




Nigel Blackaby



Alejandro Arenales



Alfredo Skinner Klée



Rodolfo Salazar