

**NOTICE OF INTENT TO SUBMIT  
A CLAIM TO ARBITRATION  
UNDER SECTION B OF CHAPTER 10 OF  
THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES  
FREE TRADE AGREEMENT**

**TECO GUATEMALA HOLDINGS, LLC**

*Investor*

v.

**THE REPUBLIC OF GUATEMALA**

*Party*

In accordance with Articles 10.15 and 10.16 of the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA"), and with a view toward resolving this dispute amicably through consultation and negotiation, TECO Guatemala Holdings, LLC ("TGH" or the "Investor"), respectfully provides the Republic of Guatemala ("Guatemala" or the "Republic") with this written notice of its intention to submit a claim to arbitration under Chapter Ten of the DR-CAFTA.

**I. IDENTIFICATION OF THE DISPUTING INVESTOR**

1. This Notice is submitted by TGH, an investor of a Party to the DR-CAFTA. TGH is a limited liability company incorporated under the laws of the State of Delaware, United States of America, and a subsidiary of TECO Energy, Inc., an energy-related holding company organized under the laws of the State of Florida.

2. The address for TGH is as follows:

TECO Guatemala Holdings, LLC  
702 North Franklin Street  
Tampa, FL 33602  
U.S.A.

All communications submitted in relation to this notice should be sent to the above address, attention: Gordon L. Gillette, President.

**RECIBIDO**

Fecha 13/10/09  
Hora 12:42  
Mamouie  
Srta. Ministro de Economía

3. Through a joint venture with Iberdrola Energía, S.A. (“Iberdrola”), and Electricidade de Portugal, S.A. (“EDP”), TGH indirectly holds a 24% ownership interest in one of the largest electricity distribution companies in Central America, Empresa Eléctrica de Guatemala, S.A. (“EEGSA” or the “Distributor”). TGH, Iberdrola, and EDP have maintained an approximate 81% controlling interest in EEGSA since 1998—first through the DECA consortium (Distribución Eléctrica Centroamerica, S.A.) and later through a successor entity referred to as DECA II (Distribución Eléctrica Centroamerica Dos (II), S.A.). Although a majority of the shares in EEGSA was transferred to private hands in 1998, the Republic has retained a stake in the distribution company and currently holds an approximate 14% interest in EEGSA.

4. EEGSA is a Guatemalan utility company that delivers electricity to more than 800,000 customers in the Republic. Pursuant to Ministerial Agreement No. OM-158-98, dated April 2, 1998, and an authorization contract dated May 15, 1998, the Guatemalan Ministry of Energy and Mines (“MEM” or the “Ministry”) granted EEGSA a 50-year concession for the distribution of electricity within the Departments of Guatemala, Sacatepéquez, and Escuintla.

## **II. FACTUAL BASIS FOR THE CLAIM**

### **A. Regulation of the Guatemalan Energy Sector**

5. In response to the Republic’s rapidly increasing energy deficit, the Guatemalan Congress ratified the General Electricity Law in October 1996 for the express purpose of “increas[ing] the production, transmission and distribution of . . . energy through the liberalization of [Guatemala’s electricity] sector.”

6. Article 4 of the General Electricity Law established the National Electric Energy Commission (“CNEE” or the “Commission”), a regulatory agency within MEM. CNEE is to publish, in accordance with the General Electricity Law and its associated Regulations (collectively, the “Applicable Law”), the electricity rates for the regulated end users of each of the Guatemalan electricity distribution companies.

7. Although these electricity rates consist of several components, one of the most significant elements in the rate-calculation formula is the “Value Added for Distribution” (“VAD”), which is defined in Article 71 of the General Electricity Law as “[t]he typical capital

and operation costs of a distribution network of a benchmark efficient company operating in an area of a given density.” Through the VAD, Guatemalan electricity distributors are able to collect the necessary funds for operating their businesses, making further investments in their electricity networks, and ensuring that their companies receive a return on their investments.

8. Under the Applicable Law, Guatemalan electricity distributors have been charged with recalculating the VAD components once every five years. To this end, Article 74 of the General Electricity Law requires each distributor to retain an engineering consulting firm (prequalified by CNEE) to prepare a study on the relevant VAD components (the “VAD Study” or the “Study”). The Applicable Law further provides that the consultant is to submit its completed VAD Study to CNEE four months prior to the effective date of the new electricity rates. Upon receiving the VAD Study, the Commission then has two months to review the submission and raise any objections.

9. If CNEE raises objections to the VAD Study, the Applicable Law provides that the distributor’s engineering firm will have 15 days to analyze the Commission’s comments, make any necessary corrections to its Study, and submit the revised document to CNEE for further review. If a disagreement over the proposed VAD Study persists, Article 75 of the Law provides that the parties may submit their dispute to a technical committee composed of three members (the “Technical Committee” or “Committee”), with one member being named by each party and the third by mutual agreement. The Law further provides that the Technical Committee is to pronounce its judgment on the dispute within 60 days of its formation.

#### **B. The 2008-2013 VAD Calculation Process**

10. As the existing VAD rates for EEGSA’s regulated customers were set to expire on July 31, 2008, CNEE issued the terms of reference for the development of EEGSA’s 2008-2013 VAD Study on April 30, 2007. EEGSA then retained a CNEE-approved consulting firm, Bates White LLC (“Bates White” or the “Consultant”), to prepare its Study, and, in accordance with the Applicable Law, submitted the Study to CNEE on March 31, 2008. The Commission responded on April 11, 2008, by issuing Resolution No. CNEE-63-2008, which concluded that EEGSA’s 2008-2013 VAD Study (the “Original VAD Study”) required correction by the Consultant and was to be resubmitted to CNEE.

11. EEGSA accordingly filed an amended Study (the “Amended VAD Study”) with the Commission on May 5, 2008. In response, on May 15, 2008, CNEE issued Resolution No. CNEE-96-2008, in which it challenged the modifications the Consultant had made in the Amended VAD Study and notified EEGSA that it was invoking Article 75 to have established a Technical Committee for the purpose of resolving the parties’ disagreements over the VAD Study.

12. Perhaps recognizing the legal infirmities in its objections to EEGSA’s Amended VAD Study, the Republic and its agencies and instrumentalities immediately began to engage in systematic efforts to undermine the legal framework on which TGH relied in making its investment in EEGSA by, among other things, engaging in efforts to change the law to its advantage. Specifically, on May 19, 2008, MEM and Guatemalan President Colom signed Governmental Agreement No. 145-2008, which amended the Applicable Law by inserting Article 98 *bis* into the General Electricity Law Regulations. Through this amendment, MEM was granted the authority to select the third member of the Technical Committee if the parties failed to reach an agreement within a specified period of time. Ultimately, MEM did not exercise its newly acquired power of appointment, and EEGSA and CNEE agreed to the appointment of the third member of the Technical Committee on June 6, 2008.

13. The Republic’s efforts to unlawfully impose its will on the Distributor continued even after the Technical Committee was formed. Among other things, the Republic engaged in a public effort to undermine the authority of the Technical Committee. In an article published in the *Prensa Libre* newspaper on July 23, 2008, for instance, CNEE President Colom Bickford was quoted as saying that, while the Technical Committee’s recommendations would be taken into account, CNEE could choose whether or not to abide by them. And on the following day, a *Siglo 21* article reported that President Colom Bickford had publicly declared that the Technical Committee’s report would not be binding on the Commission.

14. The proceeding before the Technical Committee was to be conducted in accordance with twelve rules, agreed to by CNEE and EEGSA (the “Rules of Order”). Among other things, those rules provided that, after the Technical Committee issues its ruling,

[t]he Distributor shall inform its consultant of the pronouncement of the Technical Committee, who then shall implement all of the proposed changes contained in the pronouncement of the Technical Committee and submit the new version [of its VAD Study] to the Technical Committee for its review and approval.

15. The Technical Committee issued its final report (the "Final Report") on July 25, 2008. In its analysis of the areas of disagreement enumerated in Resolution No. CNEE-96-2008, the Technical Committee denied CNEE's objections to the Amended VAD Study in large part. Implementing the Technical Committee's ruling would have resulted in an approximate 20% increase in the VAD that was then in effect for EEGSA's regulated customers. In accordance with the Rules of Order, the Technical Committee requested that the parties make the Final Report available to Bates White so that it could make the necessary adjustments to the Amended VAD Study.

16. In response, CNEE immediately took unlawful steps to block the Technical Committee from approving the revised VAD Study (the "Final VAD Study"). To this end, CNEE issued a resolution identified as "Expediente GTTE-28-2008, GJ-Providencia-3121" on July 25, 2008, which ordered the dissolution of the Technical Committee.

17. EEGSA, for its part, continued to act in accordance with the Technical Committee's direction and the Rules of Order and requested that Bates White modify the Amended VAD Study to bring it into conformity with terms of the Final Report. The Consultant accordingly submitted the Final VAD Study to EEGSA, CNEE, and the Technical Committee on July 28, 2008.

18. Shortly thereafter, the third member of the Technical Committee requested that the Committee gather in Washington, D.C., on July 31, 2008, to review and approve the Final VAD Study. Under Rule 1 of the parties' Rules of Order, meetings of the Technical Committee required the participation of all three members. CNEE's party-appointed member failed to appear in Washington for the meeting; on the day of the meeting, he sent an email to the third member of the Technical Committee, notifying him that he would be unable to attend because a CNEE employee had warned him that he would be acting in contravention of Guatemalan law were he to continue serving on the Technical Committee.

19. The remaining two members of the Technical Committee reviewed EEGSA's Final VAD Study and noted in separate communications to CNEE and EEGSA that the changes made by Bates White in the Final VAD Study fully complied with its ruling.

20. On July 29, 2008, EEGSA filed a petition for a provisional writ of constitutional protection ("*Amparo* No. 6968-2008") with the Court of First Instance for Civil Matters in the Department of Guatemala to compel CNEE to abide by the Technical Committee's ruling. In its petition, EEGSA argued that the Commission's statements to the press, coupled with its unilateral action purporting to dissolve the Technical Committee, strongly indicated that CNEE intended to disregard the Technical Committee's ruling in violation of Applicable Law.

21. On the same day, CNEE issued Resolution No. CNEE-144-2008 in which it announced, *inter alia*, that it would establish the new VAD rates for the 2008-2013 period based on a study that it had commissioned, in contravention of the Applicable Law and without EEGSA's prior knowledge.

22. On July 30, 2008, Judge Valdés of the First Court of First Instance granted *Amparo* No. 6968-2008 and ordered CNEE to comply with the ruling of the Technical Committee and to permit the Technical Committee to review EEGSA's Final VAD Study.

23. In violation of the above order, CNEE subsequently issued Resolution Nos. CNEE-144-2008, dated July 29, 2008, and CNEE-145-2008 and -146-2008, dated July 30, 2008, which established new electricity-rate schedules based on the study which it commissioned in contravention of Applicable Law and on which EEGSA was not given any opportunity to comment. The VAD imposed by CNEE deviated significantly from that calculated in accordance with the Technical Committee's ruling: on average, this VAD is approximately 50% lower than the rates that were in force during the 2003-2008 period.

24. On July 31, 2008, Judge Valdés issued a letter to the parties, attaching an order that suspended, without justification, *Amparo* No. 6968-2008 and lifted the provisional injunction against CNEE.

25. The VAD approved by Resolution No. CNEE-144-2008 and the electricity rates set forth in Resolution Nos. CNEE-145-2008 and -146-2008 became effective on August 1, 2008.

26. Since these new electricity rates have come into force, EEGSA has filed multiple actions before the administrative agencies and courts, all to no avail. On August 13, 2008, the Guatemalan Congress issued Resolution No. 21-2008, condemning EEGSA's challenges to the new VAD.

27. As a direct result of the Republic's unlawful acts, TGH has suffered severe financial losses. EEGSA's credit rating has been adversely affected, resulting in a downgrade by the international credit rating agencies, Standard & Poor's Ratings Services and Moody's Investors Service, on August 26, 2008, and December 11, 2008, respectively. Such downgrades have the effect of significantly restricting EEGSA's access to credit from both local and international lenders, and increasing associated borrowing costs for any future credit needs.

28. Since the new VAD took effect, the Distributor's financial performance has deteriorated. EEGSA has had extremely poor financial results with negative net income occurring in two consecutive months in 2008. In the face of these losses, EEGSA has been forced to implement extreme measures to reduce its costs, including foregoing planned capital expenditures, and reducing operational costs (including elimination of personnel) to a degree not sustainable long term. This situation severely jeopardizes TGH's investment in Guatemala.

### **III. BREACH OF OBLIGATIONS UNDER THE DR-CAFTA**

29. Guatemala, by and through the actions of its agencies and instrumentalities described above, has breached its obligations under Chapter Ten of the DR-CAFTA. TGH has incurred significant losses as a consequence of those breaches.

30. In particular, the Republic's actions, including those taken by CNEE and MEM, violate the following provisions of the DR-CAFTA:

- (1) Article 10.5 – Minimum Standard of Treatment; and
- (2) Article 10.7 – Expropriation and Compensation.


#### IV. RELIEF REQUESTED

31. If consultations with the Republic concerning this dispute are unsuccessful, TGH will submit a claim for arbitration under the DR-CAFTA for breaches of the aforementioned articles of the Treaty, seeking damages of approximately U.S. \$285,600,000.00, plus pre- and post-award interest, all costs and fees associated with the arbitration, and any such further relief as the Tribunal may deem appropriate.

Most respectfully,



Gordon L. Gillette  
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Tampa, FL 33602  
U.S.A.



White & Case, LLP  
701 Thirteenth Street, N.W.  
Washington, DC 20005  
U.S.A.

cc: Mr. Carlos Meany Valerio, Guatemalan Minister of Energy and Mines  
Mr. Roger Haroldo Rodas Melgar, Guatemalan Minister of Foreign Affairs  
Amb. Francisco Villagrán de León, Guatemalan Ambassador to the United States  
Amb. Stephen G. McFarland, U.S. Ambassador to the Republic of Guatemala  
Amb. Susan C. Schwab, United States Trade Representative  
Mr. Thomas A. Shannon, Jr., Assistant Secretary for Western Hemisphere Affairs,  
U.S. Department of State  
Mr. Walter M. Bastian, Deputy Assistant Secretary for the Western Hemisphere,  
International Trade Administration, U.S. Department of Commerce