INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID CASE NO. ARB/10/23

CLAIMANT'S REPLY ON THE MERITS AND COUNTER-MEMORIAL ON JURISDICTION AND ADMISSIBILITY

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CLAIMANT'S REPLY

I. INTRODUCTION

1. Claimant TECO Guatemala Holdings, LLC ("TECO" or "Claimant") hereby submits its Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility ("Reply"),[1] in accordance with the procedural schedule established by the Tribunal.[2] Claimant's Reply is supported by the following witnesses:

- *Carlos Manuel Bastos*: Third and presiding member of the Expert Commission established to resolve the dispute relating to EEGSA's 2008-2013 tariff review;[3]
- *Sandra W. Callahan*: Senior Vice President of Finance and Accounting, Chief Accounting Officer, and Chief Financial Officer for TECO Energy, Inc. ("TECO Energy");[4]
- *Miguel Francisco Calleja Mediano*: former Manager of Planning, Control, and Regulation for EEGSA;[5]
- *Leonardo Giacchino*: Member of the Expert Commission established to resolve the dispute relating to EEGSA's 2008-2013 tariff review; founding Partner of Solutions Economics, LLC; former Partner at Bates White, LLC; former Vice President at NERA Economic Consulting;[6]

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[1] Abbreviations and terms used in Claimant's Reply have the same meaning as in Claimant's Memorial.

[2] *See* Minutes of the First Session of the Tribunal dated 23 May 2011, at 6.

[3] Second Witness Statement of Carlos Manuel Bastos dated 20 Apr. 2012 ("Bastos II") **(CWS-7)**; *see also* Witness Statement of Carlos Manuel Bastos dated 21 Sept. 2011 ("Bastos I") **(CWS-1)**.

[4] Second Witness Statement of Sandra W. Callahan dated 11 May 2012 ("Callahan II") **(CWS-8)**; Witness Statement of Sandra W. Callahan dated 16 Sept. 2011 ("Callahan I") **(CWS-2)**.

[5] Second Witness Statement of Miguel Francisco Calleja Mediano dated 21 May 2012 ("Calleja II") **(CWS-9)**; Witness Statement of Miguel Francisco Calleja Mediano dated 22 Sept. 2011 ("Calleja I") **(CWS-3)**.

[6] Second Witness Statement of Leonardo Giacchino dated 24 May 2012 ("Giacchino II") **(CWS-10)**; Witness Statement of Leonardo Giacchino dated 23 Sept. 2011 ("Giacchino I") **(CWS-4)**.

- *Gordon L. Gillette*: President of Tampa Electric Co.; former President of TECO Guatemala, Inc.;[7]

- *Luis Maté*: former General Manager of EEGSA.[8]

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

- *Rodolfo Alegría Toruño*: Expert on Guatemalan law; Head of the Taxes, Labour, Regulatory Law, Telecommunications, Energy, and Commercial Law Practice Groups and Partner at Carrillo & Asociados;[9]

- *Fernando Barrera-Rey* and *Carlos Fernando Barrientos*: Regulatory Economics and Engineering Experts; Associate Director at Frontier Economics.[10]

- *Brent C. Kaczmarek*: Valuation and Damages Expert; Managing Director of Navigant Consulting, Inc.[11]

* * *

3. This case arises out of Guatemala's decision to substantially decrease, for purely political purposes, EEGSA's electricity tariffs for the 2008-2013 tariff period through the VAD in any way possible, in breach of its obligations under the General Electricity Law and its Regulations, and in breach of its own express representations made during EEGSA's privatization process. As the evidence shows, in order to achieve its goal of substantially reduced electricity tariffs, Guatemala took a series of unlawful and arbitrary measures against Claimant's protected investment in EEGSA during the 2008-2013 tariff review process, which culminated in the CNEE imposing its own unjustifiably low VAD on EEGSA, in complete

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[7] Second Witness Statement of Gordon L. Gillette dated 24 May 2012 ("Gillette II") **(CWS-11)**; Witness Statement of Gordon L. Gillette dated 23 Sept. 2011 ("Gillette I") **(CWS-5)**.

[8] Second Witness Statement of Luis Maté dated 13 Apr. 2012 ("Maté II") **(CWS-12)**; Witness Statement of Luis Maté dated 21 Sept. 2011 ("Maté I") **(CWS-6)**.

[9] Second Expert Report of Rodolfo Alegría Toruño dated 24 May 2012 ("Alegría II") (**CER-3**); Expert Report of Rodolfo Alegría Toruño dated 22 Sept. 2011 ("Alegría I") **(CER-1)**.

[10] Expert Report of Fernando Barrera-Rey dated 24 May 2012 ("Barrera") **(CER-4)**.

[11] Second Expert Report of Brent C. Kaczmarek dated 24 May 2012 ("Kaczmarek II") **(CER-5)**; Expert Report of Brent C. Kaczmarek dated 23 Sept. 2011 ("Kaczmarek I") **(CER-2)**.

disregard of the legal and regulatory framework that Guatemala had established to depoliticize the tariff review process and to encourage foreign investment in electricity distribution. The actions that the CNEE took during EEGSA's 2008-2013 tariff review process were not the actions of an independent regulatory body, nor were they motivated by a good faith interpretation of the law. Rather, as the evidence confirms, Guatemala deliberately and unjustifiably violated the law in order to achieve the outcome that it wanted—a sharp reduction in EEGSA's electricity tariffs through the VAD. In so doing, Guatemala breached its obligation under Article 10.5 of the DR-CAFTA to accord fair and equitable treatment to Claimant's investment.

4. In its Counter-Memorial, Respondent attempts to obscure the issues and to paint this case as a purely domestic regulatory dispute over the proper interpretation of the General Electricity Law and its Regulations, in which Claimant allegedly asks this Tribunal to determine the correct VAD and the proper tariffs for EEGSA. In so arguing, Respondent contends that the CNEE is an independent technical body insulated from any political influence and devoid of any political or other interest in preventing an increase in electricity tariffs, and that its interpretation and application of the law in this case was correct. The evidence demonstrates that Respondent's assertions are unquestionably false. As set forth below, not only has the MEM itself confirmed that the CNEE is subject to "high political influence," but as a series of emails between the CNEE and its own consultant reveals, the CNEE, in fact, orchestrated the decrease in EEGSA's electricity tariffs through the VAD. These contemporaneous emails show that the CNEE devised an unlawful FRC calculation with its consultant specifically to obtain a significant decrease in EEGSA's VAD, and that the CNEE also directly intervened in the Expert Commission process, providing its own appointee with materials to support the CNEE's position in the Expert Commission and engaging in *ex parte* discussions regarding the outcome of the Expert Commission's deliberations, before the Expert Commission had even issued its rulings. These are not the actions of a disinterested regulatory body.

5. In its Counter-Memorial, Respondent also attempts to defend the CNEE's actions on the purported basis that the CNEE was under an intense time constraint to publish EEGSA's new tariff schedules upon the expiration of EEGSA's previous tariff schedules on 31 July 2008, as it allegedly was required to do under the law. This assertion also is demonstrably false. As

discussed below, not only did the CNEE have *no* obligation under the law to publish EEGSA's new tariff schedules upon the expiration of EEGSA's previous tariff schedules, but the law expressly provided that the CNEE had *nine months* as of the date of expiration of the previous tariff schedules to publish the new tariff schedules and that, if the CNEE had not published the new tariff schedules, the previous tariff schedules would have continued to apply, adjusted with predetermined formulas. The notion that the CNEE needed to proceed to approve its own independent VAD study and to set EEGSA's new tariff schedules on that basis, because it did not have sufficient time under the law to review EEGSA's revised VAD study and to ensure that EEGSA had made all of the required corrections to its VAD study in accordance with the Expert Commission's decisions thus is complete fiction.

6. Respondent's evolving and *post-hoc* justifications for the CNEE's actions further reveal the baseless nature of its defenses. As the evidence shows, while the CNEE's Legal Department sought to provide cover for the CNEE by asserting that it was entitled to rely upon its own VAD study to set the tariffs given the impending expiration of EEGSA's existing tariff schedules, the CNEE, before the Guatemalan courts, abandoned that position and shifted gears, emphasizing the purportedly non-binding nature of the Expert Commission's decisions and its alleged authority to rely upon its own VAD study pursuant to an amended regulation that had been enacted just prior to EEGSA's tariff review. As set forth below, Respondent's contention that the Expert Commission's decisions are non-binding not only flies in the face of its own prior express representations to potential foreign investors and to its own courts, but also is inconsistent with its own consultants' views and its own actions in this case. It simply defies logic that Guatemala would go to the lengths that it did to subvert the Expert Commission process—by, among other things, amending the law to enable itself to appoint the presiding member and engaging in *ex parte* discussions with its own appointee throughout the process—if the resulting Report were merely advisory. Similarly, Respondent's argument that the Expert Commission existed merely to determine whether EEGSA's consultant had made all of the changes to its study that had been requested by the CNEE is illogical. It never was in doubt that EEGSA's consultant had refused to make some of the requested changes, which is what gave rise to the very disputes that were submitted to the Expert Commission for resolution. Guatemala's arguments do not reflect a legitimate disagreement about the proper interpretation of the law, but

make a mockery of that very law, as well as the procedures and regulations that Guatemala had put in place to entice foreign investors to invest in its electricity sector.

7. Moreover, that the Guatemalan courts ultimately refused to rectify the CNEE's unlawful actions cannot preclude international liability, as Respondent would have this Tribunal find; indeed, were it otherwise, every host State could immunize itself from international liability by having its own courts endorse its internationally unlawful behavior. Respondent's efforts in this arbitration to discredit EEGSA's VAD study by identifying alleged errors and arguing that the study did not fully incorporate the Expert Commission's decisions also are unavailing. The evidence shows that the study's alleged shortcomings did not serve as the basis for the CNEE's decision to disregard that study and to set EEGSA's new tariff schedules on the basis of its own study and, in fact, were only identified long after the artificially low tariffs were imposed.

8. Bereft of any justification for its actions, Respondent thus resorts to attacking Claimant for attempting to benefit from the legitimate expectations of its affiliated companies in the TECO group, because Claimant was not incorporated until 2005, several years after EEGSA was privatized. Respondent's arguments are baseless. Not only does Claimant, as a member of the TECO group of companies, share the very same expectations regarding the investment in EEGSA as the other members of that group, but Claimant necessarily had expectations at the time of its investment in 2005, which it drew from the legal and regulatory framework that Guatemala had implemented in 1996 and 1997 to depoliticize the tariff review process; from the specific representations that Guatemala had made to the TECO group of companies regarding the calculation of the VAD during EEGSA's privatization process in 1998; and from the manner in which Respondent had adhered to that legal and regulatory framework with respect to EEGSA from 1998 to 2005. As the evidence demonstrates, Guatemala's actions during EEGSA's 2008-2013 tariff review violated Claimant's legitimate expectations, eviscerating the fundamental legal premises and protections set forth in the law and subjecting Claimant's protected investment in EEGSA to the type of unlawful and arbitrary State action that the fair and equitable treatment obligation embodied in the DR-CAFTA is designed to protect against.

9. As a direct result of Guatemala's actions, Claimant has suffered damages in the amount of US$ 243.6 million, which should be awarded to Claimant. If the Tribunal finds that

Respondent has violated its Treaty obligations—as it should—Respondent offers no legitimate reason why damages in this amount should not be awarded. Indeed, although its experts acknowledge that, if Claimant prevails, damages should compensate Claimant for its portion of the difference between the cash flow and share value that EEGSA actually had and what it would have had if Guatemala had set EEGSA's tariffs in accordance with the Expert Commission's rulings, Respondent has simply refused to perform this calculation. Instead, its expert has cherry-picked which of the Expert Commission's rulings it would incorporate into its "but-for" analysis. The non-sensical nature of this exercise is apparent in its results: Respondent concludes that EEGSA actually was better off financially from August 2008 to October 2010 operating under Sigla's tariffs than it would have been had the Expert Commission's rulings served as the basis for those tariffs, even though Sigla's tariffs drastically reduced EEGSA's revenue. Respondent's own contemporaneous documents show that this is not the case, and, not surprisingly, Respondent fails to even acknowledge that the two major rating agencies downgraded EEGSA in the wake of the CNEE's unlawful actions. Far from seeking "double recovery," as Respondent brazenly asserts, an award of damages in the amount sought is necessary to compensate Claimant for the internationally wrongful actions that Respondent took against Claimant's protected investment.

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II. FACTS

A. When Guatemala Privatized Its Electricity Sector, It Adopted A New Legal Regime Designed To Attract Foreign Investment By Depoliticizing The Tariff Review Process And Guaranteeing Fair Returns

10. In its Memorial, Claimant demonstrated that, in the early 1990s, Guatemala faced a crippling crisis in its electricity sector, with blackouts and brownouts of up to eight hours per day,[12] and that, in order to address this crisis and to improve the operating standards of its electricity sector, Guatemala decided to privatize certain assets in that sector.[13] Claimant further

[12] *See* Claimant's Memorial dated 23 Sept. 2011 ("Memorial") ¶¶ 11-13.

[13] *See id*. ¶¶ 14-20.

demonstrated that, in order to attract much needed foreign investment, Guatemala adopted a new legal and regulatory framework for its electricity sector, which unbundled and depoliticized the generation, transmission, and distribution of electricity in Guatemala.[14] On 16 October 1996, the Guatemalan Congress thus enacted a new general electricity law, the LGE, which entered into force on 15 November 1996.[15] Shortly thereafter, as contemplated in the LGE,[16] the President of Guatemala and the MEM issued regulations relating to the LGE, the RLGE, by Government Accord No. 256-97 dated 21 March 1997.[17] For potential foreign investors in Guatemala's electricity distribution companies, which were to be privatized, this new legal and regulatory framework promised to depoliticize the tariff review process and to guarantee fair returns, by limiting the role of the regulator in the calculation of the VAD component of the distributor's tariff,[18] and by adopting the model efficient company approach using the new replacement value of the assets ("VNR") for calculating the distributor's VAD.[19] As demonstrated in Claimant's Memorial,[20] Guatemala emphasized these very factors in its promotion of the privatization of EEGSA, the largest electricity distribution company in Guatemala, to the TECO group of companies and to other foreign electricity companies that had been targeted by Guatemala for the privatization.[21]

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[14] *See id*. ¶¶ 21-26.

[15] *See id*. ¶¶ 24-25; Decree No. 93-96, General Electricity Law dated 16 Oct. 1996, entered into force on 15 Nov. 1996 ("LGE") **(C-17)**.

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

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

[18] *See* Memorial ¶¶ 36-44.

[19] *See id*. ¶¶ 27-35. As Claimant explained in its Memorial, the Value Added for Distribution or "VAD" is the portion of the electricity tariff through which the distributor recoups its investment and makes its profit; the VAD compensates the distributor for both operating costs (*i.e.*, costs incurred in distributing electricity) and capital costs (*i.e.*, the financial cost of capital). *See id*. ¶¶ 30-31.

[20] *See id*. ¶¶ 49-55.

[21] *See, e.g.*, Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998, at 3 **(C-27)**; Empresa Eléctrica de Guatemala, S.A., Memorandum of Sale prepared by Salomon Smith Barney ("Sales Memorandum") dated May 1998 **(C-29)**; Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998 **(C-28)**.

11. In its Counter-Memorial, Guatemala does not dispute any of these facts,[22] and, indeed, acknowledges that, in the mid-1990s, the State-owned electricity utility, INDE, "lacked the resources to make the investments in generation, transportation and distribution necessary to supply the growing demand for electricity," and that "[o]ne of the principal reasons for the lack of resources was that the electricity tariff was set at the discretion of the President of the Nation, and did not reflect the costs of the service, but rather the political will of the Government."[23] Guatemala asserts, however, that Claimant presents in its Memorial "a distorted and baseless description of the regulatory framework within which Teco made its investments,"[24] and that Claimant "completely ignores the distribution of powers among different agents in the electricity sector pursuant to the regulatory framework" and "distorts the model company system."[25] Guatemala further asserts that, contrary to Claimant's contentions, "one of the principal objectives of the [LGE] was to place the determination of tariffs in the hands of a technical body [*i.e.*, the CNEE] that would work autonomously and independently of the Political Branch,"[26] and that, under the model efficient company approach adopted in the LGE, "Guatemala expected that, as successive tariff reviews were performed, the tariffs would fall in real terms."[27] Guatemala's assertions are belied by the evidence, as set forth below.

1. The New Regulatory Framework Depoliticized The Tariff Review Process By Limiting The Government's Ability To Intervene In That Process

12. In its Memorial, Claimant demonstrated that the new legal and regulatory framework adopted by Guatemala for its electricity sector sought to depoliticize the tariff review process by ensuring that electricity tariffs would be set in accordance with economic and technical criteria; that the rights of the regulator and the regulated company would be balanced;

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[22] *See* Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits dated 24 Jan. 2012 ("Counter-Memorial") ¶¶ 139-146.

[23] *Id.* ¶ 140.

[24] *Id.* ¶ 138.

[25] *Id.*

[26] *Id.* ¶ 144.

[27] *Id.* ¶ 146.

and that there would be no political intervention in the tariff-setting process.[28] As explained in Claimant's Memorial,[29] this was achieved by establishing a legal and regulatory framework where neither the regulator nor the distributor has the authority to set the distributor's VAD unilaterally, and where "the resolution of disputes concerning the variables needed to be determined for the calculation of the VAD is left to experts" chosen by the parties.[30] The LGE, as Claimant explained in its Memorial,[31] thus includes three key requirements for the calculation of the distributor's VAD: first, every five years, each distributor must "calculate the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE];"[32] second, the CNEE prepares the terms of reference and supervises the progress of the distributor's VAD study, but does not have the right to perform the study itself;[33] and third, any disputes or discrepancies between the CNEE and the distributor relating to the VAD study must be referred to a commission of three independent experts, one appointed by each of the parties and the third by agreement, which "shall rule on the differences in a period of 60 days counted from its appointment."[34]

13. In its Counter-Memorial, Respondent contests Claimant's description of the legal and regulatory framework adopted by Guatemala in the LGE and RLGE.[35] Respondent first distorts Claimant's arguments by suggesting that Claimant contends that the depoliticization of the tariff review process was "achieved by conferring distributors with the power to set tariffs."[36] Respondent next argues that, to the contrary, the depoliticization of the tariff review process "was ensured by the creation of the CNEE as a[n] independent technical body with the

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[28] Memorial ¶ 28; *see also* Alegría I ¶¶ 20-33 **(CER-1)**.

[29] Memorial ¶¶ 37-43.

[30] Alegría I ¶ 31 **(CER-1)**; *see also* Memorial ¶ 44.

[31] *See* Memorial ¶¶ 37-43.

[32] LGE, Art. 74 **(C-17)**; *see also* Memorial ¶¶ 37-38.

[33] LGE, Art. 74 **(C-17)**; *see also* Memorial ¶¶ 39-40.

[34] LGE, Art. 75 **(C-17)**; *see also* Memorial ¶¶ 42-43.

[35] *See* Counter-Memorial ¶¶ 138-213.

[36] *Id*. ¶ 159.

responsibility of setting the tariffs and determining the VAD."[37] According to Respondent, the CNEE's purported "independence from the executive branch, its technical nature, and distributor representation among its Board" thus allegedly are the factors that "guaranteed investors that tariff reviews would be depoliticized."[38] Finally, Respondent asserts that the CNEE has the "power to unilaterally establish tariff schedules"[39] and that the Expert Commission established under LGE Article 75 serves merely "to inform the decision of the body that is legally mandated to set tariffs, the CNEE."[40] Respondent thus submits that, while the electricity tariff previously "was set at the discretion of the President of the Nation,"[41] the electricity tariff, including the distributor's VAD, now is set at the complete discretion of the CNEE.[42] Respondent's assertions not only mischaracterize Claimant's arguments, but are fundamentally at odds with the documentary record in this case.

a. Depoliticization Of The Tariff Review Process

14. At the outset, Claimant notes that, contrary to Respondent's assertions, Claimant does not allege that the depoliticization of the tariff review process was "achieved by conferring distributors with the power to set tariffs."[43] Nor does Claimant's legal expert, Rodolfo Alegría Toruño, make any such assertion in his legal expert opinions. Indeed, as Professor Alegría notes,[44] Article 4(c) of the LGE provides that one of the powers of the CNEE is to "[d]efin[e] the transmission and distribution rates subject to regulation in accordance with this law, as well as the methodology for calculation of the same."[45] This also is reflected in LGE Article 61, which provides that the CNEE is responsible for determining distribution tariffs by adding the

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[37] *Id*. ¶ 566.

[38] *Id*. ¶ 159.

[39] *Id*. ¶ 70.

[40] *Id*. ¶ 211.

[41] *Id*. ¶ 140.

[42] *See, e.g.*, *id*. ¶ 70.

[43] *Id*. ¶ 159.

[44] *See* Alegría II ¶ 22 **(CER-3)**.

[45] LGE, Art. 4(c) **(C-17)**.

components of the cost of the acquisition of capacity and energy and the efficient costs of distribution referred to in LGE Article 60.[46] What the CNEE does not have, however, is the authority to establish the distributor's VAD unilaterally, where the distributor participates in the tariff review process, as EEGSA did in the present case.[47] As discussed further below,[48] in its Counter-Memorial, Respondent deliberately conflates the CNEE's power to determine the distributor's tariffs with the process for calculating the distributor's VAD, treating these two issues as if they were one and the same, when they are, in fact, different.[49]

15. Moreover, as Claimant demonstrated in its Memorial[50] and as Professor Alegría confirms in his second expert legal opinion,[51] the depoliticization of Guatemala's electricity sector required more than simply creating the CNEE as a technical regulatory body under the MEM; it also required the establishment of a new legal and regulatory framework that provided legal certainty and prevented the arbitrary intervention of the Government.[52] This is reflected in

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[46] Alegría II ¶ 21 **(CER-3)**; LGE, Art. 61 ("Rates to users of the Final distribution service shall be determined by the Commission by adding the power and energy acquisition cost components, freely agreed upon among generators and distributors and referenced to the inlet to the distribution network with the components of efficient costs of distribution to which the preceding article refers. The rates shall be structured such that they promote equality of treatment to consumers and economic efficiency of the sector. In no case may costs attributable to the service provided to a category of users be recovered through rates charged to other users.") **(C-17)**.

[47] *See* Memorial ¶¶ 192-197.

[48] *See infra* ¶¶ 28-36, 60.

[49] *See* Alegría II ¶ 27 **(CER-3)**.

[50] *See* Memorial ¶¶ 11-26.

[51] *See* Alegría II ¶¶ 2-10 **(CER-3)**.

[52] *Id*. ¶ 2. Claimant notes in this regard that, while Respondent asserts in its Counter-Memorial that "one of the principal objectives of the law was to place the determination of tariffs in the hands of a technical body that would work autonomously and independently of the Political Branch," Respondent has produced no evidence to support that assertion, but relies entirely upon Mr. Enrique Moller Hernández's *ipse dixit* statements. *See* Counter-Memorial ¶ 144. While Claimant requested all documents presented to the Congressional Committee of Energy and Mines regarding the draft LGE, Respondent produced only the official Congressional record; Respondent did not produce any of the proposals presented to the Congressional Committee, nor did Respondent produce the purported "guidance issued by the Ministry of Energy and Mines" regarding the draft LGE, to which Mr. Moller refers in his witness statement. *See* Claimant's Redfern Schedule, Request No. A.1; Witness Statement of Enrique Moller Hernández dated 24 Jan. 2012 ("Moller") ¶ 12 **(RWS-2)**. Mr. Moller's assertion that, for the "fixing of tariffs," the creation of a technical body was proposed, "composed of individuals nominated by stakeholders interested in the development of the electricity sector" thus is entirely unsupported by the documentary record. Moller ¶ 13 **(RWS-2)**.

both the study of privatization options for EEGSA conducted by Price Waterhouse in 1990,[53] and the 1993 Final Report prepared by Chilean experts Juan Sebastián Bernstein and Jean Jacques Descazeaux on reforming and restructuring Guatemala's electricity sector, upon which the LGE and RLGE were based.[54] As set forth in the Memorial,[55] Price Waterhouse concluded in its 1990 study that it was far too early to privatize EEGSA,[56] and that the two most important obstacles to EEGSA's privatization were Guatemala's regulatory structure and the unreliability of power supplies in Guatemala.[57] As Price Waterhouse noted, "[i]f investors think that the Government will still have control over EEGSA even after privatization efforts, they will be very wary of investing" and "[t]he regulatory scheme will directly effect [*sic*] the way they will value EEGSA's shares, because it will determine EEGSA's potential profitability."[58] As Price Waterhouse further observed, "[u]ntil a regulatory scheme was established for EEGSA and its long-term relationship with INDE was guaranteed, investors would be hesitant to invest in EEGSA."[59]

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

[54] Juan Sebastián Bernstein & Jean Jacques Descazeaux, *Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report* dated June 1993 **(C-9)**. As Respondent confirms in its Counter-Memorial, "in 1991, the Government began considering the possibility of de-monopolizing and decentralizing the electricity sector" and, "in 1993, the United States Agency for International Development (USAID) commissioned expert Chilean engineers, Sebastián Bernstein and Jean Jacques Descazeaux, to prepare a diagnostic study and proposal to reform the sector." Counter-Memorial ¶ 141. As Respondent further confirms, this "study recommended that the electricity sector be restructured, as efficiency would be improved through the participation of the private sector in its development and operation." *Id*.

[55] *See* Memorial ¶ 16.

[56] Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991, Executive Summary **(C-7)**. As Claimant noted in its Memorial, Price Waterhouse noted four essential factors that prevented the privatization of EEGSA, including (i) EEGSA's continued dependence upon State subsidies; (ii) the lack of regulatory mechanisms for the electricity sector; (iii) the low privatization price due to EEGSA's condition at the time; and (iv) EEGSA's reliance upon INDE, which created significant State-intervention risks. *See id*.; Memorial ¶ 16.

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

[58] *Id*.

[59] *Id*. As Claimant noted in its Memorial, with respect to the value of INDE's 91.7% shareholding in EEGSA, Price Waterhouse concluded that, "although based upon net asset value, EEGSA's stock would be worth approximately Q297.8 million (about $59.6 million), a more appropriate valuation based upon earnings

16. In their 1993 Final Report, Messrs. Bernstein and Descazeaux similarly recommended that Guatemala reform and restructure its electricity sector, noting that "[t]he problem of the likely mal-functioning of a regulatory organism in electricity has been forcefully put forward in Guatemala,"[60] and that this "reinforce[d] the need of having objective rules which define the parties' obligations and rights, thus preventing the arbitrary intervention of regulatory entities."[61] As Messrs. Bernstein and Descazeaux observed, "the need to have clear rules of the game for the operation and development of the sector has been pointed out [throughout this Report], particularly as regards generating, transmitting and distributing companies," which "implies defining the rights, obligations and limitations of the actors participating in the industry, including the Government itself."[62]

17. Messrs. Bernstein and Descazeaux specifically identified the need to prevent the Government's arbitrary interference in the setting of distribution tariffs.[63] As Messrs. Bernstein and Descazeaux observed in their Final Report, "it would be possible to minimize the intervention of a regulatory organism in those matters most sensitive to regulation, such as price regulation in the segments with characteristics of a natural monopoly: transmission and distribution."[64] In order to achieve this, Messrs. Bernstein and Descazeaux recommended "a Committee formed by the Ministers of Finance and of Energy and Mines, to supervise [an outside tariff study] commissioned by the concession holders from a prestigious consulting agency," which would take place "every 5 or 10 years."[65] They further recommended that "[t]he

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indicates a much lower value of approximately Q69.6 million (about $13.9 million)." *See id*., at 26; Memorial ¶ 17.

[60] Juan Sebastián Bernstein & Jean Jacques Descazeaux, *Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report* dated June 1993, at 34 **(C-9)**.

[61] *Id*.

[62] *Id*., at 33.

[63] Alegría II ¶ 3 **(CER-3)**.

[64] Juan Sebastián Bernstein & Jean Jacques Descazeaux, *Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report* dated June 1993, at 34 **(C-9)**.

[65] *Id*.

permanent regulatory function would be limited to overseeing compliance with the law in matters such as safety of facilities (a function that might be assigned to the Ministry of Energy and Mines, for example)" and that the resolution of disputes "might be given to arbitrating courts appointed by the parties."[66] Messrs. Bernstein and Descazeaux thus did not recommend the creation of a technical regulatory body with discretion to set the tariffs and to determine the distributor's VAD, but recommended that the function of the permanent regulatory body be limited to "overseeing compliance with the law," and that disputes regarding the tariffs be determined by "arbitrating courts," whose members would be appointed by the regulator and the distributor jointly.

18. As Professor Alegría notes in his second expert legal opinion,[67] the final version of the LGE included the following elements of that recommendation: (i) every five years, the distributor commissions an independent VAD study to calculate its VAD; (ii) a prestigious consulting firm, which is prequalified by the CNEE, performs the independent VAD study using a model efficient company as a benchmark; (iii) the CNEE, as the permanent regulatory body, supervises the progress of the VAD study; and (iv) any disputes or discrepancies between the CNEE and the distributor with respect to the VAD study shall be resolved by a three-person Expert Commission appointed by the parties.[68] In this way, as Professor Alegría notes, the LGE "aimed to guarantee that neither the distributor nor the Government would have unilateral power in setting the distributor's tariffs, which could be harmful for the regulated consumer, on the one hand, and for the distributor, on the other hand."[69]

19. This is consistent with the Congressional Commission's Report recommending passage of the draft LGE.[70] As that Report reflects, the Congressional Commission confirmed that the objectives of the LGE were to establish a legal and regulatory framework "that provides legal certainty to public and private investment in the [electricity] subsector . . . which seek to

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[66] *Id*.

[67] Alegría II ¶ 5 **(CER-3)**.

[68] *See* Alegría I ¶¶ 20-33 **(CER-1)**; LGE, Arts. 71-79 **(C-17)**.

[69] *See* Alegría II ¶ 6 **(CER-3)**; *see also* Alegría I ¶¶ 25-31 **(CER-1)**.

[70] Report of the Congressional Commission on Energy and Mines dated 19 Sept. 1996 **(C-15)**.

invest in conditions of equality and competitiveness," and to demonopolize and depoliticize "the activities of the subsector, by creating entities and authorities that regulate and avoid the political interference that has caused, and can cause, so much distortion and damage, unless clear legal provisions of general application are established, which is precisely the intent of this law, seeking, above all, the common good."[71] As set forth below, due to strong political opposition, the Guatemalan Congress did not, however, enact the original draft of the LGE recommended by the Congressional Commission, as that draft provided for a structurally independent CNEE, which would have operated autonomously and independently from the Executive Branch.[72]

b. The Establishment Of The CNEE

20. As Claimant set forth in its Memorial,[73] the LGE created a new regulatory entity, the CNEE, as a "technical," rather than political, body of the MEM with "functional independence" in exercising its powers to regulate distributors and set distribution tariffs.[74] In its Counter-Memorial, Respondent asserts that "the draft of the LGE as submitted to Congress established the CNEE as a body fully dependent on the MEM," but that, "in the final approval of the LGE, through an amendment proposed by the Congressional Committee of Energy and Mines, the CNEE was assured by law 'functional independence to exercise its powers and the following functions […]', which strengthened the independence of the CNEE and its directors."[75] Respondent's assertions misrepresent the legislative history of the LGE.

21. As Professor Alegría explains in his second expert legal opinion,[76] the first draft of the LGE contemplated the creation of the CNEE as a technical regulatory body with its own legal personality, which would have operated autonomously and independently from the

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[71] Report of the Congressional Commission on Energy and Mines dated 19 Sept. 1996, at 1 **(C-15)**; *see also* Memorial ¶ 23.

[72] *See* Bill of the General Electricity Law and its Regulations, Final Draft, Republic of Guatemala dated 4 Apr. 1995, Art. 5 **(C-13)**.

[73] *See* Memorial ¶ 29; *see also* Alegría I ¶¶ 22-23 **(CER-1)**.

[74] LGE, Art. 4 **(C-17)**.

[75] Counter-Memorial ¶ 152 (emphasis in original).

[76] *See* Alegría II ¶ 2 **(CER-3)**.

Executive Branch.[77] As Article 5 of the first draft of the LGE provided: "The prices of the services of transportation and distribution of electricity subject to concession will be determined by a Regulatory Commission, a technical organism to which the law will grant juridical personality."[78] As Professor Alegría explains,[79] pursuant to Article 134 of the Political Constitution of Guatemala, the creation of an autonomous and decentralized entity with its own juridical personality requires the favorable vote of two-thirds of the representatives in Congress.[80] In order for the CNEE to be created by the LGE as an autonomous entity with its own juridical personality, the favorable vote of two-thirds of Congress thus was required.[81] According to a report issued by UNCTAD in 2011 (the "UNCTAD Report"),[82] and as contemporaneous newspaper articles confirm,[83] due to strong political opposition, the ruling party was not able to obtain the favorable vote of two-thirds of Congress required to grant the CNEE full autonomy and independence.[84]

22. Article 4 of the draft LGE relating to the establishment of the CNEE thus was revised and, "instead of being a self-governed agency, as provided in the prior bill, the National Electricity Commission (the 'CNEE') [was included as] an agency under the Ministry of Energy and Mines (the 'MEM')."[85] As the Congressional President, Carlos García Regás, noted at the time, "[w]ith this change, which helps avoid a full privatization of the electricity sector, we hope

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[77] *See* Bill of the General Electricity Law and its Regulations, Final Draft, Republic of Guatemala dated 4 Apr. 1995, Art. 5 **(C-13)**.

[78] Bill of the General Electricity Law and its Regulations, Final Draft, Republic of Guatemala dated 4 Apr. 1995, Art. 5 **(C-13)**.

[79] *See* Alegría II ¶ 12 **(CER-3)**.

[80] *See* Political Constitution of the Republic of Guatemala, 31 May 1985, as amended by Legislative Decree No. 18-93 of 17 Nov. 1993 ("Constitution"), Art. 134 **(C-11)**.

[81] *See* Alegría II ¶ 12 **(CER-3)**.

[82] United Nations Conference on Trade and Development, *Investment Policy Review of Guatemala*, dated 4 Jan. 2011, at 81 (noting that, "when the Electricity Law was approved, the incumbent Government did not reach the necessary majority to give the new regulatory commission full structural independence and episodes of interference occurred in early years of the Commission's life") **(C-532)**.

[83] *See CNEE will report to the MEM*, dated 13 Sept. 1996 **(C-422)**; *New Electricity Bill to be discussed today*, dated 17 Sept. 1996 **(C-423)**.

[84] *See* Alegría II ¶ 12 **(CER-3)**.

[85] *CNEE will report to the MEM*, dated 13 Sept. 1996 **(C-422)**.

the bill can be passed unanimously."[86] Mr. Regás further noted that "[w]e do not want this self-governed entity changed, but due to the systematic opposition shown by FRG's representatives, we have been left with no other choice, due to the importance of the Law."[87] During the third round of discussions for approving the LGE, Representative Ruano Herrera similarly remarked that it was "a pity that we fail to find ourselves authorizing an autonomous entity on this day, for otherwise many of the doubts raised here would be dissipated."[88] At the end of the discussion of the third reading of the LGE on 16 October 1996, the LGE was approved by 49 votes in favor, 23 votes against, and 8 abstentions.[89]

23. Article 4 of the draft LGE, as presented on 16 October 1996, provided as follows: "The National Electric Energy Commission, referred to as the Commission, is created as a technical organ depending upon the Ministry [of Energy and Mines] . . . ."[90] As Guatemala notes in its Counter-Memorial,[91] pursuant to a request of the members of the Congressional Commission, Article 4 was revised to grant the CNEE "functional independence" from the MEM: "The National Electricity Commission ('the Commission') is hereby created as a technical division of the Ministry [of Energy and Mines]. The Commission shall have functional independence to exercise its powers . . . ."[92] As Professor Alegría observes, even with this last minute change, however, "the CNEE is part of the hierarchical structure of the MEM, and thus, the CNEE depends upon the MEM and is subject to the superior authority of the MEM."[93] Resolutions issued by the CNEE accordingly may be contested by administrative remedies that

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[86] *Id*.

[87] *New Electricity Bill to be discussed today*, dated 17 Sept. 1996 **(C-423)**.

[88] Diary of Sessions of the Congress of the Republic of Guatemala, Ordinary Period 1996-1997, Record of Session No. 074 dated 16 Oct. 1996, at 102 **(C-16)**.

[89] *Id*., at 108; *see also* Congress of the Republic of Guatemala, Dictamen of the Congressional Committee of Energy and Mines, at 1 **(C-424)**.

[90] Diary of Sessions of the Congress of the Republic of Guatemala, Ordinary Period 1996-1997, Record of Session No. 074 dated 16 Oct. 1996, at 69 **(C-16)**.

[91] Counter-Memorial ¶ 152.

[92] Diary of Sessions of the Congress of the Republic of Guatemala, Ordinary Period 1996-1997, Record of Session No. 074 dated 16 Oct. 1996, at 112 **(C-16)**.

[93] Alegría II ¶ 13 **(CER-3)**.

are to be resolved by the MEM, and, by law, the MEM has the authority to modify any resolutions issued by the CNEE.[94] As Professor Alegría notes, the MEM's superior authority over the CNEE has been confirmed by the Guatemalan Constitutional Court, the highest court in Guatemala responsible for resolving constitutional matters.[95]

24. As the UNCTAD Report confirms, "when the Electricity Law was approved, the incumbent Government did not reach the necessary majority to give the new regulatory commission full structural independence and episodes of interference occurred in early years of the Commission's life."[96] As the UNCTAD Report further observes, "it is advisable to strengthen the institutional insulation of the regulator from the executive, in line with best international practice," noting that "[t]his would foster investors' trust on the equanimity of the balance between public interest and private interests" and "would also protect the regulator from further claims of political dependence."[97]

25. That the CNEE is subject to political interference is confirmed by a 2007 memorandum from the MEM to the CNEE regarding the CNEE's proposed amendments to the RLGE.[98] As the MEM noted in that memorandum, RLGE Article 87 "regulates the so-called Pass Through" and "guarantees that the costs incurred by way of generation and transportation as well as the income will be passed on to end-users only upon verification with the Regulator, the CNEE."[99] The MEM proposed changing "this principle because costs could be passed on only after a resolution of the [CNEE]" and, according to the MEM, "[t]he risks of this proposal basically stem from the fact that, since the [CNEE] is a state agency, it may come under high political influence and resolve not to pass on the generation and transportation costs, thus failing

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[94] *Id*. ¶ 14; RLGE, Art. 149 **(C-21)**.

[95] Alegría II ¶ 14 **(CER-3)**; Constitutional Court Decisions in File Nos. 235-2000 and 780-2000 dated 24 May 2000 and 8 Mar. 2001 **(C-443** and **C-441)**.

[96] United Nations Conference on Trade and Development, *Investment Policy Review of Guatemala*, dated 4 Jan. 2011, at 81 **(C-532)**.

[97] *Id*.

[98] Technical, Economic, and Legal grounds for the changes introduced in the MEM to the rules amendments proposed by the CNEE, attached to Letter from the CNEE to the MEM dated 22 Jan. 2007 **(C-478)**.

[99] *Id*., at 3.

to pay the generators and transportation companies, which may lead to power outages or rationing," citing "[t]he cases of Nicaragua and Dominican Republic."[100] The MEM further noted that "[t]he [CNEE's] arbitrariness in the mechanism of price adjustment, in the recent past of Guatemala, even under different circumstances . . . led to the construction of a dam of about 570 MILLION QUETZALS, released at the end of the previous Government and still being paid today."[101] The MEM itself thus has expressly recognized that the CNEE, as a state agency, "may come under high political influence" in its regulation of the electricity sector.

26. In an attempt to bolster the alleged independence of the CNEE, Respondent emphasizes that, under the LGE Article 5, the CNEE's Directors exercise their functions "with absolute independence of judgment and under their sole responsibility,"[102] and thus are personally liable for actions taken in the exercise of their official duties.[103] Respondent, however, neglects to inform the Tribunal that, recently, the CNEE's internal regulation was revised in its entirety by the MEM through Ministerial Accord No. 161-2011 dated 22 August 2011.[104] This internal regulation includes a new Article 15, entitled "Legal Protection,"[105] which provides that the CNEE will cover the legal costs and expenses incurred by the CNEE's Directors in defending against claims arising from actions taken in their official capacity:

> The directors of the [CNEE], as well as its authorities, officers, and employees, shall be entitled to have the [CNEE] bear the expenses and court costs required for their defense in the event they are sued as a result of documents or decisions issued in the discharge of their duties. The foregoing shall apply even where any such director, authority, officer or employee is no longer in office. The

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[100] *Id*.

[101] *Id*.

[102] LGE, Art. 5 **(C-17)**. As Professor Alegría notes, this provision is most likely unconstitutional, because it directly contradicts Article 154 of the Political Constitution of the Republic of Guatemala. Alegría II ¶ 15 fn. 60 **(CER-3)**. Article 154 of the Constitution provides that "Government Officials are depositaries of the authority, legally liable for their official conduct, subject to the law and never superior to it [the law]." Constitution, Art. 154 **(C-11)**.

[103] Counter-Memorial ¶ 156.

[104] Ministerial Accord No. 161-2011 dated 22 Aug. 2011 **(C-542)**.

[105] *Id*., Art. 15.

> [CNEE] shall determine the mechanism to be implemented in furtherance of this Article.[106]

Professor Alegría observes that the prior internal regulation of the CNEE, which was approved by the MEM through Ministerial Accord No. OM-275-98,[107] did not contain any such protection for the CNEE's Directors and officials, and that the "blanket legal protection" introduced by Ministerial Accord No. 161-2011 is equivalent to eliminating the CNEE's Directors' personal liability under LGE Article 5.[108] As Professor Alegría notes, "[i]t does not matter whether they violated the law or not; Article 15 grants them absolute coverage for their legal costs and expenses for claims brought against them for actions taken in their official capacity."[109]

27. Professor Alegría further notes that, under Article 155 of the Political Constitution of the Republic of Guatemala, when a dignitary, government official, or worker of the State, in the exercise of his official functions, violates the law to the prejudice of private citizens, the State or the State Institution which he serves, is jointly and severally liable for the damages and losses that are caused.[110] Accordingly, the CNEE is jointly and severally liable for any damages caused by the actions of the CNEE's Directors or officials. As Professor Alegría observes, "regardless of the actions of the CNEE's Directors and officials, through Article 15 of the CNEE's internal regulation, the CNEE will cover the costs of their legal defense and, because the CNEE will be jointly and severally liable for any actions taken by the Directors or officials in their official capacity, the Directors and officials also effectively will not be responsible for any losses or damages."[111] This, as Professor Alegría notes, "removes a strong incentive for Directors and officers to refuse to follow instructions to act unlawfully, as those Directors and officers, even if later sued, will not be held liable for any losses or even have to bear the burden of their legal

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[106] *Id*.

[107] Ministerial Accord No. OM-275-98 dated 29 July 1998 **(C-427)**.

[108] Alegría II ¶ 15 **(CER-3)**.

[109] *Id*.

[110] *Id*. ¶ 16; Constitution, Art. 155 **(C-11)**.

[111] Alegría II ¶ 16 **(CER-3)**.

defense."[112] Thus, not only is the CNEE not structurally independent from the Executive Branch, but the MEM recently has attempted to insulate the CNEE's Directors and officials from the personal liability that is imposed upon them by LGE Article 5.

c. The CNEE's Authority In The Distributor's Tariff Review Is Limited In Scope

28. In its Memorial, Claimant demonstrated that, consonant with the goal of depoliticizing the tariff review process and fostering foreign investment in Guatemala's electricity sector, the LGE and RLGE established a legal and regulatory framework where neither the CNEE nor the distributor may calculate the distributor's VAD unilaterally,[113] and where various actors provide input to calculate the distributor's VAD based upon purely economic and technical considerations.[114] As Claimant explained in its Memorial,[115] as a first step, LGE Article 79 provides that the CNEE must commission an independent study to calculate the distributor's cost of capital, which must be between 7% and 13% in real terms.[116] To calculate the VAD component of the distributor's tariff, the distributor is required under LGE Article 74 to retain an independent consultant prequalified by the CNEE to perform a VAD study.[117] The CNEE, under LGE Article 74, establishes the terms of reference for the distributor's VAD study and supervises its progress, but does not have the authority to calculate

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[112] *Id*.

[113] *See* Memorial ¶¶ 36-44.

[114] *See* Alegría I ¶ 27 **(CER-1)**.

[115] *See* Memorial ¶ 37.

[116] LGE, Art. 79 ("The discount rate to be used in this Law to determine the rates shall be equal to the rate of cost of capital determined by the Commission through studies commissioned with private entities that specialize in the matter, and it must reflect the rate of cost of capital for activities of similar risk in the country. Cost of capital rates different from those for the activities of transmission and distribution may be used. In any event, if the discount rate should be less than an annual real rate of seven percent or greater than an annual real rate of thirteen percent, the latter values, respectively, will be used.") **(C-17)**. As Claimant explained in its Memorial, if the CNEE's study finds a cost of capital outside of that range, the low or high point of the range must be used. *See* Memorial ¶ 37; Alegría I ¶ 25 **(CER-1)**.

[117] *See* Memorial ¶ 38; LGE, Art. 74 ("Each distributor shall calculate the VAD components through a study entrusted to an engineering firm prequalified by the Commission. The Commission may decide that several distributors commission only one study if the distribution densities are similar in each group and use only one VAD to determine the rates of all qualified companies in the same group.") **(C-17)**.

the VAD components itself.[118] Under amended RLGE Article 98, the CNEE has two months to accept or to reject the distributor's VAD study and to formulate its observations, and the distributor then has fifteen days to analyze and to respond to the CNEE's observations by correcting its VAD study in accordance with the CNEE's observations or indicating its disagreement with the CNEE's observations in writing.[119] Under LGE Article 75 and amended RLGE Article 98, if disagreements or discrepancies persist between the parties, the CNEE and the distributor must appoint a three-person Expert Commission to rule on the differences.[120] As set forth in Claimant's Memorial, the Expert Commission's ruling is binding upon the parties and must be incorporated into the distributor's VAD study.[121] The CNEE then must use the VAD that results from the distributor's corrected VAD study to set the distributor's new tariff schedule under LGE Article 76, by adding the cost of the acquisition of capacity and energy to the distributor's VAD.[122] As Professor Alegría observed in his first expert legal opinion, "the resolution of disputes concerning the variables needed to be determined for the calculation of the

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[118] *See* Memorial ¶¶ 39-40; LGE, Art. 74 ("The terms of reference of the study(ies) of the VAD shall be drawn up by the Commission, which shall have the right to supervise progress of such studies.") **(C-17)**.

[119] *See* Memorial ¶ 41; Amended RLGE, Art. 98 ("[T]he Commission, within a term of two months, shall decide on the acceptance or rejection of the studies performed by the consultants, making the observations it deems pertinent. The Distributor, through the consultant company, shall analyze the observations, perform the corrections to the studies and shall deliver them to the Commission within the term of fifteen days after receiving the observations. If discrepancies between the Commission and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed.") **(C-105)**. As explained in Claimant's Memorial, and as discussed further below, the distributor's obligation under RLGE Article 98 to "deliver the corrections" to the CNEE is satisfied if the distributor responds to the CNEE's observations within 15 days. Respondent's position that this obligation requires the distributor to incorporate all of the CNEE's observations into its revised VAD study is inconsistent with the LGE and RLGE, because, in that case, there never could be any discrepancies that persist between the parties under LGE Article 75 and RLGE Article 98 and, thus, an Expert Commission never could be convened under LGE Article 75. *See* Memorial ¶ 89 fn. 294; Alegría I ¶ 37 fn. 105 **(CER-1)**; *infra* Section II.E.1.

[120] *See* Memorial ¶ 42; LGE, Art. 75 ("The Commission shall review the studies performed and may make comments on the same. In case of differences made 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 rule on the differences in a period of 60 days counted from its appointment.") **(C-17)**; Amended RLGE, Art. 98 **(C-105)**.

[121] *See* Memorial ¶ 43.

[122] *See id.*; LGE, Art. 76 ("The Commission shall use the VAD and the prices for acquisition of energy referenced to the inlet to the distribution network to structure a set of rates for each awardee. Such rates shall strictly reflect the economic cost of acquiring and distributing the electric energy.") **(C-17)**.

VAD [accordingly] is left to experts, with neither the regulator nor the distributor having the power to impose its will on the other."[123]

29. In its Counter-Memorial, Guatemala asserts that, interpreting the LGE and RLGE such that the CNEE is the mere supervisor of the progress of the distributor's VAD study is contrary to the law, because "[t]he CNEE is the regulatory entity that is specifically empowered to determine tariffs and therefore also to define and approve the VAD."[124] Guatemala further asserts that, because LGE Article 76 requires the CNEE to structure the distribution tariffs and provides that these tariffs should "strictly reflect the economic cost of acquiring and distributing electricity energy,"[125] this means that "the CNEE, as the entity responsible for approving tariffs, should ensure that they reflect a suitable VAD (the economic cost of distributing electric energy)."[126] Guatemala thus equates the establishment of the distributor's tariffs with the calculation of the distributor's VAD and assumes that, because the CNEE is the regulatory entity charged with calculating and publishing the distributor's tariffs, it also has the power and the discretion to determine the distributor's VAD (one component of the distributor's tariff) unilaterally. As Professor Alegría explains in his second expert legal opinion, this reasoning is fundamentally flawed and is contrary to the express provisions of the LGE.[127]

30. As noted above, under LGE Article 4(c), one of the powers of the CNEE is to "[d]efin[e] the transmission and distribution rates subject to regulation in accordance with this law, as well as the methodology for calculation of the same."[128] As Professor Alegría explains, however, "LGE Article 74 contains a special provision regarding the calculation of an element of the distributor's tariffs (the VAD component), [and] such provision [thus] prevails over LGE Article 4(c), which is a general provision regarding the broad power of the CNEE to determine

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[123] Alegría I ¶ 31 **(CER-1)**.

[124] Counter-Memorial ¶ 171.

[125] LGE, Art. 76 **(C-17)**; *see also* Counter-Memorial ¶ 167.

[126] Counter-Memorial ¶ 167.

[127] Alegría II ¶¶ 20-43 **(CER-3)**.

[128] LGE, Art. 4(c) **(C-17)**; *see supra* ¶ 14.

distribution tariffs."[129] As Professor Alegría observes, "[t]he literal words of Article 74 are clear: the Distributor is the entity to which the law gives the task of calculating the VAD components through a study performed by an independent consultant prequalified by the CNEE."[130] Indeed, Respondent does not dispute this point in its Counter-Memorial, but expressly recognizes that, "[u]nder Guatemala's LGE, the distributor performs the study, and the regulator has the right to comment on, approve, or reject the study," and that "[t]his task is delegated to the distributor principally because the distributor is better positioned to access the information and documentation necessary to perform the study."[131] As Respondent observes, "[t]his mechanism prevents the regulator from directly intervening in the company to gather the information that would be necessary if the regulator were the one to perform the VAD study."[132]

31. Contrary to Guatemala's assertions, the CNEE's broad power to determine the distributor's tariffs under LGE Article 4(c) thus does not mean *ipso facto* that the CNEE has the power and the discretion to determine the distributor's VAD. Similarly, the CNEE's authority under LGE Articles 61 and 76 to calculate the distributor's tariffs by adding the cost of the acquisition of capacity and energy to the distributor's VAD does not mean that the CNEE has the authority to calculate the distributor's VAD.[133] As Miguel Calleja notes in his second witness statement,[134] LGE Article 76 provides that the CNEE "*shall use* the VAD and the prices for acquisition of energy referenced to the inlet to the distribution network to structure a set of rates for each awardee."[135] The CNEE thus does not itself "determine" the VAD, but must "use" the VAD calculated in the consultant's study to structure a set of tariff rates for each distributor.[136]

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[129] Alegría II ¶ 22 **(CER-3)**. As Professor Alegría explains, pursuant to Article 13 of the Law of the Judiciary Branch, "'[s]pecial statutory provisions shall prevail over general ones.'" *See id*. ¶ 43 (quoting Decree No. 2-89 of the Congress of the Republic ("Judiciary Law") entered into force on 31 Dec. 1990, Art. 13 **(C-6)**).

[130] Alegría II ¶ 18 **(CER-3)**.

[131] Counter-Memorial ¶ 194.

[132] *Id*.

[133] *See* LGE, Arts. 61 and 76 **(C-17)**.

[134] Calleja II ¶ 4 **(CWS-9)**.

[135] LGE, Art. 76 (emphasis added) **(C-17)**.

[136] Calleja II ¶ 4 **(CWS-9)**.

This is further confirmed by the documentary record. As reflected in an email exchange between the CNEE and Mr. Alfred Campos, one of the CNEE's consultants during EEGSA's 2008-2013 tariff review, dated 22 May 2007, the CNEE noted that the distributor's VAD study "is prepared by the consultant and supported by the Distributor" and that the "prequalified firm is liable for it (pursuant to [Article] 74 of the Law, the prequalified company prepares the study[])"[137] while Mr. Campos confirmed his understanding that, "[w]ith regard to the liability for the study, I understand that, under [Article] 74 of the Law, the calculation of the VAD (and, therefore, any materials submitted to the CNEE) is the Distributor's obligation."[138] The CNEE did not disagree.[139] This is further confirmed by Mr. Campos's comments on EEGSA's observations regarding the terms of reference ("ToR") issued by the CNEE for the 2008-2013 tariff review.[140] As that document reflects, Mr. Campos noted that, under LGE Article 74, "[i]t seems clear that the distributor is directly responsible for the calculation [of the VAD] through a consulting firm."[141]

32. As Claimant explained in its Memorial,[142] RLGE Article 98, as amended by Government Accord No. 68-2007 dated 2 March 2007,[143] introduced two narrow exceptions to the procedure set forth in LGE Articles 74 and 75 and provided, for the very first time, that the CNEE could rely upon its own VAD study to set the distributor's new tariff schedule under certain conditions. As explained in Claimant's Memorial and in Professor Alegría's first expert legal opinion,[144] this amendment contravenes the express provisions of the LGE, which grant the distributor, and not the CNEE, the authority to commission a study to calculate the VAD and, for

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[137] Email from A. Campos to A. Garcia dated 22 May 2007, at 2 **(C-484)**.

[138] *Id*., at 1.

[139] *See* Email from A. Campos to A. Garcia dated 22 May 2007, at 1 **(C-484)**.

[140] Email from A. Campos to A. Garcia, J.F. Orozco, M. Santizo, M. Peláez, M. Estrada, D. Herrera, M. Ixmucane Cordova dated 16 May 2007, attaching Terms of Reference for VAD Studies and Replies to EEGSA Comments **(C-483)**.

[141] *Id*., at 3.

[142] *See* Memorial ¶ 89; Alegría I ¶ 37 **(CER-1)**.

[143] Government Accord No. 68-2007 dated 2 Mar. 2007 **(C-104)**.

[144] *See* Memorial ¶¶ 84-93; Alegría I ¶¶ 53-40 **(CER-1)**.

that reason, is unconstitutional under Guatemalan law. That aside, amended RLGE Article 98 allows the CNEE to rely upon its own VAD study to calculate the distributor's tariffs only in two limited circumstances: (i) where the distributor fails to submit a VAD study; and (ii) where, after the distributor submits a VAD study and the CNEE has made observations on the same, the distributor fails to respond to the CNEE's observations by correcting its VAD study in accordance with the observations or indicating its disagreement with the CNEE's observations in writing.[145] As Professor Alegría confirms in his second expert legal opinion, and as discussed below, once the distributor has submitted its VAD study and responded to the CNEE's observations, the CNEE thus is precluded from publishing the distributor's new tariffs on the basis of its own VAD study, even if the distributor's VAD study is not revised to incorporate all of the CNEE's observations.[146] In that circumstance, discrepancies would be declared under LGE Article 75 and an Expert Commission would be appointed to resolve the dispute.[147]

33. In a further attempt to justify its position that the CNEE has the power and the discretion under the LGE and RLGE to determine the distributor's VAD, Respondent argues in its Counter-Memorial that the "LGE specifically defines the costs that must be approved by the CNEE in order to determine the tariffs" and that the "RLGE specifically defines which costs must not be recognized and grants the CNEE the discretion to reject any costs that it considers inappropriate or excessive" under RLGE Article 83.[148] Guatemala's legal expert, Juan Luis Aguilar Salguero, similarly asserts in his legal expert opinion that, "[w]ith regard to the CNEE's responsibility to approve the VAD studies (tariff studies), the following RLGE provisions must, for example, be noted: . . . [RLGE] Article 83, which specifies the CNEE's responsibility to determine the costs to be included in the VAD: 'the costs that, upon the Commission's criteria, are excessive or not related to the exercise of the activity […] shall not be included as supply costs.'"[149] As Professor Alegría explains in his second expert legal opinion, however,

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[145] Amended RLGE, Art. 98 **(C-105)**.

[146] Alegría II ¶ 35 **(CER-3)**; *infra* ¶¶ 35-36.

[147] LGE, Art. 75 **(C-17)**.

[148] Counter-Memorial ¶ 165 (emphasis in original).

[149] Legal Expert Report of Juan Luis Aguilar Salguero dated 18 Jan. 2012 ("Aguilar") ¶ 33 **(RER-3)**.

Respondent's reliance on RLGE Article 83 is misplaced, because that Article does not relate to the calculation of the distributor's VAD, but to other, unrelated costs.[150]

34. Under LGE Article 71, the Base Tariffs for end consumers of the final distribution service are calculated by the CNEE as the sum of: (i) the adjusted price of all energy and capacity purchases by the distributor, and (ii) the VAD.[151] With respect to the adjusted price of energy and capacity purchases, *i.e.*, the first component of the Base Tariffs, the CNEE calculates this price by applying the rules set forth in RLGE Articles 79 through 90, which refer to the real costs incurred by the distributor in purchasing energy and capacity.[152] As Professor Alegría confirms, these costs are not derived from the distributor's VAD study and are not the costs of a model efficient company, but represent the distributor's actual costs in purchasing electricity for distribution, which are passed on to end consumers through the tariff.[153] The CNEE's authority under RLGE Article 83 to exclude certain costs as supply costs in the calculation of the distributor's Base Tariffs has no bearing on the question of who has the authority to calculate the distributor's VAD.[154] RLGE Article 83 thus does not give the CNEE "discretion to reject any

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[150] Alegría II ¶¶ 24-25 **(CER-3)**.

[151] LGE, Art. 71 **(C-17)** ("The rates to end consumers for the final distribution service, in their components of power and energy, shall be calculated by the Commission as the sum of the weighted price of all the distributor purchases referenced to the inlet to the distribution network and the Valued Added of Distribution (Valor Agregado de Distribución - VAD).").

[152] RLGE, Arts. 79-90 **(C-21)**; *see also* RLGE, Art. 86 **(C-21)** ("Before March 31 of each year, the AMM shall submit to the [CNEE] the calculation of the energy and capacity prices, to be passed through to the tariffs for each of the Distributors. The calculation methodology shall be established in the Specific Regulations of the Wholesale Market Administrator, and shall be based on the following criteria: a) For the capacity price, the cost associated with the Existing Contracts and/or the new contracts resulting from open biddings shall be used. b) For the energy, the projected energy price in the Wholesale Market shall be used. The [CNEE] shall approve or reject such calculation. If it rejects it, it shall request the corresponding recalculation from the AMM . . . .").

[153] Alegría II ¶ 25 **(CER-3)**.

[154] *See* RLGE, Art. 83 **(C-21)** ("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.").

costs that it considers inappropriate or excessive" in the distributor's VAD study, as Respondent asserts,[155] because that provision does not apply to the calculation of the distributor's VAD.

35. Moreover, as Professor Alegría observes in his second expert legal opinion,[156] the fact that the CNEE must "approve" the distributor's VAD study under RLGE Articles 92 and 99[157] does not mean that the CNEE has unfettered discretion to determine the distributor's VAD, as Respondent asserts in its Counter-Memorial.[158] As Claimant explained in its Memorial and as Professor Alegría confirms in his second expert legal opinion,[159] if the CNEE is in agreement with the VAD study performed by the distributor's consultant, the CNEE shall approve that study without making any observations under LGE Article 75. If the CNEE is not in agreement with the VAD study, it is entitled to make observations under LGE Article 75.[160] Under RLGE Article 98, if the distributor, through its consultant, is not in agreement with the CNEE's observations (*i.e.*, the consultant does not make all of the corrections to the study as per the observations), then discrepancies are recorded in writing and an Expert Commission is appointed to resolve them, as required under LGE Article 75.[161] Once the Expert Commission has issued its decisions on the discrepancies, the VAD study, which must be revised to incorporate the Expert Commission's decisions, shall be approved by the CNEE and the distributor's new tariffs shall be set by the CNEE using the results of that study.[162]

36. Respondent's position that, under LGE Article 75 and RLGE Article 98, the CNEE's observations on the distributor's VAD study are mandatory, and the decisions issued by the Expert Commission on the discrepancies are merely advisory opinions, which the CNEE may

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[155] Counter-Memorial ¶ 165.

[156] Alegría II ¶ 26 **(CER-3)**.

[157] RLGE, Arts. 92, 99 **(C-21)**.

[158] Counter-Memorial ¶ 203.

[159] *See* Memorial ¶ 41; Alegría II ¶ 26 **(CER-3)**.

[160] LGE, Art. 75 **(C-17)**; RLGE, Art. 98 **(C-21)**.

[161] Alegría II ¶ 26 **(CER-3)**.

[162] *Id*.

or may not take into account in determining the distributor's VAD, is meritless.[163] As set forth below, this interpretation defeats the purpose of the Expert Commission and is contrary to both LGE Article 75 and RLGE Article 98, which expressly contemplate that the distributor may disagree with the CNEE's observations and that, if discrepancies persist between the CNEE and the distributor, they shall be referred to an Expert Commission for resolution.

d. The Expert Commission's Decisions Regarding The Distributor's VAD Study Are Binding And Cannot Be Ignored By The CNEE

37. In its Memorial, Claimant demonstrated that, under LGE Article 75 and RLGE Article 98, the role of the Expert Commission is to rule on any discrepancies that persist between the CNEE and the distributor regarding the distributor's VAD study, after the CNEE has provided its observations on the study and after the distributor has responded with its corrections to the study.[164] Claimant further demonstrated that the Expert Commission's ruling on the discrepancies is binding upon the parties and must be incorporated into the distributor's VAD study, which the CNEE then must use to set the distributor's new tariff schedule under LGE Article 76, by adding the cost of the acquisition of capacity and energy to the resulting VAD.[165] As set forth in Claimant's Memorial, the CNEE thus does not have the authority to ignore the Expert Commission's rulings simply because the CNEE disagrees with the Expert Commission's resolution of the discrepancies, as granting the CNEE such power would vitiate the role of the Expert Commission and "leave[] the distributor at the mercy of the regulator, an outcome that the LGE was designed to prevent."[166]

38. In its Counter-Memorial, Respondent disputes Claimant's description of the Expert Commission's role in the tariff review process.[167] Respondent first argues that, because "RLGE Article 98 establishes an obligation to 'incorporate' the corrections required by the

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[163] *See* Counter-Memorial ¶¶ 204-205, 206-213.

[164] *See* Memorial ¶¶ 41-42; Alegría I ¶ 31 **(CER-1)**.

[165] *See* Memorial ¶ 43; Alegría I ¶¶ 76-78 **(CER-1)**.

[166] Alegría I ¶ 78 **(CER-1)**; *see also* Memorial ¶ 215.

[167] *See* Counter-Memorial ¶¶ 206-213.

CNEE, the discrepancies before the Expert Commission concern whether the distributor (i) implemented the corrections; and (ii) the corrections were properly implemented."[168] According to Respondent, "[i]f the Expert Commission is of the opinion that the CNEE's comments have not been incorporated such that the study complies with the Terms of Reference, the CNEE has the right to reject the distributor's study in fixing the tariff schedule," and, "if the Expert Commission determines that the CNEE's comments are unjustified, its pronouncements would be one of the elements which the CNEE should take into account when establishing the new tariff schedule."[169] Respondent next argues that the reflexive verb "*se pronunciará*" in LGE Article 75 does not mean "shall rule," but "to declare oneself" or "to give one's opinion on," and that the Expert Commission thus "pronounces as an *ad hoc* panel of experts, on matters put forth for its consideration" and its pronouncement "is neither a '*ruling*' nor does it '*resolve*' the case as a decision by a judicial body would" do.[170] Rather, according to Respondent, the Expert Commission's pronouncement serves merely "to inform the decision of the body that is legally mandated to set tariffs, the CNEE," which "considers the entirety of the tariff study and [] proceeds to set the tariffs."[171] In support of its position, Respondent asserts that the Expert Commission cannot "replace the CNEE in determining the methodology, or in approving or rejecting costs, or the tariff study in general."[172] Respondent's contentions are baseless.

39. First, as Professor Alegría confirms, the discrepancies on which the Expert Commission may rule do not concern merely whether the distributor implemented or properly implemented the corrections requested by the CNEE, as Respondent contends,[173] but also may concern—and more likely will concern—whether the CNEE's corrections should be implemented at all, in view of the LGE and RLGE.[174] This is because, as noted above, the

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[168] *Id*. ¶ 207.

[169] *Id*. ¶ 210.

[170] *Id*. ¶ 211.

[171] *Id*.

[172] *Id*. ¶ 213.

[173] *Id*. ¶ 207.

[174] *See* Alegría II ¶ 36 **(CER-3)**.

corrections requested by the CNEE in its observations are not mandatory, but may be contested by the distributor through its responses to the CNEE's observations.[175] As Claimant demonstrated in its Memorial,[176] this is contemplated in both the original and the amended RLGE Article 98, which provide that the distributor, through its consultant, shall analyze the observations, perform the corrections to the studies, and deliver them to the CNEE within fifteen days after receiving the observations, and that, if discrepancies between the CNEE and the distributor persist, the procedure set out in LGE Article 75 (*i.e.*, the Expert Commission process) shall be followed.[177] Indeed, as Claimant noted in its Memorial,[178] if the distributor were obligated to accept all of the corrections requested by the CNEE, there never could be any discrepancies that persist between the CNEE and the distributor under LGE Article 75 and RLGE Article 98, and an Expert Commission never could be convened under LGE Article 75.

40. Respondent's position that the distributor has an obligation to incorporate all of the corrections requested by the CNEE in its observations also is expressly contradicted by the amended ToR for EEGSA's VAD study for the 2008-2013 tariff period set forth in Resolution No. CNEE 124-2007.[179] Article 1.8 of the ToR provides that, as set forth in RLGE Article 98, "the CNEE shall have a period of two (2) months to evaluate the Study's Final Report submitted by the Distributor" and that, "[a]s a result of the evaluation, the CNEE shall make such observations as it may deem necessary."[180] Article 1.8 further provides that the "Distributor shall analyze said observations, *make any corrections it deems appropriate* and send the corrected final report of the study to the CNEE within fifteen (15) days of receiving the

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[175] *See id*.

[176] *See* Memorial ¶¶ 193, 208; *see also* Alegría I ¶ 67 **(CER-1)**.

[177] RLGE, Art. 98 ("The Distributor, through the consultant companies, shall analyze the observations, perform the corrections to the tariffs and their adjustment formulas and shall deliver the corrected study to the Commission within the term of fifteen days after receiving the observations.") **(C-21)**; Amended RLGE, Art. 98 ("The Distributor, through the consultant company, shall analyze the observations, perform the corrections to the studies and shall deliver them to the Commission within the term of fifteen days after receiving the observations.") **(C-105)**.

[178] *See* Memorial ¶ 194; *see also* Alegría I ¶ 67 **(CER-1)**.

[179] *See* Alegría II ¶ 33 **(CER-3)**; Resolution No. CNEE 124-2007 dated 9 Oct. 2007 **(C-127)**.

[180] Resolution No. CNEE 124-2007 dated 9 Oct. 2007, Art. 1.8 **(C-127)**.

observations."[181] In EEGSA's ToR, the CNEE thus expressly acknowledged that the distributor does not need to make any corrections that it does not deem appropriate.[182] As discussed further below, while Respondent asserts in its Counter-Memorial that Article 1.8 means that "the consultant is free to decide on the 'appropriate' manner in which the measures should be implemented, but the consultant cannot decide unilaterally whether or not it will implement such measures,"[183] this interpretation is directly at odds with the express language of that Article. As Mr. Calleja notes in his second witness statement, "Article 1.8 does not provide that the distributor shall make the corrections in the 'manner' it deems appropriate; to the contrary, Article 1.8 provides that the distributor 'shall . . . make any corrections it deems appropriate.'"[184] As Mr. Calleja further observes, "this is consistent with the LGE, because, in accordance with the 2007 ToR, in order for discrepancies to persist between the parties (and for the Expert Commission to be convened), the distributor must have refused to incorporate some of the CNEE's observations into its corrected VAD study,"[185] on account of its determination that making those corrections would not be appropriate.

41. That the role of the Expert Commission under LGE Article 75 is not limited to determining whether the distributor has implemented all of the corrections requested by the CNEE in its observations is further illustrated by the ToR that governed EEGSA's VAD study for the 2003-2008 tariff review. As the 2002 ToR reflects, EEGSA's consultant was required under these ToR to revise its VAD study to incorporate all of the CNEE's observations.[186] The 2002 ToR made clear, however, that EEGSA had the right to object to the CNEE's observations and expressly provided that, "[i]n the event that the intermediate results redrafted by the CONSULTANT should be rejected by the DISTRIBUTOR on reasonable grounds, a clear,

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[181] *Id*. (emphasis added).

[182] *See* Alegría II ¶¶ 33-34 **(CER-3)**.

[183] Counter-Memorial ¶ 313.

[184] Calleja II ¶ 19 **(CWS-9)**.

[185] *Id*.; *see also* Maté II ¶ 14 ("[I]f EEGSA were required to incorporate all of the CNEE's observations, there never would be any discrepancies that 'persist' between the parties, *i.e.*, discrepancies that were the result of the consultant's decision not to accept the CNEE's observations, which would render Article 75 of the LGE and the Expert Commission process meaningless and unnecessary.") **(CWS-12)**.

[186] Resolution No. CNEE-88-2002 dated 23 Oct. 2002 (**C-59**), Art. A.6.4.

concrete, and express written statement shall be drafted containing the amounts or values related to such intermediate results where discrepancies or disagreements exist."[187] The ToR further provided that "[i]t is regarding these intermediate differences . . . that the Expert Commission mentioned in [Article] 75 of the Law shall issue its decision if, upon completion of the tariff review process, discrepancies should still exist between the CNEE and the DISTRIBUTOR which should be reconciled by the aforementioned Expert Commission."[188] Thus, if an Expert Commission had been established in connection with EEGSA's VAD study for the 2003-2008 tariff period, the role of the Expert Commission would have been to reconcile the differences between the parties, by determining which party's position was correct; its role would not have been limited to determining whether the CNEE's observations had been properly incorporated into the distributor's VAD study, as Respondent now asserts in this arbitration.

42. Moreover, the fact that the Expert Commission has authority to rule on the discrepancies between the parties under LGE Article 75 and that its role is not limited to determining whether the CNEE's observations have been properly incorporated into the distributor's VAD study does not replace the CNEE with the Expert Commission, as Respondent contends.[189] The Expert Commission does not calculate the distributor's VAD. Nor does the Expert Commission set the distributor's new tariff schedules under LGE Article 76. The only function of the Expert Commission is to rule on the discrepancies between the parties relating to the distributor's VAD components, which authority is expressly granted to it by the LGE.[190]

43. Second, with respect to the binding nature of the Expert Commission's ruling on the discrepancies, Respondent's argument that "[t]he correct translation of the reflexive form '*pronunciarse*' is 'to pronounce oneself' 'to declare oneself' or 'to give one's opinion on' (e.g. in favor of or against a proposal)"[191] is manifestly wrong. As Claimant explained in its

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[187] *Id*., A.6.5.

[188] *Id*.

[189] *See* Counter-Memorial ¶ 213.

[190] *See* Alegría II ¶¶ 30-31 **(CER-3)**.

[191] Counter-Memorial ¶ 211 (internal citation omitted).

Memorial,[192] the *Diccionario de la Real Academia Española*, to which the Guatemalan courts must look in interpreting terms not defined in the relevant law,[193] contains six definitions for the Spanish verb "*pronunciar*," including "to determine, to resolve" and "to publish a sentence or decision," both of which connote a binding decision.[194] As Professor Alegría further notes in his expert legal opinions,[195] the definition "to publish a sentence or decision" is preceded by the abbreviation "*Der*." for "*derecho*," which means that it is the definition to be used in a legal context.[196] The meaning assigned by Respondent to the word "*pronunciar*" (*i.e.*, "to declare or come out in favor or against something"), by contrast, is not preceded by the abbreviation "*Der*." and applies where an individual is "pronouncing" his or her views on a topic, as opposed to where a third party is rendering a decision on a disputed issue, such as an Expert Commission pursuant to LGE Article 75.[197]

44. As Professor Alegría explains, the verb "*pronunciarse*" also is used in other Articles of the LGE and RLGE to mean a final, binding decision.[198] For instance, under LGE Article 6, "Environmental Impact Evaluation" is defined as a "procedure whereby the competent authority rules on the environmental impact of a project."[199] This ruling, like the Expert Commission's ruling under LGE Article 75, is a final, binding decision, and not merely an advisory opinion.[200] Certain provisions in the RLGE also use the verb "*pronunciarse*" to refer to a binding decision or resolution.[201] For example, RLGE Article 27 provides that, "[o]nce the transfer request has been presented to the Ministry, the latter, with all the information required,

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[192] Memorial ¶ 213; *see also* Alegría I ¶ 76 **(CER-1)**.

[193] Alegría II ¶ 38 **(CER-3)**; Alegría I ¶ 76 **(CER-1)**.

[194] Dictionary of the Royal Spanish Academy, 2001, definition of verb "*pronunciar*" **(C-50)**.

[195] Alegría II ¶ 38 **(CER-3)**; Alegría I ¶ 76 **(CER-1)**.

[196] Dictionary of the Royal Spanish Academy, 2001, definition of verb "*pronunciar*" **(C-50)**; Alegría II ¶ 38 **(CER-3)**; Alegría I ¶ 76 **(CER-1)**.

[197] Dictionary of the Royal Spanish Academy, 2001, definition of verb "*pronunciar*" **(C-50)**; Alegría II ¶ 38 **(CER-3)**; Alegría I ¶ 76 **(CER-1)**.

[198] Alegría II ¶ 38 **(CER-3)**; Alegría I ¶ 76 **(CER-1)**.

[199] LGE, Art. 6 **(C-17)**.

[200] *See* Alegría II ¶ 38 **(CER-3)**; Alegría I ¶ 76 **(CER-1)**.

[201] *See* Alegría II ¶ 38 **(CER-3)**.

shall have a term of two months to authorize the transfer or not" and that, "[i]f at the expiration of this term the Ministry has not rendered a decision [*no se ha pronunciado*], it shall be interpreted as an approval of the transfer."[202] As Professor Alegría explains, in this context, the Ministry's "pronouncement" on the requested transfer is not advisory, but is binding.[203]

45. Moreover, as Professor Alegría explains in his second expert legal opinion,[204] the Chilean Electricity Law and its Regulation, which served as a model for the LGE and RLGE, also use the verb "*pronunciar*" in the context of a binding decision.[205] Mr. Bernstein, who drafted both the 1993 Final Report upon which the LGE and RLGE were based and the first draft of the LGE and RLGE, is a Chilean consultant, and, in his Final Report, he uses as a benchmark the Chilean electricity system and the Chilean distribution company, Chilquinta, S.A.[206] In Chile, the electricity sector is regulated by the *Ley General de Servicios Electricos, en Materia de Energía Eléctrica*,[207] Article 208 of which establishes a permanent Expert Panel to resolve discrepancies related to certain matters listed therein.[208] With respect to these discrepancies, Article 211 of the Chilean Electricity Law provides that "[t]he Expert Panel's report will be pronounced exclusively over the aspects in which the discrepancy exists."[209] Article 211 further provides that the Expert Panel's report will be binding for those who participate in the respective proceeding and no remedy, whether jurisdictional or administrative, of an ordinary or extraordinary nature, will be allowed.[210] As Professor Alegría observes, Article 211 of the

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[202] RLGE, Art. 27 **(C-21)**.

[203] *See* Alegría II ¶ 38 **(CER-3)**.

[204] *See id*. ¶¶ 8-10.

[205] *See* Chilean General Electricity Law dated 2 May 2007, Art. 211 **(C-482)**; Regulations of the Chilean General Electricity Law dated 9 Oct. 1998, Art. 314 **(C-429)**.

[206] *See* Alegría II ¶ 8 **(CER-3)**; Juan Sebastián Bernstein & Jean Jacques Descazeaux, *Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report* dated June 1993, at 17-18 **(C-9)**.

[207] *See* Alegría II ¶ 8 **(CER-3)**; Chilean General Electricity Law dated 2 May 2007 **(C-482)**.

[208] *See* Alegría II ¶ 8 **(CER-3)**; Chilean General Electricity Law dated 2 May 2007, Art. 208 **(C-482)**.

[209] *See* Alegría II ¶ 8 **(CER-3)**; Chilean General Electricity Law dated 2 May 2007, Art. 211 **(C-482)**.

[210] *See* Alegría II ¶ 8 **(CER-3)**; Chilean General Electricity Law dated 2 May 2007, Art. 211 **(C-482)**. As Professor Alegría notes, an exception to this rule is granted for specific cases in which the report may be contested if it exceeds the scope of the discrepancy at issue. *See* Alegría II ¶ 8 **(CER-3)**.

Chilean Electricity Law, like Article 75 of the LGE and Article 65 of the original draft LGE prepared by Mr. Bernstein,[211] thus provides for a panel of experts to issue a binding ruling and uses the verb "*pronunciar*" when referring to the issuance of such ruling.[212]

46. As Professor Alegría further explains,[213] Article 314 of the Regulation of the Chilean Electricity Law, the *Reglamento de la Ley General de Servicios Eléctricos*, includes a similar procedure.[214] Article 314 relates to the calculation of the New Replacement Value ("VNR") of the distributor's assets to be taken into account when determining the electricity tariffs for final users and provides, in relevant part, as follows:

> In the event of discrepancies, the companies may request that an expert commission be convened to determine the VNR. The commission shall be made up by three expert engineers, one to be appointed by the President of the Republic and another by the interested concessionaire, the third member being the dean of a School of Engineering, headquartered in the capital city, of a State University with the longest seniority in such position. The expert commission shall rule on the VNR by 31 December of the year in question.[215]

As Professor Alegría observes, "[t]his provision of the Chilean Regulation is strikingly similar to LGE Article 75: (i) it refers to discrepancies between the regulator and the distributor with respect to an element of the VAD to be taken into account when determining the distributor's electricity tariffs; (ii) it calls for the appointment of a three-member expert commission to resolve the discrepancies; and (iii) it uses the verb "*pronunciarse*" when referring to the ruling of the expert commission."[216] As Professor Alegría further observes, Respondent's argument that

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[211] Bill of the General Electricity Law and its Regulations, Final Draft, Republic of Guatemala dated 4 Apr. 1995, Art. 65 **(C-13)**.

[212] *See* Alegría II ¶ 8 **(CER-3)**.

[213] *See id*. ¶ 9.

[214] *See* Regulations of the Chilean General Electricity Law dated 9 Oct. 1998, Art. 314 **(C-429)**.

[215] *Id*.

[216] Alegría II ¶ 9 **(CER-3)**. As Professor Alegría notes, "[t]he only difference is that Article 314 of the Chilean Regulation states that the expert commission shall determine the VNR through its 'pronunciation,' while Article 75 of the LGE provides that the Expert Commission shall resolve the discrepancies between the parties with respect to the distributor's VAD study." *Id*.

the original intention of the LGE was for the Expert Commission to serve as a simple advisor to the CNEE and that the Expert Commission's "pronouncement" under LGE Article 75 refers only to an educated opinion that may be accepted or rejected by the CNEE thus ignores the context in which the LGE was drafted.[217]

47. Respondent further argues that the decisions of the Expert Commission cannot be binding on the CNEE, because it is the CNEE, and not the Expert Commission, which is empowered under the LGE to set the tariffs.[218] In support of its argument, Respondent references Mr. Bastos's testimony in the *Iberdrola* arbitration, where he stated that "[t]he truth is that the mistake comes from saying 'arbitration' instead of 'expert evaluation'" and that "[i]n reality our work was not an arbitration; it was an expert evaluation."[219] Respondent misinterprets Mr. Bastos's testimony. As Mr. Bastos explains in his second witness statement, "the statement quoted by Guatemala was made in response to an arbitrator's question concerning the terminology that [he] used in [his] financial proposal dated 6 June 2008" and that, as he explained, "in [his] financial proposal, [he] mistakenly referred to the Operating Rules as 'arbitration rules.'"[220] Mr. Bastos confirms that he "did not testify that the Expert Commission's decisions are not binding upon the parties; to the contrary, it always was [his] understanding that the Expert Commission's decisions would be binding upon the parties."[221] As Mr. Bastos notes, "[u]nder Article 75 of the LGE, the Expert Commission is a commission of technical experts appointed to resolve the discrepancies between the CNEE and the distributor" and, "[o]nce resolved, the CNEE must set the new tariff rates on the basis of the corrected VAD study; it does

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[217] *See id*. ¶ 10.

[218] *See* Counter-Memorial ¶ 212.

[219] *Id*. ¶ 212 fn. 248 (citing Transcript of the Final Hearing in ICSID Case No. ARB/09/5, Day Two, Bastos 650:8-11 **(C-538)**.

[220] Bastos II ¶ 16 **(CWS-7)**; Transcript of the Final Hearing in ICSID Case No. ARB/09/5, Day Two, Bastos 650:2-11 ("Derains: "But are these the Arbitration Rules, according to you?" Bastos: "They are the rules that the Expert Commission was submitted to, yes." Derains: "Ah. And if I understand it well it's by mistake that they were referred to as 'Arbitration Rules.'" Bastos: The truth is that the error comes from saying 'arbitration' instead of 'expert evaluation.'…") **(C-538)**.

[221] Bastos II ¶ 16 **(CWS-7)**.

not have discretion to disregard that study and to set the rates on the basis of its own independent VAD study."[222]

48. Moreover, as Claimant noted in its Memorial, Guatemala, in fact, represented—to the TECO group of companies and to other foreign investors, as well as in submissions to its own courts—that the Expert Commission's ruling is binding upon the parties.[223] In the 1998 Sales Memorandum prepared by Guatemala for the privatization of EEGSA, two years after the LGE was enacted, Guatemala stated as follows: "*La Comisión revisará los estudios y podrá efectuar observaciones, pero en caso de discrepancia se nombrará una Comisión de tres peritos para que resuelva sobre las diferencias*."[224] In English, this sentence provides that "[t]he [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*."[225] Contrary to Respondent's assertions in this arbitration that the Expert Commission's pronouncement "is neither a '*ruling*' nor does it '*resolve*' the case,"[226] at the time Guatemala was promoting the privatization of EEGSA, Guatemala specifically represented to potential investors that the meaning of the verb "*pronunciarse*" in LGE Article 75 was "to resolve" or "*resolver*."[227]

49. As Claimant also noted in its Memorial,[228] in an unrelated court proceeding in 2003, the CNEE affirmed the dispute resolution function of the Expert Commission, stating that, "[i]n the event of discrepancies, pursuant to Article 98 of the [RLGE] and [Article] 75 of the [LGE], an Expert Commission shall be constituted, which shall *resolve* [the discrepancies] in a term of 60 days."[229] The CNEE thus also expressly recognized that the role of the Expert

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[222] *Id*. ¶ 15.

[223] *See* Memorial ¶ 278.

[224] Sales Memorandum dated May 1998, at 49 (emphasis added) **(C-29)**.

[225] *Id*. (emphasis added).

[226] Counter-Memorial ¶ 211.

[227] *See* Alegría II ¶ 39 **(CER-3)**.

[228] *See* Memorial ¶ 278.

[229] CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 6-7 ("*De existir discrepancia, según artículo 98 del Reglamento de la Ley y 75 de la Ley, deche formarse una Comisión*

Commission is to *resolve* the discrepancies between the parties.[230] Similarly, in a report commissioned by the CNEE in 2002 regarding the Terms of Reference for EEGSA's 2003-2008 tariff review, the CNEE's own consultant noted that, under the LGE, the CNEE "*reviews* and comments on the distributors' studies" and that, "[i]n the case of discrepancies, the Law provides for arbitration proceedings to be conducted by an Expert Commission rather than *negotiators*, inasmuch as, according to the spirit of the Law, the Commission must render a decision based on technical criteria and grounds instead of subjective criteria, agreements, or mere negotiations."[231]

50. In addition, in his comments on EEGSA's observations regarding the ToR for the 2008-2013 tariff review, Mr. Campos, one of the CNEE's consultants during EEGSA's 2008-2013 tariff review, noted that it was important for EEGSA to understand that discussion of its stage reports would create a "better understanding between the parties, so that this situation is not left to the last moment and the Expert Commission."[232] Mr. Campos further noted that the "LGE does not say that any observations should be resolved by the Experts Commission, but only insoluble discrepancies."[233] The verb used by Mr. Campos to describe the Expert Commission's role is "to resolve" or "*resolver*."[234] Similarly, in a Supporting Report dated 27 May 2008 prepared by the CNEE's consultant Sigla-Electrotek to assist the CNEE's appointee to the Expert Commission, the CNEE's consultant noted that, "[o]n May 5, 2008 EEGSA submitted the Stage Report 1.2, the final and amended version of the previous report, which gave rise to Resolution CNEE 96-2008, detailing the CNEE's disagreements with the report and *ordering the creation of the Expert Commission specified in Article 75 of the [LGE], to resolve the disagreements*

Pericial, que resolverá en un plazo de 60 días . . . .") (emphasis added) **(C-81)**; s*ee also* Alegría II ¶ 40 **(CER-3)**; Alegría I ¶ 31 **(CER-1)**.

[230] *See* Alegría II ¶ 40 **(CER-3)**.

[231] Letter from I. Coral Martinez to the CNEE dated 31 Aug. 2002, at 1-2 (emphasis in original) **(C-446)**.

[232] Email from A. Campos to A. Garcia, J.F. Orozco, M. Santizo, M. Peláez, M. Estrada, D. Herrera, M. Ixmucane Cordova dated 16 May 2007, attaching Terms of Reference for VAD Studies and Replies to EEGSA Comments, at 2 **(C-483)**.

[233] *Id*., Art. 2.1.

[234] *Id*. ("*Tampoco dice la LGE que las eventuales observaciones deban ser resueltas por la Comisión Pericial, sino sólo las discrepancias insolubles*.").

between EEGSA and the CNEE."[235] As Professor Alegría observes, these Reports and memoranda, which were prepared by the CNEE's own consultants, further confirm that the role of the Expert Commission is to resolve or settle the differences between the parties.[236]

51. This also is reflected in a press article regarding EEGSA's 2008-2013 tariff review.[237] Quoting the Manager of the CNEE, Sergio Velásquez, the article notes that discrepancies have arisen between EEGSA and the CNEE, and further notes that, "[a]ccording to the General Electricity Law (LGE, for its acronym in Spanish), an expert commission will now need to be convened with three experts—two to be named by each of the parties, with the third member to be designated by mutual agreement—to *resolve the discrepancies and fix the applicable VAD* cost within a term of 60 days."[238] The article also reports that "[a]n *arbitral* commission is slated to determine the Distribution Added Value (VAD, by its acronym in Spanish)," and refers to sources in the electricity industry, which indicated that the discrepancies between the CNEE and EEGSA had been "compounded by the CNEE's objection to the company's accounting of networks handed over by housing builders as part of their investments, and *its intent to prevent EEGSA from continuing pricing a network that has depreciated over the years at its replacement value*."[239]

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[235] Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 **(C-494)**.

[236] *See* Alegría II ¶ 40 **(CER-3)**.

[237] *See* El Periódico*, Distribution tariff assessment pits EEGSA against the CNEE* dated 1 July 2008 **(C-492)**.

[238] *Id*. (emphasis added).

[239] *Id.* (emphasis added). As discussed further below, this is consistent with the CNEE's actions in this case, in working directly with Mr. Riubrugent to devise an FRC calculation to depreciate the regulatory asset base on which EEGSA's return would be calculated for the 2008-2013 tariff period, and in providing information to Mr. Riubrugent for him to use to defend the CNEE's position in the Expert Commission process. *See infra* ¶¶ 116, 138-140.

2. The New Regulatory Framework Guaranteed Fair Returns And Expressly Provided That The VAD Would Be Calculated On The Basis Of The New Replacement Value Of The Assets Of A Model Efficient Company

52. Claimant demonstrated in its Memorial that, in order to attract much needed foreign investment in electricity distribution, the LGE and RLGE established a framework to regulate electricity prices, while ensuring a reasonable rate of return for distributors.[240] As explained in Claimant's Memorial, the electricity tariff, which is paid by the ultimate consumer, comprises (1) electricity charges designed to cover the cost of electricity purchased by the distributor for delivery to its regulated customers; and (2) VAD charges designed to cover the operating expenses and cost of capital of an efficient model company.[241] Pursuant to the LGE and RLGE, the CNEE adjusts these tariff components every five years as part of the tariff review process,[242] with periodic interim adjustments for inflation and fuel costs, among other things.[243] As Claimant further explained, while the electricity charges component of the tariff covers the distributor's actual costs in purchasing energy and capacity for distribution, the VAD does not compensate the distributor for its actual costs in distributing electricity or its actual cost of capital, but for the costs of a model efficient company servicing the distributor's customer base with equipment and facilities that are new.[244]

53. As also explained in the Memorial, Guatemala adopted the model efficient company approach, which uses the new replacement value (or the VNR) of the assets as the distributor's regulatory asset base on which the VAD is calculated; in other words, the distributor's asset base is valued as *new* each tariff period.[245] By adopting this approach, Guatemala was able to increase the value of its distribution companies, even if the assets of those

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[240] *Id*. ¶¶ 27-35.

[241] *Id*. ¶ 30; LGE, Art. 71 **(C-17)**.

[242] LGE, Art. 77 **(C-17)**; RLGE, Art. 95 **(C-21)**.

[243] RLGE, Arts. 79, 86, 87 **(C-21)**; *see also* Kaczmarek I ¶ 83 **(CER-2)**.

[244] *See* Memorial ¶ 33.

[245] *See id*. ¶ 34; LGE, Arts. 71-73 **(C-17)**; RLGE, Art. 97 **(C-21)**; Alegría I ¶ 25 **(CER-1)**; Bastos I ¶ 20 **(CWS-1)**; Giacchino I ¶ 8 **(CWS-4)**; Kaczmarek I ¶ 60 **(CER-2)**; Gillette I ¶ 12 **(CWS-5)**; Calleja I ¶ 8 **(CWS-3)**.

companies were obsolete or deteriorated.[246] Adopting such an approach, however, likewise "result[s] in higher electricity rates, as the [investor] would need to recover the much higher regulatory asset base."[247]

54. In its Counter-Memorial, Respondent first contends that, "[i]n order to establish objective tariffs based on technical and economic criteria, a proposal was made for regulations based on the 'efficient company' model that had been implemented in Chile in the eighties and later implemented with certain variations, in different countries such as Argentina, Brazil, Ecuador, El Salvador, Nicaragua, Peru and the Dominican Republic."[248] Respondent then asserts that, under this approach, "Guatemala expected that, as successive tariff reviews were performed, the tariffs would fall in real terms."[249] Respondent further asserts that there is no evidence that the model efficient company approach adopted by Guatemala in the LGE and RLGE had any effect on the privatization proceeds that it received from the sale of EEGSA.[250] Respondent's assertions are demonstrably wrong.

55. As Dr. Barrera explains in his expert report, the key factor that impacts electricity tariffs under Guatemala's chosen method of regulation is not the fact that Guatemala chose the efficient model company approach, but, critically, that Guatemala chose to value the model company's assets using the VNR method[251] (a point that Respondent conveniently omits from its discussion of what Guatemala allegedly expected).[252] Specifically, the VNR method involves "valuing the asset base of the distribution company as if all of the efficient assets were new;" in other words, 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,"[253] and the VNR method "assumes

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[246] *See* Memorial ¶ 34; Kaczmarek I ¶ 59 **(CER-2)**; Giacchino I ¶ 7 **(CWS-4)**.

[247] Memorial ¶ 34; Kaczmarek I ¶ 59 **(CER-2)**; *see also* Giacchino I ¶ 7 **(CWS-4)**.

[248] Counter-Memorial ¶ 145.

[249] *Id*. ¶ 146.

[250] *Id*. ¶¶ 236-237.

[251] Barrera ¶¶ 28-29, 60 **(CER-4)**.

[252] *See* Counter-Memorial ¶ 146.

[253] Barrera ¶ 28 **(CER-4)**.

that the assets are always new."[254] As Dr. Barrera explains, because State-owned companies often have not maintained state-of-the-art networks, those networks tend to be in need of repair and investment, and the value of the actual assets of these companies is rather low.[255] If a VNR method is used, however, "the asset base of that State-owned company is valued at its replacement cost value, as if all of the assets of the company were new, thereby increasing the value of the company and the proceeds that the government can obtain when privatizing the company."[256]

56. This was the case in Guatemala. Although Guatemala's advisors for EEGSA's privatization, PriceWaterhouseCoopers, had valued EEGSA's then-existing distribution assets at US$ 78.3 million, "those same assets were roughly valued implicitly at US$ 724 million in 1998, given the purchase price paid at privatization."[257] In 2003, EEGSA's VNR was calculated to be US$ 583.7 million, and, in 2008, Bates White calculated the VNR to be US$1,053 million.[258] Even Sigla calculated EEGSA's VNR to be US$ 465.3 million in 2008, far above the book value of its assets.[259] As Dr. Barrera explains, this is the direct consequence of Guatemala's choice of the VNR method, as opposed to other methods of valuing the regulatory asset base:

> Guatemala's risks when using the VNR instead of historic asset costs would be compensated, however, by higher privatisation proceeds. Investors would have expected that EEGSA's value would be a function of the VNR as it would determine future allowed revenues. The value of the company was a function of expected cash flows, which included expected revenues, which are a function of the VNR, and costs – which include payments to acquire the company and expected cost reductions. Insofar as the

[254] *Id*. ¶ 29.

[255] *Id.* ¶ 32.

[256] *Id.*

[257] *Id.* ¶ 44.

[258] *Id.*

[259] *Id.*

> VNR is a prime driver of regulated revenues, it is a prime component of the value of the company.[260]

As Dr. Barrera notes, "[c]learly, rates set on a historic cost of US$ 78.3 million would have meant much lower VAD rates in 1998, 2003, and 2008 than rates set using a VNR."[261] Similarly, Mr. Kaczmarek observes: "PriceWaterhouse had concluded that under a Cost of Service regulatory framework, the market value of EEGSA would have been below its book value of approximately US$ 78 million and then only if Guatemala subsidized rates. In contrast, EEGSA was privatized for an enterprise value of US$ 724 million, implying a price to book value ratio of 17.0x. The explanation for this valuation multiple lies in the higher tariffs resulting from the Model Company Regulation that Guatemala chose to adopt."[262]

57. As regards Respondent's assertion that Guatemala expected that rates would fall over successive tariff periods,[263] that expectation (if it ever existed)[264] was baseless, because it ignored the impact of potential changes in the prices of materials on the VNR in the successive reviews.[265] In particular, as Dr. Barrera explains, electricity distribution is highly sensitive to changes in prices of materials such as aluminum and copper.[266] Consequently, as the VNR is reset in each successive tariff review using the then-current prices, "changes in the prices of copper and aluminium generally result in changes to the VNR."[267] While Dr. Barrera agrees that

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[260] *Id.* ¶ 45.

[261] *Id.* ¶ 46.

[262] Kaczmarek II ¶ 187 **(CER-5)**.

[263] Counter-Memorial ¶ 146.

[264] Claimant notes that, although Respondent agreed to produce documents responsive to Claimant's request for all documents reflecting Guatemala's expectation regarding whether electricity tariffs would increase or decrease in real terms over successive tariff periods, Respondent failed to produce any responsive documents. *See* Letter from Claimant to Respondent dated 14 Feb. 2012, Request No. A.5.

[265] In addition, as Claimant noted in its Memorial, the debate in the Guatemalan Congress regarding the LGE shows that the Congress understood that the LGE would likely lead to higher electricity tariffs. *See* Memorial ¶ 24. Thus, for example, Deputy R. Crespo Villegas declared that "the Guatemalan Republican Front, just as we have stated in the media, we vote against this bill of law because we consider that the [LGE] will produce a new hike in the electricity tariff." Diary of Sessions of the Congress of the Republic of Guatemala, Ordinary Period 1996-1997, Record of Session No. 074 dated 16 Oct. 1996, at 97 **(C-16)**.

[266] Barrera ¶¶ 54-56 **(CER-4)**.

[267] *Id.* ¶ 54.

a well-applied incentive model leads to allocative and technical efficiency, he also explains that the impact of using the model approach (the model effect) is generally outweighed by the impact of changes in the prices of materials (the price effect).[268] As Dr. Barrera explains, at the time of EEGSA's privatization, the prices of commodities such as copper and aluminum were at historically low levels, and a "casual look at history would have suggested that price increases were likely," with the consequence that "the price effect would have been expected to produce a higher regulatory asset base."[269] Conversely, for Respondent's asserted expectation of lower future tariffs to materialize, the prices of materials would need to remain at or below the record low levels prevailing as of the time of privatization. An expectation of sustained record low prices clearly would not have been reasonable, and certainly any such expectation would not have been long-lasting, as it would have dissipated once prices began increasing dramatically in subsequent years.

B. Claimant Invested In EEGSA In Reliance On The Guarantees And Protections Provided By The New Legal Regime Adopted By Guatemala To Attract Foreign Investment

58. In its Memorial, Claimant demonstrated that, shortly after Guatemala enacted the LGE and RLGE, the Government announced the privatization of EEGSA,[270] and that, in order to organize a national and international public offering of the State's shareholding in EEGSA, a High Level Committee was constituted, comprised of EEGSA's directors and the then Minister of Energy and Mines, Leonel López Rodas.[271] Claimant further demonstrated that, in 1998, an Advisory Team identified a list of strategic investors to target for EEGSA's privatization, and that "TECO" was selected by the Advisory Team as one of the strategic investors.[272] The TECO

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[268] *Id.* ¶ 64. This is because "in practice, absent objective justification, the model should not differ significantly from reality, as that would not achieve the objectives of price regulation." *Id*.

[269] *Id.*

[270] *See* Memorial ¶ 45; Alegría I ¶ 19 **(CER-1)**; *Diccionario Histórico Biográfico de Guatemala*, Fundación para la Cultura y el Desarrollo Asociación de Amigos del País (First Edition, 2004), at 371 **(C-84)**.

[271] *See* Memorial ¶ 46; Government Accord No. 865-97 dated 17 Dec. 1997 **(C-23)**; Representatives of the High Level Committee, Empresa Eléctrica de Guatemala, S.A. **(C-18)**; *see also* Minutes of the High Level Committee, Empresa Eléctrica de Guatemala, S.A., dated 30 Jan. 1998, at 2 **(C-548)**.

[272] Empresa Eléctrica de Guatemala, S.A., Investors' Profiles dated 17 Feb. 1998, at 9, 44 **(C-26)**. As the Advisory Team noted, "[t]he selection of the investor base to be contacted in the marketing stage is key since

group of companies thus received various promotional materials prepared by Guatemala with the help of its financial advisor, Salomon Smith Barney, for the privatization, including the Preliminary Information Memorandum and the Sales Memorandum, which described to potential investors the new legal and regulatory framework adopted by Guatemala, and set out how distribution tariffs would be calculated for EEGSA.[273] Claimant further demonstrated that, in reliance upon the new legal and regulatory framework adopted by Guatemala, the TECO group of companies decided to invest in EEGSA as part of a Consortium.[274] In particular, TPS, a Florida corporation, which is a wholly-owned indirect subsidiary of TECO Energy, made a presentation to the Board of TECO Energy seeking approval to participate in the bid for EEGSA's privatization;[275] the approval was granted and, after the Consortium was declared the winner of the auction,[276] the TECO group of companies made its investment in EEGSA through TPS de Ultramar Guatemala, S.A. ("TPS de Ultramar Guatemala"), a wholly-owned indirect Guatemalan subsidiary of TECO Energy.[277] Claimant also showed that the stability and predictability of the new regulatory framework and the particular regime that was adopted by Guatemala to ensure a depoliticized process for setting EEGSA's distribution tariffs were critical considerations in reaching the decision to invest.[278] Claimant further showed that, by adopting the legal and regulatory framework that it did, Guatemala was able to obtain substantial

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to guarantee the success of the process, there has to be competition;" however, "competition is not generated by inviting a large number of investors, but rather through the accurate selection of an adequate number of them with the possibility of investing in EEGSA." *Id*. at 2.

[273] Empresa Eléctrica de Guatemala S.A., Preliminary Report of the Financial and Technical Advisor prepared by Salomon Smith Barney dated 28 Jan. 1998, at 2 **(C-25)**; Sales Memorandum dated May 1998, at 9-10, 42-49 **(C-29)**. Claimant notes that, while it requested, and the Tribunal ordered, the production of all documents exchanged between Guatemala and Salomon Smith Barney regarding EEGSA's privatization, including several specific documents referenced in the Minutes of the High Level Committee, Respondent has produced no responsive documents. *See* Claimant's Redfern Schedule, Request No. B.2.

[274] *See* Memorial ¶¶ 56-64.

[275] *See id*. ¶ 61; Gillette I ¶ 16 **(CWS-5)**; Minutes of the Board of Directors of TECO Energy, Inc. dated 15 July 1998, at 4 **(C-34)**.

[276] *See* Memorial ¶ 61; Gillette I ¶ 16 **(CWS-5)**; Notarized Minutes of the Award dated 30 July 1998, at 2-3 **(C-36)**.

[277] *See* Corporate Registry of Distribución Eléctrica Centroamericana ("DECA Corporate Registry") dated 14 Aug. 1998 **(C-428)**.

[278] *See* Memorial ¶¶ 56-64; Gillette I ¶¶ 9-14 **(CWS-5)**.

privatization proceeds for EEGSA's distribution network, even though that network was deteriorated and in need of significant investment.[279]

59. In its Counter-Memorial, Respondent contends that, in the Sales Memorandum, Guatemala "clearly explained to investors that the CNEE was a functionally and financially independent technical arm of the MEM (which regulated and supervised the sector), which had the power to set the tariffs."[280] Respondent further contends that, based upon the legal framework and the promotional materials circulated by Guatemala during the privatization process, the TECO group of companies understood at the time of its investment, among other things, that "[t]he distributor would be obliged to incorporate the corrections so that its consultant's tariff study would conform to the Terms of Reference;" that "[t]he Expert Commission would pronounce itself [*se pronunciará*] on the conformity of the distributor's study with the Terms of Reference, when the CNEE rejected the study or discrepancies persisted;" and that "[t]he CNEE would approve or reject the VAD tariff study prepared by the distributor taking into account the pronouncement of the Expert Commission."[281] In addition, Respondent contends that "Teco's main interest in EEGSA was the potential for synergies with its other electricity generation investments in Guatemala,"[282] and that it therefore "is reasonable to assume that these considerations were included in the price offered" by the Consortium for EEGSA.[283] Respondent further contends that the Consortium's offer to acquire an 80% ownership interest in EEGSA was not established as a function of the model efficient company approach,[284] and that, according to "Claimant's preinvestment projections, it neither considered necessary, nor did it project, a significant increase in tariff reviews for the years 2003, 2008, and 2013."[285] Finally, Respondent contends that the corporate structure of Claimant's investment in

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[279] *See* Memorial ¶ 62; Kaczmarek I ¶¶ 58-65 **(CER-2)**

[280] Counter-Memorial ¶ 226 (emphasis in original).

[281] *Id*. ¶ 229.

[282] *Id*. ¶ 230.

[283] *Id*. ¶ 238.

[284] *Id*. ¶ 236.

[285] *Id*. ¶ 233.

EEGSA has undergone "broad changes" since EEGSA's privatization in 1998,[286] and that Claimant "could not have had any expectation, nor could it have received any guarantee, security or promise dating back to the time of EEGSA's privatization," because Claimant was created in 2005.[287] Each of Respondent's contentions is baseless, as set forth below.

60. First, Respondent again 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. As the Sales Memorandum clearly reflects, however, the CNEE's power to set the distributor's tariff is separate from the process for calculating the distributor's VAD.[288] The Sales Memorandum thus provides that the LGE created the CNEE "to regulate and oversee the electricity sector" and that the CNEE is responsible for, among other things, "setting the tariffs specified by law."[289] The Sales Memorandum also specifically provides that "VADs must be calculated by distributors by means of a study commissioned from an engineering firm, but the [CNEE] may dictate that the studies be grouped by density," and that "[t]he [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."[290] As the Sales Memorandum demonstrates, during the privatization process, Guatemala thus specifically represented to potential investors 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.[291] Contrary to Guatemala's contentions, Guatemala did not represent to potential investors that the CNEE would have

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[286] *Id*. ¶ 542.

[287] *Id*. ¶ 546.

[288] *See* Sales Memorandum dated May 1998, at 43, 49 **(C-29)**.

[289] *Id*., at 43.

[290] *Id*., at 49.

[291] *Id*. As noted above, the Sales Memorandum uses the Spanish verb "*resolver*" or "to resolve" to describe the function of the Expert Commission. *See supra* ¶ 48; Sales Memorandum dated May 1998 (Spanish original), at 63 ("*La Comisión revisará los estudios y podrá efectuar observaciones, pero en caso de discrepancia se nombrará una Comisión de tres peritos para que resuelva sobre las diferencias*.") **(C-29)**.

unilateral power and discretion to "approve or reject the VAD tariff study prepared by the distributor taking into account the pronouncement of the Expert Commission."[292] Guatemala also did not represent to potential investors that the distributor would be required to incorporate the CNEE's observations, or that the Expert Commission's resolution of disputes would be limited to pronouncing "on the conformity of the distributor's study with the Terms of Reference," as Respondent now contends in its Counter-Memorial.[293]

61. With respect to the calculation of the VAD, the Sales Memorandum explains that "[t]he capital costs included in the VAD are determined on the basis of the total investment cost of a network of considerable size in a given year (for example, the year before a tariff analysis)" and that "[t]he total investment is estimated at non-distorted market prices, which allows the supplying of an area representative of the density under analysis."[294] With respect to the capital recovery factor or FRC, which converts the VNR into cash flow payments to the company, the Sales Memorandum notes that this "is applied to the resulting cost of investment, at an actual interest rate to be determined, which should usually range between 7% and 13%, and considering a useful life of around 30 years."[295] The Sales Memorandum also expressly recognizes that tariff rates would increase under the new legal and regulatory framework, noting that "[h]istorically, tariffs have been low, which has severely stunted the distributor's potential for gains" and that "[t]he Law addresses this particular issue, empowering the companies (INDE and EEGSA) to fix tariffs by reference to market prices."[296]

62. Second, as Gordon Gillette confirms in his second witness statement,[297] the main consideration for the TECO group of companies to invest in EEGSA was not "the potential for synergies with its other electricity generation investments in Guatemala," as Respondent

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[292] Counter-Memorial ¶ 229.

[293] *Id*.

[294] Sales Memorandum dated May 1998, at 49 **(C-29)**.

[295] *Id*.

[296] *Id*.

[297] Gillette II ¶ 3 **(CWS-11)**.

contends.[298] Rather, as Mr. Gillette explains, the central consideration was "whether the investment presented a favorable rate of return."[299] As Mr. Gillette notes, the potential synergies that he referred to in his first witness statement were not "synergies as that term is commonly understood" in the context of a merger or an acquisition,[300] but rather were the "non-quantifiable savings in time and effort that a company obtains when it makes a second investment in the same foreign country."[301] As he explains, "[h]aving already invested in Guatemala and having become somewhat familiar with operations in that country, TECO naturally was more comfortable making another investment in Guatemala as compared with making an investment in a country in which it had no prior experience."[302] In addition, "the Alborada and San José power plants supplied all of their electricity to EEGSA; the privatization of EEGSA provided increased security for those investments, because they would no longer be wholly reliant on the Government for electricity payments."[303] As Mr. Gillette notes, "[w]hile [TECO] would not control EEGSA as a minority shareholder, by obtaining a stake in EEGSA, [TECO] hoped to ensure the establishment of good relations between EEGSA and our generation plants."[304]

63. As Mr. Gillette further explains,[305] the importance of these investment considerations is confirmed by the July 1998 presentation prepared by TPS for TECO Energy's Board of Directors.[306] As that presentation reflects, TPS recommended that the Board of Directors approve TPS's participation in the EEGSA privatization bid, because of the "very significant long-term earnings through the potential opportunities for both cost-cutting and

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[298] Counter-Memorial ¶ 230.

[299] Gillette II ¶ 7 **(CWS-11)**.

[300] *Id*. ¶ 4.

[301] *Id*. ¶ 5.

[302] *Id*.

[303] *Id*.; Gillette I ¶ 9 **(CWS-5)**.

[304] Gillette II ¶ 5 **(CWS-11)**.

[305] *Id*. ¶ 6-7; *see also* Gillette I ¶¶ 9-12, 14 **(CWS-5)**; TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998 **(C-32)**.

[306] TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998 **(C-32)**.

growth, which can potentially enhance our returns."[307] As TPS concluded, "[t]his one-time opportunity to acquire the EEGSA distribution company is a positive fit with the long-term strategies of TECO Energy."[308] The Board presentation also recognized that the investment would allow the TECO group of companies "to vertically integrate [its] position in Guatemala and provide added protection to [its] existing projects there" and would "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."[309] As Mr. Gillette notes, although Respondent relies upon the fact that this latter consideration is listed first in the concluding recommendation, it was the last of the factors discussed, as the presentation reflects.[310] This also is consistent with another contemporaneous presentation to management, which concluded that investing in EEGSA provided an "Excellent Fit with Long Range Strategic plan to grow end-use businesses,"[311] highlighting the "Attractive Regulated Returns on Investment" and "Attractive Opportunity for Growth in Revenues," on account of Guatemala's existing low level of electrification, EEGSA's large customer base, and projected growth in demand.[312] In noting the synergies that the investment provided, the presentation echoes Mr. Gillette's statement, observing that "TPS has existing facilities, relationships and offices in Guatemala;" that the investment would provide "additional protection for existing investments;" and that the investment "would provide for diversification of earnings sources in Central America."[313] Notably, the presentation closed with the recommendation to submit the

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[307] *Id*.

[308] *Id*.

[309] *Id*.

[310] Gillette II ¶ 7 ("The only apparent basis for Guatemala's inference is that in the concluding paragraph recommending approval of the investment, the synergies are mentioned first. I note, however, that in the main body of the July 2008 presentation, the investment potential for EEGSA itself as part of a regional strategy is discussed before TECO Energy's existing investments in Guatemala.") **(CWS-11)**; TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 7-2 **(C-32)**.

[311] EEGSA Privatization Management Presentation dated 9 July 1998, at 17 **(C-33)**.

[312] *Id*., at 18.

[313] *Id*., at 19.

bid "based upon the Base Case Model achieving a minimum acceptable IRR under base case conditions after all key assumptions have been verified."[314]

64. Respondent's suggestion that the synergies between EEGSA and TECO Energy's power generation investments increased the price that the Consortium bid for EEGSA lacks any foundation and is implausible.[315] As Mr. Gillette confirms, those synergies had no effect on "the price of the bid that the consortium ultimately submitted" to purchase EEGSA.[316] As Mr. Gillette explains, TPS, the TECO Energy wholly-owned indirect subsidiary that participated in the bidding Consortium, held only a 30% ownership interest in the Consortium's investment company, DECA.[317] The two other members of the bidding Consortium, Iberdrola and EDP, together holding a 70% ownership interest in DECA, had no synergies with TECO Energy's other investments in Guatemala. It would have been contrary to Iberdrola's and EDP's economic interests to pay a higher price for EEGSA on account of synergies from which they would not have benefited.[318] Thus, contrary to Guatemala's unsubstantiated assertion,[319] these synergies were not taken into account in the price offered by the bidding Consortium.[320]

65. Third, Respondent errs in contending that the Consortium's offer to acquire an 80% ownership interest in EEGSA was not established as a function of the model efficient company approach,[321] and misconstrues the critical issue when it asserts that, according to "Claimant's preinvestment projections, it neither considered necessary, nor did it project, a significant increase in tariff reviews for the years 2003, 2008, and 2013; instead, the Claimant projected that the tariff would decrease in real terms, in line with what was anticipated under the

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[314] *Id*., at 21.

[315] Counter-Memorial ¶ 238.

[316] Gillette II ¶ 9 **(CWS-11)**.

[317] *Id*.

[318] *Id*.

[319] Counter-Memorial ¶ 238.

[320] Gillette II ¶ 8-9 **(CWS-11)**.

[321] Counter-Memorial ¶ 236.

RLGE."[322] It is apparent that the TECO group of companies did consider and rely upon the fact that Guatemala had established the model efficient company approach when deciding to invest in EEGSA, as reflected in a contemporaneous memorandum assessing the investment opportunity, which states that "[t]his VAD calculation is based on a standard 'model efficient' utility in Latin America and will be utilized to allow EEGSA to recover its investment and expenses based on this standard."[323] Similarly, a contemporaneous management presentation reports that the "VAD [is] recalculated every 5 years based on allowable return on *new replacement cost* of efficient network plus O&M costs."[324] This shows not only that the TECO group of companies relied upon the fact that Guatemala had implemented a regulatory regime using the model company approach (*i.e.,* the "cost of efficient network"), but also that it based its investment decision on the fact that the regulatory asset base of the "efficient network" would be calculated on the "new replacement cost" of the assets.

66. Moreover, and contrary to Respondent's suggestion, it is immaterial that the Dresdner Kleinwort Benson model did not project significant tariff increases.[325] As Mr. Gillette explained in his first witness statement, the TECO group of companies would not have invested in EEGSA but for the fact that they had concluded that, in light of the regulatory regime in place and the Consortium's management's capabilities, they could achieve a rate of return in excess of their current returns in the United States and in line with that established by the LGE.[326] In this regard, Mr. Gillette observed that "the model on which the bid price was based assumed what we deemed at the time to be conservative growth figures."[327] Thus, what mattered was the projected

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[322] *Id*. ¶ 233.

[323] Empresa Electrica de Guatemala, EEGSA Privatization, Assumptions for the Base Case Business Model dated 24 July 1998, at 3 **(C-426)**.

[324] EEGSA Privatization Management Presentation dated 9 July 1998, at 5 (emphasis added) **(C-33)**.

[325] Counter-Memorial ¶ 233; Valuation Model of Dresdner Kleinwort Benson, at 43, Section C (Tariff Calculation Variables) **(R-160)**.

[326] Gillette I ¶ 12 **(CWS-5)** (stating that the regulatory regime in Guatemala "was attractive to us because it held out the promise that, if we managed the company well and achieved large efficiencies, our returns would increase"); *id*. ¶ 13 (stating that TECO "determined that we could make a return on the EEGSA investment in excess of our current utility returns in the United States, in large part because the law guaranteed a real rate of return of between 7% and 13% on the new replacement value of the assets").

[327] Gillette I ¶ 14 **(CWS-5)**.

rate of return, which was met even with "conservative growth figures" and was not dependent upon having the tariffs increase substantially over time. As a general matter, as Mr. Kaczmarek explains, "[g]iven the unknown impact of inflation, technology, and commodity prices, one could not expect there to be a consistent trend in the tariffs."[328] That said, as Dr. Barrera notes, at the time of EEGSA's privatization, commodity prices were at historic lows, and it thus would have been reasonable to expect that they were likely to increase in the future (which would mean a corresponding increase in the VNR and the tariffs).[329] Moreover, at the end of any particular tariff period, EEGSA would be able to assess the impact of the aforementioned factors vis-à-vis the tariffs in place and would have an expectation as to how those factors would affect the tariffs for the next rate period. Thus, as explained further below, because the first tariff period was a transitional one, EEGSA properly expected that tariffs would increase in the second tariff period, which they did;[330] similarly, because commodity prices for materials used in distribution networks had increased substantially beyond the rate of inflation during the five years of the second tariff period, and because there had been no significant technological advances during that time, EEGSA also correctly expected that tariffs would increase in the third tariff period.[331]

67. Finally, as Mr. Gillette explains in his second witness statement,[332] from the time of its investment in EEGSA in September 1998 until the sale of its ownership interest in EEGSA in October 2010, the TECO group of companies continuously held its investment in EEGSA. As TECO Energy's 10-K Report reflects,[333] the TECO group of companies is comprised of TECO Energy, the parent company, which was incorporated in Florida in 1981, and a series of wholly-owned subsidiaries, including TECO, the Claimant in this arbitration, and TPS de Ultramar Guatemala, through which the TECO group of companies made its investment in EEGSA. As

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[328] Kaczmarek II ¶ 173 **(CER-5)**.

[329] Barrera ¶ 64 **(CER-4)**.

[330] *See infra* Section II.D; Memorial ¶¶ 70, 72-83; Calleja II ¶ 3 **(CWS-9)**; Calleja I ¶ 7 **(CWS-3)**; Maté II ¶ 3 **(CWS-12)**; Maté I ¶ 3 **(CWS-6)**.

[331] *See infra* Section II.E; Memorial ¶¶ 186; Kaczmarek II ¶ 197 **(CER-5)**; Kaczmarek I ¶ 106 **(CER-2)**; Barrera ¶¶ 263-265 **(CER-4)**; Calleja II ¶ 25 **(CWS-9)**; Calleja I ¶¶ 7, 49 **(CWS-3)**; Maté II ¶ 18 **(CWS-12)**; Maté I ¶¶ 3, 19 **(CWS-6)**; Gillette I ¶¶ 18-19 **(CWS-5)**.

[332] Gillette II ¶ 10 **(CWS-11)**.

[333] *See* TECO Energy's Form 10-K dated 26 Feb. 2009, Exhibit 21 **(C-324)**.

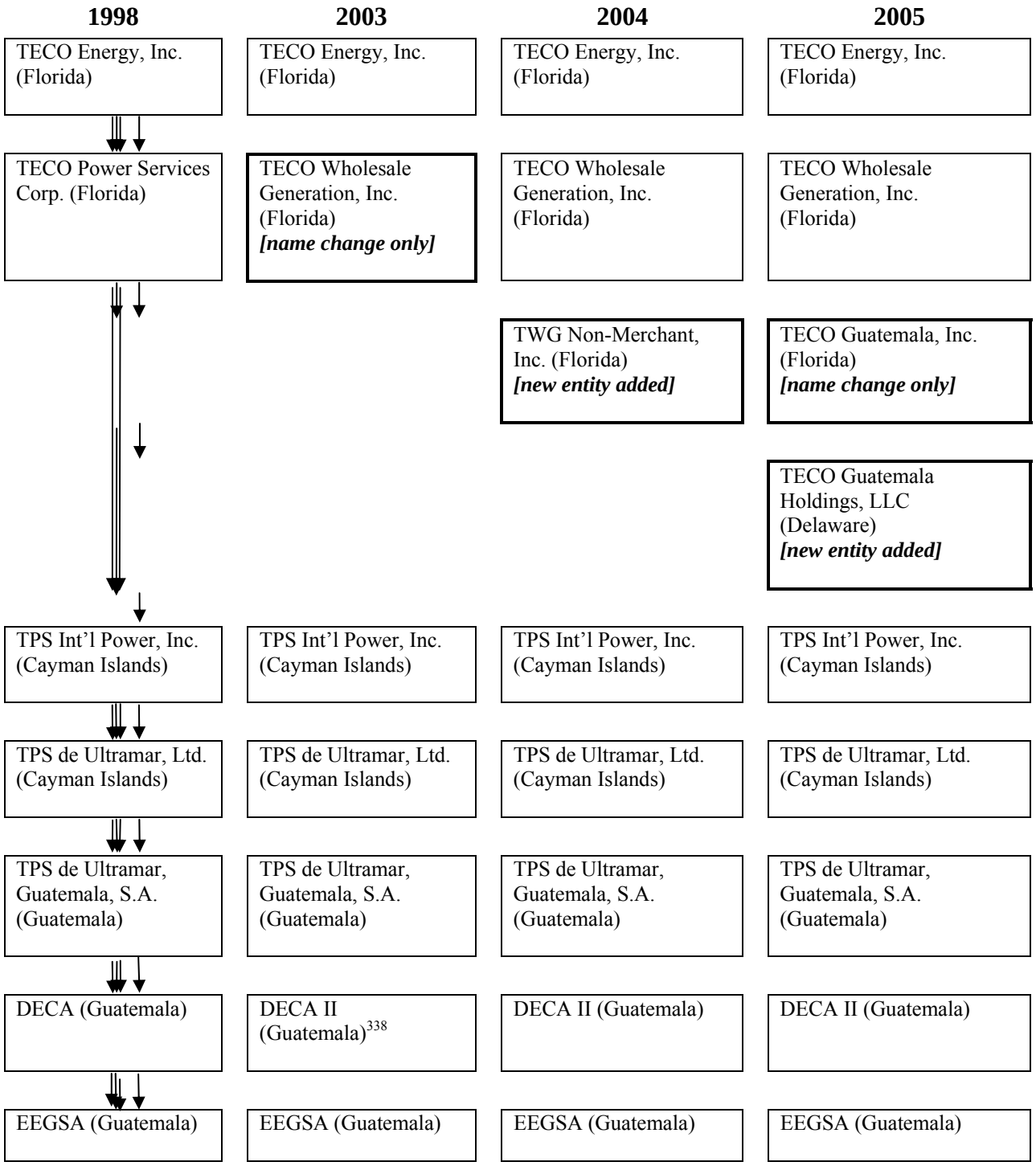
Mr. Gillette explains,[334] throughout the twelve years that the TECO group of companies held its ownership interest in EEGSA, the ownership interest was held by TECO Energy indirectly through various U.S. companies, two Cayman Island companies, and two Guatemalan companies. As Mr. Gillette further notes,[335] between 1998 and 2005, there were two corporate restructurings and two corporate name changes in EEGSA's chain of corporate ownership: two additional U.S. holding companies were added, TWG Non-Merchant, Inc. (which later changed its name to TECO Guatemala, Inc.) and Claimant, in 2004 and 2005, respectively,[336] and two U.S. companies changed their corporate names.[337] This is reflected in the following chart:

[334] Gillette II ¶ 10 **(CWS-11)**.

[335] *Id*.

[336] *See* Register of Members, TPS International Power, Inc. dated 9 Sept. 2010 **(C-526)** (confirming ownership by TECO Guatemala Holdings, LLC); Register of Members, TPS de Ultramar, Ltd. dated 9 Sept. 2010 **(C-527)** (confirming ownership by TPS International Power, Inc.); Registry of Issuance of TPS de Ultramar, Guatemala, S.A. Shares dated 11 Jan. 2012 **(C-543)** (confirming ownership by TPS de Ultramar, Ltd.); DECA Corporate Registry dated 14 Aug. 1998 **(C-428)** (confirming ownership interest of TPS de Ultramar, Guatemala, S.A.).

[337] Articles of Amendment to Articles of Incorporation of TECO Power Services Corporation dated 23 Dec. 2003 **(C-459)** (certifying name change to TECO Wholesale Generation, Inc.); Articles of Amendment to Articles of Incorporation of TWG Non-Merchant, Inc. dated 23 Dec. 2003 **(C-461)** (certifying name change to TECO Guatemala, Inc.).



[338] As Mr. Gillette has explained, DECA merged with EEGSA in 1999. Gillette I ¶ 16. TPS and the two other consortium members formed DECA II to hold their shares in EEGSA. *Id.* This did not impact the TECO Energy group of companies.

68. As Mr. Gillette explains and as the documentary record confirms,[339] when the ownership interest in EEGSA was transferred to TWG Non-Merchant, Inc. and to Claimant in 2004 and in 2005, respectively, these transfers were effectuated "for the nominal sum of USD 1.00 per share, for a total of USD 100."[340] These transfers thus were not share sales, but were internal corporate transfers between members of the same group of companies. As Mr. Gillette also notes, "[a]t the time of Claimant's incorporation in 2005, Claimant and TECO Guatemala, Inc. shared all of the same officers and directors,"[341] and "the officers and directors of those two companies, with one exception, also were identical to those in place for TECO Wholesale Generation, Inc., which is the entity between those companies and TECO Energy,"[342] further reflecting the fact that these companies operated and continue to operate under a common parent company, TECO Energy, with shared objectives. Accordingly, and as discussed in further detail below,[343] Claimant, as a member of the TECO group of companies, shared the very same expectations regarding the investment in EEGSA as the other members of that group.

C. EEGSA's Provisional VAD For The First Tariff Period Post-Privatization [1998-2003] Was Financially Crippling

69. In its Memorial, Claimant demonstrated that, during the first full year of ownership by the Consortium, EEGSA experienced 5.4% customer growth, producing an 8.2%

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[339] Stock Power dated 17 June 2004 **(C-464)** (confirming transfer of 100 shares in TPS International Power, Inc. from TECO Wholesale Generation, Inc. to TWG Non-Merchant, Inc.); Stock Power dated 4 May 2005 **(C-471)** (confirming transfer of 100 shares in TPS International Power, Inc. from TECO Guatemala, Inc. (f/k/a TWG Non-Merchant, Inc.) to TECO Guatemala Holdings, LLC); Register of Members, TPS International Power, Inc. **(C-526)** (confirming share transfers, each at a price of USD 100 for 100 shares).

[340] Gillette II ¶ 11 **(CWS-11)**.

[341] *Id.*; *see also* TECO Guatemala, Inc., Action by Consent in Lieu of Directors' Meeting dated 27 Apr. 2005 **(C-469)** (showing that in 2005 TECO Guatemala, Inc.'s directors were G.L. Gillette, S.M. Payne, and J.B. Ramil, and its officers were G.L. Gillette (President and Treasurer), S.M. Payne (Vice President-Controller, Assistant Secretary, and Tax Officer), D.E. Schwartz (Secretary), and S.W. Callahan (Assistant Secretary)); TECO Guatemala Holdings LLC Limited Liability Company Agreement dated 4 May 2005, Arts. 3.2 & 3.9 **(C-472)** (showing the same for TECO Guatemala Holdings, LLC).

[342] Gillette II ¶ 11 **(CWS-11)**; *see also* TECO Wholesale Generation, Inc., Action by Consent in Lieu of Directors' Meeting dated 27 Apr. 2005 (showing that in 2005 TECO Wholesale Generation, Inc.'s directors were C.R. Black, G.L. Gillette, and J.B. Ramil, and its officers were C.R. Black (President), S.M. Payne (Vice President-Controller, Assistant Secretary, and Tax Officer), D.E. Schwartz (Secretary), G.L. Gillette (Treasurer), and S.W. Callahan (Assistant Secretary)).

[343] *See infra* Section III.A.3.

growth in energy consumption and a substantial decrease in energy losses.[344] Claimant further demonstrated that, from 1998 to 2001, EEGSA made substantial improvements in the quality of its electricity service, increasing bill payment locations from 16 to 250; reducing the percentage of unread meters from 5% to 1.5%; reducing billing errors from 1.6% of all bills to 0.5%; increasing the number of customer calls handled annually from 4,000 to 50,000; decreasing the average complaint response time from 39 to 7 days; and decreasing the average waiting period for obtaining new electricity service from 90 to 9 days.[345] During this same period, the annual System Average Interruption Duration Index, or SAIDI, decreased from 16 to 8.7 hours, while the annual System Average Interruption Frequency Index, or SAIFI, decreased from 30 to 12 outages per year.[346] Despite EEGSA's customer growth and marked improvements in efficiency, however, EEGSA experienced significant 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.[347]

70. As Claimant explained in its Memorial, EEGSA's VAD for the 1998-2003 tariff period was not calculated in accordance with the procedure set forth in LGE Articles 71-79, but was established before EEGSA's privatization pursuant to Article 2 of the Transitory Provisions of the LGE.[348] Under that provision, EEGSA's VAD was to be established by the CNEE based upon "values used in other countries that apply a similar methodology,"[349] as there was insufficient information at that time to conduct a formal VAD study.[350] To calculate EEGSA's

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[344] *See* Memorial ¶ 64; Gillette I ¶ 17 **(CWS-5)**; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 **(C-47)**.

[345] *See* Memorial ¶ 64; Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 256 **(C-61)**.

[346] *See* Memorial ¶ 64; Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 256 **(C-61)**.

[347] *See* Memorial ¶¶ 66-71.

[348] *See id*. ¶ 66; LGE, Section VII, Ch. 1, Art. 2 ("The first establishment of tolls and rates for customers of the final distribution service, applying the criteria and methodology set out in this law, shall occur in the first half of May 1997. In that case the distribution VADs determined by the [CNEE] shall be based on values used in other countries that apply a similar methodology.") **(C-17)**.

[349] LGE, Section VII, Art. 2 **(C-17)**.

[350] *See* Memorial ¶ 66; Calleja I ¶ 6 **(CWS-3)**; Giacchino I ¶ 5 **(CWS-4)**.

VAD and to set EEGSA's distribution tariffs for the 1998-2003 tariff period, the CNEE turned to El Salvador for comparable data.[351] As Leonardo Giacchino explained in his first witness statement,[352] due to the different densities of EEGSA's distribution territory and El Salvador, among other factors, the use of data from El Salvador led to tariffs that were "too low" and that "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."[353] As Claimant noted in its Memorial, these low tariffs, combined with rapid increases in fuel costs and a significant devaluation of the Guatemalan currency in 1999,[354] resulted in negative free cash flows for EEGSA in 1999 and 2000 and negative net profit in 2001.[355] As Mr. Kaczmarek demonstrated in his first expert report, "EEGSA's [return on invested capital] during the First Rate Period, in fact, was consistently lower than the lower bound of 7 percent established by the regulatory framework," ranging between 3% to just over 4%.[356]

71. In its Counter-Memorial, Respondent contests Claimant's description of EEGSA's first five-year tariff period.[357] Respondent first contends that the tariffs set by the CNEE in 1998 "were based on a technical study performed by Synex under the auspices of the World Bank, and they were known to Teco before investing."[358] Respondent next contends that EEGSA's provisional tariffs for the 1998-2003 tariff period were not "low" and that "the

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[351] *See* Memorial ¶ 67; Giacchino I ¶ 5 **(CWS-4)**; Kaczmarek I ¶ 86 **(CER-2)**. Synex, the consulting firm that prepared the study used to calculate EEGSA's tariffs, also used data from other jurisdictions, but did not use data from Guatemala. *See* Giacchino I ¶ 5 fn. 2 (citing Synex, *Determination of Electric Tariffs at the Generation-Transmission and Distribution Levels in Guatemala*, Preliminary Report for the World Bank dated Jan. 1997, Ch. 3, § 3.1 at 12 ("Synex Report") **(C-20)**) **(CWS-4)**.

[352] Giacchino I ¶ 5 fn. 3 **(CWS-4)**.

[353] Maté I ¶ 3 **(CWS-6)**; *see also* Memorial ¶ 67.

[354] *See* Memorial ¶ 69; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 **(C-47)**.

[355] *See* Memorial ¶ 69; Kaczmarek I, Appendix 3 **(CER-2)**; *see also* TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 **(C-47)**; Gillette I ¶ 17 **(CWS-5)**; Giacchino I ¶ 5 fn. 5 **(CWS-4)**; Calleja I ¶ 7 **(CWS-3)**.

[356] Kaczmarek I ¶ 96 **(CER-2)**. As set forth above, the LGE sets a minimum cost of capital of 7%. LGE, Art. 79 **(C-17)**.

[357] *See* Counter-Memorial ¶¶ 244-249.

[358] *Id*. ¶ 245.

increases in the price of petroleum and the devaluation of the currency were compensated by the periodic adjustments within each tariff period, according to the mechanisms under the regulatory framework."[359] Respondent also contends that "investments in infrastructure are long-term investments that require a significant initial investment to be recovered over the term of the agreement,"[360] and that, "because [EEGSA] is a long-term investment, the return of 7 percent to 13 percent mentioned in the LGE must be analyzed over the concession period, and not merely a single five-year period."[361] Finally, Respondent contends that Mr. Kaczmarek "completely ignores the restructuring of EEGSA's business, including the transfer of part of the transportation infrastructure and operations from EEGSA to Trelec,"[362] and that, contrary to Mr. Kaczmarek's first expert report, TECO's Board of Directors acknowledged, in January 2000, that "EEGSA's overall income was higher than plan[ned]."[363] Respondent's contentions are wrong.

72. First, as Dr. Barrera explains in his expert report, the tariffs set by the CNEE in 1998 for EEGSA were approximately 21% lower than those calculated in the technical study performed by Synex under the auspices of the World Bank.[364] In particular, while Synex estimated that the cost for a residential customer consuming 50 kWh per month in the fourth quarter would be US$ 7.13, the CNEE set rates based on the assumption that this cost would amount to US$ 5.62 per month.[365] In addition, while Synex calculated the VAD per kilowatt hour for medium voltage as US$ 5.54 per month, the CNEE set it at US$ 3.64 (peak) and US$ 2.46 (off-peak).[366] Similarly, for low voltage, while Synex calculated the VAD per kilowatt hour

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[359] *Id*.

[360] *Id*. ¶ 247.

[361] *Id*. ¶ 248.

[362] *Id*.

[363] *Id*. ¶ 249 (citing TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000, at 2-36 **(C-47)**).

[364] Barrera ¶ 36, fn. 13 (citing Synex, Determination of Electric Rates at Generation Levels – Transmission and Distribution in Guatemala **(C-22)**); Resolution No. CNEE-15-1998 **(C-35)**) **(CER-4)**.

[365] Barrera ¶ 36, fn. 13 (citing Synex, Determination of Electric Rates at Generation Levels – Transmission and Distribution in Guatemala **(C-22)**); Resolution No. CNEE-15-1998 **(C-35)**) **(CER-4)**.

[366] Barrera ¶ 36, fn. 13 (citing Synex, Determination of Electric Rates at Generation Levels – Transmission and Distribution in Guatemala **(C-22)**); Resolution No. CNEE-15-1998 **(C-35)**) **(CER-4)**.

at US$ 7.44 per month, the CNEE set it at US$ 4.80 (peak) and US$ 3.24 (off-peak).[367] This is confirmed by Mr. Giacchino, who notes that, when he was "performing the first tariff review for EEGSA as Director of NERA's tariff study in 2003, [he] recall[s] discussing the shortcomings of the Synex study, as well as the differences between the Synex study and the tariffs that had been set for the first tariff period, with the CNEE and PA Consulting (the CNEE's consultant at that time)."[368] Moreover, as Mr. Kaczmarek notes in his second expert report, Respondent's expert, Mr. Damonte, "does not provide any analysis countering our claim that the First Rate Period VAD is a poor benchmark and not the product of a VAD study."[369] Nor does Mr. Damonte engage in any analysis of the methodology used in the Synex study.[370]

73. Second, as Messrs. Maté and Calleja confirm in their second witness statements,[371] EEGSA's provisional tariffs for the 1998-2003 tariff period were low, and EEGSA was not able to generate cash flows sufficient to cover its operating expenses or the investments needed to upgrade its electricity distribution network during this first five-year tariff period. As a result, DECA's shareholders were required to make a series of monetary contributions in order to provide EEGSA with the liquidity needed to operate and to cover its investments and operating costs.[372] As Messrs. Maté and Calleja explain,[373] during the 1998-2003 tariff period, although quarterly adjustments were made pursuant to RLGE Article 87 to reflect increases in

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[367] Barrera ¶ 36, fn. 13 (citing Synex, Determination of Electric Rates at Generation Levels – Transmission and Distribution in Guatemala **(C-22)**); Resolution No. CNEE-15-1998 **(C-35))** **(CER-4)**.

[368] Giacchino II ¶ 3 **(CWS-10)**.

[369] Kaczmarek II ¶ 193 **(CER-5)**.

[370] *Id*.

[371] Calleja II ¶ 3 **(CWS-9)**; Maté II ¶ 3 **(CWS-12)**; *see also* Calleja I ¶ 7 **(CWS-3)**; Maté I ¶ 3 **(CWS-6)**.

[372] Maté II ¶ 3 **(CWS-12)**; Maté I ¶ 3 **(CWS-6)**; *see also* TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Apr. 2000, at 2 (noting that TPS had paid US$ 6 million to fund EEGSA's deficit temporarily) **(C-430)**; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated July 2002, at 3 (noting that TPS had "loaned the project company $5.52 million thus far in 2002, with the other project partners, Iberdrola and EDP, providing loans consistent with their ownership shares") **(C-444)**.

[373] Calleja II ¶ 3 **(CWS-9)**; Maté II ¶ 3 **(CWS-12)**.

fuel prices,[374] EEGSA's tariffs were not adjusted pursuant to RLGE Article 86, which provides for annual adjustments for changes in the cost of electricity, capacity purchases, and transmission tolls that are paid by the distributor and passed on to their regulated customers through the tariff.[375] In addition, with respect to the depreciation of Guatemala's currency, EEGSA's tariffs were only partially adjusted because, although the part of the VAD corresponding to costs in Quetzales was adjusted, the part corresponding to costs in US Dollars remained unchanged.[376]

74. That EEGSA's provisional tariffs for the 1998-2003 tariff period were not fully adjusted as required under the LGE and RLGE is further confirmed by the documentary record. As the April 2000 TPS Board Book write-up reflects,[377] the Board of Directors noted that "[c]ash management at EEGSA continues as a major effort due to the regulatory lag between expenditures and rate adjustments" and that "DECA has funded the deficiency temporarily," with US$ 6 million paid by TPS.[378] Similarly, the April 2001 TPS Board Book write-up notes that, while "EEGSA's energy sales for the first quarter 2001 were 25.5% higher than the same period for the previous year," despite this increase, "EEGSA continues to experience cash flow constraints due to the delay for the true up of purchase power costs as established by the Guatemalan General Electricity Law."[379] As the July 2002 TPS Board Book write-up further notes, "EEGSA had a shortfall in cashflow during the first half of 2002," and "TPS loaned the project company $5.52 million thus far in 2002, with the other project partners, Iberdrola and EDP, providing loans consistent with their ownership shares."[380] As the TPS Board of Directors

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[374] RLGE, Art. 87 ("Every three months, the difference between the mean capacity and energy purchase price and the initially calculated corresponding mean price shall be calculated to be passed-through to the distribution tariffs.") **(C-21)**.

[375] RLGE, Art. 86 **(C-21)**. As Mr. Maté confirms, this resulted in a significant cash deficit at EEGSA of approximately 500 million Quetzales. *See* Maté II ¶ 3 **(CWS-12)**.

[376] Calleja II ¶ 3 **(CWS-9)**; Maté II ¶ 3 **(CWS-12)**.

[377] TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Apr. 2000, at 2 **(C-430)**.

[378] *Id*.

[379] TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Apr. 2001 **(C-432)**.

[380] TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated July 2002, at 3 **(C-444)**.

noted, "[t]he cash needs are primarily due to a number of issues," including the "deferred cost of purchase power."[381]

75. Third, Respondent's assertion that "the return of 7 percent to 13 percent mentioned in the LGE must be analyzed over the concession period, and not merely a single five-year period,"[382] does not assist it. The LGE sets forth the range for the cost of capital for each tariff period: LGE Article 79 provides that "[t]he discount rate to be used in this Law to determine the rates shall be equal to the rate of cost of capital determined by the [CNEE] through studies commissioned with private entities that specialize in the matter," and that, "if the discount rate should be less than an annual real rate of seven percent or greater than an annual real rate of thirteen percent, the latter values, respectively, will be used."[383] As LGE Article 79 reflects, the distributor's cost of capital thus is calculated every five years, and it must be between 7% and 13% in real terms.[384] Guatemala's damages experts, Messrs. Abdala and Schoeters of Compass Lexecon, acknowledge as much in their expert report when they assert that the 7%-13% return is to be measured over a single tariff period: "[T]he regulation doesn't contemplate any retroactivity in order to adjust the historical profitability of the company. . . . That is, the regulation doesn't consider tariff adjustments to compensate in the present five-year period eventual deficits or excesses materialized in the past."[385] As discussed further below, however, Compass Lexecon[386] misinterprets the purpose of the IRR analysis.[387] Furthermore, its assertion directly contradicts Respondent's own statement to the contrary, quoted above.[388]

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[381] *Id*.

[382] Counter-Memorial ¶ 248.

[383] LGE, Art. 79 **(C-17)**.

[384] *Id*., Arts. 77, 79; *see also* Memorial ¶ 37; Alegría I ¶ 25 **(CER-1)**.

[385] Opinion on Damages and Economic Regulation by Manuel A. Abdala & Marcelo A. Schoeters (24 Jan. 2012) ¶ 87(a) (hereinafter "Compass Lexecon") **(RER-1)**; *see also id.* ¶ 7(c).

[386] Claimant notes that between 2001 and 2006, Marcelo Schoeters, one of the two co-authors of Compass Lexecon's damages report, was an Executive Consultant at Mercados Energéticos, one of the CNEE's consultants during EEGSA's 2008-2013 tariff review. Compass Lexecon ¶ 21 **(RER-1)**.

[387] *See infra* Section IV; Kaczmarek II ¶¶ 147-159 **(CER-5)**.

[388] Counter-Memorial ¶ 248.

76. Furthermore, Respondent's attempt to discredit the conclusion of Claimant's damages expert, Mr. Kaczmarek, that Claimant did not obtain the benchmark rates of return set forth in the LGE during the first tariff period (or, indeed, over the course of the investment), because Mr. Kaczmarek allegedly "ignore[d] the restructuring of EEGSA's business, including the transfer of part of the transportation infrastructure and operations from EEGSA to Trelec," [389] is based upon a fundamental misconception. As explained further below, when conducting his IRR analysis, Mr. Kaczmarek allocated 85% of the purchase price for DECA to EEGSA, based upon information set forth in the Sales Memorandum.[390] When calculating the returns received from the investment, as Respondent notes, Mr. Kaczmarek did not make any adjustment to account for the profits of EEGSA's other subsidiaries.[391] As Mr. Kaczmarek explains, including the subsidiaries in the IRR analysis serves to *increase* the rate of return.[392] Indeed, Respondent's own expert notes that, in 2004, the activities of the non-regulated subsidiaries accounted for approximately 30% of EEGSA's profits.[393] The inclusion of the returns from these subsidiaries in Claimant's IRR analysis thus serves to reinforce the conclusion that Claimant did not receive the benchmark returns during the first tariff period (or, indeed, over the course of the investment).[394]

77. Finally, while Respondent contends that TECO's Board of Directors acknowledged in January 2000 that "EEGSA's overall income was higher than plan[ned]," allegedly contradicting Mr. Kaczmarek's first expert report, this statement is taken entirely out of context.[395] As the January 2000 TPS Board Book write-up reflects,[396] the uptick in EEGSA's

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[389] *Id*.

[390] Kaczmarek I, Appendix 6 **(CER-2)**; Kaczmarek II, Appendix 5 **(CER-5)**; Sales Memorandum dated May 1998, at 6, 11 **(C-29)**.

[391] Counter-Memorial ¶ 248; *see also* Compass Lexecon, ¶ 87(b) fn. 70 **(RER-1)**.

[392] Kaczmarek II ¶ 159 **(CER-5)**.

[393] Compass Lexecon ¶ 87(b) fn. 70 **(RER-1)**; *see also* Kaczmarek II ¶ 146 **(CER-5)**.

[394] Kaczmarek II ¶ 146 **(CER-5)**.

[395] Counter-Memorial ¶ 249 (citing TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000 **(C-47)**).

[396] TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000 **(C-47)**.

overall income in 1999 was not due to EEGSA's financial performance, but to the 14% devaluation of Guatemala's currency in 1999, which created "an accounting gain due to the restatement of EEGSA's local currency debt."[397] As the Board Book write-up explains, "[a]s a result of rapid increases in fuel costs and a 14 percent devaluation of the Guatemalan currency in 1999, purchased power revenues lagged cost," and that, "[w]hile this lag negatively affects TPS' income, the devaluation creates an accounting gain due to the restatement of EEGSA's local currency debt" and, "[a]s a result, EEGSA's overall income was higher than plan."[398] The January 2000 TPS Board Book write-up thus does not contradict Mr. Kaczmarek's first expert report, as Respondent asserts, but confirms that EEGSA's tariffs during the 1998-2003 tariff period were not generating cash flows sufficient to cover EEGSA's operating expenses. As set forth in the Memorial and discussed below, 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.[399]

D. EEGSA's Tariff Review For The 2003-2008 Tariff Period Was Conducted In Accordance With The Requirements Of The LGE And RLGE

78. In its Memorial, Claimant demonstrated that EEGSA's tariff review for the 2003-2008 tariff period resulted in returns consistent with the TECO group of companies' expectations under the LGE and RLGE and that the tariff review process was conducted by the CNEE and EEGSA in good faith and in a spirit of collaboration and cooperation, as well as in compliance with law.[400] As Claimant explained in its Memorial, the year before EEGSA's new tariffs were due to take effect, the CNEE prequalified six consulting firms to bid on preparing EEGSA's VAD study under LGE Article 74, and EEGSA selected NERA Economic Consulting to perform

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[397] *Id*., at 1.

[398] *Id.*

[399] *See* Memorial ¶ 71; Calleja II ¶ 3 **(CWS-9)**; Maté II ¶ 3 **(CWS-12)**.

[400] *See* Memorial ¶¶ 72-83.

its VAD study, with a team headed by Mr. Giacchino.[401] Claimant further explained that the CNEE retained PA Consulting to advise it during the tariff review process,[402] and that, in October 2002, the CNEE issued the terms of reference for EEGSA's VAD study, which provided that the VAD study should be performed using a top-down methodology.[403] As Claimant noted in its Memorial, this meant that EEGSA's consultant would use the actual network (and EEGSA's actual costs) and then make adjustments to optimize the network so that it resembled a model efficient company.[404]

79. Claimant further demonstrated in its Memorial that EEGSA's tariff review for the 2003-2008 tariff period was conducted in a "climate of collaboration" between EEGSA, the CNEE, and the parties' consultants, and that the parties regularly held meetings where NERA reported on its progress and responded to the CNEE's inquiries.[405] As Claimant explained, this collaboration significantly contributed to the progress of EEGSA's VAD study, as agreement was reached regarding the methodology and the partial results at each meeting.[406] Following successful negotiations between the parties, the CNEE approved NERA's VAD study, which resulted in a VNR of US$ 584 million and a revenue stream of approximately US$ 110 million annually.[407] As Claimant explained, 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 Article 79.[408] As Mr. Kaczmarek confirmed in his first expert report,[409] during the second tariff period, EEGSA's

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[401] *See* Memorial ¶ 72; Maté I ¶ 4 **(CWS-6)**; Calleja I ¶ 9 **(CWS-3)**; Giacchino I ¶ 4 **(CWS-4)**.

[402] *See* Memorial ¶ 72; Maté I ¶ 4 **(CWS-6)**; Calleja I ¶ 9 **(CWS-3)**; Giacchino I ¶ 9 **(CWS-4)**.

[403] Resolution No. CNEE-88-2002 dated 23 Oct. 2002 **(C-59)**; *see also* Memorial ¶ 73; Giacchino I ¶ 8 **(CWS-4)**; Kaczmarek I ¶ 88 **(CER-2)**.

[404] *See* Memorial ¶ 73; JONATHAN LESSER & LEONARDO GIACCHINO, FUNDAMENTALS OF ENERGY REGULATION 85-87 (2007) **(C-99)**. Respondent does not dispute this point in its Counter-Memorial, but notes that "this review used the SER *top-down approach* system, applying actual data from the company to construct the model company, which was adjusted for efficiency." Counter-Memorial ¶ 258 (emphasis in original).

[405] *See* Memorial ¶ 74; Maté I ¶ 4 **(CWS-6)**; Calleja I ¶ 10 **(CWS-3)**; Giacchino I ¶ 10 **(CWS-4)**.

[406] *See* Memorial ¶ 74; Giacchino I ¶ 10 (*citing*, *e.g.*, Minutes of Meeting with CNEE dated 4 Apr. 2003 **(C-63)**) **(CWS-4)**.

[407] *See* Memorial ¶¶ 75-82.

[408] *See id*. ¶ 81; Kaczmarek I ¶ 96, Figure 10 **(CER-2)**; *see also* LGE, Art. 79 **(C-17)**.

[409] *See* Memorial ¶ 81; Kaczmarek I ¶ 96, Figure 10 **(CER-2)**.

return on invested capital ranged between 7% to 10% in real terms—within the range of 7% to 13%, in real terms, provided by the LGE.[410]

80. In its Counter-Memorial, Respondent acknowledges that the CNEE hired external consultants for EEGSA's 2003-2008 tariff review, but asserts that the support from these external consultants "was limited to an analysis of the stage reports in the tariff study" and that "the consultant did not analyze the distributor's tariff study in full nor did he conduct a parallel study,"[411] as Mr. Bernstein had recommended in his 2002 Report regarding the ToR for EEGSA's 2003-2008 tariff review.[412] Respondent further asserts that, "without an expert to conduct an independent study during the 2003-2008 period, the CNEE was significantly limited in its supervision of NERA's stage reports" and that, "[a]lthough the CNEE could make certain comments on the study, it did not have a 'benchmark' or reference against which it could compare the results of the study" and thus "was unable to fully review the voluminous information to justify the reference prices included in the VNR."[413] Respondent also asserts that, "due to a lack of internal resources and outside advisory services, many elements of the EEGSA tariff study—which would have been rightfully challenged by the CNEE—were never objected to" and that "[s]ome of these elements were as obvious as the payment of the operator's fee in the amount of US$4.889 million, even when the bidding documents and the Operating Contract clearly indicated that such a fee would be incorporated in the tariffs only during the first five-year period."[414] Respondent thus asserts that "this tariff review resulted in very disproportionate values for EEGSA as compared to the average throughout Latin America,"[415] and led to the

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[410] LGE, Art. 79 **(C-17)**; *see also* Gillette I ¶ 19 (stating that "[a]lthough still below the expected level that the company required to invest in DECA II, the cumulative returns did start approaching the 8% range of utility returns in the U.S. during the second VAD period") **(CWS-5)**.

[411] Counter-Memorial ¶ 255.

[412] Juan Sebastián Bernstein, *Some Methodological Aspects to Be Considered in the Terms of Reference for the Study of Added Value on Distribution* dated May 2002 **(C-442)**.

[413] Counter-Memorial ¶ 257.

[414] *Id*. ¶ 281 (internal citations omitted).

[415] *Id*. ¶ 259.

reform of the RLGE in 2003 by Government Accord No. 787-2003 dated 5 December 2003.[416] Respondent's assertions are incorrect, as set forth below.

81. Claimant notes at the outset that Respondent's assertions regarding EEGSA's tariff review process for the 2003-2008 tariff period are based solely upon Mr. Colóm's uncorroborated hearsay statements.[417] As Mr. Calleja confirms in his second witness statement, Mr. Colóm was not a member of the CNEE during EEGSA's 2003-2008 tariff review and thus did not participate in this tariff review himself; the CNEE's Directors at that time were Messrs. Luis García, Elmer Ruiz, and Edgar Navarro,[418] none of whom has offered testimony in this arbitration. In addition, while Mr. Colóm asserts that he was told by former Minister of Energy and Mines Carmen Urízar (who likewise has not testified in this arbitration), among others, that "the CNEE had limited technical support to analyze the successive stage reports of" EEGSA's VAD study and that the CNEE thus "was not able to adequately review the information submitted by the distributor,"[419] Minister Urízar, like Mr. Colóm, did not participate in EEGSA's 2003-2008 tariff review, as the MEM is not involved in the tariff review process.

82. As Messrs. Calleja and Giacchino further explain in their second witness statements,[420] 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, which was headed by the then Manager of the CNEE's Tariff Division, Mr. Roberto Urdiales.[421] As Mr. Calleja notes, "Mr. Urdiales previously had worked at INDE and at EEGSA before its privatization for many years and had significant experience and recognition in Guatemala's electricity sector."[422] As Messrs. Maté,

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[416] *Id*. ¶ 264.

[417] *See id*. ¶¶ 250-259.

[418] Calleja II ¶ 5 **(CWS-9)**.

[419] Witness Statement of Carlos Eduardo Colóm Bickford dated 24 Jan. 2012 ("Colóm") ¶ 49 **(RWS-1)**.

[420] Calleja II ¶ 5 **(CWS-9)**; Giacchino II ¶ 8 **(CWS-10)**; *see also* Calleja I ¶¶ 9-10 **(CWS-3)**; Letter from the CNEE to EEGSA and NERA dated 18 Feb. 2003 **(C-451)** (noting that the CNEE had hired PA Consulting to assist in the supervision of EEGSA's VAD study).

[421] Calleja II ¶ 5 **(CWS-9)**; *see also* Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.7 **(C-59)**.

[422] Calleja II ¶ 5 **(CWS-9)**.

Calleja, and Giacchino confirm, during the course of EEGSA's 2003-2008 tariff review, EEGSA and its prequalified consultant, NERA, met numerous times with the CNEE and its consultants to discuss issues that arose from the preparation of EEGSA's VAD study, which the parties referred to as "Coordination Meetings."[423] As Mr. Maté notes, contrary to Mr. Colóm's hearsay statements, "the CNEE and its external consultant, PA Consulting, always showed a deep understanding of the issues related to EEGSA's VAD study and provided extensive comments to EEGSA and its prequalified consultant, NERA, regarding that study."[424] Mr. Giacchino further notes that the CNEE and PA Consulting "were actively involved in the tariff review process and provided extensive comments not only on NERA's stage reports, but also on the tariff study."[425] As Mr. Calleja confirms, "the CNEE made extensive comments on EEGSA's VAD study both during [the] Coordination Meetings and in writing, including with respect to the payment of EEGSA's management fee,"[426] which Respondent asserts never was raised by the CNEE during EEGSA's tariff review.[427] As the 1 June 2003 letter from NERA to the CNEE demonstrates, that is wrong; the CNEE did make observations with respect to the management fee, to which NERA responded in detail.[428] The CNEE's terms of reference for PA Consulting, as well as the tariff review schedule prepared by PA Consulting for the CNEE, further reflect the nature of PA Consulting's involvement in EEGSA's 2003-2008 tariff review, showing that PA Consulting had

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[423] Maté II ¶ 4 **(CWS-12)**; Maté I ¶ 4 **(CWS-6)**; Calleja II ¶ 5 **(CWS-9)**; Calleja I ¶ 10 **(CWS-3)**; Giacchino II ¶ 6 **(CWS-10)**; Giacchino I ¶¶ 9-10 **(CWS-4)**; *see also* Minutes of Meeting with the CNEE dated 4 Apr. 2003 (noting that the CNEE's Technical Committee "want[s] to receive quickly the methodology" and that "[t]hey specially asked for the models so as to become familiar with them") **(C-63)**.

[424] Maté II ¶ 4 **(CWS-12)**; *see also* Letter from NERA to the CNEE and EEGSA dated 1 June 2003 **(C-455)**.

[425] Giacchino II ¶ 8 **(CWS-10)**.

[426] Calleja II ¶ 5 **(CWS-9)**; *see also* Letter from NERA to the CNEE and EEGSA dated 1 June 2003, section F (**C-455**).

[427] Counter-Memorial ¶ 281.

[428] Letter from NERA to the CNEE and EEGSA dated 1 June 2003, section F **(C-455)**; *see also* Calleja II ¶ 5 **(CWS-9)**; Giacchino II ¶ 8 **(CWS-10)**; Letter No. CNEE-4748-2003, GT-NotaS-398 from R. Urdiales to L. Giacchino and M. Calleja dated 4 July 2003, at 4 **(C-67)**.

regular meetings and telephone conferences with the CNEE to carry out its review and analysis of EEGSA's VAD study.[429]

83. As Messrs. Maté and Calleja confirm, although the discussions between the CNEE and EEGSA regarding EEGSA's VAD study were tense, the parties maintained a constructive dialogue throughout the tariff review process and eventually resolved all of their differences without having to resort to an Expert Commission.[430] 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 Articles 71-79.[431] EEGSA's new tariffs included a notable increase in the VAD, as well as a 10 percent electricity adjustment surcharge so that EEGSA could recover the accrued deferred cost from the previous tariff period under RLGE Article 86.[432] As Mr. Calleja explains in his second witness statement, because the CNEE had not approved an annual adjustment of EEGSA's tariff from September 1998 until 1 August 2003, EEGSA's accrued deferred cost was significant and, when the CNEE established EEGSA's tariff for the 2003-2008 tariff period, the CNEE and EEGSA agreed that the accrued deferred cost as of 31 July 2003 would be recovered over the course of the following 60 months.[433]

84. Respondent also asserts that the 2003-2008 VNR "resulted in very disproportionate values for EEGSA as compared to the average throughout Latin America."[434] Respondent cites to Mr. Damonte's purported benchmarking analysis in support of this proposition.[435] However, as discussed in greater detail below, Mr. Damonte's purported

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[429] *See, e.g.*, Email from Ing. Sergio Velasquez to R. Urdiales, M. Peláez, J.F. Orozco, L. Garcia, E. Ruiz, E. Navarro dated 5 Feb. 2003, attaching Cronograma Actualizado and TDR Revision Tarifaria 2003 **(C-450)**.

[430] Maté I ¶ 4 **(CWS-6)**; Calleja I ¶ 10 **(CWS-3)**.

[431] Resolution No. CNEE-67-2003 dated 1 Aug. 2003 (**C-79**); *see also* LGE, Arts. 71-79 **(C-17)**.

[432] *See* Calleja II ¶ 5 **(CWS-9)**; Resolution No. CNEE-67-2003 dated 1 Aug. 2003 (**C-79**); RLGE, Art. 86 **(C-21)**.

[433] Calleja II ¶¶ 3, 5 & fn. 27 **(CWS-9)**.

[434] Counter-Memorial ¶ 259.

[435] *Id*. ¶ 259 fn. 324; Damonte ¶ 251 **(RER-2)**.

benchmarking analysis is entirely unreliable and not a basis to draw any conclusions regarding EEGSA's VNRs.[436]

85. Respondent further asserts that, following EEGSA's 2003-2008 tariff review, RLGE Article 99 was amended by the MEM in December 2003 in order to allow the CNEE to issue and implement a tariff schedule immediately, where the distributor's tariff schedule has expired, and that the purpose of this amendment was to prevent the distributor from continuing to apply its previous tariff schedule.[437] As Professor Alegría demonstrates, this is wrong; amended RLGE Article 99 gives the CNEE no such authority.[438] As Professor Alegría explains, and as Messrs. Maté and Calleja confirm, the MEM amended RLGE Article 99 by Government Accord No. 787-2003 dated 5 December 2003[439] in order to resolve a situation created by an *amparo* request to suspend EEGSA's existing tariff schedule.[440] That *amparo* request had been filed on 20 May 2003 by the Human Rights Ombudsman against the quarterly increase in EEGSA's tariffs that had gone into effect on 1 May 2003, which suspended EEGSA's existing tariff schedule provisionally.[441] The provisional suspension of EEGSA's tariff schedule was lifted on 23 May 2003.[442] If the provisional suspension of EEGSA's tariff schedule had not been lifted, EEGSA would not have had a valid tariff schedule to apply and, thus, could not have charged its customers and continued to operate.[443] In order to resolve this issue, the MEM subsequently amended RLGE Article 99 in order to allow the CNEE to issue and implement a tariff schedule immediately where the distributor's current tariff schedule has been suspended or invalidated by

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[436] *See infra* Section II.E.5.e.

[437] Counter-Memorial ¶¶ 264-268.

[438] *See* Alegría II ¶ 28 **(CER-3)**.

[439] Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004 **(C-82)**.

[440] *See* Alegría II ¶ 28 **(CER-3)**; Alegría I ¶ 32 **(CER-1)**; *Amparo* Request filed by the Human Rights Ombudsman before the Third Court of Appeals dated 20 May 2003 **(C-452)**; Calleja II ¶¶ 6-7 **(CWS-9)**.

[441] *Amparo* Request filed by the Human Rights Ombudsman before the Third Court of Appeals dated 20 May 2003 **(C-452)**; *see also* Alegría II ¶ 28 **(CER-3)**; Prensa Libre, *Amparo Action Against EEGSA*, dated 21 May 2003 **(C-453)**; Calleja II ¶¶ 6-7 **(CWS-9)**.

[442] Prensa Libre, *Electricity Tariff Increase Upheld*, dated 24 May 2003 **(C-454)**.

[443] *See* Alegría II ¶ 28 **(CER-3)**; Alegría I ¶ 32 **(CER-1)**; Calleja II ¶¶ 6-7 **(CWS-9)**.

a court order such that the distributor has no tariff schedule to apply.[444] Amended RLGE Article 99 thus provides that, if the distributor ends up without a tariff schedule (*i.e.*, where a court suspends or invalidates the distributor's current tariff schedule), the CNEE shall issue a tariff schedule immediately.[445]

86. As Mr. Calleja explains, in May 2004, the Human Rights Ombudsman filed another *amparo* request against the quarterly increase in EEGSA's tariffs, which again suspended EEGSA's tariff schedule.[446] In order to allow EEGSA to continue to operate, the CNEE issued a second tariff schedule for EEGSA under amended RLGE Article 99.[447] As Mr. Calleja notes, and as Professor Alegría confirms, this new tariff schedule contained the same VAD as the suspended tariff schedule, because the CNEE cannot approve any VAD other than the one obtained through the procedure established by law.[448] EEGSA appealed the *amparo* and, on 2 March 2005, the Constitutional Court granted EEGSA's appeal.[449] As Messrs. Maté and Calleja confirm, the 2003 amendments to the RLGE were designed to protect distributors by allowing the CNEE to reissue and implement a tariff schedule immediately, where the distributor's current tariff schedule has been suspended or invalidated; the amendments were not designed to prevent distributors from seeking to maintain their previous tariff schedules.[450] EEGSA consequently did not raise any objections to the 2003 amendments to the RLGE.[451]

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[444] *See* Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004 **(C-82)**; Alegría II ¶ 28 **(CER-3)**; Maté II ¶ 5 **(CWS-12)**; Calleja II ¶¶ 6-7 **(CWS-9)**.

[445] *See* Alegría II ¶ 28 **(CER-3)**; Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004, Art. 2 (amending RLGE Art. 99) ("In no case shall the activity of Final Distribution of the electric service be carried out without an effective tariff schedule. If a Distributor does not have a tariff schedule, the National Electric Energy Commission is charged with issuing and immediately putting into effect a tariff schedule, to comply with the above-enunciated principle.") **(C-82)**.

[446] Calleja II ¶ 6 **(CWS-9)**; Amparo Request from the Human Rights Ombudsman to the Fourth Civil Court dated 5 May 2004 **(C-462)**.

[447] Calleja II ¶ 6 **(CWS-9)**; Resolution No. CNEE-127-2004 dated 24 Nov. 2004 **(C-466)**.

[448] Calleja II ¶ 6 **(CWS-9)**; Alegría II ¶ 28 **(CER-3)**; Resolution No. CNEE-127-2004 dated 24 Nov. 2004 **(C-466)**.

[449] Decision of the Constitutional Court of Guatemala in File No. 2287-2004 dated 2 Mar. 2005 (**C-467**).

[450] Maté II ¶ 5 **(CWS-12)**; Calleja II ¶ 7 **(CWS-9)**.

[451] Maté II ¶ 5 **(CWS-12)**.

87. Indeed, as Mr. Calleja explains, RLGE Article 98, as amended by Government Accord No. 787-2003, expressly provided that, where the new tariff schedule was not published due to the distributor's error, *i.e.*, where a distributor failed to deliver a VAD study or its corrections to the study, the distributor may not modify its tariffs, but "shall continue applying the effective tariffs at the time of the termination of the effective term of such tariffs."[452] Thus, where a distributor failed to submit a VAD study or failed to submit its corrections to the study, Government Accord No. 787-2003 provided that the distributor's prior tariff schedule was to remain in force; it did not grant the CNEE the power to issue a new tariff schedule under those circumstances.[453] This is confirmed by Professor Alegría. As Professor Alegría explains,[454] under amended RLGE Article 98, where the distributor's new tariff schedule was not published because of the distributor's error, the distributor's previous tariff schedule would have continued to apply without any adjustments;[455] while, under amended RLGE Article 99, "[i]f the [CNEE] has not published the new tariffs, the tariffs of the previous tariff schedule shall continue to apply with their adjustment formulas."[456] As Professor Alegría notes, this is fully consistent with LGE Article 78, which provides that, "[i]n the event that upon the expiration of the period of validity of the rates, the rates have not been set for the next period on account of the [CNEE], they may be adjusted by the awardees according to the automatic adjustment formulas."[457] Thus, contrary to Respondent's assertions in this arbitration, the RLGE was not modified in 2003 "to resolve instances in which the distributor did not have a tariff schedule after its prior tariff schedule had expired,"[458] but was modified to expressly provide that, in such circumstances, the distributor's

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[452] Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004, Art. 1 (amending RLGE Art. 98) **(C-82)** ("Until the distributor delivers the tariff studies, or until it performs the corrections to same, according to what is stipulated in the previous paragraphs, it may not modify its tariffs and it shall continue applying the effective tariffs at the time of the termination of the effective term of such tariffs."); *see also* Calleja II ¶ 7 **(CWS-9)**.

[453] Calleja II ¶ 7 **(CWS-9)**.

[454] *See* Alegría II ¶ 29 **(CER-3)**.

[455] Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004, Art. 1 (amending RLGE Art. 98) **(C-82)**.

[456] *Id*., Art. 2 (amending RLGE Art. 99).

[457] LGE, Art. 78 **(C-17)**; *see also* Alegría II ¶ 29 **(CER-3)**.

[458] Counter-Memorial ¶ 266.

previous tariff schedule would continue to apply, either with adjustments (where the CNEE was at fault) or without adjustments (where the distributor was at fault).

88. Furthermore, the CNEE does not have any obligation under amended RLGE Article 99 to ensure that approved tariff schedules are in place at the end of each five-year tariff period, as Mr. Colóm asserts in his witness statement.[459] As Mr. Calleja explains, and as noted above, amended RLGE Article 99 provides that, "[i]f the [CNEE] has not published the new tariffs, the tariffs of the previous tariff schedule shall continue to apply with their adjustment formulas."[460] This is confirmed by LGE Article 78, which provides that, "[i]n the event that upon the expiration of the period of validity of the rates, the rates have not been set for the next period on account of the [CNEE], they may be adjusted by the awardees according to the automatic adjustment formulas."[461] Thus, the only circumstance in which the CNEE may issue and implement a tariff schedule immediately under amended RLGE Article 99 is where the distributor's current tariff schedule has been suspended or invalidated, and not where the distributor's current tariff schedule has expired.[462] As also explained above, if the CNEE issues and implements a tariff schedule under amended RLGE Article 99, the new tariff schedule will contain the same VAD as the suspended tariff schedule, because the CNEE does not have the authority in such circumstances to calculate a new VAD.[463] As set forth below, on the eve of EEGSA's 2008-2013 tariff review, the MEM, however, introduced a new amendment to RLGE Article 98 in March 2007 in order to grant the CNEE the authority to set the distributor's tariff schedule on the basis of its own independent VAD study in certain limited circumstances.

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[459] Colóm ¶ 37 (asserting that, under amended RLGE Article 99, the CNEE has an obligation "to ensure that approved tariff schedules are in place upon expiry of each five-year tariff period") **(RWS-1)**.

[460] Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004, Art. 2 (amending RLGE Art. 99) **(C-82)**; *see also* Calleja II ¶ 8 **(CWS-9)**.

[461] LGE, Art. 78 **(C-17)**; *see also* Calleja II ¶ 8 **(CWS-9)**.

[462] *See* Calleja II ¶ 8 **(CWS-9)**.

[463] *Id*. ¶ 6; Alegría II ¶ 28 **(CER-3)**.

E. EEGSA's Tariff Review For The 2008-2013 Tariff Period Was Conducted In Violation Of The Regulatory Framework And In Violation Of Guatemala's Representations During The Privatization Process

89. In its Memorial, Claimant demonstrated that, from the beginning of EEGSA's 2008-2013 tariff review, Guatemala disregarded the very legal and regulatory framework that it had established to attract foreign investment in its electricity sector in order to prevent an increase in EEGSA's VAD, which, due to the sharp rise in the cost of materials used in electricity distribution, particularly copper and aluminum, was inevitable under the LGE and RLGE.[464] In order to avoid an unpopular increase in electricity tariffs, the CNEE thus arbitrarily and unlawfully imposed its own VAD on EEGSA, ignoring the Expert Commission's Report and EEGSA's revised VAD study, and relying instead upon its own independent VAD study, which neither EEGSA nor its prequalified consultant, Bates White, had been given the opportunity to review and which contravened several rulings of the Expert Commission.[465] As Claimant demonstrated in its Memorial, both the process and the result of EEGSA's 2008-2013 tariff review were unlawful and arbitrary, and contravened both the letter and the spirit of the laws that Guatemala had adopted specifically to entice foreign investment in EEGSA, as well as the representations that Guatemala had made during the privatization process regarding EEGSA's distribution tariffs.[466]

90. In its Counter-Memorial, Respondent contends that, contrary to Claimant's assertions, "the CNEE does not have any political or other interests in preventing an increase in distribution tariffs" and that "[i]ts only obligation is to ensure compliance with the LGE."[467] Respondent further contends that, under the circumstances, "the CNEE decided that the most reasonable option would be to use the tariff study prepared by the Sigla consultant to set the

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[464] *See* Memorial ¶¶ 84-199; *see also* Giacchino I ¶¶ 73-75 (explaining that "there was a tremendous increase in the cost of raw materials" in the intervening period, "particularly copper and aluminum, which impacted the cost of electrical materials") **(CWS-4)**; Kaczmarek II, Table 9 **(CER-5)**.

[465] *See* Memorial ¶¶ 84-199.

[466] *See id*. ¶¶ 84-199.

[467] Counter-Memorial ¶ 452.

tariffs,"[468] because EEGSA's "new schedule had to take effect on August 1" and therefore "had to [be] published in the Diario de Centroamérica by Thursday, July 31 at the latest,"[469] and because "there was no legal authority under the LGE and RLGE to review the distributor's study for a third time."[470] Respondent also contends that the CNEE's actions in adopting its own VAD study were lawful and reasonable, because EEGSA's 2008-2013 tariffs allegedly "reflect the efficient cost of the electricity distribution service."[471] Respondent's contentions are belied by the documentary evidence. As set forth below, this evidence shows not only that the CNEE proposed the 2007 amendment to RLGE Article 98 at the eleventh hour after the deadline had passed for comments from the electricity industry, but that the CNEE, from the very beginning of EEGSA's 2008-2013 tariff review, was intent upon decreasing EEGSA's VAD. The evidence further shows that the CNEE directly intervened in the Expert Commission process through a series of *ex parte* communications with Jean Riubrugent, the CNEE's appointee to the Expert Commission, and that the reasons proffered by Respondent for the CNEE's actions in rejecting EEGSA's revised VAD study and in adopting its own independent VAD study are, in fact, nothing more than *ex post facto* justifications without any basis in the contemporaneous documentary record.

1. Guatemala Amended RLGE Article 98 To Grant Itself The Right To Rely Upon Its Own Independent VAD Study To Set The Distributor's Tariffs In Certain Circumstances

91. As Claimant demonstrated in its Memorial,[472] the first indication that Guatemala intended to re-politicize the tariff review process occurred in March 2007, shortly before EEGSA's 2008-2013 tariff review was to commence, when the MEM unexpectedly amended RLGE Article 98 to grant the CNEE the right to rely upon its own independent VAD study to set the distributor's tariffs in certain circumstances.[473] As Messrs. Maté and Calleja explained in

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[468] *Id*. ¶ 417.

[469] *Id*. ¶ 415.

[470] *Id*. ¶ 419.

[471] *Id*. ¶ 420.

[472] *See* Memorial ¶¶ 84-93.

[473] *See* Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 **(C-104)**.

their first witness statements,[474] despite the fact that the MEM held meetings with industry participants to discuss and obtain feedback regarding the proposed amendments to the RLGE, the amendment to RLGE Article 98 was not discussed or disclosed to the electricity industry before Government Accord No. 68-2007 was issued by the MEM on 2 March 2007, Article 21 of which amended RLGE Article 98.[475] As Professor Alegría explained in his first expert legal opinion,[476] this amendment was unconstitutional, not only because it contravened the plain language of LGE Article 74, which provides that the distributor shall calculate the VAD through a study entrusted to a consultant prequalified by the CNEE,[477] but also because it was inconsistent with the very purpose of the LGE, which, as set forth above, was to establish a reliable, depoliticized tariff review process in which independent consultants calculate the VAD on the basis of purely economic and technical information.[478] Claimant further demonstrated that, following the issuance of Government Accord No. 68-2007, EEGSA seriously considered challenging the amendment to RLGE Article 98, but ultimately decided not to do so, because EEGSA feared possible retaliation from the CNEE during its forthcoming tariff review, and because a final decision would not have been reached in any judicial challenge against the amendment before the completion of EEGSA's tariff review.[479]

92. In its Counter-Memorial, Respondent contends that RLGE Article 98 was amended in 2007 "in order to ensure that [RLGE] Articles 98 and 99 [were] fully consistent,"[480] asserting that "the continued application of the prior tariff schedule [under original RLGE Article

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[474] Maté I ¶ 6 **(CWS-6)**; Calleja I ¶ 12 **(CWS-3)**.

[475] Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 **(C-104)**; *see also* Letter from MEM to the CNEE dated 18 Jan. 2007 (attaching draft resolution with proposed amendments to the RLGE) **(C-101)**; *see also* Letter No. CNEE-13063-2007 from the CNEE to the President of Guatemala dated 22 Jan. 2007, at 1-3 **(C-102)**.

[476] Alegría I ¶¶ 36-40 **(CER-1)**.

[477] LGE, Art. 74 **(C-17)**.

[478] Memorial ¶ 84.

[479] *See id*. ¶ 93; Maté I ¶ 6 **(CWS-6)**; Calleja I ¶ 13 **(CWS-3)**.

[480] Counter-Memorial ¶ 278; *see also* Aguilar ¶ 40 ("The 2007 amendments made Article 98 consistent with Article 99, modified in 2003.") **(RER-3)**.

98] could create perverse incentives for distributors."[481] Respondent further contends that the fines that the CNEE may impose upon distributors for failing to comply with their obligations under the LGE do not "address the negative impact that a deviation from the Terms of Reference or the timeframes has on the regulatory system (inefficient tariffs, harm to the consumer),"[482] and that, "given the magnitude of capital involved in a tariff review, the proposed fines will not generate a sufficient disincentive to alter the distributor's conduct."[483] Respondent also contends that "at no point did EEGSA or its shareholders (or other distributors) ever object, formally or informally" to Government Accord No. 68-2007,[484] and that EEGSA's alleged fear of reprisal from the CNEE during the 2008-2013 tariff review "is inconsistent with the challenge, and even the request for injunctive relief, that EEGSA presented shortly after the release of the first version of the Terms of Reference for the 2008 tariff review."[485] Respondent's contentions are incorrect.

93. First, as Professor Alegría explains in his second expert legal opinion,[486] RLGE Article 98 was not amended in 2007 "in order to ensure that [RLGE] Articles 98 and 99 [were] fully consistent."[487] To the contrary, RLGE Article 98 was amended to introduce the possibility that the CNEE, in certain limited circumstances, could issue the distributor's tariff schedules on the basis of its own independent VAD study; this possibility, as Professor Alegría notes, is not contemplated in amended RLGE Article 99.[488] As set forth above, amended RLGE Article 99 provides that the CNEE may issue and implement a tariff schedule immediately on the basis of

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[481] Counter-Memorial ¶ 278; *see also* Aguilar ¶ 38 (noting that the 2007 amendment to RLGE Article 98 was "aimed at preventing the Distributors from manipulating, determining or limiting the CNEE's powers by failing to submit or make corrections to the tariff studies in order to continue to benefit from the application of the tariffs in force at the time when their validity period expires") **(RER-3)**.

[482] Counter-Memorial ¶ 279.

[483] *Id*.

[484] *Id*. ¶ 283.

[485] *Id*. ¶ 285.

[486] *See* Alegría II ¶ 49 **(CER-3)**.

[487] Counter-Memorial ¶ 278; *see also* Aguilar ¶ 40 ("The 2007 RLGE amendments made Article 98 consistent with Article 99, modified in 2003.") **(RER-3)**.

[488] *See* Alegría II ¶ 49 **(CER-3)**; Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004, Art. 2 (amending RLGE Art. 99) **(C-82)**.

the previously-established VAD, where the distributor's existing tariff schedule has been suspended or invalidated by a court order such that the distributor has no tariff schedule to apply; amended RLGE Article 99 does not give the CNEE the authority to rely upon its own independent VAD study in issuing the distributor's new tariff schedule under LGE Article 76.[489] The 2007 amendments to RLGE Article 98, by contrast, granted the CNEE, for the very first time, the authority to issue the tariff schedule based on its own independent VAD study.

94. As Professor Alegría explains, RLGE Article 98 (as amended in 2007) and RLGE Article 99 (as amended in 2003) provide as follows: (i) where the CNEE publishes the distributor's new tariff schedules, but those schedules subsequently are suspended or invalidated by a court order, the CNEE may issue and implement tariff schedules immediately under amended RLGE Article 99; (ii) where the distributor engages in the tariff review process, but the CNEE fails to publish the distributor's new tariff schedules, the distributor's previous tariff schedules will continue to apply with the appropriate adjustments under amended RLGE Article 99 and LGE Article 78; and (iii) where the distributor fails to engage in the tariff review process by refusing to submit a VAD study or by refusing to respond to the CNEE's observations, the CNEE is entitled to issue the distributor's new tariff schedules on the basis of its own independent VAD study or on the basis of its own corrections to the distributor's VAD study under amended RLGE Article 98.[490]

95. While Respondent asserts that RLGE Article 98 "was also amended to require the CNEE to hire its own prequalified expert to conduct an independent tariff study" and that amended RLGE Article 98 thus allegedly imposes "this as an obligation of the CNEE so as to not leave it to the discretion of the CNEE's Directors,"[491] as Professor Alegría notes in his second expert legal opinion, "[n]owhere in amended RLGE Article 98 does this Article impose an obligation on the CNEE to 'hire its own prequalified expert to conduct an independent tariff

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[489] *See supra* ¶¶ 85-88; Alegría II ¶ 49 **(CER-3)**.

[490] *See* LGE, Art. 78 (**C-17**); Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004, Art. 2 (amending RLGE Art. 99) (**C-82**); Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) **(C-104)**.

[491] Counter-Memorial ¶ 280.

study.'"[492] Amended RLGE Article 98 provides that, "[i]n case of the Distributor's failure to deliver the studies or the corrections to same, the Commission shall be empowered to issue and publish the corresponding tariff schedule, based on the tariff study the Commission performs independently or performing the corrections to the studies begun by the distributor."[493] As Professor Alegría notes, contrary to LGE Article 74, which requires the distributor to hire a consultant prequalified by the CNEE,[494] amended RLGE Article 98 imposes no obligation upon the CNEE to hire a prequalified consultant to perform its independent VAD study.[495]

96. Second, Respondent's argument that the distributor, under original RLGE Article 98, would have had a "perverse incentive" not to participate in the tariff review process, so that its previous tariff schedule would have continued to apply assumes that the distributor's tariffs will decrease over time.[496] As set forth above, that assumption is incorrect.[497] In addition, as Professor Alegría notes, at the end of the five-year tariff period, it is not necessarily true that the distributor's tariff will be "inefficient" or that it "will no longer strictly reflect the economic cost of acquiring and distributing electricity," as Respondent contends.[498] As Professor Alegría explains, under RLGE Article 79, the Base Tariffs are adjusted periodically throughout the five-year tariff period so that the tariffs reflect the real and current costs of distributing electricity.[499] Similarly, under RLGE Article 92, the VAD costs are adjusted on a yearly basis through a reduction factor pre-approved by the CNEE.[500] The distributor's tariffs thus are adjusted during the course of each tariff period to ensure that they continue to reflect the economic cost of acquiring and distributing electricity.

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[492] Alegría II ¶ 54 **(CER-3)**.

[493] Amended RLGE, Art. 98 **(C-105)**.

[494] LGE, Art. 74 **(C-17)**.

[495] Alegría II ¶ 54 **(CER-3)**.

[496] Counter-Memorial ¶ 278.

[497] *See supra* ¶ 66.

[498] Aguilar ¶ 38 **(RER-3)**.

[499] Alegría II ¶ 50 **(CER-3)**; RLGE, Art. 79 **(C-21)**.

[500] RLGE, Art. 92 **(C-21)**.

97. Third, as Claimant explained in its Memorial,[501] if the distributor refuses to submit a VAD study or refuses to respond to the CNEE's observations, the CNEE is not left without recourse; LGE Article 80 grants the CNEE the authority to fine a distributor for failure to abide by the provisions of the LGE and, after receiving an order of non-compliance from the CNEE, fines may be assessed on a daily basis.[502] As Professor Alegría explains, under RLGE Article 115, such fines are calculated based upon the energy component of the tariff applicable to a kilowatt hour for a residential consumer in Guatemala City, corresponding to the first day of the month in which the fine is being applied.[503] Pursuant to RLGE Article 116, the range of the fines for distributors is between 10,000 and one million kilowatt hours.[504] Thus, if the distributor refuses to deliver its VAD study within the established term, the fine for the distributor's lack of compliance with its obligations under the LGE could be equivalent to the energy component of the tariff for one million kilowatt hours.[505] As Professor Alegría notes, in the Base Tariffs set by the CNEE in Resolution No. CNEE-146-2008, the energy component for a kilowatt hour is 0.9749 Quetzales; multiplied by one million, the fine thus would amount to 974,900 Quetzales, which, at the current exchange rate of 7.80 Quetzales per each U.S. Dollar, would be approximately US$ 125,000.00.[506] Under RLGE Article 115, each day of non-compliance is considered a new infraction and, thus, the distributor potentially could be penalized with a fine of US$ 125,000.00 for each day that the distributor refuses to submit its VAD study or refuses to respond to the CNEE's observations on its VAD study.[507] As Professor Alegría observes, "this provides a strong incentive for the distributor to prepare a VAD study and to respond to the CNEE's observations, as required by the LGE and RLGE."[508]

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[501] Memorial ¶ 89; *see also* Alegría I ¶ 38 **(CER-1)**.

[502] LGE, Art. 80 **(C-17)**.

[503] Alegría II ¶ 51 **(CER-3)**; RLGE, Art. 115 **(C-21)**.

[504] Alegría II ¶ 51 **(CER-3)**; RLGE, Art. 116 **(C-21)**.

[505] Alegría II ¶ 51 **(CER-3)**.

[506] *Id*.; Resolution No. CNEE-146-2008 dated 30 July 2008 ¶ 24 **(C-274)**.

[507] Alegría II ¶ 51 **(CER-3)**.

[508] *Id*.; Alegría I ¶ 38 **(CER-1)**.

98. Professor Alegría further confirms that he is not aware of any instance in which a distributor in Guatemala has ever failed to present a VAD study or refused to respond to the CNEE's observations in a tariff review.[509] While Respondent asserts that "municipal companies often decide not to present tariff studies,"[510] Respondent has not provided any concrete examples of distributors deciding not to present VAD studies under LGE Articles 74 and 75.[511] As Professor Alegría observes, "even if this were the case, the logical amendment would not have been to RLGE Article 98, but to the articles of the RLGE that relate to violations and penalties, so that the penalties are proportionate to the harm caused by the distributor's violation."[512] As Professor Alegría notes, if a distributor refuses to comply with its obligations under the LGE and RLGE, Guatemala also may terminate the distributor's authorization contract.[513] Article 17(A)(v) of the Authorization Contract concluded between EEGSA and Guatemala provides that the failure to satisfy any material term or condition established in this contract, the LGE, or the RLGE will be considered an event of default for the distributor.[514] Article 18 of the Contract further provides that if the default is not rectified, the Contract may be terminated, without prejudice to the other remedies provided by the contract and applicable law,[515] while Article 19 provides that the termination of the Contract results in the revocation of the distributor's authorization.[516] This also provides a strong incentive for the distributor to prepare a VAD study and to respond to the CNEE's observations, as required by the LGE and RLGE.[517]

99. Fourth, as Messrs. Maté and Calleja confirm in their second witness statements, neither EEGSA nor the other electricity distributors in Guatemala could have objected, formally

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[509] Alegría II ¶ 52 **(CER-3)**; Alegría I ¶ 38 **(CER-1)**.

[510] Counter-Memorial ¶ 266 fn. 329.

[511] Alegría II ¶ 52 **(CER-3)**; *see, e.g.*, Counter-Memorial ¶ 266 fn. 329.

[512] Alegría II ¶ 52 **(CER-3)**.

[513] *Id*. ¶ 53.

[514] Authorization Contract Between the Ministry of Energy and Mines and Empresa Eléctrica de Guatemala S.A. dated 15 May 1998, Art. 17(A)(v) **(C-31)**.

[515] *Id*., Art. 18.

[516] *Id*., Art. 19.

[517] Alegría II ¶ 51 **(CER-3)**; Alegría I ¶ 38 **(CER-1)**.

or informally, to the proposal of the amendment of RLGE Article 98, as that amendment was not disclosed to the distributors prior to the issuance of Government Accord No. 68-2007 on 2 March 2007.[518] As Messrs. Maté and Calleja note, the amendment to RLGE Article 98 was not included in any of the drafts of the amendments that were circulated by the MEM to the electricity industry.[519] The amendment to RLGE Article 98 likewise was not discussed at the meeting held by the MEM and the CNEE with the distributors on 15 February 2007.[520] This is confirmed by the documentary record. As the minutes of the 15 February 2007 meeting reflect,[521] the MEM provided a copy of the proposed amendments to the distributors and requested comments and proposals by 19 February 2007.[522] The copy of the proposed amendments provided to the distributors, however, did not contain any amendments to RLGE Article 98.[523] Indeed, as the record demonstrates, the amendment to RLGE Article 98 was not proposed by the CNEE until 23 February 2007, *i.e.*, four days after the 19 February 2007 deadline for distributors to submit their comments regarding the proposed amendments to the RLGE.[524] Claimant notes that Respondent has not explained why this proposed amendment was not added until 23 February 2007 or why it was not disclosed to the electricity industry before the MEM issued Government Accord No. 68-2007 on 2 March 2007.

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[518] Maté II ¶ 6 **(CWS-12)**; Calleja II ¶ 9 **(CWS-9)**.

[519] Maté II ¶ 6 **(CWS-12)**; Calleja II ¶ 9 **(CWS-9)**; *see also* Letter from MEM to the CNEE dated 18 Jan. 2007 (attaching draft resolution with proposed amendments to the RLGE) **(C-101)**; *see also* Letter No. CNEE-13063-2007 from the CNEE to the President of Guatemala dated 22 Jan. 2007, at 1-3 **(C-102)**.

[520] *See* Minutes of the Meeting with Distributors dated 15 Feb. 2007 **(C-479)**.

[521] *See id*.

[522] Maté II ¶ 6 **(CWS-12)**; Maté I ¶ 6 **(CWS-6)**.

[523] Maté II ¶ 6 **(CWS-12)**; Maté I ¶ 6 **(CWS-6)**. Indeed, as the record reflects, the only discussion of RLGE Article 98 was raised by the large users of the electricity sector, which noted in their comments to the proposed amendments that RLGE Articles 98 and 99 should be revised to reflect their original text, as enacted in 1997. *See* Minutes of the Meeting of the Working Group on the Amendments to the General Electricity Law Rules and the Wholesale Electricity Market Administrator Rules Between the Government Committee and Representatives of Large Users of the Electricity Sector dated 15 Feb. 2007, at 5 **(C-480)**.

[524] Letter to Minister with regards to the Proposed Amendments to the General Electricity Law Rules including the changes introduced dated 23 Feb. 2007 **(C-481)**. The CNEE's initial proposed amendments to the RLGE were sent to the MEM by letter dated 22 Dec. 2006 **(C-475)**.

100. Finally, while Guatemala asserts that EEGSA's alleged fear of reprisal from the CNEE during its tariff review "is inconsistent with the challenge, and even the request for injunctive relief, that EEGSA presented shortly after the release of the first version of the Terms of Reference for the 2008 tariff review,"[525] Messrs. Maté and Calleja explain that EEGSA had no choice but to challenge the 30 April 2007 ToR.[526] Unlike amended RLGE Article 98, which did not automatically apply to EEGSA's tariff review, the ToR applied directly to EEGSA's tariff review process and, as discussed below, contained detailed criteria and formulas for calculating the VAD that had the effect of predetermining the results of the consultant's VAD study and resulting in a VAD which was inconsistent with the principles set forth in the LGE and RLGE.[527] As Messrs. Maté and Calleja confirm, while EEGSA seriously considered challenging Government Accord No. 68-2007 following its enactment, EEGSA ultimately decided not to do so, because it did not want to strain its relationship with the CNEE prior to EEGSA's 2008-2013 tariff review.[528] Messrs. Maté and Calleja also note that, although EEGSA was concerned that amended RLGE Article 98 provided the CNEE with powers that were not contemplated by Articles 71-79 of the LGE, EEGSA did not have any reason to believe that RLGE Article 98 would be applied during the course of EEGSA's tariff review, because EEGSA planned on participating in the tariff review process by submitting a VAD study and by submitting its corrections to the study.[529] As set forth further below, EEGSA participated in the 2008-2013

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[525] Counter-Memorial ¶ 285.

[526] Maté II ¶ 8 **(CWS-12)**; Calleja II ¶ 119 **(CWS-9)**; Calleja I ¶ 15 **(CWS-3)**.

[527] Maté II ¶ 8 **(CWS-12)**; Calleja II ¶ 11 **(CWS-9)**; Calleja I ¶ 15 **(CWS-3)**; Alegría II ¶ 19 **(CER-3)**; Alegría I ¶ 29 **(CER-1)**.

[528] Maté II ¶ 7 **(CWS-12)**; Calleja II ¶ 10 **(CWS-9)**.

[529] Maté II ¶ 7 **(CWS-12)**; Calleja II ¶ 10 **(CWS-9)**. In its Counter-Memorial, Guatemala asserts that, Mr. Calleja's statement that EEGSA "believed that [the amendment] would not apply to EEGSA," which he made in his first witness statement in the *Iberdrola* arbitration, is incompatible with his statement in this arbitration that EEGSA considered challenging the amendment. Counter-Memorial ¶ 285 fn. 356 (citing *Iberdrola Energía, S.A. v. the Republic of Guatemala* (ICSID Case No. ARB/09/05), Witness Statements of Miguel Francisco Calleja dated 14 Oct. 2009 and 25 Sept. 2010, ¶¶ 10-12 **(R-150)**). As Mr. Calleja explains, that is wrong. Mr. Calleja notes in his second witness statement that, "although EEGSA was concerned that amended RLGE Article 98 provided the CNEE with powers that were not contemplated by Articles 71-79 of the LGE, EEGSA did not have any reason to believe that RLGE Article 98 would be applied during the course of EEGSA's tariff review, because we planned on participating in the tariff review process by submitting a VAD study and by submitting our corrections to the study" and that "this was one of the reasons why we decided not to challenge Government Accord No. 68-2007." Calleja II ¶ 10 **(CWS-9)**; Calleja I ¶ 14 **(CWS-3)**. Thus, far

tariff review process by submitting a VAD study and by submitting its corrections to the study, as required under the LGE and RLGE. Notably, as the evidence demonstrates and as discussed further below, the CNEE's Legal Department's stated justification for the CNEE's actions in rejecting EEGSA's revised VAD study and in adopting its own independent VAD study did not rely upon amended RLGE Article 98; rather, it sought to justify the CNEE's actions under amended RLGE Article 99.

2. The CNEE's Terms Of Reference Contravened The LGE And RLGE And Undermined The Objective Of The Tariff Review Process

101. In its Memorial, Claimant demonstrated that the ToR issued by the CNEE for EEGSA's 2008-2013 tariff review were not guidelines for the consultant's VAD study, but contained specific criteria and formulas that not only differed radically from the methodology of EEGSA's prior tariff review for the 2003-2008 tariff period, but also had the effect of improperly reducing the VNR and incorrectly calculating the FRC so as to require a decrease in EEGSA's VAD and corresponding tariffs, in violation of the LGE and RLGE.[530] As Claimant explained, while the CNEE is empowered under LGE Article 74 to draft the terms of reference,[531] the CNEE must draft the ToR within the constraints of the law; the CNEE thus may not draft the ToR to produce a result that is incompatible with the LGE's governing principle that the VAD should be calculated based on the new replacement value of the assets of a model company, require the use of a methodology that necessarily will understate the assets of a model company, or otherwise draft the terms of reference to predetermine the outcome of the consultant's VAD study, as this would compromise the independence of the consultant's study and contravene the letter and spirit of the LGE and RLGE.[532] As Claimant demonstrated in its Memorial, not only did the CNEE draft EEGSA's ToR for the 2008-2013 tariff review to produce a result that was

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from being incompatible, Mr. Calleja made exactly the same point in his first statement in this arbitration as he made in his first statement in the *Iberdrola* arbitration. *See* Calleja II ¶ 10 **(CWS-9)**.

[530] Memorial ¶¶ 94-107; CNEE Terms of Reference dated April 2007, enclosed with Letter No. CNEE-13680-2007 from the CNEE to EEGSA dated 30 Apr. 2007 ("April 2007 ToR") **(C-106)**; *see also* Calleja I ¶ 15 **(CWS-3)**; Maté I ¶ 8 **(CWS-6)**.

[531] LGE, Art. 74 **(C-17)**.

[532] *See* Memorial ¶ 95; Alegría I ¶¶ 24-25, 29 **(CER-1)**; LGE, Art. 74 **(C-17)**; RLGE, Arts. 86-90, 97 **(C-21)**.

incompatible with the LGE, but the CNEE granted itself wide latitude to stop the consultant's progress on its VAD study and to deem the study as "not received" under newly-amended RLGE Article 98, so that the CNEE could rely upon its own VAD study to calculate EEGSA's VAD, in violation of the LGE and RLGE.[533]

102. Claimant further demonstrated that, given the risk to the legitimacy of the tariff review process, on 8 May 2007, EEGSA filed an administrative appeal (*recurso de revocatoria*) against the ToR,[534] which was rejected by the CNEE on 15 May 2007.[535] That rejection, which consisted of a single paragraph, claimed that the appeal was untimely and could not be processed because the terms of reference were "not final."[536] On 29 May 2007, EEGSA thus filed a court action for legal protection (*amparo*), arguing, among other things, that although the LGE provided for the consultant to prepare its own VAD study, the CNEE's ToR imposed all of the methodological and technical criteria and reduced the consultant to "a mere signatory of the study prepared by the [CNEE]."[537] EEGSA further argued that, although the LGE authorized an Expert Commission to resolve any disagreements between the CNEE and the distributor, the ToR provided, in effect, that "if CNEE does not like the study, it considers it not delivered and issues its own VAD without any study" by the distributor.[538] EEGSA thus requested that the Court void the ToR, as the ToR would have enabled the CNEE to obtain "the VAD it wants, something the legislat[ure] wished to avoid."[539] As Claimant explained in its Memorial, the CNEE failed to comply with its obligation to respond to the *amparo* with a detailed report, and the Sixth Civil Court of First Instance thus granted EEGSA a provisional *amparo* and voided the

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[533] *See* Memorial ¶ 97; Alegría I ¶¶ 41-43 **(CER-1)**; Calleja I ¶¶ 16-17 **(CWS-3)**; Maté I ¶ 8 **(CWS-6)**.

[534] *See* Memorial ¶ 101; Calleja I ¶ 18 **(CWS-3)**; Maté I ¶ 9 **(CWS-6)**; EEGSA Appeal to Revoke the Terms of Reference Issued by the CNEE in April 2007 dated 8 May 2007 **(C-107)**.

[535] *See* Memorial ¶ 102; Calleja I ¶ 19 **(CWS-3)**; Maté I ¶ 9 **(CWS-6)**; CNEE Resolution No. DMJ-Measure-543 dated 15 May 2007 **(C-109)**.

[536] *See* CNEE Resolution No. DMJ-Measure-543 dated 15 May 2007 **(C-109)**.

[537] EEGSA Amparo Request to the First Civil Court dated 29 May 2007, at 6 **(C-112)**; *see also* Memorial ¶ 103; Alegría I ¶ 47 **(CER-1)**; Calleja I ¶ 19 **(CWS-3)**; Maté I ¶ 9 **(CWS-6)**.

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

[539] *Id*.

CNEE's ToR, pending the Court's further consideration of the matter.[540] On 11 June 2007, after the first hearing in the *amparo* procedure, the same Court issued an order confirming the provisional *amparo* in EEGSA's favor.[541] Following these decisions, EEGSA participated in numerous meetings at the CNEE in an attempt to revise the ToR with the CNEE's new President, Carlos Colóm, the CNEE's two other new directors, and its new tariff manager, Melvin Quijivix.[542] As Messrs. Maté and Calleja explained in their first witness statements,[543] while the parties were able to reach agreement on several points, the ToR still contained numerous objectionable articles concerning the applicable methodology; the parties thus agreed to include a new Article 1.10 to clarify that the ToR were guidelines and were subject to and did not amend the LGE or the RLGE, and that the consultant could deviate from the ToR, if it provided a reasoned justification for doing so.[544]

103. In its Counter-Memorial, Respondent asserts that, contrary to Claimant's contentions, the 2007 ToR for the 2008-2013 tariff review did not "radically depart[]" from the 2002 ToR issued by the CNEE for the 2003-2008 tariff review and that EEGSA, in fact, had "accepted, without objection," the provisions of the 2002 ToR, which granted the CNEE an "equal or greater degree of control over EEGSA's tariff study, even using the same language for such Terms" as the 2007 ToR.[545] Respondent further asserts that "EEGSA's *amparo* ignored basic principles of the LGE, making it clear that in reality, EEGSA was challenging the fundamental bases of the regulatory framework under which Teco invested in 1998,"[546] including "the CNEE's legal right to establish the methodology and to declare the study 'admissible or inadmissible' (as stated in the original language of the RLGE as 'accept or reject')

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[540] *See* Memorial ¶ 104; Alegría I ¶ 48 **(CER-1)**; Calleja I ¶ 20 **(CWS-3)**; Maté I ¶ 9 **(CWS-6)**; Decision of the Sixth Civil Court of First Instance dated 4 June 2007 **(C-114)**.

[541] *See* Memorial ¶ 104; Alegría I ¶ 48 **(CER-1)**; Calleja I ¶ 20 **(CWS-3)**; Decision of the Sixth Civil Court of First Instance Confirming Amparo C2-2007-4329 dated 11 June 2007 **(C-115)**.

[542] *See* Memorial ¶ 106; Calleja I ¶ 21 **(CWS-3)**; Maté I ¶ 11 **(CWS-6)**.

[543] Calleja I ¶¶ 21-22 **(CWS-3)**; Maté I ¶ 11 **(CWS-6)**.

[544] *See* Memorial ¶¶ 106-107; 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[545] Counter-Memorial ¶¶ 300-301.

[546] *Id*. ¶ 303.

if not in accordance with the Terms of Reference."[547] With respect to the parties' negotiation of the ToR, Respondent acknowledges that "the CNEE decided to incorporate certain modifications requested by EEGSA that did not affect the principles underlying the LGE,"[548] but asserts that Claimant's interpretation of Articles 1.8 and 1.10 in its Memorial is incorrect.[549] Respondent's assertions are baseless.

104. First, as Mr. Calleja notes in his second witness statement, and as the evidence reflects, EEGSA did object to the 2002 ToR issued by the CNEE for the 2003-2008 tariff review, including to some of the same provisions to which EEGSA objected in the 2007 ToR.[550] This is confirmed by EEGSA's comments on the 2002 ToR,[551] as well as by the 27 September 2002 letter from PA Consulting to the CNEE assessing EEGSA's comments on the 2002 ToR.[552] As those documents reflect, EEGSA objected to Articles A.6.2, A.6.3, A.6.4, A.6.7, and A.6.8,[553] which, as Respondent notes in its Counter-Memorial,[554] are equivalent to Articles 1.7.4 and 1.9 in the 2007 ToR, to which EEGSA objected in its *amparo* request.[555] Respondent's assertion that "EEGSA (and TGH) accepted, without objection these same provisions in the Terms of Reference of the prior 2002 tariff review"[556] thus is wrong.

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[547] *Id*. ¶ 304.

[548] *Id*. ¶ 307.

[549] *Id*. ¶¶ 307-317.

[550] Calleja II ¶ 14 **(CWS-9)**; EEGSA's Comments on the 2002 ToR **(C-440)**; Letter from P.A. Consulting to the CNEE dated 27 Sept. 2002 **(C-447)** (assessing EEGSA's comments on the Terms of Reference for the 2003-2008 tariff review).

[551] EEGSA's Comments on the 2002 ToR **(C-440)**.

[552] Letter from PA Consulting to the CNEE dated 27 Sept. 2002 **(C-447)**.

[553] EEGSA's Comments on the 2002 ToR **(C-440)**; Letter from P.A. Consulting to the CNEE dated 27 Sept. 2002 **(C-447)**.

[554] Counter-Memorial ¶ 301.

[555] *See* EEGSA Amparo Request to the First Civil Court dated 29 May 2007 **(C-112)**.

[556] Counter-Memorial ¶ 301.

105. In any event, as Messrs. Maté and Calleja explain in their second witness statements,[557] while some of the provisions in the 2007 ToR were similar to provisions in the 2002 ToR, the impact of those provisions was fundamentally different in view of amended RLGE Article 98, which entered into force shortly before the 2007 ToR were issued by the CNEE on 30 April 2007.[558] As Mr. Calleja explains, "while both the 2002 ToR and 2007 ToR provided that the CNEE could deem EEGSA's VAD study 'as not received' if the study 'omitted the results required under' the ToR,[559] the repercussions of this provision were dramatically different."[560] As he observes, "[w]hile there was little incentive for the CNEE in 2002 to deem EEGSA's study 'as not received,' because EEGSA's prior tariff schedule simply would have remained in effect, that was not the case in 2007, where the CNEE did have reasons 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 (which is what it ultimately did)."[561] As EEGSA noted in its *amparo* request, under the 2007 ToR with amended RLGE Article 98 in place, "if CNEE does not like the study, it considers it not delivered and issues its own VAD without any study" by the distributor.[562] In addition, as Messrs. Maté and Calleja also note, some of the provisions that EEGSA challenged in the 2007 ToR were not in the 2002 ToR, including Article 12, which provided that the CNEE could modify the ToR at any time during the course of the

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[557] Calleja II ¶ 14 **(CWS-9)**; Maté II ¶ 10 **(CWS-12)**; *see also* Alegría II ¶ 57 (noting that "even though the 2002 and 2007 ToR provisions are similar in many respects, the effect of such provisions on the tariff review process was fundamentally different in view of amended RLGE Article 98") **(CER-3)**.

[558] April 2007 ToR **(C-106)**.

[559] Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.6.8 **(C-59)**; April 2007 ToR, Art. 1.9 **(C-106)**.

[560] Calleja II ¶ 14 **(CWS-9)**.

[561] *Id*. ¶ 15; *see also* Maté II ¶ 10 (noting that, under the 2002 ToR, "if the CNEE deemed EEGSA's VAD study 'not received' under Article A.6.8, the CNEE was not empowered to calculate EEGSA's VAD unilaterally based upon its own VAD study; rather, under original RLGE Article 98, which applied at that time, the previous tariff schedule would have continued to apply") **(CWS-12)**.

[562] EEGSA Amparo Request to the First Civil Court dated 29 May 2007, at 6 **(C-112)**; *see also* Maté II ¶ 10 **(CWS-12)**; April 2007 ToR, Art. 1.9 **(C-106)**; Alegría II ¶ 57 (noting that, "[i]f EEGSA had accepted the 2007 ToR as originally drafted by the CNEE, EEGSA would have been defenseless against the CNEE's decision to declare EEGSA's VAD study 'not received' under the ToR") **(CER-3)**.

tariff review process.[563] As they observe, these provisions made the 2007 ToR all the more objectionable.[564]

106. Second, as Messrs. Maté and Calleja confirm, by challenging the 2007 ToR, EEGSA did not ignore the basic principles of the LGE, nor did it seek to challenge the fundamental basis of the regulatory framework established for electricity distribution, as Respondent contends; to the contrary, EEGSA sought to give effect to the regulatory framework under which EEGSA had been acquired, *i.e.*, Article 74 of the LGE, which makes clear that each distributor shall calculate "the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE],"[565] as well as Article 75 of the LGE, which sets forth the Expert Commission process for the resolution of disputes relating to that study.[566] Indeed, as Mr. Calleja explains, far from challenging "the CNEE's legal right to establish the methodology and to declare the study 'admissible or inadmissible,'"[567] EEGSA's *amparo* request expressly recognized the CNEE's right to declare the study admissible or inadmissible,[568] noting that, "if the [CNEE] does not agree with the study prepared by the Consultant, the differences are submitted to the decision of an Expert Commission, who has the final word."[569] As Mr. Calleja explains, "[d]eclaring the study inadmissible, however, does not empower the CNEE to disregard the distributor's VAD study under amended RLGE Article 98."[570] To the contrary, as amended RLGE Article 98 provides, the CNEE, "within a term of two months, shall decide on the acceptance or rejection of the studies performed by the consultants, making the observations it

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[563] Calleja II ¶ 15 **(CWS-9)**; Maté II ¶ 10 **(CWS-12)**; April 2007 ToR, Art. 12 ("The content of these Terms of Reference may be modified or expanded on by the National Electric Energy Commission provided it is for the benefit of the users of the Final Distribution Service and doing so does not substantially affect the development of the tariff study if it is ongoing. Such modifications may be performed through the publication of addenda.") **(C-106)**.

[564] Calleja II ¶ 15 **(CWS-9)**; Maté II ¶ 10 **(CWS-12)**.

[565] LGE, Art. 74 **(C-17)**.

[566] Calleja II ¶¶ 16-17 **(CWS-9)**; Maté II ¶ 11 **(CWS-12)**; LGE, Art. 75 **(C-17)**.

[567] Counter-Memorial ¶ 304.

[568] Calleja II ¶ 16 **(CWS-9)**.

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

[570] Calleja II ¶ 16 **(CWS-9)**.

deems pertinent" and, "[i]f discrepancies between the [CNEE] and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed."[571] As Mr. Calleja notes, "[a]mended RLGE Article 98 thus did not give the CNEE the authority to substitute itself for the Expert Commission, but required the CNEE to submit the discrepancies that persisted between the parties to an Expert Commission for resolution, *i.e.*, the CNEE could not substitute itself for the Expert Commission, because the Expert Commission process was provided for by law."[572]

107. Third, as Messrs. Maté and Calleja confirm, while the Court's provisional *amparo* remained in effect, they met numerous times with the CNEE's Directors, Mr. Quijivix,[573] and the CNEE's technical specialists in an attempt to agree on new terms of reference for EEGSA's tariff review, and that, during these negotiations, the parties agreed to replace Articles 1.7.4 and 1.9 with new Articles 1.6.4 and 1.8, and to introduce new Article 1.10.[574] As Mr. Calleja explains, Article 1.6.4 of the final ToR clarified that the distributor, through its consultant, would analyze the CNEE's observations, which implied (pursuant to the law) that the consultant could decide whether or not to incorporate those observations into the corrected VAD study,[575] while Article 1.8 confirmed that "[t]he Distributor shall analyze [the] observations, *make any*

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[571] Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) **(C-104)**.

[572] Calleja II ¶ 16 **(CWS-9)**.

[573] As Mr. Calleja notes in his second witness statement, while Mr. Colóm asserts that, "at the time of his appointment, the engineer Quijivix had professional and academic experience from Guatemala and abroad, making him the ideal person for this position" and that "[h]e was also very knowledgeable about electricity regulation and knew the sector's players well," this is incorrect; as Mr. Calleja confirms, "Mr. Quijivix had very little experience in the electricity sector and was not knowledgeable about electricity regulation, which is why, when Mr. Quijivix was just hired by the MEM, Minister of Energy and Mines Luis Ortiz asked me to prepare a presentation to introduce Mr. Quijivix to basic concepts regarding the electricity industry, which I did." Calleja II ¶ 18 **(CWS-9)**; Colóm ¶ 54 **(RWS-1)**. As the record reflects, in anticipation of EEGSA's 2008-2013 tariff review, the CNEE also hired consultants to train the CNEE's personnel on issues relating to tariff studies and quality control. *See, e.g.*, CNEE Contract No. 189-2007 (undated) **(C-477)**; Terms of Reference Hiring of Course on Distribution Network Optimization Models for Tariff Purposes dated June 2007 **(C-485)**.

[574] Calleja II ¶ 19 **(CWS-9)**; Maté II ¶ 12 **(CWS-12)**; 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[575] Calleja II ¶ 19 **(CWS-9)**; 2007 Terms of Reference dated Jan. 2008, Art. 1.6.4 **(C-417)**.

corrections it deems appropriate and send the corrected final report of the study to the CNEE within fifteen (15) days of receiving the observations."[576]

108. This is confirmed by the CNEE's Technical Report dated 16 August 2007,[577] which provides that, "[f]ollowing the comments submitted by EEGSA and the Technical Coordination Meetings held with Expert Consultants hired by the CNEE and with the Technical Group appointed to conduct the Tariff Studies, it was noted that some amendments should be introduced in the Terms of Reference, regarding methodological aspects as well as the submission dates for the initial units of the study."[578] In its Counter-Memorial, Respondent asserts, however, that revised Article 1.8 means that "the consultant is free to decide on the 'appropriate' manner in which the measures should be implemented, but the consultant cannot decide unilaterally whether or not it will implement such measures," and that this "is the only interpretation compatible with RLGE Article 98, which establishes that the consultant 'make the corrections to the studies,' with LGE Article 75 and with the CNEE's function to monitor the studies, including the authority to order corrections."[579] As Messrs. Maté and Calleja explain, this is incorrect. Article 1.8 does not provide that the distributor shall make the corrections in the "manner" it deems appropriate; to the contrary, Article 1.8 expressly provides that the distributor "shall . . . make any corrections it deems appropriate."[580] As Mr. Calleja notes, "this is consistent with the LGE, because, in accordance with the 2007 ToR, in order for discrepancies to persist between the parties (and for the Expert Commission to be convened), the distributor must have refused to incorporate some of the CNEE's observations into its corrected VAD study."[581]

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[576] 2007 Terms of Reference dated Jan. 2008, Art. 1.8 (emphasis added) **(C-417)**; *see also* Calleja II ¶ 19 **(CWS-9)**.

[577] Department of Studies – Technical Report – DMT-Dictamen-4 dated 16 Aug. 2007 **(C-489)**.

[578] *Id*., at 2.

[579] Counter-Memorial ¶ 313.

[580] 2007 Terms of Reference dated Jan. 2008, Art. 1.8 **(C-417)**; *see also* Calleja II ¶ 19 **(CWS-9)**; Maté II ¶ 14 **(CWS-12)**.

[581] Calleja II ¶ 19 **(CWS-9)**; *see also* Maté II ¶ 14 (noting that, "if EEGSA were required to incorporate all of the CNEE's observations, there never would be any discrepancies that 'persist' between the parties, *i.e.*, discrepancies that were the result of the consultant's decision not to accept the CNEE's observations, which

109. With respect to Article 1.10, Mr. Colóm asserts in his witness statement that "the consultant could depart from the ToR in certain aspects," provided that "there was an appropriate justification and always subject to the CNEE's approval," and that the CNEE clarified that Article 1.10 "did not imply that the consultant had a 'carte blanche' to modify the ToR without the CNEE's consent."[582] As Messrs. Maté and Calleja explain, this also is incorrect. Article 1.10 clarified that the ToR were subject to and did not amend the LGE and RLGE, and that the consultant could deviate from the ToR if the consultant had justification for doing so;[583] as Messrs. Maté and Calleja confirm, this Article was essential to resolving the dispute regarding the ToR so that the tariff review could proceed.[584] As Professor Alegría confirms, under Article 1.10, the CNEE did not have the power to "approve" the consultant's deviation from the ToR; rather, Article 1.10 provides that the CNEE may make observations with respect to whether such deviation is justified under the LGE and RLGE.[585] Under LGE Article 75, if the parties disagreed as to whether any such deviation was justified, an Expert Commission would have been appointed to resolve that discrepancy.[586]

110. As Professor Alegría observes, because the preparation of a VAD study under the LGE and RLGE "requires technical expertise to manage and put together many variables to obtain a particular result, it is expected that different experts may manage the variables in different ways and obtain different results."[587] Accordingly, "[i]f the guidelines contained in the ToR were considered fixed and could not be varied by the consultants, then the outcome of the VAD studies would be predetermined by the ToR,"[588] which would compromise the

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would render Article 75 of the LGE and the Expert Commission process meaningless and unnecessary") **(CWS-12)**.

[582] Colóm ¶ 69 (emphasis in original) **(RWS-1)**.

[583] 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[584] Calleja II ¶ 20 **(CWS-9)**; Maté II ¶ 12 **(CWS-12)**.

[585] Alegría II ¶ 60 **(CER-3)**; 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**; *see also* Calleja II ¶ 20 **(CWS-9)**.

[586] Alegría II ¶ 60 **(CER-3)**; *see also* Calleja II ¶ 20 **(CWS-9)**; LGE, Art. 75 **(C-17)**.

[587] *Id*. ¶ 61.

[588] *Id*.

independence of the consultant's study and could result in a VAD that is inconsistent with the LGE and RLGE. As Professor Alegría notes, it thus is "reasonable that, if the consultant, based upon his own expertise, considers that the guidelines set forth in the ToR do not reflect a methodology that is consistent with the LGE and RLGE, or if the methodology provides a result that the consultant does not consider appropriate under the LGE and RLGE, then the consultant may change the methodology and justify the reasons for that change."[589] The consultant nonetheless does not "have a free hand in deviating from the ToR; it may only do so where the ToR is inconsistent with the LGE or RLGE, as Article 1.10 of the ToR makes clear."[590] Professor Alegría further observes that "there is no statement or provision in the LGE or RLGE that says that VAD studies must follow the ToR word for word" and that "the ToR are not instructions, but are guidelines which allow room for the consultants to provide their own input,"[591] as is typically the case with matters of a highly technical nature. As he notes, RLGE Article 97 provides that the ToR "shall be based" upon the concepts set forth in RLGE Articles 86 through 90 in a general way, and the provisions of RLGE Article 97 are descriptive, rather than detailed instructions regarding the VAD studies.[592]

111. This is confirmed by the documentary record. As reflected in the 27 September 2002 letter from PA Consulting to the CNEE assessing EEGSA's comments on the 2002 ToR, the CNEE's consultant noted that "[t]here is no need to state the obvious, *e.g.* that the ToR cannot prevail over the Law or the Rules."[593] Similarly, in an email from Mr. Campos to the CNEE dated 20 June 2007, Mr. Campos discusses the process for designing a model efficient grid and notes that he suggests keeping the example in the ToR "to provide greater clarity, but we should specify that the Consultant must adapt it to the availability of information and the characteristics of each area, as explained in [the second paragraph of] Section 3.5[]."[594] The

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[589] *Id*.

[590] *Id*.; 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[591] Alegría II ¶ 62 **(CER-3)**.

[592] *Id*.; Amended RLGE, Art. 97 **(C-105)**.

[593] Letter from PA Consulting to the CNEE dated 27 Sept. 2002, at 2 **(C-447)**.

[594] Email from A. Campos to A. Garcia dated 20 June 2007 **(C-487)**.

CNEE's own consultants thus expressly recognized that the CNEE's ToR is subject to the LGE and RLGE, and that the ToR are to be used as guidelines by the distributor's consultant in preparing its VAD study and may be adapted accordingly.

112. Fourth, as detailed in Claimant's Memorial, the FRC calculation that the CNEE placed in an addendum to the ToR in January 2008 contravened the basic principles of the LGE by calculating EEGSA's return on a depreciated asset base and thereby granting EEGSA a return that was equal to only *half* of its cost of capital.[595] Valuing the regulatory asset base as 50% depreciated, as opposed to new, is contrary to the express requirement of LGE Article 67 that the VAD be "calculated based on the *New* Replacement Value of the optimally designed facilities."[596] This is confirmed by Dr. Barrera, who explains that the defining feature of the VNR method is that it "valu[es] the asset base of the distribution company as if all of the efficient assets were *new*; in other words, the replacement cost of all of the company's efficient assets is calculated."[597] Similarly, Mr. Kaczmarek explains that "[t]he LGE used the terminology (in English) of '**New** Replacement Value,'" and "[a]s valuation professionals, the inclusion of the adjective **new** conveys the notion that the assets are supposed to be valued as if new and not depreciated."[598] Mr. Kaczmarek thus concludes that "the introduction of the concept of a depreciating network is at odds with the valuation standard adopted in the LGE."[599] Because the CNEE's calculation assumed an asset base that was 50% depreciated, it was "inconsistent with the concept of a VNR."[600]

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[595] *See* Memorial ¶¶ 105, 159; Kaczmarek I, Figure 14 & fn. 123 **(CER-2)**; *see also* Counter-Memorial ¶ 310 (stating that "[f]or purposes of this [2008-2013] tariff review, the assets of the distributors (EEGSA, Deorsa and Deocsa) were considered to be 50 percent depreciated."); Kaczmarek II ¶ 80 (confirming that the CNEE's FRC assumed "assets that are 50 percent depreciated (i.e., half-way through their useful lives).") **(CER-5)**.

[596] LGE, Art. 67 (emphasis added) **(C-17)**.

[597] Barrera ¶ 28 (emphasis in original) **(CER-4)**.

[598] Kaczmarek II ¶ 85 **(CER-5)**.

[599] *Id*.

[600] Barrera ¶ 260 **(CER-4)**. As Dr. Barrera also demonstrates, in contrast, the 5 May 2008 Bates White VAD study calculated the FRC in a manner which was "entirely consistent with the VNR method," because "Bates White calculated the return of capital and the return on capital on an undepreciated asset base." *Id*. ¶ 212.

113. The reason that the FRC calculation in the ToR would not allow the investor to recoup its investment is because the model efficient company approach adopted in Guatemala does not recognize (*i.e.,* compensate the distributor for) capital expenditures needed to replace existing network assets; the only capital expenditures recognized are those necessary for the expansion of the network.[601] This is because the assets are valued as new each regulatory period, so there is no theoretical need to replace them.[602] In reality, of course, the company will need to spend capital not only to expand the network, but also to replace depreciating assets and to keep the existing network running.[603] As Dr. Barrera explains, one advantage of the model company regulation that Guatemala adopted is that the regulator does not need to track the depreciation of the existing assets and to compensate the distributor for the costs of replacing those assets.[604] Instead, the regulator compensates the distributor on the value of a new asset base, and the distributor replaces assets as needed.[605] The distributor will have the funds to do this only because its return is being calculated on the new replacement value of the assets.[606]

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[601] Kaczmarek II ¶¶ 86-87 **(CER-5)**; Terms of Reference dated 17 Jan. 2008, Art. 8.2.2 **(C-417)**.

[602] Kaczmarek II ¶ 71 **(CER-5)**.

[603] *Id*.

[604] Barrera ¶ 31 **(CER-4)**; *see also* Kaczmarek II ¶ 71 **(CER-5)**.

[605] Barrera ¶¶ 28-29 **(CER-4)**; *see also* Kaczmarek II ¶ 71 **(CER-5)**.

[606] Kaczmarek II ¶¶ 71, 86 **(CER-5)**. Respondent's suggestion that a depreciated asset base was used in the 2003 tariff review is wrong. *See* Counter-Memorial ¶ 310. For that tariff review, Mr. Giacchino (then of NERA) proposed using an FRC formula that was exactly the same as the one he proposed for the 2008 tariff review. NERA Stage E Report, revised 30 July 2003, at 11 **(C-75)**; *see also* CNEE letter No. 4821-2003 GT-NotaS-407 dated 17 July 2003 (Note 407) **(C-565)**; Giacchino II ¶ 18 **(CWS-10)**. The CNEE and EEGSA ultimately agreed to use another formula with a constant annuity method. *See* NERA Stage E Report, revised 30 July 2003, at 15 (stating that "[a]t a meeting held by the CNEE and EEGSA on July 30, 2003, it was agreed that the first alternative (Note 407) would be used for the tariff revision") **(C-75)**. NERA objected to this formula because, "[i]f the formula proposed by Note 407 were used and the [VNR] were recalculated upon each tariff revision, the concessionaire would not be able to recover their investment at the end of the concession period." NERA Stage E Report, revised 30 July 2003, at 12-13 **(C-75)**. Nevertheless, the agreed-upon formula used in 2003, unlike the CNEE's proposed formula in 2008, did not depreciate the assets and did not calculate EEGSA's return off of a depreciated asset base. Giacchino II ¶ 18 **(CWS-10)**. In any event, the CNEE did not propose using this same formula in 2008, presumably because it would not have resulted in the substantially decreased tariffs that it was trying to obtain.

114. Respondent's assertion that the "return of" capital portion of the VAD is used by the distributor to replace assets[607] is wrong. Mr. Damonte implicitly recognizes this when he contrasts depreciation and operating expenses, which "involve actual money outlays," because the former "is not a money outlay in the year it is charged. . . . It belongs to the owners; it is part of the gross return they are permitted to earn on their investment."[608] In other words, if the distributor needed to use the "return of" capital portion of the VAD to replace assets, it never would receive back the cost of its investment; this is because the "return of" capital portion of the VAD, by its very terms, is paid to the investor to recoup its investment.[609] As Mr. Kaczmarek observes, depending on the "return of" capital portion of the VAD for replacement capital expenditures is the equivalent of investing in a bond that pays interest, but which never repays the principal.[610] Accordingly, regulatory regimes either (i) calculate the investor's return on a depreciated asset base and recognize replacement capital expenditures as costs; or (ii) calculate the investor's return on an undepreciated asset base—*i.e.*, the new replacement value of the assets—and recognize only expansion, but not replacement, capital expenditures.[611] Through the ToR's FRC calculation, the CNEE sought to have it both ways, by refusing to recognize capital expenditures to replace network assets, but calculating EEGSA's return on an asset base that had been depreciated by 50%.[612]

115. Moreover, the documentary record confirms that Respondent understood that, given that its regulatory model does not recognize replacement capital expenditures, the distributor's return must be calculated off an undepreciated asset base. Thus, for example, in a 2002 presentation, CNEE's consultant, PA Consulting, lists a variety of different regulatory methods, including one which it labels the "[b]ook value of fixed assets," with a note that this takes the initial value plus investments minus depreciation, and it then lists another method

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[607] Kaczmarek II ¶ 39 **(CER-5)**.

[608] Damonte ¶ 75 fn. 31 (citing A. Kahn, *The Economics of Regulation - Principles and Institutions* (1991)) **(RER-2)**.

[609] Kaczmarek II ¶¶ 66, 74 **(CER-5)**.

[610] Kaczmarek II ¶ 39 **(CER-5)**.

[611] Kaczmarek II ¶ 87 **(CER-5)**.

[612] *See id*. ¶¶ 86-87.

called the "Net Replacement Value of Assets [VNR]," with an indication that this is the method used by Guatemala.[613] PA Consulting thus clearly differentiated between the cost-of-service method, which uses a depreciated asset base, and Guatemala's VNR method, which does not. Similarly, in a Technical Report prepared for the CNEE by another consultant, Edwin Quintanilla Acosta, in June 2007, among the listed advantages of the VNR method is the fact that it does not take into account the age of the assets.[614] This also was recognized by Synex: in a 1997 report calculating the cost of capital, Synex recommended to Guatemala that it use a 10% real discount rate for the cost of capital, noting that networks with depreciated assets have higher rates, typically ranging between 12%-15%, and thus implicitly recognizing that Guatemala calculates the return off of an undepreciated asset base and, if a depreciated asset base were used, a higher rate of return would be warranted.[615]

116. As is evident from the CNEE's own internal communications, the FRC calculation set forth in the ToR applicable to the 2008-2013 tariff review was devised by the CNEE with Mr. Riubrugent's assistance specifically for the purpose of decreasing the tariffs. As the record reflects, by email to the CNEE dated 13 December 2007, Mr. Riubrugent recommended, "first and foremost," the "steady-state" model for the FRC calculation considered by the Brazilian regulator ANEEL, "due to its simplicity (*it yields the lowest tariff*)."[616] As Dr. Barrera explains, however, Brazil uses "an accounting method where assets are valued at replacement cost, taking depreciation into account, which is inconsistent with the VNR concept."[617] The CNEE nevertheless followed Mr. Riubrugent's advice and adopted that

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[613] PA Consulting, Adjustments to the TOR for the Execution of the VAD study dated 22 Aug. 2002, at 8 **(C-445)**.

[614] Edwin Quintanilla Acosta, Technical Report dated June 2007, Annex 3 at 21 **(C-486)**.

[615] Synex Report, Chapter 3 **(C-20) (C-22)**.

[616] Email chain from J. Riubrugent to M. Peláez, M. Quijivix, M. Perez Yat, and A. Garcia dated 17 Dec. 2007 (emphasis added) **(C-490)**.

[617] Barrera ¶ 239 **(CER-4)**; *see also* Kaczmarek I ¶¶ 203-204, 214 & fn. 192 (explaining that in its comparables analysis, Navigant weighed companies in Chile, El Salvador and Peru more heavily than those in Brazil because the regulatory regimes in the former countries are more similar to Guatemala) **(CER-2)**.

calculation.[618] On 8 January 2008, Ms. Peláez of the CNEE wrote to Mr. Riubrugent, stating that "Eng. Colom has asked us a question we can't answer and we will therefore appreciate your assistance."[619] She then reproduced what she described as the "final formula we defined for the [FRC],"[620] and asked with respect to the figure 2 in the denominator in the calculation (which is what has the effect of depreciating the distributor's asset base by 50% and cutting by half the investor's return on capital in violation of LGE Article 67), "what does 2 mean? Or what is the concept for it? Thanks a lot in advance for your invaluable cooperation."[621] The next day, Mr. Riubrugent responded as follows: "the aggregate depreciation of the whole of these assets totals half of the new value (NRV) and, naturally, the residual value is half the new value of that fraction (that is the "2" in the denominator on the second term of the formula's second member!)."[622] Less than two weeks later, the CNEE adopted the 17 January 2008 ToR, which contained an FRC calculation identical to that laid out in Ms. Peláez's email to Mr. Riubrugent.[623] Thus, it is clear that the CNEE itself did not understand the theoretical underpinning of the FRC calculation that it sought to impose upon EEGSA; that the FRC calculation in the ToR was used by countries, such as Brazil, which had adopted a different regulatory regime; and that the FRC calculation was adopted with the express intention of decreasing the tariffs. As discussed further below, the Expert Commission ultimately would

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[618] *See, e.g.*, Email from J. Riubrugent to M. Peláez on 19 Dec. 2007 **(C-490)**; Email from J. Riubrugent to M. Peláez dated 9 Jan. 2008 **(C-567)**.

[619] Email from M. Peláez to J. Riubrugent dated 8 Jan. 2008 **(C-567)**.

[620] *Id*.

[621] *Id*. (emphasis omitted).

[622] Email from J. Riubrugent to M. Peláez dated 9 Jan. 2008 **(C-567)**. In his witness statement, Mr. Moller of the CNEE declares that the decision to depreciate EEGSA's assets by 50% through the FRC was "arrived at [by the CNEE] on the basis of a theoretical study that took into account that the distributor's assets would be used intensively and would have to be updated regularly." Moller ¶ 50 **(RWS-2)**. On cross-examination at the *Iberdrola* hearing, Mr. Moller testified that the "theoretical study" that purportedly showed that EEGSA's assets were 50% depreciated was this email chain between the CNEE and Mr. Riubrugent. *See* Testimony of E. Moller from *Iberdrola* Hearing dated 27 July 2011, 722:8-22 (affirming that the "2" in the denominator "derives from a theoretical study that takes into account the useful life of the distributor's assets and their replacement schedule over time") **(C-539)**.

[623] *See* 2007 Terms of Reference dated Jan. 2008, at 55 **(C-417)**.

disagree with the CNEE's FRC calculation on the basis that the calculation had the effect of cutting by half the investor's return on capital, in violation of the LGE.[624]

3. The CNEE Failed To Constructively Engage With EEGSA Or Its Consultant During The Tariff Review Process

117. As Claimant demonstrated in its Memorial, notwithstanding the CNEE's agreement to amend the ToR for the 2008-2013 tariff review, the CNEE made no effort to engage constructively with EEGSA or its consultant, Bates White, during the tariff review process, but instead arbitrarily invoked amended RLGE Article 98 throughout the process in an unlawful attempt to disregard Bates White's VAD study and to determine the VAD without the participation of EEGSA or its consultant.[625] As Claimant explained, unlike during EEGSA's 2002 tariff review, the CNEE held only one meeting with EEGSA and its consultant in November 2007 to discuss its Stage A Report, following which neither the CNEE nor its consultants submitted any comments on Bates White's presentation or its Stage A report.[626] Four weeks after this meeting, however, the CNEE informed EEGSA by letter dated 17 December 2007 that it did not consider that the Stage A report had been "received," because EEGSA's authorized representative had not submitted the report by "formal delivery" with a notarized power of attorney, a copy of EEGSA's contract with Bates White, and all information provided by EEGSA to Bates White for the study.[627] In accordance with the schedule in the revised terms of reference, Bates White thus resubmitted the Stage A report, together with the Stage B report, on 25 January 2008,[628] which the CNEE again rejected by letter dated 30 January

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[624] *See* Expert Commission's Report dated 25 July 2008 (hereinafter "EC Report"), Discrepancy D.1 (Annuity of the Investment, Capital Recovery Factor), at 92 (determining that calculating the FRC in accordance with the ToR "would imply considering that the Grid is at half its service life, whereas the legal provisions establish that the new replacement value of the grid must be considered. In other words, it considers that the capital cost must arise from considering a grid that is totally new at the time of calculating the tariff.") **(C-246)**.

[625] *See* Memorial ¶¶ 108-122.

[626] *See id*. ¶ 112; Giacchino I ¶ 22 **(CWS-4)**; Calleja I ¶ 24 **(CWS-3)**.

[627] *See* Memorial ¶ 113; Letter No. CNEE-15225-2007 from the CNEE to EEGSA dated 17 Dec. 2007, at 1-2 **(C-134)**; *see also* Maté I ¶ 16 **(CWS-6)**; Calleja I ¶ 25 **(CWS-3)**.

[628] *See* Memorial ¶ 115; Calleja I ¶ 26 **(CWS-3)**; Maté I ¶ 16 **(CWS-6)**; Letter No. GG-07-2008 from EEGSA to the CNEE dated 25 Jan. 2008, at 1-3 (re-submitting the Stage A report) **(C-156)**; Letter No. GG-08-2008 from EEGSA to the CNEE dated 25 Jan. 2008, at 1-3 (enclosing the Stage B report) **(C-157)**.

2008, repeating its prior claim that it had not received the Stage A or Stage B reports for the reasons set forth in its letter dated 17 December 2007.[629] EEGSA thus sent an immediate reply enclosing a copy of the notarized deed appointing Mr. Calleja to act on EEGSA's behalf, copies of the letters signed by Mr. Calleja delivering both stage reports (the CNEE had the originals), and a copy of the letter with the CNEE's stamp showing that it had received EEGSA's contract with Bates White.[630]

118. As Claimant further demonstrated in its Memorial, the CNEE's efforts to disrupt Bates White's progress persisted and, on 12 February 2008, three and a half months after Bates White had submitted the Stage A report, the CNEE communicated its first comments on that report.[631] The CNEE claimed that the Stage A report could not be used as a basis for subsequent stage reports because, in the CNEE's view, the report did not comply with the ToR and the CNEE's comments to the Stage A report were mandatory "requirements" and, thus, EEGSA had to "use the ranges defined by CNEE in the subsequent phases of the Study."[632] The CNEE thus reverted to the position that it had taken in the initial ToR, ignoring its own crucial modifications of Articles 1.6.4, 1.8, and 1.10 of the revised ToR.[633] As Claimant also demonstrated, although each of Bates White's stage reports already contained all of the required information, many of the CNEE's comments to those stage reports were demands for additional information.[634] As Mr. Giacchino noted in his first witness statement, in his experience as a consultant in dozens of tariff reviews for both regulators and companies, no regulator has required as much information

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[629] *See* Memorial ¶ 116; Maté I ¶ 16 **(CWS-6)**; Letter No. CNEE-15504-2008 from the CNEE to EEGSA dated 30 Jan. 2008, at 1-2 **(C-158)**.

[630] *See* Memorial ¶ 116; Maté I ¶ 17 **(CWS-6)**; Letter No. GG-017-2008 from EEGSA to the CNEE dated 31 Jan. 2008, at 1 **(C-159)**.

[631] *See* Memorial ¶ 117; Maté I ¶ 18 **(CWS-6)**; Letter No. CNEE-15597-2008 from the CNEE to EEGSA dated 12 Feb. 2008, 1-10 **(C-161)**.

[632] Letter No. CNEE-15597-2008 from the CNEE to EEGSA dated 12 Feb. 2008, at 10 **(C-161)**; *see also* Memorial ¶ 117; Maté I ¶ 18 **(CWS-6)**; Calleja I ¶ 27 **(CWS-3)**.

[633] *See* Memorial ¶ 117.

[634] *See* Memorial ¶ 118; Giacchino I ¶ 27 **(CWS-4)**; *see also, e.g.*, Letter No. CNEE-15597-2008 from the CNEE to EEGSA dated 12 Feb. 2008, at 3 (claiming that the Stage A report "failed to comply with the Terms of Reference insofar as the information provided in the report does not conform to the requirements set forth in the TOR") **(C-161)**.

as the CNEE did from Bates White during that tariff review.[635] The CNEE also issued numerous directives for Bates White to perform calculations or to use criteria that were not contemplated in the ToR.[636] As Claimant explained, although the CNEE caused months of delay and substantial additional expense, Bates White finished all nine stage reports on time, and EEGSA delivered the complete study, along with revised versions of each stage report, to the CNEE on 31 March 2008, as scheduled.[637]

119. As Claimant noted in its Memorial, although the CNEE had two months under amended RLGE Article 98 to analyze the study, to accept or reject it, and to proffer any pertinent observations, on 11 April 2008, only eleven days after EEGSA had delivered its VAD study, the CNEE issued Resolution No. 63-2008, through which the CNEE declared the study "inadmissible" and advised that EEGSA "must perform the corrections to same pursuant to the [CNEE's] observations" therein "within a term of 15 days."[638] Shortly thereafter, in response to a question from Enrique Moller, one of the CNEE's directors, as to whether EEGSA could accept a VAD that was 5 percent lower than the one in effect at that time, EEGSA attended a meeting with the CNEE to discuss its proposal to increase the VAD by 10 percent, while maintaining the overall tariff for EEGSA's regulated customers.[639] EEGSA never received a response from the CNEE regarding its proposal.[640] In the absence of any negotiated agreement, EEGSA thus requested Bates White to revise its VAD study to address the CNEE's observations in Resolution No. 63-2008 and, on 5 May 2008, EEGSA submitted Bates White's corrected

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[635] Giacchino I ¶ 27 **(CWS-4)**.

[636] *See* Memorial ¶ 118; Giacchino I ¶ 27 **(CWS-4)**.

[637] *See* Memorial ¶ 118; Giacchino I ¶ 27 **(CWS-4)**; Maté I ¶ 19 **(CWS-6)**; Calleja I ¶ 27 **(CWS-3)**; Letter No. GG-045-2008 from EEGSA to the CNEE dated 31 Mar. 2008, at 1-2 **(C-178)**.

[638] Resolution No. CNEE-63-2008 dated 11 Apr. 2008, at 3 **(C-193)**; *see also* Memorial ¶ 119; Maté ¶ 20 **(CWS-6)**; Calleja ¶ 28 **(CWS-3)**.

[639] *See* Memorial ¶¶ 120-121; Maté I ¶ 23 **(CWS-6)**; Calleja I ¶ 29 **(CWS-3)**; *see also* Tariff Study Presentation dated 22 Apr. 2008, at 14 (explaining that the "proposal has no effect on tariffs") **(C-194)**.

[640] *See* Memorial ¶ 121; Maté I ¶ 23 **(CWS-6)**; Calleja I ¶ 31 **(CWS-3)**.

VAD study to the CNEE[641] In its revised study, Bates White accepted some of the CNEE's observations and made corresponding changes to its various stage reports, and rejected other observations and provided its rationale for doing so.[642]

120. In its Counter-Memorial, Respondent asserts that, contrary to Claimant's contentions, it was EEGSA that failed to cooperate in the tariff review process, by "fail[ing] to submit requested information, ask[ing] for repeated extensions on the submission of its stage reports (which were granted), systematically refus[ing] to implement the directives contained in the Terms of Reference, and refus[ing] to present information in an auditable format."[643] Respondent further asserts that the CNEE's comments on Bates White's stage reports "were duly reasoned, as explained in each one of the letters sent to EEGSA,"[644] and that, "[o]nce the CNEE made comments on the stage reports, it was up to the EEGSA expert to 'implement' the corrections and deliver its final study," but that "EEGSA's supposedly 'final' study of March 31, 2008 did not contain a majority of the corrections as requested by the CNEE" in its observations.[645] Respondent also asserts that Mr. Moller never asked Mr. Maté whether EEGSA could accept a VAD that was 5 percent lower than the one in effect at that time,[646] and that "EEGSA did not provide a reason for the meeting" that it requested with the CNEE.[647] Respondent further implies that EEGSA's proposal to increase the VAD, while maintaining the overall tariff, was improper.[648] Finally, Respondent asserts that Bates White's 5 May 2008 VAD study incorporated a small number of corrections "ordered by the CNEE through its

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[641] *See* Memorial ¶ 122; Maté I ¶ 25 **(CWS-6)**; Calleja I ¶ 31 **(CWS-3)**; Giacchino I ¶ 28 **(CWS-4)**; Letter from Bates White to the CNEE and EEGSA dated 5 May 2008 (enclosing final corrected reports for Stages A to I and I.2) **(C-195)**.

[642] *See* Memorial ¶ 122; Maté I ¶ 25 **(CWS-6)**; Calleja I ¶ 31 **(CWS-3)**; Giacchino I ¶ 28 **(CWS-4)**; Letter from Bates White to the CNEE and EEGSA dated 5 May 2008 (enclosing final corrected reports for Stages A to I and I.2) **(C-195)**; Letter from Bates White to the CNEE and EEGSA dated 5 May 2008 **(C-207)**.

[643] Counter-Memorial ¶ 325.

[644] *Id*. ¶ 329.

[645] *Id*. ¶ 330.

[646] *Id*. ¶ 339.

[647] *Id*. ¶ 336.

[648] *Id*. ¶ 340.

comments"[649] and that "Bates White justified its failure to correct 85 of the 125 comments with an inaccurate interpretation of Articles 1.5 and 1.10 of the Terms of Reference."[650] Respondent's assertions are incorrect.

121. First, as Mr. Calleja explains in his second witness statement, at the beginning of the tariff review process, he proposed to Mr. Quijivix that the CNEE and EEGSA hold Coordination Meetings with their respective consultants, as had been done during the previous tariff review, so that EEGSA's consultant, Bates White, could explain the partial results obtained for each stage report and so that the parties could resolve any issues between them.[651] Despite EEGSA's request for Coordination Meetings with the CNEE and its consultant, Mercados Energéticos, the CNEE agreed to only one such meeting in November 2007, following the delivery of Bates White's Stage A report on 29 October 2007; the CNEE refused all of EEGSA's subsequent requests to discuss the content of the VAD study, reflecting that any lack of cooperation was on the part of the CNEE and not EEGSA.[652] Moreover, while Respondent asserts that EEGSA's "uncooperative attitude" in the tariff review process is "illustrated in a letter written by EEGSA, dated September, 17, 2007, in response to the CNEE's request for information," which indicates that many categories of information are "not available,"[653] as Mr. Maté explains, "this letter does not reflect EEGSA's uncooperative attitude, but shows that EEGSA submitted to the CNEE all of the available information that was used in its VAD study."[654] As Mr. Maté notes, "while EEGSA states in its letter that information regarding the length of high-voltage lines and the high-voltage injection points is 'not available,' it also explains that all injection points are at 13.8 kV, *i.e.*, there are no high-voltage lines or high-

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[649] *Id*. ¶ 344.

[650] *Id*. ¶ 345.

[651] Calleja II ¶ 21 **(CWS-9)**; *see also* Giacchino II ¶ 13 (noting that "EEGSA attempted to hold monthly meetings with the CNEE to discuss its stage reports, as it had during the 2003-2008 tariff review," but that "the CNEE refused to meet to discuss its observations, holding only one such meeting together with its consultants, Mercados Energéticos and Sigla, in November 2007 to discuss Bates White's original Stage A report") **(CWS-10)**.

[652] Letter from Bates White to the CNEE and EEGSA dated 29 Oct. 2007, at 1 **(C-128)**.

[653] Counter-Memorial ¶ 328 (citing Letter from EEGSA to the CNEE dated 17 Sept. 2007 **(R-42)**).

[654] Maté II ¶ 16 **(CWS-12)**; Letter from EEGSA to the CNEE dated 17 Sept. 2007, at 2-3 **(R-42)**.

voltage injection points and thus the information requested simply does not exist."[655] Mr. Maté also notes that "the requested information concerning the classification as 'urban' and 'rural' did not exist, as there was no such distinction made between urban and rural zones by Guatemalan legislation or by EEGSA."[656] He further confirms that "the CNEE never responded to this letter or informed us that the information provided by EEGSA was insufficient," and did not "request any justifications from EEGSA with respect to the availability of the requested information."[657]

122. With respect to the information provided by EEGSA to the CNEE during the tariff review process, Mr. Calleja explains that, in the first ToR issued by the CNEE on 30 April 2007,[658] which EEGSA challenged, "the CNEE had included a stage in which EEGSA was to produce a large volume of information with respect to EEGSA's actual costs and asset base that was unnecessary for its VAD study (given that, under the LGE and RLGE, the VAD study does not reflect the distributor's actual costs or asset base, but those of a model efficient company)."[659] As Mr. Calleja notes, during their negotiations regarding the ToR, "the CNEE acknowledged this fact, and the parties thus agreed to remove this stage from the ToR."[660] They further agreed upon the information that was needed for the VAD study and, in response to the CNEE's requests for information, EEGSA provided all of the available information that was used in its VAD study.[661] As Messrs. Maté and Calleja observe, the CNEE never sanctioned EEGSA for failing to submit any requested information, even though the CNEE had the authority under RLGE Article 134 to sanction a distributor for failing to provide the MEM or the CNEE with required information.[662] This is confirmed by Mr. Giacchino, who notes that "[d]espite the expansive nature of the CNEE's requests, all of the information that was requested by the CNEE was, nonetheless, delivered, adequately conveyed, and in compliance with the

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[655] Maté II ¶ 16 **(CWS-12)**; Letter from EEGSA to the CNEE dated 17 Sept. 2007, at 2-3 **(R-42)**.

[656] Maté II ¶ 16 **(CWS-12)**; Letter from EEGSA to the CNEE dated 17 Sept. 2007, at 2-3 **(R-42)**.

[657] Maté II ¶ 16 **(CWS-12)**.

[658] April 2007 ToR **(C-106)**.

[659] Calleja II ¶ 22 **(CWS-9)**.

[660] *Id.*; *see, e.g.*, 2007 Terms of Reference dated Jan. 2008 **(C-417)**.

[661] Calleja II ¶ 22 **(CWS-9)**; *see, e.g.*, Letter from EEGSA to the CNEE dated 17 Sept. 2007, at 1-3 **(R-42)**.

[662] Calleja II ¶ 22 **(CWS-9)**; Maté II ¶ 15 **(CWS-12)**; RLGE, Art. 134 **(C-21)**.

ToR."[663] Moreover, the evidence reveals that the CNEE sought such detailed information from EEGSA in order to prepare its own VAD study, about which neither EEGSA nor Bates White was informed. As a 22 May 2007 email chain between the CNEE and Mr. Campos reflects,[664] the CNEE noted that, with respect to the stage reports, because EEGSA was "willing to submit preliminary information, maybe [the CNEE] could require more elaborate stage reports, in order to get inputs for our study . . . ."[665]

123. Second, while Respondent asserts that "[o]nce the CNEE made comments on the stage reports, it was up to the EEGSA expert to 'implement' the corrections and deliver its final study,"[666] this is incorrect. As set forth in Professor Alegría's second expert opinion and above,[667] the fact that LGE Article 75 and RLGE Article 98 contemplate the existence of discrepancies that persist between the parties affirms that the distributor is not under any legal obligation to make all of the corrections requested by the CNEE.[668] As also set forth above, Respondent's position is contradicted by Article 1.8 of the final ToR.[669] As Article 1.8 provides, "the CNEE shall have a period of two (2) months to evaluate the Study's Final Report submitted by the Distributor" and that, "[a]s a result of the evaluation, the CNEE shall make such observations as it may deem necessary."[670] Article 1.8 further provides that the "Distributor shall analyze said observations, *make any corrections it deems appropriate* and send the corrected final report of the study to the CNEE within fifteen (15) days of receiving the

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[663] Giacchino II ¶ 15 **(CWS-10)**. Moreover, while Mr. Moller asserts in his witness statement that EEGSA presented its information in a "crude" manner and that he recalls seeing "several boxes of documents piled up in the Tariff Division's offices," Mr. Giacchino explains that, to the contrary, EEGSA's documents were well organized and accompanied by an index, and that he also sent a number of supporting documents to the CNEE by email, organized by the particular stage of the VAD study. *See id*. at ¶ 27; Moller ¶ 48 **(RWS-2)**.

[664] Email from A. Campos to A. Garcia dated 22 May 2007 **(C-484)**.

[665] *Id*.

[666] Counter-Memorial ¶ 330.

[667] Alegría II ¶ 32 **(CER-3)**; Alegría I ¶ 67 **(CER-1)**; *supra* ¶¶ 39-40.

[668] LGE, Art. 75 **(C-17)**; Amended RLGE, Art. 98 **(C-105)**.

[669] *See supra* ¶ 40; Resolution No. CNEE 124-2007 dated 9 Oct. 2007, Art. 1.8 **(C-127)**.

[670] Resolution No. CNEE 124-2007 dated 9 Oct. 2007, Art. 1.8 **(C-127)**.

observations."[671] The necessary corollary to this is that the distributor need *not* make any corrections it deems inappropriate. As Professor Alegría observes, "[t]he CNEE thus expressly acknowledged in the Terms of Reference that the distributor has a right, and not an obligation, to make the corrections requested by the CNEE."[672]

124. Third, as Mr. Maté confirms in his second witness statement, shortly after the CNEE issued Resolution No. 63-2008 dated 11 April 2008, listing all of its observations on EEGSA's completed VAD study,[673] Mr. Moller met Mr. Maté for lunch and asked whether EEGSA would accept a VAD that was 5 percent lower than the VAD that was in force at that time and that, in response to this proposal, EEGSA prepared a counter-proposal, offering a 10 percent increase in the VAD, while maintaining the overall tariffs for EEGSA's regulated consumers.[674] Mr. Maté notes that, contrary to Respondent's suggestions, "[t]here is nothing secretive about a proposal made in person and in writing, and EEGSA would not have been the least interested in an inappropriate or illegal agreement, as a VAD set under those conditions would be extremely vulnerable to any legal challenge," and that, "in view of the increase in the price of materials and equipment and the devaluation of the US Dollar, the strict application of the legal framework set forth in the LGE and RLGE would have resulted in a significant increase in EEGSA's VAD for the 2008-2013 tariff period."[675] As Mr. Maté explains, "[i]n light of the CNEE's uncooperative and unreceptive attitude during the tariff review process and Mr. Moller's question to me as to whether EEGSA would accept a *decrease* in the VAD, it seemed inevitable that the parties would have to resort to an Expert Commission" and that, "[i]n order to avoid the expense and uncertainty that is present in any adjudicatory process, EEGSA was willing to negotiate and accept a VAD rate that was lower than that to which it was entitled."[676] As he notes, "[t]here is nothing remarkable about this: companies negotiate all of the time and

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[671] *Id*. (emphasis added).

[672] Alegría II ¶ 33 **(CER-3)**.

[673] Resolution No. CNEE-63-2008 dated 11 Apr. 2008 **(C-193)**.

[674] Maté II ¶ 17 **(CWS-12)**.

[675] *Id*. ¶ 18; Maté I ¶ 22 **(CWS-6)**.

[676] Maté II ¶ 18 **(CWS-12)**.

accept less than that to which they are entitled in order to avoid litigation, whose outcome is always uncertain," and that "similar proposals had been made to the CNEE previously, including by Mr. Colóm himself while he was General Manager at INDE."[677]

125. As Messrs. Maté and Calleja explain, in that instance, INDE's transmission company, TRELEC, submitted, together with EEGSA's transmission company, ETCEE, a proposal to the CNEE to issue tariffs for electricity transmission that were less than the amount resulting from the applicable study (the study, which had been performed by PA Consulting at the request of the administrator of the wholesale market, determined that the tariffs should more than double).[678] As that proposal reflects, TRELEC and ETCEE informed the CNEE that they "would be willing to concede, under strict compliance with the Current Rules and Regulations . . . a unilateral, one-time discount of 40%, which consequently achieves intermediate results similar to those proposed by the CNEE."[679] The parties further noted that they expected "compliance with current Rules and Regulations and the appreciation of the joint effort that" the transmission companies had offered through their proposal "to establish a transitory stage at [their] expense, that is useful for consolidating the electricity sector of our country."[680] As Mr. Calleja notes, "[t]his proposal, like EEGSA's proposal, thus offered the Government the opportunity to apply a discounted tariff, *i.e.*, one lower than the applicable rate pursuant to the study provided for by law" and that "[t]his attempt at a negotiated resolution in no way contravened the law."[681]

126. Mr. Calleja confirms that, "[b]ased upon the legal challenges to EEGSA's previous tariff and the political changes in Guatemala with the election of President Colóm in 2007, [his] assumption at the time was that, for political reasons, the CNEE was opposed to any

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[677] *Id*.; *see also* Calleja II ¶ 27 ("In order to avoid the expense and uncertainty of adjudicating the parties' dispute, EEGSA was willing to negotiate and accept a VAD rate that was lower than that to which it was entitled under the LGE.") **(CWS-9)**.

[678] Calleja II ¶ 25 **(CWS-9)**; Maté II ¶ 18 **(CWS-12)**; Letter 0-553-170-2005 from TRELEC and ETCEE to the CNEE dated 9 May 2005 **(C-91)**.

[679] Letter 0-553-170-2005 from TRELEC and ETCEE to the CNEE dated 9 May 2005, at 3-4 **(C-91)**.

[680] *Id*., at 4-5 (emphasis in original).

[681] Calleja II ¶ 27 **(CWS-9)**.

increase to the current electricity tariffs," and that his objective was to come up with a counter-proposal that would satisfy both parties and maintain compliance with the legal framework.[682] As he explains, EEGSA "needed to increase its VAD, because, among other things, the part of the VAD estimated in U.S. Dollars in 2003 (approximately 50 percent of the VAD) had not been adjusted to reflect changes in the U.S. Consumer Price Index for the U.S. Dollar during the entire 2003-2008 tariff period."[683] Mr. Calleja thus considered whether there was any way to increase EEGSA's VAD without increasing the overall electricity tariff for consumers and came up with a proposed way of doing this through a 10 percent increase in the VAD.[684] As Mr. Calleja explains, and as discussed above, EEGSA's tariff rates for the 2003-2008 period had included a 10 percent electricity adjustment surcharge so that EEGSA could recover the accrued deferred amounts from the 1998-2003 tariff period, which it was entitled to receive in accordance with RLGE Article 86.[685] The last installment for the repayment of this deferred amount was in July 2008. Accordingly, if EEGSA's VAD were to increase by 10 percent, the resulting tariff rate would have remained the same for EEGSA's regulated consumers.[686] Mr. Calleja thus prepared a presentation with a proposal to this effect for Messrs. Pérez and Maté, which was delivered by them to the CNEE's Directors on 22 April 2008.[687]

127. In his second witness statement, Mr. Maté notes that "Mr. Colóm's insinuations that there was something underhanded about the meeting because there was no agenda and no letterhead on the presentation are curious."[688] As he observes, 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."[689] In his witness statement, Mr. Colóm also claims that, at the meeting, Mr. Pérez said that the Bates White study "was good for

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[682] *Id*. ¶ 25; Calleja I ¶ 28 **(CWS-3)**.

[683] Calleja II ¶ 25 **(CWS-9)**.

[684] *Id*.; Calleja I ¶ 29 **(CWS-3)**.

[685] *See supra* ¶ 83.

[686] Calleja I ¶ 29 **(CWS-3)**.

[687] Tariff Study Presentation dated 22 Apr. 2008 **(C-194)**.

[688] Maté II ¶ 19 **(CWS-12)**.

[689] *Id*.

nothing," and that Mr. Colóm noted this remark on his copy of EEGSA's presentation.[690] Mr. Colóm further asserts that the CNEE told Messrs. Pérez and Maté that it had no authority to negotiate the tariff with EEGSA.[691] As Mr. Maté notes in his second witness statement, both of these assertions are untrue.[692] As he confirms, "Mr. Pérez certainly did not say that the Bates White study was 'good for nothing,'" but rather "told the CNEE's Directors that EEGSA had the authority to agree to a VAD that was lower than the VAD calculated in the Bates White study."[693] As Mr. Maté further confirms, "[t]his did not discredit the validity of the Bates White study in any way, something which would have been entirely inconsistent with Mr. Pérez's position that the outcome of the Bates White study represented a significant increase in the VAD."[694] In addition, Mr. Maté notes that, at the end of the meeting, the CNEE's Directors thanked them for their proposal and said that they would analyze EEGSA's presentation and respond to it, but that no one ever said that the CNEE did not have authority to negotiate EEGSA's tariffs, as Mr. Colóm now asserts.[695] As Mr. Maté observes, he remembers this well "because, in the days following the meeting, Mr. Perez called [him] several times to ask if [they] had received CNEE's response, which would not make sense if, during the meeting itself, the CNEE had said that it lacked authority to negotiate or if it had flatly rejected our proposal."[696]

128. In his witness statement, Mr. Colóm also asserts that EEGSA's request for a meeting was "unusual," particularly because it was made by Mr. Pérez, who had not been involved in the tariff review process.[697] As Mr. Calleja explains, neither the meeting nor the fact that the proposal was made was at all unusual.[698] As he notes, Mr. Pérez was EEGSA's President, and he would travel to Guatemala at least every two months to attend the meetings of

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[690] Colóm ¶ 103 **(RWS-1)**.

[691] *Id*. ¶ 104.

[692] Maté II ¶ 19 **(CWS-12)**.

[693] *Id*.

[694] *Id*.

[695] *Id*.; Maté I ¶ 23 **(CWS-6)**.

[696] Maté II ¶ 19 **(CWS-12)**.

[697] Colóm ¶ 101 **(RWS-1)**.

[698] Calleja I ¶ 27 **(CWS-3)**.

EEGSA's Board of Directors, during which Mr. Pérez also would organize meetings with various Guatemalan officials, including the CNEE's Directors; it thus was not at all unusual for Mr. Pérez to attend a meeting with the CNEE.[699]

129. Finally, on 5 May 2008, Bates White submitted its revised VAD study to the CNEE, responding to the totality of the observations made by the CNEE in Resolution No. CNEE-63-2008, either incorporating the CNEE's observations into its VAD study or explaining the reasons that justified their exclusion.[700] In this connection, Respondent identifies what it asserts are the "most relevant flaws" in the 5 May 2008 Bates White study.[701] These alleged flaws, even if they existed, however, are not "relevant." This is because the disputes that arose regarding Bates White's 5 May 2008 study were submitted to the Expert Commission for resolution, and Bates White revised its 5 May 2008 study accordingly. To the extent that Bates White's position prevailed before the Expert Commission, Respondent's complaints that Bates White's position was wrong thus already have been rejected. And where Bates White's position did not prevail, it revised its study to incorporate the Expert Commission's decision, likewise making irrelevant whether it previously was correct or not. Finally, and contrary to Respondent's suggestion, the fact that Bates White did not prevail with respect to certain discrepancies does not indicate that Bates White failed to act in good faith during the tariff review process or that it did not submit a "serious" study; Bates White had legitimate grounds for its positions.

130. Accordingly, Respondent's complaints that the 5 May 2008 study was not auditable because it contained un-linked spreadsheets and pasted values;[702] that Bates White did not justify the efficient prices it used;[703] and that the study included the costs for undergrounding

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[699] *Id*.

[700] Letter from Bates White to the CNEE and EEGSA dated 5 May 2008, enclosing final corrected reports for Stages A to I and I.2 **(C-195 – C-206)**.

[701] *See* Counter-Memorial ¶ 390.

[702] *See id*. ¶ 391.

[703] *Id*. ¶ 395.

where the actual network contained aerial lines[704] are all unfounded, because the Expert Commission ruled on each of these issues, and Bates White revised its 28 July 2008 study in accordance with those rulings.[705] Although the Expert Commission ruled against Bates White with respect to these issues, Bates White had principled reasons for taking the positions it endorsed in its 5 May 2008 study. With respect to the linking of the models, for instance, Mr. Giacchino explained that the ToR did not require such links; that several people in different countries were working simultaneously on the study under intense time pressure, making it impossible to link the model before the deadline for submission; and that computer memory limits prevented the spreadsheets from being opened all at once, limiting the usefulness of fully linking the model.[706] Notably, Respondent's own expert Mr. Damonte acknowledges that "the simultaneous operation of all these files was not possible, even on machines with large memory RAM," and that this was resolved only "thanks to the new version of Excel 2010."[707] Obviously, the 2010 version of Excel was not available in 2008.

131. Likewise, with regard to reference prices, Bates White provided an explanation of its approach to reference prices in the study.[708] With respect to undergrounding, Mr. Giacchino explained in his first witness statement that Bates White initially included undergrounding because it was required by the Guatemalan service norms, and the municipalities had requested that existing aerial lines be undergrounded in certain areas.[709] After the CNEE issued Resolution No. 63-2008 in April 2008, however, Bates White revised its study so that the 5 May 2008 study provided for aerial lines only in areas of narrow rights of way where aerial lines were not permitted.[710] Each of these positions was justifiable, and there is no ground for finding that Bates White acted in bad faith, especially when it revised its report in accordance with the Expert Commission's rulings.

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[704] *Id*. ¶ 405.

[705] Barrera ¶¶ 73-129 **(CER-4)**; Giacchino II ¶¶ 27-28 **(CWS-10)**; Giacchino I ¶¶ 64-65, 89-90 **(CWS-4)**.

[706] Giacchino I ¶ 54 **(CWS-4)**.

[707] Damonte ¶ 106 fn. 41 **(RER-2)**.

[708] *See* Bates White 5 May 2008 Stage B Report at 33, 38-42 **(C-197)**.

[709] Giacchino I ¶¶ 30-31, 55 **(CWS-4)**.

[710] *Id*.

132. Respondent's protest that the 5 May 2008 Bates White study did not calculate EEGSA's return on a 50% depreciated asset base, in disregard of the ToR,[711] is also spurious, because that requirement contravened the LGE, as the Expert Commission confirmed.[712] Similarly unfounded are Respondent's complaints regarding Bates White's treatment in its 5 May 2008 study of hook-ups and the optimal configuration for outlets. With respect to the former, Respondent erroneously contends that the Expert Commission's Report validates its complaint;[713] to the contrary, the decision of the Expert Commission that Respondent cites related to the price of meters, and not the technical specifications of hook-ups, about which Respondent complains.[714] Finally, with respect to the configuration for outlets, although Respondent criticizes Bates White's optimization, Dr. Barrera confirms that Bates White not only complied with the Expert Commission's decision on this discrepancy, but also that the configuration required by Respondent in the ToR was not technologically sound.[715]

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

133. In its Memorial, Claimant demonstrated that, because Bates White did not accept all of the CNEE's observations in its 5 May 2008 VAD study, and because the CNEE did not accept Bates White's justifications, discrepancies persisted between the parties, which were to be resolved by an Expert Commission pursuant to LGE Article 75 and RLGE Article 98.[716] On 15 May 2008, the CNEE thus issued Resolution No. CNEE-96-2008, notifying EEGSA that discrepancies persisted between the parties with regard to its VAD study, and calling for the establishment of an Expert Commission in accordance with LGE Article 75 to "decide on the

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[711] Counter-Memorial ¶¶ 398-399.

[712] EC Report at 91 **(C-246)**; *see also* Bastos I ¶¶ 21-22 **(CWS-7)**; Barrera ¶¶ 135-136 **(CER-4)**; Kaczmarek II ¶¶ 85-90 **(CER-5)**.

[713] Counter-Memorial ¶ 407 (citing EC Report at 94 **(C-246)**); Damonte ¶¶ 149-53 **(RER-2)**.

[714] *See* Counter-Memorial ¶ 407 (citing EC Report at 94 **(C-246))**; EC Report at 80-81 **(C-246)**.

[715] Barrera ¶¶ 123-124 **(CER-4)**.

[716] *See* Memorial ¶ 124; LGE, Art. 75 **(C-17)**; Amended RLGE, Art. 98 **(C-105)**.

discrepancies," which had been identified therein.[717] Claimant further demonstrated that, during the ensuing negotiations between the CNEE and EEGSA regarding the establishment of the Expert Commission, Guatemala, through both the CNEE and the MEM, undertook to manipulate the process to its advantage—first, by seeking to submit to the Expert Commission alleged discrepancies on issues that the CNEE had not raised in its prior observations; second, by seeking to grant itself the power to appoint two of the Expert Commission's three members by enacting yet another amendment to RLGE Article 98, Article 98 *bis*; and third, by seeking to grant itself (and not the Expert Commission) the ability to determine whether Bates White had fully incorporated the Expert Commission's rulings into its revised VAD study.[718] As Claimant demonstrated, notwithstanding Guatemala's repeated efforts to manipulate the process, Bates White submitted its responses to the new discrepancies set forth in Resolution No. CNEE-96-2008, and EEGSA agreed to submit those discrepancies to the Expert Commission for resolution, so long as the Expert Commission considered Bates White's responses to them; the CNEE ultimately agreed not to apply RLGE Article 98 *bis* to EEGSA's tariff review; a neutral, independent, and highly qualified expert, Mr. Carlos Bastos, was appointed to serve as the third member of the Expert Commission; and the agreed-upon Operating Rules for the Expert Commission provided, in Rule 12, that after Bates White revised its VAD study to incorporate the Expert Commission's decisions, the Expert Commission would determine whether Bates White's revised VAD study fully complied with its decisions.[719]

134. In its Counter-Memorial, Respondent asserts that the CNEE called for the establishment of the Expert Commission after it rejected Bates White's 5 May 2008 VAD study, and that the role of the Expert Commission "was limited to determining whether the Terms of Reference had been properly applied in the distributor's study."[720] Respondent further asserts that "no one considered that this Commission was to be independent or impartial," as both the

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[717] *See* Memorial ¶ 124; Resolution No. CNEE-96-2008 dated 15 May 2008 **(C-209)**; *see also* Email from M. Quijivix (CNEE) to M. Calleja (EEGSA) dated 13 May 2008 **(C-208)**.

[718] Memorial ¶¶ 123-142.

[719] *Id*. ¶¶ 123-142.

[720] Counter-Memorial ¶ 351.

CNEE's and EEGSA's appointees to the Expert Commission previously had been involved in the tariff review as party consultants.[721] With respect to the discrepancies set out in Resolution No. CNEE-96-2008, Respondent asserts that, while EEGSA complained to the CNEE that Resolution No. CNEE-96-2008 had included "additional discrepancies" that the CNEE had failed to raise previously, this is untrue.[722] According to Respondent, "[w]hile some of the titles of the discrepancies named in Resolution [CNEE-]96-2008 had changed, nearly all of the discrepancies were already the subject of previous communications from the CNEE," and the "new issues" that arose involved only "a few minor discrepancies," which were addressed by Bates White in its 23 May 2008 response.[723] Respondent further asserts that, because the parties subsequently agreed to submit these new issues to the Expert Commission, this could "not have caused EEGSA any damage."[724]

135. With respect to RLGE Article 98 *bis*, Respondent contends that, because the CNEE and EEGSA initially failed to agree upon the third member of the Expert Commission, "the CNEE board became concerned as it became apparent that, due to a lacuna in the RLGE, the procedure would be blocked indefinitely if the parties were unable to agree on the third member of the Expert Commission" and that, "[t]o avoid this situation, the CNEE proposed the incorporation of RLGE Article bis to allow the tariff review to process and establish tariffs on time."[725] According to Respondent, "behind this modification, there were only practical motives and concern on the part of the CNEE to implement the new tariff schedule within the legal timeframe" under the LGE.[726] Finally, with respect to the Operating Rules, Respondent claims that, "[a]lthough the parties agreed in principle on most of the operating rules, it was precisely the disagreement on Rule 12 that prevented the parties from formalizing any final agreement on

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[721] *Id*. ¶ 352.

[722] *Id*. ¶ 351 fn. 459.

[723] *Id*.

[724] *Id*.

[725] *Id*. ¶ 354.

[726] *Id*. ¶ 356.

those rules,"[727] and that "the primary reason for the CNEE's objection to Rule 12 was that it affected essential powers of the CNEE and breached the procedure established in the LGE and RLGE, which did not provide for any additional action or duty on the part of the Expert Commission after issuing its pronouncement on the discrepancies."[728] Respondent's assertions are baseless.

136. First, as Resolution No. CNEE-96-2008 reflects, the CNEE resolved "[t]o establish the Expert Commission referred to in article 75 of the [LGE], which must decide on the discrepancies in the Study of [EEGSA], listed below, verifying the correct application of the Terms of Reference (ToR) of the Distribution Value Added Study approved by the [CNEE]."[729] As Professor Alegría explains, and as set forth above, the role of the Expert Commission is to resolve "any discrepancies or differences between the parties with respect to the calculation of the VAD components in the distributor's VAD study," after the CNEE has provided its observations on the distributor's VAD study and after the distributor has responded to the same.[730] In order to do so, the Expert Commission must apply both the ToR issued by the CNEE for the distributor's VAD study and the principles of the LGE and RLGE to which the ToR is subject.[731] This is consistent with the documentary record. As Mr. Bastos notes in his second witness statement,[732] Article 3 of his contract with the CNEE provides that, as the third member of the Expert Commission, he 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 CNEE-96-2008; as well as on the responses to [the] same from" EEGSA.[733] Under Article 4, Mr. Bastos also was required, among other things, to "learn and use the applicable legislation on the points under discrepancy

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[727] *Id*. ¶ 359.

[728] *Id*.

[729] Resolution CNEE-96-2008 dated 15 May 2008, received by EEGSA on 16 May 2008, Art. I **(C-209)**.

[730] Alegría II ¶ 31 **(CER-3)**; *see supra* Section II.A.1.d.

[731] *See* 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[732] Bastos II ¶ 9 **(CWS-7)**.

[733] Administrative Professional Expert Services Contract between the CNEE and C. Bastos dated 26 June 2008, Art. 3 **(C-237)**.

identified precisely in Resolution CNEE-96-2008, and the replies to [the] same by [EEGSA] and its Consultant" and to "[i]ssue his decision on the discrepancies, according to the current law and the Terms of Reference approved by the CNEE for" EEGSA's VAD study.[734]

137. As the Expert Commission's 25 July 2008 Report similarly reflects, the Expert Commission stated that "[t]he issue [was] to discern whether the Consultant's Tariff Study, considering the TOR as guidelines, has performed a task that is in accordance with the requirements of the Law and the Regulations, or otherwise determine if given the justifications of the deviations, [the] CNEE maintained and certifies that the requirements of the TOR better reflect the requirements of the Law."[735] As Mr. Bastos notes, "[i]n other words, the role of the Expert Commission was to examine the LGE and RLGE, as well as the ToR, and to determine which position—the CNEE's or Bates White's—better conformed with and achieved the objectives set forth in the law, and thus whether Bates White was justified in deviating from the ToR with respect to any particular discrepancy."[736] As Professor Alegría observes, "[t]he discrepancies before the Expert Commission thus do not concern merely whether the distributor properly implemented the corrections requested by the CNEE, but also may concern 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."[737] Indeed, if the Expert Commission were limited to determining whether the ToR had been properly applied in the distributor's study, as Respondent asserts,[738] there would be no reason for Mr. Bastos to "learn and use the applicable legislation on the points under discrepancy identified precisely in Resolution CNEE-96-2008, and the replies to [the] same by [EEGSA] and its Consultant" and to "[i]ssue his decision on the discrepancies,

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[734] Bastos II ¶ 9 **(CWS-7)**; Administrative Professional Expert Services Contract between the CNEE and C. Bastos dated 26 June 2008, Art. 4(d)-(e) **(C-237)**.

[735] *See* Expert Commission's Report dated 25 July 2008, at 13 **(C-246)**.

[736] Bastos II ¶ 10 **(CWS-7)**; Bastos I ¶ 18 **(CWS-1)**.

[737] Alegría II ¶ 36 **(CER-3)**.

[738] Counter-Memorial ¶ 351.

according to the current law and the Terms of Reference approved by the CNEE for" EEGSA's VAD study, as set forth in his contract with the CNEE.[739]

138. Second, Respondent's assertion that "no one considered that [the Expert] Commission was to be independent or impartial" is wrong.[740] As Mr. Bastos notes in his second witness statement, after the Expert Commission had been established, he "reminded Messrs. Riubrugent and Giacchino that, as experts on the Expert Commission, they had assumed a different role in the tariff review process and that, in providing their opinions on the discrepancies, they needed to act as independent experts and not as consultants to the parties."[741] This is confirmed by Mr. Giacchino, who notes that, "[t]hroughout the Expert Commission process, 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."[742] This also is reflected in Mr. Bastos's email to Messrs. Riubrugent and Giacchino dated 16 June 2008, in which Mr. Bastos noted that they played "a double role, on the one hand, as involved consultants, in the case of Leonardo, in the preparation of the study and in Jean's case, as an assistant to CNEE in the formulation of observations," and that, in his opinion, their "actions in those roles have been fulfilled" and their "opinions have been given in the different documents."[743] As Mr. Bastos further noted, "[t]he 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" and that, "[i]n this regard it would be

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[739] Bastos II ¶ 9 **(CWS-7)**; Administrative Professional Expert Services Contract between the CNEE and C. Bastos dated 26 June 2008, Art. 4(d)-(e) **(C-237)**.

[740] Counter-Memorial ¶ 352.

[741] Bastos II ¶ 11 **(CWS-7)**; Email from C. Bastos to J. Riubrugent and L. Giacchino dated 16 June 2008 **(C-236)**.

[742] Giacchino II ¶ 23 **(CWS-10)**. As Mr. Giacchino explains, "because it was clear that Bates White would not be able to implement the Expert Commission's decisions on time unless it received them on a rolling basis . . . [he] sought and obtained the consent of the other two Commission members to communicate [their] decisions to Bates White," but that, "[i]n keeping with [their] understanding . . . [he] did not communicate with EEGSA about the Expert Commission's deliberations or rulings during this time period." *Id*.

[743] Email from C. Bastos to J. Riubrugent and L. Giacchino dated 16 June 2008 **(C-236)**.

important for me to have a summarized presentation of your opinions as experts."[744] As Mr. Riubrugent's 17 June 2008 email reflects, Mr. Riubrugent agreed with Mr. Bastos's position, noting that he "basically agree[s] with the proposed methodology" and that "[i]t follows a natural logic and clearly delimits our roles."[745] As the documentary evidence shows, however, the CNEE and Mr. Riubrugent did not respect the independence and impartiality of the Expert Commission, but engaged a series of *ex parte* communications that undermined the integrity of the Expert Commission process, as well as the spirit of the LGE and RLGE.

139. As the record reflects, shortly after Mr. Riubrugent was appointed to the Expert Commission in May 2008, a Supporting Report was prepared for him by Sigla, the CNEE's consultant responsible for preparing the CNEE's own independent VAD study.[746] The purpose of this Supporting Report, according to its own terms, was to enable Mr. Riubrugent to "endorse and sustain the rejection of the Distributor's Proposal" in his role on the Expert Commission.[747] As Mr. Bastos confirms, this Report was not shared with the other members of the Expert Commission, and Mr. Bastos "was unaware that the CNEE was providing analytical support to Mr. Riubrugent to assist him in rejecting EEGSA's positions" in the Expert Commission.[748] Mr. Giacchino likewise understood that Mr. Riubrugent had agreed to refrain from any discussions with the CNEE, the party which had appointed him to the Expert Commission, during the Expert Commission's deliberations and, thus, "was very surprised when [he] recently learned that Mr. Riubrugent [had] communicated about the Expert Commission's decision-making process with the CNEE without informing [him] or Mr. Bastos."[749] As the record further reflects, after the Expert Commission was formally constituted on 6 June 2008,[750] the CNEE and Mr. Riubrugent

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[744] Email from C. Bastos to J. Riubrugent and L. Giacchino dated 16 June 2008 **(C-236)**.

[745] Email from J. Riubrugent to C. Bastos and L. Giacchino dated 17 June 2008 **(C-497)**; *see also* Bastos II ¶ 10 **(CWS-7)**.

[746] *See* Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008 **(C-494)**.

[747] *Id*.

[748] Bastos II ¶ 11 **(CWS-7)**.

[749] Giacchino II ¶ 23 **(CWS-10)**.

[750] Email from M. Quijivix to J. Riubrugent, L. Giacchino, and C. Bastos dated 6 June 2008, attaching Notarized Record Establishing the Expert Commission dated 6 June 2008 **(C-223)**.

not only discussed the Expert Commission's deliberations, but the CNEE gave Mr. Riubrugent information to use in the Expert Commission process and asked that he not share the provenance of the information with the other members of the Expert Commission. Specifically, in a 13 June 2008 email exchange between Marcela Peláez, a CNEE official, and Mr. Riubrugent, Ms. Peláez forwarded to Mr. Riubrugent EEGSA's Financial Statements as of 31 March 2008, which, she remarked, showed that EEGSA was "depreciating 42.8% of their assets" and that EEGSA had "a 10.91% return on equity" and a debt/equity ratio of 0.69.[751] A few hours later, Ms. Peláez sent another email to Mr. Riubrugent, noting as follows: "One more thing . . . this information was not provided to the CNEE by EEGSA. *We obtained it by 'alternative' means, so please don't present it very straightforwardly to the Expert Commission*. It's better to ask *them* to submit the Financial Statements. We'll keep in touch."[752] Mr. Riubrugent responded to Ms. Peláez, noting that, "[g]iven that this material is available to the public, I don't think there will be any problem using it in our arguments within the Expert Commission, *as long as doing so is convenient for defending our position*."[753] Thus, far from acting as an independent and impartial expert, as he had agreed to do, Mr. Riubrugent, unbeknownst to the other members of the Expert Commission, was working behind the scenes directly with the CNEE to defend the CNEE's position.

140. As the evidence further demonstrates, the CNEE's *ex parte* communications with Mr. Riubrugent continued throughout the Expert Commission process. By email dated 18 June 2008, for example, Ms. Peláez sent Mr. Riubrugent additional supporting documents, noting that "there are a few other documents which help support some issues mentioned in the analysis" and that "[t]hey are in a complete folder, which will be uploaded to ME's FTP today."[754] By email to Mr. Quijivix dated 11 July 2008, Mr. Riubrugent requested that information "about EEGSA's

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[751] Email chain between M. Peláez and J. Riubrugent dated 13 June 2008 **(C-496)**.

[752] *Id*. (emphasis added).

[753] *Id*. (emphasis added). Claimant notes in this regard that Mr. Riubrugent's reference to "defending our position" further belies Respondent's contrived argument that the role of the Expert Commission was merely to issue a non-binding advisory opinion on whether Bates White had fully incorporated the CNEE's corrections into its VAD study.

[754] Email chain between M. Peláez and J. Riubrugent dated 18 June 2008 **(C-498)**.

actual monomic purchase prices" be provided "as soon as possible."[755] Mr. Riubrugent also requested legal advice from the CNEE regarding whether the Expert Commission should rule on the additional discrepancies that EEGSA had challenged in Resolution No. 96-2008 given that the CNEE had failed to raise those discrepancies previously.[756] After receiving the CNEE's response, by email dated 23 June 2008, Mr. Riubrugent thanked Mr. Quijivix, noting that now he felt "more confident in [his] position."[757] The documentary record also shows that Mr. Riubrugent discussed the Expert Commission's rulings with the CNEE well before the Expert Commission issued its 25 July 2008 Report. By email dated 7 July 2008, Mr. Riubrugent forwarded to Mr. Quijivix the opinions that he had prepared thus far, noting as follows: "I'm sending the files as promised. I hope you can read them and make any comments by tomorrow. I think I can have a telephone conversation with Mr. Colom tomorrow afternoon; please find out what time suits him best."[758] This is confirmed by Mr. Bastos. As Mr. Bastos explains in his second witness statement, before the Expert Commission's 18 July 2008 meeting in Buenos Aires, Mr. Riubrugent mentioned to him that "the CNEE was not happy with the numbers and wanted a reduced tariff."[759] As Mr. Bastos notes, he "was surprised by this remark, because it suggested to [him] that Mr. Riubrugent was speaking directly with the CNEE regarding the decisions that the Expert Commission had been making, even though the experts had agreed to act independently from the party which had appointed them to the Expert Commission in understanding and resolving the discrepancies between the parties."[760] Mr. Colóm not only fails to mention his *ex parte* communications with the CNEE in his witness statement, but Respondent has not offered any testimony from Mr. Riubrugent, Mr. Quijivix, or Ms. Peláez in this arbitration.

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[755] Email from J. Riubrugent to M. Quijivix dated 11 July 2008 **(C-501)**.

[756] Email chain between M. Quijivix, A. Brabatti, and J. Riubrugent dated 23 June 2008 **(C-499)**.

[757] *Id*.

[758] Email from J. Riubrugent to M. Quijivix dated 7 July 2008 **(C-500)**.

[759] Bastos II ¶ 13 **(CWS-7)**.

[760] *Id*.

141. Moreover, while Mr. Colóm asserts that "[Mr.] Giacchino could never issue an independent and impartial pronouncement on a tariff study which he had prepared himself,"[761] this assertion is wrong. As Mr. Giacchino explains, not only is it "standard practice in tariff reviews to appoint persons who worked on the tariff study to expert commissions charged with resolving disputes between the regulated entity and the regulator," but, "during the Expert Commission process, [he] 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 CNEE on a number of issues."[762] He further explains that Respondent's assertion that he had a contractual obligation to pursue approval of the Bates White study, and that Bates White had an economic interest in such approval, as its fees could be refused by EEGSA if the study were not approved,[763] is incorrect.[764] As Mr. Giacchino explains, the contract that Respondent cites was executed by Bates White LLC, not by him in his personal capacity, and provides that, if the CNEE does not approve the study, compensation for further work "shall be agreed upon between the parties."[765] As Mr. Giacchino further explains, this is not at all unusual, because, "[i]f the study is not approved, the distributor might very well ask the consultant to do some additional work, such as, for example, act as an adviser or a representative on an Expert Commission constituted to resolve the discrepancies between the parties (as in fact happened in this case)."[766]

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[761] Colóm ¶ 116 **(RWS-1)**.

[762] Giacchino II ¶ 25 **(CWS-10)**.

[763] Counter-Memorial ¶ 422; Contract between EEGSA and Bates White dated 23 Jan. 2008, Cl. 5, No. 12 & Cl. 4, ltr. D **(R-55)**.

[764] Giacchino II ¶ 26 **(CWS-10)**.

[765] *Id*.; Contract between EEGSA and Bates White dated 23 Jan. 2008, Cl. 5, No. 12 ("Should the CNEE not approve the Tariff Study, the Consulting Firm shall continue to provide its services, provided EEGSA so requires, and the Consulting Firm undertakes to present and defend the Tariff Study, and in general pursue approval thereof, until final approval thereto is given by the CNEE. Compensation for such services shall be agreed upon between the parties in the event that the deadline established for Stage I.2 in Clause 5.1.4 above is exceeded") **(R-55)**.

[766] Giacchino II ¶ 26 **(CWS-10)**.

He also confirms that the provision setting forth circumstances in which EEGSA may refuse payment does not list the non-approval of the study by the CNEE.[767]

142. Third, Respondent's argument that RLGE Article 98 *bis* filled a "lacuna" in the RLGE is wrong.[768] As Claimant explained in its Memorial,[769] RLGE Article 98 *bis* provides that, if the parties are unable to agree on the third member of the Expert Commission within a period of three days, the MEM shall appoint the third member from the list of candidates proposed by the CNEE.[770] As Professor Alegría explains, this amendment was unconstitutional, because "[t]he LGE does not vest the MEM or any other actor (Government or private) with the authority to appoint the third member of the Expert Commission unilaterally."[771] As Professor Alegría notes, "[t]he language of LGE Article 75 is unequivocal in this regard: the parties together are responsible for the appointment of the Expert Commission, and the third member of the Expert Commission must be appointed 'by mutual agreement.'"[772] Professor Alegría observes that, contrary to Respondent's contentions, there was no "lacuna" in the RLGE; if the CNEE and the distributor were unable to reach agreement on the third member of the Expert Commission, the CNEE would have been unable to publish the distributor's new tariff schedules, and the distributor's previous tariff schedules simply would have continued to apply, with the appropriate adjustments, under LGE Article 78 and amended RLGE Article 99.[773] As Professor

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[767] Giacchino II ¶ 26 **(CWS-10)**; Contract between EEGSA and Bates White dated 23 Jan. 2008, Cl. 4, ltr. D ("EEGSA may refuse payment upon occurrence of any of the following events: (a) the services rendered fail to satisfactorily comply with the Bidding Specifications, the TOR, or this Contract; (b) claims have been filed by third parties or reasonable evidence exists that said claims may be filed; (c) the Consulting Firm has failed to make payments to subcontractors or pay salaries or wages to employees; (e) the Consulting Firm has committed a partial breach. EEGSA reserves the right to directly commission [to a third party] the Study or any phase thereof which the Consulting Firm has failed to complete") **(R-55)**.

[768] *See* Counter-Memorial ¶ 354.

[769] Memorial ¶ 133.

[770] Government Accord No. 145-2008 dated 19 May 2008, published 26 May 2008, at 2 ("If the three-day term for the selection of the third member expires without an agreement by the parties, the [CNEE] shall forward the respective dossier to the Ministry, for the latter to definitively select, within a maximum term of three days after receiving the dossier, the third member of the Expert Commission, from among the proposed candidates.") **(C-212)**.

[771] Alegría II ¶ 64 **(CER-3)**; Alegría I ¶ 53 **(CER-1)**.

[772] Alegría II ¶ 64; *see also* LGE, Art. 75 **(C-17)**.

[773] Alegría II ¶ 66; *see also* LGE, Art. 78 **(C-17)**; Amended RLGE, Art. 99 **(C-105)**.

Alegría notes, the LGE and RLGE do not impose an immediate deadline upon the CNEE to publish the distributor's tariff schedules;[774] to the contrary, RLGE Article 99 provides that the CNEE shall publish the new tariff schedules "in the Central American Gazette, within a term that may never exceed nine months as of the date of expiration of the five-year effective term of the previous tariff schedule" and that, "[i]f the Commission has not published the new tariffs, the tariffs of the previous tariff schedule shall continue to be applied, with their adjustment formulas."[775]

143. As Professor Alegría further observes, RLGE Article 98 *bis* did not address any problem that already had arisen under the LGE, as the Expert Commission established for EEGSA's 2008-2013 tariff review was the very first Expert Commission established in Guatemala under LGE Article 75, and RLGE Article 98 *bis* was adopted a mere four days after the CNEE had called for its establishment.[776] Moreover, as Professor Alegría notes, "even if there were a gap in the LGE, the Government of Guatemala acted unlawfully when it modified the express provisions of the LGE by amending the RLGE," and that "[t]he amendment has the effect of fundamentally altering the balance between the regulator and the distributor that was achieved in the LGE."[777] The CNEE's alleged concern that, "due to a lacuna in the RLGE, the procedure would be blocked indefinitely if the parties were unable to agree on the third member of the Expert Commission,"[778] moreover, is inconsistent with the notion—adopted by Respondent in this arbitration—that the Expert Commission's decisions are advisory opinions that do not bind the CNEE or limit its discretion in any way. If, as Respondent argues, the Expert Commission's decisions are non-binding and have no effect upon the CNEE's actions in setting the distributor's tariff schedules under LGE Article 76, then that process could not have been "blocked indefinitely" by the failure to appoint an Expert Commission, as the CNEE would have the discretion to proceed to set the distributor's tariff schedules unilaterally. Indeed, the

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[774] Alegría II ¶ 80-81 **(CER-3)**.

[775] Amended RLGE, Art. 99 **(C-105)**.

[776] Alegría II ¶ 66 **(CER-3)**.

[777] *Id*.

[778] Counter-Memorial ¶ 354.

fact that Article 98 *bis* was motivated by this alleged concern demonstrates not only that the Expert Commission is a necessary part of the tariff review process, but also that its decisions on the discrepancies are binding upon their parties.

144. In his expert legal opinion, Mr. Aguilar asserts that "the appointment by the MEM [of the Expert Commission's third member was] a logical solution, given the Expert Commission's role as advisor to the CNEE."[779] As Professor Alegría notes, however, "nothing in the LGE establishes the Expert Commission as an 'advisor to the CNEE.'"[780] To the contrary, under LGE Article 75, the Expert Commission is appointed by the CNEE and the distributor in order to resolve the differences that persist between them.[781] Notably, in the Statement of Reasons prepared by the MEM justifying RLGE Article 98 *bis*, the MEM does not refer to the Expert Commission as an "advisor to the CNEE."[782] Rather, the MEM states that a procedure is needed, which "upon discrepancies between the Commission and the Distributor and, therefore, upon the need to convene the Expert Commission referred to in Section [sic] 75 of the General Electricity Law, establishes the terms and procedure to select and appoint the Third Member, who shall be agreed upon by the National Electricity Commission and the pertaining Distributor . . . ."[783] The Opinion of the General Secretariat of the Office of the President of the Republic of Guatemala regarding the proposed Resolution further provides that "the Consulting Body deems it appropriate to issue the abovementioned Government Resolution," because LGE Article 75 provides that the CNEE "shall review the studies conducted and, in the event of discrepancies, it shall agree to appoint an Expert Commission consisting of three members, two of whom shall be appointed by each party, with the third member being appointed by mutual agreement" and that "no procedure has been established to appoint the members and no time

[779] Aguilar ¶ 44 **(RER-3)**.

[780] Alegría II ¶ 65 **(CER-3)**.

[781] *Id*.

[782] Statement of Reasons for RLGE Article 98 *bis* dated 25 Mar. 2008 **(C-493)**.

[783] *Id*. at 1.

frames have been set to convene the Expert Commission."[784] The Consulting Body also does not refer to the Expert Commission as an "advisor to the CNEE."[785]

145. Finally, with respect to the Operating Rules, Messrs. Maté and Calleja confirm that EEGSA opposed the initial regulations proposed on 14 May 2008 by the CNEE to govern the conduct of the Expert Commission, because those regulations provided that the Expert Commission's decisions would be non-binding, which was inconsistent with LGE Article 75 and RLGE Article 98.[786] In view of EEGSA's objections, the CNEE sent a new proposal for the operating rules on 15 May 2008.[787] As that proposal reflects, the CNEE removed the language regarding the non-binding nature of the Expert Commission's decisions and instead included Rule 3, which provided that "[t]he EC shall decide the discrepancies and the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC, and must deliver it to CNEE, which shall review the incorporation of the decision of the [EC], and which shall approve the Tariff Study."[788] As Mr. Calleja notes, Rule 3 shows that the CNEE understood "that the purpose of the Expert Commission was to decide on the discrepancies between Bates White's VAD study and the CNEE's observations, *i.e.,* to determine whether Bates White needed to incorporate the CNEE's observations or whether Bates White's decision not to incorporate the CNEE's observations (and, thus, to deviate from the ToR) was justified under the LGE and RLGE."[789] Mr. Calleja also notes that Rule 3 makes clear

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[784] Opinion No. 182-2008 of the General Secretariat of the Office of the President of the Republic of Guatemala dated 23 Apr. 2008, at 9 **(C-493)**.

[785] Alegría II ¶ 65 **(CER-3)**.

[786] Calleja II ¶ 30 **(CWS-9)**; Maté II ¶ 21 **(CWS-12)**; Email from M. Quijivix to M. Calleja dated 14 May 2008, attaching the Proposed Rules of the Expert Commission, Arts. 1 and 17 **(R-70)**.

[787] Calleja II ¶ 30 **(CWS-9)**; Maté II ¶ 21 **(CWS-12)**; *see* Email from M. Quijivix to M. Calleja dated 15 May 2008 **(C-210)**.

[788] Email from M. Quijivix to M. Calleja dated 15 May 2008, Rule 3 **(C-210)**.

[789] Calleja II ¶ 31 **(CWS-9)**; *see also* Maté II ¶ 22 ("As Rule 3 reflects, contrary to Guatemala's assertions in this arbitration, the CNEE tacitly admitted that the purpose of the Expert Commission is not limited to verifying the existence of discrepancies between Bates White's VAD study and the CNEE's observations, *i.e.*, verifying whether or not Bates White had incorporated all of the CNEE's observations in its VAD study; rather, the purpose of the Expert Commission was to decide the discrepancies, *i.e.,* to determine whether the CNEE's observations needed to be incorporated or whether Bates White's decision not to incorporate those observations (and, thus, to deviate from the ToR) was justified.") **(CWS-12)**.

that the CNEE understood that the Expert Commission's decisions would be binding upon the parties, as EEGSA's consultant was to recalculate the VAD study "'strictly adhering to what is resolved by the EC' and deliver the study to the CNEE 'which shall review the incorporation of the decision of the [EC], and which *shall approve* the Tariff Study.'"[790] As Mr. Calleja observes, under the rules proposed by the CNEE, "[t]he CNEE thus did not have discretion to reject the VAD study after it had been corrected by EEGSA's consultant to incorporate the decisions of the Expert Commission, as Articles 75 and 76 of the LGE make clear."[791]

146. In its Counter-Memorial, Respondent notes that the version of the operating rules submitted by EEGSA on 19 May 2008 "mentioned that the Expert Commission would issue a 'Ruling' [*Sentencia*] and that it would be in charge of the 'resolution of disputes'" and that "[t]he CNEE rejected this proposal because it contradicted the LGE and the RLGE, which provide that the Expert Commission's task is to pronounce itself [*se pronunciará*] on the discrepancies as it is not a tribunal or organ that resolves disputes."[792] Respondent further notes that "EEGSA agreed to remove this language from its proposal and [that] the wording never appeared again in successive communications circulated among the parties."[793] As Mr. Calleja explains, "[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 LGE Article 75, is binding."[794] Accordingly, when EEGSA changed the word "ruling" to "pronouncement," it did not concede that the Expert Commission's decisions would not be binding upon the parties, as Respondent implies.[795] To the contrary, as Mr. Calleja states, "it always was EEGSA's position that the Expert Commission was to decide on the discrepancies

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[790] Calleja II ¶ 31 **(CWS-9)**; Email from M. Quijivix to M. Calleja dated 15 May 2008, Rule 3 (emphasis added) **(C-210)**; *see also* Maté II ¶ 22 ("Rule 3 also makes clear that the CNEE understood that the decision of the Expert Commission would be binding upon the parties, as the consultant was to recalculate the VAD study 'strictly adhering to what is resolved by the EC' and deliver the study to the CNEE 'which shall review the incorporation of the decision of the CNEE, and which *shall approve* the Tariff Study.'") **(CWS-12)**.

[791] Calleja II ¶ 31 **(CWS-9)**.

[792] Counter-Memorial ¶ 362.

[793] *Id*. (emphasis omitted).

[794] Calleja II ¶ 32 **(CWS-9)**.

[795] *Id*.

between the parties and that its decisions would be binding."[796] This is confirmed by Mr. Maté. As Mr. Maté explains, while "EEGSA agreed to change the word 'ruling' to 'pronouncement in the operating rules so as to reflect the precise language of Article 75 of the LGE," this amendment did not "change the meaning of that provision: a 'pronouncement,' as that word is defined by the Royal Spanish Academy: '*Law*: each of the statements, sentences or rulings of a court,' is binding."[797]

147. With respect to Respondent's assertion that "there was never a final agreement between the parties regarding the operating rules"[798] and that "[t]he May 28 draft (sent by Mr. Quijivix to Mr. Calleja) was the last document regarding which the parties attempted − unsuccessfully − to reach agreement,"[799] Messrs. Maté and Calleja explain that this is incorrect. As they note, the CNEE and EEGSA held several meetings between 14 and 28 May 2008 to discuss and negotiate the operating rules for the Expert Commission and, at a meeting held at the CNEE on 28 May 2008, the parties reached a final agreement on 12 operating rules, including Rule 12.[800] As Mr. Maté confirms, "agreement was reached first with respect to Rules 8 and 9, which were modified slightly with the agreement of both parties," and that, "[w]ith respect to Rule 12, EEGSA argued that the Expert Commission should review and verify whether the changes made by the consultant in its corrected VAD study were in accordance with the Expert Commission's decisions, while the CNEE argued that the CNEE should perform this role."[801] Mr. Maté explains that the CNEE's Directors invited additional CNEE staff members to join the debate on this issue, including the Head of the CNEE's Legal Department, Mr. Amilcar Bravatti, and that, after exhaustively debating the issue, the CNEE's representatives retired to deliberate.[802] As Mr. Maté notes, more than half an hour later, the CNEE's representatives

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[796] Calleja II ¶ 32 **(CWS-9)**.

[797] Maté II ¶ 23 **(CWS-12)** (quoting Royal Spanish Dictionary **(C-431)**).

[798] Counter-Memorial ¶ 366.

[799] *Id*. ¶ 365.

[800] Calleja II ¶ 33 **(CWS-9)**; Maté II ¶ 24 **(CWS-12)**.

[801] Maté II ¶ 25 **(CWS-12)**.

[802] *Id*.

returned and informed EEGSA that they agreed to modify the final part of Rule 12 so that it read ". . . and remit the new version to the EC for its review and approval."[803] As Mr. Quijivix had the final document on his computer, which had been projected onto a screen during the meeting, Mr. Quijivix circulated the final, agreed version of the operating rules to EEGSA by email dated 28 May 2008.[804] As Mr. Calleja notes, immediately after this meeting had concluded, he forwarded this email to Mr. Pérez and to Mr. Antonio Martinez, a representative on EEGSA's Board of Directors, reporting that the parties had reached "[a]greement about the procedure regarding the operation of the Expert Commission."[805]

148. In its Counter-Memorial, Respondent asserts that the CNEE could not have agreed to Rule 12, because, "[t]o allow the Expert Commission to review the study, supposedly corrected by the distributor, to confirm whether it was consistent with its pronouncement would have meant reversing the roles of the CNEE and the Expert Commission," and that "[o]nly the CNEE has the authority to determine the admissibility of the tariff study and approve it."[806] As Professor Alegría explains, this is incorrect. First, the CNEE's authority to determine the admissibility of the distributor's VAD study under amended RLGE Article 98 applies before the Expert Commission has been established and before any discrepancies have been declared by the CNEE;[807] the CNEE thus has no authority to accept or reject the distributor's VAD study once it

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[803] *Id*.

[804] *Id*.; *see also* Email from M. Calleja to L. Giacchino, dated 28 May 2008, forwarding Email from M. Quijivix to L. Maté and M. Calleja dated 28 May 2008 **(C-218)**.

[805] Calleja II ¶ 33 **(CWS-9)**; Email from M. Calleja to G. Pérez and A. Martinez dated 28 May 2008, forwarding Email from M. Quijivix to L. Maté and M. Calleja dated 28 May 2008 **(C-217)**.

[806] Counter-Memorial ¶ 364.

[807] Alegría II ¶ 68 **(CER-3)**; Amended RLGE, Art. 98 **(C-105)**. As Professor Alegría explains, "[a]mended RLGE Article 98 contemplates two possible scenarios: (i) the distributor delivers its VAD study, and the CNEE accepts the study without making any observations; or (ii) the distributor delivers its VAD study, and the CNEE rejects the study, making the appropriate observations. Alegría II ¶ 68 **(CER-3)**. As Professor Alegría further explains, "[i]f the CNEE rejects the [distributor's] VAD study and makes observations, RLGE Article 98, as amended in 2007, contemplates three additional possible scenarios: (i) the distributor accepts all of the CNEE's observations and revises its VAD study accordingly; in this case, the CNEE publishes the distributor's new tariff schedules on the basis of the distributor's revised VAD study; (ii) the distributor does not accept, or accepts only some of, the CNEE's observations and provides its objections in writing; if the CNEE disagrees with the distributor's objections, discrepancies are declared and an Expert Commission is appointed to resolve the differences; in this case, the distributor's new tariff schedules are set on the basis of the distributor's VAD study after it has been revised to incorporate the Expert Commission's decisions; or (iii)

has been revised to incorporate the decisions of the Expert Commission.[808] Second, while amended RLGE Article 99 contemplates that the CNEE will "approve" the VAD study and will "proceed to set definitive tariffs as of the date on which the definitive study was approved,"[809] as Professor Alegría explains, "once the distributor's VAD study has been revised to incorporate the Expert Commission's decisions, the scope of the CNEE's review and approval of that study must be limited to ensuring that the distributor's VAD study has been correctly revised," because the Expert Commission's decisions are binding upon the CNEE.[810] As Professor Alegría confirms, the CNEE thus "does not have the discretion under the LGE or RLGE to reject the revised VAD study on the basis that the Expert Commission's decisions are incorrect."[811] Finally, as Professor Alegría notes, Rule 12 does not transfer the CNEE's authority under amended RLGE Article 99 to the Expert Commission, as the Expert Commission does not "approve" the VAD study; rather, the Expert Commission confirms that the VAD study had been correctly revised as per the decisions of the Expert Commission.[812]

149. Respondent also argues that to allow the Expert Commission to review the corrected VAD study under Rule 12 would have been impracticable, because "the Expert Commission could not approve a tariff study that it had not reviewed in its entirety."[813] In so arguing, Respondent relies upon Mr. Bastos's testimony from the *Iberdrola* arbitration, in which he stated that "the Expert Commission only considered points of disagreement, but did not review the tariff study in its entirety nor did it have the means to do so."[814] Respondent's

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the distributor fails to respond to the CNEE's observations; in this case, the CNEE is empowered to set the distributor's new tariff schedules on the basis of its own independent VAD study or on the basis of the distributor's VAD study, as corrected by the CNEE." *Id*. ¶ 69.

[808] Alegría II ¶ 68 **(CER-3)**.

[809] Amended RLGE, Art. 99 **(C-105)**.

[810] Alegría II ¶ 70 **(CER-3)**.

[811] *Id*.

[812] *Id*. ¶ 71.

[813] Counter-Memorial ¶ 364.

[814] *Id*.

assertion is without merit.[815] As Mr. Bastos explains, "[t]he role of the Expert Commission under Rule 12 was not to approve EEGSA's corrected VAD study *per se*, but to confirm that the Expert Commission's decisions with respect to the discrepancies had been fully implemented by Bates White."[816]

150. In his witness statement, Mr. Colóm asserts that, contrary to Claimant's contentions, "no agreement could be reached on a complete set of operating rules" and that the issue of the operating rules thus "moved into the background," after the appointment of Carlos Bastos as the third member of the Expert Commission.[817] As Messrs. Maté and Calleja explain, this is wrong; EEGSA would not have proceeded to agree upon the third member of the Expert Commission without first reaching agreement with the CNEE on the operating rules that would govern the procedure of the Expert Commission.[818] As they note, the reason why the issue of the operating rules "moved into the background" was because the parties had agreed on the operating rules, not because the parties had agreed to proceed with the Expert Commission process without operating rules.[819] Respondent further asserts that, "[d]espite the lack of agreement between the parties, on June 2, 2008, Mr. Calleja re-sent to the president of the Expert Commission, Mr. Bastos—behind the CNEE's back, without notifying it or cc-ing it—the e-mail with the draft under discussion that Mr. Quijivix had sent to EEGSA on May 28" and that "EEGSA unilaterally communicated with the President of the Expert Commission and sent him the operating rules (including Rule 12), telling him that these had been agreed upon, which was false."[820] Respondent also asserts that Mr. Calleja made "an untruthful statement that, after sending an e-mail to Mr. Bastos," he had "informed Mr. Quijivix that [he] had done so" and that

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[815] *See* Bastos II ¶ 19 **(CWS-7)**.

[816] *Id*.

[817] Colóm ¶ 130 **(RWS-1)**.

[818] Calleja II ¶ 34 **(CWS-9)**; Maté II ¶ 26 **(CWS-12)**.

[819] Calleja II ¶ 34 **(CWS-9)**; Maté II ¶ 26 **(CWS-12)**.

[820] Counter-Memorial ¶ 369 (emphasis omitted).

Mr. Calleja does "not offer any proof of this, nor does he explain the manner in which such contact took place."[821] As Mr. Calleja explains, these assertions are wrong.

151. With respect to Mr. Bastos, Mr. Calleja confirms that "Mr. Colóm proposed hiring Mr. Bastos, to which EEGSA agreed after it had fully disclosed the fact that Mr. Bastos previously had carried out a project for EEGSA in connection with the Wholesale Electricity Market."[822] As Mr. Calleja notes, "[t]he CNEE's Directors acknowledged that they were fully aware of this work and that it did not present a problem" and, per their request, Mr. Calleja forwarded a copy of Mr. Bastos's report and invoices for the project to the CNEE for its information.[823] The CNEE's Directors then asked Mr. Calleja to contact Mr. Bastos and to arrange a meeting between him, EEGSA, and the CNEE, which he did.[824] Soon after the 28 May 2008 meeting at the CNEE, Mr. Calleja spoke with Mr. Bastos and forwarded to him a copy of Mr. Quijivix's email with the agreed operating rules.[825] He then informed Mr. Quijivix that he had done so.[826] As Mr. Calleja explains, it is clear that Mr. Quijivix knew that he had forwarded the agreed operating rules to Mr. Bastos, because, during the joint conference call they "discussed the operating rules one by one . . . and it was evident that Mr. Bastos was reading the rules together with [them]."[827] As Mr. Calleja notes, "Mr. Quijivix raised no objections whatsoever either during [his] call with him or during [their] joint conference call with Mr. Bastos."[828]

152. In his witness statement, Mr. Colóm asserts that, during this joint conference call, no representations were made to Mr. Bastos that the CNEE had agreed to Rule 12 or that it had

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[821] *Id*.

[822] Calleja II ¶ 35 **(CWS-9)**; Email from M. Calleja to E. Moller dated 16 June 2008 (attaching the report and related invoices) **(C-233)**; Report by C. Bastos dated Jan. 2008 **(C-151)**.

[823] Calleja II ¶ 35 **(CWS-9)**; Email from M. Calleja to E. Moller dated 16 June 2008 (attaching the report and related invoices) **(C-233)**; Report by C. Bastos dated Jan. 2008 **(C-151)**.

[824] Calleja II ¶ 35 **(CWS-9)**.

[825] *Id*. ¶ 36; Calleja I ¶ 42 **(CWS-3)**; Email from M. Calleja to C. Bastos dated 2 June 2008 **(C-220)**.

[826] Calleja II ¶ 36 **(CWS-9)**; Calleja I ¶ 42 **(CWS-3)**.

[827] Calleja II ¶ 36 **(CWS-9)**.

[828] *Id*.

been approved.[829] As Mr. Calleja notes, however, "Mr. Colóm did not participate in the joint conference call with Mr. Bastos; Mr. Quijivix was the only member of the CNEE on that call."[830] Mr. Calleja further notes that he and Mr. Quijivix both informed Mr. Bastos that the operating rules had been agreed between the parties and that these were the rules to be followed by the Expert Commission in deciding the discrepancies between the parties pursuant to Article 75 of the LGE.[831] Moreover, as Mr. Calleja observes, "Mr. Bastos referred specifically to the operating rules in his financial offer to the parties dated 6 June 2008, which is expressly referred to and incorporated in the contract between Mr. Bastos and the CNEE,"[832] and, "[a]t no point did the CNEE complain or raise any issues with these references to the operating rules."[833]

153. This is confirmed by Mr. Bastos. As Mr. Bastos explains, during his initial call with Alejandro Arnau, one of the CNEE's consultants, at the end of May 2008, Mr. Arnau told him that the Operating Rules had been agreed between the CNEE and EEGSA.[834] Mr. Bastos further confirms that, during his conference call with Messrs. Quijivix and Calleja on 5 June 2008, "neither Mr. Quijivix nor Mr. Calleja said that the Operating Rules 'had been discussed, with the beginnings of an agreement,' as Guatemala asserts."[835] Rather, Messrs. Quijivix and Calleja stated that the Operating Rules had been agreed between the parties.[836] Mr. Bastos notes that Messrs. Quijivix and Calleja "discussed each of the Operating Rules with [him] during [their] conference call, and Mr. Quijivix [thus] was aware that [he] already had received a copy of the Rules and had reviewed them."[837] As Mr. Bastos explains, his "communications with Messrs. Quijivix and Calleja following this conference call further confirm that the CNEE was

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[829] Colóm ¶ 131 **(RWS-1)**.

[830] Calleja II ¶ 37 **(CWS-9)**.

[831] *Id*.

[832] *Id*.; *see also* Contract between the CNEE and Carlos Bastos dated 26 June 2008, at 9 ("The following documents are part of the contract: . . . b) The economic offer made by the EXPERT and accepted by [CNEE].") **(C-237)**; *see also* Letter from Carlos Bastos to EEGSA and the CNEE dated 6 June 2008 **(C-225)**.

[833] Calleja II ¶ 37 **(CWS-9)**.

[834] Bastos II ¶ 4 **(CWS-7)**.

[835] *Id*.; Counter-Memorial ¶ 370.

[836] Bastos II ¶ 4 **(CWS-7)**.

[837] *Id*.

aware that [he] had received a copy of the Operating Rules."[838] In addition to his financial proposal to the CNEE and EEGSA dated 6 June 2008, which specifically referenced the Operating Rules,[839] Mr. Bastos asked Messrs. Quijivix and Calleja by email dated 12 June 2008 whether he could travel to Guatemala by himself for the first meeting of the Expert Commission, as Messrs. Riubrugent and Giacchino were unable to travel at that time.[840] As that email reflects, Mr. Bastos inquired "whether this would be in accordance with the "formal requirements," *i.e.*, the Operating Rules (which required that all three members attend meetings of the Expert Commission, and that its first and last meetings be held in Guatemala City)."[841] Mr. Quijivix responded that the CNEE had no objection.[842] As Mr. Bastos notes, "[t]he CNEE thus was aware that [he] had a copy of the Operating Rules and that [he] understood that the Expert Commission was to follow the procedure set forth therein."[843]

154. Mr. Bastos further notes that his discussions with the CNEE during that first meeting in Guatemala also demonstrate that the CNEE was aware that he had received a copy of the Operating Rules.[844] As he explains, at that meeting, Mr. Moller asked him whether he had already selected the support staff that would assist the Expert Commission and, specifically, whether he had identified a lawyer to advise him with regard to the Expert Commission's activities.[845] Mr. Bastos told Mr. Moller that he wanted to retain Mr. Edgar Navarro, a former CNEE director, to advise him on issues of Guatemalan law.[846] The CNEE objected to him doing

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[838] *Id*.

[839] Letter from C. Bastos to M. Quijivix and M. Calleja dated 6 June 2008 **(C-225)**.

[840] Bastos II ¶ 4 **(CWS-7)**; Email from C. Bastos to M. Quijivix and M. Calleja dated 12 June 2008 **(C-495)**.

[841] Bastos II ¶ 4 **(CWS-7)**; Email from C. Bastos to M. Quijivix and M. Calleja dated 12 June 2008 **(C-495)**. Under Rule 2 of the Operating Rules, the first session of the Expert Commission was to be held in Guatemala City. *See* Email from M. Calleja to C. Bastos dated 2 June 2008 (submitting the Operating Rules for the Expert Commission), Rule 2 **(C-220)**. Rule 1 of the Operating Rules further provided that all meetings of the Expert Commission needed to be attended by all three members. *See id.*, Rule 1.

[842] Email from M. Quijivix to C. Bastos and M. Calleja dated 13 June 2008 **(C-495)**.

[843] Bastos II ¶ 4 **(CWS-7)**.

[844] *Id*. ¶ 5.

[845] *Id*.

[846] *Id*.

so, and Mr. Bastos instead retained an Argentine lawyer.[847] As Mr. Bastos notes, in his contract with the CNEE, there is no mention of him retaining any support staff.[848] The Operating Rules, however, expressly contemplate that the third member of the Expert Commission shall retain the necessary staff.[849] As Mr. Bastos explains, "Mr. Moller's question to [him] thus indicates that [Mr. Moller] was aware that [he] had received and reviewed a copy of the Operating Rules."[850]

155. Mr. Bastos also confirms 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 such would respect the limitations provided by the parties," as Mr. Colóm contends.[851] As Mr. Bastos notes, "the Expert Commission understood that the Operating Rules governed its conduct, which is why the Expert Commission incorporated those Rules into its 25 July 2008 Report and expressly stated therein that '[t]he Parties have agreed on the following Expert Commission operating rules.'"[852] Mr. Bastos further notes that "Mr. Riubrugent, the CNEE's 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."[853]

156. In his witness statement, Mr. Colóm asserts that "[p]roof that these rules never went farther than discussions is provided by the Notice of Appointment for the Expert Commission dated June 6, 2008," because that Notice does not refer to the operating rules.[854] As the Notice of Appointment reflects, the Notice officially appointed the members of the Expert

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[847] Bastos II ¶ 5 **(CWS-7)**.

[848] Bastos II ¶ 5 **(CWS-7)**; Administrative Professional Expert Services Contract between the CNEE and C. Bastos dated 26 June 2008 **(C-237)**.

[849] Bastos II ¶ 5 **(CWS-7)**; Email from M. Calleja to C. Bastos dated 2 June 2008, Rule 5 ("The third member of the EC shall coordinate the Expert Commission and shall have the necessary Staff to develop the activities it deems pertinent.") **(C-220)**; *id*., Rule 6 ("Third parties shall not be allowed at the EC meetings, save for the Staff and the experts who are expressly cited therefor.").

[850] Bastos II ¶ 5 **(CWS-7)**.

[851] Colóm ¶ 130 **(RWS-1)**.

[852] Bastos II ¶ 6 **(CWS-7)**; Expert Commission's Report dated 25 July 2008, at 10 **(C-246)**.

[853] Bastos II ¶ 6 **(CWS-7)**.

[854] Colóm ¶ 133 **(RWS-1)**; *see also* Email from M. Quijivix to J. Riubrugent, L. Giacchino, and C. Bastos, attaching Notarized Record Establishing the Expert Commission dated 6 June 2008, at 1-3 **(C-223)**.

Commission and constituted the Expert Commission under LGE Article 75.[855] As Mr. Calleja notes, "[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. Colóm's assertion that the parties failed to reach agreement on the operating rules."[856]

157. In a further attempt to undermine the Operating Rules, Respondent asserts that "the content and order of the rules included in Mr. Bastos's contract [with EEGSA] are materially different from the last version thereof that was discussed—without agreement—by the parties."[857] As Mr. Calleja explains, this too is incorrect. First, as Mr. Calleja notes, "not every rule was reproduced in Mr. Bastos's contract, but those that were reproduced are exactly the same as the agreed-upon rules as included in the email that [he] sent to Mr. Bastos on 2 June 2008."[858] Second, as Mr. Calleja confirms, "EEGSA included in its contract with Mr. Bastos only those operating rules that related directly to Mr. Bastos's tasks as the third member of the Expert Commission, and did not consider it necessary to include the other rules that related to the internal workings of the Expert Commission."[859] Thus, the rules relating to the timing and content of the Expert Commission's decision were reproduced in the contract, whereas the rules providing for the location and quorum for the Expert Commission's meetings were not reproduced.[860] As Mr. Calleja notes, "Rule 12, which dealt with the manner in which Bates White's compliance with the Expert Commission's rulings would be verified, fell into the former category and thus was included in Mr. Bastos's contract."[861] As Mr. Calleja further explains,

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[855] Email from M. Quijivix to J. Riubrugent, L. Giacchino, and C. Bastos, attaching Notarized Record Establishing the Expert Commission dated 6 June 2008, at 2 **(C-223)**; *see also* Calleja II ¶ 38 **(CWS-9)**; Maté II ¶ 27 **(CWS-12)**.

[856] Calleja II ¶ 38 **(CWS-9)**; Maté II ¶ 27 **(CWS-12)**.

[857] Counter-Memorial ¶ 379.

[858] Calleja II ¶ 39 **(CWS-9)**; Email from M. Calleja to C. Bastos dated 2 June 2008 **(C-220)**.

[859] Calleja II ¶ 39 **(CWS-9)**; Calleja I ¶ 44 fn. 97 **(CWS-3)**; Contract between EEGSA and C. Bastos dated 26 June 2008, at 2-3 **(C-238**).

[860] Calleja II ¶ 39 **(CWS-9)**; Email from M. Calleja to C. Bastos dated 2 June 2008 **(C-220)**; Contract between EEGSA and C. Bastos dated 26 June 2008 **(C-238)**.

[861] Calleja II ¶ 39 **(CWS-9)**; Contract between EEGSA and C. Bastos dated 26 June 2008 **(C-238)**.

EEGSA later had to amend Mr. Bastos's contract in order to pay him for his work on the Expert Commission, because the Expert Commission was unable to perform its obligations under Rule 12.[862] As Mr. Calleja notes, and as discussed further below, this was due to the refusal of Mr. Jean Riubrugent, the CNEE's appointee to the Expert Commission, to participate in the Expert Commission's review and approval of Bates White's corrected VAD study in accordance with Rule 12.[863]

5. The CNEE Unilaterally And Unlawfully Dissolved The Expert Commission And Set EEGSA's New Tariff Schedules Based Upon Its Own VAD Study

158. In its Memorial, Claimant demonstrated that, although the CNEE and EEGSA appointed an Expert Commission to resolve their dispute relating to EEGSA's VAD study, the CNEE disregarded the legal and regulatory framework, as well as the agreed-upon Operating Rules, to set the VAD that it wanted.[864] As Claimant demonstrated, after the Expert Commission had concluded its deliberations, the CNEE made a series of public statements foreshadowing that the CNEE would not comply with an adverse decision.[865] Then, after the Expert Commission had ruled against the CNEE on several key discrepancies, including the FRC calculation that the CNEE and Mr. Riubrugent had devised to decrease EEGSA's VAD,[866] the CNEE unilaterally dissolved the Expert Commission and threatened its own appointed expert in order to prevent the Expert Commission from reviewing and approving Bates White's revised VAD study under Rule 12.[867] Finally, when a majority of the Expert Commission confirmed that Bates White had, in fact, revised its VAD study in accordance with the Expert Commission's Report, the CNEE

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[862] Calleja II ¶ 39 **(CWS-9)**.

[863] *Id*.; Calleja I ¶¶ 52-53 **(CWS-3)**.

[864] *See* Memorial ¶¶ 189-199.

[865] *See id*. ¶¶ 151-154; Eduardo Smith, "Distribution Rate not yet determined," *Prensa Libre* dated 23 July 2008 **(C-242)**; Fernando Quiñónez, "CNEE shall receive the expert report today," *Siglo 21* dated 24 July 2008 **(C-243)**.

[866] *See* Memorial ¶¶ 155-166; EC Report **(C-246)**.

[867] *See* Memorial ¶¶ 167-183; Notification Document dated 28 July 2008, enclosing CNEE Resolution No. GJ-Providencia-3121 dated 25 July 2008 (dissolving the Expert Commission because the Expert Commission's Report was "deemed received," and the Expert Commission thus had "met the purpose of its appointment") **(C-247)**; *see also* Bastos I ¶ 30 **(CWS-1)**; Maté I ¶¶ 48-49 **(CWS-6)**; Calleja I ¶ 47 **(CWS-3)**.

nonetheless proceeded to publish EEGSA's new tariff schedules based upon its own independent VAD study.[868] In so doing, the CNEE not only violated EEGSA's due process rights under the law, but undermined the very legal and regulatory framework that Guatemala had adopted to depoliticize the tariff review process and to encourage foreign investment in its electricity sector.[869]

159. In its Counter-Memorial, Respondent contends that "the Expert Commission issued a pronouncement on most of the discrepancies (58 percent)—including on the most important ones—in favor of the CNEE"[870] and that, "[w]ith only a few days before the due date for setting the new tariff schedule, the Expert Commission confirmed the inadmissibility of most of [EEGSA's VAD] study."[871] According to Respondent, once the Expert Commission had issued its pronouncement on the discrepancies, "the duties assigned to it in the Notarized Act of Appointment were completed," and the CNEE accordingly proceeded to dissolve the Expert Commission, because "there was never an agreement between the CNEE and EEGSA" regarding Rule 12.[872] With respect to EEGSA's new tariff schedules, Respondent contends that these tariff schedules had to take effect on 1 August 2008 and therefore had to be published in the Diario de Centroamérica by 31 July 2008 at the latest,[873] and that, because "it was impossible to correct [Bates White's VAD] study within the remaining available time," the CNEE "decided that the most reasonable option would be to use the tariff study prepared by the Sigla consultant to set the tariffs."[874] Respondent further contends that there was no legal basis for the CNEE to review Bates White's VAD study for a third time, and that the CNEE accordingly decided to proceed with its plan to analyze Sigla's VAD study for approval.[875] Respondent also contends that two external reports subsequently confirmed that "very many pronouncements were never

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[868] *See* Memorial ¶¶ 184-199; Alegría I ¶¶ 61, 64-69 **(CER-1)**.

[869] *See* Memorial ¶¶ 189-199; Alegría I ¶¶ 61, 64-69 **(CER-1)**.

[870] Counter-Memorial ¶ 390.

[871] *Id*. ¶ 410.

[872] *Id*. ¶ 411.

[873] *Id*. ¶ 415.

[874] *Id*. ¶ 417.

[875] *Id*. ¶ 419.

incorporated" into Bates White's revised VAD study.[876] Respondent's contentions are belied by the documentary record.

160. At the outset, Claimant notes that the legal premise underlying Respondent's justifications for the CNEE's actions in this case is false. EEGSA's new tariff schedules did not have to take effect on 1 August 2008, nor did they have to be published in the *Diario de Centroamérica* by Thursday, 31 July 2008 at the latest, as Respondent contends.[877] To the contrary, as set forth above, and as Professor Alegría confirms, RLGE Article 99 expressly provides that the CNEE shall publish the new tariff schedules "in the Central American Gazette, *within a term that may never exceed nine months as of the date of expiration of the five-year effective term of the previous tariff schedule*" and that, "[i]f the Commission has not published the new tariffs, the tariffs of the previous tariff schedule shall continue to be applied, with their adjustment formulas."[878] The RLGE thus does not impose any obligation on the CNEE "to ensure that approved tariff schedules are in place upon expiry of each five-year tariff period," as Mr. Colóm asserts,[879] but expressly provides that the CNEE has *nine months* after the expiration of each five-year tariff term to publish the distributor's new tariff schedules and that, in the interim, the distributor's previous tariff schedules will continue to be applied with the appropriate adjustments. That the CNEE was "pressed for time" and that it was "impossible" to set the tariffs on the basis of Bates White's VAD study, even if that study needed to be further revised, within the time that the CNEE had thus is false;[880] under the law, the CNEE had until 1 May 2009 to publish EEGSA's new tariff schedules.[881] As set forth below, what the evidence shows is that the CNEE, in an unlawful and arbitrary exercise of regulatory power, imposed its own VAD upon EEGSA, when the VAD that resulted from the Expert Commission process was deemed by the CNEE to be too high.

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[876] *Id*. ¶ 419.

[877] *Id*. ¶ 415.

[878] Amended RLGE, Art. 99 (emphasis added) **(C-105)**; *see also supra* ¶¶ 85-88, 142; Alegría II ¶ 81 **(CER-3)**.

[879] Colóm ¶ 37 **(RWS-1)**.

[880] *Id*. ¶¶ 146-147.

[881] *See* Amended RLGE, Art. 99 **(C-105)**.

a. The Expert Commission's Report Largely Favored EEGSA And Bates White

161. Claimant demonstrated in its Memorial that the majority of the discrepancies that had the most significant impact on the VNR and the VAD were decided by the Expert Commission in Bates White's favor.[882] This was confirmed by Mr. Calleja, who explained in his first witness statement that "EEGSA and Bates White prevailed on the core disputes that had the greatest impact on the VAD."[883] In particular, Claimant explained how the Expert Commission's decision with respect to the FRC calculation was much more favorable to EEGSA's position (which sought a 100% return on the VNR) than it was to the CNEE's position (which would have allowed only a 50% return), because it permitted an approximate 93% return on the VNR, on average, over the five-year period.[884] Claimant also described how the Expert Commission's agreement with Bates White that the most recent prices should be used, rather than updating 2006 prices for inflation as the CNEE had insisted, had a significant impact on the VNR, because commodity prices for products used in distribution networks had risen more than inflation.[885] In addition, Claimant noted the positive impact on the VNR that resulted from the Expert Commission's ruling regarding the methodology for calculating demand density, and explained how the CNEE's position, if accepted, would have resulted in the underestimation of the network's assets.[886]

162. In its Counter-Memorial, Respondent asserts that "the Expert Commission issued a pronouncement on most of the discrepancies (58 percent) – including on the most important ones – in favor of the CNEE."[887] The evidence, as well as the CNEE's own actions taken in response to the Expert Commission's Report, plainly demonstrate that this was not the case. In

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[882] *See* Memorial ¶¶ 158-164.

[883] Calleja I ¶ 46 **(CWS-3)**.

[884] Memorial ¶¶ 159-162; Bastos I ¶¶ 20-22 **(CWS-1)**; Giacchino ¶¶ 58-60 **(CWS-4)**; Kaczmarek I ¶¶ 106, 115-121, Figure 15 **(CER-2)**.

[885] Memorial ¶ 163; Bastos I ¶ 28 **(CWS-1)**; Giacchino I ¶ 57 **(CWS-4)**; Kaczmarek I ¶¶ 105-106 **(CER-2)**. This is confirmed by Dr. Barrera. *See* Barrera ¶¶ 55-56, 265 **(CER-4)**.

[886] Memorial ¶ 164; Bastos I ¶¶ 23-26 **(CWS-1)**.

[887] Counter-Memorial ¶ 390.

support of its contention, Respondent mentions four discrepancies.[888] Respondent, however, does not proceed to show how the Expert Commission's decision with respect to each of those four discrepancies was in the CNEE's favor or to rebut Claimant's assertion that, by and large, the discrepancies that had the greatest impact on the VNR were decided in EEGSA's favor. Instead, with respect to the rulings on the four discrepancies, Respondent either criticizes the Expert Commission's decision or relies upon the particular ruling to support its contention that Bates White's 5 May 2008 VAD study was unsuitable, presumably because the Expert Commission ruled against Bates White's position. As shown above, however, that is irrelevant: the Expert Commission's function was to resolve the discrepancies, and not to determine whether the 5 May 2008 VAD study had incorporated all of the CNEE's observations.[889]

163. While the first discrepancy highlighted by the CNEE—the traceability of the model—may have been important to the CNEE, the Expert Commission's ruling on the discrepancy had no direct effect on the VNR or the VAD; as Dr. Barrera explains, to comply with this ruling, Bates White needed to ensure that its "changes to the 28 July 2008 model as compared with the 5 May 2008 model can be verified through the links in the 28 July 2008 model."[890] This ruling said nothing about the level of the VNR or VAD. Likewise, Respondent's observation that the Expert Commission ruled that Bates White needed to include two international reference prices, along with one domestic price, for materials,[891] had no direct effect on the VNR or the VAD; because the consultant needed to choose the 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. Third, Respondent criticizes the Expert Commission's decision on the FRC calculation, but does not and cannot contend that the Expert Commission's ruling on this discrepancy was more favorable to it than it was to EEGSA.[892] Finally, Respondent notes the Expert Commission's

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[888] *See id*. ¶¶ 391-410.

[889] *See supra* ¶¶ 39-42.

[890] Barrera ¶ 74 **(CER-4)**.

[891] Counter-Memorial ¶¶ 395-397.

[892] *See id*. ¶¶ 398-401.

ruling that only the cost of existing undergrounding can be included in the VNR and that the network needed to be optimized in certain respects.[893] Claimant acknowledged that the Expert Commission's decision on undergrounding was in favor of the CNEE and that it resulted in a substantial decrease in the VNR; Claimant likewise recognized that other decisions also favored the CNEE.[894] These decisions, however, do not change the fact that the full implementation of the Expert Commission's rulings would have resulted in a VNR and VAD that was closer to that advocated by Bates White than to that insisted upon by the CNEE.

164. Indeed, the contemporaneous evidence reveals that the CNEE understood this immediately. In an undated CNEE presentation, presumably prepared for the 28 July 2008 meeting convened to discuss the tariffs, which is referenced by Mr. Colóm in his witness statement,[895] the CNEE analyzes the effect of the Expert Commission's rulings on the VNR and the VAD.[896] As that presentation reflects, although the Expert Commission's decision on undergrounding and optimization of the network were decided in the CNEE's favor and would have a significant impact on the VNR and VAD, this effect would be off-set by the Expert Commission's unfavorable decision on the FRC: "The effect of eliminating Underground

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[893] *See* Counter-Memorial ¶¶ 402-410.

[894] Memorial ¶¶ 165-166.

[895] Colóm ¶ 139 ("Because the new tariffs needed to be published on July 31 at the latest so that they would be in effect on August 1, the CNEE had very little time to act. Therefore, my Tariff Division team worked the entire weekend (July 26 and 27) analyzing the Expert Commission's pronouncement to present us its conclusions on Monday in the Director's meeting") **(RWS-1)**. Claimant notes that, while Respondent agreed to produce "[a]ll reports, memoranda, minutes of meetings of the CNEE's Board of Directors, or other documents reflecting the CNEE's discussions or analysis of the Expert Commission's Report, as well as all documents reflecting the CNEE's conclusion that neither Bates White's 5 May 2008 VAD study, nor any subsequent, revised study by Bates White, could serve as the basis for establishing the tariffs," Respondent has not produced *any* minutes from the 28 July 2008 meeting of the CNEE's Board of Directors that was held to discuss the Expert Commission's Report. *See* Letter from Claimant to Respondent dated 14 Feb. 2012, Request No. G.9. In fact, Respondent has produced only *one* document containing any of the CNEE's meeting minutes, even though numerous categories of documents requested by Claimant and ordered by the Tribunal called for the production of CNEE meeting minutes. *See* CNEE Minutes Terms of Reference, EEGSA's Load Characterization Study dated 10 July 2007 **(C-488)**.

[896] Analysis of the Expert Commission Opinion, undated **(C-547)**. This presentation, which lists the "[p]revailing party" on each particular discrepancy and estimates the amount of time that it would take Sigla to incorporate each ruling into its VAD study, further confirms that the Expert Commission's function was to resolve the discrepancies, and not to determine whether Bates White's 5 May 2008 VAD study had incorporated all of the CNEE's observations. *See id*. at 15-17.

Facilities, Optimum Technologies and Construction Units affects the [VNR] of EEGSA's Study [by] 600 million. Such effect will not be sensitive given that the [FRC] difference has a multiplying factor for such [VNR]. For this reason, it is not expected to significantly affect Distribution Charges."[897] In particular, the CNEE reported that the Expert Commission's decision on the FRC "increases the [VNR]'s Annuity [by] 47% compared to the formula set forth in the ToR" and that "[i]f the effects of inflation and the [FRC] are included, then the impact is 63%."[898] Ultimately, the CNEE concluded that, although some of the Expert Commission's decisions were in favor of the CNEE and would had have the effect of decreasing the VNR, if all of the rulings were implemented into a revised study, the VNR would be "higher than the [VNR] of the CNEE's Independent Study."[899] It also determined that, even if it relied upon Sigla's VNR and did not change any of the costs in that study, but only implemented the Expert Commission's decision on the FRC, "the [VAD] would be increased [by] approximately 25%."[900] It is clear that this is what motivated the CNEE's decision to disregard the revised Bates White VAD study, which had incorporated all of the Expert Commission's rulings; to instruct Sigla not to incorporate any of the Expert Commission's rulings (particularly its ruling on the FRC) into its VAD study; and to rely instead upon the Sigla study to set EEGSA's tariffs.

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

165. In its Memorial, Claimant demonstrated that, after the Expert Commission had delivered its Report to the CNEE and EEGSA on 25 July 2008, the CNEE proceeded to unilaterally dissolve the Expert Commission, in violation of law and the agreed-upon Operating Rules, on the alleged ground that the Expert Commission had completed its work.[901] Claimant further demonstrated that, although EEGSA succeeded in obtaining an *amparo* from the

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[897] Analysis of the Expert Commission Opinion, undated, at 8 **(C-547)**.

[898] *Id*., at 9.

[899] *Id*.

[900] *Id*.

[901] *See* Memorial ¶¶ 167-183; Notification Document dated 28 July 2008, enclosing CNEE Resolution No. GJ-Providencia-3121 dated 25 July 2008 (dissolving the Expert Commission because the Expert Commission's Report was "deemed received," and the Expert Commission thus had "met the purpose of its appointment") **(C-247)**; *see also* Bastos I ¶ 30 **(CWS-1)**; Maté I ¶¶ 48-49 **(CWS-6)**; Calleja I ¶ 47 **(CWS-3)**.

Guatemalan courts ordering the CNEE to "comply in full with the decision of the Expert Commission" and to allow the Expert Commission "to conclude its work, especially the final review of the changes presented to the Expert Commission by the Firm Bates White,"[902] the Court reversed itself by order of the same date, suddenly concluding that it was "unable to hear and decide the merits of the case," because EEGSA had not exhausted its administrative remedies.[903] As Claimant demonstrated, these actions led to uncertainty among the members of the Expert Commission, because, as Messrs. Bastos and Giacchino explained in their first witness statements, they understood that they still were required to review and approve Bates White's revised VAD study, in accordance with Rule 12.[904] Claimant further demonstrated that, although Mr. Riubrugent previously had indicated that he was "certain" that Bates White's revised VAD study incorporated the Expert Commission's decisions,[905] Mr. Riubrugent refused to participate in the Expert Commission's review and approval of Bates White's revised VAD study under Rule 12, after the CNEE issued a veiled threat to prevent him from doing so.[906]

166. In its Counter-Memorial, Respondent argues that, contrary to Claimant's contentions, the dissolution of the Expert Commission was "not illegal or arbitrary," but was "plainly consistent with LGE Article 75, which established that the Expert Commission is only to pronounce itself on the discrepancies."[907] Mr. Aguilar similarly asserts in his expert legal

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[902] First Court of the First Civil Instance Decision dated 30 July 2008, at 2 **(C-275)**; *see also* Memorial ¶ 179; Calleja I ¶ 48 **(CWS-3)**; Maté I ¶ 52 **(CWS-6)**; Alegría I ¶ 71 **(CER-1)**; *see also* Letter from the First Court of the First Civil Instance to the CNEE dated 30 July 2008 (reflecting CNEE's receipt of this order on 30 July 2008) **(C-277)**.

[903] Resolution of the First Court of the First Civil Instance dated 30 July 2008 **(C-278)**; *see also* Memorial ¶ 180; Alegría I ¶ 72 **(CER-1)**; Maté I ¶ 52 **(CWS-6)**; Calleja I ¶ 51 **(CWS-3);** Letter from the First Court of the First Civil Instance to the CNEE dated 31 July 2008 (C-280).

[904] *See* Memorial ¶ 172; Bastos I ¶ 31 (stating, among other things, that he "was surprised by the CNEE's dissolution of the Expert Commission and termination of [his] contract, as [his] understanding was that, under Rule 12 of the Operating Rules, the Expert Commission was to review and approve the corrected Bates White tariff study") **(CWS-1)**; Giacchino I ¶¶ 82-84 **(CWS-4)**.

[905] Email from J. Riubrugent to L. Giacchino and C. Bastos dated 29 July 2008 **(C-268)**.

[906] *See* Memorial ¶ 181; Email Chain from J. Riubrugent to C. Bastos and L. Giacchino dated 30-31 July 2008 **(C-281)**; *see also* Bastos I ¶ 33 **(CWS-1)**; Giacchino I ¶ 88 **(CWS-4)**; Maté I ¶ 55 **(CWS-6)**; Calleja I ¶ 52 **(CWS-3)**; Alegría I ¶ 62 **(CER-1)**.

[907] Counter-Memorial ¶ 412.

opinion that the Expert Commission "is not a permanent body" and that it is dissolved by operation of law once it issues its report on the discrepancies.[908] Mr. Aguilar also asserts that, under LGE Article 75 and amended RLGE Article 98, the Expert Commission "cannot exist for more than sixty days counted from the date of its constitution."[909] In addition, Respondent contends in its Counter-Memorial that the CNEE's actions in dissolving the Expert Commission were consistent with Mr. Bastos's financial proposal, as well as his contract with EEGSA, which provided for payment of his final fee upon submission of the Expert Commission's Report.[910] Respondent's assertions are incorrect.

167. First, as Professor Alegría confirms, the CNEE's unilateral dissolution of the Expert Commission was unlawful, because the Expert Commission is appointed based upon the agreement of both parties, and neither the CNEE nor the distributor thus has the authority to dissolve the Expert Commission unilaterally.[911] As Professor Alegría further confirms, although the Expert Commission is not a permanent body, nothing in the LGE or the RLGE provides that the Expert Commission will dissolve automatically by operation of law after it issues its ruling on the discrepancies, as Mr. Aguilar contends.[912] Indeed, if this were true, the CNEE would not have needed to dissolve the Expert Commission by issuing GJ-Providencia-3121 on 25 July 2008.[913] Professor Alegría further confirms that the LGE does not provide that the Expert Commission "cannot exist for more than sixty days counted from the date of its constitution."[914] As Professor Alegría explains, the only limitation that LGE Article 75 establishes is that the Expert Commission "shall rule on the differences in a period of 60 days counted from its appointment."[915] Professor Alegría confirms that, "[a]fter the Expert Commission has issued its ruling on the discrepancies, the Expert Commission could, for example, respond to questions

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[908] Aguilar ¶ 54 **(RER-3)**.

[909] *Id*.

[910] Counter-Memorial ¶¶ 380, 412.

[911] Alegría II ¶ 72 **(CER-3)**; Alegría I ¶ 60 **(CER-1)**.

[912] Alegría II ¶ 73 **(CER-3)**; Aguilar ¶ 54 **(RER-3)**.

[913] Alegría II ¶ 73 **(CER-3)**; CNEE Resolution No. GJ-Providencia-3121 dated 25 July 2008 **(C-247)**.

[914] Aguilar ¶ 54 **(RER-3)**.

[915] LGE, Art. 75 **(C-17)**; *see also* Alegría II ¶ 73 **(CER-3)**.

from the parties or review the distributor's revised VAD study in order to verify that its ruling had been fully incorporated," as provided in Rule 12.[916]

168. Second, as Mr. Bastos explains in his second witness statement, in his financial proposal to the CNEE and EEGSA, he indicated that the work of the Expert Commission would be complete when it issued its Final Report, noting his "performance . . . shall run . . . until the decision of the Expert Commission communicated officially to the [CNEE] and the Distributor though a final report," and that he "shall remain at [their] disposal for any additional clarification or task arising from such decision, and which is necessary for the effective application thereof."[917] As Mr. Bastos notes, Respondent incorrectly infers from this that, once the Expert Commission had issued its Final Report, he would be available to assist the parties on a personal basis only.[918] As Mr. Bastos explains, his financial proposal, which was incorporated into his contract with the CNEE, was for the entire work of the Expert Commission.[919] Because the corrected VAD study was to be reviewed and approved by the Expert Commission under Rule 12, Mr. Bastos notes that "[r]eviewing and approving Bates White's corrected VAD study thus was a task arising from the Expert Commission's pronouncement and was included in [his] financial proposal."[920] Similarly, while Mr. Colóm asserts that Mr. Bastos's contract with the CNEE "clearly stated that his work would conclude upon issuance of the opinion,"[921] Mr. Bastos explains that this too is incorrect.[922] As he notes, under Article 9 of his contract with the CNEE,[923] the term of his contract was 60 days from the date of the constitution of the Expert

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[916] Alegría II ¶ 73 **(CER-3)**.

[917] Letter from C. Bastos to EEGSA and the CNEE dated 6 June 2008 **(C-225)**; *see also* Bastos II ¶ 7 **(CWS-7)**; Administrative Professional Expert Services Contract between the CNEE and C. Bastos dated 26 June 2008, Art. 22 ("The following documents are part of the contract: . . . b) The economic offer made by the EXPERT and accepted by the COMMISSION; . . . .") **(C-237)**.

[918] Bastos II ¶ 7 **(CWS-7)**; Counter-Memorial ¶ 380.

[919] Bastos II ¶ 7 **(CWS-7)**; Letter from C. Bastos to EEGSA and the CNEE dated 6 June 2008 **(C-225)**.

[920] Bastos II ¶ 7 **(CWS-7)**.

[921] Colóm ¶ 136 **(RWS-1)**.

[922] Bastos II ¶ 8 **(CWS-7)**.

[923] Administrative Professional Expert Services Contract between the CNEE and C. Bastos dated 26 June 2008, Art. 9 **(C-237)**.

Commission (*i.e.*, 6 June 2008); his contract thus did not terminate automatically upon the issuance of the Expert Commission's Report, as Mr. Colóm suggests.[924]

169. With respect to Mr. Bastos's contract with EEGSA, Respondent asserts that this contract provided for payment of the balance of Mr. Bastos's fees upon delivery of the Expert Commission's Report, and that EEGSA did not pay Mr. Bastos the balance that was due after the Expert Commission's Report had been delivered, but rather made him sign an addendum, "stipulating that the outstanding balance would be paid in full once 'the Expert Commission had been reinstated' and when procedures subsequent to the Final Report, not previously mentioned in the agreement, had been carried out."[925] As Mr. Bastos explains, this is wrong. In September 2008, Mr. Bastos and EEGSA executed an amendment to his contract, because the Expert Commission had been unable to review and approve Bates White's corrected VAD study, as required by Article 4.7.[926] Article 4.7 of his contract provided that "EEGSA shall inform its consultant of the EC's decision, and the consultant shall perform all the changes requested and remit the new version to the EC for its review and approval."[927] As Mr. Bastos explains, "[b]ecause the Expert Commission had been unable to review and approve Bates White's corrected VAD study due to the CNEE's actions," he and EEGSA "agreed to amend the contract to allow for payment of all but US$ 5,000 due under the contract, with the remainder to be held in reserve should the Expert Commission ever be reinstated in the future and permitted to convene a full quorum to review and approve the corrected tariff study in accordance with Article 4.7 of [his] contract."[928]

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[924] Bastos II ¶ 8 **(CWS-7)**.

[925] Counter-Memorial ¶ 414 fn. 566.

[926] Bastos II ¶ 22 **(CWS-7)**; Bastos I ¶ 37 **(CWS-1)**; Agreement for the Compensation of the Third Member of the Expert Commission between EEGSA and C. Bastos dated 26 June 2008, Art. 4.7 **(C-238)**; Modification of the Agreement for the Compensation of the Third Member of the Expert Commission between EEGSA and C. Bastos dated 3 Sept. 2008 **(C-302)**.

[927] Agreement for the Compensation of the Third Member of the Expert Commission between EEGSA and C. Bastos dated 26 June 2008, Art. 4.7 **(C-238)**.

[928] Bastos II ¶ 22 **(CWS-7)**; Modification of the Agreement for the Compensation of the Third Member of the Expert Commission between EEGSA and C. Bastos dated 3 Sept. 2008 **(C-302)**.

170. Finally, with respect to Mr. Riubrugent, neither Respondent nor its witnesses address the improper pressure that the CNEE put on Mr. Riubrugent to prevent him from reviewing and approving Bates White's revised VAD study, as required under Rule 12.[929] As the evidence demonstrates, Mr. Riubrugent, whose testimony Respondent has not proffered in this arbitration, had serious reservations about the directions he received from the CNEE. In an email to Mr. Quijivix dated 31 July 2008, Mr. Riubrugent noted, for example, that "[f]ollowing the directions given through Melvin, [he has] refrained from attending further meetings of the former Expert[] Commission called by the coordinator, Carlos Bastos, to whom [he has] notified that the reason for my non-attendance is that [he has] followed the CNEE's express instructions," and that, "[h]aving in mind the possibility of further legal actions by the other party against the members of the Expert[] Commission for allegedly failing to comply with their duties, [he needs] to have reliable proof of the CNEE's decision to have [him] removed from the Expert[] Commission."[930] Mr. Riubrugent thus requested that the CNEE "consider, as soon as it is possible, issuing a note in that regard addressed to [him], signed by the same CNEE authority who signed the Resolution that brought the Expert[] Commission's mission to an end, or by an equivalent authority" and that, "[i]n order for the note to constitute reliable proof, once it has been issued and registered by the CNEE pursuant to the usual formalities, [the CNEE] may send it to [him] at this e-mail account, attached as a PDF file, of which [he] will notify the members of the former Expert[] Commission."[931]

171. In an email to Mr. Quijivix dated 2 August 2008, Mr. Riubrugent further requested that the CNEE release him "from any legal action potentially taken by EEGSA against

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[929] *See* Memorial ¶ 181; Email Chain from J. Riubrugent to C. Bastos and L. Giacchino dated 30-31 July 2008 (reproducing the CNEE's instructions, which stated that "'in consultation with the Directorate of CNEE and the Legal Management, according to what was notified, you represent CNEE within the Expert Commission, and therefore you were contracted solely and exclusively until the decision of the Expert Commission was issued, according to Art. 75 of the General Electricity Law. Once the report has been delivered, you have no further responsibilities with the parties and your contract shall be paid according to the scope[] and clauses thereof. Otherwise, it could be considered in Guatemala to be an overstepping of bounds.'") **(C-281)**.

[930] Email from J. Riubrugent to M. Quijivix, A. Brabatti, S. Velasquez, and E. Cua dated 31 July 2008 **(C-504)**.

[931] *Id*.

[him], which may even lead to claims for compensation."[932] As that email reflects, Mr. Riubrugent forwarded to Mr. Quijivix a letter from EEGSA's judicial representative to Mr. Riubrugent dated 1 August 2008 regarding Mr. Riubrugent's refusal to participate in the Expert Commission's review and approval of Bates White's revised VAD study under Rule 12.[933] Characterizing EEGSA's letter as "compelling," Mr. Riubrugent noted that, as he predicted, "the legal dispute will partly involve the members of the former Expert[] Commission," and that "[n]either [his] nor ME Consultores' professional reputation can get damaged by this incident, so [they] need [his] liability in the dispute to be effectively and definitely ruled out."[934] Mr. Riubrugent accordingly requested that Mr. Quijivix "arrange for the CNEE's Legal Department to take any action necessary for [him] to be definitely and unquestionably released from any legal action potentially taken by EEGSA against [him], which may even lead to claims for compensation."[935] Recognizing the inherent weakness in the CNEE's legal position, Mr. Riubrugent further noted that "[i]t is clear that it is not enough to produce [GJ-Providencia-3121] and the suspension of the [*amparo*] filed against it."[936] Respondent has not produced any documents reflecting the content of the legal release requested by Mr. Riubrugent for his actions in connection with the Expert Commission. As set forth below, despite the CNEE's intervention in the Expert Commission process, Messrs. Bastos and Giacchino met in Washington, D.C. to review and analyze Bates White's revised VAD study, as required under Rule 12.

c. The Expert Commission Confirmed That Bates White's Revised Study Complied With The Expert Commission's Ruling

172. In its Memorial, Claimant demonstrated that, following Bates White's presentation of its revised calculations, Messrs. Bastos and Giacchino both concluded that Bates White had revised its VAD study in accordance with the Expert Commission's rulings on each

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[932] Email from J. Riubrugent to M. Quijivix, A. Arnau, R. Sanz dated 2 Aug. 2008, forwarding letter from EEGSA to J. Riubrugent dated 1 Aug. 2008 **(C-505)**.

[933] *Id*.

[934] *Id*.

[935] *Id*.

[936] *Id*.

discrepancy and so advised the CNEE and EEGSA.[937] As Claimant explained, by letter dated 1 August 2008, Mr. Bastos summarized the steps that he had taken since delivering the Expert Commission's Report and confirmed that, in his opinion, Bates White had revised its VAD study in accordance with the Expert Commission's rulings on each discrepancy.[938] As Mr. Bastos explained, Bates White's model for the calculations consisted of 173 linked files, which each contained several spreadsheets with different steps leading to the final calculation of the VAD and the tariffs, and that he had been "able to verify that the modifications made by Bates White to its Tariff Study of July 28, 2008 follow the decisions of the Expert Commission."[939]

173. In its Counter-Memorial, Respondent contends that the CNEE conducted a "preliminary review" of Bates White's revised VAD study upon receipt and confirmed that "[a]uditing the model remained impossible," and that, "[l]ater on, two external expert reports commissioned by the CNEE to analyze whether Bates White['s] July 28 study complied with the Expert Commission's pronouncement confirmed that very many pronouncements were never incorporated."[940] Respondent further contends that, "[g]iven the volume and complexity of the model (according to Mr. Bastos, it was 137 Excel spreadsheets and more than one thousand pages), it is clear that Mr. Bastos did not have time to review the model, but rather was limited to listening to and relying on Mr. Giacchino's explanations," and that Mr. Bastos "himself made this clear when he sent his letter to the CNEE 'approving' the study of the 28th and confirming that it was impossible for him to go further."[941] Respondent thus asserts that "Mr. Bastos only confirmed that pronouncements were incorporated into the model" and that "he does not know

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[937] *See* Memorial ¶ 187; Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, attached to Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008 **(C-288)**; Letter from L. Giacchino to the CNEE and EEGSA dated 31 July 2008, attached to Email from L. Giacchino to M. Quijivix (CNEE) and M. Calleja (EEGSA) dated 1 Aug. 2008 **(C-284)**; *see also* Bastos I ¶ 35 **(CWS-1)**; Giacchino I ¶ 90 **(CWS-4)**; Maté I ¶ 55 **(CWS-6)**; Calleja I ¶ 53 **(CWS-3)**.

[938] *See* Memorial ¶ 188; Bastos I ¶ 35 **(CWS-1)**; Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, attached to Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008 **(C-288)**.

[939] Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, attached to Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008, at 3 **(C-288)**; *see also* Memorial ¶ 188; Bastos I ¶ 35 **(CWS-1)**.

[940] Counter-Memorial ¶ 419.

[941] *Id*. ¶ 423 (internal citations omitted).

how those incorporations were accomplished or the veracity of the calculations."[942] Respondent further asserts that Mr. Bastos "failed to review all of the pronouncements" and failed to notice that, "in some cases, the July 28 study indicated that certain pronouncements stated to be in EEGSA's favor were in reality issued in favor of CNEE."[943] Respondent's contentions are incorrect.

174. First, there is no evidence that the CNEE conducted a "preliminary review" of Bates White's revised VAD study in July 2008.[944] As set forth above, what the evidence shows is that the CNEE reviewed and analyzed the Expert Commission's Report and concluded that it did not want to use a VAD study that applied the Expert Commission's decisions on the discrepancies, because, even "[a]ssuming that neither SIGLA's [VNR] nor the costs are changed and that the new [FRC] formula is applied, the [VAD] would be increased in approximately 25%,"[945] which was unacceptable to the CNEE.[946] As reflected in the technical reports prepared by the CNEE's Tariff Department on 29 July 2008, the CNEE's Tariff Department did not review or analyze Bates White's revised VAD study in any way, but analyzed only Sigla's VAD study.[947] The evidence further demonstrates that the CNEE first reviewed and analyzed Bates White's revised VAD study in April 2009, when, in response to Iberdrola's claim against Guatemala under the Spain-Guatemala BIT, the CNEE hired Mercados Energéticos.[948]

175. Second, as Mr. Bastos confirms in his second witness statement, Mr. Bastos, together with Mr. Giacchino, reviewed the corrected Bates White VAD study on 30 and 31 July

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[942] *Id*. ¶ 424.

[943] *Id*.

[944] *Id*. ¶ 419.

[945] Analysis of the Expert Commission Opinion (undated), at 9 **(C-547)**.

[946] *See supra* Section II.E.5.b.

[947] CNEE, Department of Tariff Studies, Technical Report on the Tariff Schedule for the Subsidized Tariff of EEGSA for the 2008-2013 five year period and Technical Report on the Tariff Schedules for the Users not Assigned to the Subsidized Tariff of EEGSA for the 2008-2013 five year period, dated 29 July 2008 **(C-503)**.

[948] *See* Letter from R. Sanz (Mercados Energéticos Consultores S.A.) to C.C. Bickford (CNEE) dated 30 July 2009 **(C-513)**; Witness Statement of Alejandro Alberto Arnau Sarmiento, Mariana Álvarez Guerror & Edgardo Leandro Torres dated 24 Jan. 2012 (hereinafter "Arnau, Álvarez & Leandro") ¶ 24 **(RWS-3)**.

2008 and confirmed that it had fully incorporated the decisions of the Expert Commission.[949] As Mr. Bastos notes, "[i]n so doing, [he] was not approving the VAD study, but verifying that Bates White had incorporated all of the decisions of the Expert Commission by noting exactly where in the Excel spreadsheets each correction had been incorporated into the model, as reflected in the attachment to [his] 1 August 2008 letter to the CNEE and EEGSA."[950] He explains that "[t]he models for these calculations were based upon several Excel workbooks, which in turn were linked to their constitutive spreadsheets" and that, "[i]n reviewing these spreadsheets, what [he] confirmed was that the model had been revised to reflect each of the Expert Commission's decisions."[951] In particular, with respect to the Expert Commission's decision on Discrepancy No. 1, which required the model to be traceable and linked, Mr. Bastos notes that he checked the Excel spreadsheets and workbooks with the Formula function in the toolbar and within that function with the Trace Precedents and Trace Dependents tools that allowed him to see that the models used were traceable and linked.[952] As Mr. Bastos's 1 August 2008 letter reflects,[953] he confirmed that each of the Expert Commission's decisions was reflected in the model and that "the result of the VAD calculated in [Bates White's] Tariff Study of July 28, 2008 [was] indeed calculated with a model that incorporates the decisions made by the Expert Commission."[954] As he notes, "[w]hat I did not do was to check all of the internal calculations in each Excel spreadsheet, which would have been an impossible task and which would have been beyond the scope of the Expert Commission's mandate under Rule 12."[955]

176. Mr. Bastos further explains that Respondent's assertion that the chart attached as Exhibit 4 to his 1 August 2008 letter fails to account for three discrepancies—C.4, C.9.b, and

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[949] Bastos II ¶ 20 **(CWS-7)**; Bastos I ¶ 35 **(CWS-1)**; Giacchino I ¶¶ 89-90 **(CWS-4)**.

[950] Bastos II ¶ 20 **(CWS-7)**; *see also* Chart of Corrections Required by the Expert Commission, attached to Letter from C. Bastos to C. Colóm Bickford and L. Maté dated 1 Aug. 2008 **(C-289)**.

[951] Bastos II ¶ 20 **(CWS-7)**.

[952] *Id*.

[953] Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, attached to Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008 **(C-288)**.

[954] Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, attached to Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008, at 3-4 **(C-288)**.

[955] Bastos II ¶ 20 **(CWS-7)**.

E.4, each of which was decided in the CNEE's favor[956]—is misplaced.[957] As Mr. Bastos notes, "C.4 was automatically corrected by correcting C.3.b and C.3.f" and that, "[b]y correcting these two discrepancies (C.3.b and C.3.f), along with making the corrections to discrepancies C.2 through C.8, discrepancy C.9.b. also was automatically corrected."[958] With regard to discrepancy E.4, Mr. Bastos explains that "the Expert Commission verified that what the consultant had done was correct and in accordance with the CNEE's observations, and therefore did not require modifications to the Study."[959] As he notes, "[t]he decision of the Expert Commission regarding this discrepancy said: '[t]herefore, the inclusion of the losses in the public lighting ballasts in the balance of energy and capacity by the consultant has been performed correctly.'"[960]

177. Further, Claimant's expert Dr. Barrera conducted an extensive analysis of whether Bates White complied with each of the Expert Commission's decisions, and concluded that "the July 28, 2008 Bates White study fully implemented the EC Report decisions, and … Guatemala's assertions to the contrary are unfounded."[961] Specifically, with respect to Discrepancy No. 1, Dr. Barrera confirms that "the relevant calculations are verifiable through links in accordance with the Expert Commission's decision."[962] Dr. Barrera also concluded that

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[956] Counter-Memorial ¶ 424 fn. 595.

[957] Bastos II ¶ 21 **(CWS-7)**.

[958] *Id*.

[959] *Id*.

[960] *Id*. (citing EC Report, at 117 **(C-246)**).

[961] Barrera ¶ 65 **(CER-4)**.

[962] Barrera ¶ 74 **(CER-4)**. In this regard, Mr. Barrera notes, as part of their analysis of the Bates White's 28 July 2008 VAD study, he and Mr. Barrientos "consulted with Dr. Leonardo Giacchino, the author of the Bates White studies" and that "[t]his facilitated our understanding how the model operates and how the individual Excel spreadsheets comprising the model work together." *Id*. ¶ 69. As he notes, in their "experience in many tariff reviews involving tariff models, the type of assistance [they] received from Dr. Giacchino is routinely provided by consultants to clients and regulators, and often is an important part of the regulatory review process." *Id*. ¶ 70. This is confirmed by Mr. Colóm, who states that the CNEE "thoroughly understood the Sigla study, not least because its preparation had lasted seven months, during which time we had been in close contact with the consulting firm." Colóm ¶ 150 **(RWS-1)**. As Dr. Barrera notes, "had the CNEE acted as a regulator in good faith, its alleged concerns about [the matters it raised regarding Bates White's VAD study] could have been resolved through [its] interactions with Bates White." Barrera ¶ 278 **(CER-4)**.

the July 28, 2008 Bates White study complied with each of the other rulings of the Expert Commission.[963]

178. Respondent also states that the "independent consultant firm" Mercados Energéticos reviewed the July 28, 2008 Bates White study and concluded that the study did not incorporate the totality of the Expert Commission's pronouncements.[964] As an initial matter, Mercados Energéticos is an expert, masquerading as a witness in this arbitration,[965] and is not independent. As discussed above, Mercados Energéticos prepared the report, attached to their witness statement, in July 2009, nearly one year after the 2008-2013 tariffs were implemented. Mr. Riubrugent, who had worked hand-in-hand with the CNEE to reduce EEGSA's VNR (including throughout his role as a member of the Expert Commission), was a partner in Mercados Energéticos.[966] Mercados Energéticos thus hardly was an "independent consultant" to CNEE, and its results-oriented, arbitration-focused July 2009 study lacks any credibility.

179. In any event, Dr. Barrera demonstrates that "Mercados Energéticos' criticisms of the [July 28, 2008 Bates White] study are incorrect, go beyond the scope of the EC Report decisions, and/or relate to minuscule issues that are immaterial to both Bates White's model as a whole and the resulting VNR and VAD."[967] Specifically, Respondent asserts that Mercados Energéticos determined that Bates White's model contained irregularities in reference prices.[968]

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[963] *See* Barrera § 3 (entitled "The July 28, 2008 Bates White report fully implemented the Expert Commission's decisions") **(CER-4)**.

[964] Counter-Memorial ¶ 428; Mercados Energéticos Consultores, Review of the Audit Reports of the Independent Consultants in Relation to the "Review of the EEGSA Distribution Value Added Study in Relation to the Decision of the Expert Commission," July 2009 **(C-582)**.

[965] *See* Arnau, Álvarez & Leandro **(RWS-3)**. Although they submitted a joint witness statement and it is evident from the documentary record that Mr. Arnau was involved in EEGSA's 2008-2013 tariff review, none of the witnesses testifies to any contemporaneous facts in their witness statement. Instead, they use their witness statement merely as a vehicle to introduce their 42-page expert report, which is referenced as an exhibit to their 10-page witness statement. *See* Mercados Energéticos Consultores, Review of the Audit Reports of the Independent Consultants in Relation to the "Review of the EEGSA Distribution Value Added Study in Relation to the Decision of the Expert Commission," July 2009 **(C-582)**; Arnau, Álvarez & Leandro ¶¶ 26-27 **(RWS-3)**.

[966] *See* Memorial ¶ 141.

[967] Barrera ¶¶ 66 **(CER-4)**.

[968] Counter-Memorial ¶ 431.

Dr. Barrera demonstrates, however, that, Bates White, in fact, complied with the Expert Commission's decision regarding reference prices, and that each of Mercados Energéticos' assertions to the contrary is unfounded.[969] Respondent also asserts that Bates White misrepresented certain decisions of the Expert Commission rendered in favor of the CNEE as in favor of EEGSA, and therefore did not make the required changes.[970] As Mr. Giacchino explained in his first witness statement, Bates White merely made a typographical error in the headings in its report discussing these discrepancies and did implement the required changes,[971] which Dr. Barrera confirms.[972] Finally, Respondent asserts that Mercados Energéticos determined that Bates White made unjustified changes as to certain discrepancies that were decided in EEGSA's favor.[973] As Dr. Barrera explains, these changes were the consequence of implementing the Expert Commission's decisions on other discrepancies, and were justified.[974]

180. Finally, Respondent asserts that Bates White's alleged failure to incorporate all of the decisions of the Expert Commission was confirmed by Mr. Damonte, who allegedly included "all possible pronouncements (excluding those for which additional information was required and without being able to optimize the Bates White model)" and obtained a VNR of US$ 629 million.[975] As Dr. Barrera explains, however, "although Mr. Damonte commented on the July 28, 2008 Bates White study in the Executive Summary section of his expert report, Mr. Damonte's report contains only a few brief, isolated assertions about the July 28, 2008 Bates White study, devoid of any analysis."[976] Mr. Damonte's sole basis for his conclusion concerning the alleged non-compliance of the July 28, 2008 Bates White study with the Expert Commission's decisions is the different VNR figure that Mr. Damonte obtained through his "recalculation" of the May 5, 2008 Bates White study. As discussed further below and as Dr.

[969] Barrera ¶¶ 77-107 **(CER-4)**.

[970] Counter-Memorial ¶ 431.

[971] Giacchino I ¶ 65 fn. 141 **(CWS-4)**.

[972] Barrera ¶¶ 125, 129 **(CER-4)**.

[973] Counter-Memorial ¶ 431.

[974] Barrera ¶¶ 121, 132, 150-151 **(CER-4)**.

[975] Counter-Memorial ¶ 432; Damonte ¶ 173 **(RER-2)**.

[976] Barrera ¶ 67 **(CER-4)**.

Barrera explains,[977] however, Mr. Damonte ignored many of the Expert Commission's decisions in his recalculation, including those having the most significant impact in favor of EEGSA. It thus is unsurprising that Mr. Damonte's VNR figure is much lower than Bates White's VNR figure. Consequently, "Mr. Damonte's expert report is not a basis to draw any conclusions about the July 28, 2008 Bates White study."[978]

d. The CNEE Imposed EEGSA's VAD And The Tariffs Based Upon Its Own VAD Study, Which Contravened The Expert Commission's Rulings

181. In its Memorial, Claimant demonstrated that, after a majority of the Expert Commission had notified the CNEE in writing that the VAD in Bates White's revised VAD study had been calculated in accordance with the Expert Commission's decisions and, thus, in accordance with law, the CNEE arbitrarily disregarded Bates White's revised VAD study and imposed its own VAD, in violation of the legal framework and in contravention of the Expert Commission's key rulings.[979] As Claimant demonstrated, the CNEE issued EEGSA's new tariff schedules using its own VAD study on the purported basis that the Expert Commission's Report of 25 July 2008 had confirmed that Bates White's study *of 5 May 2008* had "failed to perform all the corrections pursuant to the [CNEE's] observations" in Resolution No. CNEE-63-2008 of 11 April 2008.[980] The CNEE thus took the position that the parties had appointed the Expert Commission solely to determine whether Bates White had accepted all of the CNEE's observations, and that it made no difference whatsoever if the Expert Commission ruled that some—or even all—of the CNEE's observations were unfounded and contrary to the LGE and RLGE.[981] As Claimant demonstrated, the underlying premise of the CNEE's position—that

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[977] Barrera ¶¶ 193-207 **(CER-4)**.

[978] Barrera ¶ 67 **(CER-4)**; *see also id.* ¶ 79 fn. 41 (noting Mr. Damonte's isolated remark that the July 28, 2008 Bates White model allegedly "is not traceable or auditable either" (Damonte ¶ 108 **(RER-2)**) and observing that "Mr. Damonte does not provide any analysis whatsoever in support of the foregoing assertion").

[979] *See* Memorial ¶¶ 189-199.

[980] Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 **(C-272)**; *see also* Memorial ¶ 191; Resolution No. CNEE-145-2008 dated 30 July 2008, at 3 **(C-273)**; Resolution No. CNEE-146-2008 dated 30 July 2008, at 3 **(C-274)**.

[981] *See* Memorial ¶ 191; Calleja I ¶ 50 **(CWS-3)**.

Bates White was required to accept all of the CNEE's observations in Resolution No. CNEE-63-2008—was false, as both RLGE Article 98 and the CNEE's ToR provided that EEGSA had the right to disagree with the CNEE's observations and that any disagreements that persisted between them would be submitted to an Expert Commission, which would act as the final arbiter of the dispute under LGE Article 75.[982] As Claimant noted, the members of the Expert Commission, including Mr. Riubrugent, had reached the same conclusion in their Report, observing that "[t]hose observations made by the CNEE, if not incorporated by the Consultant and therefore, if they persist, constitute discrepancies and must be resolved by the Expert Commission (articles 75 LGE and 98 RLGE)."[983] Claimant also demonstrated that EEGSA's new tariff schedules relied upon a VAD study that was prepared by the CNEE in violation of EEGSA's procedural rights and which contravened the Expert Commission's key rulings.[984]

182. In its Counter-Memorial, Respondent contends that the CNEE's "Board of Directors was informed that the Expert Commission had found in favor of the CNEE in more than 58 percent of cases," and that the CNEE thus "concluded that the May 5 Bates White study could not serve as a basis for setting the tariff schedule."[985] Respondent further contends that, while "[o]ne possibility was to correct the study . . . given the magnitude of comments confirmed by the Expert Commission, in terms of both quantity and substance, it was impossible to [do so] within the remaining available time."[986] According to Respondent, because there was no legal authority under the LGE and RLGE for the CNEE to review Bates White's VAD study for a third time, the CNEE thus decided to proceed with its plan to analyze Sigla's VAD study for approval,[987] which, it claims, was "the most reasonable option" in the circumstances.[988] Respondent further contends that EEGSA's new tariff schedules "were established using

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[982] *See* Memorial ¶ 193; Alegría I ¶ 67 **(CER-1)**.

[983] EC Report, at 3 **(C-246)**.

[984] Memorial ¶¶ 197-199.

[985] Counter-Memorial ¶ 416.

[986] *Id*. ¶ 417.

[987] *Id*. ¶ 419.

[988] *Id*. ¶ 417.

technical criteria in accordance with the procedure and principles of the LGE and RLGE" and that "Sigla based its calculations on the Terms of Reference timely accepted by EEGSA."[989] Respondent's contentions are false.

183. First, Respondent's argument that "there was no legal authority under the LGE and RLGE to review the distributor's study for a third time"[990] not only lacks any legal foundation, but is belied by the CNEE's own proposals for the Expert Commission's operating rules. As those documents reflect, the CNEE proposed that Bates White deliver its revised study to the CNEE, and that the CNEE would decide whether Bates White had incorporated the Expert Commission's decisions and, if so, would approve the revised study.[991] If, as Respondent and Mr. Colóm now assert, the CNEE had no legal authority under the LGE and RLGE to review Bates White's VAD study for a third time, the CNEE's own proposals, as reflected in the drafts of the operating rules, would have been contrary to law.

184. Moreover, as Professor Alegría confirms in his second expert legal opinion, Respondent's argument that the CNEE has no legal authority under the LGE and RLGE to review the distributor's VAD study for a third time is wrong.[992] As Professor Alegría explains, "after the distributor revises its VAD study to incorporate the Expert Commission's decisions, the CNEE must proceed to approve that study and then to publish the new tariff schedules on that basis under LGE Article 76 and amended RLGE Article 99," and that "[t]he CNEE's review of the revised VAD study is a logical and necessary step, and is compatible with the letter and spirit of LGE Articles 74, 75, and 77, as well as amended RLGE Articles 98 and 99."[993] As Professor Alegría notes, "administrative bodies may perform acts in order to carry out their official functions and duties," and "the CNEE's review of the distributor's revised VAD study

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[989] *Id*. ¶ 435.

[990] *Id*. ¶ 419 (citing Colóm ¶ 149 **(RWS-1)**).

[991] *See, e.g.*, Proposed Operating Rules attached to Email from M. Quijivix to M. Calleja dated 15 May 2008, at 2 **(C-210)**; Proposed Operating Rules for the Operation of the Expert Commission, attached to Email from M. Quijivix to M. Calleja dated 21 May 2008, Rule 13 **(C-213)**.

[992] Alegría II ¶ 76 **(CER-3)**.

[993] *Id*.

qualifies as such an act."[994] Indeed, RLGE Article 99 "expressly contemplates that the CNEE will review the distributor's revised study in order to verify that the Expert Commission's decisions have been fully incorporated, and then will approve it and proceed to issue the new tariff schedules on the basis of that study."[995] As noted above, however, the CNEE's review and approval of the distributor's revised VAD study under RLGE Article 99 is limited to determining whether the revised study complies with the Expert Commission's decisions; the CNEE "does not have the discretion under the LGE or RLGE to reject the revised VAD study on the basis that the Expert Commission's decisions are incorrect."[996]

185. As also noted above, in Rule 12 of the Operating Rules, the parties agreed to have the Expert Commission review and confirm that Bates White's revised VAD study had incorporated the Expert Commission's decisions.[997] As Professor Alegría notes, "[t]his confirmation does not reverse the roles of the CNEE and the Expert Commission," as "the CNEE retains the authority to approve the revised VAD study and to issue the distributor's new tariff schedules under LGE Article 76 and amended RLGE Article 99."[998] As Professor Alegría observes, by having the Expert Commission confirm that Bates White's revised VAD study had incorporated the Expert Commission's decisions, the parties merely sought to limit a potential future dispute related to the revised VAD study, and "EEGSA likely sought to mitigate the risk that the CNEE would act arbitrarily in failing to approve the VAD study on the ground that the revised study did not incorporate the revisions required by the Expert Commission, by having the Expert Commission make a determination on that very issue."[999]

186. Professor Alegría further observes that "Guatemala's assertion that the CNEE did not have any legal authority under the LGE or RLGE to review the distributor's study for a third

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[994] *Id*.

[995] *Id*.

[996] *Id*. ¶ 70; *see also supra* ¶¶ 35, 133.

[997] *See supra* ¶ 35; Email from M. Calleja to L. Giacchino dated 28 May 2008, forwarding Email from M. Quijivix to L. Maté and M. Calleja dated 28 May 2008, at 2 **(C-218)**.

[998] Alegría II ¶ 71 **(CER-3)**.

[999] *Id*.

time demonstrates precisely why, in [his] opinion, the CNEE's actions in this case constitute a flagrant violation of the law: the CNEE, without any legal foundation, rejected Bates White's revised VAD study without having engaged in any review of that study."[1000] As Professor Alegría notes, "the CNEE [then] unilaterally, and acting against the letter and the spirit of LGE Articles 74, 75 and 77, and RLGE Articles 97, 98 and 99, proceeded to approve its own VAD study prepared by Sigla and to use that study as the basis for issuing EEGSA's new tariff schedules."[1001] As he observes, "[i]t is a tremendous waste of time and resources for all parties involved to appoint an Expert Commission to decide on the parties' discrepancies only to have the CNEE disregard the distributor's revised VAD study on the basis that it cannot approve that study without reviewing it and that it is not legally authorized to review the VAD study for a third time."[1002] Professor Alegría notes that "Guatemala's explanations for the actions that the CNEE took reaffirm [his] opinion that Guatemala acted unlawfully and in bad faith in issuing EEGSA's new tariff schedules."[1003]

187. Second, with respect to EEGSA's new tariff schedules, Professor Alegría confirms that the CNEE had no legal basis to rely upon its own VAD study to establish those new tariff schedules.[1004] As Professor Alegría observes, "[i]f amended RLGE Article 98 is correctly interpreted and applied, the CNEE's powers under amended RLGE Article 98 were not triggered in EEGSA's 2008-2013 tariff review, because EEGSA delivered a VAD study in a timely manner, and because EEGSA responded to the CNEE's observations by submitting its corrections to the VAD study and by indicating its disagreement with the CNEE's observations, where necessary."[1005] Amended RLGE Article 98 thus provided no legal basis for the CNEE to rely upon its own VAD study to establish EEGSA's new tariff schedules.[1006]

[1000] *Id*. ¶ 77.

[1001] *Id*.

[1002] *Id*.

[1003] *Id*.

[1004] *Id*. ¶ 78.

[1005] *Id*.

[1006] *Id*.

188. As discussed below, although the CNEE later would rely upon RLGE Article 98 to defend its actions before the Guatemalan courts,[1007] the two legal opinions issued by the CNEE's Legal Department on 29 July 2008 recommending the approval of Sigla's VAD study are not based upon amended RLGE Article 98; rather, they indicate that the CNEE's authority for its actions derives from the second paragraph of amended RLGE Article 99.[1008] In GJ-Dictamen-1287, the Legal Department notes that, in order to comply with the five-year term set forth in the law, a new tariff schedule must be issued and published for EEGSA's users prior to 1 August 2008, and that the CNEE "is required [to] approve a tariff study to be used" as the basis for EEGSA's new tariff schedule.[1009] The Legal Department further notes that, because EEGSA's 5 May 2008 VAD study was not "corrected" in accordance with the CNEE's 11 April 2008 observations, the CNEE cannot approve EEGSA's VAD study.[1010] The Legal Department thus concludes that, "as [EEGSA's] tariff schedule now in place is set to expire on 31 July 2008," and in accordance with the principle stated in RLGE Article 99 that "no distributor may operate without an applicable tariff schedule in place," the CNEE is entitled to approve the VAD study prepared by the CNEE's own consultant, Sigla, and to establish EEGSA's new tariff schedule on the basis of that study.[1011] Notably, neither legal opinion analyzes the Expert Commission's Report or Bates White's 28 July 2008 revised VAD study.

189. As Professor Alegría explains, the Legal Department's analysis is fundamentally flawed.[1012] The second paragraph of amended RLGE Article 99 provides that "[i]n no case shall

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[1007] *See infra* ¶ 214; *see also* Alegría II ¶ 87 **(CER-3)**.

[1008] Alegría II ¶ 79 **(CER-3)**; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 5, 9-10 **(C-503)**.

[1009] Alegría II ¶ 79 **(CER-3)**; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 4 **(C-503)**.

[1010] Alegría II ¶ 79 **(CER-3)**; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 4 **(C-503)**.

[1011] Alegría II ¶ 79 **(CER-3)**; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 4-5 **(C-503)**.

[1012] Alegría II ¶ 80 **(CER-3)**.

the Final Distribution activity of the electric service be carried out without an effective tariff schedule" and that, "[g]iven the circumstance in which a Distributor does not have a tariff schedule, the [CNEE] shall be responsible for immediately issuing and making effective a tariff schedule so as to comply with such stated principle."[1013] As set forth above, this section of amended RLGE Article 99 does not apply where the CNEE has failed to publish the distributor's new tariff schedule, but applies where the distributor's current tariff schedule has been suspended or invalidated such that the distributor has no tariff schedule to apply.[1014] As Professor Alegría confirms, "[w]here the distributor's previous tariff schedule has not been suspended or invalidated, that schedule will continue to apply under LGE Article 78 and the first paragraph of amended RLGE Article 99, with the appropriate adjustments, until the CNEE publishes the new tariff schedule, the only exceptions being where the distributor has failed to submit a VAD study or has failed to respond to the CNEE's observations."[1015]

190. As also set forth above, and as confirmed by Professor Alegría, the notion that the CNEE was under an obligation to publish EEGSA's new tariff schedules as of the date of expiration of the previous tariff schedules is incorrect; under RLGE Article 99, the CNEE has *nine months* as of the date of expiration of the previous tariff schedules to publish the distributor's new tariff schedules.[1016] Under the law, the CNEE thus had until 1 May 2009 to publish EEGSA's new tariff schedules and, in the interim, EEGSA's previous tariff schedules would have continued to be applied with the appropriate adjustments.[1017] In fact, in a pleading filed with the Constitutional Court in 2003, "the legal representative of the CNEE clearly defended the position that there may be a delay in the issuance of the distributor's new tariff schedules and that, in that case, the distributor's previous tariff schedules would continue to apply based upon LGE Article 78 and original RLGE Articles 98 and 99."[1018] As Professor

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[1013] Amended RLGE, Art. 99 **(C-105)**.

[1014] *See supra* ¶¶ 85-88; Alegría II ¶ 80 **(CER-3)**.

[1015] Alegría II ¶ 80 **(CER-3)**; LGE, Art. 78 **(C-17)**; Amended RLGE, Art. 99 **(C-105)**.

[1016] *See supra* ¶ 142; Alegría II ¶ 81 **(CER-3)**; Amended RLGE, Art. 99 **(C-105)**.

[1017] *See supra* ¶ 142; Alegría II ¶ 81 **(CER-3)**; Amended RLGE, Art. 99 **(C-105)**.

[1018] Alegría II ¶ 82 **(CER-3)**; CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003 **(C-81)**.

Alegría observes, "[t]his further confirms [his] opinion that the CNEE's actions in disregarding both the Expert Commission's Report and Bates White's revised VAD study and in unilaterally adopting its own VAD study were unlawful and arbitrary."[1019]

191. Finally, as discussed in Claimant's Memorial, the CNEE never provided an opportunity to EEGSA to review or comment on Sigla's study, which undermines the purpose of the LGE.[1020] This is particularly disturbing in light of the facts that, as Mr. Kaczmarek and Dr. Barrera demonstrate, the VAD resulting from the Sigla study was unjustified from a financial and engineering perspective, and, moreover, the Sigla study contravened the Expert Commission's rulings in a number of important respects.[1021] Specifically, as Dr. Barrera shows, Sigla did not follow the Expert Commission's decision regarding the FRC (which would have allowed EEGSA to obtain a return on approximately 93% of the VNR) but instead adopted the FRC calculation set forth in the ToR, which assumes as the starting point a 50% depreciated asset base and thus effectively reduces the value of the initial asset base by one-half. [1022] As Dr. Barrera confirms, the "FRC calculation used by Sigla undercompensates the distribution company … [it] would not permit the EEGSA's investors to recover their investments."[1023] Mr. Kaczmarek agrees and explains that "[t]he fundamental flaw in the [FRC] formula advocated by CNEE/Sigla and Mr. Damonte is that they factor in depreciation into the tariffs, but they do not provide a corresponding adjustment to the VNR to compensate the distributor for capital expenditures."[1024] As Mr. Kaczmarek confirms, "[t]he consequence of adopting the tariffs advocated by CNEE/Sigla and Mr. Damonte is that EEGSA would have to utilize its 'return of

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[1019] Alegría II ¶ 82 **(CER-3)**.

[1020] *See* Memorial ¶¶ 197, 259.

[1021] Notably, Respondent has not proferred the authors of the Sigla study as witnesses or experts in either this arbitration or in the *Iberdrola* arbitration to defend that study.

[1022] Barrera ¶ 260 **(CER-4)**; *see also* Sigla Phase D Report, at 2 **(C-267)**.

[1023] Barrera ¶ 261 **(CER-4)**.

[1024] Kaczmarek II ¶¶ 86-87 **(CER-5)**.

capital' portion of the tariff to pay for replacement capital expenditures, thereby foregoing the possibility of recovering its capital investment."[1025]

192. Sigla also contravened the Expert Commission's rulings that the tariff study must use most recent reference prices and select the lowest of two international prices and a domestic price. Instead, Sigla purported to use 2006 prices as required by the ToR, but in fact used even lower, poorly adjusted 2004 prices.[1026] Sigla also for the most part used three international prices (without the domestic price), and when it did use a domestic price, it used an average of the prices rather than the lowest price.[1027] As Dr. Barrera demonstrates, given the significant increases in the prices of materials such as copper and aluminum between 2006 and 2008, Sigla's approach had a profound deflating impact upon the VAD.[1028] Dr. Barrera concludes that "as regards reference prices, the Sigla study does not comply with the Terms of Reference or the Expert Commission's decision … Sigla's approach results in a significant understatement of EEGSA's VNR and VAD."[1029] As Dr. Barrera also points out, the unreasonableness of Sigla's approach to reference prices is underscored by the fact that Respondent's own expert adopted a different approach to reference prices in his purported recalculation of the May 5, 2008 Bates White study than Sigla.[1030]

193. Regarding the engineering aspects of the model company's network, among other things, to calculate demand Sigla divided the distribution area into squares of 100 x 100 meters rather than the 400 x 400 meters squares, as the Expert Commission had required, which resulted in the elimination of certain blocks from the model, pushing down the VNR and the VAD.[1031] Furthermore, Sigla placed transformer posts on the corners of intersections, which allowed Sigla

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[1025] Kaczmarek II ¶ 87 **(CER-5)**; *see also* Bates White Tariff Study, Phase D, 31 Mar. 2008, at 3 (showing that the CNEE's FRC calculation would not result in the minimum 7% rate of return, whereas Bates White's calculation would obtain that result) **(C-182)**.

[1026] Barrera ¶ 265 **(CER-4)**.

[1027] *Id*. ¶ 267.

[1028] *Id.* ¶ 269.

[1029] *Id.*

[1030] *Id.* ¶ 268.

[1031] *Id*. ¶ 271.

to model four outputs per transformer, and decrease the related cost (and thus the VNR and the VAD). This configuration, however, violated Guatemalan technical norms and presented a safety risk.[1032] Finally, Sigla assumed that the model company would only need 48% of the transformers in urban areas actually used by EEGSA, which, as Dr. Barrera explains, is an assumption "so far removed from the actual network as to make it unreliable and unjustified from an engineering perspective."[1033]

194. Dr. Barrera also confirms that the Sigla study contained many of the same features that Respondent asserts were found in the Bates White study (which Claimant disputes) that made it allegedly unsuitable for setting the tariffs, such as missing links between spreadsheets, unexplained or untraceable factors in formulas, pasted or typed values, and errors in formulas.[1034]

195. Respondent nevertheless contends that the values resulting from the Sigla study are in line "with the entire region," as allegedly demonstrated by Mr. Damonte in his purported benchmarking study of the VNRs of 60 Latin American distributors.[1035] Contrary to Respondent's assertion, as demonstrated by Dr. Barrera, Mr. Damonte's benchmarking analysis suffers from multiple serious flaws and, as such, is unreliable, and not a basis to draw any conclusions about EEGSA's VNR.[1036]

196. First, as Dr. Barrera explains, Mr. Damonte's benchmark is based on improper methodology. This is because regulators use benchmarking primarily to assess the distributor's recoverable operating costs (and sometimes total costs), not capital costs on a standalone basis, and much less a VNR.[1037] In addition, regulators typically base the benchmark on companies from within a single country, not across countries, due to the significant complexity and

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[1032] *Id*. ¶ 274.

[1033] *Id*. ¶ 275.

[1034] *Id*. ¶¶ 276-277 **(CER-4)**.

[1035] Counter-Memorial ¶ 442; Damonte ¶¶ 235-57 **(RER-2)**; *see also* Counter-Memorial ¶ 522.

[1036] Barrera § 5 (entitled "Mr. Damonte's and Mercados Energéticos' benchmarking analyses are unreliable") **(CER-4)**.

[1037] *Id*. ¶ 225.

uncertainty that arises from differences among countries concerning regulatory methods, accounting principles, labor costs, and similar factors.[1038] Moreover, Mr. Damonte used an extremely over-simplified benchmarking formula that, among other things, fails to incorporate any control factors for the differences among the countries in his sample, and is at odds with the more sophisticated formulas normally used in benchmarking.[1039] Mr. Damonte also failed to use customary statistical tests to demonstrate that the purported VNRs of the companies in his sample are, in fact, the product of the variables he used.[1040] Further, the companies in Mr. Damonte's sample range in size from hundreds of times smaller than EEGSA to more than seven times larger than EEGSA, and Mr. Damonte failed to adjust his benchmark for the associated economies of scale effects impacting these companies' costs.[1041] Finally, Mr. Damonte's comparison spans various years, and Mr. Damonte failed to make proper adjustments for the fact that the values of regulatory asset bases fluctuate over time as the prices of materials change.[1042]

197. Second, Mr. Damonte's benchmark is largely *not* based on VNRs of other companies. This is because Mr. Damonte's sample of companies is composed mostly of distributors from countries that do not use the VNR method, including Brazil, Panama and Bolivia. The values of the regulatory asset bases reported for these companies thus do not represent VNRs.[1043] Moreover, far from representing the "entire region,"[1044] Mr. Damonte benchmarks companies from seven countries, and most of the companies in his sample are Brazilian (not a VNR country).[1045]

198. Third, Mr. Damonte's purported underlying data for the companies in his sample is highly suspect. As one example, Mr. Damonte's purported VNR for the Peruvian company

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[1038] *Id*. ¶ 226.

[1039] *Id*. ¶ 231.

[1040] *Id*. ¶ 235.

[1041] *Id*. ¶ 234.

[1042] *Id*. ¶ 236.

[1043] *Id*. ¶ 239.

[1044] Counter-Memorial ¶ 442.

[1045] Barrera ¶ 239.

Electronoroeste is almost four times lower than the VNR published by the Peruvian regulator.[1046] For another Peruvian company, Edelnor, Mr. Damonte used a VNR of US$ 867.8 million, while according to the Peruvian regulator, that company's VNR amounted to US$ 960.2 million, more than $90 million more than Mr. Damonte alleges.[1047] Understating the VNRs of companies included in the benchmarking sample obviously depresses the resulting benchmark. Moreover, Mr. Damonte failed to provide any support for key data that he lists with respect to the companies in his sample, such as the companies' VNRs, quantities of electricity sold annually, lengths of the network, and numbers of customers.[1048]

199. Last, but not least, Mr. Damonte's benchmark is highly sensitive to changes in elasticity, which determines by how much the benchmark changes when the other variables change. As Dr. Barrera demonstrates, a mere 1% change in the effect of Mr. Damonte's elasticity figure—which can be easily made in Mr. Damonte's model by replacing the 0.4759 elasticity figure stated in his corrected report with the 0.58 figure stated in his report as originally submitted with the Counter-Memorial—increases Mr. Damonte's 2008 VNR benchmark to $2.4 billion, significantly above all of the VNRs calculated by Bates White.[1049] Notably, Mr. Damonte failed to provide any data that would justify his elasticity figure.[1050]

e. The VNR And VAD Resulting From Bates White's Revised VAD Study Were Justified And Reasonable

200. In contrast to the tariffs that were imposed on EEGSA by the CNEE, the tariffs that would have resulted had the CNEE acted in accordance with law and set the tariffs on the basis of Bates White's revised VAD study, which incorporated all of the Expert Commission's

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[1046] *Id*. ¶ 242.

[1047] *Id*.

[1048] *Id*. ¶¶ 243-244.

[1049] *Id*. ¶¶ 232-233.

[1050] *Id*. ¶ 233. Separately, Mercados Energéticos purported to provide a benchmarking analysis in its July 2009 report, focusing on the VADs of various companies. *See* Mercados Energéticos Consultores, Review of the Audit Reports of the Independent Consultants in Relation to the "Review of the EEGSA Distribution Value Added Study in Relation to the Decision of the Expert Commission," July 2009, at 12-13 **(C-582)**. As Dr. Barrera demonstrates, Mercados Energéticos' purported benchmarking analysis is as flawed and unreliable as Mr. Damonte's analysis. *See* Barrera ¶¶ 246-253 **(CER-4)**.

decisions, would have been reasonable from both a financial and engineering perspective. As Claimant demonstrated in the Memorial, the US$ 1,053 million VNR (and, by extension, the VAD) resulting from the July 28, 2008 Bates White study, although significantly higher than the US$ 583.69 million VNR calculated in the 2003 tariff review, was fully justified.[1051] As explained in the Memorial, the increase from the 2003 VNR to the 2008 VNR was due to several factors, including substantial increases in the cost of materials used in electricity distribution; the different treatment of working capital and easements in the two tariff reviews; the proper inclusion of additional assets in the 2008 tariff review; the increase in the price of oil, which affects the optimization of the grid to minimize energy losses; customer growth; and the expansion of the physical network.[1052]

201. Respondent does not dispute that the foregoing factors contributed to the increase in the VNR between 2003 and 2008, but Mr. Damonte speculates that the optimizing the network could have negated their impact.[1053] Respondent thus puts forward a purported recalculation of the 5 May 2008 Bates White study by Mr. Damonte, in which he calculates a VNR of US$ 629 million, and argues that this demonstrates that Bates White's VNR was excessive.[1054] As Dr. Barrera demonstrates, however, Mr. Damonte' "recalculation" "is unreliable and Mr. Damonte's resulting VNR and VAD are unjustified and significantly understated."[1055] This is so for a number of reasons.

[1051] *See* Memorial ¶ 186; Giacchino I ¶ 73-80 **(CWS-4)**; Kaczmarek I ¶¶ 105-111 **(CER-2)**.

[1052] *See* Memorial ¶ 186; Giacchino I ¶ 73-80 **(CWS-4)**; Kaczmarek I ¶¶ 105-111 **(CER-2)**.

[1053] *See* Damonte ¶¶ 223-228 **(RER-2)**; *see also* Kaczmarek II ¶¶ 196-197 (explaining why each of these four factors contributed to an increase in the VNR and why Mr. Damonte's attempts to minimize their impact are unavailing) **(CER-5)**.

[1054] Counter-Memorial ¶ 432; Damonte ¶ 173 **(RER-2)**.

[1055] *See* Barrera ¶¶ 207 **(CER-4)**; *see also* Damonte § 5 (entitled "Recalculation of the Bates White Study Based on the Expert Commission Opinion"); *id.* § 6 (entitled "Recalculation of the Bates White Study Correcting the FRC Proposed by the EC") **(RER-2)**.

202. First, Mr. Damonte himself acknowledges that he simply ignored a number of the Expert Commission's decisions.[1056] While Mr. Damonte asserts that this was due to a lack of time and information,[1057] these excuses are false: as Dr. Barrera points out, Mr. Damonte proffered the same excuse about a lack of time almost two years ago when he presented his recalculation of Bates White's 5 May 2008 model in the *Iberdrola* arbitration.[1058] With respect to his alleged lack of information, Mr. Damonte simply chose to ignore the substantial supporting documentation provided by Bates White to the CNEE subsequent to the 5 May 2008 study.[1059]

203. Second, the rulings of the Expert Commission that Mr. Damonte chose to ignore include ones that have the most significant impact on the VNR and the VAD. As an example, Mr. Damonte ignored the decision on the FRC calculation and instead devised his own calculation (at odds also with the ToR) that in effect calculates Claimant's return on an asset base that has been depreciated by approximately 30%.[1060] This error alone decreases Mr. Damonte's VAD by US$ 288.7 million.[1061] Moreover, Mr. Damonte ignored the Expert Commission's ruling regarding reference prices, instead calculating prices based on the DEORSA and DEOCSA tariff studies and the Sigla study.[1062] This error decreases Mr. Damonte's VNR by US$ 473.2 million and the VAD by US$ 139.7 million.[1063]

[1056] Damonte ¶¶ 163, 176 **(RER-2)**; Counter-Memorial ¶ 603 fn. 834 ("As Mr. Damonte explains in detail in his report, the inclusion of many of the pronouncements required additional information and optimizations that were impossible to achieve within the available time frame."); Barrera ¶ 195 **(CER-4)**.

[1057] *See* Damonte ¶ 163 **(RER-2)**.

[1058] Barrera ¶ 197 **(CER-4)**; Expert Report of Mario C. Damonte, July 2010, *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), ¶¶ 426, 434, 436, 438, 440, 442 **(C-572)**.

[1059] *See* Barrera ¶ 195 **(CER-4)**.

[1060] *See id*. ¶ 198.

[1061] *See id*.; *see also* Analysis of the Expert Commission Opinion, undated, at 9 ¶ 6 (noting that if the Expert Commission's decision on the FRC was incorporated into Sigla's study with *no* other changes made, the VAD would be increased by 25%) **(C-547)**.

[1062] *See* Barrera ¶ 197 **(CER-4)**; *see also* Kaczmarek I ¶¶ 39-41 **(CER-2)**.

[1063] *See* Barrera ¶ 197 **(CER-4)**.

204. Third, Mr. Damonte made unrealistic assumptions concerning the model company's network. For example, Mr. Damonte assumed that the model company would require only 32% of the transformers in urban areas as compared to the number of transformers used in EEGSA's actual network.[1064] Mr. Damonte provided no justification for this very large deviation. As Dr. Barrera notes, absent some justification, which is lacking here, such a large discrepancy between the number of assets in the actual as compared with the model company typically signifies model error.[1065] Fourth, notwithstanding Claimant's repeated requests for the spreadsheets underlying Mr. Damonte's analysis, Respondent failed to provide an important spreadsheet relevant to Mr. Damonte's analysis of reference prices.[1066] Moreover, Mr. Damonte's spreadsheets evidently had been tampered with in between Respondent's piecemeal document productions, with Respondent's most recently-produced files eliminating the links to the spreadsheet that Mr. Damonte failed to produce and replacing them with manually pasted values.[1067]

205. Finally, as Dr. Barrera notes, the reasonableness of the VNR and the VAD resulting from the Expert Commission's decisions is underscored by the fact that the CNEE benefitted from a number of decisions "as to which a decision in favour of EEGSA would have been justified from an economic and engineering perspective."[1068] As an example, while the Expert Commission's decision on the FRC calculation allowed EEGSA to obtain an

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[1064] *See id*. ¶¶ 200-201.

[1065] *Id*. ¶ 38.

[1066] *See id*. ¶¶ 202-203.

[1067] *See id*. 203. As Dr. Barrera explains, Mr. Damonte's reference prices taken from Sigla's study are reflected in his spreadsheet called "Precios." The file "Precios.xlsm" lists the Sigla reference prices in tab "Resumen," columns S and T, which in turn are linked to the file "VNR-Total-EEGSA.xlsb," tab "Costos Unitarios." Despite repeated requests to produce all files, Respondent failed to produce the file "VNR-Total-EEGSA.xlsb." Moreover, when Respondent produced Mr. Damonte's model in zip file format with the links preserved, in response to Claimant's request, which "linked" version of Mr. Damonte's model contained a different version of the "Precios" file called "Precios V2.xlsx," which eliminated the links to the unproduced file "VNR-Total-EEGSA.xlsb" and replaced them with pasted or typed values. *Id*. ¶¶ 202-203. *See* Correspondence between Claimant and Respondent concerning Respondent's document production **(C-569)**. For ease of reference, Claimant submits all of Mr. Damonte's Excel files submitted by Respondent into the record and produced to Claimant as a single electronic exhibit, organized in folders per the date when they were provided. *See* Mr. Damonte's Excel files **(C-568)**.

[1068] Barrera ¶ 209 **(CER-4)**.

approximately 93% return on capital, on average, as explained above and as Dr. Barrera confirms, the Bates White FRC calculation, which would have allowed EEGSA to obtain a 100% return on capital, "was entirely correct and the Expert Commission's decision thus was wrong. Had the Expert Commission determined this issue correctly, it would have resulted in a higher VNR and VAD."[1069] Mr. Kaczmarek reaches the same conclusion.[1070] In this regard, Respondent's assertion that the Expert Commission's FRC calculation implemented in the 28 July 2008 Bates White study over-compensated EEGSA is wrong.

206. Respondent relies on a net present value test, which according to Mr. Damonte and Compass Lexecon shows that the Expert Commission's FRC calculation (as well as Bates White's original calculation) allegedly contravenes the "principle of equivalence," because the net present value of the cost of capital flows, discounted to present value using the regulated rate of return, is higher than the value of the regulatory asset base.[1071] As Mr. Kaczmarek explains, Respondent's net present value test is fundamentally flawed.[1072] As an initial matter, Mr. Damonte's and Compass Lexecon's purported "principle of equivalence" "has been created by [them] for purposes of this arbitration" and is "not a recognized theorem that is employed to evaluate regulatory schemes" or discussed in academic literature.[1073] In fact, Compass Lexecon's underlying assumption that the fair market value of the utility must equal the value of the regulatory asset base is unfounded,[1074] and if it were to be accepted, it would disqualify Mr. Damonte's FRC formula.[1075] In any case, if, as in Compass Lexecon's hypothetical scenario, the VNR were US$ 100 and the regulatory scheme provided a cash flow stream with a net present value of US$ 120.40, "the buyer of the utility would pay US$ 120.40 for the cash flow stream, not US$ 100, thus establishing the 'equivalence.'"[1076] Furthermore, Respondent's net present

[1069] *Id*. ¶ 215.

[1070] Kaczmarek II ¶ 80 **(CER-5)**.

[1071] *See* Compass Lexecon ¶¶ 67-71 **(RER-1)**; Damonte ¶¶ 177-99 **(RER-2)**; Counter-Memorial ¶ 606.

[1072] Kaczmarek II ¶¶ 93-103 **(CER-5)**.

[1073] *Id*. ¶ 97.

[1074] *Id*. ¶¶ 98-99.

[1075] *Id*. ¶ 100 & Figure 8.

[1076] *Id*. ¶ 98.

value is based on the assumption that the assets must be fully depreciated over their useful lives.[1077] That assumption is incorrect because the distributor "has to continuously replace the network assets in order to keep the network operating" and "[t]hese reinvestments create a 'perpetual' asset base such that the value of the assets, net of depreciation, will never be zero," as Respondent itself has recognized.[1078] Thus, while "the model company regulation originally implemented by Guatemala, correctly ignored both depreciation and replacement capital expenditures," Compass Lexecon's net present value test attempts improperly to "incorporate depreciation without adding replacement capital expenditures."[1079]

207. Other examples where the Expert Commission's decisions were in favor of the CNEE's position, in whole or in part, but Bates White's position should have prevailed and, thus, incorporating these rulings into the revised VAD study resulted in a lower VAD and VNR than otherwise would have been justified, include the decision on the costs of labor (discrepancy B.2), where the Expert Commission failed to consider that due to economies of scope, "the costs of individual tasks outsourced as a package are lower than if the same tasks are outsourced individually;"[1080] operator fees (discrepancy F.8), where "the actual amounts of value-for-money consultant costs are routinely taken into account in tariff reviews," rather than being capped at the low level required by the Expert Commission;[1081] easements (discrepancy C.11), where "the usual way to treat easements is to include those easements that have been acquired for a cost … as well as costs associated with maintaining the easements," rather than exclude costs related to easements altogether, as the Expert Commission required and which was inconsistent with their treatment in the 2003-2008 tariff period;[1082] intercalating interest (discrepancy B.4.c), *i.e.*, funding costs incurred during the construction of an asset, where "it would have been reasonable to allow intercalating interest at its full cost (not as capped by the CNEE)" and accepted by the

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[1077] *Id*. ¶ 101.

[1078] *Id*. ¶ 101; Counter-Memorial ¶ 189(a) fn. 207 ("[i]f the investor reinvests this money, it goes toward an increase in the compensable capital").

[1079] Kaczmarek II ¶ 102 **(CER-5)**.

[1080] Barrera ¶ 216 **(CER-4)**.

[1081] *Id*. ¶ 218.

[1082] *Id*. ¶ 219.

Expert Commission;[1083] non-technical losses (discrepancy E.5), *i.e.*, losses relating mostly to electricity theft, where "the 2.2% limit adopted by the Expert Commission [is] too low;"[1084] and undergrounding (discrepancy C.3.f), where "consistent with the Expert Commission's approach to discrepancy C.3.f, it would have been reasonable to allow the model to incorporate the already existing underground outputs [in addition to the existing underground lines] rather than model them as aerial."[1085]

f. Guatemala Rebuffed EEGSA's Efforts To Remedy The Harm Suffered And Retaliated Against EEGSA

208. In its Memorial, Claimant demonstrated that, immediately following the CNEE's publication of EEGSA's new tariff schedules based upon Sigla's VAD study and in complete disregard of the Expert Commission's decisions, EEGSA filed administrative appeals with the CNEE challenging Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008, as well as an *amparo* petition for constitutional relief.[1086] Claimant further demonstrated that, in an effort to reach an agreement with Guatemala, Mr. Gillette, the then President of TECO Guatemala, met with the CNEE and other Guatemalan officials and explained that, while Claimant remained committed to Guatemala, the new tariff rates imposed by the CNEE had been set arbitrarily and in violation of law, were considerably lower than the previous tariff rates, and seriously threatened EEGSA's financial stability.[1087] EEGSA's representatives, Messrs. Maté and Calleja, also met with officials from the CNEE and the MEM to discuss the possibility of

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[1083] *Id*. ¶ 220.

[1084] *Id*. ¶ 221.

[1085] *Id*. ¶ 222.

[1086] *See* Memorial ¶ 200; Maté I ¶ 59 **(CWS-6)**; Calleja I ¶ 54 **(CWS-3)**; Alegría I ¶ 73 **(CER-1)**; EEGSA Appeal to Revoke Resolution No. CNEE-144-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 **(C-285)**; EEGSA Appeal to Revoke Resolution No. CNEE-145-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 **(C-286)**; EEGSA Appeal to Revoke Resolution No. CNEE-146-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 **(C-287)**; EEGSA *Amparo* Request against CNEE Resolution GJ-Providencia-3121 and Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008 dated 14 Aug. 2008 **(C-291)**.

[1087] *See* Memorial ¶ 200; Gillette I ¶ 23 **(CWS-5)**; Letter from G. Gillette to President of Guatemala À. Colom Caballeros dated 15 Aug. 2008 **(C-292)**.

negotiating a resolution of the dispute.[1088] Despite Claimant's and EEGSA's efforts, however, Guatemala was unwilling to negotiate regarding EEGSA's VAD.[1089] Claimant further demonstrated that, while EEGSA's challenges were pending before the Guatemalan courts, the Prosecutor's Office petitioned the Criminal Court to issue warrants to arrest two of EEGSA's senior managers, including Mr. Maté, on baseless charges relating to allegations of purported trespass in connection with EEGSA's electricity lines along a railway right of way, which had been installed more than 50 years earlier when EEGSA was a State-owned company.[1090] As Claimant explained, three days after the Prosecutor's Office had filed its petition, the Criminal Court issued the arrest warrants and, although a provisional *amparo* suspending the arrest warrants was issued by the Court a few days later, Mr. Maté decided not to return to Guatemala in light of the uncertainties in the country and the threats posed to his freedom and safety.[1091] Claimant also explained that, following the theft of his laptop during a radio interview regarding the CNEE's unlawful actions, Mr. Calleja also subsequently left Guatemala.[1092]

209. Claimant further demonstrated that, although the Second Civil Court granted EEGSA's *amparo* petition against Resolution No. CNEE-144-2008, finding that the CNEE was not entitled to disregard Bates White's revised VAD study and to approve its own VAD study as the basis for setting EEGSA's new tariff schedules,[1093] the Constitutional Court, in a politically-motivated three-to-two decision, reversed the Second Civil Court's ruling, ending EEGSA's

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[1088] *See* Memorial ¶ 201; Maté I ¶ 61 **(CWS-6)**; Calleja I ¶ 54 **(CWS-3)**.

[1089] *See* Memorial ¶¶ 200-203; Gillette I ¶ 23 **(CWS-5)**; Maté I ¶ 61 **(CWS-6)**; Calleja I ¶ 54 **(CWS-3)**.

[1090] *See* Memorial ¶ 205; Maté I ¶¶ 68-71 **(CWS-6)**; Calleja I ¶ 55 **(CWS-3)**; Official Letter No. 1967-2008 of the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment dated 29 Aug. 2008 **(C-299)**.

[1091] *See* Memorial ¶ 205; Maté I ¶¶ 71-72 **(CWS-6)**; Official Letter No. 1967-2008 of the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment dated 29 Aug. 2008 **(C-299)**; Decision of the Third Chamber of the Court of Appeals, Amparo No. 52-2008 dated 2 Sept. 2008 **(C-301)**.

[1092] *See* Memorial ¶ 206; Calleja I ¶ 55 **(CWS-3)**.

[1093] *See* Memorial ¶ 207; Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-2008-7964, at 7 (finding that the CNEE had "acted outside the boundaries established in the General Law of Electricity") **(C-328)**.

legal challenge to Resolution No. CNEE-144-2008.[1094] As Claimant explained, the Constitutional Court, in its majority decision, erroneously equated the Expert Commission's ruling with the CNEE's issuance of the distributor's tariff schedules, and found that EEGSA could not have suffered any due process violation because only the CNEE has the power under the LGE to issue tariff schedules.[1095] Claimant further explained that two judges on the Constitutional Court wrote dissenting opinions, concluding that the CNEE had violated LGE Article 75 and RLGE Article 98 when it issued Resolution No. CNEE-144-2008 approving Sigla's VAD study as the basis for EEGSA's new tariff schedules.[1096]

210. Claimant also demonstrated that, on 31 August 2009, the Eighth Civil Court of First Instance granted EEGSA's *amparo* petition against CNEE's Resolution GJ-Providencia-3121, finding that the CNEE had violated EEGSA's right of defense and the principles of due process and legality, when it dissolved the Expert Commission.[1097] In so ruling, the Court observed that the procedure under Operating Rule 12 had been "halted with the resolution issued by the [CNEE] dissolving the Expert Commission, whereby a step was skipped and [EEGSA] was not notified of the decision made by the Expert Commission, thus breaching the working rules the parties had agreed to abide by, and further violating [Article] 75 of the General Electricity Law and [Article] 99 of its Rules."[1098] As the Court noted, "upon reviewing the new version of the study, the Expert Commission should have approved it and notified" the CNEE and EEGSA, and, after having done so, the CNEE should have "fixed the final tariffs for [EEGSA] based on the new amended version of the study prepared by Bates White, LLC, which

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[1094] *See* Memorial ¶ 211; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009 **(C-331)**.

[1095] *See* Memorial ¶¶ 211-212; Alegría II ¶ 87 **(CER-3)**; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 15-20 **(C-331)**.

[1096] *See* Memorial ¶ 216; Alegría I ¶ 79 **(CER-1)**; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 22-23, 27-29 **(C-331)**.

[1097] *See* Memorial ¶ 209; Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009 **(C-330)**.

[1098] Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009, at 9 **(C-330)**; *see also* Memorial ¶ 210.

already contained each one of the items in the decision issued by the Expert Commission."[1099] As Claimant explained, by decision dated 24 February 2010, the Constitutional Court reversed the decision of the Eighth Civil Court, erroneously holding that the dissolution of the Expert Commission, after it had issued its decision, could not have caused any injury to EEGSA, and that the Expert Commission's decision was not binding on the CNEE because experts, under Guatemalan law, traditionally have been considered advisors rather than arbiters.[1100] As Professor Alegría noted in his first expert legal opinion, "the two magistrates of the Constitutional Court who had dissented in the prior case were not chosen to form part of the Court in this case."[1101]

211. In its Counter-Memorial, Respondent asserts that, contrary to Claimant's contentions, the warrants for the arrest of EEGSA's senior managers "resulted from EEGSA's dispute with a private company" and that Guatemala "protected these EEGSA executives by way of its Judicial Branch," when the Criminal Court subsequently suspended the arrest warrants.[1102] With respect to EEGSA's legal challenges, Mr. Aguilar asserts in his expert legal opinion that EEGSA accepted the legality of the tariff schedules issued by the CNEE, because EEGSA never contested the actual tariffs or the sufficiency of the tariffs to cover its costs, but instead challenged the procedural aspects of the Resolutions setting the tariffs.[1103] Respondent further asserts that "[t]he process and the foundation underlying [the] Constitutional Court decisions respected the rights of TGH and EEGSA," and that Claimant's "criticism of the Constitutional Court is opportunistic and unfounded, revealing a profound lack of understanding with regard to the relationship between the Constitutional Court, the CNEE, and the Government of Guatemala."[1104] Respondent also asserts that "the CNEE does not have any political or other

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[1099] Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009, at 9 **(C-330)**; *see also* Memorial ¶ 210.

[1100] Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 15-17 **(C-345)**; *see also* Alegría I ¶ 80 **(CER-1)**.

[1101] Alegría I ¶ 80 **(CER-1)**.

[1102] Counter-Memorial ¶¶ 457-458.

[1103] Aguilar ¶¶ 62-63 **(RER-3)**.

[1104] Counter-Memorial ¶¶ 450-451.

interests in preventing an increase in distribution tariffs," and that "[i]ts only obligation is to ensure compliance with the LGE."[1105] Respondent's assertions are wrong.

212. First, while Respondent contends that the warrants for the arrest of EEGSA's senior managers resulted from a private dispute and that these senior managers subsequently were "protected" by Guatemala's Judicial Branch, Respondent fails to acknowledge that the arrest warrants were issued by the Criminal Court in August 2008 upon a petition filed by Guatemala's Prosecutor's Office, even though the Prosecutor's Office previously had rejected the very criminal allegations underlying the arrest warrants.[1106] As Mr. Maté confirms in his second witness statement, "the Prosecutor's Office suddenly changed its position with respect to prior criminal suits that had been filed against [him] relating to [EEGSA's] distribution installations and requested, on 26 August 2008, [his] immediate apprehension,[1107] even though the Prosecutor's Office had twice requested dismissal of the suit."[1108] In its Counter-Memorial, Respondent does not proffer any explanation as to why, after EEGSA had filed its legal challenges against the CNEE's actions in August 2008, the Prosecutor's Office suddenly shifted its position with respect to these criminal allegations.

213. Second, as Professor Alegría explains in his second expert legal opinion, EEGSA did not accept the legality of the tariff schedules issued by the CNEE, as Mr. Aguilar asserts,[1109] but challenged their legal basis through both administrative appeals and *amparo* petitions.[1110] As Professor Alegría notes, in its administrative appeals, EEGSA challenged Resolution Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008, arguing that the CNEE had violated

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[1105] *Id*. ¶ 452.

[1106] Maté I ¶¶ 70-71 **(CWS-6)**; Prosecutor's Office Petition for Dismissal to the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment dated 5 Mar. 2008 **(C-166)**; Official Letter No. 1967-2008 of the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment dated 29 Aug. 2008 **(C-299)**.

[1107] Prosecutor's Office Petition for Warrants to Arrest Luis Antonio Maté Sánchez and Gonzalo Gómez Alcántara dated 26 Aug. 2008 **(C-296)**.

[1108] Maté II ¶ 29; *see also, e.g.*, Prosecutor's Office Petition for Dismissal to the First Instance Criminal Court for Narcoactivity and Crimes Against the Environment dated 5 Mar. 2008 **(C-166)**.

[1109] Aguilar ¶¶ 62-63 **(RER-3)**.

[1110] Alegría II ¶¶ 84-85 **(CER-3)**.

its due process rights in rejecting Bates White's revised VAD study and in setting EEGSA's new tariff schedules on the basis of Sigla's VAD study, and that the resulting tariff schedules were unlawful and, as a consequence, null and void.[1111] EEGSA also filed an *amparo* petition against Resolution Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008 in the Guatemalan courts, which sought to void the Resolutions based upon the CNEE's violation of EEGSA's due process rights.[1112] As Claimant explained in its Memorial,[1113] by decisions dated 20 August 2008, the MEM rejected EEGSA's administrative appeals, finding that the Resolutions were general resolutions directed at the final users of electricity, and not at EEGSA, and that an administrative appeal thus was not appropriate.[1114] As Professor Alegría observes, "[i]n view of Article 10 of the Law of Administrative Disputes, which provides that administrative appeals may be filed by whoever appears to have an interest in the administrative file, the MEM's reasons for rejecting EEGSA's appeals are, in [his] opinion, baseless."[1115] As Professor Alegría explains, "it is evident that EEGSA had an interest in the Resolutions which approved Sigla's VAD study and which set EEGSA's tariff schedules for the 2008-2013 tariff period."[1116] As he further notes, "it is difficult to understand how a Resolution setting the tariff schedules for a particular distributor would not be directed at such distributor, as the MEM argued in its decisions."[1117]

[1111] *Id*. ¶ 84; EEGSA Appeal to Revoke Resolution No. CNEE-144-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 **(C-285)**; EEGSA Appeal to Revoke Resolution No. CNEE-145-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 **(C-286)**; EEGSA Appeal to Revoke Resolution No. CNEE-146-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 **(C-287)**.

[1112] *See* Alegría II ¶ 85 **(CER-3)**; EEGSA Amparo Request dated 14 Aug. 2008 against Resolution No. GJ-Providencia-3121 and Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008 **(C-291)**.

[1113] Memorial ¶ 203.

[1114] *See* Ministry of Energy and Mines Decision No. 2557 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-145-2008) **(C-293)**; Ministry of Energy and Mines Decision No. 2558 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-146-2008) **(C-294)**; Ministry of Energy and Mines Decision No. 2559 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-144-2008) **(C-295)**.

[1115] Alegría II ¶ 84 **(CER-3)**.

[1116] *Id*.; Law of Administrative Disputes, Art. 10 **(C-425)**.

[1117] Alegría II ¶ 84 **(CER-3)**; Ministry of Energy and Mines Decision No. 2557 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-145-2008) **(C-293)**; Ministry of Energy and Mines Decision No. 2558 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-146-2008) **(C-294)**; Ministry of Energy

214. Third, with respect to the Constitutional Court's three-to-two decision reversing the Second Civil Court, as Professor Alegría confirms, "the Constitutional Court manifestly erred in this ruling," and "the ruling was influenced by political considerations to prevent an increase in EEGSA's electricity tariffs, rather than a good faith interpretation of the law."[1118] As Professor Alegría explains, the Second Civil Court had granted EEGSA's *amparo* petition against Resolution No. CNEE-144-2008, finding that the CNEE's authority to disregard the distributor's VAD study and to rely upon its own VAD study pursuant to amended RLGE Article 98 is limited to circumstances in which a distributor fails to submit a VAD study or the corrections to the same, circumstances that did not apply to EEGSA.[1119] The Court thus rejected the CNEE's argument that EEGSA had not "proceed[ed] to make the totality of the corrections it should have made," finding that, "such argument lacks validity given that the law foresees the possibility that the distributor does not agree with certain observations, which gives rise to the existence of discrepancies."[1120] Notably, the CNEE, as Professor Alegría observes, had argued before the Court that the legal basis for Resolution No. CNEE-144-2008 was amended RLGE Article 98, and not RLGE Article 99, even though, as set forth above, the CNEE's Legal Department had justified the CNEE's actions on the basis of RLGE Article 99 at the time the CNEE issued Resolution No. CNEE-144-2008 approving Sigla's VAD study.[1121] Apparently recognizing the inherent weakness in that position, the CNEE abandoned its previous reliance upon RLGE Article 99 in its arguments before the Guatemalan courts.

215. As noted above, the Constitutional Court reversed the Second Civil Court, finding that EEGSA could not have suffered any due process violation because only the CNEE has the

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and Mines Decision No. 2559 dated 20 Aug. 2008 (rejecting appeal to revoke Resolution No. CNEE-144-2008) **(C-295)**.

[1118] Alegría II ¶ 87 **(CER-3)**.

[1119] Memorial ¶ 207; Alegría II ¶ 86 **(CER-3)**; Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-2008-7964, at 6-7 **(C-328)**.

[1120] Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-2008-7964, at 6 **(C-328)**.

[1121] *See* Alegría II ¶ 86 **(CER-3)**; Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-2008-7964, at 6 **(C-328)**; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 4-5, 9-10 **(C-503)**.

power under the LGE to issue tariff schedules.[1122] As Professor Alegría explains, "this is the same error that Guatemala and its legal expert, Mr. Aguilar, make in their reasoning."[1123] As Professor Alegría notes, "[t]he fundamental flaw in the Court's ruling – and in Guatemala's position in this arbitration – is the failure to acknowledge that the Expert Commission does not itself issue or set the distributor's tariff schedules, but rather resolves the discrepancies between the CNEE and the distributor with respect to the VAD study, upon which the distributor's tariff schedules are to be based."[1124] Thus, as Professor Alegría explains, "when the CNEE proceeded to set EEGSA's new tariff schedules on the basis of Sigla's VAD study, EEGSA's due process rights were violated, because there was no basis for the CNEE to ignore the Expert Commission's ruling on the discrepancies or Bates White's VAD study, which had been revised to incorporate the Expert Commission's ruling."[1125] The Constitutional Court's reversal of the Eighth Civil Court's decision was similarly flawed.[1126] As Professor Alegría confirms, under LGE Articles 75 and 76, the Expert Commission's decisions on the discrepancies are binding upon the parties, and the CNEE must use the resulting VAD to establish the distributor's new tariff schedule.[1127]

216. Finally, Respondent's argument that "the CNEE does not have any political or other interests in preventing an increase in distribution tariffs" and that "[i]ts only obligation is to ensure compliance with the LGE"[1128] is false. As set forth above, the evidence demonstrates that the CNEE not only devised the FRC formula with Mr. Riubrugent specifically to obtain a significant decrease in EEGSA's VAD, but the CNEE also directly intervened in the Expert Commission process, providing Mr. Riubrugent with materials to support the CNEE's position in

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[1122] Alegría II ¶ 87 **(CER-3)**; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 15-20 **(C-331)**.

[1123] Alegría II ¶ 87 **(CER-3)**.

[1124] *Id*.

[1125] *Id*.

[1126] Alegría I ¶ 80 **(CER-1)**; *see also* Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 15-17 **(C-345)**.

[1127] Alegría II ¶ 7 **(CER-3)**.

[1128] Counter-Memorial ¶ 452.

the Expert Commission and engaging in *ex parte* discussions with Mr. Riubrugent regarding the outcome of the Expert Commission's deliberations, before the Expert Commission had even issued its decisions.[1129] These actions are not the actions of a disinterested regulatory body, but are the actions of a regulatory body, which, from the very beginning of EEGSA's tariff review, was intent on decreasing EEGSA's electricity tariffs through the VAD in any way possible.

g. The Unlawful And Unjustifiably Low VAD Was Economically Devastating For EEGSA's Investors And Caused Claimant To Sell Its Investment At A Substantial Loss

217. In its Memorial, Claimant demonstrated that, if the Expert Commission's rulings had been respected and Bates White's revised VAD study had been used to set EEGSA's tariffs, as it should have been, EEGSA's VAD would have increased from approximately US$ 178 million per year in 2007 (based upon a VNR of US$ 583.69 million) to approximately US$ 232 million per year (based upon a VNR of US$ 1.053 million).[1130] By contrast, the VAD that Sigla calculated—and that the CNEE used to calculate EEGSA's unlawfully-imposed tariffs—was US$ 85 million (based upon a VNR of US$ 465 million).[1131] As Mr. Gillette confirmed in his first witness statement, the VAD that the CNEE imposed upon EEGSA was "approximately 45% lower than the VAD for the prior tariff period;"[1132] as a result, EEGSA's revenues fell by approximately 40 percent.[1133] Indeed, as Claimant noted, the CNEE itself emphasized the fact that the VAD imposed upon EEGSA was lower than that applied in the first tariff period, when

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[1129] *See supra* ¶¶ 116, 138-140.

[1130] *See* Memorial ¶ 220; Giacchino I ¶¶ 72-73 **(CWS-4)**; Kaczmarek I ¶¶ 102-103 **(CER-2)**.

[1131] *See* Memorial ¶ 220; SIGLA Stage D Report, Investment Annuity, at 11 (Table titled "Summary by Voltage Level") **(C-267)**; Sigla Stage G Report, VAD Cost Components, at 4 **(C-267)**; Kaczmarek I ¶¶ 114, 123 (further observing that, as a result of the CNEE's unlawful conduct, EEGSA's VAD "decreased significantly from the Second Rate Period to the Third Rate Period," *id.* at 123) **(CER-2)**.

[1132] Gillette I ¶ 22 **(CWS-5)** (citing TECO Guatemala, Inc. Operations Summary for Periods Ended September 30, Board Book Write-up dated Oct. 2008, at 4-23 **(C-303)**); *see also* Memorial ¶ 221; TECO Energy's Form 10-K dated 26 Feb. 2009, at 49 ("The new lower VAD set by CNEE was, on average 50% below the prior level, essentially putting all of EEGSA's earnings, which had previously averaged about $ 10 million annually, at risk during the time this tariff remains in effect.") **(C-324)**; Callahan I ¶ 5 (quoting same) **(CWS-2)**.

[1133] *See* Memorial ¶ 221; Gillette I ¶ 24 **(CWS-5)** (citing TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up dated Apr. 2009, at 4-17 **(C-326)**).

EEGSA's VAD was provisionally set based upon data from El Salvador.[1134] Consequently, EEGSA adopted a "drastic plan cutting costs and investment."[1135] As Ms. Callahan explained, however, she questioned whether this action was sufficient and, specifically, whether the cost-cutting measures "were sustainable over the long term, as it is impossible for any company, especially one in the electricity distribution service, to postpone indefinitely capital expenditures."[1136] As Ms. Callahan noted in her first witness statement, although projections taking into account EEGSA's cost-cutting measures indicated that EEGSA would be able to pay its creditors, she remained concerned that "there may not be sufficient cushion to absorb operating outcomes less favorable than those forecast."[1137]

218. As Claimant further demonstrated, similar concerns were shared by the preeminent rating agencies and, on 26 August 2008, five days after EEGSA began applying its new tariff rates, Standard & Poor's Rating Services downgraded EEGSA and listed it on its CreditWatch.[1138] As Claimant explained, in downgrading EEGSA, Standard & Poor's specifically blamed EEGSA's unlawfully-imposed tariffs, noting that the rating downgrade reflects the CNEE's announcement of the "applicable tariffs for the 2008-2013 period, establishing a value-added distribution (a component of the tariff that reimburses the distribution company for its investment) that is about 55% lower than EEGSA's tariffs for the previous period," and that "[t]his change will result in deteriorated profitability and cash flow measures as well as limited liquidity during the second half of 2008 and going forward."[1139] Standard & Poor's further observed that "[t]he rating on EEGSA is constrained by the inherent challenges

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[1134] *See* Memorial ¶ 221; Carlos E. Colom Bickford, President of the CNEE, *Evolution of the Tariff Calculation Method in Guatemala*, dated Apr. 2010, at 5 **(C-348)**; *see also* Kaczmarek I ¶¶ 123-124 **(CER-2)**; *id*. ¶ 96, Figure 10 (showing that the first period returns were "consistently lower than the lower bound of 7 percent established by the regulatory framework").

[1135] Maté I ¶ 57 **(CWS-6)**; *see also* Memorial ¶ 222; Gillette I ¶ 24 **(CWS-5)**; Callahan I ¶ 6 **(CWS-2)**.

[1136] Callahan I ¶ 6 **(CWS-2)**; *see also* Memorial ¶ 222.

[1137] Callahan I ¶ 6 **(CWS-2)**; *see also* Memorial ¶ 222.

[1138] *See* Memorial ¶ 223; Gillette I ¶ 24 **(CWS-5)**; Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 **(C-297)**.

[1139] Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 **(C-297)**; *see also* Memorial ¶ 223.

associated with the operating environment in the Republic of Guatemala," and that it "reflects the company's limited financial flexibility, given the undeveloped capital markets in Guatemala compared with distribution companies operating in countries with more developed financial markets."[1140]

219. As Claimant explained, almost four months later, on 11 December 2008, Moody's similarly downgraded EEGSA and also expressly placed the blame for having to do so on the CNEE's actions in EEGSA's 2008-2013 tariff review.[1141] As Moody's observed, "[t]he rating action is driven by the anticipated material deterioration in the near term of EEGSA's credit metrics, in the wake of the August 2008 tariff decision by the Comision Nacional de Electricidad y Energia ("CNEE") regarding the reduction of the Value Added of Distribution-charge ("VAD-charge") by 45% and the subsequent disputes among the CNEE and EEGSA."[1142] As Moody's noted, while historically it "had considered the Guatemalan Regulatory framework to be relatively stable but still untested and developing," this "untested characteristic has been highlighted by the outcome of the 2008 VAD-review process whereby certain mechanisms in the legislation were used for the first time, resulting in additional unresolved disputes."[1143] Moody's observed that "the 2008 VAD-review raised concerns about the predictability and transparency of the process, and the overall supportiveness of the regulatory framework," and that, "[b]ased upon the results of the VAD-review process, EEGSA's financial profile will deteriorate substantially from historical results due to a material weakening in its ability to recover operating costs and generate a sufficient rate of return."[1144] As Claimant explained, having determined that Claimant had suffered "significant financial losses" as a consequence of the arbitrary regulatory

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[1140] Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 **(C-297)**; *see also* Memorial ¶ 223; Gillette I ¶ 24 (quoting same) **(CWS-5)**.

[1141] *See* Memorial ¶ 224; Gillette I ¶ 25 **(CWS-5)**; Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 **(C-305)**.

[1142] Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 **(C-305)**.

[1143] *Id*.

[1144] *Id*.; Gillette I ¶ 25 (quoting same) **(CWS-5)**.

actions taken by Guatemala,[1145] Claimant thus responded favorably when its partner in DECA II, Iberdrola, approached it about the possibility of selling its troubled investment[1146] and, after weeks of negotiations, ultimately agreed to sell its shares in EEGSA to EPM for US$ 181.5 million.[1147]

220. In its Counter-Memorial, Respondent asserts that EEGSA's 2008-2013 tariffs did not adversely affect EEGSA or its shareholders, because Claimant was able to sell its shares in EEGSA to EPM after the new tariffs were established.[1148] Respondent further asserts that, while Claimant alleges that the sale of its shares in EEGSA was motivated by mistreatment by Guatemala, Claimant's press releases do not reference any such mistreatment, but rather indicate that the sale of its shares in EEGSA was "due to its interest in concentrating its power generating assets in Guatemala, emphasizing its 'continued good operations and strong earnings and cash flow.'"[1149] Respondent also asserts that Claimant recently acquired the bidding rules for a major investment in Guatemala's electricity sector, which, Respondent claims, "demonstrates that [Claimant's] decision in 2010 [to sell its shares in EEGSA] had no relation to a discrepancy with the regulatory framework or the authorities in that sector."[1150] Finally, Respondent quotes a statement made by Victor Urrutia of TECO Guatemala in July 2010 to the effect that "TECO Energy decided to go for the extension [of the contract] because 'we continue to believe [that Guatemala is] a market where there are clear rules and certainty,'"[1151] suggesting that Claimant's assertions that Guatemala acted arbitrarily and in disregard of its legal and regulatory framework during EEGSA's 2008-2013 tariff review are unfounded. Respondent's assertions are incorrect.

[1145] Callahan I ¶ 5 **(CWS-2)**; *see also* Memorial ¶ 225.

[1146] Callahan I ¶¶ 7-8 **(CWS-2)**.

[1147] *Id*. ¶ 11; Stock Purchase Agreement between Iberdrola, TPS, EDP, and EPM dated 21 Oct. 2010 **(C-356)**; *see also* Minutes of TECO Energy, Inc. Board of Directors meeting dated 14 Oct. 2010, at 2 (approving the sale) **(C-354)**.

[1148] Counter-Memorial ¶ 445.

[1149] *Id*. ¶ 447.

[1150] *Id*. ¶ 448.

[1151] *Id*. ¶ 44.

221. First, with respect to the harm suffered by Claimant as a result of EEGSA's unlawfully-imposed tariffs, as Ms. Callahan confirms in her second witness statement, not only did Claimant earn substantially less than that to which it was entitled under the regulatory framework between August 2008 (when the VAD was imposed by the CNEE) and October 2010 (when EEGSA was sold to EPM), but "the fact that independent rating agencies downgraded EEGSA after the CNEE announced EEGSA's tariffs for the 2008-2013 period shows that EEGSA was financially harmed by the imposition of those low tariffs."[1152] As Ms. Callahan notes, and as discussed further below, Respondent's argument "also fails to acknowledge that Claimant sold its indirect interest in EEGSA for much less than it would have been worth had Guatemala acted lawfully in accordance with the regulatory framework."[1153] Indeed, Respondent's assertion that EEGSA's VAD could be decreased by approximately 45% without the company suffering financial harm defies all logic.

222. Second, as Ms. Callahan confirms, the sale of Claimant's shares in EEGSA was a direct result of the CNEE's unlawful and arbitrary actions during EEGSA's 2008-2013 tariff review.[1154] As Ms. Callahan notes, "after the CNEE imposed EEGSA's VAD for the 2008-2013 tariff period in contravention of the legal framework on which TECO had relied in making its investment, TECO concluded that there was no legal certainty in Guatemala with respect to electricity distribution and that the risk involved in maintaining its investment in EEGSA was too great."[1155] This is confirmed by the documentary record. As reflected in the Minutes of the

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[1152] Callahan II ¶ 3 **(CWS-8)**; *see also* Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 **(C-297)**; Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 **(C-305)**; *see also* El Periódico, *Constitutional Court to resolve dispute between EGGSA and the CNEE* dated 17 June 2009 (noting that "[t]he lower VAD tariff, on top of a sliding electricity demand, has driven EEGSA's revenues and profits down" and that "[t]he company reported GTQ984 million in sales during the first quarter of 2008, signaling a 21.8% loss from a turnover of GTQ1,258.7 million in the first quarter of 2008. Its gains were also down by 97.4 per cent from GTQ86.5 million in the first quarter of 2008 to some GTQ2.2 million three months into 2009") **(C-545)**.

[1153] Callahan II ¶ 3 **(CWS-8)**.

[1154] *Id*. ¶ 2.

[1155] *Id*.; Callahan I ¶ 11 fn. 13 **(CWS-2)**.

Board of Directors' Meeting held on 14 October 2010,[1156] at which the sale of Claimant's indirect interest in EEGSA was approved, the sale was motivated by the CNEE's unlawful and arbitrary actions during EEGSA's 2008-2013 tariff review:

> **The Rationale**
>
> The proposed sale provides us with an opportunity to exit a minority position in a business where we perceive risk to have meaningfully increased. As discussed at previous Board meetings, 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 discussed below. We believe there is continued risk of government interference in EEGSA's business.[1157]

223. Third, Respondent's assertion that Claimant recently acquired the bidding rules for a project in Guatemala's electricity sector (but, notably, did not bid for the project),[1158] is irrelevant to the issues in dispute. Respondent neglects to mention that this project was in the generation sector, not the distribution sector, and that any company with existing investments in generation would have an interest in purchasing those rules—regardless of whether it had any intention of bidding—in order to understand the competitive environment in which they were operating and to make strategic decisions on that basis. For instance, the amount at which capacity payments are capped under the rules will affect the prices at which a new plant sells electricity and, therefore, may influence decisions of other generators with respect to options and contracts. The generation sector, moreover, is fundamentally different from the distribution sector, because revenues in the former are set out in PPAs, which are negotiated for long terms with companies, whereas revenues in the latter are dependent upon the outcomes of tariff reviews, which involve the regulatory authorities. Thus, the same concerns do not exist for

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[1156] *See* Minutes of TECO Energy, Inc. Board of Directors Meeting dated 14 Oct. 2010 **(C-354)**; TECO Energy, Inc. Board of Directors Meeting October 14, 2010, Proposed Sale of DECA II dated 14 Oct. 2010 **(C-353)**.

[1157] TECO Energy, Inc. Board of Directors Meeting October 14, 2010, Proposed Sale of DECA II dated 14 Oct. 2010, at 1 **(C-353)**.

[1158] Counter-Memorial ¶ 448.

investments in generation as exist for investments in distribution, although, as discussed below, this has not insulated generation investments from unlawful interference by the Government.

224. Finally, as Mr. Gillette explains in his second witness statement, Respondent takes Mr. Urrutia's 12 July 2010 statement that "TECO Energy decided to go for the extension [of the contract] because 'we continue to believe [that Guatemala is] a market where there are clear rules and certainty'"[1159] entirely out of context.[1160] As Mr. Gillette explains, that statement was made in the context of TECO Energy's efforts to salvage its investment in the Alborada Power Station, which had been subjected to unfair and unjustifiable treatment by the Government of Guatemala.[1161] As Professor Alegría explains, following the privatization of EEGSA in 1998 and the application of the quarterly adjustments provided for in the LGE and RLGE, electricity tariffs began increasing in 1999 due to inflation, devaluation of the national currency, and the rise in oil prices.[1162] In a meeting called by the then Vice President of Guatemala, Luis Flores, and the future President of the CNEE, José Toledo, the electricity generators, including TECO Energy's subsidiary, Tampa Centro Americana de Electricidad, Limitada ("TCAE"), which operates the Alborada Power Station,[1163] were informally requested to discount their electricity supplies to EEGSA, as the Government wanted to avoid any further tariff increases in advance of the elections that were to take place in 1999.[1164] The requested discount was not granted by the generators, and the Government thus decided to effectuate the decrease through a direct subsidy to INDE, which, at that time, was one of the largest power

[1159] *Id*. ¶ 44 (citing "Price Reduction in Tampa contract," *Prensa Libre* dated 12 July 2010 **(R-125)**).

[1160] Gillette II ¶ 12 **(CWS-11)**.

[1161] *Id*. ¶¶ 12-20.

[1162] Alegría II ¶ 44 **(CER-3)**; Carla Pantanali & Juan Benavides, Inter-American Development Bank, *Subsidios Eléctricos en América Latina y El Caribe: Análisis Comparativo y Recomendaciones de Política*, at 14 (2006) **(C-474)**.

[1163] Gillette II ¶ 13 **(CWS-11)**; Gillette I ¶ 5 **(CWS-5)**.

[1164] Alegría II ¶ 44 **(CER-3)**.

suppliers.[1165] At the Government's request, INDE thus began applying a discount towards the price of electricity, which was passed on to EEGSA's regulated customers through the tariffs.[1166]

225. As Professor Alegría explains, in 2000 and 2001, the Government again opened negotiations with generators with the intention of decreasing electricity prices.[1167] Unlike the last time, these negotiations were successful. Many generators agreed to decrease the electricity prices set forth in their PPAs in exchange for five-year extensions of those PPAs.[1168] With respect to TCAE, as Mr. Gillette confirms, pursuant to a 16 August 2001 option contract, TCAE paid US$ 2.92 million to the Government to purchase the five-year extension;[1169] this amount was to be used by the Government to subsidize electricity costs.[1170] As Mr. Gillette explains, "[a]ccording to its terms, the five-year extension of TCAE's PPA was to become effective unless TCAE, at its option, exercised a right to terminate."[1171] Absent termination, the option contract provided that TCAE and EEGSA would formalize the extension of the PPA in writing by April 2009.[1172] The contract was formally ratified by the CNEE in Resolution No. CNEE-71-2001

[1165] *Id*.

[1166] *Id*. As Professor Alegría explains, this benefit was substituted by the Social Tariff that was enacted by the Government in 2001. *See id*.; Jorge Salvador Samayoa Mencos, *Efectos Económicos De La Tarifa Social al Consumo de Energía Eléctrica en el Instituto Nacional de Electrificación (INDE) y en el Mercado Eléctrico Nacional, Durante el Período 2001-2004*, Graduation Thesis, Escuela de Economía, Facultad de Ciencias Económicas, Universidad de San Carlos, at 29-30, Cuadro 7 (2007) **(C-476)**.

[1167] Alegría II ¶ 45 **(CER-3)**; Resolution No. CNEE-71-2001 dated 24 Aug. 2001 **(C-438)**; Resolution No. CNEE-72-2001 dated 24 Aug. 2001 **(C-437)**; Resolution No. CNEE-47-2001 dated 30 May 2001 **(C-433)**; Resolution No. CNEE-56-2001 dated 2 July 2001 **(C-434)**; Resolution No. CNEE-66-2001 dated 6 Aug. 2001 **(C-435)**; Resolution No. CNEE-78-2001 dated 19 Sept. 2001 **(C-439)**.

[1168] Alegría II ¶ 45 **(CER-3)**; Resolution No. CNEE-71-2001 dated 24 Aug. 2001 **(C-438)**; Resolution No. CNEE-72-2001 dated 24 Aug. 2001 **(C-437)**; Resolution No. CNEE-47-2001 dated 30 May 2001 **(C-433)**; Resolution No. CNEE-56-2001 dated 2 July 2001 **(C-434)**; Resolution No. CNEE-66-2001 dated 6 Aug. 2001 **(C-435)**; Resolution No. CNEE-78-2001 dated 19 Sept. 2001 **(C-439)**.

[1169] Gillette II ¶ 15 **(CWS-11)**; Contract for the Option to Extend between EEGSA and TCAE dated 16 Aug. 2001, Art. II.A **(C-436)**.

[1170] CNEE Resolution No. 71-2001 dated 24 Aug. 2001, at 2-3 **(C-438)**.

[1171] Gillette II ¶ 15 **(CWS-11)**; *see also* Contract for the Option to Extend between EEGSA and TCAE dated 16 Aug. 2001, Art. II.B **(C-436)**.

[1172] Gillette II ¶ 15 **(CWS-11)**; Contract for the Option to Extend between EEGSA and TCAE dated 16 Aug. 2001, Art. II.C **(C-436)**.

dated 24 August 2001, which specifically noted that the option contract "no doubt shall benefit to [*sic*] the final users of the electrical energy distribution service."[1173]

226. As Mr. Gillette further explains, in March 2007, the MEM issued Governmental Accord No. 68-2007, which prohibited distribution companies from entering into agreements to extend the terms of PPAs.[1174] As he notes, TCAE assumed that this Accord would not apply retroactively to invalidate its 2001 option contract, "as TCAE already had paid for the extension option and the Government had approved it in a Resolution."[1175] In 2009, when EEGSA sought approval from the CNEE to give effect to the automatic five-year PPA extension,[1176] which TCAE had purchased in 2001 pursuant to the aforementioned option contract, the CNEE rejected EEGSA's request based upon Governmental Accord No. 68-2007 and warned that, if EEGSA agreed to extend the PPA with TCAE, the Government would not recognize EEGSA's right to pass through the costs of electricity to consumers.[1177] EEGSA subsequently filed an administrative appeal with the MEM, seeking to overturn the CNEE's rejection of the extension formalization request and to reaffirm the CNEE's original ratification of the PPA extension contained in Resolution No. CNEE-71-2001.[1178] As Mr. Gillette explains, "TCAE focused its

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[1173] CNEE Resolution No. 71-2001 dated 24 Aug. 2001, at 2 **(C-438)**; *see also* Gillette II ¶ 16 **(CWS-11)**.

[1174] Gillette II ¶ 17 **(CWS-11)**; Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 28 ("Existing contracts. For the purposes of transferring the costs to the tariffs of the regulated users, as of the effective term of this Government Resolution, the distributors may not extend the terms of the existing contracts.") **(C-104)**.

[1175] Gillette II ¶ 17 **(CWS-11)**.

[1176] *Id*. ¶ 18; Letter No. GG-009-09 from EEGSA to the CNEE dated 30 Mar. 2009 **(C-507)**.

[1177] Gillette II ¶ 18 **(CWS-11)**; Letter No. CNEE-19344-2009 from the CNEE to EEGSA dated 2 Apr. 2009 **(C-508)**.

[1178] Administrative appeal by EEGSA against the resolution contained in letter CNEE-19344-2009 dated 14 Apr. 2009 **(C-509)**. As the record reflects, between April and December 2009, the parties filed various motions and the MEM issued several resolutions, none of which resolved the dispute. *See, e.g.*, MEM Resolution No. 1271 dated 22 Apr. 2009 **(C-510)** (rejecting EEGSA's appeal on the grounds that the Resolution contained in CNEE's letter No. 19344-2009 did not address the merits of the dispute, but merely informed EEGSA that the distributors could not extend existing contracts and, therefore, was not subject to challenge); EEGSA Motion to Amend Proceeding dated 23 July 2009 **(C-512)** (requesting that the MEM amend the proceedings and notify TCAE, as an affected party, of the proceedings); MEM Resolution No. 2562 dated 17 Aug. 2009 **(C-514)** (amending the proceedings, as requested, and remanding the matter to the CNEE for further consideration and action); EEGSA Motion dated 3 Dec. 2009 **(C-518)** (requesting the issuance of a new resolution by the CNEE granting approval of the requested 5-year extension of the contract with TCAE, in accordance with MEM Resolution No. 2562); MEM Resolution No. 3761 dated 10 Dec. 2009 **(C-519)**

efforts on trying to find a negotiated resolution to the dispute" and, "[i]n this connection, [he] met several times with the CNEE and the MEM, including with the Minister of Energy and Mines, Mr. Meany,"[1179] and ultimately was able to reach a negotiated settlement whereby the PPA was extended for the five years at a much lower amount than that which was provided for under the contract.[1180] The PPA extension agreement was signed on 21 July 2010.[1181]

227. As Mr. Gillette confirms, Mr. Urrutia's statement regarding the PPA extension was made on 12 July 2010, shortly before the PPA extension agreement was signed with Guatemala on 21 July 2010, and thus must be interpreted in the context of TCAE's efforts to salvage its investment in Alborada.[1182] As the record demonstrates, TCAE did not "decide[] to go for the extension" in 2010, but decided to go for that extension 10 years earlier when it paid nearly US$ 3 million for the option to extend its PPA.[1183] In 2010, however, the Government refused to honor its end of the bargain. Contrary to Respondent's assertions, Mr. Urrutia's statement thus does not "reveal[] the fallacy" of Claimant's allegations in this arbitration,[1184] but rather reflects TCAE's good faith efforts to settle its dispute with the CNEE regarding the PPA extension.

III. GUATEMALA VIOLATED ITS FAIR AND EQUITABLE TREATMENT OBLIGATION UNDER ARTICLE 10.5 OF THE DR-CAFTA

228. As demonstrated in Claimant's Memorial and above, the CNEE arbitrarily decided, for purely political reasons and in breach of its obligations under the LGE and RLGE, to substantially decrease EEGSA's electricity tariffs for the 2008-2013 tariff period by imposing its

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(revoking Resolution No. 2562 and reinstating Resolution No. 1271, which had rejected EEGSA's administrative appeal).

[1179] Gillette II ¶ 19 **(CWS-11)**.

[1180] *Id*.

[1181] *Id*.; Contract for the Extension of the Contract for the Supply and Sale of Electric Energy between EEGSA and TCAE dated 21 July 2010 **(C-522)**.

[1182] Gillette II ¶ 20 **(CWS-11)**.

[1183] Contract for the Option to Extend between EEGSA and TCAE dated 16 Aug. 2001 **(C-436)**; CNEE Resolution No. 71-2001 dated 24 Aug. 2001 **(C-438)**.

[1184] Counter-Memorial ¶ 44.

own artificially low VAD on EEGSA, thus contravening TECO's legitimate expectations that the CNEE would carry out its regulatory functions in accordance with law and in accordance with the representations that Respondent had made to induce Claimant's investment.[1185] Claimant has further demonstrated that, during the course of EEGSA's 2008-2013 tariff review, Guatemala took a series of unlawful and arbitrary measures against Claimant's protected investment, which culminated in the CNEE imposing its own VAD on EEGSA, in complete disregard of the legal and regulatory framework that Guatemala had established to depoliticize the tariff review process and to encourage foreign investment in electricity distribution.[1186] Guatemala's unlawful and arbitrary actions breached Guatemala's obligation under the DR-CAFTA to accord fair and equitable treatment to Claimant's investment.[1187]

229. In its Counter-Memorial, Respondent concedes that the fair and equitable treatment standard "prohibits changes to the regulatory framework that are fundamental and that affect the legitimate expectations of an investor,"[1188] but asserts that Claimant's claim under Article 10.5 of the DR-CAFTA relates merely to a "difference of opinion between the investor and the regulator regarding the scope of the applicable rules,"[1189] and that "[a] dispute of a regulatory or contractual nature [such as that] submitted by TGH can under no circumstances give rise to a violation of the international minimum standard."[1190] Respondent further asserts that an international tribunal "is not competent to rule on the simple interpretation of domestic regulatory provisions," and that Claimant's claim thus "is not justiciable by this Tribunal."[1191] According to Respondent, what Claimant allegedly seeks in this arbitration is to have the Tribunal determine the proper VAD in the place of the Guatemalan regulatory authority and to act as an appellate court to review the decision of the Guatemalan Constitutional Court, which,

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[1185] *See* Memorial ¶¶ 228-244, 259-280; *supra* Section II.E.5.

[1186] *See id*. ¶¶ 245-280; *supra* Section II.E.

[1187] *See id*. ¶¶ 228-280.

[1188] Counter-Memorial ¶ 567 (subheading b).

[1189] *Id*. ¶ 479.

[1190] *Id*. ¶ 480.

[1191] *Id*. ¶ 7; *see also id*. ¶¶ 4-6, 47-97, 468-479.

Respondent claims, are matters reserved exclusively for the CNEE and the Guatemalan courts, respectively.[1192] Respondent's contentions not only mischaracterize Claimant's arguments, but they also are fundamentally misguided.

230. As set forth below, 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—upon which Claimant's investment in EEGSA was premised—in order to obtain a substantial decrease in EEGSA's electricity tariffs through the VAD. Respondent's transparent efforts to recast this dispute as a mere regulatory dispute, and thus to distinguish this case from numerous other cases where the State's outright and unjustified repudiation of its own regulatory regime was found to constitute a violation of the fair and equitable treatment standard, are unavailing. Similarly, Respondent's efforts to conflate the fair and equitable treatment standard with a denial of justice, and to suggest that Claimant cannot assert a claim for the former without asserting one for the latter, are demonstrably wrong. Finally, the numerous cases demonstrating the applicability of fair and equitable treatment protections to the State's arbitrary treatment of investments or the State's repudiation of its own legal and regulatory regime make clear that Respondent's jurisdictional objection is meritless.

A. Guatemala Breached Its Treaty Obligation To Accord TECO's Investment Fair And Equitable Treatment When It Arbitrarily And In Complete Disregard Of Its Legal Framework Ignored The Expert Commission's Report And Imposed Its Own Artificially Low VAD On EEGSA

1. The Fair And Equitable Treatment Standard Under Article 10.5 Of The DR-CAFTA Prohibits The State From Frustrating An Investor's Legitimate Expectations Or Taking Arbitrary Measures Against A Protected Investment

231. In its Memorial, Claimant demonstrated that Article 10.5 of the DR-CAFTA sets out the "minimum standard of treatment" that each State Party must accord to covered

[1192] *Id*. ¶¶ 499-524.

investments, such as EEGSA,[1193] and that Annex 10-B confirms that the customary international law minimum standard of treatment of aliens, as that phrase is used in Article 10.5, "refers to all customary international law principles that protect the economic rights and interests of aliens."[1194] Claimant further demonstrated that, as the U.S. Government and commentators have observed, Article 10.5 of the DR-CAFTA is substantively identical to Article 1105 of the NAFTA,[1195] and that the decisions of tribunals in NAFTA and other relevant cases establish that a State will be deemed to have violated the obligation to accord a foreign investor the minimum standard of treatment if it violates an investor's legitimate expectation on which the investor relied to make the investment, if it failed to act in good faith, or if it engaged in arbitrary conduct.[1196] Claimant also demonstrated that the minimum standard of treatment under customary international law has evolved and, in the context of foreign investment, has converged in substance with the standard of fair and equitable treatment.[1197] As Claimant explained, it now is axiomatic that a host State has legal obligations under the minimum standard of treatment—and thus under Article 10.5 of the DR-CAFTA—to act in good faith, to refrain from exercising its regulatory powers arbitrarily, to provide a stable and secure legal and business environment, and to honor legitimate expectations arising from conditions that the State offered to induce an investor's investment.[1198]

[1193] *See* Memorial ¶ 229; The Dominican Republic – Central America – United States Free Trade Agreement dated 5 Aug. 2004 ("DR-CAFTA"), Chapter Ten, Art. 10.5 **(CL-1)**.

[1194] *See* Memorial ¶ 229; DR-CAFTA, Annex 10-B ("Customary International Law") **(CL-1)**.

[1195] *See* Memorial ¶ 230; United States Trade Representative, The Dominican Republic – Central America – United States Free Trade Agreement: Summary of the Agreement, Chapter Ten, *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file74_7284.pdf (observing that the provisions of the DR-CAFTA "reflect traditional standards incorporated in earlier U.S. investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties) and in customary international law") **(CL-1)**; David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. Int'l & Comp. L. Rev. 331, 356-357 (2007) **(CL-50)**; *see also* Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions, 31 July 2001, *available at* http://www.state.gov/documents/organization/38790.pdf **(CL-55)**.

[1196] *See id*. ¶¶ 229-244.

[1197] *See id*. ¶ 244.

[1198] *See id*. ¶¶ 231-244.

232. In its Counter-Memorial, Respondent asserts that Claimant's argument "lacks any basis in law," because Claimant "limits itself to citing cases" and does not present evidence of State practice with respect to the customary international law standard.[1199] It is well established, however, including in the legal authorities upon which Respondent itself relies, that arbitral awards serve as indicators of customary international law. In *Glamis Gold v. United States*, for example, the tribunal observed that arbitral awards may "serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation."[1200] In *ADF v. United States*, the tribunal similarly observed that "any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law."[1201] Likewise, in response to a similar argument raised by Guatemala in *Railroad Development Corporation v. Guatemala*, which also arose under the DR-CAFTA, Professor Michael Reisman confirmed in his legal expert report that, "[i]n any examination of state practice, such arbitral awards, by virtue of their very judgment of lawfulness, are a reliable indicator of relevant state practice."[1202] Indeed, Respondent itself does not hesitate to rely upon arbitral jurisprudence when articulating its own, more restrictive view of the minimum standard.[1203]

[1199] Counter-Memorial ¶ 463; *see also* DR-CAFTA, Annex 10-B (confirming shared understanding that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation") **(CL-1)**.

[1200] *Glamis Gold, Ltd. v. United States of America*, NAFTA Chapter Eleven, UNCITRAL, Award of 8 June 2009 ("*Glamis Gold v. United States*") ¶ 605 **(CL-23)**.

[1201] *ADF Group Inc. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1, Award of 9 Jan. 2003 ("*ADF v. United States*") ¶ 184 **(CL-4)**.

[1202] Second Opinion of W. Michael Reisman on Legal Issues Raised in the Respondent's Counter-Memorial, *Railroad Development Corp. v. Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23 dated 11 Mar. 2011 ¶ 52 **(CL-68)**; *see also id*. ¶ 54 ("Under recognized standards of international law the Claimant need not conduct a vast research of pertinent state practice and *opinion juris* itself, as the Respondent would have it, to confirm the emergence of a new norm of customary international law. Under Article 38(1)(d) of the Statute of the International Court of Justice, it is entitled to rely on the evidence of customary international law norms provided by pertinent decisions of tribunals and the teachings of the most highly qualified publicists."); Statute of the International Court of Justice, Art. 38(1)(d) (providing that, in deciding disputes in accordance with international law, the Court "shall apply . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law") **(CL-72)**.

[1203] *See, e.g.*, Counter-Memorial ¶¶ 464-479.

233. Second, Respondent suggests that Claimant's detailed analysis of the international minimum standard in its Memorial[1204] is incomplete, asserting that Claimant "omits any reference to the rulings of international tribunals that have confirmed that in order to constitute a violation of the international minimum standard under customary international law, the State's conduct must be extreme and outrageous."[1205] In so arguing, Respondent relies upon *Cargill v. Mexico*, in which the tribunal observed that "a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic," or "arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive."[1206] Contrary to Respondent's assertion, Claimant referenced and relied upon *Cargill* in its Memorial.[1207] In any event, it is Respondent that disregards the evolution of the international minimum standard when it argues that the standard can be violated only by State conduct that is "extreme and outrageous."[1208]

234. As Claimant demonstrated in its Memorial, it is widely accepted that "both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development" and are "not frozen in time."[1209] As the NAFTA tribunal observed in *Merrill & Ring v. Canada*, there exists a "trend towards liberalization of the standard applicable to the treatment of business, trade and investments" that has "continued

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[1204] Memorial ¶¶ 229-244.

[1205] Counter-Memorial ¶ 464.

[1206] *Cargill, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/05/2, Award of 18 Sept. 2009 ("*Cargill v. Mexico*") ¶ 296 **(CL-12)**.

[1207] Memorial ¶¶ 240, 280.

[1208] Counter-Memorial ¶ 464; *see also id*. ¶ 534 (arguing, with reference to the *Glamis Gold v. United States* decision, that acts in violation of the standard must be "particularly manifest and shocking").

[1209] *ADF v. United States* ¶ 179 **(CL-4)**; *see also, e.g.*, *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Award of 31 Mar. 2010 ("*Merrill & Ring v. Canada*") ¶ 193 (noting "a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community") **(CL-29)**.

unabated over several decades and has not yet stopped."[1210] Noting that NAFTA tribunals have found "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process" to constitute "a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention,"[1211] the *Merrill & Ring* tribunal observed that "[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*."[1212] As the tribunal confirmed, "the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness."[1213]

235. Leading commentators likewise have noted that "arbitral practice shows a clear progression over time towards more exacting [fair and equitable treatment] standards for host states."[1214] This progression also is reflected in State practice, with tribunals recognizing that "the vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments," and that "such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law."[1215]

236. While failing to account for this progression in the application of the international minimum standard, Respondent relies in several instances upon *Glamis Gold* to suggest that a

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[1210] *Merrill & Ring v. Canada* ¶¶ 207, 210 **(CL-29)**.

[1211] *Id*. ¶ 208.

[1212] *Id*. ¶ 210.

[1213] *Id*.

[1214] R. Dolzer and C. Schreuer, Principles of International Investment Law (2008), at 128 **(CL-71)**; *see also* Andrew Newcombe & Lluis Paradel, *Law and Practice of Investment Treaties: Standards of Treatment* 276 (2009) ("Fair and equitable treatment is a broad legal standard. While it does not provide a tribunal an open-ended mandate to second-guess government decision-making, it does allow tribunals to assess whether state conduct was clearly unreasonable.") **(CL-77)**.

[1215] *Mondev International Ltd. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/99/2, Award of 11 Oct. 2002 ("*Mondev v. United States*") ¶ 117 **(CL-31)**; *see also Chemtura Corporation v. Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Award of 2 Aug. 2010 ("*Chemtura v. Canada*") ¶ 121 (observing that it could not "overlook the evolution of customary international law, nor the impact of [bilateral investment treaties] on this evolution") **(CL-14)**.

breach of the standard is not found in "any arbitrariness,"[1216] but instead requires that an act be elevated to a level that is "surprising, shocking, or exhibit[ing] a manifest lack of reasoning," or "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."[1217] In applying a seemingly stricter interpretation of the international minimum standard, the *Glamis Gold* tribunal expressly acknowledged, however, that it was "departing from major trends present in previous decisions" and applying a "level of scrutiny [that] is the same" as applied nearly one hundred years ago.[1218] Even in view of the language in *Glamis Gold*, Respondent's attempt to minimize the importance of arbitrariness as an element of the customary international law standard should be rejected. As Professor Reisman observes:

> It is unusual, to say the least, to argue that international law allows states to act in an arbitrary fashion. . . . *Glamis Gold* sees a customary international law violation of the fair and equitable treatment standard in conduct that is 'manifestly arbitrary' or 'discriminatory'. . . . I remain convinced that the standards of non-arbitrariness and non-discrimination are alive and well in customary international law.[1219]

237. In defining arbitrariness, Respondent itself relies on the *ELSI* case.[1220] In that oft-cited decision—characterized as the "most authoritative interpretation" of arbitrariness under international law[1221]—the ICJ stated that "[a]rbitrariness is not so much something opposed to a

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[1216] Counter-Memorial ¶ 534.

[1217] *Id*. ¶¶ 465, 534 (quoting *Glamis Gold v. United States* ¶¶ 616-617 **(CL-23)**).

[1218] *Glamis Gold v. United States* ¶¶ 8, 616 **(CL-23)**.

[1219] Second Opinion of W. Michael Reisman on Legal Issues Raised in the Respondent's Counter-Memorial, *Railroad Development Corp. v. Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23 dated 11 Mar. 2011 ¶ 55 **(CL-68)**.

[1220] Counter-Memorial ¶ 528 (quoting *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, reprinted in 1989 I.C.J. REP. 15 ("*ELSI*") ¶ 128 **(RL-1)**).

[1221] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 Feb. 2007 ("*Siemens v. Argentina*") ¶ 318 **(CL-44)**; *see also, e.g.*, *Cargill v. Mexico* ¶ 291 ("With respect to arbitrariness, the Tribunal agrees with the view expressed by a Chamber of the International Court of Justice in the *ELSI* case . . . .") **(CL-12)**; *id.* (noting that at least two NAFTA State Parties accepted the *ELSI* definition as the "best expression" of arbitrariness); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008 ("*Duke v. Ecuador*") ¶ 378 ("For the sake of its determination, the Tribunal will rely on the ICJ's definition of arbitrariness set forth in *ELSI* . . . .") **(CL-19)**.

rule of law, as something opposed to the rule of law. . . . It is a wilful [*sic*] disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[1222] Thus, while the *ELSI* formulation refers to conduct "which shocks," it also refers to conduct which "at least surprises." Further, tribunals applying *ELSI* and finding arbitrary conduct in violation of fair and equitable treatment obligations have emphasized the willful disregard of the law element of the *ELSI* definition.[1223] Respondent's focus on "extreme and outrageous" conduct[1224] is thus misplaced and, in any event, met here. As elaborated below, Respondent's unlawful and arbitrary conduct giving rise to liability in this case includes the deliberate repudiation and violation of critical aspects of its own laws and regulations.

2. The Fair And Equitable Treatment Standard Protects A Covered Investment From The State's Deliberate Repudiation Or Violation Of Critical Elements Of Its Own Domestic Legal Or Regulatory Framework

a. Numerous Tribunals Have Held A State Liable Where, As Here, It Deliberately Repudiated Or Violated Critical Elements Of Its Domestic Legal Or Regulatory Framework

238. As Claimant demonstrated in its Memorial, and as many international investment tribunals have determined, the fair and equitable treatment standard protects covered investors against a State's deliberate repudiation or violation of the domestic legal or regulatory framework upon which the investor relied in making its investment.[1225] Thus, as Respondent itself acknowledges,[1226] tribunals have found violations of the fair and equitable treatment standard in the cases listed below (among others), where the State undermined or fundamentally

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[1222] *ELSI* ¶ 128 **(RL-1)**.

[1223] *See, e.g.*, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006 ("*Azurix v. Argentina*") ¶ 392 ("The Tribunal finds that the definition in *ELSI* is close to the ordinary meaning of arbitrary since it emphasizes the element of willful disregard of the law.") **(CL-8)**; *Siemens v. Argentina* ¶ 318 ("[T]he definition in *ELSI* is the most authoritative interpretation of international law and it is close to the ordinary meaning of the term emphasizing the willful disregard of the law. The element of bad faith added by *Genin* [*v. Estonia*] does not seem to find support either in the ordinary concept of arbitrariness or in the definition of the ICJ in *ELSI*.") **(CL-44)**.

[1224] *See* Counter-Memorial ¶ 464.

[1225] Memorial ¶¶ 228-258.

[1226] *See* Counter-Memorial ¶¶ 507-508, 568-575.

altered critical aspects of its own legal regime, whether by legislative, regulatory, administrative, or other measures:

- *CMS v. Argentina*: transformation of a public utility tariff regime that had been implemented to solicit foreign investment.[1227]
- *LG&E v. Argentina*: transformation of a public utility tariff regime that had been implemented to solicit foreign investment.[1228]
- *BG Group v. Argentina*: transformation of a public utility tariff regime that had been implemented to solicit foreign investment.[1229]
- *CME v. Czech Republic*: politically-motivated application of pressure by a media regulator to eliminate contractual protections offered at the time of investment.[1230]
- *PSEG v. Turkey*: administrative inconsistencies, efforts to reopen agreed issues, and legislative changes that altered the preexisting legal and business environment.[1231]
- *Biwater Gauff v. Tanzania*: failure to appoint an independent regulator, the existence of which had been a key factor in the decision to invest.[1232]
- *ADC v. Hungary*: elimination of contractual rights upon which the investment had been based through an executive decree prohibiting participation of non-State entities.[1233]

[1227] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005 ("*CMS v. Argentina*") **(CL-17)**.

[1228] *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 Oct. 2006 ("*LG&E v. Argentina*") **(CL-27)**.

[1229] *BG Group Plc. v. Argentine Republic*, UNCITRAL, Award of 24 Dec. 2007 ("*BG Group v. Argentina*") **(CL-9)**.

[1230] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 Sept. 2001 ("*CME v. Czech Republic*") **(CL-16)**.

[1231] *PSEG Global Inc. and Konya Ilgin Electrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 ("*PSEG v. Turkey*") **(CL-37)**.

[1232] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008 ("*Biwater Gauff v. Tanzania*") **(CL-10)**.

[1233] *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 Oct. 2006 ("*ADC v. Hungary*") **(CL-3)**.

239. In each of these cases, the tribunal made the relevant inquiry into the domestic legal and/or regulatory framework, and determined that the State had violated the fair and equitable treatment standard by eviscerating or repudiating the very legal basis upon which the investor had made its investment.[1234] As the tribunal observed in *ADC v. Hungary*, "while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries,"[1235] and "the rule of law, which includes treaty obligations, provides such boundaries."[1236] As the tribunal further observed, "when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate."[1237]

240. In its Counter-Memorial, Respondent does not dispute any of these principles, but asserts that "only fundamental changes to the legal framework can result in a violation of the fair and equitable treatment standard," and that there can be no violation for a mere "failure to comply with regulations" or "when, at most, there have been partial reforms to the regulatory framework that have not resulted in a derogation or abolishment of the basic premises of the regulation."[1238] Respondent thus attempts to distinguish the cases cited in Claimant's Memorial, and in particular those stemming from Argentina's 2001 economic collapse, from its own actions on the purported basis that those cases involved the total "dismantling of the regulatory and contractual framework" through the adoption of emergency legislation, an allegedly "far more serious scenario."[1239] According to Respondent, unlike the claimants in the Argentina cases, TECO allegedly "has no basis to claim that the regulatory framework [was] dismantled," as "it was the manner in which the CNEE interpreted and applied the regulatory framework that led to the frustration of [TECO's] legitimate expectations—not the fundamental alteration or abolition

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[1234] *See* Memorial ¶¶ 245-258.

[1235] *ADC v. Hungary* ¶ 423 **(CL-3)**.

[1236] *Id*.

[1237] *Id*.

[1238] Counter-Memorial ¶ 575.

[1239] *Id*. ¶ 569.

of said regulatory framework."[1240] In so arguing, Respondent again mischaracterizes Claimant's claim and, furthermore, fails to distinguish the cases relied upon by Claimant in its Memorial.

241. As numerous cases—including the Argentina cases—demonstrate, the wholesale dismantlement of a legal or regulatory framework, through legislative measures or otherwise, is not necessary for a violation of the fair and equitable treatment standard. For example, in *Total v. Argentina*, the tribunal held, *inter alia*, that the alteration of a utility pricing mechanism through exclusively administrative measures—while leaving the relevant statutory framework intact—constituted a breach of the fair and equitable treatment standard. In particular, the tribunal found that a series of resolutions by the Argentine Secretariat of Energy put in place an alternative pricing system that was at odds with the existing electricity law upon which the investor had relied.[1241] Indeed, the tribunal emphasized that its finding of a fair and equitable treatment violation was reinforced by the fact that Argentina had unilaterally altered the legal framework through non-legislative means while keeping the preexisting legislative regime in place:

> The disregard of the basic principles of the Electricity Law is relevant irrespective of whether the changes introduced were in violation of Argentina's domestic legal system, an issue that the Tribunal does not need to resolve. *This finding of unfairness is reinforced by the fact that the complete overhaul of the electricity regime established by the Electricity Law which remained on the books, was effected through acts of administrative authorities*. The security that a regime established by law offered to investors, who necessarily plan on a long-term basis, was thereby severely undermined.[1242]

Further, in language reminiscent of *ADC v. Hungary*, the *Total* tribunal rejected Argentina's claims to have "broad powers to regulate generation activities on grounds of general interest," and instead contrasted Argentina's improper repudiation of the regulatory framework with the

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[1240] *Id*. ¶ 576.

[1241] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability of 27 Dec. 2010 ("*Total v. Argentina*") ¶¶ 288, 325-335 **(CL-70)**.

[1242] *Id*. ¶¶ 331-332 (emphasis added).

"normal" risks that an investor might assume under domestic law: "[t]his evolution goes beyond the normal regulatory risk that could be anticipated under the Electricity Law."[1243]

242. As *Total* highlights, Respondent is incorrect to suggest that wholesale dismantlement of a regulatory framework or sweeping legislative measures are required for a fair and equitable treatment violation.[1244] Other decisions reinforce the notion that more targeted measures that alter a central component of an investment regime—and an investor's legitimate expectations with respect to that regime—can run afoul of the fair and equitable treatment standard. For instance, in *Biwater Gauff*, as noted in Claimant's Memorial and above, the tribunal held that a State's commitment to appoint an independent regulatory authority, if not met, could violate the fair and equitable treatment standard:

> [A]s a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from [the claimant's] legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA.[1245]

Indeed, Respondent itself characterizes the State's failure in *Biwater Gauff* to appoint an independent regulator, as required by local law, as a "radical change in the regulatory framework."[1246]

243. Similarly, in *ATA Construction v. Jordan*, the tribunal ruled that an investor's contractual right to arbitrate disputes in a neutral forum—so that the State party to the investment contract would not be "both litigant and judge"—was an "integral part" of that contract.[1247] Accordingly, the tribunal ruled that the extinguishment of the investor's right to arbitrate through

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[1243] *Id*. ¶ 332.

[1244] In fact, the tribunal in *Total* determined that certain wholesale changes that had been implemented through the emergency law did *not* violate the fair and equitable treatment standard. *Id.* ¶ 165 (ruling that the law's elimination of dollar denomination for gas tariffs did not violate the fair and equitable treatment standard).

[1245] *Biwater Gauff v. Tanzania* ¶ 615 **(CL-10)**.

[1246] Counter-Memorial ¶ 575 fn. 807.

[1247] *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award of 18 May 2010 ("*ATA Construction v. Jordan*") ¶¶ 121-128 **(CL-58)**.

the State's retroactive application of a new arbitration law breached the fair and equitable treatment standard.[1248] In so holding, the tribunal "recall[ed] the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law."[1249] Thus, even without dismantling the entire legal framework upon which the investor had predicated its investment, Jordan was held liable for the fundamental change that it had made to a critical aspect of the legal regime that was of particular importance to the investor—namely, the availability of a neutral dispute resolution mechanism removed from the political influences of the State.

244. The facts of this case present similar grounds for finding that Respondent violated its fair and equitable treatment obligation. As in *Total*, *Biwater Gauff*, and *ATA Construction*, Guatemala's unlawful and arbitrary actions in this case resulted in the outright derogation of the basic premises of the legal and regulatory framework upon which Claimant's investment in EEGSA had been made. As demonstrated in the Memorial and above, Claimant made its investment in EEGSA in reliance upon the legal and regulatory framework set forth in the LGE and RLGE, which guaranteed both a depoliticized tariff review process and fair returns, by limiting the role of the regulator in the calculation of the VAD component of the distributor's tariff, and by adopting the model efficient company approach using the new replacement value of the assets for calculating the distributor's VAD.[1250] As the evidence reflects, Guatemala emphasized these very factors in promoting the privatization of EEGSA to the TECO group of companies, stating unequivocally in the Sales Memorandum 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*."[1251] Guatemala further

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[1248] *Id*. ¶¶ 121, 125, 133.

[1249] *Id*. ¶ 122.

[1250] *See supra* Section II.B; Memorial ¶¶ 27-35.

[1251] Empresa Eléctrica de Guatemala S.A., Memorandum of Sale prepared by Salomon Smith Barney dated May 1998 ("Sales Memorandum"), at 49 (emphasis added) **(C-29)**; *see also supra* ¶¶ 58-61; Memorial ¶¶ 52-55; Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998, at 3 **(C-27)**; Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998, at 16-19 **(C-28)**.

represented that, while "[h]istorically, tariffs have been low, which has severely stunted the distributor's potential for gains," the LGE "addresses this particular issue, empowering the companies (INDE and EEGSA) to fix tariffs by reference to market prices."[1252]

245. As the evidence further reflects, from the very beginning of EEGSA's 2008-2013 tariff review, the CNEE undertook to prevent an increase in EEGSA's VAD through any means possible—including by acting arbitrarily and repudiating critical elements of the legal and regulatory framework that Guatemala had established to encourage foreign investment in its electricity sector, and by violating the express representations that Guatemala had made during EEGSA's privatization process:

- The MEM first amended RLGE Article 98 to allow the CNEE to rely upon its own VAD study in certain circumstances to set the distributor's new tariff schedules, a possibility not contemplated in the LGE, and deliberately excluded this amendment from the drafts circulated by the MEM to the electricity industry.[1253]

- The CNEE then granted itself unfettered discretion in the ToR to stop the consultant's progress on its VAD study and to declare that study as "not received" under newly-amended RLGE Article 98, so that, if the CNEE was not satisfied with the results of the consultant's VAD study, the CNEE would be able to rely upon its own independent VAD study to set EEGSA's new tariff schedules, in violation of the procedure set forth in LGE Articles 74-76.[1254]

- The CNEE then worked directly with Mr. Riubrugent to devise an FRC calculation to include in the ToR that would guarantee a significant decrease in EEGSA's VAD and prevent EEGSA from obtaining the rate of return set forth in the LGE, by calculating

[1252] Sales Memorandum dated May 1998, at 49 **(C-29)**.

[1253] *See supra* Section II.E.1; Memorial ¶¶ 84-93; Maté II ¶ 6 **(CWS-12)**; Maté I ¶ 6 **(CWS-6)**; Calleja II ¶ 9 **(CWS-9)**; Calleja I ¶ 12 **(CWS-3)**; *see also* Minutes of the Meeting with Distributors dated 15 Feb. 2007 **(C-479)**.

[1254] *See supra* Section II.E.2; Memorial ¶¶ 94-107; Alegría I ¶¶ 41-43 **(CER-1)**; Calleja II ¶¶ 14-15 **(CWS-9)**; Calleja I ¶¶ 16-17 **(CWS-3)**; Maté II ¶ 10 **(CWS-12)**; Maté I ¶ 8 **(CWS-6)**.

EEGSA's return off of a regulatory asset base that had been depreciated by 50 percent, in violation of LGE Articles 67 and 73.[1255]

- After the CNEE agreed to amend some provisions of the ToR in view of EEGSA's legal challenges and to include Article 1.10, which allowed EEGSA's consultant to deviate from the ToR where it had justification for doing so, the CNEE refused to hold any meaningful discussions with EEGSA regarding its VAD study, despite EEGSA's repeated requests for the same.[1256]

- Knowing that the parties would not be able to reach agreement and that the CNEE would be required under the law to appoint an Expert Commission, the MEM amended the RLGE to grant the Government the power to appoint two of the Expert Commission's three members under RLGE Article 98 *bis*, thus guaranteeing the Government a majority on the Expert Commission.[1257]

- After EEGSA's threat of legal challenge prevented the CNEE from retroactively applying RLGE Article 98 *bis* to EEGSA's tariff review, the CNEE undertook to influence the Expert Commission's deliberations through Mr. Riubrugent, sending him materials and information to support the CNEE's position before the Expert Commission and expressly requesting that he not share the provenance of that information with the other two members of the Expert Commission.[1258]

- Once the CNEE had learned from Mr. Riubrugent that the other two members of the Expert Commission were not going to rule in favor of the CNEE on many critical discrepancies, including the CNEE's FRC calculation, the CNEE laid the groundwork for disregarding the Expert

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[1255] *See supra* ¶ 116; Email exchange between J. Riubrugent and M. Peláez dated 13 Dec. 2007 **(C-490)**; Email exchange between J. Riubrugent to M. Peláez dated 19 Dec. 2007 **(C-491)**; Email exchange between M. Peláez to J. Riubrugent dated 9 Jan. 2008 **(C-567)**.

[1256] *See supra* Section II.E.3; Memorial ¶¶ 108-122; Calleja II ¶ 21 **(CWS-9)**; Giacchino II ¶ 14 **(CWS-10)**; Maté II ¶ 16 **(CWS-12)**.

[1257] *See supra* Section II.E.4; Memorial ¶¶ 133-135; Alegría II ¶ 64 **(CER-3)**; Alegría I ¶ 53 **(CER-1)**.

[1258] *See supra* ¶¶ 139-140; Email chain between M. Peláez and J. Riubrugent dated 13 June 2008 **(C-496)**; Email chain between M. Peláez and J. Riubrugent dated 18 June 2008 **(C-498)**; Email from J. Riubrugent to M. Quijivix dated 11 July 2008 **(C-501)**.

Commission's Report by publicly announcing that the Expert Commission's decision would not bind the CNEE.[1259]

- After analyzing the Expert Commission's Report and concluding that its decision regarding the FRC calculation alone would increase the VAD by approximately 25 percent,[1260] the CNEE ignored the Expert Commission's Report and Bates White's revised VAD study, and proceeded to approve its own independent VAD study, which had been prepared by Sigla without any input from EEGSA or its independent consultant and which used the CNEE's own FRC calculation that had been rejected by the Expert Commission.[1261]

- The CNEE then set EEGSA's new tariff schedules on the basis of Sigla's VAD study, which decreased EEGSA's VAD by approximately 45 percent, thus achieving the CNEE's ultimate goal of significantly lowering EEGSA's electricity tariffs.[1262]

246. As the evidence demonstrates, both the process and the result of EEGSA's 2008-2013 tariff review were unlawful and arbitrary, and contravened not only the laws that Guatemala had adopted specifically to entice foreign investment in EEGSA, but also the express representations that Guatemala had made during the privatization process.[1263] As in *CMS v. Argentina*, where the tribunal found that Argentina had fundamentally transformed the legal and business environment by removing guarantees that "were crucial for the investment decision,"[1264] the 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

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[1259] *See supra* II.E.5; Memorial ¶¶ 151-154; Eduardo Smith, "Distribution Rate not yet determined," *Prensa Libre* dated 23 July 2008 **(C-242)**; Fernando Quiñónez, "CNEE shall receive the expert report today," *Siglo 21* dated 24 July 2008 **(C-243)**.

[1260] Analysis of the Expert Commission Opinion (undated), at 8 **(C-547)**.

[1261] *See supra* Section II.E.5.d; Memorial ¶¶ 189-199; Analysis of the Expert Commission Opinion (undated), at 8 **(C-547)**.

[1262] *See supra* Section II.E.5.d; Memorial ¶¶ 189-199.

[1263] *See* Memorial ¶¶ 84-199.

[1264] *CMS v. Argentina* ¶ 275 **(CL-17)**.

within the range expressly set forth in the LGE.[1265] In so doing, the CNEE did not merely fail to comply with the provisions of the LGE and RLGE, but dismantled the fundamental legal premises and protections set forth in the law, subjecting Claimant's protected investment in EEGSA to the type of unlawful and arbitrary State action against which the fair and equitable treatment obligation is directed. Even under Respondent's articulation of the fair and equitable treatment standard, State misconduct rising to such a level constitutes a breach.[1266]

b. This Dispute Does Not Relate To A Mere Misapplication Or Misinterpretation Of The Guatemalan Legal and Regulatory Framework

247. On the basis of the evidence presented and the cases discussed above, it is clear that Claimant does not present, as Respondent contends, a mere "dispute[] over the interpretation and application of a regulatory framework."[1267] Rather, Respondent's misconduct in this case reflects a willful disregard for, and manifest repudiation of, critical aspects of the legal and regulatory framework upon which Claimant's investment was based. Respondent's unfounded efforts to re-characterize this case as a mere regulatory dispute are further undermined by the cases upon which Respondent relies, which bear no resemblance to the facts of this case and, to the extent they are relevant, support Claimant's case. For example:

- *SD Myers v. Canada*:[1268] while holding that it could not second-guess a government's mistakes or misjudgments—language seized upon by Respondent—the tribunal ultimately ruled that the imposition of restrictions on the transport of hazardous substances, which fundamentally altered the applicable legal framework and prevented

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[1265] *See supra* Section II.E.5; Memorial ¶¶ 189-199.

[1266] *See* Counter-Memorial ¶¶ 477, 479 (arguing that, to constitute a breach, "the conduct must constitute a deliberate violation of the regulatory authority's duties and obligations or an insufficiency of action falling far below international standards," and that the "actions in question must constitute a clear and manifest repudiation of the relevant domestic laws").

[1267] *Id*. ¶ 468; *see also id*. ¶ 479 ("[A] government authority does not violate the international minimum standard when it commits mistakes, makes questionable decisions, commits errors of judgments, or adopts misinformed or misguided measures.").

[1268] *See, e.g.*, *id*. ¶ 469 (applying *S.D. Myers, Inc. v. Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Partial Award of 13 Nov. 2000 ("*S.D. Myers v. Canada*") **(CL-41)**).

the claimant from operating its investment, constituted a breach of the fair and equitable treatment obligation.[1269]

- *Cargill v. Mexico*:[1270] as Respondent notes, the tribunal made the unremarkable statement that "the unlawfulness of a municipal law does not necessarily mean that the act is unlawful under international law."[1271] The tribunal, however, ultimately ruled that Mexico had breached its fair and equitable treatment obligations through municipal law measures because it had implemented a sugar import permit, among other measures, in bad faith and for the specific purpose of harming U.S. producers and suppliers.[1272]

- *GAMI v. Mexico*:[1273] held, as Respondent notes, that the claimant "demonstrated clear instances of failures to implement important elements of Mexican regulations."[1274] Nonetheless, the tribunal rejected the fair and equitable treatment claim because there was no evidence of "outright and unjustified repudiation" of the regulatory framework—including, as Respondent fails to mention, because there was "no evidence that Mexico set its face against implementation."[1275] Rather, the regulatory regime explicitly called for private sector intervention, and the tribunal could not conclude that failures in the regulatory program were either attributable to the government or directly causative of the investor's alleged injury.[1276]

- *Thunderbird v. Mexico*:[1277] rejected a fair and equitable treatment claim because the investor had no legitimate expectations when investing in gaming facilities in the face of Mexican law prohibitions on gambling, the investor had misrepresented the nature of its gaming

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[1269] *See S.D. Myers v. Canada* ¶ 268 **(CL-41)**. The tribunal found that the national treatment violation *ipso facto* amounted to a fair and equitable treatment violation, a finding discredited by the subsequent NAFTA FTC Interpretation, but which is not implicated by the facts of this case. *See id*. ¶ 266.

[1270] *See, e.g.*, Counter-Memorial ¶ 474.

[1271] *Cargill v. Mexico* ¶ 287 **(CL-12)**.

[1272] *Id*. ¶¶ 298-299, 305.

[1273] *See, e.g.*, Counter-Memorial ¶¶ 471-473 (applying *GAMI Investments, Inc. v. United Mexican States*, NAFTA Chapter Eleven, UNCITRAL, Award of 15 Nov. 2004 ("*GAMI v. Mexico*") **(RL-7)**).

[1274] *GAMI v. Mexico* ¶ 103 **(RL-7)**.

[1275] *Id*. ¶ 104.

[1276] *Id*. ¶ 110.

[1277] *See, e.g.*, Counter-Memorial ¶ 470 (applying *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA Chapter Eleven, UNCITRAL, Award of 26 Jan. 2006 ("*Thunderbird v. Mexico*") **(CL-25)**).

machines to the government, and there was insufficient evidence that proceedings to close the facilities were arbitrary or unfair.[1278]

- *Glamis Gold v. United States*:[1279] rejected a fair and equitable treatment claim on the grounds that, *inter alia*, an administrative review process supported by reasonable evidence and the transparent promulgation of generally applicable legislation and regulations impacting mining operation requirements were rationally related to their stated purpose and reasonably drafted, and thus not arbitrary or otherwise in breach of the State's international legal obligations.[1280]

- *EnCana v. Ecuador*:[1281] held that denial of a tax refund pursuant to application of a general tax measure did not constitute a breach of an international obligation because "taxation is in a special category" and "[i]n the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage."[1282] The tribunal further held that, notwithstanding the disputed tax measure, the investment companies were "able to continue to function profitably and to engage in the normal range of activities," and thus did not suffer actionable harm.[1283]

- *ADF v. United States*:[1284] rejected a fair and equitable treatment claim because the domestic legal requirements alleged to be unfair were commonly found in many States, those legal requirements had been consistently and properly interpreted and applied by the State, and the investor had not made even a *prima facie* case that the regulator had acted outside the bounds of its authority under that statute.[1285]

[1278] *Thunderbird v. Mexico* ¶¶ 151-155, 164-166, 197-200 **(CL-25)**.

[1279] *See, e.g.*, Counter-Memorial ¶ 478 (applying *Glamis Gold v. United States* **(CL-23)**).

[1280] *Glamis Gold v. United States* ¶¶ 778-818 **(CL-23)**.

[1281] *See, e.g.*, Counter-Memorial ¶ 86 (applying *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award of 3 Feb. 2006 ("*EnCana v. Ecuador*") **(RL-9)**).

[1282] *EnCana v. Ecuador* ¶ 173, 177 **(RL-9)**.

[1283] *Id*. ¶ 174.

[1284] *See, e.g.*, Counter-Memorial ¶ 475 (applying *ADF v. United States* **(CL-4)**).

[1285] *ADF v. United States* ¶¶ 187-192 **(CL-4)**.

- *Genin v. Estonia*:[1286] rejected a fair and equitable treatment claim on the grounds that revocation of the investor's banking license was "justified," including because the Bank of Estonia had acted within its statutory authority in the face of "serious and entirely reasonable misgivings regarding EIB's management, its operations, its investments and, ultimately, its soundness as a financial institution."[1287] There simply was no misapplication, let alone repudiation, of the law at issue.

Notwithstanding Respondent's selective quotations from these various decisions throughout its Counter-Memorial—often of non-dispositive *dicta*—even such a cursory examination of the cases reveals that they either directly support a finding of a fair and equitable treatment violation in this case, or present such distinguishable facts as to have no relevance here.

248. Unlike the cases declining to find a violation on the basis of a misapplication or misinterpretation of local law, Claimant's claim in this case arises out of the CNEE's deliberate, results-oriented actions in attempting to manipulate and control EEGSA's tariff review process, and then in unilaterally imposing its own artificially low VAD on EEGSA, despite the Expert Commission's rulings. In so doing, the CNEE did not merely misapply or misinterpret the law, but deliberately and unjustifiably violated the law in order to obtain a substantial decrease in EEGSA's electricity tariffs. Like the Media Council's actions in *CME v. Czech Republic*, the CNEE's actions in EEGSA's 2008-2013 tariff review cannot be characterized as "normal . . . regulator's [actions] in compliance with and in execution of the law."[1288] Rather, the CNEE eviscerated critical aspects of the LGE and RLGE in order to achieve the result that it wanted—namely, a sharp reduction in EEGSA's VAD. The fact that the regulatory framework allegedly "remains in force and with no fundamental changes"[1289] thus is irrelevant; in this case, as in *Total* and in *ATA Construction*, the CNEE's deliberate violations of the LGE and RLGE constituted an outright and unjustified repudiation of critical aspects of the legal and regulatory framework upon which Claimant had relied in making its investment in EEGSA.

[1286] *See, e.g.*, Counter-Memorial ¶ 476 (applying *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001 ("*Genin v. Estonia*") **(RL-3)**).

[1287] *Genin v. Estonia* ¶ 361 **(RL-3)**.

[1288] *CME v. Czech Republic* ¶ 603 **(CL-16)**.

[1289] Counter-Memorial ¶ 509.

249. Moreover, Claimant's allegations are not "based on events that have not taken place," as Respondent contends,[1290] but are based upon a series of unlawful and arbitrary actions taken by Guatemala to manipulate and control EEGSA's tariff review process, culminating in the CNEE's unilateral imposition of its own reduced VAD on EEGSA. Thus, although the CNEE ultimately acknowledged that Bates White's stage reports had been "received," when it earlier had arbitrarily invoked a newly-amended regulation in an attempt to ignore them altogether, and agreed not to apply Article 98 *bis* to EEGSA's tariff review, and although EEGSA ultimately agreed to submit the additional discrepancies improperly included by the CNEE in Resolution No. CNEE-96-2008 to the Expert Commission for resolution, these actions reflect the pattern of unlawful and arbitrary conduct undertaken by the CNEE and the MEM in EEGSA's 2008-2013 tariff review. Moreover, as set forth in Claimant's Memorial and above, even though Article 98 *bis* was not applied to EEGSA's 2008-2013 tariff review, Article 98 *bis* constituted a fundamental change to the regulatory framework established in the LGE and RLGE, because it subverted the requirement in LGE Article 75 that the third member of the Expert Commission be appointed by "mutual agreement" of the parties, and gave the Government the power to secure a majority, undermining the impartial nature of the Expert Commission.[1291]

250. The same is true with respect to Government Accord No. 68-2007, which amended RLGE Article 98 to grant the CNEE the right to rely upon its own independent VAD study to set the distributor's tariffs in certain circumstances.[1292] Contrary to Respondent's contentions,[1293] Government Accord No. 68-2007 also constituted a fundamental change to the regulatory framework established in the LGE and RLGE, because it subverted the requirement in LGE Article 74 that the distributor calculate the VAD through an independent consultant prequalified by the CNEE, and introduced the possibility, for the very first time, that the CNEE could set the distributor's tariff schedules on the basis of its own VAD study.[1294] Thus, even

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[1290] *Id*. ¶ 499.

[1291] *See supra* Section II.E.4; Memorial ¶¶ 133-135; Alegría II ¶ 64 **(CER-3)**; Alegría I ¶ 53 **(CER-1)**; Government Accord No. 145-2008 dated 19 May 2008, published 26 May 2008, at 2 **(C-212)**.

[1292] Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) **(C-104)**.

[1293] *See, e.g.*, Counter-Memorial ¶ 510.

[1294] *See supra* Section II.E.1; Memorial ¶¶ 84-93; Alegría II ¶ 49 **(CER-3)**; Alegría I ¶¶ 36-40 **(CER-1)**.

though the contemporaneous evidence shows that this amendment was not invoked by the CNEE as the alleged legal basis for its actions at the time,[1295] it fundamentally altered the balance struck between the regulator and the distributor in the LGE and RLGE with respect to the calculation of the VAD (and it is being invoked by Respondent as justification for its actions in this arbitration).[1296] The amendment also violated Guatemala's own express representation during EEGSA's privatization process that "VADs must be calculated by distributors by means of a study commissioned [by] an engineering firm."[1297]

251. Similarly, and contrary to Respondent's contentions, this case does not arise out of a mere dispute concerning the proper interpretation of Guatemalan law.[1298] Rather, as noted above, this case is based upon the CNEE's unjustified and arbitrary refusal to accept the outcome of the Expert Commission process, which outcome did not result in a decrease in EEGSA's VAD. Indeed, as demonstrated above, contrary to the CNEE's current interpretation of LGE Article 75, the CNEE, in 2003, affirmed in its own pleadings before the Guatemalan courts that the role of the Expert Commission was to *resolve* the discrepancies between the parties.[1299] This also is reflected in Sigla's Supporting Report for the CNEE's appointee to the Expert Commission, which expressly states that the CNEE had ordered "the formation of the Expert Commission that is referred to in Article 75 of the LGE *and that will be responsible for resolving disagreements between EEGSA and the CNEE*."[1300]

[1295] *See supra* ¶ 188; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 5, 9-10 **(C-503)**.

[1296] *See supra* Section II.E.1; Memorial ¶¶ 84-93; Alegría II ¶ 49 **(CER-3)**; Alegría I ¶¶ 36-40 **(CER-1)**.

[1297] *See supra* ¶ 60; Sales Memorandum dated May 1998, at 49 **(C-29)**.

[1298] *See* Counter-Memorial ¶ 500.

[1299] *See supra* ¶ 49; CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6; *see also id.* (Spanish original) at 7 ("*De existir discrepancia, según artículo 98 del Reglamento de la Ley y 75 de la Ley, deche formarse una Comisión Pericial, que resolverá en un plazo de 60 días* . . . .") (emphasis added) **(C-81)**; Alegría II ¶ 40 **(CER-3)**; Alegría I ¶ 31 **(CER-1)**.

[1300] Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 1 **(C-494)**; *see also supra* ¶ 50.

252. As set forth above, the alleged basis for adopting RLGE Article 98 *bis*—that "due to a lacuna in the RLGE, the procedure would be blocked indefinitely if the parties were unable to agree on the third member of the Expert Commission"[1301]—also is entirely inconsistent with the notion that the Expert Commission's decisions are merely advisory opinions that do not bind the CNEE in any way.[1302] The CNEE's *ex parte* discussions with Mr. Riubrugent similarly reflect that the CNEE could not have understood that the "Expert Commission was only a technical opinion that did not bind the CNEE."[1303] As noted above, the fact that Ms. Paláez obtained information regarding EEGSA by "alternative means" and asked Mr. Riubrugent to use that information in the Expert Commission without revealing its source is entirely inconsistent with the notion that the Expert Commission's decisions were advisory in nature.[1304] Mr. Riubrugent's response to Ms. Paláez that he would use that information "as long as doing so is convenient for defending our position," is equally inconsistent with that notion.[1305]

253. Respondent's argument that this "case relates to a dispute regarding the interpretation and application of the regulatory framework by the regulator—in particular, the role of the Expert Commission"[1306] thus fails. As demonstrated above, this 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.

[1301] Counter-Memorial ¶ 354.

[1302] *See supra* ¶ 143.

[1303] Counter-Memorial ¶ 500.

[1304] *See supra* ¶¶ 139-140; Email chain between M. Paláez and J. Riubrugent dated 13 June 2008 **(C-496)**.

[1305] *See supra* ¶¶ 139-140; Email chain between M. Paláez and J. Riubrugent dated 13 June 2008 **(C-496)**.

[1306] Counter-Memorial ¶ 509.

3. Respondent Violated Claimant's Legitimate Expectations, Which Are Integral To The DR-CAFTA's Fair And Equitable Treatment Standard

a. Numerous Tribunals Have Held A State Liable Where, As Here, The State Took Action In Blatant Violation Of The Investor's Legitimate Expectations

254. In its Memorial, Claimant demonstrated that tribunals routinely hold States liable for failing to honor the investor's legitimate expectations,[1307] and that investors may rely "on 'an assessment of the state of the law and the totality of the business environment at the time of the investment.'"[1308] Thus, as the tribunal observed in *ADC v. Hungary*, while an investor must comply with relevant domestic laws and regulations, it need not accept "whatever the host State decides to do to it."[1309] Further, as the above discussion makes plain, the dismantling or flouting of critical components of a State's regulatory regime that were enacted in order to entice the investment necessarily contravenes an investor's legitimate expectations and violates a State's obligation to accord fair and equitable treatment. Respondent concedes this uncontroversial principle as well.[1310] Even while doing so, however, Respondent seeks to minimize the importance of legitimate expectations in this case, asserting that Claimant "does not cite even one case in which a tribunal found that the international minimum standard was violated due to a violation of legitimate expectations"[1311]—and that, in any event, specific commitments by a State purportedly are necessary to the formation of legitimate expectations and do not exist in this case.[1312] Respondent is wrong in both respects.

[1307] Memorial ¶¶ 245-258.

[1308] *PSEG v. Turkey* ¶ 255 (quoting *Saluka Investments BV (The Netherlands) v. Czech Republic,* UNCITRAL, Partial Award of 17 Mar. 2006 ("*Saluka v. Czech Republic")* ¶ 301 **(CL-16))** **(CL-37)**.

[1309] *ADC v. Hungary* ¶ 424 **(CL-3)**.

[1310] *See* Counter-Memorial ¶ 567 ("[F]rustration of those [legitimate] expectations requires a fundamental change to the legal framework. The premises upon which the investment was made must be dismantled by legislative or regulatory measures such that it can be concluded that the stability of the legal system, which had been guaranteed by a specific commitment, has been compromised.").

[1311] *Id*. ¶ 550.

[1312] *Id*. ¶¶ 552-566.

255. First, as Claimant demonstrated in its Memorial, the protection of an investor's legitimate expectations is fundamental to the obligation to accord an investment treatment that comports with the customary international law minimum standard.[1313] The tribunal's decision in *BG Group v. Argentina* is illustrative. There, the tribunal understood the applicable fair and equitable treatment standard to be a part of the international minimum standard, and found a breach of the standard arising from Argentina's transformation of a public utility tariff regime upon which the investor had reasonably relied:

> In summary . . . Argentina fundamentally modified the investment Regulatory Framework, which, as stated above, provided for specific commitments that were meant to apply precisely in a situation of currency devaluation and cost variations. Thus, Argentina reversed commitments towards BG, when BG relied the most on its legitimate and reasonable expectations of a stable and predictable business and legal investment environment.[1314]

In reaching this conclusion, the *BG Group* tribunal specifically referenced the "unambiguous statement" in *Waste Management II* (a NAFTA Chapter Eleven case) that a State's commitments to the investor, and the investor's reliance on such commitments, are "relevant to the application of the minimum standard of protection under international law."[1315] Indeed, in *Waste Management II*, the tribunal stated that "[i]n applying this [minimum] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."[1316] The *BG Group* tribunal further noted, with reference to the *Generation*

[1313] Memorial ¶¶ 233-244; *see also* Stephan W. Schill, *Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law*, *in* International Investment Law and Comparative Public Law (Stephan W. Schill ed., 2010) 164 ("T]he concept of legitimate expectations is another prominent sub-element of fair and equitable treatment. . . . Its main thrust is the protection of confidence against administrative and legislative conduct.") **(CL-78)**.

[1314] *BG Group v. Argentina* ¶ 310 **(CL-9)**; *see also id.* ¶ 298 ("The duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest.").

[1315] *Id*. ¶ 294.

[1316] *Waste Management, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/3, Award of 30 Apr. 2004 ("*Waste Management II*") ¶ 98 **(CL-46)**.

Ukraine case, that "the protection of [legitimate expectations] is a major concern of the minimum standards of treatment contained in bilateral investment treaties."[1317]

256. Other cases previously relied upon by Claimant reinforce the principle that the international minimum standard protects an investor's legitimate expectations. In *Duke v. Ecuador*, for example, the tribunal held that "the stability of the legal and business environment is directly linked to the investor's justified expectations," and that the fair and equitable treatment obligation, as understood by reference to the international minimum standard, was breached in that case by the respondent's violation of the investor's expectations.[1318] In *Rumeli v. Kazakhstan*, the tribunal likewise found a violation of a fair and equitable treatment obligation that was "not materially different from the minimum standard of treatment in customary international law," holding that "the State must respect the investor's reasonable and legitimate expectations."[1319] Similarly, in *Biwater Gauff v. Tanzania*, the tribunal ruled that "the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law," and that "[s]pecific [c]omponents of the [s]tandard" include the "[p]rotection of legitimate expectations."[1320]

257. The tribunal's decision in *Thunderbird v. Mexico* (another NAFTA Chapter Eleven case), upon which Respondent itself relies, further demonstrates that legitimate expectations are integral to the fair and equitable treatment standard under customary international law. As the *Thunderbird* tribunal observed:

> Having considered recent investment case law and the good faith principle of international customary law, the concept of

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[1317] *BG Group v. Argentina* ¶ 295 (quoting *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 Sept. 2003 ("*Generation Ukraine v. Ukraine*") ¶ 20. 37 **(RL-6)**) **(CL-9)**.

[1318] *Duke v. Ecuador* ¶¶ 337, 340 **(CL-19)**.

[1319] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008 ("*Rumeli v. Kazakhstan*") ¶¶ 609, 611 **(CL-39)**.

[1320] *Biwater Gauff v. Tanzania* ¶¶ 592, 602 **(CL-10)**; *see also Siemens v. Argentina* ¶ 299 (finding that "the current [international] standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment") **(CL-44)**.

> 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.[1321]

The relevance, and indeed fundamental importance, of legitimate expectations to the international minimum standard of treatment cannot reasonably be questioned.

258. Respondent also misses the mark when it argues that, if legitimate expectations are to play a role—as they must—the fair and equitable treatment standard requires that "the investor must have received specific promises or guarantees that the State would not make any changes to the legal framework," such as in the "classic example" of a stability clause.[1322] This assertion improperly conflates fair and equitable treatment obligations under a treaty and stability commitments under a contract. Contrary to Respondent's suggestion, no such specific guarantee is necessary for a fair and equitable treatment standard violation. Indeed, as ICSID Secretary-General Meg Kinnear has observed, "[t]he weight of authority suggests that an undertaking or promise need not be directed specifically to the investor and that reliance on publicly announced representations or well known market conditions is a sufficient foundation for investor expectations."[1323]

259. Numerous tribunals likewise have found that domestic law and regulations can, in and of themselves, form the basis of the investor's legitimate expectations. This is particularly the case where the legal framework was adopted with the specific aim of attracting foreign

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[1321] *Thunderbird v. Mexico* ¶ 147 **(CL-25)**.

[1322] Counter-Memorial ¶ 558.

[1323] M. Kinnear, "The Continuous Development of the Fair and Equitable Treatment Standard," in A. Bjorklund, I. Laird, S. Ripinsky (eds.), INVESTMENT TREATY LAW, CURRENT ISSUES III (2009), at 228 **(CL-73)**; *see also* Stephan W. Schill, *Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law*, *in* International Investment Law and Comparative Public Law (Stephan W. Schill ed., 2010) 165 ("It is, however, not necessary that expectations were induced by conduct that was individually directed towards a foreign investor. Legitimate expectations can also originate from the provisions of the general regulatory framework that a host state has put in place, as long as the confidence the framework generated is sufficiently specific. In this context, the concept of legitimate expectations as an element of the rule of law may even restrict the domestic legislator in making changes to the regulatory framework in place.") **(CL-78)**.

investment, as well as in disputes involving public utilities (as in the Argentina cases discussed above) where the host State's regulatory framework is viewed as a "specific" commitment to investors. Thus, for example, in another public utilities case, *Suez v. Argentina*, the tribunal noted:

> [T]his Tribunal finds that an important element of such cases [addressing legitimate expectations] has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. *It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not accorded protected investments fair and equitable treatment*.[1324]

Turning to the facts of the case before it, the *Suez* tribunal found:

> [I]t should be emphasized that the expectations of the Claimants with respect to their investment . . . did not suddenly and surprisingly come into their minds the way Athena sprang from the head of Zeus. *Argentina through its laws, the treaties it signed, its government statements, and especially the elaborate legal framework which the Province designed and enacted, deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed* to revitalize and expand the Province's water and sewage system. . . . *Like any rational investor, the Claimants attached great importance to the tariff regime . . . and the regulatory framework. Indeed, their ability to make a profit was crucially dependent on it*.[1325]

Given the "central role" of the legal framework, and the "care and attention that the Province devoted to the creation of that framework," the tribunal ruled that the claimants' expectations

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[1324] *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 of 30 July 2010 ("*Suez v. Argentina*") ¶ 207 (emphasis added) **(RL-17)**.

[1325] *Id*. ¶¶ 208, 212 (emphasis added).

that the framework would be respected were "legitimate, reasonable, and justified," and that the failure to act in accordance with that legal framework breached the host State's obligation to accord fair and equitable treatment to the investment.[1326]

260. Similarly, in *Total v. Argentina*, the tribunal reasoned—again, with respect to Argentina's public utility regulatory regime—that:

> [A] claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations . . . . In such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (be they domestic or foreign) may provide a yardstick. This is the case for capital intensive and long term investments and operation of utilities under a license, natural resources exploration and exploitation, project financing or Build Operate and Transfer schemes. The concept of 'regulatory fairness' or 'regulatory certainty' has been used in this respect.[1327]

Applying these principles to Argentina's alteration of electricity pricing mechanisms through a series of administrative decrees—while leaving the relevant electricity law in place—the tribunal concluded that Argentina had "objectively breached" the fair and equitable treatment standard.[1328] In particular, the tribunal determined that "[a] foreign investor is entitled to expect that a host state will follow those basic principles (which it has freely established by law) in administering a public interest sector that it has opened to long term foreign investments" and that "[e]xpectations based on such principles are reasonable and hence legitimate, *even in the absence of specific promises by the government*."[1329] Thus, contrary to Respondent's contentions, the investor's legitimate expectations are integral to the international minimum standard, even absent the type of specific commitments included in a contractual stability clause.

[1326] *Id*. ¶ 212.

[1327] *Total v. Argentina* ¶ 122 **(CL-70)**.

[1328] *Id*. ¶ 333.

[1329] *Id*. (emphasis added).

b. Respondent's Deliberate Repudiation Of Its Legal And Regulatory Framework Violated Claimant's Legitimate Expectations

261. As set forth in Claimant's Memorial and above, a critical factor in Claimant's decision to invest in Guatemala was the existence of a stable and depoliticized tariff review process in which EEGSA's VAD would be calculated by an independent consultant retained by the distributor on the basis of the new replacement value of a model efficient company's network, and where any disputes concerning the distributor's VAD study would be resolved by an independent Expert Commission appointed by the parties.[1330] As Mr. Gillette confirmed in his first witness statement, "[t]he laws that Guatemala had enacted to reform its electricity sector were central to [the] decision to participate in the bid to privatize EEGSA. They established a stable and predictable regulatory framework for setting EEGSA's tariffs."[1331] Mr. Gillette reaffirms in his second witness statement that Guatemala's reforms in the electricity sector had established "a stable and predictable framework for setting EEGSA's tariffs, which was a critical investment consideration."[1332] Indeed, Respondent's own witness, Mr. Moller, acknowledged in testimony in the *Iberdrola* arbitration that tariff rates and the methodology to determine them were important to investors' decisions to invest; and that, at the time of privatization, Guatemala's regulatory scheme was "well developed" and affected the prices that investors were willing to pay.[1333]

262. While Claimant does not dispute that States retain their ability to regulate and, absent a stability agreement, their laws are not frozen, this does not mean that the State has a free hand to dismantle the very regime that the State established to attract investment through amendments or administrative or regulatory actions clearly at odds with the law and the State's

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[1330] *See supra* Section II.B; Memorial ¶¶ 56-64.

[1331] *See, e.g.*, Gillette I ¶ 11 **(CWS-5)**.

[1332] Gillette II ¶ 2 **(CWS-11)**.

[1333] *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Testimony of E. Moller from Hearing dated 27 July 2011, 712:14-22, 702:12-14 ("There were questions regarding the methodology to apply the rate schedule. It was a question that—and the explanation that was always given was that the methodology used to set the rate schedule was well developed in the law, that that was the recommendation given by the consultants, that it would be very well established in the law to have judicial certainty.") **(C-539)**.

prior representations. Thus, while EEGSA was obligated under the 1998 Authorization Agreement "to fulfill all provisions set forth in the Law of General Electricity and its Regulations, or any amendments thereto,"[1334] this does not mean, as Respondent appears to suggest, that the CNEE was permitted to eviscerate the protections and guarantees set forth in the law for electricity distributors. Indeed, as set forth above, it is well established that the implementation of an investment framework can, in and of itself, create legitimate investor expectations—particularly, where, as here, projections of stability are critical to the decision to invest in public utilities.

263. Thus, as noted above, the *Suez v. Argentina* tribunal placed particular emphasis on the fact that the respondent "through its laws, the treaties it signed, its government statements, and especially the elaborate legal framework which the Province designed and enacted, deliberately and actively sought to create [legitimate] expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed."[1335] Likewise, in *Total v. Argentina*, the tribunal recognized, in the long-term public utility investment context, that "[e]xpectations based on such principles [of economic rationality, reasonableness, and proportionality] are reasonable and hence legitimate, even in the absence of specific promises by the government."[1336] In the words of the *Suez* tribunal, 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."[1337]

264. As the evidence demonstrates, Respondent actively sought to create legitimate expectations through its newly-established regulatory framework—and succeeded in doing so. Thus, even if, as Respondent suggests, explicit commitments regarding the regulatory framework were necessary (which they are not) to establish legitimate expectations, Respondent did, in fact,

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[1334] Counter-Memorial ¶ 560 (quoting Authorization Agreements for the Departments of Guatemala, Sacatepéquez and Escuintla, signed by EEGSA and Ministry of Energy and Mines, dated 15 May 1998, Clause 20 **(C-31)**).

[1335] *Suez v. Argentina*, ¶ 208 **(RL-17)**.

[1336] *Total v. Argentina* ¶ 333 **(CL-70)**.

[1337] *Suez v. Argentina* ¶ 212 **(RL-17)**.

make several specific representations regarding its regulatory framework to potential investors in EEGSA, including to the TECO group of companies. As set forth in Claimant's Memorial and above,[1338] Respondent made the following specific representations:

> - *Preliminary Information Memorandum*: described, *inter alia*, the method to be implemented for calculating tariffs, and stated that "[t]he electric sector in Guatemala offers investors a high potential for growth within a regulatory framework designed to stimulate the development of the sector through free competition."[1339]
>
> - *Memorandum of Sale*: discussed, *inter alia*, the tariff calculation regime and the role of the Expert Commission, 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."[1340]
>
> - *Roadshow Presentation*: further discussed details of the tariff regime and reaffirmed that the investment in EEGSA presented a "landmark opportunity for investors" providing access to "a growing economy within a stable political framework."[1341]

265. Numerous tribunals have taken into account an investor's reliance on sales memoranda and other similar documents when assessing the investor's legitimate expectations.[1342] Respondent's attempt to minimize its own specific representations regarding the regulatory framework on the ground that "these are non-binding documents" (with reference to a provision in the Sales Memorandum only)[1343] is unavailing. Indeed, similar arguments have

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[1338] *See, e.g.*, *supra* Section II.B; Memorial ¶¶ 49-55.

[1339] Preliminary Information Memorandum dated April 1998, at 13 **(C-27)**; *see also id.* at 9-10.

[1340] Sales Memorandum dated May 1998, at 49 **(C-29)**; *see also id.* at 42-49.

[1341] Roadshow Presentation dated May 1998, at 39 **(C-28)**; *see also id.* at 15-20.

[1342] *See, e.g.*, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award of 3 Nov. 2008 ("*National Grid v. Argentina*") ¶ 177 (discussing prospectus) **(CL-33)**; *CMS v. Argentina* ¶¶ 133-134 (discussing information memorandum) **(CL-17)**; *Enron Corp, and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007 ("*Enron v. Argentina*") ¶ 103 (same) **(CL-21)**; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 Sept. 2007 ("*Sempra v. Argentina*") ¶ 113 (same) **(CL-43)**; *BG Group v. Argentina* ¶¶ 171-72 (same) **(CL-9)**.

[1343] Counter-Memorial ¶ 562 & fn. 797.

been rejected in other cases. In *CMS v. Argentina*, for example, the tribunal found that an information memorandum, "while not legally binding, accurately reflect[ed] the views and intentions of the Government."[1344] Similarly, in *National Grid v. Argentina*, the tribunal ruled that "the Respondent solicited the investments in the power sector internationally. It is disingenuous for the Respondent now to rely on the disclaimers in the prospectus in order to distance itself from the information given therein."[1345]

266. The relevant inquiry here is not whether Respondent's promotional materials bind Respondent as a matter of domestic contract law (the focus of the Sales Memorandum provision that Respondent cites), but rather whether the representations contributed to Claimant's legitimate expectations as a matter of international law under the DR-CAFTA. As these documents reflect, they were targeted at potential investors in EEGSA and contain specific statements regarding the stability and operation of the regulatory framework (including the role of the Expert Commission and the tariff calculation methodology), which were intended to attract foreign investment.[1346] Just as critically, these documents demonstrate Respondent's own understanding of the regulatory framework at the time of EEGSA's privatization—an understanding that is fundamentally at odds with the manner in which Respondent later applied that framework with respect to EEGSA's 2008-2013 tariff review. Indeed, the representations in these promotional materials highlight the baseless and disingenuous nature of Respondent's contentions that Claimant now purportedly misinterprets the legal regime—and further make clear that this dispute does not concern merely the proper interpretation of Guatemalan law, but Respondent's international obligation to act in a manner consistent with its prior representations aimed at inducing foreign investment in its electricity sector. In the words of the *National Grid* tribunal, it would be "disingenuous" for Respondent to now try to "distance itself" from the specific representations it made in its own promotional materials. Taken together with

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[1344] *CMS v. Argentina* ¶ 134 **(CL-17)**.

[1345] *National Grid v. Argentina* ¶ 177 **(CL-33)**.

[1346] Preliminary Information Memorandum dated April 1998, at 9-13 **(C-27)**; Roadshow Presentation dated May 1998, at 39 **(C-28)**; Sales Memorandum dated May 1998, at 42-49 **(C-29)**.

Respondent's commitments to stability reflected in the Treaty,[1347] there can be no doubt that Respondent created legitimate expectations with respect to its legal and regulatory framework that are subject to fair and equitable treatment protections.

267. Respondent's assertion that "TGH does not allege or prove the existence of any legitimate expectation of its own in this case"[1348] also must be rejected. Claimant undoubtedly had expectations with respect to its investment in EEGSA and, as demonstrated above, those expectations were legitimate. Respondent's argument in this respect relies on the fact that Claimant was incorporated in 2005. As the record reflects, from 1998 when EEGSA was privatized, the corporate changes in the chain of companies that held TECO Energy's indirect interest in EEGSA were limited to: (i) two companies in the TECO group of companies changing their names;[1349] and (ii) two new U.S. holding companies, TWG Non-Merchant and Claimant, being added to the corporate chain between TECO Energy and EEGSA.[1350] As set forth above, these changes in the corporate chain of ownership did not change the fact that, from September 1998 until October 2010, TECO Energy held its indirect interest in EEGSA through DECA (later, DECA II) and various subsidiaries in the TECO group of companies.[1351]

268. Contrary to Respondent's contentions, this restructuring does not mean that Claimant "could not have had any expectation . . . dating back to the time of EEGSA's privatization."[1352] It also does not require a novel or "unheard of" legal theory of transferred

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[1347] *See generally* DR-CAFTA, Preamble (stating that all State Parties "resolv[e] to . . . ensure a predictable commercial framework for the planning of business activities and investment") **(CL-1)**.

[1348] Counter-Memorial ¶ 549.

[1349] *See* Articles of Amendment to Articles of Incorporation of TECO Power Services Corporation dated 23 Dec. 2003 **(C-459)** (certifying name change to TECO Wholesale Generation, Inc.); Articles of Amendment to Articles of Incorporation of TWG Non-Merchant, Inc. dated 7 Apr. 2005 **(C-460)** (certifying name change to TECO Guatemala, Inc.); *see also* Gillette II ¶ 10 **(CWS-11)**.

[1350] Articles of Incorporation of TWG Non-Merchant, Inc. dated 4 May 2004 **(C-461)**; Certificate of Formation of TECO Guatemala Holdings, LLC dated 26 Apr. 2005 **(C-468)**; *see also* Gillette II ¶ 10 **(CWS-11)**.

[1351] *See supra* ¶¶ 67-68; Gillette II ¶ 10 & fn. 15 (detailing chain of ownership and supporting corporate documentation for same) **(CWS-11)**.

[1352] Counter-Memorial ¶ 546.

expectations, as Respondent asserts,[1353] to establish that Claimant's expectations included the continuous expectations of the TECO group of companies from its initial investment in EEGSA in 1998 until Claimant was created and inserted into the corporate chain of ownership in 2005.[1354] As Respondent acknowledges, protected legitimate expectations "are those of each individual investor at the time that the initial investment is made."[1355] Claimant necessarily had expectations at the time of its investment, which it drew from the legal and regulatory framework that Respondent had implemented in 1996 and 1997; from the specific representations that Guatemala had made to the TECO group of companies during EEGSA's privatization process in 1998; and from the manner in which Respondent adhered to that framework *vis-à-vis* EEGSA from 1998 to 2005.

269. Indeed, in this case, there could be no question that Claimant would have shared the same expectations as the other members of the TECO group of companies. When Claimant acquired its indirect interest in EEGSA, the transfer of the shares were not share sales, but were internal corporate transfers between members of the same group of companies.[1356] Moreover, as Mr. Gillette notes, "[a]t the time of Claimant's incorporation in 2005, Claimant and TECO Guatemala, Inc. shared all of the same officers and directors,"[1357] and "the officers and directors

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[1353] *Id*. ¶ 548.

[1354] Without cause, Guatemala attacks Claimant for using TGH and TECO interchangeably in its Memorial and thus erroneously indicating that Claimant existed in 1998, and yet Guatemala makes a similar mistake when it repeatedly asserts that Claimant filed claims before the local Guatemalan courts. As the documents clearly reflect, Claimant was not a party to any of those proceedings—all proceedings were brought by EEGSA, in which Claimant held a minority, indirect interest. *See, e.g.*, Counter-Memorial ¶ 14 ("EEGSA *and TGH* clearly understood this when *they resorted to the courts in Guatemala* to challenge the same regulatory decisions about which TGH complains in this arbitration.") (emphasis added); *id.* ("EEGSA and *TGH took their claim up to the Constitutional Court* . . . .") (emphasis added); *id.* ¶ 15 ("Having obtained well-founded decisions from the Constitutional Court that *rejected its claims, TGH* now . . . wants this Tribunal to become a court of *last instance* . . . .") (emphasis added).

[1355] Counter-Memorial ¶ 548.

[1356] *See supra* ¶ 68; Gillette II ¶ 11 **(CWS-11)**.

[1357] Gillette II ¶ 11 **(CWS-11)**; *see also* TECO Guatemala, Inc., Action by Consent in Lieu of Directors' Meeting dated 27 Apr. 2005 (showing that in 2005 TECO Guatemala, Inc.'s directors were G.L. Gillette, S.M. Payne, and J.B. Ramil, and its officers were G.L. Gillette (President and Treasurer), S.M. Payne (Vice President-Controller, Assistant Secretary and Tax Officer), D.E. Schwartz (Secretary), and S.W. Callahan (Assistant Secretary)) **(C-469)**; TECO Guatemala Holdings, LLC Limited Liability Company Agreement dated 4 May 2005, Arts. 3.2 & 3.9 (showing the same for TECO Guatemala Holdings, LLC) **(C-472)**.

of those two companies, with one exception, also were identical to those in place for TECO Wholesale Generation, Inc., which is the entity between those companies and TECO Energy,"[1358] further reflecting the fact that these companies operated and continue to operate as a single group of companies with a common parent company, TECO Energy. Accordingly, Claimant, as a member of the TECO group of companies, shared the very same expectations regarding the investment in EEGSA as the other members of that group.

270. In fact, it is commonplace in investment treaty arbitration for a subsequent investor to derive legitimate expectations from a State's assurances regarding its legal regime to an earlier investor—even when the investors are not closely related. In *Sempra v. Argentina*, for example, the regulatory framework governing the privatization of the gas industry had been implemented beginning in 1989, and the governing Gas Law and Gas Decree were enacted in 1992. Sempra, however, did not make its investment in the gas sector until 1996. Although Sempra therefore had not invested when the regulatory framework was first implemented—and in fact acquired its interest from an earlier, unrelated investor—the tribunal nonetheless determined that Sempra could legitimately rely on the legal framework that was in place at the time of its investment: "[t]he measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Where there was business certainty and stability, there is now the opposite."[1359] Likewise, in *LG&E v. Argentina*, the claimant did not make its investment in the gas sector until 1997—again, acquiring it from another, unrelated investor that had invested when the gas sector was privatized and the regulatory framework was first implemented. Notwithstanding the fact that LG&E assumed ownership years later, the tribunal did not hesitate to rule that "Claimants relied upon certain key guarantees in the Gas Law and implementing

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[1358] Gillette II ¶ 11 **(CWS-11)**; *see also* TECO Wholesale Generation, Inc., Action by Consent in Lieu of Directors' Meeting dated 27 Apr. 2005 (showing that in 2005 TECO Wholesale Generation, Inc.'s directors were C.R. Black, G.L. Gillette, and J.B. Ramil, and its officers were C.R. Black (President), S.M. Payne (Vice President-Controller, Assistant Secretary and Tax Officer), D.E. Schwartz (Secretary), G.L. Gillette (Treasurer), and S.W. Callahan (Assistant Secretary)) **(C-470)**.

[1359] *Sempra v. Argentina* ¶ 303 **(CL-43)**.

regulations. . . .The abrogation of these specific guarantees violates the stability and predictability underlying the standard of fair and equitable treatment."[1360]

271. Similarly, the fact that Claimant did not exist when Respondent first implemented its new legal and regulatory framework and when Respondent targeted the TECO group of companies for EEGSA's privatization does not render the regulatory regime (still in place in 2005) any less relevant, or Claimant's expectations with respect to that regime (in 2005) any less legitimate. Indeed, when Claimant acquired its interest in EEGSA in 2005, it had all the more reason to reasonably rely upon the regulatory framework that Respondent had implemented to depoliticize the tariff review process and to guarantee fair returns, because the tariff review process for the second tariff period (2003-2008) had functioned as intended, and had allowed the TECO group of companies to obtain a return in line with its expectations under the LGE and RLGE.[1361] Moreover, unlike in *Sempra* and *LG&E*, where the claimants were deemed to have expectations arising from the legal framework and regulatory operations that had been in place even when an entirely unrelated entity first made the investment, in this case, Claimant's legitimate expectations arose not only from the legal and regulatory framework in place at the time of its investment, but from the express representations that had been made by Guatemala to the TECO group of companies, of which Claimant is part, and from the manner in which Guatemala had implemented the provisions of the LGE and RLGE from 1998 until 2005.

4. A Showing Of A Denial Of Justice Is Not Required To Sustain A Fair And Equitable Treatment Claim

272. Respondent improperly conflates fair and equitable treatment and denial of justice claims when arguing that "[o]nly if the Guatemalan justice system had denied justice to EEGSA/TGH could a valid international claim come to exist."[1362] Denial of justice is but a subset of the international minimum standard and one way in which a State may violate its obligation to accord an investment fair and equitable treatment. As Fitzmaurice explains, "every

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[1360] *LG&E v. Argentina* ¶ 133 **(CL-27)**.

[1361] *See supra* Sections II.C-D.

[1362] Counter-Memorial ¶ 17; *see also, e.g.*, *id*. ¶¶ 480-486, 587.

injury involving the responsibility of the state committed by a court or judge acting officially, or alternatively every such injury committed by any organ of the government in its official capacity in connection with the administration of justice, constitutes and can properly be styled a denial of justice, whether it consists in a failure to redress a prior wrong, or in an original wrong committed by the court or other organ itself."[1363] And as legal commentators McLachlan, Shore and Weiniger make clear:

> The cases on fair and equitable treatment fall into two broad categories. The first set of cases are concerned with the treatment of investors by the courts of the host State. The second, and more numerous, set of cases deal directly with administrative decision-making.[1364]

This case is among the "more numerous set of cases" that challenges administrative and regulatory action.

273. As shown above, a State violates its obligation to provide fair and equitable treatment when it acts arbitrarily, violates an investor's legitimate expectations, or fundamentally changes the regulatory framework on which an investor relied, irrespective of whether there has been a denial of justice by the host State's courts. Tribunals, thus, have rightly rejected the line of argument that Respondent advances here. In *Vivendi II*, for example, the tribunal held:

> To the extent that Respondent contends that the fair and equitable treatment obligation constrains government conduct only if and when the state's courts cannot deliver justice, this appears to conflate the legal concepts of fair and equitable treatment on the one hand with the denial of justice on the other. But if this Tribunal were to restrict the claims of unfair and equitable treatment to circumstances in which Claimants have also

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[1363] Jan Paulsson, Denial of Justice in International Law, at 64 (2005) (quoting G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice,'" 13 BYIL 93, 107-09 (1932)) **(CL-75)**.

[1364] Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration – Substantive Principles*, at 226 (Oxford UP 2007) **(CL-74)**; *see also* R. Dolzer and C. Schreuer, Principles of International Investment Law (2008), at 142-144 (addressing the issue of procedural propriety and due process as one category of claim, among several, implicating the fair and equitable treatment standard) **(CL-71)**.

> established a denial of justice, it would eviscerate the fair and equitable treatment standard.[1365]

Likewise, in *Consortium R.F.C.C. v. Kingdom of Morocco*, the tribunal noted that a host State may exhibit unjust and unfair behavior even in the absence of a denial of justice or denial of a right without obvious cause.[1366]

274. Investment treaty jurisprudence is thus replete with cases finding a fair and equitable treatment violation on account of a State's legislative or regulatory actions where there has been no finding of a denial of justice by the State's courts—or, indeed, where State court action is not even questioned. Among the cases discussed above, for example, the tribunal in *CME v. Czech Republic* ruled that pressure by a State media regulator to eliminate contractual protections violated the fair and equitable treatment standard.[1367] The fairness of the local judiciary was never at issue: the claimant had not sought recourse in the State courts or alleged a denial of justice, and the tribunal made no mention of denial of justice in finding a breach of fair and equitable treatment.[1368] Likewise, in *Biwater Gauff v. Tanzania*, the tribunal ruled that regulatory acts by the State, including the publicly-announced repudiation of an investment contract, the withdrawal of VAT exemptions, and the failure to appoint an independent regulator, constituted breaches of the fair and equitable treatment standard.[1369] Once again, there were no judicial proceedings at issue. The *Biwater* claimant had not sought relief in Tanzanian courts, but rather argued in connection with a local remedy requirement under the applicable BIT that it would have been denied justice *if* it had been required to pursue local remedies.[1370]

[1365] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 Aug. 2007 ("*Vivendi II*") ¶¶ 7.4.10-7.4.11 **(CL-18)**.

[1366] *Consortium R.F.C.C. v. Kingdom of Morocco,* ICSID Case No. ARB/00/6, Award of 22 Dec. 2003 ¶ 51 ("Un tribunal peut donc décider que l'Etat d'accueil a fait preuve d'un comportement injuste et inéquitable même en l'absence de déni de justice ou de négation sans motif d'un droit evident.") (Informal translation by counsel: "A court can decide that the host state has demonstrated unjust and unfair behavior even in the absence of a denial of justice or denial of a right without obvious cause.") **(CL-60)**.

[1367] *CME v. Czech Republic* ¶¶ 603, 611, 614 **(CL-16)**.

[1368] *See id*.

[1369] *Biwater Gauff v. Tanzania* ¶¶ 497, 501, 503, 511, 605, 615 **(CL-10)**.

[1370] *Id*. ¶ 264(e) **(CL-10)**.

275. Even in cases where the State judiciary is implicated, investment tribunals have recognized that a breach of the fair and equitable treatment standard can occur separate and apart from any treatment rendered by the local courts. In *ATA v. Jordan*, for example, the claimant had argued that "denial of justice is of central importance to this case" because it allegedly had been mistreated by the Jordanian court system.[1371] The tribunal, however, found that it did not have jurisdiction over the claims relating to denial of justice—and that, in any event, the local courts had not effected a denial of justice:

> From the outset, the parties focussed [sic] on the conduct of the Jordanian courts in adjudicating the grounds for annulment of the Final Award. *Their actions could hardly be said to have constituted abusive misconduct, bad faith or a denial of justice*. Notwithstanding its finding of a lack of temporal jurisdiction, the Tribunal would note that it was unconvinced that, even if there had been jurisdiction, a claim of denial of justice, whether substantive or procedural, could have been sustained.[1372]

While ruling out the possibility of a denial of justice, the tribunal found that Jordan *had* breached its fair and equitable treatment obligation through retroactive application of a new law that extinguished the investor's right to arbitrate—a requirement for neutral dispute resolution that the tribunal deemed an "integral part" of the investment contract.[1373] Similarly, in *PSEG v. Turkey*, the State's constitutional court did not effect a denial of justice, and, in fact, had upheld the investor's contractual rights.[1374] However, this pro-investor holding was disregarded by other State organs when implementing inconsistent administrative positions and legislative changes—*i.e.*, those State acts which, in the tribunal's view, had violated the State's fair and equitable treatment obligations.[1375]

276. As these cases underscore, the absence of a denial of justice finding (or claim) does not change the fact that fundamental alterations of the legal and regulatory framework on

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[1371] *ATA Construction v. Jordan* ¶ 73 **(CL-58)**.

[1372] *Id*. ¶ 123 (emphasis added).

[1373] *Id*. ¶ 125; *see also id.* ¶¶ 121-128.

[1374] *PSEG v. Turkey* ¶ 249 **(CL-37)**.

[1375] *Id*.

which an investor relies do violate fair and equitable treatment obligations. Respondent's arguments to the contrary rely on inapposite cases involving breach of contract disputes or disputes concerning local matters under domestic law not rising to the level of an international breach, where the tribunals determined that a treaty violation could only be found if an investor had been denied the opportunity to obtain redress in, or was denied justice by, local courts.[1376] Thus, the denial of justice was a necessary additional step that elevated or transformed the dispute from one of purely domestic law to one of international law.

277. The cases upon which Respondent relies involving claims for breach of contract are irrelevant for the additional reason that Claimant has not alleged a breach of contract. Furthermore, it is widely recognized that a breach of contract by itself is not internationally unlawful.[1377] Thus, where the crux of a claim is for breach of a contract, there can only be a violation of customary international law where the foreign party is denied justice by the local courts and therefore is unable to obtain recompense for the contractual breach. This is made clear in the breach-of-contract cases on which Respondent relies—and which, as is readily apparent, have no application to the circumstances of this case:

- *Waste Management II*: holding that "[n]on-compliance by a government with contractual obligations" did not constitute an expropriation, and that for a treaty breach "it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant."[1378]

[1376] *See, e.g.*, Counter-Memorial ¶¶ 87-96 (discussing *Generation Ukraine v. Ukraine* **(RL-6)**; *Waste Management II* **(CL-46)**; *Azinian v. Mexico* **(RL-2)**; *Feldman v. Mexico* **(RL-5)**; and *Parkerings v. Lithuania* **(RL-10)**).

[1377] *See, e.g.*, Report of the Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Art. 4, n.6 (2001) ("Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.") **(CL-79)**; Restatement (Third) of Foreign Relations Law § 712, cmt. h (1987) ("A state party to a contract with a foreign national is liable for a repudiation or breach of that contract under applicable national law, but not every repudiation or breach by a state of a contract with a foreign national constitutes a violation of international law. Under Subsection (2), a state is responsible for such a repudiation or breach only if it is discriminatory . . . or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons and the state is not prepared to pay damages.") **(CL-80)**.

[1378] *Waste Management II* ¶ 175 **(CL-46)**.

- *Azinian v. Mexico*: holding that claimants' "fundamental complaint is that they are the victims of a breach of the Concession Contract," and therefore "[w]hat must be shown is that the court decision itself constitutes a violation of the treaty."[1379]

- *Parkerings v. Lithuania*: holding that a breach of contract did not constitute a treaty violation, but that "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."[1380]

278. The two non-breach-of-contract cases on which Respondent relies to support its denial of justice contention are distinguishable as well, because each involved State administrative or regulatory action that did not rise to the level of an international breach. In *Feldman v. Mexico*, for example, the tribunal determined that an investor's indirect expropriation claim "depend[ed] in significant part" on a tax law provision of general application requiring that companies submit certain invoices in order to be eligible for a tax rebate.[1381] The tribunal found it "important to observe that the invoice requirements of the [tax] law were not new [at the time of investment], and had not been changed by Mexican officials (except to the extent or non-extent of enforcement) to the detriment of the Claimant."[1382] While Mexican officials purportedly had agreed informally not to apply the invoice requirement to the claimant during certain times, the "law at all relevant times contained the invoice requirements," which the tribunal ruled was "a reasonable requirement" and reflected "a rational tax policy"—and which the claimant had not met.[1383] Accordingly, the tribunal held that the tax authority's application of the law to withhold rebate benefits did not constitute a treaty violation; something more was needed for international liability to attach.[1384] *Feldman* is plainly distinguishable from this case

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[1379] *Azinian v. Mexico* ¶¶ 87, 99 **(RL-2)**.

[1380] *Parkerings v. Lithuania* ¶ 317 **(RL-10)**.

[1381] *Feldman v. Mexico* ¶ 128 **(RL-5)**.

[1382] *Id*. ¶ 119.

[1383] *Id*. ¶¶ 119, 129.

[1384] *Id*. ¶¶ 117-134.

because it involved the straightforward application of a domestic legal framework that had not been changed, reinterpreted, or repudiated in any way—and, indeed, had existed in the same form since prior to the time of the investment. The tribunal's further conclusion that "there appear[ed] to have been no denial of due process or denial of justice there as would rise to the level of a violation of international law"[1385] thus has no relevance here.

279. In *Generation Ukraine v. Ukraine*, the claimant complained of various minor acts and omissions by a local city administration that hindered completion of a construction project—including, *e.g.*, the administration's failure to procure temporary use of a neighboring property as a construction staging area and to produce two-page amendment forms for a land lease agreement.[1386] The tribunal ruled that the conduct of the city administration did "not come close" to a treaty breach, and in fact that "[n]o act or omission . . . whether cumulatively or in isolation, transcends the threshold for an indirect expropriation."[1387] The tribunal further noted that it did "not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently," which instead was for local courts "cognisant of the minutiae of the applicable regulatory regime."[1388] Given the absence of any basis for a treaty claim, the tribunal further ruled that "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."[1389]

280. In light of the minor nature of the administrative acts underlying the investor's claims, *Generation Ukraine* also is plainly distinguishable on the facts. The decision, moreover, has been criticized for appearing to inject a local remedies requirement into a claim for breach of a treaty obligation. In the annulment proceeding in *Helnan International Hotels v. Egypt*, for example, the *ad hoc* Committee observed:

[1385] *Id*. ¶ 140.

[1386] *See, e.g.*, *Generation Ukraine v. Ukraine* ¶¶ 20.14-20.15 **(RL-6)**.

[1387] *Id*. ¶¶ 20.32-20.33.

[1388] *Id*. ¶ 20.33.

[1389] *Id*. ¶ 20.33.

> In numerous ICSID cases, tribunals have rendered awards in favour of the claimants as a result of administrative decisions, in which no such application to the local courts had been made. . . . In the light of these precedents and considerations, the Award in *Generation Ukraine* . . . stands somewhat outside the *jurisprudence constante* under the ICSID Convention in the review of administrative decision-making for failure to provide fair and equitable treatment. . . . A requirement to pursue local court remedies would have the effect of disentitling a claimant from pursuing its direct treaty claim for failure by the Executive to afford fair and equitable treatment, even where the decision was taken at the highest level of government within the host State. It would leave the investor only with a complaint of unfair treatment based upon denial of justice in the event that the process of judicial review of the Ministerial decision was itself unfair.[1390]

Generation Ukraine also has been criticized by leading commentators on similar grounds.[1391] In addition to being clearly distinguishable, Respondent's reliance on *Generation Ukraine* fails for this reason as well.

281. In contrast to the clearly distinguishable cases cited by Respondent, and as demonstrated further above, where a State has acted arbitrarily, in violation of the investor's legitimate expectations and with complete disregard of its legal or regulatory framework, the breach of a fair and equitable treatment obligation occurs irrespective of any recourse to domestic courts. No separate judicial action or inaction is required to elevate a claim in this context from the domestic law level to the treaty level; the regulatory or administrative action itself is sufficient. Indeed, Respondent's argument is akin to injecting an exhaustion of local remedies requirement into the Treaty because, under its theory, no claim for fair and equitable treatment based on regulatory or administrative action could succeed unless and until an investor

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[1390] *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee of 14 June 2010 ("*Helnan Int'l v. Egypt*") ¶¶ 48-49, 53 **(CL-62)**.

[1391] *See, e.g.*, Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 L. & Pract. Of Int'l Cts & Tribunals 1, 15 (2005) (discussing *Generation Ukraine*, among other cases, and concluding that "it is not difficult to see that the rationale in these cases can be developed into something that reintroduces the local remedies rule through the back door. Once it is accepted that the investor should make an attempt at local remedies it is only a small step to require that the attempt should not stop at the level of the lowest court. Once we require that reasonable appeals be taken we are close to demanding that these be exhaustive.") **(CL-76)**.

unsuccessfully pursued relief in domestic courts. This is expressly rejected by the DR-CAFTA, which instead requires that a claimant *waive* the right to initiate or continue domestic court remedies as a condition of submitting a claim to arbitration.[1392]

282. Respondent's efforts to interpose a denial of justice as a purported prerequisite to international liability must be rejected. A State cannot be permitted to use its own domestic judicial system to bless, and insulate itself from, a violation of an international law obligation. As the tribunal noted in *Azinian v. Mexico*, "an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials."[1393] Respondent's mischaracterization of denial of justice as a requirement for a fair and equitable treatment violation would, in the words of the *Vivendi II* tribunal, "eviscerate the fair and equitable treatment standard."[1394] No denial of justice claim or finding is necessary to sustain violations of fair and equitable treatment when a State has fundamentally altered or completely disregarded the regulatory and legal framework on which an investor relied.

B. The Tribunal Has Jurisdiction To Decide Claimant's Claim For Respondent's Violation Of Article 10.5 Of The DR-CAFTA

283. Respondent's argument that the Tribunal does not have jurisdiction *ratione materiae* over this dispute because Claimant's claim purportedly is not a "valid international claim"[1395] must be rejected. As established above, Respondent's attempt to recast this case as

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[1392] DR-CAFTA, Art. 10.18(2) ("No claim may be submitted to arbitration under this Section unless . . . (b) the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver . . . of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.").

[1393] *Azinian v. Mexico* ¶ 98 **(RL-2)**; *see also ATA Construction v. Jordan* ¶ 122 ("[T]he Tribunal recalls the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law.") **(CL-7)**; *Feldman v. Mexico*, ¶ 140 ("As the Respondent concedes, this Tribunal could find a [Treaty] violation even if Mexican courts uphold Mexican law; the Tribunal is not bound by a decision of a local court if that decision violates international law.") **(RL-5)**.

[1394] *Vivendi II* ¶ 7.4.11 **(CL-18)**.

[1395] *See, e.g.*, Counter-Memorial ¶¶ 79 (subheading 2), 98 (arguing that the "consequence" of the alleged invalidity of an international claim is that the "Tribunal does not have jurisdiction *ratione materiae*").

involving a mere difference of opinion over the interpretation of Guatemalan laws and regulations is baseless. Respondent's deliberate and calculated violation of critical components of the legal and regulatory framework upon which Claimant's investment was premised gives rise to a violation of Article 10.5 of the DR-CAFTA. This is underscored by the ample jurisprudence detailed above in which States were deemed liable in similar circumstances involving arbitrary action and the fundamental transformation or outright repudiation of a regulatory framework upon which an investor had legitimately relied. It is self-evident that, in order to hold the respondent States liable for breaches of fair and equitable treatment obligations, the tribunals in those cases necessarily determined that they had jurisdiction. Indeed, Respondent fails to cite a single instance where a tribunal has declined jurisdiction in such circumstances.

284. Respondent's purportedly "jurisdictional" objection, moreover, fundamentally misconstrues the nature of the Tribunal's inquiry at the jurisdictional level. Indeed, regardless of the underlying merits of Claimant's claim—*i.e.*, whether the claim is "valid" under the DR-CAFTA—it is well established that the Tribunal has jurisdiction, and must proceed to an examination on the merits, if "the facts *as alleged by the Claimant* . . . if established, are *capable* of coming within those provisions of the [Treaty] which have been invoked."[1396] In other words, for purposes of jurisdiction, "the Tribunal is not required to consider whether the claims under the Treaty . . . are correct," but rather "simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them."[1397] This approach is supported by a long line of consistent investment arbitration decisions,[1398] and confirmed by the very authority upon which Respondent relies.

[1396] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 Apr. 2005 ("*Impregilo S.p.A. v. Pakistan*") ¶ 254 (emphasis added) **(CL-63)**.

[1397] *Siemens v. Argentina* ¶ 180 **(CL-44)**.

[1398] *See, e.g.*, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 Jan. 2004 ¶ 157 **(CL-69)**; *Methanex Corp. v. United States of America*, NAFTA Chapter Eleven, UNCITRAL, First Partial Award of 7 Aug. 2002 ¶¶ 116-21 **(CL-64)**; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 Feb. 2005 ¶¶ 118-19 **(CL-66)**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 Aug. 2009 ¶¶ 193-97 **(CL-59)**; *Jan de Nul N.V. & Dredging International*

285. Quoting *UPS v. Canada* at length, Respondent argues that Claimant has merely "labeled" its claim as a treaty claim and that the Tribunal must perform its own jurisdictional assessment, regardless of Claimant's characterization of the claim.[1399] The entirely unremarkable proposition that the Tribunal is responsible for assessing the jurisdictional predicates of a claim is fully consistent with the established standard articulated above—and yet, contrary to the implication that Respondent would draw, still does not require or warrant an inquiry into the validity of Claimant's claim. In fact, in *UPS v. Canada*, the tribunal noted that both parties had accepted for jurisdictional purposes that the tribunal "must conduct a *prima facie* analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts alleged are capable of constituting a violation of these obligations."[1400] The tribunal agreed that its "task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state?"[1401] Claimant's detailed assessment above confirms that it has answered this question in the affirmative—not only on the basis of facts as alleged, but as supported by extensive witness and documentary evidence.

286. The baseless nature of Respondent's attempt to inject an inquiry of international claim validity into the jurisdictional analysis is further underscored, once again, by its own legal authorities. *Not one* of the ten cases that Respondent addresses in its discussion of "claim validity" and purported jurisdictional implications was dismissed on jurisdictional grounds.[1402]

N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/07/21, Award of 6 Nov. 2008 ¶¶ 69-71 **(RL-11)**; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 31 Jan. 2006 ¶¶ 137-151 **(CL-67)**; *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction of 5 Mar. 2008 ¶¶ 150-153 **(CL-65)**; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 Feb. 2008 ¶¶ 129-32 **(CL-61)**.

[1399] Counter-Memorial ¶¶ 100-104.

[1400] *United Parcel Service of America, Inc. v. Canada*, UNCITRAL, Decision on Jurisdiction of 22 Nov. 2002 ("*UPS v. Canada*") ¶ 33 **(RL-4)**.

[1401] *Id*. ¶ 37.

[1402] *See* Counter-Memorial ¶¶ 79-112.

Indeed, given that all were decided on the merits, these decisions affirmatively establish that whether a claimant's claim turns on a mere difference of opinion over regulatory interpretation, or on the fundamental alteration or outright repudiation of critical aspects of the regulatory framework, is a question properly reserved for the merits—and not a basis for dismissal on jurisdictional grounds.[1403]

287. Respondent's jurisdictional objection thus is without basis. Indeed, Respondent's concession that the DR-CAFTA's fair and equitable treatment obligation "prohibits changes to the regulatory framework that are fundamental and that affect the legitimate expectations of an investor"[1404] also must constitute a concession that this Tribunal has jurisdiction over any dispute alleging such prohibited changes. As established, this is just such a dispute. Claimant has not engaged in the mere "labeling" of treaty claims, but rather seeks to hold Respondent accountable for misconduct giving rise to international liability under Article 10.5 of the DR-CAFTA. The Tribunal has jurisdiction to do so.

[1403] *See ADF v. United States* ¶ 126 (noting that two issues unrelated to the fair and equitable treatment claim "relate to the jurisdiction of this Tribunal or the admissibility of certain claims . . . while the rest of the issues are concerned with the merits of the Claimant's claims about the consistency or inconsistency of the U.S. measures with certain NAFTA provisions") **(CL-4)**; *Azinian v. Mexico* ¶ 79 (noting that "this is the first dispute brought by an investor under NAFTA to be resolved by an award on the merits") **(RL-2)**; *Waste Management II* ¶¶ 138-139 (dismissing the claim on the merits (and not for lack of jurisdiction) after finding that an unjustifiable, conscious decision by the government to defeat the purposes of an investment agreement would breach the fair and equitable treatment obligation because that obligation requires good faith and "not deliberately to set out to destroy or frustrate the investment by improper means," but that claimant's complaints were contractual in nature and it had not proven a denial of justice) **(CL-46)**; *Saluka v. Czech Republic* ¶ 243 (finding "jurisdiction to hear the claims brought before it by the Claimant under the arbitration procedure provided for in Article 8 of the Treaty.") **(CL-42)**; *EnCana v. Ecuador* ¶ 168 (holding that "in the end [even] the Respondent argued on the basis that [the expropriation claim] fell within the Tribunal's jurisdiction") **(RL-9)**; *Generation Ukraine v. Ukraine* ¶ 17.3 (ruling that particular claims "allege expropriatory acts attributable to Ukraine and thus fall within the Tribunal's jurisdiction *ratione materiae* as giving rise to a dispute with respect to a right created by the BIT") **(RL-6)**; *Feldman v. Mexico* ¶¶ 49-88 (observing that most jurisdictional issues had been resolved in an interim decision and resolving additional jurisdictional issues before turning to the merits analysis) **(RL-5)**; *Parkerings v. Lithuania* ¶¶ 256-266 (concluding it has jurisdiction and noting that "the substantive justification of the Claimant's claims is not a matter of jurisdiction but of merit. This question will be developed below [in the merits analysis].") **(RL-10)**; *Pantechnicki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009 ¶¶ 48-49, 67-68 (rejecting the jurisdictional objection to the treaty-based claim, while granting objections with respect to contract-based measures that the claimant had already challenged in local court) **(RL-12)**; *UPS v. Canada* ¶¶ 21-38 (following preliminary jurisdictional decision, resolving further jurisdictional objections raised during merits briefing before proceeding to the merits assessment) **(RL-4)**.

[1404] Counter-Memorial ¶ 567 (subheading b).

IV. DAMAGES

288. In his first expert report, Brent Kaczmarek of Navigant Consulting calculated Claimant's damages to be US$ 237.1 million, which represented TECO's share of EEGSA's lost cash flow while operating from 1 August 2008 until 21 October 2010 under the unlawfully imposed tariff rates, as well as TECO's share of EEGSA's lost share value realized in the sale of DECA II in October 2010.[1405] Navigant makes certain relatively minor adjustments to its model submitted with its second expert report, which result in a calculation of total damages to TECO of US$ 243.6 million.[1406]

289. In its Counter-Memorial, Respondent agrees with Claimant that damages encompass lost cash flow for the period that EEGSA was operating under the Sigla tariff and lost share value realized in EEGSA's sale.[1407] Respondent's conclusion, however, that Claimant gained a net financial *benefit* as a result of the unlawful measures imposed by Guatemala or, alternatively, suffered damages in the range of US$ 5.3 million is clearly erroneous. Respondent's arguments defy logic and are internally inconsistent. Specifically, it defies logic to conclude, as Respondent does, that Claimant suffered no damages—and, in fact, benefitted in the amount of US$ 10.2 million[1408]—as a result of the unlawful VAD imposed on EEGSA, when that VAD was approximately 45% lower than the VAD that had been in place and, as a result, EEGSA's revenues decreased by approximately 40%.[1409] Notably, Respondent nowhere even attempts to explain why the two largest, independent rating agencies, Standard & Poors and

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[1405] Kaczmarek I ¶ 18, Table 2 **(CER-2)**.

[1406] Kaczmarek II ¶ 14, Table 3 **(CER-5)**. These include (i) an update to the implementation of the VNR primarily related to donated assets; (ii) a change in the working capital adjustments to the VNR; (iii) an adjustment to the Bates White energy price forecast to take into account the actual energy prices observed up to the date of the valuation; (iv) an upward adjustment in EEGSA's but-for capital expenditures projection, as discussed below; and (v) a corrected inflation factor. *See* Kaczmarek II ¶¶ 136, 141 & Appendix 2 **(CER-5)**.

[1407] Compass Lexecon ¶ 25 ("The difference between both (i.e., *but for* less *actual*) represents the presumed economic damages suffered by TGH. The methodology to calculate damages by difference between these two scenarios is standard and appropriate for this case . . . . ") **(RER-1)**.

[1408] Compass Lexecon, Table 1 **(RER-1)**.

[1409] TECO Guatemala, Inc. Operations Summary for Periods Ended Sept. 30, Board Book Write-up dated Oct. 2008, at 4-23 **(C-303)**; TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up dated Apr. 2009, at 4-17 **(C-326)**; Gillette I ¶¶ 22, 24 **(CWS-5)**.

Moody's, would have downgraded EEGSA, specifically citing Respondent's imposition of the Sigla VAD as the cause,[1410] if EEGSA did not suffer any financial harm as a result of the imposition of that VAD. Respondent's valuation showing that EEGSA's cash flows between 1 August 2008 and 21 October 2010 were *greater than* the cash flows that it would have experienced but-for the measures,[1411] is thus demonstrably wrong. Respondent's conclusion that EEGSA's cash flow was greater as a result of the measures is also inconsistent with its conclusion that EEGSA's share value (*i.e.*, the difference between EEGSA's actual and but-for values as of the time of the sale to EPM) decreased as a result of the measures.[1412] Respondent makes no attempt to reconcile these clearly contradictory results, which is not surprising, as they are irreconcilable.

290. As shown below, Respondent does not offer any legitimate criticism of Mr. Kaczmarek's valuation or damages assessment. Respondent instead has elected to confuse the issues by creating an alternative model that bears no relationship to Claimant's case. Thus, while its experts proclaim that they have been instructed to calculate Claimant's damages, if any, by determining the difference between EEGSA's actual value and what EEGSA would have been worth had Guatemala acted in accordance with its treaty obligations by setting the tariffs on the basis of "the full implementation of the recommendations made by the Expert Commission,"[1413]

[1410] Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008, at 2 (observing that EEGSA's VAD for the 2008-2013 tariff "is about 55% lower than EEGSA's tariffs for the previous period," and concluding that "[t]his change will result in deteriorated profitability and cash flow measures as well as limited liquidity during the second half of 2008 and going forward," and further noting "the inherent challenges associated with the operating environment in the Republic of Guatemala") **(C-297)**; Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (stating that its downgrade was "driven by the anticipated material deterioration in the near term of EEGSA's credit metrics, in the wake of the August 2008 tariff decision by the Comision Nacional de Electricidad y Energia ("CNEE") regarding the reduction of the Value Added of Distribution-charge ("VAD-charge") by 45%" and that "the 2008 VAD-review raised concerns about the predictability and transparency of the process, and the overall supportiveness of the regulatory framework.") **(C-305)**.

[1411] Compass Lexecon, Table 1 **(RER-1)**.

[1412] *Id*.; *see also* Kaczmarek II ¶ 12 ("Compass Lexecon strangely concludes that the Measures had a very positive impact on EEGSA's cash flows up to 21 October 2010 (when the foreign investors sold EEGSA to EPM), but had a modestly, negative impact on the fair market value of EEGSA's share capital. These two conclusions are clearly contradictory.") **(CER-5)**.

[1413] Compass Lexecon ¶ 1 **(RER-1)**.

Respondent's experts have failed to do this. Instead of relying on Bates White's 28 July 2008 study for an assessment of EEGSA's value in the but-for scenario, Compass Lexecon relies on Mr. Damonte's model.[1414] By his own admission, Mr. Damonte has chosen which of the Expert Commission's rulings to incorporate into his model and has consciously determined to ignore those rulings with which Respondent disagrees.[1415] Respondent's exercise and its resulting damages calculation is thus meaningless; Mr. Damonte's model would not have been used to set EEGSA's tariffs in the but-for scenario—that model did not exist at the time and, more importantly, Claimant's case presupposes that had Guatemala acted in accordance with its obligations, it would have respected *all* of the Expert Commission's decisions. Respondent's insistence that EEGSA's value but-for the challenged measures would have been based on a tariff that was set on the basis of a study that did not incorporate all of the Expert Commission's decisions renders its expert's damages calculation irrelevant.

A. Claimant's Valuation Of EEGSA In The But-for Scenario Is Correct

1. Navigant Properly Used DCF, Comparable Publicly-Traded Company, And Comparable Transaction Approaches For Its But-For Valuation

291. As explained in Claimant's Memorial and in the first expert report of Mr. Kaczmarek, Navigant calculated the value of EEGSA in both the but-for and actual scenarios by using a DCF approach, a comparable publicly-traded companies approach, and a comparable transaction approach.[1416] The valuations obtained from each of these methods were within an acceptable range of one another, thus reaffirming the reasonableness of Navigant's ultimate valuation.[1417] Following established practice, Navigant assigned a weight to each of the

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[1414] Compass Lexecon ¶ 4.b, Compass Lexecon Model "Control Panel" tab **(RER-1)**.

[1415] Damonte ¶ 163 **(RER-2)**; Compass Lexecon ¶ 50 (stating that Mr. Damonte revised Bates White 5 May 2008 model to include "*most* of the missing or incorrectly implemented" rulings of the Expert Commission) (emphasis added) **(RER-1)**; *id*. ¶ 71 (explaining that Mr. Damonte "considers that the EC's [FRC] formula is technically incorrect and therefore inapplicable," which is why he did not use it in his model); Counter-Memorial ¶ 603 ("We reiterate that [the VNR calculated by Mr. Damonte] only reflects the incorporation of 'feasible' pronouncements [of the Expert Commission].").

[1416] Kaczmarek I ¶ 17 **(CER-2)**.

[1417] *Id*. ¶ 19.

approaches, according to the degree of confidence that it had with regard to the data available for each approach, and calculated a weighted average, to arrive at a valuation for EEGSA.[1418]

292. Respondent does not dispute that all three valuation approaches are widely-used and that it is customary to use more than one approach when valuing a company. Respondent nevertheless argues that only a DCF approach should be used in this case to calculate the but-for value of EEGSA because there are no comparable publicly-traded companies and no comparable transactions. In this respect, Respondent contends that the sample size chosen by Navigant is too small, the companies and transactions relied on by Navigant are "distant" comparables, and Navigant's assignment of weight to both the comparables and, ultimately, to the valuations themselves was arbitrary and intended to improperly inflate EEGSA's valuation.[1419] Each of these assertions is incorrect.

293. First, Compass Lexecon wrongly dismisses Navigant's sample size of comparable companies and transactions as being too small and its comparables as being too dissimilar.[1420] As explained in his first expert report, Mr. Kaczmarek identified 70 potentially comparable public companies and 67 potentially comparable transactions and, applying filters, narrowed these to 12 and 9, respectively.[1421] This sample size is not small; by means of comparison, Citigroup conducted a comparatives analysis to render its Fairness Opinion and relied on 6 public companies and 8 transactions.[1422] Nor are the companies or transactions too "distant" to be used for this purpose;[1423] all of them were primarily engaged in electricity distribution and driven by the same economic factors.[1424] In any event, as Mr. Kaczmarek observes, leading practitioners do not abandon either the Comparable Publicly-Traded Company or the

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[1418] Kaczmarek I ¶ 17 **(CER-2)**.

[1419] Compass Lexecon ¶¶ 72-76 **(RER-1)**; Counter-Memorial ¶¶ 609-610.

[1420] Compass Lexecon ¶ 73 **(RER-1)**.

[1421] Kaczmarek II ¶ 108 **(CER-5)**; Kaczmarek I ¶¶ 199-200, 212-213 **(CER-2)**.

[1422] Citigroup Global Markets, Inc., Project Primavera, Fairness Opinion ("Citigroup Fairness Opinion") dated 14 October 2010, at 8-9, 27, 29, 31 **(C-531)**; Kaczmarek II ¶ 130 **(CER-5)**.

[1423] Kaczmarek II ¶¶ 119-121 **(CER-5)**.

[1424] *Id*. ¶ 122.

Comparable Transaction approaches due to the number of companies in the analysis. Rather, according to leading practitioners, significant confidence can be derived from an analysis based on four to seven comparable companies, such that a practitioner could rely on this valuation method "exclusively."[1425] Furthermore, the companies chosen by Mr. Kaczmarek as comparables hardly qualify as too "distant" from EEGSA. Leading valuation practitioners use a test of "reasonable and justifiable similarity" with a focus on finding companies with similar "underlying economics" when selecting comparable companies.[1426] Mr. Kaczmarek's review and ultimate selection of a subset of similar Latin American electricity distributors meets these two standards for a comparable analysis. In this regard, it is noteworthy that both Citigroup and EPM conducted a comparable publicly-traded company and comparable transaction approach, in addition to a DCF approach, when valuing EEGSA for purposes of its sale.[1427] Respondent's outright rejection of these accepted valuation approaches is unjustifiable and flies in the face of well-accepted valuation practices.

294. Second, Mr. Kaczmarek explained in his first expert report how Navigant assigned a relative weight to each company or transaction based on several objective criteria, including, for example, the similarity of the regulatory regime, size and density of the network, and customer mix.[1428] Compass Lexecon does not disagree that these are valid factors to consider, nor does it contend that Navigant misapplied these filters. Because Mr. Kaczmarek had legitimate reasons for assigning greater weights to those companies and transactions that

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[1425] *Id*. ¶ 109.

[1426] *Id*. ¶¶ 119-121.

[1427] Citigroup Fairness Opinion, at 5 **(C-531)**; Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, dated 26 July 2010 ¶ 1.ii **(C-557)**; Kaczmarek II ¶¶ 128-130 **(CER-5)**. Respondent errs in asserting that TECO Energy's statement in its 2009 Annual Report supports its conclusion that there are no comparable companies or transactions to use in valuing EEGSA. *See* Counter-Memorial ¶ 609(b) fn. 844. As Ms. Callahan explains in her second witness statement, an impairment analysis, which was what was being described in the Annual Report, must be done on an annual basis for accounting purposes and "TECO Energy does not have the in-house expertise or resources to conduct a comparable company or comparable transaction analysis for a diversified Latin American company every year," so, in accordance with accounting practices, it relies on a DCF analysis. Callahan II ¶ 5 **(CWS-8)**. In addition, the impairment analysis was for DECA II, and it is "much easier to identify companies that are comparable to EEGSA, a distribution company, than it is to do the same for DECA II, which held interests in a variety of different companies." *Id.*; *see also* Kaczmarek II ¶ 128 **(CER-5)**.

[1428] Kaczmarek II ¶ 108 **(CER-5)**; Kaczmarek I ¶¶ 203, 214, Tables 11 & 15 **(CER-2)**.

were more similar to EEGSA in these various respects, his analysis is not arbitrary or results-oriented. While this exercise requires a certain degree of subjectivity, as Mr. Kaczmarek observes, because the comparable valuation methods rely on an objective key variable, namely the price paid for the comparable company, "there is inherently far less subjectivity introduced in the comparable methods than the DCF method."[1429] Most importantly, Mr. Kaczmarek's valuations derived from the comparables approaches were similar to one another and similar to the valuation obtained from his DCF approach, thus further supporting the reliability of the valuation.[1430]

2. Respondent's Criticism Of Claimant's Capital Expenditure Projections Is Disingenuous

295. Respondent asserts that in its but-for DCF valuation, Navigant underestimates EEGSA's projected capital expenditures, thus artificially inflating EEGSA's value and, thereby, Claimant's damages.[1431] To calculate EEGSA's actual future capital expenditures, Mr. Kaczmarek relied on an internal, contemporaneous DECA II 2007 projection of capital expenditures, making adjustments for inflation.[1432] This resulted in estimated capital expenditures of approximately US$ 30 million per year (as explained in Mr. Kaczmarek's second expert report, he has subsequently revised this figure to approximately US$ 46 million per year).[1433] Compass Lexecon argues that Navigant instead should have relied on the projections contained in Bates White's 28 July 2008 VAD study, which it claims amounted to approximately

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[1429] Kaczmarek II ¶ 118 **(CER-5)**.

[1430] *Id*. ¶ 123.

[1431] Compass Lexecon ¶ 41 **(RER-1)**.

[1432] Kaczmarek II ¶ 35 **(CER-5)**; Kaczmarek I ¶ 180 **(CER-2)**.

[1433] As Mr. Kaczmarek explains in his second expert report, this figure was revised in light of the fact that the 2007 DECA II projection "could be considered outdated for a valuation as of 21 October 2010" because "the VNR and VAD would have increased relative to the values established during the Second Rate Period – when the DECA II projections were prepared," and it would be reasonable to assume that with a higher VNR and VAD, EEGSA would have increased its capital expenditures. Kaczmarek II ¶ 46 **(CER-5)**. Navigant also adjusted the VNR and associated capital expenditures by the U.S. Producer Price Index, rather than by the Consumer Price Index, as advocated by Respondent. *Id*. ¶ 47.

US$ 82 million per year.[1434] Respondent claims that making this adjustment reduces Claimant's damages by US$ 100 million.[1435] Respondent's contentions are patently without merit.

296. First, Respondent is wrong to insist that the Bates White VAD study should serve as the basis for calculating EEGSA's actual capital expenditures in the but-for scenario. As Respondent itself recognizes, the VAD study is conducted on the basis of a model efficient company and, thus incorporates the costs of a model company, and not the actual company: "the real company 'competes' with the designed model company, trying to keep costs close to those recognized in the model company in order to achieve the expected profitability, or even surpass it."[1436] When calculating what value EEGSA would have had but-for the unlawful measures taken by Guatemala, Navigant thus properly projected EEGSA's actual capital expenditures using company data, rather than projecting the capital expenditures of a model efficient company, which is what the capital expenditures figures in Bates White's VAD study represent.[1437]

297. Second, Compass Lexecon miscalculates the amount of capital expenditures in the Bates White study. To arrive at the US$ 82 million figure, Compass Lexecon adds together the capital expenditures and the "return of" capital portion of the VAD. As Mr. Kaczmarek explains, this is wrong because the "return of capital portion of the VAD is just the opposite of a capital expenditure. The return of capital is a recovery of an investment, while capital expenditure is an investment."[1438] As Mr. Kaczmarek points out, Compass Lexecon should have recognized its error by comparing its US$ 82 million calculation of capital expenditures to EEGSA's actual capital expenditures, which averaged approximately US$ 20 million per year,

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[1434] Compass Lexecon ¶¶ 42, 45 **(RER-1)**.

[1435] Compass Lexecon ¶ 46 **(RER-1)**. Compass Lexecon's conclusion that damages would decrease by US$ 100 million takes into account only Claimant's DCF valuation. If all three valuation methods are used and weighed, in accordance with Mr. Kaczmarek's model, then Compass Lexecon's capital expenditures adjustment decreases damages by US$ 52 million. *See* Kaczmarek II ¶ 38 **(CER-5)**.

[1436] Compass Lexecon, Appendix B ¶ 116 **(RER-1)**.

[1437] Kaczmarek II ¶ 43 **(CER-5)**.

[1438] *Id*. ¶ 39.

i.e., its estimate was four times the amount that EEGSA had incurred historically.[1439] Navigant also shows that Compass Lexecon's projection for EEGSA's capital expenditures is out of line with the amount of capital expenditures for other Latin American distribution companies.[1440]

298. Finally, it is clear that Respondent itself does not actually believe that EEGSA's capital expenditures in the but-for scenario should approach anywhere near US$ 82 million because, in its model, Compass Lexecon incorporates capital expenditures of approximately US$ 45 million, and not US$ 82 million.[1441] Had Compass Lexecon incorporated the US$ 82 million capital expenditures projection into its model, its "damages" calculation would have become far more negative, further highlighting the untrustworthiness of its valuation. Thus, Respondent chose to cast aspersions on Claimant's valuation, while concealing the fact that it did not endorse the position it was advocating. In any event, this point is moot, because Navigant has made certain adjustments to its capital expenditures projection which, as noted above, increases that amount to approximately US$ 46 million per year. Claimant's capital expenditures projection is thus slightly higher than Respondent's projection of US$ 45 million per year. Because incorporating Claimant's capital expenditures projection into the but-for model will result in lower damages than incorporating Respondent's slightly higher number, this issue has no further bearing on the parties' dispute.

3. Using Mr. Damonte's Model For The But-For Valuation Is Nonsensical

299. Respondent's other two criticisms that form a part of the "three fundamental mistakes" that Respondent alleges are present in Claimant's but-for valuation are not "errors" at all, but are a reflection of Respondent's unwillingness to join issue on the damages calculation. Respondent acknowledges that Claimant's but-for scenario "assumes that the CNEE applied the Bates White study of July 28, 2008 to determine the 2008-2013 tairffs."[1442] Compass Lexecon

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[1439] *Id*. ¶ 40; Kaczmarek I, Figure 9 (showing EEGSA's actual capital expenditures) **(CER-2)**.

[1440] Kaczmarek II ¶ 41, Figure 2 **(CER-5)**

[1441] Compass Lexecon Model "Control Panel" tab **(RER-1)**; Kaczmarek II ¶ 42 **(CER-5)**.

[1442] Counter-Memorial ¶ 594; *id*. ¶ 596 ("The future damage (called 'lost value' by the expert), is the alleged difference in value of Teco's shareholdings in EEGSA as of October 21, 2010, considering EEGSA's situation

thus was instructed "to compute presumed damages to [Claimant] assuming as if the CNEE had set the tariffs for the Guatemalan electricity distribution firm EEGSA for the five-year period 2008-2013 according to the full implementation of the recommendations made by the Expert Commission . . . instead of the tariffs implemented by the CNEE during this period."[1443] This notwithstanding, Compass Lexecon does not calculate its but-for valuation of EEGSA using the 28 July 2008 Bates White study or any other model that incorporates all of the Expert Commission's rulings. Instead, Compass Lexecon relies on Mr. Damonte's model, which admittedly did *not* incorporate all of the Expert Commission's rulings[1444] and, at the same time, criticizes Navigant for using the 28 July 2008 Bates White model as the basis for its but-for valuation.

300. In particular, as noted above, Mr. Damonte did not incorporate the Expert Commission's decision on the FRC into his model.[1445] Instead, he devised his own formula.[1446] Whereas the CNEE's formula set forth in the Terms of Reference would have provided a return on an asset base that was depreciated by 50%; Bates White's formula would have provided a return on 100% of the VNR; and the Expert Commission's decision permitted EEGSA to obtain a return on approximately 91% of the VNR, Mr. Damonte's formula depreciates the asset base by 30%.[1447] There is no basis for using Mr. Damonte's FRC in the but-for model, as there is no circumstance under which EEGSA's VAD would have been calculated on the basis of Mr.

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as of that date to be: (i) the *but for* scenario (i.e. if the tariffs based on the Bates White study of July 28, 2008 had been approved); and (ii) the actual scenario (i.e. with the tariffs approved by the CNEE based on the Sigla study)).").

[1443] Compass Lexecon ¶ 1 **(RER-1)**.

[1444] Counter-Memorial ¶ 603 (explaining that Mr. Damonte incorporated only "feasible" rulings of the Expert Commission into his model); *id*. ¶¶ 606-607 (explaining that Mr. Damonte incorporated his own FRC formula into his model, because Respondent determined that the Expert Commission's ruling on the issue "contains serious technical errors and overcompensates the investor").

[1445] Counter-Memorial ¶¶ 606-607; Damonte ¶ 190 **(RER-2)**; Compass Lexecon ¶ 71 **(RER-1)**; Kaczmarek II ¶ 19 **(CER-5)**. Compass Lexecon wrongly asserts that Mr. Damonte included in his model "all of the EC's recommendations that are possible of being introduced." Compass Lexecon ¶ 4(b) **(RER-1)**. This clearly is not true; there was no impossibility of applying the Expert Commission's decision on the FRC.

[1446] Damonte ¶ 191 **(RER-2)**; Compass Lexecon ¶ 71 **(RER-1)**.

[1447] Kaczmarek II ¶ 82 **(CER-5)**.

Damonte's FRC in the absence of the measures taken by Guatemala. Likewise, Mr. Damonte's "adjustments" to the VNR in Bates White's 28 July 2008 study serve no purpose insofar as Claimant's damages analysis is concerned. Mr. Damonte concededly disregarded certain of the Expert Commission's decisions in revising the VNR in Bates White's earlier study.[1448] Once again, if the Expert Commission's decisions had been respected—as Claimant contends they ought to have been—there would have been no occasion to calculate the VNR on the basis of some, but not all, of the Expert Commission's rulings. Compass Lexecon's reliance on Mr. Damonte's model, which does not accept the Expert Commission's decisions, to value EEGSA in the but-for scenario thus makes no sense.

301. As Mr. Kaczmarek observes, "Compass Lexecon has undertaken a calculation that is neither consistent with their stated mandate nor Claimant's legal case that EEGSA was entitled to the full implementation of the decisions of the Expert Commission."[1449] Respondent's "fundamental critiques" of Navigant's but-for valuation of EEGSA are therefore baseless.

B. Claimant's Valuation Of EEGSA's Actual Value Is Correct

302. In his first expert report, Mr. Kaczmarek properly calculated EEGSA's value in the actual scenario using all three valuation approaches, and using the EPM sale as a reasonableness check.[1450] Respondent's position that the sale of DECA II to EPM should be used as the sole determinant of EEGSA's value in the actual scenario is mistaken.[1451] Claimant agrees that a transaction for the company that is being valued is the best evidence of that company's actual value; in this case, however, the sale at issue was for DECA II, and not for EEGSA.[1452] As Mr. Kaczmarek explains, "the price paid by EPM for DECA II does not yield a directly observable price for EEGSA.[1453] Because of this, the EPM sale is more appropriately

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[1448] Damonte ¶ 163 **(RER-2)**; Compass Lexecon ¶¶ 43, 50, 71 **(RER-1)**; Counter-Memorial ¶ 603.

[1449] Kaczmarek II ¶ 19 **(CER-5)**.

[1450] Kaczmarek I ¶ 241**(CER-2)**.

[1451] Compass Lexecon ¶ 80 **(RER-1)**; Counter-Memorial ¶¶ 611-612.

[1452] Kaczmarek II ¶¶ 132-134 **(CER-5)**.

[1453] *Id*. ¶ 134; *see also* Kaczmarek I ¶ 239 **(CER-2)**.

used as a reasonableness check on a valuation conducted using traditional approaches, which is how Navigant used this evidence.[1454] Respondent's assertion that Mr. Kaczmarek "discards [the price paid by EPM] in calculating the alleged damage, with no justification whatsoever,"[1455] is thus patently false.

303. Using the EPM sale, Compass Lexecon "could only conclude that EPM paid somewhere between US$ 518.2 million and US$ 582.2 million for EEGSA."[1456] In his first expert report, Mr. Kaczmarek, using all three valuation approaches, arrived at an actual value for EEGSA of US$ 524.3,[1457] an amount within the range computed by Compass Lexecon. Having made an adjustment in accordance with Respondent's observation that the CPI, rather than PPI, should be used to update the VNR from 2006 to 2008, Navigant's actual value of EEGSA has been revised to US$ 562.4 million,[1458] which is still within the range asserted by Compass Lexecon.

C. Reasonableness Checks Confirm The Accuracy Of Claimant's Damages Calculation

1. Internal Rate of Return

304. In Mr. Kaczmarek's first report, he calculated Claimant's actual Internal Rate of Return (IRR) on its investment in EEGSA to be 3.2% in nominal terms, *i.e.*, not adjusted for inflation.[1459] Navigant then calculated Claimant's IRR if the Tribunal were to award damages in the amount sought, and showed that this would be 10.47% in nominal terms.[1460] Both amounts are significantly below Claimant's cost of equity capital in 2007 of 13.97% in nominal terms, as calculated by the CNEE in 2008, and below Claimant's expected returns of 15.15%, as

[1454] Kaczmarek II ¶ 132 **(CER-5)**; Kaczmarek I ¶ 239 **(CER-2)**.

[1455] Counter-Memorial ¶ 613 fn. 847.

[1456] Kaczmarek II ¶ 134 **(CER-5)**.

[1457] Kaczmarek I ¶ 218 **(CER-2)**.

[1458] Kaczmarek II ¶ 135 **(CER-5)**.

[1459] Kaczmarek II, Table 4, Table 15 & ¶ 146 **(CER-5)**; Kaczmarek I ¶ 230 **(CER-2)**. This corresponds to 0.6% real. *Id*.

[1460] Kaczmarek II, Table 4, Table 15 & ¶ 146 **(CER-5)**; Kaczmarek I ¶ 233 **(CER-2)**. This corresponds to 7.99% real. *Id*.

calculated by Dresdner Kleinwort when EEGSA was privatized.[1461] This demonstrated, first, that Claimant must have suffered damages as a result of Guatemala's measures; otherwise, as Mr. Kaczmarek notes, "this very low IRR could only be explained by exceptionally poor management and operation. However, that is not alleged in this case."[1462] Second, Mr. Kaczmarek's IRR analysis confirmed the reasonableness and, indeed, the conservative nature of his valuation and damages assessment, because even with an award of damages in the amount sought, Claimant still would fail to recover the cost of its investment and a reasonable rate of return (*i.e.,* its cost of capital).[1463]

305. In response, Respondent argues that the LGE does not guarantee certain rates of return,[1464] thus suggesting that Claimant's IRR analysis is not relevant. This is misguided. Navigant has not calculated Claimant's damages using an IRR analysis; it has simply affirmed the reasonableness of its damages calculation by comparing the returns that Claimant actually received and those it would receive if damages are awarded with the targeted returns in the LGE. And, indeed, Mr. Kaczmarek's damages would not allow Claimant to obtain even the lower bounds of the benchmark rates in the LGE. While the LGE does not guarantee a certain rate of return, it is reasonable for investors to expect that they would receive, at a minimum, their cost of equity, as provided for in the LGE, as long as they did not mismanage the investment.[1465] As noted, there are no allegations of gross mismanagement, inefficiencies, or poor service that should have prevented Claimant from obtaining, at a minimum, the floor of the targeted rate of return set forth in the LGE.[1466] To the contrary, as detailed above, the evidence shows that electricity losses were significantly reduced post-privatization[1467] and that EEGSA made

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[1461] Kaczmarek I ¶ 231 **(CER-2)**; CNEE Resolution 04-2008 dated 17 February 2008, at 5 **(C-152)**; DresdnerKleinwort EEGSA Base Case Scenario dated June 1998, at 1 **(C-418)**; *see also* Kaczmarek II ¶ 146, Table 15 **(CER-5)**.

[1462] Kaczmarek II ¶ 22 **(CER-5)**.

[1463] *Id*. ¶¶ 145-146; Kaczmarek I ¶ 233 **(CER-2)**.

[1464] Compass Lexecon ¶¶ 7, 87(a) **(RER-1)**.

[1465] Kaczmarek II ¶¶ 150-154 **(CER-5)**.

[1466] *See id*. ¶ 153.

[1467] Kaczmarek I, Figure 23 **(CER-2)**.

substantial improvements in the quality and efficiency of its electricity service by, among other things, increasing bill payment locations, reducing the percentage of unread meters, reducing billing errors, increasing the number of customer calls handled, significantly decreasing the average complaint response time, substantially decreasing the average waiting period for obtaining new electricity service, and appreciably decreasing the frequency and length of power interruptions.[1468] Respondent's own expert, in fact, has endorsed using an IRR analysis to calculate damages to a claimant in investment disputes: "The underlying concept is that investors have the right to recover their capital contributions to the firm, making a return equal to the opportunity cost of capital."[1469]

306. Curiously, Respondent also criticizes Claimant's IRR analysis for including the returns from other non-distribution subsidiaries that were part of EEGSA from 1998 to 2004.[1470] Navigant did include these returns in its analysis;[1471] their inclusion, however, benefits Respondent by artificially *increasing* Claimant's actual IRR and, thus, provides no basis to question Mr. Kaczmarek's conclusions derived from his IRR analysis.

[1468] *See* Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America* dated 2003, at 256 **(C-61)**; Memorial ¶ 64. Respondent's related argument that Guatemala's regulatory system does not set tariffs based on the price paid for EEGSA similarly misses the point. *See* Counter-Memorial ¶ 240. As explained above, EEGSA's privatization price reflected the expected cash flows, which necessarily were calculated on the basis of the regulatory framework established for setting tariffs, particularly the use of the VNR method. If Guatemala had adopted a cost-of-service regulatory approach, Claimant has shown that the privatization price paid would have been a mere fraction of what actually was paid. *See supra* Section II.B (citing Kaczmarek and Barrera expert reports); *see also supra* Section II.A.1.a. It was reasonable for Claimant to expect to recover this investment through the tariffs, as Respondent's expert has acknowledged. *See* Manuel A. Abdala & Pablo T. Spiller, *Damage Valuation of Indirect Expropriation in Public Services*, dated 9 Sept. 2003, at 13-14 **(C-555)**.

[1469] Manuel A. Abdala & Pablo T. Spiller, *Damage Valuation of Indirect Expropriation in Public Services* dated 9 Sept. 2003, at 13-14 **(C-555)**; *see also id*. ("To estimate compensation values, it is assumed that investments by shareholders will provide profitability equal to its expected return, adjusted by business risk and net of dividend payments, interests and/or other compensations to equity and debt contributions that shareholders might have done before expropriation. . . . One of the characteristics of this method is that it computes a 'theoretical' return on equity contributions that in general should not differ substantially from the 'actual' historic return.").

[1470] Counter-Memorial ¶ 248; Compass Lexecon ¶ 87(c) **(RER-1)**.

[1471] Kaczmarek II ¶ 159 **(CER-5)**.

307. In short, Respondent's own expert has recognized the usefulness of an IRR analysis to assess damages, and Mr. Kaczmarek's conclusion that Claimant failed to recover its cost of capital and awarding the damages sought still would not allow Claimant to do so remains unchallenged.

2. VNR

308. In his first expert report, Mr. Kaczmarek also explained that his valuation of EEGSA could be checked against EEGSA's VNR, which should approximate the fair market value of EEGSA.[1472] Mr. Kaczmarek showed that his valuation of EEGSA in the but-for scenario was within 6% of Bates White's VNR.[1473] He also demonstrated that his valuation of EEGSA in the actual scenario was lower than Sigla's VNR, which was to be expected because Sigla used the CNEE's FRC formula, which reduced EEGSA's return on capital.[1474]

309. Compass Lexecon disagrees with this reasonableness check because, it asserts, that although a company's fair market value may be similar to its tariff base, a company's tariff base "is never equal to the VNR, since companies operate with depreciated assets, not with new ones."[1475] Respondent, in essence, thus contends that EEGSA's fair market value should not equal its VNR because the company does not receive a return on the VNR, but instead receives a return through the FRC. Once again, Respondent's argument depends on its erroneous notion that EEGSA was not entitled to receive a return on the VNR but, instead only was entitled, through the FRC, to receive a return on an asset base that was 50% depreciated. Thus, Respondent argues that neither EEGSA's cash flows nor value should be determined by strict reference to the VNR. Respondent is wrong. As shown above, in accordance with the LGE, the distribution company's tariff base is calculated based on the VNR, and the FRC grants the distributor a return of and return on its capital off of the VNR.[1476] EEGSA's tariffs were to be

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[1472] Kaczmarek I ¶¶ 234-235 **(CER-2)**; Memorial ¶ 302.

[1473] Kaczmarek I ¶ 236 **(CER-2)**; Memorial ¶ 303.

[1474] Kaczmarek I ¶ 237 **(CER-2)**; Memorial ¶ 304.

[1475] Compass Lexecon ¶ 8 **(RER-1)**.

[1476] *See supra* Section II.A.2.

set on the basis of the VNR, and not on the depreciated asset base. EEGSA's investors accordingly paid a purchase price for EEGSA implying a value for 100 percent of EEGSA of US$ 724 million in 1998. This purchase price was based on the VNR and the tariffs associated with the VNR, and not on the book value of EEGSA's depreciated asset base at the time of privatization of approximately US$ 78.3 million.[1477]

D. Respondent's Reasonableness Checks Are Fundamentally Flawed

1. Alternative Regulatory Scheme

310. Compass Lexecon attempts to show the reasonableness of its but-for valuation of EEGSA by calculating the tariffs that EEGSA would have received if Guatemala had operated under a completely different regulatory regime akin to a cost-of-service regime.[1478] Compass Lexecon accordingly purports to estimate the book value of EEGSA's depreciated assets in order to calculate what VAD would result if Guatemala had adopted this alternative regime.[1479] It then uses this regulatory asset base as the but-for value of EEGSA to calculate damages, which it estimates would range between US$ 0 and US$ 11.7 million.[1480] Because this range approximates Respondent's damages calculation, it concludes that its calculation is reasonable. Respondent's "reasonableness check" is deeply flawed and offers no assurance as to the correctness of its damages calculation. Rather, as Mr. Kaczmarek points out, "[t]he fact that their reasonableness check simulates an alternative regulatory scheme, more akin to a cost-of-service model, and results in the same damages they determine in the primary scenario is

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[1477] *See supra* Section II.B; Kaczmarek I ¶ 62 **(CER-2)**; PriceWaterhouseCoopers, "Limited Scope Analysis to Estimate the Fair Market Value of Certain Intangible Assets, as of September 10, 1998," 13 April 1999, Exhibit 1 **(C-43)**.

[1478] Compass Lexecon ¶ 10(a) ("We ask ourselves which would have been the level of VAD (and corresponding damages) if the CNEE had used in 2008 a tariff base applying the approach known as 'regulatory asset base' ('RBA').") **(RER-1)**; *id.* ¶ 97(a) (stating that they used an analysis "which although is not consistent with Guatemala's legislation, it is considered as a universal standard in the regulation of public services companies and, therefore, it could have been used by the CNEE . . . . "); *id*. ¶ 99 ("Even though we know that the LGE establishes that the tariff reviews should be based on the VNR, this alternative constitutes a solid ground for understanding the outcome of the 2008-2013 tariff review, if this alternative regulatory procedure to determine the capital base, widely accepted in public services in numerous countries (including Latin America), would have been followed.").

[1479] Compass Lexecon ¶ 10(a) **(RER-1)**.

[1480] *Id*., Table VI.

unremarkable because both the damages methodology and the reasonableness check use depreciated assets as the regulatory asset base."[1481]

311. EEGSA's VNR would not have been equivalent to its regulatory asset base if Guatemala had adopted a cost-of-service regime; in that latter case, the regulatory asset base would reflect the actual value of the network's depreciated assets. By contrast, with a VNR method, the VNR represents the new replacement value of a model efficient company's assets. Consequently, calculating EEGSA's VAD under this alternative regulatory approach and using that VAD to determine a but-for valuation of EEGSA is clearly erroneous. The manner in which Compass Lexecon calculated the value of the regulatory asset base upon which to assess tariffs is also problematic. Compass Lexecon, for example, fails to take into account inflation or an increase in the costs of building the network when calculating EEGSA's tariff base under this alternative regime.[1482] Compass Lexecon also included the amortized portion of goodwill remaining from the time of EEGSA's privatization in its calculation of EEGSA's tariff base under this alternative regulatory regime.[1483] That goodwill—which represented the large difference between the purchase price and book value of EEGSA's assets—existed precisely because the regulatory regime that was in place was the VNR method; had Compass Lexecon's "alternative" regulatory scheme been in place, EEGSA's goodwill would likely have been non-existent. Indeed, this shows that, in EEGSA's case, the VNR method produces a higher tariff than a cost-of-service method and highlights the arbitrary nature of Compass Lexecon's validation exercise.

2. Evolution of Tariffs

312. Finally, as a last check, Respondent takes the VNR that was calculated from Mr. Damonte's model—which selectively incorporated those rulings of the Expert Commission with which Respondent agreed—and states that the tariffs that would have resulted from this VNR are consistent with EEGSA's historical trend and also consistent with the tariffs of CAESS, an El

[1481] Kaczmarek II ¶ 170 **(CER-5)**.

[1482] *Id*. ¶¶ 196-197.

[1483] Compass Lexecon ¶ 102 & Table VI **(RER-1)**; *see also* Kaczmarek II ¶ 171 **(CER-5)**.

Salvadoran electricity distribution company. Respondent then concludes that its damages calculation, which it prepared using Mr. Damonte's model in the but-for scenario, is validated. Respondent's analysis is fundamentally flawed.

313. As noted above, the tariffs resulting from Mr. Damonte's model are irrelevant for assessing EEGSA's value in the but-for scenario because EEGSA never would have had any opportunity to operate under those tariffs; that model was prepared for purposes of this arbitration and does not incorporate the Expert Commission's rulings. Furthermore, Compass Lexecon's argument that Mr. Damonte's tariffs are more in line with EEGSA's historical trend than the tariffs derived from Bates White's 28 July 2008 study ignores all of the reasons why EEGSA's VNR in the third tariff period should have increased by more than the rate of inflation. These factors include, among others, the steep rise in commodity prices, particularly for copper and aluminum, that are heavily used in electricity distribution and that outpaced inflation; the increase in demand; and the increase in fuel.[1484]

314. Finally, the notion that EEGSA's tariffs should be equivalent to CAESS's tariffs, and that CAESS's tariffs can be used to validate Respondent's damages calculation, lacks merit. Compass Lexecon's observation that El Salvador was used a reference for the Synex study, upon which the transitional tariffs for the first tariff period were based, does not alter this conclusion because it was El Salvador, and not any particular company, that was used as a reference. In addition, adjustments were made to the El Salvadoran tariffs to reflect "the economic and electricity situation in Guatemala,"[1485] which recognized that tariffs from El Salvador could not simply be imported into Guatemala. Finally, the tariffs implemented by the CNEE in the first tariff period did not even adhere in all respects to those proposed by Synex.[1486]

[1484] Giacchino I ¶¶ 75, 77, 80 **(CWS-4)**; Kaczmarek II ¶¶ 195-197 **(CER-5)**; Kaczmarek I ¶¶ 14, 104-112 **(CER-2)**; Barrera ¶¶ 54-56, 263, 265 **(CER-4)**.

[1485] Synex Report, Ch. 3, § 3.2, at 2 **(C-20)**.

[1486] Barrera ¶ 36 fn. 13 **(CER-4)**; Giacchino II ¶¶ 3-4 **(CER-10)**.

E. Claimant Properly Calculated Interest

315. In its First Expert Report, Navigant explained why applying an interest rate between 5.7% and 7%, compounded annually, on the amount awarded to TECO would be commercially reasonable and in line with prevailing arbitral practice.[1487] This rate, based on the yield on Guatemalan sovereign bonds, takes into account the risk that Claimant undertook as an unwilling lender to Guatemala.[1488] Alternatively, Navigant proposed two other rates, namely, the U.S. Prime Rate plus 2% or LIBOR plus 4%, both of which reflect a commercial bank lending rate to a creditworthy buyer.[1489]

316. In response, Compass Lexecon contends that a risk-free interest rate, akin to that applicable to U.S. Government bonds, should be used.[1490] Respondent's suggestion runs counter to arbitral jurisprudence and its own experts' prior statements and practice.

317. In order to compensate Claimant for the time-value of money, interest must be awarded at a commercially reasonable rate. The risk-free rate at which the United States is able to borrow money is not a commercially-reasonable rate, as it is not available to participants in the commercial sector. Moreover, as Mr. Kaczmarek observes, "[a]n award of interest at a rate less than the state's borrowing cost would incentivize states to essentially 'refinance' their fiscal obligations by withholding money from the private sector."[1491]

318. Investment treaty tribunals have recognized as much and, indeed, Respondent does not cite a single case where a tribunal has ordered interest to be paid at a risk-free rate. Compass Lexecon, in fact, contends that, for the period up to October 2010, when EEGSA was sold, "conceptually" the proper interest rate would be equivalent to EEGSA's cost of capital or

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[1487] Kaczmarek I ¶¶ 220-224 **(CER-2)**.

[1488] *Id*. ¶ 221; Memorial ¶ 310; Kaczmarek II ¶ 174 **(CER-5)**.

[1489] Kaczmarek I ¶¶ 222-223 **(CER-2)**.

[1490] Compass Lexecon ¶¶ 108-111 **(RER-1)**. According to Respondent, this rate was 3.3% from August 2008 to October 2010 and 2.8% from October 2010 to December 2011. *Id*. ¶ 111.

[1491] Kaczmarek II ¶ 176 **(CER-5)**.

WACC.[1492] This is consistent with the position that Respondent's experts have taken in other cases. Thus, for instance, in a case against Bolivia, where the claimant seeks compensation for the expropriation of its investment, Compass Lexecon argued that "[u]sing an interest rate equivalent to the WACC thus ensures that full reparation is made by Bolivia. To apply a risk free rate of interest would be to assume that [the claimants] would have invested their resources in risk-free instruments, such as US Government bonds. This does not reflect commercial reality."[1493] In that case, the claimant's WACC was 10.63%.[1494] Here, the parties agree that EEGSA's WACC was 8.80%.[1495] Claimant agrees that the WACC provides an appropriate interest rate.

319. Despite this common ground, Respondent rejects the use of the WACC in this case on the sole basis that it has calculated negative damages.[1496] Respondent then notes that, because of this, "the higher the discount rate used, the lower the damages becomes [sic] [and] [t]his is why . . . we have used a risk-free interest rate."[1497] That is absurd. The Tribunal only will address the issue of the proper interest rate if it finds liability and determines that Claimant has suffered damages. At that time, *ipso facto*, Claimant's damages will be *positive* (*i.e.*, an interest rate will never be applied to a negative number) and a commercially reasonable interest rate must be applied to those damages to make Claimant whole.

320. Finally, Respondent's argument that interest accruing after the sale of EEGSA in October 2010 to the present should be set at a risk-free rate because, since that time, Claimant

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[1492] Compass Lexecon ¶ 109 **(RER-1)**.

[1493] *Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bolivia*, Statement of Claim dated 1 March 2012 ¶ 240 **(C-556)**; *see also Alpha Projekholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award dated 8 Nov. 2010 ("*Alpha v. Ukraine*") ¶ 514 (holding that "the risk-free rate plus the market risk premium, which . . . is 9.11% in total. . . . [and which] reflects the opportunity cost associated with Claimant's losses, adjusted for the risks of investing in Ukraine") **(CL-57)**. Notably, Mr. Schoeters, who along with Mr. Abdala is Respondent's damages expert, was claimant's damages expert in the *Alpha* case. *Alpha v. Ukraine* ¶ 476 **(CL-57)**.

[1494] *Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bolivia*, Statement of Claim dated 1 March 2012 ¶ 243 **(C-556)**.

[1495] Compass Lexecon ¶ 109 **(RER-1)**.

[1496] *Id*.

[1497] *Id*.

"was no longer exposed to the risk of operating said Company"[1498] is likewise meritless. The fact that EEGSA was sold makes no difference, as valuation of a business in the context of international arbitration is akin to simulating the sale of that business on a specific date. To value EEGSA for purposes of this arbitration, its projected future cash flows were discounted at the company's cost of capital; similarly, EEGSA's sales prices was based on future cash flows discounted at the company's cost of capital.[1499] As Mr. Kaczmarek observes, "[d]iscounting those future cash flows at one, higher rate and then applying pre-award interest at a risk-free rate results in exactly the under-compensation that Dr. Abdala wrote about . . . ."[1500] Claimant's expert, Dr. Abdala, has consistently maintained this position; thus, for instance, in the aforementioned case against Bolivia where claimant's investment had been nationalized and claimant no longer was operating the investment, Compass Lexecon sought interest at the rate of the investment's WACC, from the date of the nationalization until the date of the award.[1501] Moreover, and although Respondent fails to address this point, post-award interest likewise must be awarded at the same commercially reasonable rate as pre-award interest.[1502]

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[1498] *Id*. ¶ 110.

[1499] *See* Kaczmarek II ¶ 182 **(CER-5)**.

[1500] *Id*. (citing Manuel A. Abdala, *Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration*, World Arbitration & Mediation Review, Vol. 5, No. 1, at 9 (2011) **(C-551)**).

[1501] *Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bolivia*, Statement of Claim dated 1 March 2012 ¶ 239 **(C-556)**.

[1502] *Id*. ¶ 245 (arguing that compound, post-award interest should be awarded at a rate equivalent to the company's WACC); Kaczmarek II ¶ 179 **(CER-5)**.

V. CONCLUSION

321. For the foregoing reasons, Claimant respectfully requests that the Tribunal issue an Award:

1. Finding that Respondent has breached its obligations under Article 10.5 of the DR-CAFTA;

2. Ordering Respondent to pay compensation to Claimant in the amount of US$ 243.6 million;

3. Ordering Respondent to pay interest on the above amount at a reasonable commercial rate, compounded from 1 August 2008 until full payment has been made; and

4. Ordering Respondent to pay Claimant's legal fees and costs incurred in these proceedings.

Respectfully submitted,

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