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INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

**TECO GUATEMALA HOLDINGS, LLC**

*Claimant*

v.

**THE REPUBLIC OF GUATEMALA**

*Respondent*

ICSID CASE No. ARB/10/23

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**CLAIMANT'S SUBMISSION ON COSTS**

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24 July 2013

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## CLAIMANT'S SUBMISSION ON COSTS

### I. INTRODUCTION

1. In accordance with the Tribunal's letter dated 22 March 2013, Claimant hereby submits its Submission on Costs.

### II. RESPONDENT SHOULD BEAR ALL OF THE COSTS OF THIS PROCEEDING

2. Pursuant to Article 10.26.1 of the DR-CAFTA and Article 61(2) of the ICSID Convention, which grant the Tribunal discretion to allocate the costs of the arbitration,<sup>1</sup> and ICSID Arbitration Rule 47(1)(j), which provides that the Award should contain any decision regarding the costs of the proceeding,<sup>2</sup> Claimant respectfully requests that the Tribunal order Respondent to bear all costs incurred by Claimant in connection with this arbitration, including the fees of its counsel, the fees of its expert witnesses, translation costs, travel and other costs associated with the hearings, the fees and expenses of the members of the Tribunal, and the charges for using the facilities of the Centre.

3. An award of costs is warranted in the present case, on account of Respondent's actions that gave rise to this dispute, as well as its actions during the course of this arbitration proceeding. Claimant has demonstrated that, in order to decrease in EEGSA's 2008-2013 VAD, Respondent violated the specific representations it made to induce Claimant's investment in EEGSA, and deliberately disregarded the key principles set forth in the LGE and RLGE upon which Claimant's investment in EEGSA was premised, in breach of Article 10.5 of the DR-CAFTA. In addition, by enacting and applying the 2007 amendment to RLGE Article 98 to permit the CNEE to set EEGSA's VAD and tariffs on the basis of its own VAD study, which EEGSA was not even permitted to review and which contravened the Expert Commission's rulings, Respondent fundamentally displaced the central premises of its regulatory regime upon

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<sup>1</sup> DR-CAFTA, Art. 10.26.1 ("A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.") (CL-1); ICSID Convention, Art. 61(2) ("In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.").

<sup>2</sup> ICSID Arbitration Rule 47(1)(j) (providing that the Award "shall be in writing and shall contain . . . any decision of the Tribunal regarding the cost of the proceeding").

which Claimant relied in making its investment. Moreover, as the evidence shows, Respondent not only acted in bad faith during EEGSA's 2008-2013 tariff review, by, among other things, enacting RLGE Article 98 *bis*, engaging in a series of *ex parte* communications with its own appointee to the Expert Commission, and refusing to apply Rule 12 of the Operating Rules after expressly agreeing to it, but the defenses that Respondent has advanced in this arbitration are nothing more than *post-hoc* justifications that Respondent has manufactured to defend the CNEE's arbitrary actions in this case. This is confirmed by Respondent's own written and oral submissions, which are based upon virtually no contemporaneous documentary evidence.

4. Where, as here, a respondent State has violated its treaty obligations, numerous investment treaty tribunals have followed the principle of "loser pays" or "costs follow the event," and have awarded the successful party all or a portion of its costs.<sup>3</sup> In *Lemire v. Ukraine*, the tribunal thus "welcome[d] the newly established and growing trend, that there should be an allocation of costs that reflects in some measure the principle that the losing party should contribute in a significant, if not necessarily exhaustive, fashion to the fees, costs and expenses of the arbitration of the prevailing party."<sup>4</sup> In *Kardassopoulos v. Georgia*, the tribunal likewise observed that "ICSID arbitration tribunals have exercised their discretion to award costs which follow the event in a number of cases, demonstrating that there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs."<sup>5</sup> The tribunal found, in that case, that it was "appropriate and fair . . . to award the Claimants their

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<sup>3</sup> See, e.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 Oct. 2012 ("*Deutsche Bank v. Sri Lanka*") ¶¶ 588, 590 (CL-100); *Railroad Development Corp. (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012 ¶ 282 (CL-92); *Joseph Charles Lemire & others v. Ukraine*, ICSID Case No. ARB/06/18, Award of 28 Mar. 2011 ("*Lemire v. Ukraine*") ¶ 380 (CL-26); *Ioannis Kardassopoulos & others v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award of 3 Mar. 2010 ("*Kardassopoulos v. Georgia*") ¶ 692 (CL-121); *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 ¶¶ 618-631 (CL-122); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 Feb. 2008 ¶ 304 (CL-61); *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 Feb. 2007 ¶ 402 (CL-44); *PSEG Global Inc. & Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 ¶ 353 (CL-37); *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 Oct. 2006 ¶ 533 (CL-3); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006 ¶ 441 (CL-8); *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Award of 17 Dec. 2003 ¶ 63 (CL-119).

<sup>4</sup> *Lemire v. Ukraine* ¶ 380 (CL-26).

<sup>5</sup> *Kardassopoulos v. Georgia* ¶ 689 (CL-121).

costs of the arbitrations, including legal fees, experts' fees, administrative fees and the fees of the Tribunal.”<sup>6</sup> The tribunal in *Deutsche Bank v. Sri Lanka* similarly awarded the claimant “a full recovery of its costs, legal fees and expenses,” finding that “[t]he Respondent’s jurisdictional challenges have failed as have its attempts to resist findings against it on the merits,” and that the “breaches by the Respondent were egregious and it acted in bad faith.”<sup>7</sup>

5. In addition, Respondent’s procedural misconduct throughout this case is a further basis to award costs to Claimant. As the tribunal in *Cementownia v. Turkey* observed, “the misconduct of an arbitration proceeding leads generally to the allocation of all costs on the party in bad faith.”<sup>8</sup> Finding, among other things, that the claimant had “caused excessive delays and thereby increased the costs of the arbitration,” and that there was “an accumulation of liabilities – abuse of process and procedural misconduct,”<sup>9</sup> the tribunal in *Cementownia* ordered the claimant to pay all of the respondent’s costs, totaling more than US\$ 5.3 million.<sup>10</sup> In this case, Respondent likewise has sought to unfairly prejudice Claimant, and has significantly and unnecessarily increased Claimant’s costs.

6. *First*, Respondent included with its Rejoinder submission a Reply on Jurisdiction and Admissibility, even though that submission was expressly limited to addressing the merits of Claimant’s claims, and thus required Claimant to bear the expense of preparing a Rejoinder on Jurisdiction and Admissibility in response.<sup>11</sup> As the Minutes of the First Session reflect, the Tribunal had ordered, based upon the parties’ prior agreement, that the parties would exchange two submissions each on the merits and that, if jurisdictional or admissibility objections were raised, those objections would be addressed in one exchange of submissions.<sup>12</sup> When

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<sup>6</sup> *Id.* ¶ 692.

<sup>7</sup> *Deutsche Bank v. Sri Lanka* ¶¶ 588, 590 (CL-100).

<sup>8</sup> *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award of 17 Sept. 2009 ¶ 159 (CL-120).

<sup>9</sup> *Id.* ¶ 159.

<sup>10</sup> *Id.* ¶¶ 159, 177-179.

<sup>11</sup> *See* Letter from Claimant to the Tribunal dated 27 Sept. 2012.

<sup>12</sup> Minutes of the First Session, Item 13 (“The parties agree that there should be two exchanges (*i.e.*, Memorial, Counter-Memorial, Reply, Rejoinder) for the merits phase. . . . If there is a jurisdictional phase, the parties agree that there should be only one exchange of written pleadings (*i.e.*, Memorial, Counter-Memorial).”).

Respondent indicated that it intended to raise jurisdictional and admissibility objections, but was not seeking bifurcation to have those objections addressed separately,<sup>13</sup> the schedule for submissions was revised accordingly, and the parties confirmed their understanding that there would be only one exchange of written submissions addressing Respondent's objections. For the avoidance of any doubt, Claimant nonetheless sent an email to the Tribunal dated 25 October 2011, stating that "Claimant confirms its agreement with Respondent's proposal [regarding the dates for submissions], with one clarification. In accordance with Item 13 of the Minutes of the First Session, there should be only one round of submissions on jurisdiction and admissibility. Accordingly, *Respondent's 24 September 2012 submission should be a Rejoinder on the Merits, but should not address its jurisdictional or admissibility objections.*"<sup>14</sup> Respondent replied on 27 October 2011, stating that "*Respondent agrees to a single round of submissions on questions of jurisdiction and admissibility.*"<sup>15</sup> There thus was no ambiguity that the parties would exchange only one round of submissions on jurisdiction and admissibility, and that Respondent's Rejoinder submission thus would be limited to addressing only the merits of Claimant's claims.

7. In blatant violation of the parties' prior agreement and the Tribunal's order, Respondent, however, unilaterally granted itself the right to submit a Reply on Jurisdiction and Admissibility with its Rejoinder, without seeking prior leave from the Tribunal or agreement from Claimant. In its Reply, Respondent, moreover, did not limit its jurisdictional and admissibility arguments to those relating to the Award in the *Iberdrola v. Guatemala* arbitration, which had been issued after Respondent filed its Memorial on Jurisdiction and Admissibility; instead, Respondent addressed *all* of Claimant's arguments on jurisdiction and admissibility.<sup>16</sup> In response to Claimant's objection, Respondent notably did not deny that it had violated the parties' prior agreement and the Tribunal's order, but rather simply responded that it had no objection to Claimant filing a Rejoinder on Jurisdiction and Admissibility.<sup>17</sup>

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<sup>13</sup> Email from Respondent to the Tribunal dated 25 Oct. 2011.

<sup>14</sup> Email from Claimant to the Tribunal dated 25 Oct. 2011 (emphasis added).

<sup>15</sup> Email from Respondent to the Tribunal dated 27 Oct. 2011 (emphasis added).

<sup>16</sup> See Rejoinder ¶¶ 31-78.

<sup>17</sup> See Letter from Claimant to the Tribunal dated 27 Sept. 2012; Letter from Respondent to the Tribunal dated 1 Oct. 2012.

8. *Second*, throughout this arbitration, Respondent repeatedly and deliberately violated the Tribunal's orders regarding the use of evidence and testimony from the *Iberdrola* arbitration. With each of its written and oral submissions, Respondent introduced evidence and testimony from the *Iberdrola* arbitration that was intended to unfairly prejudice Claimant in violation of the Tribunal's orders and, in many instances, reintroduced the very same evidence in subsequent submissions that the Tribunal already had ruled inadmissible, thus seeking to taint these proceedings and requiring multiple objections from Claimant and multiple rulings from the Tribunal on the very same issues at great expense.

9. With its Counter-Memorial, for instance, Respondent introduced, among other things, (i) its own witnesses' testimony from the *Iberdrola* arbitration; (ii) Claimant's witnesses' testimony from the *Iberdrola* arbitration; (iii) the testimony of experts from the *Iberdrola* arbitration, who were not presented as experts in this arbitration, and (iv) the entire transcript of the *Iberdrola* hearing.<sup>18</sup> Claimant objected to the introduction of this evidence and testimony from the *Iberdrola* arbitration and requested that the Tribunal strike it from the record, noting that to allow Respondent to selectively submit and to rely upon evidence from another ICSID arbitration proceeding, to which Claimant was not a party, would prejudice Claimant and would create an imbalance in favor of Respondent.<sup>19</sup>

10. In its letter to the parties dated 10 February 2012, the Tribunal recognized that "the present arbitration is distinct from the *Iberdrola* arbitration and that, as a general matter, the Arbitral Tribunal does not believe [it] necessary to refer to the evidence produced in a separate arbitration to decide this case."<sup>20</sup> The Tribunal also recognized, however, that the parties have the "right to properly cross-examine the witnesses presented by the other party, which right supposes that each party has the possibility to produce, in advance of the hearing, documents that may be necessary in order to assess the credibility of such witnesses."<sup>21</sup> On the basis of these principles, the Tribunal thus ruled that, with respect to the *Iberdrola* testimony of Claimant's

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<sup>18</sup> See Letter from Claimant to the Tribunal dated 31 Jan. 2012; Letter from Respondent to the Tribunal dated 3 Feb. 2012; Letter from Claimant to the Tribunal dated 6 Feb. 2012; Letter from Respondent to the Tribunal dated 7 Feb. 2012.

<sup>19</sup> Letter from Claimant to the Tribunal dated 31 Jan. 2012, at 2.

<sup>20</sup> Letter from the Tribunal to the Parties dated 10 Feb. 2012, at 2.

<sup>21</sup> *Id.*

witnesses, it was “not improper for the Respondent, if and to the extent it will call such witnesses to appear at the hearing for cross-examination, to test their testimony by pointing out possible inconsistencies with their earlier testimony in the *Iberdrola* arbitration,”<sup>22</sup> but that, “in the event Respondent does not call such witnesses to be cross-examined, or would for any reason such witnesses refuse or be unable to appear for cross-examination, the Arbitral Tribunal would reconsider its decision in light of the foregoing.”<sup>23</sup> With respect to the *Iberdrola* testimony of Respondent’s own witnesses, the Tribunal ruled that the written statements of Respondent’s own witnesses should contain their “direct testimony with no need for the Respondent to refer to other documents drawn from another arbitration,”<sup>24</sup> and thus struck the oral testimony of Mr. Colom from the record.<sup>25</sup> With respect to the *Iberdrola* testimony of witnesses and experts not presented in this arbitration, the Tribunal ruled that “it would be unfair to the Claimant to admit in the record portions of the transcript of the evidence of witnesses that it would not have a chance to examine or cross-examine at the hearing,”<sup>26</sup> and thus struck the testimony of Mr. Suárez from the record.<sup>27</sup>

11. In complete disregard of the Tribunal’s rulings, Respondent proceeded to submit as factual exhibits with its Rejoinder the *Iberdrola* testimony of Iberdrola’s expert witnesses, who were not experts in this proceeding, even though the Tribunal already had ruled that such testimony was not admissible.<sup>28</sup> Respondent also submitted the damages sections of Iberdrola’s

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at 2-3.

<sup>24</sup> *Id.*, at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Letter from Claimant to the Tribunal dated 12 Oct. 2012; The Brattle Group, “Damage Estimate caused to Iberdrola by the Decrease in the Distribution Tariffs in Guatemala,” Carlos Lapuerta, filed in *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/05 dated Nov. 2009 (**R-189**); Alexander Galetovic, Comments on the Report of Abdala y Schoeters, filed in *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/05 dated Sept. 2010 (**R-195**); The Brattle Group, “Evaluation of the Estimated Damage caused to Iberdrola by the Tariff Decrease in Guatemala,” produced by Manuel A. Abdala and Macelo A. Schoeters” filed in *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/05 dated Sept. 2010 (**R-197**).

written pleadings,<sup>29</sup> and resubmitted the entire transcript of the *Iberdrola* hearing.<sup>30</sup> In response to Claimant's objection, the Tribunal struck Respondent's exhibits, as well as all references thereto, from the record, reaffirming its prior ruling that "[i]t would be unfair to the Claimant to admit in the record as written evidence what is in fact the opinion of experts that the Claimant does not have an opportunity to cross-examine," and finding that the admission of Iberdrola's written pleadings "would be contrary to [the Tribunal's] decision that the present arbitration is distinct from the Iberdrola arbitration."<sup>31</sup>

12. Then again, in blatant violation of these rulings, Respondent proceeded to refer to Iberdrola's damages claim, as well as to the way in which that claim allegedly had evolved during the course of the *Iberdrola* arbitration, in its Opening Statement at the Hearing, even though the Tribunal had stricken that information from Respondent's Rejoinder submission.<sup>32</sup> Claimant objected to the introduction of this information at the Hearing, and after Respondent represented that this information was contained in the *Iberdrola* Award,<sup>33</sup> Claimant confirmed during its Rebuttal that, the *Iberdrola* Award contained no "indication of what damages they [*i.e.*, Iberdrola] were seeking or whether they changed that number at all during the course of the arbitration," and that Respondent, in its Opening Statement, thus was seeking to introduce information that was not in the record.<sup>34</sup>

13. After failing to rebut Claimant's statement at the Hearing, Respondent proceeded to reintroduce in its Post-Hearing Brief *that very same information* regarding Iberdrola's damages claim, with no citation to any document in the record.<sup>35</sup> In its Post-Hearing Brief, Respondent also expressly relied upon the *Iberdrola* testimony of Mr. Luis Maté,<sup>36</sup> even though

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<sup>29</sup> Damages Plea by Iberdrola filed in *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5 dated 27 September 2010 and 12 Nov. 2010 (**R-194**).

<sup>30</sup> Transcript of the Hearing on Jurisdiction and Merits, *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/05 (**R-202**).

<sup>31</sup> Letter from the Tribunal to the Parties dated 15 Oct. 2012, at 2.

<sup>32</sup> *See* Tr. (21 Jan. 2013) 191:13-18 (Respondent's Opening).

<sup>33</sup> *See id.* at 191:19-193:3.

<sup>34</sup> Tr. (21 Jan. 2013) 341:12-22 (Claimant's Rebuttal).

<sup>35</sup> Respondent's Post-Hearing Brief ¶ 10 & n.18.

<sup>36</sup> *Id.* ¶¶ 152, 155.

Respondent chose not to call Mr. Maté for cross-examination at the Hearing, and thus was not entitled to rely upon that testimony. In response to Claimant’s objection, the Tribunal ruled that, consistent with its prior decisions, it would disregard the sections of Respondent’s Post-Hearing Brief referencing Iberdrola’s damages claim and Mr. Maté’s *Iberdrola* testimony.<sup>37</sup> The Tribunal reiterated that, “in order to avoid any further similar incidents when the second round of Post-Hearing Briefs will be submitted, [it] would like the parties to be mindful that it will resolve this case on the basis of the direct oral and written evidence produced in this case, and that no consideration will be given to either the parties pleadings or the transcripts in the *Iberdrola* arbitration, save of course to the limited extent identified in the Tribunal’s letters of 10 February and 15 October 2012.”<sup>38</sup> Despite these repeated warnings, Respondent continues to contravene the Tribunal’s orders at every opportunity, and has made inadmissible statements in its Post-Hearing Reply concerning the content of arguments made by Iberdrola in its arbitration, which evidence is not in the record.<sup>39</sup>

14. *Third*, Respondent engaged in procedural misconduct during the document production phase of this arbitration. After Respondent requested documents “relating to communications between EEGSA and Leonardo Giacchino and/or Carlos Bastos, or communications between these two individuals, as of their appointment as members of the Expert Commission,” which Respondent asserted were “relevant to evaluate the Claimant’s assertions relating to the independence of the members of the Expert Commission,”<sup>40</sup> and which Claimant agreed to produce, Respondent objected to the production of that very same category of documents with respect to the CNEE and its appointee to the Expert Commission, Jean Riubrugent, on the ground Claimant’s request for such documents was overbroad, and not sufficiently relevant or material to the outcome of the case.<sup>41</sup> The *ex parte* communications between the CNEE and Mr. Riubrugent—which Respondent agreed to produce only after

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<sup>37</sup> Letter from the Tribunal to the Parties dated 27 June 2013.

<sup>38</sup> *Id.*

<sup>39</sup> See Respondent’s Post-Hearing Reply ¶ 90 n.151 (claiming, without reference to any exhibit in the record, that “Iberdrola never mentioned [RLGE Article 83] in its arbitration proceeding”).

<sup>40</sup> Letter from Respondent to Claimant dated 7 Nov. 2011, Request No. B.2, at 4, 5.

<sup>41</sup> Claimant’s Redfern Schedule, *attached to* Procedural Order No. 2 dated 21 Mar. 2012, Request No. G.3, at 70.

Claimant included this request in its Redfern Schedule and demonstrated that Respondent had sought and received the very same category of documents from Claimant—clearly are both relevant and material to the outcome of the case, as they evidence the arbitrary and bad faith nature of the CNEE’s actions during EEGSA’s tariff review, and further undermine Respondent’s arguments that the Expert Commission merely is an advisory body whose decisions can be ignored by the CNEE.<sup>42</sup> Respondent’s internally inconsistent positions, in both requesting and objecting to the same category of documents, evidences its unprincipled approach and its bad faith attempt to hide evidence harmful to its defense.

15. In addition, as Claimant noted in its Post-Hearing Brief, Respondent withheld a series of responsive documents that the Tribunal expressly ordered Respondent to produce, or which Respondent itself agreed to produce to Claimant.<sup>43</sup> Although Respondent, for example, should have produced the CNEE’s “minutes of meetings,” Respondent produced *no* minutes of the meetings of the CNEE’s directors.<sup>44</sup> As Mr. Moller confirmed on cross-examination, in accordance with the CNEE’s Internal Regulations, the CNEE’s directors are required to meet at least once a week, and that minutes of their meetings—both ordinary and extraordinary—must be recorded in writing, but *Counsel for Respondent never requested a copy of the minute book in which these minutes are recorded.*<sup>45</sup> The same is true with respect to Claimant’s request for “[a]ll promotional materials, presentations, or other documents prepared, used, or distributed by Guatemala during its promotion of the privatization of EEGSA,”<sup>46</sup> including a copy of the presentation given by the CNEE to the High-Level Committee on 13 March 1998 regarding the tariff methodology set out in the LGE,<sup>47</sup> and for “[d]ocuments showing the three lists of

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<sup>42</sup> See Email chain between M. Peláez and J. Riubrugent dated 13 June 2008 (C-496); Email from J. Riubrugent to M. Quijivix dated 7 July 2008 (C-500).

<sup>43</sup> Claimant’s Post-Hearing Brief ¶ 7.

<sup>44</sup> *Id.*

<sup>45</sup> Tr. (4 Mar. 2013) 992:8-993:22 (Moller Cross) (confirming that, “under the Internal Regulations of the CNEE, the CNEE Directors are required to meet at least once a week, and they are required to record the minutes of those meetings, both extraordinary and ordinary, in a minute book,” that the minute book is located at the CNEE, and that Counsel for Respondent never asked him for, nor did he ever provide, a copy of that minute book).

<sup>46</sup> Claimant’s Redfern Schedule, *attached to* Procedural Order No. 2 dated 21 Mar. 2012, Request No. B.1, at 12.

<sup>47</sup> *Id.*, at 18; Tr. (4 Mar. 2013) 1005:15-1006:15 (Moller Cross).

candidates proposed by the national universities, the MEM, and the wholesale market agents for CNEE's Board of Directors in 2007," which the Tribunal likewise ordered Respondent to produce.<sup>48</sup> In its Post-Hearing Reply, Respondent notably fails to justify its incomplete document production.<sup>49</sup>

16. *Fourth*, Claimant repeatedly and intentionally misrepresented the record in this case in an effort to mislead the Tribunal to Claimant's prejudice. Respondent, for example, proclaimed in its Post-Hearing Brief that, "[d]espite Guatemala's request for documentation of any due diligence in its request for documents (Exhibit R-142, Documentation A.2), TGH did not present even a single document,"<sup>50</sup> even though Claimant had produced several documents and had listed several more on its privilege log in response to Respondent's Request No. A.2.<sup>51</sup> Respondent further misleadingly argued in its Post-Hearing Reply that Claimant "cannot seriously allege bad faith on the part of Guatemala in the submission of documents, when Guatemala submitted around 300 documents while TGH provided only 50."<sup>52</sup> As Claimant previously had explained, however, unlike Respondent, Claimant did not produce the same document more than once, nor did it reproduce documents that already were in the record;<sup>53</sup> the

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<sup>48</sup> Claimant's Redfern Schedule, *attached to* Procedural Order No. 2 dated 21 Mar. 2012, Request No. F.1, at 53.

<sup>49</sup> Respondent's Post-Hearing Reply ¶¶ 9-10. Indeed, in its Post-Hearing Reply, Respondent does not even attempt to explain its compliance with the Tribunal's document production orders, but rather simply asserts that it did not ask Mr. Moller for the CNEE's minutes of meetings, because "the contact at the CNEE for this matter was . . . the CNEE's Legal Department," without representing that it duly requested and reviewed the CNEE's minute book for documents responsive to Claimant's request. *Id.* ¶ 9. Respondent further asserts that the documents relating to EEGSA's privatization were kept by EEGSA and not by other Government agencies, even though one of the documents Claimant requested was a presentation prepared by the CNEE itself. *Id.* ¶ 10; Claimant's Post-Hearing Brief ¶ 7. Respondent likewise fails to offer any defense for its failure to produce documents reflecting the three lists of candidates proposed for the CNEE Directors, which Mr. Moller confirmed on cross-examination are kept by the MEM. *See* Claimant's Post-Hearing Brief ¶ 7.

<sup>50</sup> Respondent's Post-Hearing Brief ¶ 314 n.425.

<sup>51</sup> Claimant's Post-Hearing Reply ¶ 45.

<sup>52</sup> Respondent's Post-Hearing Reply ¶ 10 n.12.

<sup>53</sup> Indeed, nearly 25 percent of the documents that Respondent produced to Claimant already were in the record as Claimant's own exhibits. *See* Letter from Claimant to the Tribunal dated 9 Mar. 2012. For example, the document that Respondent produced to Claimant as D.2-a is a duplicate of Exhibit C-101 (Letter from the MEM to the CNEE dated 18 Jan. 2007); the document that Respondent produced to Claimant as F.7-a is a duplicate of Exhibit C-133 (Letter No. CNEE-14986-2007 from the CNEE to EEGSA dated 12 Nov. 2007); and the document that Respondent produced to Claimant as G.4-c is a duplicate of Exhibit C-225 (Letter from C. Bastos to M. Calleja and M. Quijivix dated 6 June 2008).

50 documents that Claimant produced to Respondent thus do not include the many responsive documents that Claimant already had submitted as exhibits to its Memorial. Similarly, Respondent erroneously asserted in its Post-Hearing Brief that Claimant never addressed the non-disputing party submissions at the Hearing,<sup>54</sup> when Claimant not only addressed those submissions in its Opening Statement, but also had slides directly quoting them.<sup>55</sup>

17. Respondent also incorrectly asserts in its Post-Hearing Reply that Claimant mentioned the Memorandum of Sale in its Memorial “only in order to support its interpretation of the regulatory framework,” and not “as a source of its supposed expectations.”<sup>56</sup> As Claimant’s Memorial reflects, however, Claimant contended in that submission that “[b]oth the process and the result of the tariff review were unlawful and arbitrary, and contravened TECO’s legitimate expectations that resulted from Guatemala’s representations during the privatization process,”<sup>57</sup> and then referred specifically to the representations made by Guatemala in the Memorandum of Sale, noting that, “Guatemala, in fact, represented – both to TECO and other foreign investors and in submissions to its own courts – that the Expert Commission’s ruling was binding. Specifically, in promoting EEGSA’s privatization, Guatemala informed potential investors, including TECO, that ‘in the event of discrepancy, a three-expert Commission will be convened to resolve the differences.’”<sup>58</sup> Respondent further has repeatedly misrepresented in its Post-Hearing Briefs that the 28 July 2008 model submitted by Claimant as an exhibit was altered.<sup>59</sup> Although that model was submitted by Claimant with its Memorial, Respondent waited to raise its objection to that model until after the cross-examination of Mr. Giacchino, the author of the model, thus depriving Mr. Giacchino of an opportunity to respond.<sup>60</sup> Respondent, moreover, continues to accuse Claimant of misconduct in this regard, despite the fact that it never has disputed Claimant’s explanation that the two exhibits at issue differ only with respect

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<sup>54</sup> Respondent’s Post-Hearing Brief ¶¶ 15, 16.

<sup>55</sup> Claimant’s Post-Hearing Reply ¶ 33; Tr. (21 Jan. 2013) 121:4-6, 123:11-124:1 (Claimant’s Opening Statement); Claimant’s Opening Slides 126, 130.

<sup>56</sup> Respondent’s Post-Hearing Reply ¶ 33.

<sup>57</sup> Memorial ¶ 259.

<sup>58</sup> *Id.* ¶ 278 (quoting Empresa Eléctrica de Guatemala S.A., Memorandum of Sale dated May 1998, at 49 (emphasis added) (C-29)). Claimant made the very same argument in its Reply. *See* Reply ¶¶ 264-266.

<sup>59</sup> Respondent’s Post-Hearing Brief ¶ 211.

<sup>60</sup> Claimant’s Post-Hearing Reply ¶ 110; Claimant’s Post-Hearing Brief ¶ 158.

to a single file, which is dated contemporaneously with the VAD study, and which has no effect on the VNR or VAD amounts.<sup>61</sup>

18. *Fifth*, Respondent engaged in procedural misconduct with respect to the submission of translations, increasing unnecessarily Claimant's costs. As the record reflects, Claimant initially proposed that international legal authorities need not be translated, because "Respondent has not shown that the parties' purported need to review translations of international legal authorities, including ICSID cases, outweighs the burden and expense of having those legal authorities translated."<sup>62</sup> Claimant noted that "[b]oth parties' counsel have worked on numerous ICSID cases and neither party's counsel will be prejudiced by having ICSID cases, or relevant excerpts thereof, submitted in the language(s) in which the case is published," and that, "[w]hile the parties themselves may have a legitimate interest in reviewing the factual evidence and domestic legislation and court decisions, the same has not been shown to be true with regard to international legal authorities."<sup>63</sup>

19. Respondent objected to Claimant's proposal, arguing that "there is no reason to distinguish ICSID decisions from other legal authorities or factual exhibits filed by the Parties with regard to the need for courtesy translations," and thus insisting that both Parties provide translations of "relevant excerpts of ICSID decisions not available in the other procedural language."<sup>64</sup> On the basis of Respondent's objection, the Tribunal ruled in Item No. 10 of the Minutes of the First Session that, "[f]or factual exhibits and legal authorities, including ICSID decisions, presented with submissions, the parties will translate into the other procedural language an appropriate excerpt that is relied upon by the party making the submission."<sup>65</sup>

20. In accordance with the Tribunal's direction, Claimant submitted with its Memorial submission relevant excerpts in Spanish for all 44 international cases (only 13 of which were publicly available in both English and Spanish). Despite its insistence on this ruling,

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<sup>61</sup> Claimant's Post-Hearing Reply ¶ 110; Claimant's Post-Hearing Brief ¶ 158; Respondent's Post-Hearing Brief ¶¶ 211-213.

<sup>62</sup> Letter from Claimant to Tribunal dated 13 May 2011, at 2.

<sup>63</sup> *Id.*

<sup>64</sup> Letter from Respondent to Tribunal dated 13 May 2011, at 3 (emphasis removed).

<sup>65</sup> Minutes of the First Session of the Tribunal dated 23 May 2011, Item No. 10.

however, Respondent failed to submit with its Counter-Memorial submission relevant excerpts in Spanish for 13 of its 16 international cases (the remaining three authorities were cases that were publicly available in both English and Spanish).<sup>66</sup> Respondent's failure to do so not only violated Item No. 10 of the Minutes of the First Session, but demonstrated that its insistence on having Claimant provide such translations was for no reason other than to burden Claimant with unnecessary expenses. In view of Respondent's failure to translate its international legal authorities, Claimant thus was compelled to seek modification of Item No. 10 of the Minutes of the First Session.<sup>67</sup>

21. In addition, Respondent refused to translate other exhibits into English, including, for example, the report of Mercados Energéticos. As the Tribunal will recall, that report was submitted as an exhibit to a witness statement that served only to confirm the contents of the attached report,<sup>68</sup> and Respondent relied heavily upon that expert report in its own pleadings.<sup>69</sup> Nevertheless, and even though the Minutes of the First Session expressly require the translation of exhibits or relevant excerpts thereof, Respondent did not provide a translation of this expert report, thus forcing Claimant to incur the cost of translating it itself.<sup>70</sup> Likewise, Respondent failed to translate other important documents, such as Respondent's Instruction Letter to Dr. Abdala.<sup>71</sup> Respondent also submitted partial translations of other documents in an attempt to mislead this Tribunal, including CNEE Resolution Nos. 184-2008 and 16-2009, thus also compelling Claimant to incur the cost of translating these documents in full.<sup>72</sup>

22. For all of the reasons set forth above, Claimant respectfully requests that the

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<sup>66</sup> See RL-2, RL-5, RL-9.

<sup>67</sup> See Claimant's Letter to the Tribunal dated 2 Feb. 2012; see also Letter from the Parties to the Tribunal dated 8 Feb. 2012 (noting modification).

<sup>68</sup> Mercados Energéticos Consultores, "Review of EEGSA's Value-Added for Distribution Study in the Relation to the Opinion of the Expert Commission" dated July 2009 (**R-103**).

<sup>69</sup> See, e.g., Rejoinder ¶¶ 459-463; Counter-Memorial ¶¶ 428-431, 603.

<sup>70</sup> 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'" dated July 2009 (**C-582**).

<sup>71</sup> Exhibit 1 to Abdala-Schoeters (**RER-1**).

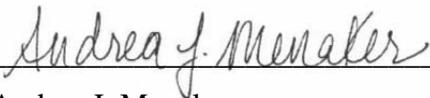
<sup>72</sup> See Claimant's Post-Hearing Brief ¶ 74; CNEE Decision 184-2008 dated 25 Sept. 2008 (**R-241**); CNEE Decision 16-2009 dated 28 Jan. 2009 (**R-244**).

Tribunal order Respondent to bear all of Claimant’s costs incurred in this proceeding. As set forth in the chart below, Claimant’s costs in this arbitration are reasonable in view of the length of the proceedings, the two merits hearings, and the issues in dispute in this case.

|   | <b>INCURRED COSTS (US\$)</b> |
|---|------------------------------|
| <b>WHITE &amp; CASE LEGAL FEES &amp; EXPENSES</b>                   |                              |
| <b>WHITE &amp; CASE LLP FEES</b>                                    | <b>US\$ 5,874,412.50</b>     |
| <b>WHITE &amp; CASE LLP COSTS (NOT INCLUDING TRANSLATION COSTS)</b> | <b>US\$ 217,402.54</b>       |
| <b>WHITE &amp; CASE LLP TRANSLATION COSTS</b>                       | <b>US\$ 225,786.78</b>       |
| <b>TOTAL WHITE &amp; CASE FEES &amp; EXPENSES</b>                   | <b>US\$ 6,317,601.82</b>     |
| <b>EXPERT &amp; CONSULTANT FEES &amp; EXPENSES</b>                  | <b>US\$ 2,932,603.33</b>     |
| <b>TECO ARBITRATION EXPENSES</b>                                    | <b>US\$ 17,087.24</b>        |
| <b>ICSID COSTS</b>  | <b>US\$ 750,000</b>          |
| <b>TOTAL INCURRED COSTS</b>   | <b>US\$ 10,017,292.39</b>    |

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Respectfully submitted,



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24 July 2013