

MEMORANDUM OF DETERMINATIONS

Expropriation Claim of Ponderosa Assets, L.P. Argentina - Contract of Insurance No. D733

I. CLAIM

By a letter dated August 12, 2002 (Annex 1), supplemented by a letter dated April 10, 2003 (Annex 2) (the "April Letter"), Ponderosa Assets, L.P. ("Ponderosa" or the "Investor") filed an application under OPIC Insurance Contract No. D733 dated June 1, 1993 (the "OPIC Contract"), a Form 234 KGT 12-85 (Second Revised) NS equity contract, as amended (Annex 3), for compensation in the amount of US\$50,000,000 (the "Application"). The OPIC Contract covers an equity investment in the privatization, acquisition and operation of Transportadora de Gas del Sur ("TGS"), a gas pipeline company located in southern Argentina (the "Project").

On August 12, 2002, Ponderosa filed the Application for the expropriation of its equity interest in the Project. OPIC thereafter requested additional information by letter dated November 7, 2002, and, on the basis of this request, a response was filed by Ponderosa in the April Letter. In addition, Ponderosa requested, and received, confirmation that its claim would continue to be processed despite the fact that Ponderosa has a simultaneous pending claim for compensation with an arbitral tribunal (the "Tribunal") in ICSID arbitration. Arbitration under ICSID is still pending, and the Tribunal determined that the dispute was within the standing of the Centre and the competence of the Tribunal on August 2, 2004.¹ The merits of the dispute are still pending with the Tribunal.

Based on all the information provided and certifications made by Ponderosa, OPIC finds that an expropriation within the meaning of the OPIC Contract has occurred. This finding is based upon OPIC's determination that, even if enactment of the Emergency Law can be justified in general as a valid exercise of regulatory power, the actions of the GOA in enacting the Emergency Law constitute repudiation of the GOA's contract with Ponderosa, motivated by noncommercial considerations, and for which compensatory damages were not paid, in violation of the GOA's responsibilities to a foreign investor under international law.

The amount of compensation due under the OPIC Contract is the full active amount of expropriation coverage at the time of the claim, \$50,000,000.

II. THE INSURANCE CONTRACT

Enron Corp. ("Enron") was the entity that initially applied for political risk insurance with OPIC for coverage of the Project. On June 1, 1993, OPIC and Enron executed the OPIC Contract, which provided coverage against the risks of inconvertibility, expropriation, and

¹ See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3) Decision on Jurisdiction of August 2, 2004.

political violence. The OPIC Contract covered Enron's equity in the Project, contributed in the form of capital contributions; Enron acquired 99.99% of the shares in Enron Pipeline Company – Argentina, S.A. (“EPCA”), which acquired 25% of the shares in Compania de Inversiones de Energia S.A. (“CIESA”), which acquired 70% of the shares in TGS, resulting in an initial indirect investment by Enron in TGS of 17.5%.

Due to the complexities of the financial statements, the numerous intermediate subsidiaries involved, and the various charges of accounting fraud associated with Enron, OPIC hired an independent forensic accounting firm, Russel Novak & Company LLC (“RNCO”), to review the various financial representations in the OPIC Contract and Application.

The first item RNCO assessed was the initial and subsequent investments that Enron made in TGS in connection with the issuance of the OPIC Contract. Although the OPIC Contract states that the total amount of the equity investment “contributed or to be contributed” was \$ [REDACTED], RNCO determined that the actual equity investment made in conjunction with execution of the OPIC Contract was \$ [REDACTED].²

Moreover, the OPIC Contract was amended on September 30, 1997 (the “Amendment”) to reflect Enron's increased investment in the Project. At the time of execution of the amendment, Enron had acquired an additional 25% of CIESA's share holdings through EPCA, thereby increasing its percentage ownership of TGS to 35%. The Amendment states that Enron contributed an aggregate amount of \$ [REDACTED] to EPCA and EACH. Neither Enron nor RNCO has been able to reconcile this amount, but a careful audit of the financial records reveals that the actual investment by Enron in TGS at the time of execution of the Amendment was \$ [REDACTED], which is well over the \$ [REDACTED] originally represented.³

At the time of submission of the claim, the active amount of expropriation coverage under the OPIC Contract was \$50,000,000. The Investor is claiming the full amount, as it claims that its loss exceeds the active amount of coverage. Although in the Application Enron represented that its total investment over time was \$ [REDACTED], RNCO has found, and Enron has confirmed, that its actual investment from the date of the initial investment through the date of the Emergency Law, using the equity method of accounting, was \$ [REDACTED].⁴ It is the total write-off of this amount that demonstrates the effect of the Emergency Law (defined below), and justifies a finding of expropriation.

² See Memo to OPIC from Michael Pakter, RNCO, dated August 16, 2004 (the “RNCO Memo”). At the time of execution of the OPIC Contract, Enron had contributed \$ [REDACTED] to CIESA through the purchase of Argentine Government bonds, and had contributed an initial \$ [REDACTED] in the purchase of common shares in CIESA, for a total investment of \$ [REDACTED]. Over the course of 1993, Enron also contributed to the payoff of debt (through a guarantee) of CIESA in an amount of \$ [REDACTED]. It is unclear whether Enron intended to include this contribution as part of its initial investment in the June 1993 contract, but at any rate the amount of the investment excluding this amount still exceeds the stated amount of \$ [REDACTED].

³ See RNCO Memo, Section 12. The RNCO Memo states: “... it does seem that Enron's promise (1) that it contributed \$ [REDACTED] (directly or indirectly) to EPCA and EACH, (2) that it owned (directly or indirectly) 50% in CIESA and (3) that it contributed those sums to acquire a 70% equity interest in TGS was substantially correct.” Although normally the extent to which the investment was “underinsured” would be subject to an additional premium, in this case OPIC was only to serve as a first loss layer, and private market participation was to cover the remaining investment. Therefore, no underinsurance premium was assessed.

⁴ See RNCO Memo, Section 15.

On December 18, 1998, Enron entered into an Assumption and Consent with OPIC and Ponderosa (the "Assignment"), whereby Enron transferred all of its interests in the OPIC Contract to Ponderosa, and OPIC consented to such assignment.

III. FACTUAL SUMMARY

As part of the privatization of its gas industry, Argentina divided and sold its state gas company, Gas del Estado, into numerous smaller companies, including TGS, one of two transportation companies that was formed and privatized. CIESA acquired 70% of TGS capital stock. In turn, 25% of the CIESA's shares were owned by each of the four investors, giving each, indirectly, a 17.5% interest in TGS. As described above, Enron acquired an additional 25% interest in CIESA in 1996 and amended the OPIC Contract accordingly, increasing its indirect equity interest in TGS to 35%.

The government of Argentina (the "GOA") granted TGS its rights to transport gas through a gas transportation license (the "License") dated December 18, 1992 with a term of thirty-five years. The License allows TGS to collect revenues for transporting gas through tariffs set by GOA. However, the License specifies that the tariffs will be calculated in U.S. dollars and expressed in Argentine pesos⁵ and that the tariffs shall be adjustable every six months in accordance with variations in the US Producer Price Index ("PPI").⁶ These provisions were meant to protect the Investor against the respective risks of devaluation of the peso and of inflation in Argentina. TGS's main source of revenue is the tariffs.

The GOA enacted the Public Emergency and Exchange Regime Reform Law No. 25,561 (the "Emergency Law") on January 6, 2002. Article 8 of the Emergency Law provides that "in contracts entered into by the public administration and subject to public law, including contracts for works and public services, dollar ... adjustment clauses and indexation clauses based on the price indexes of other countries, as well as any other indexation mechanisms shall no longer be effective. The prices and rates resulting from such clauses shall be fixed in pesos at a ONE PESO (\$1) = ONE DOLLAR (US\$1) exchange rate."⁷

As a result of the enactment of the Emergency Law, TGS' revenues have been (1) frozen at the January 2000 rate and an adjustment to the PPI index has not been permitted; and (2) limited to the peso equivalent of the US dollar amount which should have been paid. These two elements have resulted in a decrease in the revenues of TGS so great that it justified a total write-off by the Investor of its investment in TGS.

Beginning in 2000, the GOA attempted through various other measures to limit TGS's rights to adjust the tariff, culminating in the Emergency Law. In January 2000, according to

⁵ See Section 9.2 of the License, which states that "[r]ates have been calculated in United States dollars. Adjustments ... shall be calculated in United States dollars."

⁶ See Section 9.4.1.1 of the License, which states: "Transportation rates shall be adjusted semiannually pursuant to PPI's variation." "PPI" is defined as "Producer Prices' Index - Industrial Goods' (1967=100) published by the Bureau of Labor Statistics of the Labor Department of the United States of America, or by that agency which may replace it, or, should that publication be discontinued, such industrial prices statistics as might be comparable."

⁷ Article 8 of the Emergency Law.

Ponderosa, the GOA “pressured” TGS to defer the PPI-linked tariff increase for the six-month period from January-June 2000. Then, in July 2000, it further pressured TGS to enter into another such agreement, providing for 30% of the previous tariff adjustment and postponing any further adjustments until October 2000. The Argentine gas regulatory agency, Ente Nacional Regulador del Gas (“ENARGAS”), issued a decree on August 4, 2000 formalizing this agreement.⁸ On August 3, 2000, the Argentine Ombudsman challenged the constitutionality of the PPI-linked tariff adjustment in the License and sought an injunction in the Federal Court suspending any further tariff adjustments. The Ombudsman also sought an injunction against implementation of the ENARGAS decree on the grounds that the decree allowed for a partial tariff adjustment. The injunction was granted, and ENARGAS sent a notice to TGS that it was obliged to maintain its tariffs at the January 2000 rates. These measures are noted by way of background, as they were voluntarily entered into and therefore cannot be the basis for an expropriation claim. Ponderosa stated in the April Letter that its sole basis for the claim is the passing of the Emergency Law.

IV. DETERMINATIONS UNDER THE OPIC CONTRACT

A. The actions taken by the GOA with respect to Ponderosa’s insured investment in TGS constitute total expropriation within the meaning of Section 4.01 of the OPIC Contract.

Four issues are presented by Section 4.01 of the OPIC Contract, which sets forth the requirements for total expropriation coverage: (1) whether the acts were attributable to a foreign governing authority in de facto control of the part of the country where the Project is located; (2) whether the acts constituted a violation of international law or a material breach of local law; (3) whether Ponderosa was deprived of fundamental rights in the insured investment, and if so, whether the stated acts directly caused such loss; and (4) whether the expropriatory effect has continued for the requisite six-month period.

1. The acts are attributable to a foreign governing authority which is in de facto control of the part of the country in which the project is located.

The identity of the foreign governing authority in control of southern Argentina is not in question in this case. The OPIC Contract itself defines “foreign governing authority” as the “the governmental authority(ies) in effective control in all or part of Argentina.” The GOA is in effective control of all of Argentina.

There have been a number of acts attributable to the GOA that have directly affected the rights of the Investor in its investments in TGS:

- (i) Through negotiations with the Investor and subsequent amendments to the License, GOA suspended its obligation under the License to allow the tariff to be payable using the PPI index adjustment, in January and again in July 2000.
- (ii) This arrangement was formally codified into law through Decree 669/2000 enacted by ENARGAS.

⁸ See ENARGAS Decree 669/2000.

- (iii) The Argentine Ombudsman sought and received an injunction in the Federal Court suspending any further tariff adjustments. The Ombudsman also sought an injunction of the ENARGAS decree on the grounds that the decree allowed for a partial tariff adjustment in favor of the Investor.
- (iv) The courts of Argentina upheld the injunction and suspended the application of Decree 669/2000, due to the fact that it allowed for a partial tariff adjustment.
- (v) The GOA enacted the Emergency Law, which suspended all tariff adjustments and set exchange rates under public utility contracts at one peso per dollar.

Although all of these actions affected the rights of the Investor in TGS, the main expropriatory action, and the action on which the claim is based,⁹ consists of the enactment of the Emergency Law, which resulted in a change in tariff treatment in violation of the GOA's contractual obligation under the License to allow tariff payments in dollars and with a PPI-indexed adjustment. The enactment of the Emergency Law was authorized and implemented by the GOA.

2. The acts are violations of international law (without regard to the availability of local remedies).¹⁰

A state is responsible under international law for injury resulting from: “(1) a taking by the state of the property of a national of another state that (a) is not for public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation; ... (2) a repudiation or breach by the state of a contract with a national of another state (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by noncommercial considerations, and compensatory damages are not paid; or (b) where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred...”¹¹ If, according to these principles, the GOA bears state responsibility for injury resulting from the Emergency Law, then this provision of the OPIC Contract has been satisfied.

(A) We take no position as to whether the GOA's enactment of the Emergency Law constitutes a “taking” by the state of the Investor's property.

One grounds for determining whether the enactment of the Emergency Law was a violation of international law above is that the action constitutes a “taking.” Although traditional interpretations of expropriation deal with “taking” as actions which force the foreign entity to abandon operations entirely or where legal title is actually lost, the theory of indirect

⁹ The April Letter states that “the sole basis of the claim is the Emergency Law.”

¹⁰ The relevant section, Section 4.01 of the OPIC Contract, also includes “material breaches of local law.” The local law question is addressed in Section 3 of this Memorandum.

¹¹ Restatement (Third) of the Foreign Relations Law of the United States §712 (1987) (the “Restatement”).

expropriation recognizes that a government may deprive an investor of the economic value of its investment and that such deprivation is tantamount to a “taking.”¹² The Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) defines a taking as “unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner will not be able to use, enjoy, or dispose of the property within a reasonable time after the inception of such interference.”¹³ This definition would include an act or series of acts that deprived an investor of the benefit of its investment without compensation from the state or a third party.

The Iran-U.S. Claims Tribunal found takings in Iran’s deprivation of fundamental property or contract rights of several American companies notwithstanding the lack of a formal decree of nationalization.¹⁴ In numerous cases, the tribunal recognized that interference by a state with the foreign national’s use of the property or enjoyment of its benefits may constitute a compensable expropriation, even where legal title was not affected.¹⁵ In one of these cases in particular, the tribunal ruled that the government of Iran’s enactment of legislation requiring the foreign national’s land to be used for a particular purpose constituted an impairment of the foreign national’s right to use his property “that prevents, unreasonably interferes with, or unduly delays, effective enjoyment”¹⁶ of such property, thereby constituting a taking. In this case, the main asset of TGS, and of Ponderosa’s investment, is the License, and the GOA is preventing TGS from enjoying the benefits of its “property”, i.e. charging a tariff to its customers paid in dollars and adjusted via the PPI index.

The deprivation of property is a violation of international law if prompt, adequate, and effective compensation is not paid.¹⁷ The GOA has failed to pay or offer to pay any compensation to the Investor. Furthermore, GOA has, through another provision of the Emergency Law, prevented the Investor from suspending compliance with its own obligations, thereby forcing it to endure ongoing losses.¹⁸ Ponderosa claims that the acts of the GOA constitute a violation of international law. Indeed, there is reason to believe that the Emergency Law went beyond the limits of commonly accepted principles of a state’s power. However, we

¹² See George C. Christie, *What Constitutes a Taking Under International Law?*, 28 Brit. Y.B. Int’l L. 307, 309 (1962) (“[I]nterference with an alien’s property may amount to expropriation even when no explicit attempt is made to affect the legal title to the property.”)

¹³ Although this document is a draft and has not been accepted by any state, it reflects the opinions of experts on customary international law in this area. “Although ... in the form of conventions requiring ratification or accession, they have been widely accepted as generally declaratory of existing law and therefore actually given legal effect even prior to their formal entry into force.” Oscar Schachter, *International Law in Theory and Practice* 71 (1991).

¹⁴ See, e.g., *Starrett Housing v. Islamic Republic of Iran*, 23 I.L.M. 1090 (Iran-U.S. Cl. Trib. 1993).

¹⁵ See, e.g., *Jahangir Mohtadi, et al. v. Iran*, Iran Award 573-271-3, Case No. 271 (1996) (“It is firmly established in the Tribunal’s jurisprudence that liability for interference with property rights may be found even where the formal legal title to property has not been affected.”); *Tippets, Abbott, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al.*, Award No. 141-7-2 (29 June 1984) (“A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”).

¹⁶ Restatement (Third) of Foreign Relations Law of the United States §712 (1987), cmt. g.

¹⁷ See O’Connell, 2 *International Law* 776-77 (2d. ed. 1970)

¹⁸ See Article 10 of the Emergency Law: “The provisions of Articles 8 and 9 of this Law shall under no circumstances authorize utility providers or contractors to suspend or alter compliance with their obligations.”

need not decide this question, as the second grounds for an international law violation are much more clearly demonstrated in the present circumstance.

- (B) *By application of the Emergency Law to the Project, the GOA repudiated a contractual agreement with TGS, constituting an independent violation of international law.*

Under certain conditions, international law imposes state responsibility for “a repudiation or breach by the state of a contract with a national of another state ...”¹⁹ Before evaluating whether these conditions exist, however, it is necessary to determine whether there has been a “repudiation or breach by the state of a contract.”

The first threshold question to address is whether the License constitutes a contract by the state with a foreign national. The License was entered into in 1992 between the GOA, through the President of Argentina via his National Executive Power, as licensor, and TGS, as licensee, and contains various obligations and undertakings of the GOA. A contract is a legally enforceable exchange of promises. The formation of a contract can take place “by the acceptance of an offer.”²⁰ An exclusive license is an agreement that gives the licensee the exclusive right to perform the licensed act and that prohibits the licensor from granting the right to other parties.²¹ In this case, TGS agreed to transport gas and the GOA agreed to give TGS the right to charge a specific amount for transporting the gas. Their negotiated exchange of promises is the essence of any contract, and TGS accepted the licensing offer of the GOA, thereby creating a binding contract regardless of who signed the decree.

In addition, a contract is formed by “conduct of the parties that is sufficient to show agreement” and their intention to be bound.²² TGS and the GOA both conducted themselves in a manner that would indicate there was a contract between the parties. From 1992, when the GOA granted TGS the license, through early 2000, when the GOA first attempted to limit TGS’ rights to adjust the tariff according to the terms of the license, TGS transported gas through the pipeline and was paid the tariffs set up by the GOA in accordance with the agreement. The conduct of the parties is sufficient to show they had an agreement and therefore there is a valid contract.

The second threshold question is whether the License constitutes a contract “with a foreign national.” TGS is a company incorporated under the laws of Argentina but owned entirely by foreign nationals. In the ICSID case brought by Enron and Ponderosa, Argentina unsuccessfully argued to the Tribunal that the claimants, the indirect shareholders of TGS, lacked standing to pursue a claim under the Bilateral Investment Treaty between the United States and Argentina Concerning the Reciprocal Encouragement and Protection of Investment

¹⁹ Restatement (Third) of Foreign Relations Law of the United States §712 (1987), Part (2).

²⁰ UNIDROIT Principles Art. 2.1 (1994). The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization with its seat in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States. Both Argentina and the United States are member states in UNIDROIT.

²¹ See Black's Law Dictionary (7th ed. 1999).

²² UNIDROIT Principles Art. 2.1 (1994).

(the “BIT”). The Tribunal made its determination based on the definition of “investment” under the BIT:

- (a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation: (...)
 - (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;²³

The Tribunal concluded that “the Treaty was made with the specific purpose of guaranteeing the rights of the foreign investors and encouraging their participation in the privatization process”, and that therefore the shareholders ownership of TGS fell squarely within the definition of “investment.”²⁴

In the case of *CMS Gas Transmission Company v. Argentina*, also cited by the Tribunal, an ICSID arbitral tribunal stated that “foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State is precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment.”²⁵ Since TGS would be treated as a national of a country other than Argentina for purposes of arbitrating claims under the BIT, it can also be considered a foreign national party to a contract under international law principles.

Another question to address is whether there has been a “repudiation or breach” by GOA of the License. OPIC has in the past interpreted the term “repudiate” to mean an outright disclaimer by the state of any liability under the contract.²⁶ The GOA has not disclaimed liability. However, GOA has materially changed the terms of the contract unilaterally, which amounts to the same thing. OPIC finds that this unilateral and material modification of the License constitutes a repudiation by GOA of its obligations under the License.

The main obligation of GOA under the License is that it shall “allow [TGS] to collect Rates fixed in Chapter IX hereof in accordance with provisions of [Law 24,076, which establishes the regulatory framework of Natural Gas activity.]”²⁷ Chapter IX of the License sets forth the regulatory provisions regarding the tariff rates, including the provisions that the tariff shall be paid in dollars and shall be adjusted based on the PPI index. Since Section 4.5 creates an actual obligation on the GOA to allow TGS to collect the tariff according to this particular scheme, OPIC concludes that the enactment by the GOA of the Emergency Law, which had the

²³ Article I(1)(a) of the BIT.

²⁴ See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3) Decision on Jurisdiction of August 2, 2004.

²⁵ *CMS Gas Transmission Company v. Argentine Republic*, 42 Int’l Leg. Mat. 788, 796 (2003) . See also *Azurix v. Argentine Republic*, (ICSID Case No. ARB/01/12) Decision on Jurisdiction of December 8, 2003.

²⁶ See *Matter of Revere Copper & Brass Co. and Overseas Private Investment Corp.*, 15 Int’l Leg. Mat. 1321, 1345 (1978).

²⁷ See Section 4.5.1 of the License.

effect of nullifying these provisions, constitutes a repudiation or abrogation of GOA's obligations under the License.

According to the claim application by Ponderosa, the two provisions in question were negotiated as "material parts of the deal."²⁸ The provisions were meant to protect against both inflation in Argentina and devaluation of the peso, both important risks that foreign investors seek to limit to the extent possible. The application states that since TGS' revenues rely heavily on the tariffs, as approximately 80% of its revenues flow from them, these provisions "were absolutely central to the deal."²⁹ Indeed, the mere fact that a public utility license granted by a government explicitly provides for payment in dollars *and* links tariffs to a US-based adjustment scheme indicates that a foreign investor likely negotiated these terms, since such government contracts would otherwise, as a matter of policy, be linked to local pricing and currency. Furthermore, the express terms of the License provide that the provisions of the License, and the obligations created thereby, would continue for the entire term of the License, i.e., thirty-five years.³⁰

For approximately eight years after the execution of the License, the tariffs charged by TGS in accordance with the License were permitted by the GOA with the PPI-indexed adjustment and were calculated in dollars, thereby limiting the risk to TGS of fluctuations in the rate of exchange or inflation.

Although TGS did agree to two suspensions of the PPI-indexation under the License, no document executed by TGS and the GOA expressly or implicitly terminates the License and all GOA obligations thereunder. Thus, the GOA's principal obligation to allow TGS to collect tariffs in accordance with the License was never terminated by mutual consent. The License explicitly states that the rate shall not be modified except "according to provisions in the Law, Regulatory Decree, these Basic Standards and regulations of the Rate itself."³¹ The Emergency Law purportedly supersedes any previous laws to the contrary by a sweeping provision which states: "This law deals with matters concerning the overriding public interest. No person may assert irrevocably acquired rights against it. Any other provision to the contrary is hereby abrogated."³² The Emergency Law on its face constitutes abrogation of the License; the GOA cannot override its international law obligations to investors by enacting domestic laws that are inconsistent with those obligations. Therefore, OPIC determines that the provisions of the Emergency Law which contradict those of the License create a modification outside of the allowable provisions under Section 9.2 of the License. Thus, the application of the Emergency Law in contradiction of the explicit terms of the License is in itself a repudiation of the GOA's contractual obligations under the License. The fundamental obligation of the GOA to maintain the pricing mechanisms of the License should have survived the enactment of the Emergency Law. Therefore, OPIC finds that there has been a repudiation of by the GOA of the License.

²⁸ See Application, page 5.

²⁹ *Id.*

³⁰ See Section 3.1 of the License.

³¹ See Section 9.2 of the License. "Law" refers to Law 24,076 establishing the regulatory framework for the privatization of the natural gas industry; the Regulatory Decree is the Decree No 245 which grants TGS the License and enters the License into law; and the Basic Standards are the provisions of the License itself.

³² Article 19 of the Emergency Law.

The theory that certain contractual breaches may constitute expropriation has other bases in law. International arbitral tribunals have recognized that rights under contracts are property subject to expropriation.³³ Furthermore, in its definition of expropriation in the United States Code, Congress has explicitly included impairment by a government of a contract with a foreign investor.³⁴ The elements of the Code, which, although reflecting US law, can be seen as well as indicative of customary international law, are all met here: the enactment of the Emergency Law constituted a repudiation of GOA's contractual obligation under Section 4.5 of the License, the repudiation was not caused by the Investor's fault or misconduct, and the repudiation, by limiting the Investor's right to collect revenues from TGS' operations, materially and adversely affected the continued operation of the Project, and ultimately caused a write-off of the Investor's investment in TGS.

- (1) *We need not decide whether the repudiation or breach of the License by GOA was discriminatory.*

A state is responsible for a repudiation or breach of contract where the repudiation or breach is "discriminatory."³⁵ Although the Emergency Law was nondiscriminatory on its face inasmuch as it applied to Argentine as well as foreign holders of dollar-denominated obligations, its impact on specific groups of people must be further examined in order to determine whether it was discriminatory in substance.

Since the discriminatory nature of the act is just one of two conditions, either of which must be met in order to constitute an international law violation, and the other of which (as shown below) has been met, it is not necessary to decide this question for purposes of our determination.

- (2) *The contractual repudiation was motivated by noncommercial reasons, and compensatory damages were not paid, giving rise to state responsibility for contract repudiation under international law.*

International law prohibits "a repudiation or breach by the state of a contract with a national of another state (a) where the repudiation or breach is ... (ii) motivated by noncommercial considerations, and compensatory damages are not paid." OPIC finds that the GOA's repudiation of the License was motivated by noncommercial considerations.

All relevant events leading up to the GOA's repudiation of the License; *i.e.*, the initial suspension of the PPI-indexed increase, the enactment of the ENARGAS decree, the challenge to the indexation by the Ombudsman, and finally the enactment of the Emergency Law were all

³³ *Libyan Am. Oil Co. v. Libyan Arab Republic*, 20 I.L.M. 1, 60 (I.C.J. 1977); *German Interests in Polish Upper Silesia*, 1926 P.C.I.J., Ser. A, No. 7 at 14045 (Judgment of May 25, 1926); *Norwegian Shipowner's Case*, 1 R. Int'l Arb. Awards 307 (1922); *see also* O'Connell, 2 *International Law* 763-68 (2d. ed. 1970).

³⁴ 22 U.S.C. § 2198(b) (where expropriation includes "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project.")

³⁵ Restatement (Third) of Foreign Relations Law of the United States §712 (1987), Part (2)(a)(i).

prompted by the GOA's need, in its sovereign capacity, to deal with Argentina's currency crisis, and not by commercial considerations. Additionally, the contractual obligation under the License to permit TGS to charge tariffs was created as a result of the GOA's jurisdiction over public utilities and was therefore undertaken in the GOA's capacity as a sovereign government, and not as a party with a commercial interest in the License. In fact, the License was granted to TGS by GOA in its capacity as regulator of the natural gas industry.

The prevailing view is that "international law is not implicated if a state repudiates or breaches a commercial contract with a foreign national for commercial reasons as a private contractor might, e.g. due to inability of the state to pay or otherwise perform, or because performance has become uneconomical ..."³⁶ Because there is a fine line between commercial and policy motives where a governmental contract is concerned, this provision should be examined in light of the actual motive of the GOA in enacting the Emergency Law. In this case, the Emergency Law was purportedly enacted for public policy reasons, specifically to curb the risk of inflation and devaluation and to control the flight of foreign exchange from Argentina. The Emergency Law itself begins with GOA declaring a state of emergency and sets as its goal "to rearrange the financial, banking and exchange market system" and "to relaunch the economy."³⁷ If the GOA acted "essentially on governmental motives",³⁸ *i.e.*, the public policy motive of curbing the risk of inflation and easing the effect of the state's severe devaluation, it cannot have been acting in its commercial capacity. The same consideration that might relieve GOA of state responsibility for a "taking" for public policy purposes gives rise to state responsibility for abrogation or repudiation of contract.

In a similar expropriation claim presented to OPIC, the Government of Jamaica terminated a foreign enterprise's marketing and purchasing functions designated under a specific contract.³⁹ In that case, OPIC held that the government's actions amounted to a breach of its obligations to provide support to the foreign enterprise to maintain pricing margins. Although, in that case, the government did not specifically undertake to allow the foreign enterprise to charge tariffs under a certain regime, OPIC found that the government had undertaken a general obligation to provide protection through maintaining the foreign enterprise's pricing margins – whether through tariffs or otherwise.⁴⁰ OPIC further found that the government actions were taken for reasons related to the country's trade liberalization policies and not for commercial considerations.⁴¹ The government's failure to maintain this protection and failure to pay adequate compensation for such action were deemed expropriatory acts for which compensation under the OPIC insurance contract was payable.

In this case, the GOA had specific contractual obligations that were abrogated due to its enactment of the Emergency Law. As in *Joseph Companies*, the GOA, contrary to its undertakings, took actions that undercut entirely its obligations under the License of allowing the tariffs to be charged according to a PPI price adjustment and calculated in US dollars. While the

³⁶ Restatement (Third) of Foreign Relations Law of the United States §712 (1987), Note 8.

³⁷ Article 1 of the Emergency Law.

³⁸ *Id.*

³⁹ See Expropriation Claim of Joseph Companies Incorporated of Minneapolis. Jamaica Contract of Insurance No. E197.

⁴⁰ See *Id.* at 9.

⁴¹ See *Id.*

contractual obligation could not prevent the government from carrying out sovereign acts, it does require that the government answer in damages for its conduct. Therefore, OPIC has determined that the GOA had a continuing contractual obligation under the License to maintain a protective environment for TGS to collect revenues through the tariffs calculated in accordance with Section IX of the License or through some other mechanism which would allow TGS to maintain its revenues at equivalent levels. Failure to maintain such protection constituted a repudiation of contract and gave rise to a right to compensation. The GOA's decision not to compensate TGS thereby constitutes a violation of international law.

- (3) Although the Investor has been given an adequate forum to determine his claim of repudiation or breach, the ongoing ICSID arbitration, Ponderosa has not to date been compensated for any repudiation or breach determined to have occurred.

In addition, a state may be held responsible for repudiation of a contract "where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred." This provision describes a claim for "denial of justice" if the state denies the alien an effective domestic forum to resolve the dispute and has not agreed to any other forum.⁴² In this case, GOA has agreed to resolve the dispute under an arbitration with ICSID, which is currently ongoing and is scheduled to be heard late in 2005. It should be noted, however, that GOA has made consistent challenges to the Investor's right to arbitrate under ICSID, including a jurisdictional challenge which was decided against GOA⁴³, requests for information on inter-shareholder settlements, numerous requests for extensions, and public statements about defects in the ICSID process. However, since OPIC has agreed to make a determination on the merits while the ICSID arbitration is pending, and since no compensation has been made to date, OPIC finds that GOA has, up to the date hereof, violated the principle outlined in the second part of this clause; since Ponderosa has not been "compensated for any repudiation or breach determined to have occurred."

Of course, if the ICSID arbitral panel rules in favor of Ponderosa, and GOA does honor its obligation to pay under that arbitration, then the violation of international law will have been remedied. Under these circumstances, however, OPIC would receive the benefit of the arbitral award to the extent it has paid out on the Claim hereunder.

(D) Summary.

OPIC finds that there has been a violation of international law by GOA. Specifically, the enactment of the Emergency Law repudiated a contractual obligation by GOA to allow TGS to charge a tariff calculated in dollars and adjusted according to the PPI index. The failure to provide adequate compensation for such repudiation constitutes a violation of international law.

3. The acts are material breaches of local law.

⁴² Restatement (Third) of Foreign Relations Law of the United States §712 (1987), cmt. h.

⁴³ See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Decision on Jurisdiction of August 2, 2004.

Ponderosa further argues that the enactment of the Emergency Law violates Argentine law. Since the tariff provisions in the License refer to law 24,076, the law deregulating the gas industry and to the ENARGAS regulations, both of which explicitly provide for the PPI adjustment and the dollar-calculated tariffs, Ponderosa argues that an abrogation of these provisions is a material breach of Argentine Law.⁴⁴ Ponderosa further argues that a fundamental principle of Argentine administrative law provides that “the government cannot unilaterally change or terminate a public contract without duly compensating the other party for losses generated by such changes or termination.”⁴⁵

The Emergency Law has thus far sustained heavy attack in the Argentine courts. The US Embassy in Buenos Aires has informed OPIC of a series of claims alleging the unconstitutionality of the provisions of the Emergency Law that converted accounts originally denominated in US dollars into peso accounts. Thus far, lower Argentine courts have consistently held that it was unconstitutional for the GOA to convert these accounts and that the conversion scheme constituted an impermissible use of state power. The GOA’s authority to implement the Emergency Law for this purpose has been challenged before the Argentinean Supreme Court. However, this challenge is entirely separate from the aspect of the law concerning public contracts. Such a challenge has not yet been made by the Investor, due to the fact that ICSID arbitration precludes the simultaneous pursuit of local remedies. Although there appears to be a strong case for the assertion that the Emergency Law may violate local law, given the fact that this case has not been tested, in addition to the fact that a separate basis for violations of international law has been found, we determine that such an investigation is not necessary in the instant case.

4. *The acts deprived the Investor of fundamental rights in the insured investment.*

A determination under Section 4.01(c) of the OPIC Contract raises the issue of whether Ponderosa was substantially deprived of fundamental rights in the Project.

As discussed in Part (2) above, not all of the investor’s rights with respect to the insured investment need be affected for an Investor to be fundamentally deprived of the benefits of its investment. In determining whether total expropriation has occurred, OPIC will examine the significance of the rights in question in the context of the overall investment.

Ponderosa, together with its fellow consortium members, retains full control of the assets of TGS, including the License. However, the revenue stream of TGS has been reduced so drastically as a result of the provisions of the Emergency Law that it resulted in the total write-off of the investment under the equity method of accounting. Ponderosa argues that “the abrogated provisions of the License were necessary to ensure that Ponderosa received a reasonable return on its investment.”⁴⁶ Without such provisions, Ponderosa argues, its investment in TGS is rendered worthless and therefore justified a total write-off. RNCO, after extensive financial analysis, concurred, stating:

⁴⁴ See Application at 9.

⁴⁵ Application at 10.

⁴⁶ Application at 13.

RNCO recalculated, evaluated and concurs with [the Investor]'s financial analysis that, at an exchange rate of 1.7, with no tariff relief, Enron's share of TGS' decrease in shareholders' equity exceeded \$ [REDACTED]. In addition, GAAP guidance supports Enron writing off its investment in TGS under the equity method of accounting.⁴⁷

In the context of an investment, the right to recover its economic value in accordance with the terms governing that investment is a fundamental right of the investor. In this case, the most important asset of TGS, the License, has been dramatically altered, depriving Ponderosa of its right to collect revenues via the tariffs.

For these reasons, OPIC has determined that Ponderosa has been deprived of fundamental rights in the insured investment.

5. The violations of law are not remedied and the expropriatory effect continues for six months.

To date, the GOA has not taken any action that would provide relief or compensation. Although it has filed an arbitration claim against GOA with ICSID, Ponderosa has not, since the enactment of the Emergency Law in January 2002, succeeded in obtaining any compensation from other sources. Therefore, OPIC finds that the alleged violations of law have not been remedied and the alleged expropriatory effect has continued for the requisite six-month period.

B. Section 4.03 Exclusions and 5.04 Limitations.

The duty to pay compensation by OPIC is subject to the limitations and exclusions in Section 4.03 and 5.04 of the OPIC Contract. None of the exclusions apply to this claim.

1. Provocation. No compensation is payable if "the preponderant cause is unreasonable action attributable to the Investor, including corrupt practices."⁴⁸

In this case, the cause of the Investor's loss is GOA's enactment of the Emergency Law. Although Ponderosa did agree to defer the PPI-indexed increase in 2000, thereby arguably allowing for the loss for this period, the action was reasonable under the circumstance, and the subsequent enactment of the Emergency Law cannot be attributed to this concession. According to Ponderosa, TGS has at all times complied with all of its obligations under the License, and continues to operate the pipeline despite the losses incurred due to the limitation on its revenue stream.⁴⁹ Furthermore, although Enron was allegedly involved in unorthodox accounting practices, these allegations are unrelated to the expropriation and to the Investor's loss in

⁴⁷ RNCO Memo, Section 18. The RNCO Memo goes on to state: "Enron has completely written off its \$ [REDACTED] investment in TGS ... even though its 35.5% share of TGS' shareholders' equity may have some market value and/or fair value. RNCO considers this appropriate under GAAP."

⁴⁸ Section 4.03(a) of the OPIC Contract.

⁴⁹ See Application at 14.

Argentina, and all of the financial records relating to this transaction have been fully reviewed by OPIC's accountant RNCO. Therefore, OPIC finds that the provocation exclusion does not apply.

2. *Government Action* No compensation is payable if "the action is taken by the foreign governing authority in its capacity or through its powers as a purchaser, supplier, creditor, shareholder, director or manager of the project company."⁵⁰

When the License was originally granted, GOA retained a 30% interest in TGS, but this interest was subsequently sold to TGS employees and the general public⁵¹; therefore, GOA is not a shareholder of the TGS. Furthermore, GOA entered into the License as a regulator and not as a purchaser or supplier of natural gas. GOA is not a purchaser, supplier, creditor, shareholder, director or manager of TGS.

We have already found that the repudiation was motivated by noncommercial reasons. While the original request by GOA to defer the PPI-indexed tariff was made in its capacity as a contracting party, the same cannot be said for the enactment of the Emergency Law. The Emergency Law was undertaken by the GOA acting in its sovereign capacity, as it was a legislative act. The Emergency Law was passed by the Senate and House of Representatives of Argentina, pursuant to the Argentine Constitution.⁵² Article 8 of the Emergency Law in particular notes that it relates solely to contracts "subject to public law."⁵³ Thus, since the law was passed for reasons related to the public interest and not in GOA's capacity as a contracting party, and was the underlying cause of, and the channel for, the GOA's repudiation of the License, OPIC finds that the government exclusion does not apply.

3. *Active Amount.* Compensation is limited to "the Active Amount on the date the expropriatory effect commences."⁵⁴

According to the executed Election of Political Risk Insurance Coverage for the period from October 22, 2001 through January 21, 2002, the Active Amount (as defined in the OPIC Contract) was \$50,000,000 on January 6, 2002, which is when the Emergency Law was enacted.⁵⁵ Since the enactment of the Emergency Law has been determined to be the expropriatory event, and the claim is for the Active Amount as of the date of such expropriatory event, a limitation of \$50,000,000 applies.

4. *Insolvency.* Compensation under the OPIC Contract is limited "if the liabilities of the foreign enterprise exceed its assets as of the date the expropriatory effect commences."⁵⁶

⁵⁰ Section 4.03(b) of the OPIC Contract.

⁵¹ See Application at 4.

⁵² See Article I of the Emergency Law: "The state of ... emergency is hereby declared pursuant to Article 76 of the Argentine Constitution."

⁵³ Article 8 of the Emergency Law.

⁵⁴ Section 5.04(a) of the OPIC Contract.

⁵⁵ See Exhibit 6 of the Application.

⁵⁶ Section 5.04(b) of the OPIC Contract.

According to TGS' audited financial statements presented with the Application, TGS had, as of December 31, 2001, a book value of \$ [REDACTED]⁵⁷, of which Ponderosa's share was 35%. Therefore, despite the fact that Ponderosa's decrease in equity exceeded its investment, TGS' assets exceeded its liabilities as of the date immediately preceding the Emergency Law, and this limitation does not apply.

5. *Self-Insurance. Compensation under the OPIC Contract is limited by "the maximum amount which could be received by the Investor from OPIC without breaching 9.01.3."*⁵⁸

Section 9.01.3 provides that "the Investor shall continue to bear the risk of loss of at least 10% of the book value of its interest in the foreign enterprise."

The Application asserts that "the book value of Ponderosa's 35% stake in TGS dropped from \$ [REDACTED] to nil."⁵⁹ As mentioned above, the true amount of the investment according to RNCO, and confirmed by the Investor, using the equity method of accounting, was \$ [REDACTED]. Nonetheless, this amount far exceeds the coverage election of \$50,000,000. While it is true that private market participation would decrease the Investor's risk of loss, that participation was later voided *ab initio* and thus, at the time of the expropriatory event, the Investor bore the entire risk of loss in excess of OPIC's first loss, approximately [REDACTED]% of its interest in TGS. Therefore, the Investor has satisfactorily complied with the requirements of this provision.

C. Procedural Issues.

There are no procedural issues that require discussion in connection with this claim determination.

D. Investor's Duties. *The Investor has complied with its duties under the OPIC Contract.*

1. *Ownership and Eligibility. Investor shall remain at all times the beneficial owner of the insured investment*⁶⁰.

Although Enron assigned its ownership interest to Ponderosa pursuant to the Assignment, OPIC consented to such Assignment and Ponderosa represented that it too satisfied all of the ownership and eligibility requirements set forth at Section 9.01.2 of the OPIC Contract.⁶¹ Therefore, OPIC has determined that the Investor has complied with the requirements of Section 9.01.2.

⁵⁷ See Exhibit 10 of the Application, page 2. The book value was obtained by adding the Shareholder's Equity under US GAAP for end year 2000 and the 2001 net income (for Argentine GAAP, since the US GAAP value included the effect of the Emergency Law), minus 2001 dividends paid.

⁵⁸ Section 5.04(c) of the OPIC Contract.

⁵⁹ Application at 2.

⁶⁰ See Section 9.01.2 of the OPIC Contract.

⁶¹ See Section 1(a) of the Assignment.

2. *Self-Insurance. The Investor shall continue to bear the risk of loss of at least 10% of its interest in the foreign enterprise⁶².*

As noted in B(5) above, the Investor has satisfactorily complied with the requirements of this provision.

3. *Assignment. No assignments of the OPIC Contract may be made without the prior written consent of OPIC⁶³.*

Pursuant to the Assignment, Enron transferred its interest in the OPIC Contract to Ponderosa in 1998 with OPIC's written consent. Therefore, this condition has been met.

4. *Accounting Records. The Investor shall maintain in the United States certain accounting records for the foreign enterprise necessary to compute and substantiate compensation.⁶⁴*

Enron utilized the equity method of accounting, which, according to the RNCO memo, is acceptable under US GAAP.⁶⁵ Although as noted above, OPIC has identified certain deficiencies in the accounting records and financial statements submitted by Ponderosa, OPIC finds that these deficiencies did not render the representations and allegations made in the OPIC Contract and the Application materially misleading. Specifically, and with RNCO's support, OPIC finds that (1) Enron's initial investment in TGS, both at execution of the OPIC Contract and at execution of the Amendment, was greater than that initially provided by Enron; (2) Enron and subsequently Ponderosa's total investment in TGS, using the equity method of accounting, was substantially less than what was represented in the Application; and (3) the total write-off of Ponderosa's investment was justified using the equity method of accounting. Ponderosa has provided extensive additional information as necessary for OPIC to compute and substantiate compensation.

5. *Reports and Access to Information. The Investor shall furnish OPIC with such information related to the Project as OPIC may reasonably request.⁶⁶*

Through numerous requests, correspondence, and a formal meeting at the Investor's headquarters in Houston in March 2004, OPIC and RNCO have received all the necessary information to make the determinations contained herein. OPIC therefore finds that the Investor has satisfactorily complied with the requirements of this provision.

6. *Compulsory Notice The Investor shall notify OPIC promptly of any acts or threats to act in a manner which may come within the scope of the*

⁶² See Section 9.01.3 of the OPIC Contract.

⁶³ See Section 9.01.4 of the OPIC Contract.

⁶⁴ See Section 9.01.6 of the OPIC Contract.

⁶⁵ See RNCO Memo, Section 1.

⁶⁶ See Section 9.01.7 of the OPIC Contract.

*expropriation coverage and shall keep OPIC informed as to all recent developments.*⁶⁷

The Investor has satisfactorily complied with the requirements of this provision.

*7. Preservation, Transfer and Continuing Cooperation. The Investor, in consultation with OPIC, shall take all reasonable measures to preserve property, to pursue available administrative and judicial remedies, and to negotiate in good faith with the GOA.*⁶⁸

Ponderosa is currently involved in arbitration with Argentina under the Bilateral Investment Treaty at ICSID.⁶⁹ On August 2, 2004, the Tribunal made a favorable decision on jurisdiction on this claim, and issued an Order for continuation of the procedure in order to hear the merits of the claim.⁷⁰ On February 25, 2005, the Tribunal denied GOA's request for an extension in filing its counter-memorial brief.⁷¹ The GOA counter-memorial was filed in May 2005.

By providing OPIC with regular updates on the ICSID process, and by certifying, pursuant to the Application, that it has and continues to pursue all available remedies, OPIC finds that this condition of the OPIC Contract has been met.

*8. Other Agreements. The Investor has not entered into any agreement with a foreign governing authority with respect to compensation for any acts within the scope of coverage.*⁷²

Although Ponderosa did agree to allow the GOA to defer the PPI-indexed increase in 2000, thereby arguably allowing for the loss for this period, the subsequent enactment of the Emergency Law cannot be attributed to this concession, since the Emergency Law was clearly enacted for reasons related to Argentina's devaluation and inflation crisis. Therefore, any agreement entered into with the GOA prior to the enactment of the Emergency Law would relate to acts outside of the scope of coverage with respect to the Claim. Therefore, the Investor has satisfactorily complied with the requirements of this provision.

9. Modification of Agreements. Neither the Investor nor [TGS] shall agree to modify or amend any material project agreement executed on or before the date of this contract, which modification or amendment would have a material

⁶⁷ See Section 9.01.8 of the OPIC Contract.

⁶⁸ See Section 9.01.9 of the OPIC Contract.

⁶⁹ See Response to Question 6 of April Letter.

⁷⁰ See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3) Decision on Jurisdiction of August 2, 2004.

⁷¹ See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3) Letter sent by Tribunal Secretary, February 25, 2005.

⁷² See Section 9.01.10 of the OPIC Contract.

*adverse effect on the risks borne by OPIC, without OPIC's prior written consent.*⁷⁴

When TGS agreed to allow the deferral of the PPI-indexed adjustments in 2000, such action, in substance, constituted a waiver of a provision of a project agreement, not a modification or amendment *per se*. Moreover, in order to fall under this exclusion of the OPIC Contract, any modification would have to have a material adverse effect on the risks borne by OPIC.⁷⁵

It would be difficult to argue that TGS' forbearance had a material adverse effect on the risks borne by OPIC. The only effect was to limit the revenues that TGS was allowed to receive. Such limitation, absent the Emergency Law, would not be sufficient to constitute an expropriatory event. Therefore, OPIC finds that the Investor has satisfactorily complied with the requirements of this provision.

10. *Disclosure.* The Investor has provided OPIC with all available documents and information relating to the project that would affect materially OPIC's interest under the contract⁷⁶.

The Investor has satisfactorily complied with the requirements of this provision.

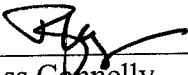
11. *Worker Rights.* The Investor has not taken any actions in violation of the worker rights requirements of the OPIC Contract.⁷⁷

The Investor has satisfactorily complied with the requirements of this provision.

V. CONCLUSION

For the foregoing reasons, OPIC concludes that the claim of the Investor is valid. The Investor is entitled to compensation in the amount of the insured investment, \$50,000,000.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By: 

Ross Connelly
Acting President and Chief Executive Officer

Date:
8-2-05

⁷⁴ See Section 9.01.11 of the OPIC Contract.

⁷⁵ OPIC notes that no consent was requested or given as to the deferment of the adjustment under the License.

⁷⁶ See Section 9.01.12 of the OPIC Contract.

⁷⁷ See Section 9.01.13 of the OPIC Contract.