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USAID Regulatory Reform and Energy Sector Restructuring Project

Romania – Legal Advice on Revisions to the Energy Law and Other Energy Sector Issues

1996 - 1998

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Prepared by
Pierce Atwood Attorneys

Bechtel International, Inc **22934-009-016**

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PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
ATTORNEYS AT LAW
ONE MONUMENT SQUARE PORTLAND MAINE 04101 1110
207/773-6411 ~ FAX 207/773-3419

MEMORANDUM

TO: Wayne Mikutowicz

FROM: John Gulliver

DATE: November 7, 1995

Wayne,

Per our call, attached please find the "punchlist" of edits for the Inception Report

Here are a few additional thoughts as we finalize the Inception Report and head into the next phase

1 Some of the commentary from the Romanian counterpart team is critical of the Inception Report, and many of the changes that some of the Romanian reviewers have suggested will not be made Would it be wise for you to spend time meeting with and talking to these parties (such as Ministry of Industry, Ministry of Finance, RENEL), to explain why certain changes were made and why certain changes were not made I am concerned that if this effort is not made, these various agencies will not understand why the revised Inception Report is not fully in accord with their expectations and will be more reluctant to cooperate and participate in the next phases of the project In other words, I think that you need to become a roving ambassador of sorts in order to keep the process on track and make sure that the Romanians do not have a sour taste in their mouths

2 Would it be helpful if the U S components of the team could have a meeting in early December to focus on what needs to be accomplished in the next phases for the Options Report, to identify what additional information needs to be obtained, to assign tasks among the team, and to set interim and final dates for production of drafts of the Option Study If properly planned in advance, I think such a meeting, for no more than a day, could be very beneficial for us all I recognize you are in San Francisco, but given Alan's location in Washington, Ellen's move to Washington, Diana's location in Atlanta and our location in Maine, does it make sense to have the meeting in, say, Bechtel's Washington offices? I leave this issue entirely in your discretion but think that some sort of planning session would help us in the next stage of the project

Let me know if you have any questions or comments regarding the enclosed Thanks for your various faxes

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PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
ATTORNEYS AT LAW
ONE MONUMENT SQUARE PORTLAND MAINE 04101 1110
207/773-6411 ~ FAX 207/773 3419

MEMORANDUM

TO W Mikutowicz, L Mihai

FROM: J Gulliver/C Connors

RE: Bechtel-Romania - Punchlist changes to draft Inception Report

DATE: November 7, 1995

Following up on our various conversations and the written comments received from RENEL and the various ministries, the items we agree should be changed in the draft Inception Report (going to legal issues) are as follows

- The list of documents at the end of the report should be altered as in Lucien's e-mail to Wayne and us We have double-checked references and attach a revised list of documents

- p 4, II A 1, 2d paragraph - change the second sentence to "As with RENEL projects, however, if a non-RENEL entity (IPP or self-generator) sought to build a new generation project, Cabinet Decision no 623 of 1993 on fuel use would prohibit "

  NOTE Lucien, you have suggested that we change all our references from governmental decisions to cabinet decisions We have done so throughout We note, however, that the translation of the MOJ's comments Wayne faxed to us refers to "governmental decision (GD) " See, e g , their first comment on 623/1993 Lucien, please advise Wayne if what we have done is not correct

- top of p 5 - change "a general study" to "an opportunity study",

- top of p 5 - add the following after the last sentence in the top carryover paragraph

  "Additionally, after the initial draft of this report, on October 25, 1995, Cabinet Decision no 592 of 1993, as modified by Cabinet Decision no 761 of September 26, 1995, sets forth

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provisions relating to approval of regulations regarding procedures to organize bids in the field of investments Under the regulatory scheme provided for under these Cabinet Decisions, bids are organized for investments totaling over 500 million lei, international bids may be organized for investments totaling over 12 billion lei "

NOTE Lucien, please review our summary of your comments

- p 5, II A 3, second sentence - change to "There are six Cabinet Decisions on pricing (45/1994, 206/1993, 179/1993, 418/1993, 380/1993, 776/1991) "

- p 5, II A 3, last sentence, last clause - change "and there are no substantive grounds provided in any law or decree to support " to "and there are no substantive grounds provided in any law or Cabinet Decision to support "

- p 5, II A 4, second sentence - change to "(See also Article 135(5) of the Constitution, which provides)"

- p 5, II A 4, second paragraph, first sentence - change to "The Cabinet Decision creating RENEL "

- p 6, second paragraph - delete "informal"

- p 6, third and fourth paragraphs - change the references to "government decision 846/1994" and "government decision 236/1994" to "Cabinet Decision 846/1994" and "Cabinet Decision 236/1994 "

- p 6, third paragraph, first sentence - NOTE - the MOJ doesn't like our parenthetical definition of S A s as "state-owned commercial operations," saying that "State-owned operations do not exist " They would like to call these "commercial companies," set up under Law 15/1990, with "partial" state capital and "engaged in the privatization process," as opposed to "commercial companies" set up under Law 31/1990 with private capital Lucien, what is the correct reference?

- p 6, fourth paragraph, first sentence - change reference to "ordinance 41/1995" to "Cabinet Ordinance no 41 of 1995 "

NOTE Lucien In light of your e-mail, we are confused as to the status of this law Please clarify with Wayne on this

- p 7, end of first paragraph - change the last sentence to "There are, however, certain significant legal impediments that affect private investment in the electric sector, as explained below "

- p 7, B 1, first sentence - change the term "real property" to "land"

- p 7, B 1 end of first paragraph, add the cite "See Decision no 831 of March 25, 1994 (Supreme Court of Justice, Civil Section), published in the legal review "Dreptul" no 2 of 1995 "

- p 7, bottom paragraph, third sentence - change to "Article 135 indicates that "waters with hydropower availabilities" are inalienable "

  NOTE Lucien Should we add or change anything else at the bottom of the page about what's patrimony and what's inalienable? The MOI says that several consititutional court decisions in analogous situations show that the whole patrimony of RENEL belongs to the private domain (MOI comments p 2) Is this correct (despite the RENEL counselor's comments to us which suggested that not all RENEL's assets might be considered alienable)?

- p 8, 2d paragraph - NOTE Lucien Is the 6 2% surcharge is still there or not? We think it is, but are not sure

- p 8, 2d paragraph - change cite of "(ordinance 70/1994)" to "Cabinet Ordinance no 70 of 1994) "

- p 8, B 2 - change this section to the following

  "Although concessions for state assets (including land) for limited terms (e g 20 years) are allowed under Article 135 of the Constitution, see also Law no 15 of 1990, there is no law specifically regulating how such concessions are awarded, and by whom, in the electric sector A general Cabinet Decision on concessions (no 1228 of 1990) is designed more for shops, and would be difficult to apply in the electrical context Specific concession laws or regulations, however, have been enacted in other contexts (e g , Cabinet Ordinance no 30 of 1995 regarding the Concessions for Roads, providing a 49 year term), and there is a specific concession law in the oil sector that may provide guidance "

- p 8, B 3 - NOTE the MOJ also mentions a "stamp tax" Lucien how significant is this is as an impediment to access? Is this the 10% fee we've already talked about in the report? Please clarify with Wayne

- p 10, first full paragraph, first bullet - after "Does not guarantee grid access by third party generators" add "(but does not expressly deny access, either),"

- p 10, third paragraph - change to "A recent order of the MOF (519/1995) has established the price to be paid "

- p 14, last paragraph - MOJ says that at least the translated version implies that RENEL, an R A is a joint stock company, which it is not Is this point clarified by deleting the word "other" from the last sentence? You might want to check with NERA, who wrote this section

ADDITIONAL NOTES

MOI says that the draft law analyzed is from March 1995 and outdated, so the analysis is "completely distorted" (MOI comments, p 1) If there is a more recent draft and if it is different in any material aspects from the March, 1995 draft, we'd be happy to review and comment if the newer draft is available in English

MOI asks that the "conflict of law created by the Plan Contract between EDF and the French Government until now" be mentioned (MOI comments p 4) - We think this may be a translation issue - "jurisdiction" translated as "law" We think this can be clarified by adding the following to the sentence they are commenting on (p 21 of the draft report, last full paragraph, first sentence)

> " which may also create jurisdictional conflict in the sense that the regulator and operator become merged into one entity "

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List of Documents (amended 11/07/95)

The Romanian Constitution of 1991

Laws

Law no 65 of 1995 on the Procedure of Reorganization and Judicial Liquidation
Law no 55 of 1995 on Acceleration of the Privatization Process
Law no 66 of 1993 on the Management Contract
Law no 105 of 1992 on International Private Law Relationships
Law no 66 of 1992 on Granting of Incentives to Attract Foreign Capital in the Field of Exploitation and Exploration of Oil and Gas Deposits
Law no 58 of 1991 on Privatization
Law no 35 of 1991 on Foreign Investment (as amended by Law no 71 of 1994)
Law no 33 of 1991 on Banking Activity
Law no 31 of 1991 for Approval of the National Bank Statute
Law no 18 of 1991 on Land
Law no 11 of 1991 on Unfair Competition
Law no 10 of 1991 on Public Finances
Law no 31 of 1990 on Trading Companies
Law no 29 of 1990 on Settlement of Administrative Disputes
Law no 26 of 1990 on Commercial Register
Law no 15 of 1990 on Reorganization of the State Units as Autonomous Regies and Trading Companies
Law no 8 of 1980 on Investments
Law no 8 of 1974 on Waters

Draft Environmental Law

Draft of the Law on Protection of Competition

Cabinet Ordinances

41 of 1995 on Ratification of the Guarantee Agreement between Romania and the International Bank for Reconstruction and Development, signed at Washington on August 29, 1995 (Project of Rehabilitation and Modernization of the Energy Sector of Romania)
- 13 of 1995 regarding Some Measures for Acceleration of the Privatization Process of the Autonomous Regies and of the Trading Companies with Majority State Owned Capital, as well as for Improving the Financial Discipline and the Payments in Economy
70 of 1994 on Profit Tax

29 of 1994 regarding the Establishment and Utilization of the Special Fund for the Development of the Energetic System
13 of 1994 regarding Moderation of the Inflation Through Extension of Application of the Supplementary Tax on the Fund of Salaries
15 of 1993 regarding Some Measures for Restructuring of the Autonomous Regies Activity (as amended by Cabinet Ordinance no 3 of 1994)

Cabinet Decisions

221 of 1995 regarding Organization and Operation of the National Agency for Mineral Resources
216 of 1995 for Approval of the Romanian Development Agency By-laws
212 of 1995 regarding Establishment of a Special Regime for Economic-Financial Supervising of Several Autonomous Regies and Trading Companies with Majority State Owned Capital
846 of 1994 regarding Establishment of Trading Companies Through Reorganization of Certain Divisions of RENEL
500 of 1994 regarding Reevaluation and Modification of the Assets
425 of 1994 regarding Approval of the Regulations for Supply and Use of Thermal Energy
263 of 1994 regarding Approval of the Methodological Regulations concerning the Selection of Managers and Appointments of Managers for Autonomous Regies
45 of 1994 to Modify and Supplement the Cabinet Decision no 206 of 1993 regarding Some Measures for Continuation of Prices and Tariffs Liberalization
623 of 1993 on Organization of the Activity of Approval of Fuel and Energy Use
592 of 1993 on Approval of the Regulations regarding the Procedures to Organize Bids in the Field of Investments, as amended by the Cabinet Decision no 761 of September 26, 1995 and republished on October 25, 1995
418 of 1993 regarding Some Measures for Establishment of the Prices, Tariffs and Royalties for Oil and Natural Gas Extracted and Sold in Romania
380 of 1993 to Supplement and Modify the Cabinet Decision no 299 of 1993 on the Tax on the Fund of Salaries
236 of 1993 regarding Approval of the Regulations for Supply and Use of Electrical Energy
206 of 1993 regarding Some Measures for Continuation of Liberalization of Prices
179 of 1993 regarding the Establishment of Prices and Tariffs for Some Produces and Services for Population, while Cutting-off the Subventions from the State Budget
322 of 1992 regarding Establishment of Trading Companies by Spinning-Off Certain Activities from RENEL

195 of 1992 to Modify and Supplement the Cabinet Decision no 1199 of 1990 regarding the Establishment of RENEL

776 of 1991 regarding the Prices and Tariffs Consequently to the New Situation of the Romanian Currency

1326 of 1990 to Supplement the Cabinet Decision no 1199 of 1990 regarding the Establishment of RENEL

1228 of 1990 for Approval of the Methodology of Concessions and Rental Contracts

1199 of 1990 regarding Establishment of RENEL

73 of 1990 regarding Certain Measures to Maintain the Stability of the Electricity System

Decrees

276 of 1973 on Taxation of the Income Gained in Romania by Foreign Persons

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PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
ATTORNEYS AT LAW
ONE MONUMENT SQUARE PORTLAND MAINE 04101 1110
207/773-6411 ~ FAX 207/773 3419

MEMORANDUM

TO. W Mikutowicz, D DePinto, E Moran, A Townsend, J Stern

FROM: J Gulliver, C Connors

RE· Bechtel - Romania Pierce, Atwood insert to Options Report

DATE: January 5, 1996

The materials set forth below follow up on our discussions regarding our draft insert to the Options Report Consistent with our conversations and the outline, the insert addresses (A) current legal barriers to the implementation of each of the four models discussed in the Report (status quo, single buyer, open access and competitive), and (B) general policy and legislative requirements for the power sector, with suggested modifications to the most recent draft Electricity Law Please note the questions we have included in footnotes for the team to ponder These questions have occurred to us as we have tried to describe the different legal impacts of the base case and different models proposed and are not intended to be criticisms but discussion points We look forward to discussing these and related issues at our meetings next week

Comments

This Report examines four sector models (1) the Status Quo (vertical integration), (2) Single Buyer, (3) Open Access, and (4) Competitive The legal issues relating to each model

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overlap significantly Very generally, the more competitive the model chosen, the more change needed with current laws (Note that references to such changes means changes from the current laws in effect, and not deviations from any draft Electricity Law The latest draft Electricity Law is discussed *infra*, Section B)

Whatever model is chosen, fundamental change should be made to the current legal framework to make regulatory control over the sector more open and defined and to assure achievement of the stated goals of the GOR for the electric power sector From a legal perspective, moreover, the additional changes required in creating any new model, including a fully competitive model, are not so complex or difficult that they should be considered a factor in determining which model to choose The selection of a model should be based on considerations of what is best for Romania and not on the existing or future legal framework necessary to implement the desired structure for the industry, laws should be a tool to implement the GOR's choice, not an impediment to that choice

The giant step in reforming the electrical sector will occur in creating the open, accessible, regularized administrative and legal procedures necessary under *any* of these models An independent regulatory body, engaged in principled, predictable and reviewable decision-making, pursuant to established substantive standards, is a goal under any model Likewise, a clear system of commercial laws permitting a stable investment climate is necessary to the extent private capital investment (equity or debit) is an element under any model

A Barriers to Each Model in Existing Law

1 The Status Quo

Even if Romania were to continue with its existing structure -- a vertically integrated monopoly -- some changes in the law would be helpful to standardize conduct, ensure predictable results, create transparent administrative and regulatory processes, and strengthen the investment climate

There are four core legal areas that should be addressed with respect to any model chosen

- enabling legislation - the electric law should clearly set forth the authority pursuant to which the structure for the sector operates and should define the general parameters of that structure,
- regulatory authority - the law should provide for an independent regulatory authority, which must follow clearly expressed substantive criteria and function in an open, predictable and reviewable manner,
- commercial and investment structure - if private investment is a goal, laws dealing with commercial and investment issues should facilitate such investment, and
- antimonopoly control - if competition is a goal, the law must set up a mechanism by which the government can deter and stop participants in the sector from obtaining monopoly control and engaging in anti-competitive behavior

Each of the four models discussed in the report has different needs relating to each of these four critical areas of the law, and some models need more legal development in certain of these fields than others

With respect to the Status Quo

- the existing practices are, to some extent, not clearly defined and authorized in the law This problem is described more fully in the Inception Report For example, the role of independent power producers ("IPPs") (if any) is not treated - does RENEL have to buy their power or not? The substantive criteria by which prices are set also do not appear clearly in the law How new capacity is obtained and licensed is unstated Current practices, involving rate-setting negotiations without public review, could be opened up by establishing standard criteria to be reviewed publicly, and culminating in a reasoned, written determination

- regulatory authority is not clearly distinguished - the roles of the Ministry of Industry and Trade, the Ministry of Finance, and other governmental participants are not expressly set forth in any law The degree of reviewability of any decisions they make is unclear due to the lack of substantive criteria in the law by which their actions should be gauged and by the lack of a requirement for reasoned, written orders

- those aspects of commercial and investment laws currently needing revision are more fully described in the Inception Report As just two examples, to encourage private investment, ownership and currency issues should be resolved Can Romanian corporations with majority foreign ownership own land? If not (as appears to be the case), then concession laws must be developed to permit concessioning of real property interests for power plant development purposes Can Romanian real property be mortgaged to a foreign investor, or does the bar on foreign ownership affect this right? If so, then laws providing other forms of security interests acceptable to investors must be promulgated Those electric assets which constitute alienable patrimony and those assets which constitute inalienable public property must be clarified Tax surcharges on foreign investment discourage investment and should be eliminated Currency transactions more in line with expectations of developed markets (e g , easy convertibility, full repatriation of profits, a currency futures market) should be facilitated to invite major, capital intensive foreign investments

- as long as RENEL remains a regulated monopoly, the issue of laws to protect competition does not arise in the electric sector

2 The Single Buyer model

Under the Single Buyer model, RENEL would continue as a state owned, vertically integrated company, it would retain its existing generation assets and own and operate the transmission network and distribution system

The basic changes from the current system would occur in (1) the creation of a Single Buyer governmental entity separate from RENEL and (2), eventually, increased participation of private parties in new generation RENEL, IPPs and self-generators would sell their generation to one, non-profit, government-owned entity, the Single Buyer RENEL would then purchase power from the Single Buyer and transmit and distribute that power [1] The Single Buyer could also sell directly to large industrial customers with a demand of 100 GWh/yr and higher

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[1] [TEAM As noted in the text, the Single Buyer model as proposed by NERA contemplates an independent governmental power purchasing entity, separate from RENEL, which would act as the sole buyer and seller of bulk power in Romania The model does not identify the legal status of this Single Buyer as an R A or other type of entity, nor does the model discuss the legal status of RENEL, and whether RENEL should remain an R A , become another form of national company, or privatize Are these distinctions important? What are the advantages of creating a separate Single Buyer to buy and sell, as opposed to RENEL itself doing it? Could clear price regulation and other laws address any potential problems with RENEL as the buyer (e g., ensuring no favoritism over RENEL generating assets)? Would creation of another agency just make things more complicated legally, and create more overlap and confusion over who does what in the government, the MOI, the MOF or this new Single Buyer entity? Do we end up regulating the regulator (a regulator agency regulating the Single Buyer)?

For example, the model contemplates a bidding process for new capacity, run by the Single Buyer, with regulatory review (see p 6) The Single Buyer is also in charge of long term planning Realistically, this bid process and long term planning are going to involve substantial governmental and regulatory review The model contemplates that the Single Buyer would seek regulatory approval from the regulator to issue a tender, having to show the regulator a need for new capacity The Single Buyer would then run the bid, pick a winner, and, if that price is

a **Enabling Legislation**

With respect to the first of the four previously identified areas of primary legal concern, enabling legislation, comprehensive laws to permit and facilitate the change from the status quo to the Single Buyer model would have to be enacted The Single Buyer's legal existence, and its powers and responsibilities, would need to be clearly spelled out in law and regulation The enabling legislation should also identify those decisions the Buyer makes that are reviewable and those that are not, and the substantive criteria and procedures for challenging reviewable

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(continued)
deemed competitive by the regulator, the bid would be approved But some input other than price is going to be needed - other factors will be deemed relevant as a matter of policy (e g , renewable resources over nonrenewable, domestic vs foreign fuels) The Single Buyer is also in charge of long term planning and is going to need policy oversight in that area Given that the Single Buyer is going to have to be thoroughly regulated, should the GOR create two governmental entities -- the Single Buyer and the regulator -- instead of simply subjecting RENEL to this thorough review?

Also, why does the model presume Single Buyer intervention instead of direct IPP-industrial sales with respect to sales to large industrials? Under this version of the model, large industrials need not buy through RENEL distribution, and "Transmission charges for eligible industrial customers who choose to buy directly from the Power Purchaser [Single Buyer] must be provided at the same rate as RENEL charges its own supply business" (p 5) If RENEL just wheels electricity to large industrial customers at a fixed charge, why does such power need to be bought and sold first through the Single Buyer, instead of directly between the IPP and the large industrial user? Does this Single Buyer intervention between the large industrial and IPP discourage IPP participation? This Single Buyer model in general includes no express incentives to IPPs That option is saved for the Open Access model Instead, this Single Buyer model contemplates that IPP participation will come naturally when the need for new capacity arises, subject to the bidding process Is this realistic, given the provisions for lifetime contracts, which could include extended life through refurbishments? (See *infra* note 3)]

decisions RENEL's identity, rights and responsibilities must be similarly set forth in law and regulation, along with the IPPs' ability to compete to provide new capacity [2]

In addition to establishing the new Single Buyer entity and restructuring the role of other entities such as RENEL and IPPs, new laws will have to address at least five areas of regulatory concern -- bidding, licensing, concessions, contracts and pricing

Bidding

Because the model contemplates that the Single Buyer will conduct a bidding process for new capacity, the enabling legislation must include laws describing and authorizing that process How flexible the tender can be, what non-price factors must be considered, how much weight should be give to each factor, and the review process for challenging a bid decision must be set forth in law or regulation

Licensing

To ensure technical and operating safety and uniform treatment of all participants, a licensing procedure for new plants (and alterations to existing plants) should be established in the generation area, as well as for transmission and distribution The new laws or regulations in this area should clearly provide for the substantive criteria to be applied in granting licenses (e g ,

[2] [TEAM The NERA model contemplates that RENEL would be transformed into a holding company, with a segregation into generation, transmission and distribution divisions We need to confirm with Lucian Mihai the legality of this structure under Romanian law]

what financial criteria must an applicant meet to obtain a license? Should there be a series of licenses, e g , for construction, operation and decommissioning or a single license?)

Concessions

Due to ownership limitations and other policy determinations, it appears that concessions will also be awarded, this area will also need to be addressed in new laws Laws and regulations should clarify who awards the concession, the general criteria for the award, and the terms governing concession agreements

Contracts

The legal parameters for the Single Buyer's buy and sell contracts will have to be established, along with modification or creation of other contracts For example, how is the price to be determined between generators and the Single Buyer? By negotiations? A formula rate? How are "economic lifetime" rates for generators to be established fairly, to protect RENEL's stranded investments but deliver lowest cost power to consumers? Whether and how these issues are to be regulated must be resolved under the new legal regime The RENEL-government contract required under the Constitution will have to address private party participation in generation when setting RENEL's performance targets If the Single Buyer is an R A , it will also need a contract with the government

Pricing

The new laws should provide that price regulation be made predictable, contain clear, substantive criteria and address back-up and standby charge issues for IPPs and self-generators

The regulatory decision should be made as to whether to retain uniformity of tariffs, or vary them based on actual cost of service While large industrial users will pay individual contract prices for generation, they could be charged a uniform transmission and distribution price, wherever located, if deemed appropriate as a matter of pricing policy

b Regulatory Framework

The new laws should also provide for a transparent and predictable procedure to seek regulatory action and review of that action (e g , a hearing process for licensing, subject to judicial review) These laws should clearly define which governmental entity is authorized to act on which issue

Likewise, the delineation of responsibilities among the Single Buyer, the MOF, the MOI and any other regulator must be made clear and distinct For instance, regulation should specify which entity, if any, can decide whether a bid should be limited by fuel source or other non-price factor As noted, subject matters of regulation requiring development or change include bidding, licensing, concessions, power purchase agreements and pricing The role of each governmental entity with respect to each of these areas should be spelled out

Not only must each of these substantive areas of regulatory concern be addressed separately, their interrelationship must also be addressed For example, pricing regulation, the bid process, licensing, the granting of concessions and contracting are all related Presumably, the regulatory system should be coordinated such that the party who wins the concession rights for generation also obtains the requisite licenses and enters into an enforceable sales contract

consistent with its winning bid Thus, prices paid to generators should incorporate winning bid prices for new capacity and enable IPPs and self-generators to enter into long-term contracts to sell their power, it is imperative that private party participants in the electric sector be given the opportunity to earn a sufficient return over the life of their investment if such participation is to take place At the same time, however, least cost principles should prevail, allowing competition to keep the price of new capacity down The price at which the Single Buyer sells all power to RENEL must then be regulated to incorporate these costs The regulatory regime must clearly articulate the price (and the basis for that price) at which the Single Buyer (now a single seller) can resell the electricity it purchases [3]

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[3] [TEAM As proposed by NERA, under the Single Buyer model, "existing" generation plants would hold "economic lifetime" contracts with the Single Buyer This lifetime could include extensions given refurbishment Only at the end of a contract, would the amount of capacity covered by that contract be open for bid (See p 4 12/19 draft) The plant that previously had the contract could bid to sell its power, but would no longer be guaranteed the contract price Given this "lifetime contract" method of addressing the stranded investment issue, all existing RENEL capacity would be tied up in long-term contracts, so that any IPP or self-generator participation is going to be limited to new capacity NERA concludes that "competitive procurement processes" on the part of the Single Buyer "would probably be enough to ensure that a competitive generation sector came into being over time " *Id* How will this happen, if we start with the Single Buyer (government), locked into long-term contracts for existing generation with RENEL (government), and the price in these long-term contracts can include life extension costs? There isn't any specific encouragement of self-generation or IPPs under this model Will a bidding process for new capacity and the IPP's right to sell to the Single Buyer, who, in turn can sell to RENEL distribution or large industrial users, be sufficient to create a viable market for IPPs? Similarly, the NERA draft says "Competition to supply large users (over 100 GWH/year) would be allowed," but how is there competition to sell this large industrial power if the Single Buyer is locked into long-term contracts with existing generation plants?]

c Commercial and Investment Issues

Under the third area of legal review, laws to encourage private investment, the law should address the transferability and mortgage capability (and/or other security devices) relating to licenses, concessions and contracts, in addition to the various commercial issues discussed with respect to the Status Quo model and in the Inception Report Inability to mortgage, create security interests in or otherwise involuntarily transfer rights could discourage private investment Property ownership issues should be clarified, investment and currency laws should be modified to facilitate investment, and, as discussed in the Inception Report, judicial access should made easier If there is to be private participation, private parties will demand the right to judicial review Excessive charges for using the judicial system, and other legal impediments, could also dampen investment These constraints should be eliminated

d Antitrust

Finally, with respect to the fourth core legal area, antitrust laws, participants will need assurances that these elements of the Single Buyer model which depend on market forces can operate in a truly competitive market not dominated by one or a few players Thus, if the generation contracts with the Single Buyer are to be governed by market principles rather than by regulation, laws will be required to assure that no seller (nor the Single Buyer) can manipulate this process improperly Given the liberal participation RENEL is allowed in IPPs (49% ownership), and the limited encouragement of IPPs in the sector generally, the antimonopoly

thrust under this first model should focus in part on limiting RENEL's ability to control the market [4]

2 The Open-Access model

This model contemplates no Single Buyer Instead, direct sales would be permitted between large industrial customers and IPPs, with RENEL obligated to wheel the power at a regulated transmission price The model could also contain positive encouragement of IPP sales by forcing RENEL to buy a certain amount of its power from IPPs and/or self-generators [5]

From a legal perspective, the changes needed for the Single Buyer model would also be needed for the Open Access model, except that the law need not deal with the creation and delineation of responsibilities of the Single Buyer Instead, enabling laws permitting direct sales by non-RENEL entities would be required Price regulation would focus on RENEL's

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[4] [TEAM NERA states, "Large users may ask the Power Purchaser [Single Buyer] to initiate discussions on its behalf with foreign or domestic producers " (p 6) This sounds informal and non-binding -- how mandatory should this process be? Similarly, while IPPs have no right to sell directly to endusers, NERA states (p 6) that large industrial customers "may ask" the Single Buyer "to initiate discussions with specific power producers, both in Romania and in neighboring countries (i e , customers can speak directly with IPPs but need the [Single Buyer] to take ownership of the deal " Again, how formalized should the process be in law/regulation?]

[5] [TEAM As contemplated by NERA, this model does have incentives for encouraging IPPs, requiring RENEL to acquire 100% of any new capacity needed for supply to the distribution sector from IPPs, until at least 15% of the distribution company's needs are supplied by independent generators There would then be bidding for new capacity after the 15% level is reached Does this term effectively *limit* IPP participation to that 15% level?]

transmission charges and the problem of "cherry picking" by IPPs of the best large retail customers If too many industrial customers choose to contract directly with independent generators, RENEL could have a stranded investment problem

In sum, when reviewed against the back drop of the four principal areas of legal review, the Open Access model triggers the following legal requirements the enabling legislation will need to focus on provisions facilitating IPP participation and direct retail sales Key terms include RENEL obligations to buy and IPP ability to contract directly with large industrial users Regulatory authority will focus on scrutiny of RENEL purchases, meeting the 15% threshold, and contract and price regulation Since RENEL would use competitive bidding to acquire new capacity, the same need for clear regulation of the bidding process arises as with the Single Buyer model Similar licensing, concession and contracting issues arise, since the Open Access option depends on a sophisticated blend of bids, concessions, licenses and contracts, partly regulated and partly market dominated, as does the Single Buyer model The same bank and financing issues arise here as with the Single Buyer model, since private investment is critical to the model With respect to antitrust issues, laws will have to ensure separation between RENEL generation and distribution and guard against RENEL control over the IPP market In this respect, also, the Open Access model poses considerations similar to those triggered by the Single Buyer Option Because key elements of the Open Access model depend on market forces, antimonopoly laws must assure potential participants that a true, functioning market, unconstrained by parties who exercise market control, exists

3 The Competitive model

This model disaggregates RENEL, creates a power pool, and permits open access to the transmission system

The model would, therefore, from an enabling perspective, require laws for disaggregating RENEL, presumably over a period of time (It is contemplated that, if this model is selected, it will be phased in gradually) The laws necessary to effect this disaggregation would be multiple and complex, with numerous decisions to be made regarding how the disaggregation occurs (e g , timing, ownership, managerial issues) and any private participation in the initial or eventual ownership of the disaggregated pieces of RENEL The constitutional limitation on ownership of state assets or foreign ownership of real property could become an issue and would need to be addressed

With respect to regulatory authority concerns, because the Competitive model essentially replaces a non-competitive, government owned utility with multiple competing parties, the role of the regulator as referee over these parties becomes very important The clarity and predictability of laws and regulations defining the powers of the regulator are crucial to facilitate private participation, the regulator must also be viewed as independent, to give confidence to the private parties of the non-discriminatory playing field in the sector, and the regulator must be given sufficient power (subject to judicial review) to prevent and penalize any missteps in the competitive process

Not only would the regulatory authority need to oversee the disaggregation process, but thereafter it would have to regulate the power pool While the need for new capacity would be dealt with by market forces, the process for obtaining such capacity would also require review Some price regulation would still be necessary, particularly at the distribution level

With many new entities created by the disaggregations, multiple new contracts will have to be executed, including management contracts, service agreements, operating contracts, and buy-sell agreements Certain of these contracts will need regulatory oversight to assure that the contracts reflect the overall goals of the disaggregation process In the banking and financial area, facilitation of private investment would be important, leading to the same concerns as discussed in the earlier models

Finally, with increased competition comes the increased need for antitrust oversight Some regulator, not necessarily the same as the regulator overseeing utility issues, will need effective power to avoid non-competitive actions by participants acting either singly or in concert with others The law itself must also have sufficient force to give a regulator the power to avoid monopolies forming from the disaggregated elements of RENEL

* * * *

In short, each model will require fundamental changes in the electric laws to effect the structure and goals of that model While the Competitive model would require the most change in the law, each model has certain uniform and basic needs -- each requires laws which set forth

specific substantive, enforceable criteria, create predictable, transparent and reviewable procedures, and clearly delineate governmental and private party rights and responsibilities

B General policy and legislative requirements (including suggested modification of the Draft Electricity Law)

The latest draft of the Electricity Law makes substantial progress in focusing on the legal issues that must be resolved to create a modern electric sector which embraces least-cost principles and encourages market competition where feasible and private party participation

As set forth above, the crucial legal building blocks for any workable electric sector model are (1) clear enabling legislation, (2) laws relating to regulatory authority creating predictable and open procedures -- e g , rules requiring written, reviewable decisions explicating the agency's reasoning -- and clearly distinguishing between governmental and private party rights and responsibilities, (3) laws facilitating private investment, and (4) antimonopoly measures These laws should include understandable, substantive, enforceable criteria For example, the auction process for acquiring new capacity should expressly list what factors are examined in evaluating bids -- what weight is given to price, whether non-price factors are considered, and if so, how A similar listing of substantive criteria should be set forth for licenses and concessions, so an applicant knows exactly what it needs to do to obtain these privileges, and is secure in knowing that the courts can provide a meaningful review of the process The current draft Electricity Law deals successfully with many of these critical topics,

nonetheless, certain changes, and additions to the draft Law will need to be made to fulfill the requirements within these four areas of the law

1 **Apparent inconsistency**

As a threshold matter, the latest draft Law appears to incorporate an inconsistency between its articulated goals and substantive provisions

The draft Law recites that the purpose of the Law is to fill a currently existing legal void in the electrical sector as it restructures for a market economy (Introduction, p 1) The stated goal of the Law is to promote competition (*id*), along with maintaining the power supply, with open access to the grid (*id* ,pp 1-2, see also Art 2(b))

Thus, the general goal of the draft Law is to facilitate private investment, encourage competition, at least at the generation level, allow open access, and modernize the electrical sector to meet market economy standards, while maintaining a stable, safe supply of electricity These goals are well-articulated and are absolutely on-target

Nonetheless, specific provisions of the draft may be inconsistent with these goals For instance, despite the goals of competition and open access, the draft provides for a system whereby one Power Autonomous Regie (presumably RENEL) generates, transmits and distributes That R A acts as the sole buyer of all power and is the only entity that can sell power to consumers (Art 13(3)) Hence, that entity constrains the market and enjoys monopoly status Furthermore, as so designed, this system fits none of the three models proposed in this study, and would have to be changed accordingly -- to allow for a separate buyer for the Single

Buyer model, to facilitate direct sales under the Open Access model, or to disaggregate RENEL under the Competitive model Art 1 additionally provides that electric lines and power stations "constitute state public propriety " If this section means that these assets are considered inalienable state property, private participation in any ownership of any transmission or distribution entities becomes problematic [6]

Nor does the draft Law create incentives for IPP and self-generator participation in generation and does not explicitly state that such participation is legal and allowed The draft does not impose on the RENEL-single buyer the duty to buy from an IPP Without such a requirement, the IPP will have no way of assuring a market for its output, and private participation in the sector is unlikely to develop

Yet the draft contemplates IPP participation Even though the draft creates the RENEL-single buyer model, it states that the regulator will negotiate and conclude concession agreements (Art 15(d) and Chapter VI) Art 29(1) refers to an auction "according to present law provisions and dispositions in force regarding concessions "[7] Art 31 also affirmatively

[6] Aside from establishing a RENEL-single buyer system discouraging competition, competition is also diminished by imposing a 100 mW minimum for all IPPs (Art 13(6)) While "local" producers over 25 mW are allowed (Art 13(7), Art 21 seems to indicate that such local producers serve isolated areas not connected to a distribution system, and the price consumers pay to the local producer must be the same price as that on the connected system, Art 21(3) The regulator, together with the MOF, is supposed to subsidize these local producers No detail is given, however, regarding this subsidization, the local producer has no assurance that it will recover adequate costs and reasonable profit

[7] We will need to explore with Lucian Mihai what this current law is

provides that concessions are granted through auction, on the basis of terms of reference drafted by the regulator as concession grantor Art 29(b) provides that the regulator annually lists what activities, goods, installations and land which may be concessioned The regulator grants the concessions, and Romanian or foreign legal persons can apparently also instigate a request for a concession (Art 29(b))

Presumably, the Law assumes that private investment in generation will occur through the auctioned concession process But the Law does not say what can be the subject of a concession -- new capacity only? refurbishments? life extensions? existing generation? For instance, Art 31(3) provides that concessions are for specified durations depending whether they are for "thermal distribution and transmission grids", "thermo-power and thermal plants," or "hydropower plants development " Can concessions exist for other components of the electric system? The Law either should specify the scope of concessions or should clearly grant to a regulatory body the ability to define that scope

Most importantly, the Law should confirm that these concession winners are assured of an opportunity to sell their power and make a profit With no substantive provisions requiring the RENEL-single buyer to take the power, and no right to sell to consumers directly, IPPs, whether through concessions or not, have no avenue for participating in the market, unless by fact of winning the concession they automatically gain a contract at the winning bid price But the draft Law is silent on this important detail

Art 33 states that "[t]he right to develop and operate, acquired through concession, constitute a right which cannot be mortgaged " Inability to mortgage, or create security interests in, concession rights could severely impair private parties' ability and interest to compete for such concessions and will be inconsistent with the goal of promoting a market economy

The draft Law must address these issues to encourage private investors to participate These changes or additions should be made to facilitate private investment under any model Since the Competitive model contemplates that the bidding process would be sponsored by distribution companies, additional modifications of Chapter VI of the draft Law would be needed to reflect this feature Once the GOR adopts its preferred industry model, the Electricity Law, and other laws as appropriate, should be thoroughly reviewed and revised to implement the selected model

2 Lack of clarity

The Introduction to the draft (p 2) states that it is meant to be flexible to respond to rapid evolution in the electricity sector Flexibility is a laudable characteristic The Law, however, should *guide* the evolution in the electricity sector Therefore, the Law must be sufficiently clear about the substantive criteria applied in making decisions, which governmental body has control over what issue, and how decision-making will proceed, to direct and facilitate that evolution Private investment cannot flourish unless or until the law is clear and predictable As written, the Law could be interpreted as granting open-ended powers to the regulator and the RENEL-single buyer, without affirmatively listing the substantive criteria these entities must follow The Law

also appears to give the regulator, the RENEL-single buyer and/or Parliament the ability to change existing rights In general, certain areas of the draft lack requisite clarity, specificity and substance

A few examples illustrate this problem

1 Art 15 states that the regulator, among other things, "drafts projects for regulation of the economic-financial mechanism of the economic agents which participate in the sector activities " (Art 15(a)) Perhaps some perceived flaws in this provision are a product of the translation, but the provision appears to be a vague delegation of limitless power to impose restrictions and duties on all participants in the electricity sector The powers should be limited and specified

2 Art 15(c) provides that the regulator "coordinates and controls the activity of investment in the power and thermal energy sector " How it does so is not explained, and needs to be The Law should list the standards of investment approval

3 Art 15(c) provides that the regulator negotiates and concludes concession agreements, but gives no substantive criteria for doing so Chapter VI, dedicated to the concession process, likewise does not provide any such criteria Art 36(d), moreover, permits the government to cancel a concession whenever the holder "doesn't observe any other clauses mentioned in the contract " Thus, any minor, technical infraction could potentially result in a wholesale loss of a concession, presenting risk and uncertainty and further discouraging private party willingness to participate The concession scheme should include these important details

4 Art 9 provides that "The sector ministry will monitor companies" which participate in various electricity activities, apparently, to, among other things, "allow the utilization of certain quantities form a certain form of primary or transformed energy" and "utilize, under economic conditions, certain quantities of inferior fuels from internal sources or valuate preestablish quantities of renewable and secondary energy sources " It appears from this language that the ministry (MOI?) will have some sort of input as to what kind of power is used (hydro, oil, gas etc), and will be able to order use of "inferior" fuels, like lignite The relationship of these powers to the National Energy Policy (discussed below) will have to be spelled out, how these powers affect the bidding process for new capacity must be established, and inability to force fuel-type changes after award of licenses and concessions and entry into contracts will have to be made clear

5 Art 16(6) provides that "operating authorizations" (licenses?) may be withdrawn "when the authorized installation is at risk or is the source of disturbances, following the failing to observe the operation, maintainance and repair technical and organizational conditions " This provision again appears to give too much open-ended power to the regulator to terminate existing rights and thus discourages private investment

6 Art 18(2) gives the RENEL-single buyer the power of drafting the dispatch statute, with the approval of the regulator Nowhere does this Law indicate that RENEL must dispatch the least cost power first, or otherwise limit RENEL's power not to dispatch IPP or self-generator power While Article 19(a) provides for a National Energy Dispatcher, which authorizes generation "on the basis of marginal least costs," that Dispatcher is expressly "subordinated" to the RENEL-single buyer Does this mean that RENEL appoints the Dispatcher? How does the Dispatcher gain any independence from RENEL to assure that competitive IPP power is dispatched?

7 The draft provides for a National Power and Thermal Energy Policy adopted by the Parliament (See text, Chapter II) Whichever model is chosen, laws and regulations must make clear how this policy is implemented in individual bidding, licensing and other decisions Art 8 provides that the Policy is drafted at least every 5 years, but can be changed at any time In order to assure investors, the draft should clarify that such changes cannot affect existing rights

8 Art 27 refers to criteria to be established by the regulator for operating authorization, but provides no substance or guidance to be followed by the regulator in imposing these criteria Do the criteria incorporate bid terms? Are they tied to the National Plan? Do they follow least cost principles?

9 Art 45 is not clear as to whether the price paid for power should include profit The opportunity to earn a reasonable rate of return on capital deployed is essential for private participation

3 Lack of an independent regulator

The draft also contemplates a regulator within an existing ministry The Competitive model provides for an independent regulator If the Competitive model is chosen, the draft Law

should be modified to allow for such an independent regulatory body Whichever model is chosen, an independent regulator would be preferable

Art 45 provides that tariffs are promulgated by the MOF, based on the regulator's proposal The relationship between tariffs and long-term contract prices must be clearly defined for any private participation under any model Art 49, for example, states that the regulator is obligated to revise tariffs any time necessary and propose them to the MOF However, new tariffs cannot affect the price paid for capacity under existing long-term contracts, otherwise the private investor will have no incentive to invest

Art 46 provides that proposals are made to the Responsible Authority as to "prices, tariffs and taxes, performance standards, and other conditions for power and thermal energy supply " The MOF then issues pricing decisions based on recommendations of the Responsible Authority The draft does not state who appoints the Responsible Authority nor does it define the result if the MOF disagrees with the Responsible Authority's evaluation The draft should address these points and also should provide that the Responsible Authority must articulate the reasoning for its decisions in writing, that its evaluation process is open to the public and that its decisions are reviewable in court

* * * *

These comments and suggestions in no way detract from the substantial achievements of the current draft - the Law clearly states its purposes and goals and frames in many of the essential points required to achieve the stated objectives Given the complexity both of the

electric sector and of the myriad intersections of regulatory and market issues, it is understandable that the draft Law will benefit from further analysis, specificity, and redrafting, as the GOR debates and ultimately selects its preferred structure for this crucial sector of the economy

MEMORANDUM

TO. W Mikutowicz, P Hindley cc J Stearns, A Townsend, D, DePinto, E Moran

FROM CRConnors

DATE February 23, 1996

RE Bechtel-Romania - revisions to Section V of Options Report

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The following sets forth John and my modifications of Section V to integrate it with the rest of the Options report We have incorporated suggestions from you, Wayne and Jon Stearns, including responses to the changes Wayne told us about in the latest draft Electricity Law

There are two attachments Attachment #1 summarizes your previous recommendations on modifications or expansions, and our response as to how each recommendationhas been addressed Attachment #2 is a redlined revised version of Section V

We understand the time constraints you are under in putting together a final, translated version of the Report Hopefully Lucien can review this draft rapidly and give us any further information we need on concessions, if necessary In my telephone conversation with Wayne today, Wayne indicated that he would try to contact Lucien directly when he returns to Romania

ATTACHMENT #1

Wayne's comments and our responses

1 We need to discuss heat

We have included discussion of that issue at Section V I 5

2 We need to relate comments regarding enabling legislation, concessions and other legal points to other countries - show how other existing models address these issues

We have included discussion of that issue For example, note the discussion of Hungary and the United States in Section V I 5

3 We need to address contract and concession law in more detail - how developed is contract law in Romania? Is a special concession law needed?

We have included some discussion, but, as Attachment #2 indicates, are contacting Lucien to develop these points

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ATTACHMENT #2
Revised Section V to the Options Report, redlined (as of 2/23/96)

Section V

Policy and Legislative Requirements

Section III examines four sector options (1) a vertically integrated monopoly, (2) single buyer, (3) open access, and (4) competitive market The legal issues relating to each option overlap significantly Generally, the more competitive the option chosen, the more change that will be needed ~~with~~ to current ~~laws~~ law (Note that references to such changes means changes from ~~the current~~ laws currently in effect, and not deviations from any draft Electricity Law The latest draft Electricity Law, dated **[Wayne insert]**, is discussed in Section V 2)

Whichever option is chosen, fundamental changes should be made to the current legal framework to make regulatory control over the sector more open and defined and to assure achievement of the stated goals of the GOR for the electric power sector From a legal perspective, moreover, the additional changes required in creating any new option, including a fully competitive one, are not so complex or difficult that they should be considered a factor in determining which option to choose The selection of an option should be based on considerations of what is best for Romania, not on the existing or future legal framework necessary to implement the desired structure for the industry, laws should be a tool to implement the GOR's choice, not an impediment to that choice

The giant step in reforming the electrical sector will occur in creating the open, accessible, regularized administrative and legal procedures necessary under any of these options An independent or semi-independent regulatory body engaged in principled, predictable and reviewable decision making, pursuant to established substantive standards, is a goal under any option Likewise, a clear system of commercial laws permitting a stable investment climate is necessary to the extent private capital investment (equity or debit) is an element under any option

V 1 BARRIERS TO EACH OPTION IN EXISTING LAW

V.1 1 The Vertically Integrated Monopoly Option

Even if Romania were to continue with its existing structure - a vertically integrated monopoly - some changes in the law would be helpful to standardize conduct, ensure predictable results, create transparent administrative and regulatory processes, and strengthen the investment climate

There are four core legal areas that should be addressed with respect to any option chosen

- ▪ Enabling Legislation The electric law should clearly set forth the authority pursuant to which the structure for the sector operates and should define the general parameters of that structure

- ▪ Regulatory Authority The law should provide for an independent regulatory authority, which must follow clearly expressed substantive criteria and function in an open, predictable and reviewable manner

- ▪ Commercial and Investment Structure ~~Private~~ Since private investment is a goal ~~,~~ of the Government of Romania, laws dealing with commercial and investment issues should facilitate such investment

- ▪ Antimonopoly Control If competition is a goal, the law must set up a mechanism by which the government can deter and stop participants in the sector from obtaining monopoly control and engaging in anti-competitive behavior

Each of the four options discussed in this report has different needs relating to each of these four critical areas of the law, and some options need more legal development in certain of these ~~fields than others~~ areas than others The general legal goals within each option, however, are the same clarity, transparency, predictability and reviewability The ultimate objective reflected in each of these goals is also the same equality If private parties are to participate in the Romanian electricity sector, whether as independent power producers or investors, they need to be confident that they are being treated in a non-discriminatory manner The primary legislation under which rules are made must be clear and predictable, as should the rules themselves Standardization should be achieved to the greatest extent possible Primary legislation should require these qualities in the implementing regulation

~~With~~ When legislation and rules are clear and predictable, and when decisions are reviewable in court under pre-existing standards, potential participants in the electricity sector are given the security that they have as good an opportunity to compete in the sector as any other similarly situated interested party Providing such confidence and security, in turn, increases the potential pool of participants, which should not only increase the availability of private participation quantitatively, but should also qualitatively increase the commercial chances of success of such participation

Thus, for example, decisions regarding licensing or concessions need to be standardized to the greatest extent possible Instead of each application being individually treated, and awards given after discretionary Parliamentary review, for example, any award process should contain pre-existing standards for obtaining a license or concession, which can then be applied in a non-discriminatory manner as to each application, and be further subject to judicial review

With specific respect to the vertically integrated monopoly

- ▪ The existing practices are, to some extent, not clearly defined and authorized in the law This problem is described more fully in the Inception Report For example, the role of independent power producers (IPPs), if any, is not treated Does RENEL have to buy their power or not? The substantive criteria by which prices are set also do not appear clearly in the law How new capacity is obtained and licensed is unstated Current practices involving rate-setting negotiations without public review could be opened up by establishing standard criteria to be reviewed publicly, and culminating in a reasoned, written determination-

- ▪ Regulatory authority is not clearly distinguished The roles of the MOI, the MOF, and other governmental participants are not expressly set forth in any law The degree of reviewability of any decisions they make is unclear due to the lack of substantive criteria in the law by which their actions should be gauged and by the lack of a requirement for reasoned, written orders

- ▪ Those aspects of commercial and investment laws currently needing revision are more fully described in the Inception Report As just two examples, to encourage private investment, ownership and currency issues should be resolved Can Romanian corporations with majority foreign ownership own land? If not (as appears to be the case), then concession laws must be developed to permit concessioning of real property interests for power plant development purposes Can Romanian real property be mortgaged to a foreign investor, or does the bar on foreign ownership affect this right? If so, then laws providing other forms of security interests acceptable to investors must be promulgated Those electric assets which constitute alienable patrimony and those assets which constitute inalienable public property must be clarified Tax surcharges on foreign investment discourage investment and should be eliminated Currency transactions more in line with expectations of developed markets (e g , easy convertibility, full repatriation of profits, a currency futures market) should be facilitated to invite major, capital intensive foreign investments

- ▪ As long as RENEL remains a regulated monopoly, the issue of laws to protect competition does not arise in the electric sector

V 1 2 The Single Buyer Option

Under the single buyer option, RENEL would continue as a state-owned, vertically integrated company, it would retain its existing generation assets and own and operate the transmission network and distribution system

The basic changes from the current system would occur in (1) the creation of a single buyer governmental entity separate from RENEL and (2), eventually, increased participation of private parties in new generation RENEL, IPPs and self-generators would sell their generation to one, nonprofit, government-owned entity, the single buyer RENEL would then purchase power from

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the single buyer and transmit and distribute that power The single buyer could also sell directly to large industrial customers with a demand of 100 GWh/yr and higher

V 1 2.1 Enabling Legislation

With respect to the first of the four previously identified areas of primary legal concern, enabling legislation, comprehensive laws to permit and facilitate the change from the vertically integrated monopoly to the single buyer option would have to be enacted The single buyer's legal existence, and its powers and responsibilities, would need to be clearly spelled out in law and regulation The enabling legislation should also identify those decisions the single buyer makes that are reviewable and those that are not, and the substantive criteria and procedures for challenging reviewable decisions RENEL's identity, rights and responsibilities must be similarly set forth in law and regulation, along with the IPPs' ability to compete to provide new capacity

In addition to establishing the new single buyer entity and restructuring the role of other entities such as RENEL and IPPs, new laws will have to address at least five interrelated areas of regulatory concern -- bidding, licensing, concessions, contracts and pricing

Bidding

Because ~~the~~ this option contemplates that the single buyer will conduct a bidding process for new capacity, the enabling legislation must include laws describing and authorizing that process How flexible the tender can be, what non-price factors must be considered, how much weight should be given to each factor, and the review process for challenging a bid decision must be set forth in law or regulation

Licensing

To ensure technical and operating safety and uniform treatment of all participants, a licensing procedure for new plants (and alterations to existing plants) should be established in the generation area as well as for transmission and distribution The new laws or regulations in this area should clearly provide for the substantive criteria to be applied in granting licenses (e g , what financial criteria must an applicant meet to obtain a license? Should there be a series of licenses - e g , for construction, operation, and decommissioning - or a single license?)

Concessions

Due to ownership limitations and other policy determinations, it appears that concessions will also be awarded, this area will need to be addressed in new laws Laws and regulations should clarify who awards the concession, the general criteria for the award, and the terms governing concession agreements

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Contracts

The legal parameters for the single buyer's buy-and-sell contracts will have to be established, along with modification or creation of other contracts For example, how is the price to be determined between generators and the single buyer? By negotiations? A formula rate? How are "economic lifetime" rates for generators to be established fairly to protect RENEL's stranded investments but to deliver the lowest cost power to consumers? Whether and how these issues are to be regulated must be resolved under the new legal regime ~~The~~ If RENEL remains an R A , the RENEL-government contract required under ~~the Constitution~~ Law 66/1993 will have to address private-party participation in generation when setting RENEL's performance targets If the single buyer is an R A , it will also need a contract with the government

Pricing

The new laws should provide that price regulation be made predictable, contain clear, substantive criteria, and address backup and standby charge issues for IPPs and self-generators The ~~regulatory~~ policy decision should be made as to whether to retain uniformity of tariffs, or vary them based on actual cost of service While large industrial users will pay individual contract prices for generation, they could be charged a uniform transmission and distribution price, wherever located, if deemed appropriate as a matter of pricing policy

V 1 2 2 Regulatory Framework

The new laws should also provide for a transparent and predictable procedure to seek regulatory action and review of that action (e g , a hearing process for licensing, subject to judicial review) These laws should clearly define which governmental entity is authorized to act on which issue

Likewise, the delineation of responsibilities among the single buyer, the MOF, the MOI and any other regulator must be made clear and distinct For instance, regulation should specify which entity, if any, can decide whether a bid should be limited by fuel source or other non-price factor As noted, subject matters of regulation requiring development or change include bidding, licensing, concessions, power purchase agreements, and pricing The role of each governmental entity with respect to each of these areas should be spelled out

The clarity of a jurisdiction's primary law as to which agency enjoys which powers is a major factor in contributing to the success of any restructuring effort For example, in Hungary, the role of a quasi-independent agency, the Hungarian Energy Office ("the HEO"), on bidding, licensing, contracting and pricing has been made clear The relationship between the HEO and the Ministry of Finance as to pricing is also clear, and the role of other ministries as to concessions is separately addressed The clarity of this role delineation has contributed to the success of the Hungarian privatization efforts to date, and predicts a greater chance of further

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success than that which can be expected from other jurisdictions in the region which have not been as clear in setting out the role of each of its governmental bodies

Thus, not ~~Not~~ only must each of these substantive areas of regulatory concern be addressed separately, but their interrelationship must also be addressed For example, pricing regulation, the bid process, licensing, the granting of concessions, and contracting are all related Presumably, the regulatory system should be coordinated such that the party who wins the concession rights for generation also obtains the requisite licenses and enters into an enforceable sales contract consistent with its winning bid Thus, prices paid to generators should incorporate winning bid prices for new capacity and should enable ~~IPP's~~ IPPs and self-generators to enter into long-term contracts to sell their power~~,~~ To achieve these objectives, it is imperative that private party participants in the electric sector be given the opportunity to earn a sufficient return over the life of their investment if such participation is to take place At the same time, however, least-cost principles should prevail, allowing competition to keep the price of new capacity down

The price at which the single buyer sells all power to RENEL must then be regulated to incorporate these costs

~~The~~ Whichever pricing approach is used (cost based, price cap, profit sharing, and so on, as discussed in Section IV above), the regulatory regime must clearly articulate the price (and the basis for that price) at which the single buyer (now a single seller) can resell the electricity it purchases

V. 1 2 3 Commercial and Investment Issues

Under the third area of legal review, laws to encourage private investment, the law should address the transferability and mortgage capability (and/or other security devices) relating to licenses, concessions, and contracts, in addition to the various commercial issues discussed with respect to the vertically integrated monopoly option and in the Inception Report Inability to mortgage, create security interests in, or otherwise involuntarily transfer rights could discourage private investment Property ownership issues should be clarified, investment and currency laws should be modified to facilitate investment, and, as discussed in the Inception Report, judicial access should be made easier If there is to be private participation, private parties will demand the right to judicial review Excessive charges for using the judicial system, and other legal impediments, could also dampen investment These constraints should be eliminated

V 1 2 4 Antitrust

~~Finally, with respect to the fourth core legal area, antitrust laws, participants~~ Strong, workable antitrust laws need to be adopted, with a governmental agency authorized to ensure the enforcement of such laws Participants in the electricity sector will need assurances that ~~these~~ the elements of the single buyer option which depend on market forces can operate in a truly competitive market not dominated by one or a few players Thus, if the generation contracts with

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the single buyer are to be governed by market principles rather than by regulation, laws will be required to assure that no seller (nor the single buyer) can manipulate this process improperly Given the liberal participation RENEL is allowed in IPPs~~(49 percent ownership)~~, and the limited encouragement of IPPs in the sector generally, the antimonopoly thrust under this first option should focus in part on limiting RENEL's ability to control the market

Experiences in other jurisdictions teach that market blockages can constrain competition when the numbers of participants in the market are too few In the Czech Republic, for example, the government had wanted to rely on the market, instead of price regulation at the wholesale level Because one company owns 80% of the generation along with the transmission system -- only distribution was effectively broken up among many entities -- that 80% owner dominates the market, resulting in difficulty for the distributors in negotiating market driven pricing in their contracts Even in England -- a country with a long history of trade regulation -- too few generators may have been created, and mergers among generators and distributors are currently pending for approval in front of the regulating antitrust board Hence, even when the initial restructuring breaks up monopolies into multiple separate entities, these entities can then re-group into market dominating forces absent vigorous antitrust control Antitrust regulation is, to some extent, symbiotic with price regulation -- either prices are directly regulated by governmental entities, or, if prices are to be unregulated and driven by market forces, antitrust regulation must then be enacted, implemented and enforced to ensure the market works properly

V 1 3 The Open Access Option

This option contemplates no single buyer Instead, direct sales would be permitted between large industrial customers and IPPs, with RENEL obligated to wheel the power at a regulated transmission price The option could also contain positive encouragement of IPP sales by forcing RENEL to buy a certain amount of its power from IPPs and/or self-generators

From a legal perspective, the changes needed for the single buyer option would also be needed for the open access option, except that the law need not deal with the creation and delineation of responsibilities of the single buyer Instead, enabling laws permitting direct sales by non-RENEL entities would be required Price regulation would focus on RENEL's transmission charges and the problem of "cherry picking" by IPPs of the best large retail customers If too many industrial customers choose to contract directly with independent generators, RENEL could have a stranded investment problem

~~In sum, when~~ When reviewed against the backdrop of the four principal areas of legal review, the open access option triggers the following legal requirements the enabling legislation will need to focus on provisions facilitating IPP participation and direct retail sales Key terms include RENEL obligations to buy and IPP ability to contract directly with large industrial users Regulatory authority will focus on scrutiny of RENEL purchases, meeting the ~~1 5~~ 15 percent threshold, and contract and price regulation Since RENEL would use competitive bidding to acquire new capacity, the same need for clear regulation of the bidding process arises as with the single buyer option Similar licensing, concession and contracting issues arise, since the open

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access option depends on a sophisticated blend of bids, concessions, licenses, and contracts, partly regulated and partly market dominated, as does the single buyer option The same bank and financing issues arise here as with the single buyer option, since private investment is critical to the option With respect to antitrust issues, laws will have to ensure separation between RENEL generation and distribution and guard against RENEL control over the IPP market In this respect, also, the open access option poses considerations similar to those triggered by the single buyer option Because key elements of the open access option depend on market forces, antimonopoly laws must assure potential participants that a true, functioning market, unconstrained by parties who exercise market control, exists

V 1 4 The Competitive Market Option

This option disaggregates RENEL, creates a power pool, and permits open access to the transmission system

The option would, therefore, from an enabling perspective, require laws for disaggregating RENEL, presumably over a period of time (It is contemplated that if this option is selected, it will be phased in gradually) The laws necessary to effect this disaggregation would be multiple and complex, with numerous decisions to be made regarding how the disaggregation occurs (e g , timing, ownership, managerial issues) and any private participation in the initial or eventual ownership of the disaggregated pieces of RENEL The constitutional limitation on ownership of state assets or foreign ownership of real property could become an issue and would need to be addressed

With respect to regulatory authority concerns, because the competitive option essentially replaces a noncompetitive, government-owned utility with multiple competing parties, the role of the regulator as referee over these parties becomes very important The clarity and predictability of laws and regulations defining the powers of the regulator are crucial to facilitate private participation, the regulator must also be viewed as independent to give confidence to the private parties of the nondiscriminatory playing field in the sector, and the regulator must be given sufficient power (subject to judicial review) to prevent and penalize any missteps in the competitive process

Not only would the regulatory authority need to oversee the disaggregation process, but thereafter it would have to regulate the power pool While the need for new capacity would be dealt with by market forces, the process for obtaining such capacity would also require review Some price regulation would still be necessary, particularly at the distribution level

With many new entities created by the disaggregations, multiple new contracts will have to be executed, including management contracts, service agreements, operating contracts, and buy-sell agreements Certain of these contracts will need regulatory oversight to assure that the contracts reflect the overall goals of the disaggregation process In the banking and financial area, facilitation of private investment would be important, leading to the same concerns as discussed in the earlier options

Finally, with increased competition comes the increased need for antitrust oversight Some regulator, not necessarily the same as the regulator overseeing utility issues, will need effective power to avoid noncompetitive actions by participants acting either singly or in concert with others As noted above, even in countries with the most established antitrust laws and principles, restructuring the electricity sector has led to potential antitrust difficulties Aside from creating a framework for vigorous antitrust oversight, the ~~The~~ law itself must also have sufficient force to give a regulator the power to avoid monopolies forming from the disaggregated elements of RENEL

V 1 5 Heat Supply

Section II 3 4 generally discusses the impact of the significant presence of combined heat and electricity plants on Romania's electricity sector, including the recommendation that some isolation of heat production take place to avoid cross-subsidizations, increase the accuracy of cost analyses, and facilitate competition

Just as the choice of one of the four models discussed in this Report triggers a legal response that can be guided and reviewed by the four areas of primary legal concern and the five areas of regulatory concern identified and discussed above, so also the particular direction chosen for treatment of heat supply will require a legal response addressing these areas of concern

More particularly, one issue that will need to be addressed is whether CHP plants or other forms of cogeneration resulting in steam production should receive separate or preferable treatment Many countries give preferences to generation that uses renewable fuel sources In Hungary, for example, the transmission and distribution companies cannot collectively refuse to accept power offered to be sold from licensed plants using such fuel sources, and the price these plants receive for such power is higher than the price for power from other, less desirable sources The United States in the past similarly gave preferences to "Qualified Facilities" ("Qfs") using environmentally superior fuel sources

The question arises whether preferences should be given to cogeneration involving heat supply In an effectively functioning competitive model, no such preferences should or need be given The efficiencies that make cogeneration more desirable, along with its environmentally superior qualities, would naturally make such plant the most price competitive in any bidding process, or other market driven method for acquiring new capacity Conversely, if excessive preference is given to a particular type of generation, without letting the market determine fuel choice and without regulating fuel diversity, the electrical sector could find itself dominated by choices that, over the long run are not the most efficient or desirable For example, in the United States, the past legal preference for Qfs led to the compelled execution of long-term contracts at prices that, in hindsight, turned out to be higher than the freely-acting market provided The result is a cost to utilities and, ultimately, the consumers, that is higher than it had to be

Therefore, whichever model is chosen, and whichever direction the GOR chooses for heat supply, laws and regulations should not give so much preference to heat supply sources as to

distort the market and the ability to achieve the most competitive prices for power over the long term

V 1 6 Summary

Each ~~In short, each~~ option will require fundamental changes in the electric laws to effect the structure and goals of that option While the competitive market option would require the most change in the law, each option has certain uniform and basic needs ~~Each~~ each requires laws that set forth specific substantive, enforceable criteria, create predictable, transparent and reviewable procedures, and clearly delineate governmental and private-party rights and responsibilities

V 2 GENERAL POLICY AND LEGISLATIVE REQUIREMENTS (INCLUDING SUGGESTED MODIFICATION OF THE DRAFT ELECTRICITY LAW)

The latest draft of the Electricity Law makes substantial progress in focusing on the legal issues that must be resolved to create a modern electric sector that embraces least-cost principles and encourages market competition, where feasible, and private party participation

As set forth above, the crucial legal building blocks for any workable electric sector option are (l) clear enabling legislation, (2) laws relating to regulatory authority, creating predictable and open procedures - e g , rules requiring written, reviewable decisions explicating the agency's reasoning and clearly distinguishing between governmental and private party rights and responsibilities, (3) laws facilitating private investment, and (4) antimonopoly measures These laws should include understandable, substantive, enforceable criteria For example, the auction process for acquiring new capacity should expressly list what factors are examined in evaluating bids - what weight is given to price, whether non-price factors are considered, and if so, how A similar listing of substantive criteria should be set forth for licenses and concessions, so an applicant knows exactly what it needs to do to obtain these privileges, and is secure in knowing that the courts can provide a meaningful review of the process The current draft Electricity Law deals successfully with many of these critical topics, nonetheless, certain changes~~,~~ and additions to the draft Law will need to be made to fulfill the requirements within these four areas of the law

V 2 1 Apparent Inconsistency

As a threshold matter, the latest draft Law appears to incorporate an inconsistency between its articulated goals and substantive provisions

The draft Law recites that the purpose of the Law is to fill a currently existing legal void in the electrical sector as it restructures for a market economy (See Page V-l) The stated goal of the

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Law is to promote competition ~~(id)~~(id), along with maintaining the power supply, with open access to the grid (id , pp 1-2, see also Art 2(b))

Thus, the general goal of the draft Law is to facilitate private investment, encourage competition (at least at the generation level), allow open access, and modernize the electrical sector to meet market economy standards, while maintaining a stable, safe supply of electricity These goals are well articulated and are absolutely on target

Nonetheless, specific provisions of the draft may be inconsistent with these goals For instance, despite the goals of competition and open access, the draft provides for a system whereby one Power Autonomous Regie (R A) - presumably RENEL - generates, transmits and distributes That R A acts as the sole buyer of all power and is the only entity that can sell power to consumers (Art 13(3)) Hence, that entity constrains the market and enjoys monopoly status Furthermore, as so designed, this system fits none of the ~~three~~ options proposed in this study except the status quo, and would have to be changed accordingly -- to allow for a separate buyer for the single buyer option, to facilitate direct sales under the open access option, or to disaggregate RENEL under the competitive market option

Art 1 additionally provides that electric lines and power stations "constitute state public propriety " If this section means that these assets are considered inalienable state property, private participation in any ownership of any transmission or distribution entities becomes problematic

Nor does the draft Law create incentives for IPP and self-generator participation in generation or explicitly state that such participation is legal and allowed The draft does not impose on the RENEL-single buyer the duty to buy from an IPP Without such a requirement, the IPP will have no way of assuring a market for its output, and private participation in the sector is unlikely to develop

Yet the draft contemplates IPP participation Even though the draft creates the RENEL-single buyer option, it states that the regulator will negotiate and conclude concession agreements (Art 15(d) and Chapter VI) Art 29(1) refers to an auction "according to present law provisions and dispositions in force regarding concessions " Art 31 also affirmatively provides that concessions are granted through auction, on the basis of terms of reference drafted by the regulator as concession grantor Art 29(b) provides that the regulator annually lists what activities, goods, installations and land which may be concessioned The regulator grants the concessions, and Romanian or foreign legal persons can apparently also instigate a request for a concession (Art 29(b))-

Presumably, the Law assumes that private investment in generation will occur through the auctioned concession process But the Law does not say what can be the subject of a concession -- new capacity only? refurbishments? life extensions? existing generation? For instance, Art 31(3) provides that concessions are for specified durations, depending on whether they are for "thermal distribution and transmission grids," "thermo-power and thermal plants," or "hydropower plants development " Can concessions exist for other components of the electric

system? The Law either should specify the scope of concessions or should clearly grant to a regulatory body the ability to define that scope

Most important, the Law should confirm that these concession winners are assured of an opportunity to sell their power and make a profit With no substantive provisions requiring the RENEL-single buyer to take the power, and no right to sell to consumers directly, IPPs, whether through concessions or not, have no avenue for participating in the market, unless if, by ~~fact of~~ winning the concession they automatically gain a contract at the winning bid price But the draft Law is silent on this important detail

Recent changes to the draft Law, moreover, increase the RENEL-single buyer's potential opportunity to self-deal, further undercutting the chances of private participation in the sector Article 15(c), for example, has been apparently modified from previous drafts to decrease the regulator's ability to limit the RENEL-single buyer's wheeling charges Article 51 has similarly diluted the RENEL-single buyer's duty to avoid cross-subsidizations between its monopoly and competitive businesses These developments would trouble any potential private party participant in assessing its ability to compete on an equal playing field

Other provisions could discourage private party participation in different ways Art 33 for example, ~~Art 33~~ states that "[t]he right to develop and operate, acquired through concession, constitute a right which cannot be mortgaged " Inability to mortgage, or create security interests in, concession rights could severely impair private parties' ability and interest to compete for such concessions and will be inconsistent with the goal of promoting a market economy

The draft Law must address these issues to encourage private investors to participate These changes or additions should be made to facilitate private investment under any option, including the status quo, if IPPs are to play an important part in the sector Since the competitive market option contemplates that the bidding process would be sponsored by distribution companies, additional modifications of Chapter VI of the draft Law would be needed to reflect this feature Once the GOR adopts its preferred industry option, the Electricity Law, and other laws as appropriate, should be thoroughly reviewed and revised to implement the selected option

V 2 2 Lack of ~~Clarify~~ clarity

The Introduction to the draft (p 2) states that it is meant to be flexible to respond to rapid evolution in the electricity sector Flexibility is a laudable characteristic The Law, however, should guide the evolution in the electricity sector Therefore, the Law must be sufficiently clear about the substantive criteria applied in making decisions, which governmental body has control over what issue, and how decision making will proceed, to direct and facilitate that evolution Private investment cannot flourish unless or until the law is clear and predictable As written, the Law could be interpreted as granting open-ended powers to the regulator and the RENEL-single buyer without affirmatively listing the substantive criteria these entities must follow The Law also appears to give the regulator, the RENEL-single buyer and/or Parliament the ability to

change existing rights In general, certain areas of the draft lack requisite clarity, specificity and substance

A few examples illustrate this problem

1 Art 15(b) ~~states that the regulator, among other things, "drafts projects for regulation of the economic financial mechanism of the economic agents which participate in the sector activities " (Art 15(a)) Perhaps some perceived flaws in this provision are a product of the translation, but the provision appears to be a vague delegation of limitless power to impose restrictions and duties on all participants in the electricity sector The powers should be limited and specified~~

~~2 Art 15(c)~~ provides that the regulator "coordinates and controls the activity of investment in the power and thermal energy sector " How it does so is not explained, and needs to be The Law should list the standards of investment approval

~~3~~ 2 Art ~~15(c)~~ 15(b) provides that the regulator negotiates and concludes concession agreements, but gives no substantive criteria for doing so Chapter VI, dedicated to the concession process, likewise does not provide any such criteria Art 36(d), moreover, permits the government to cancel a concession whenever the holder "doesn't observe any other clauses mentioned in the contract " Thus, any minor, technical infraction could potentially result in a wholesale loss of a concession, presenting risk and uncertainty and further discouraging private party willingness to participate The concession scheme should include these important details

4 3 Art 9 provides that "The sector ministry will monitor companies" which participate in various electricity activities, apparently, to, among other things, "allow the utilization of certain quantities form a certain form of primary or transformed energy" and "utilize, under economic conditions, certain quantities of inferior fuels from internal sources or valuate preestablish quantities of renewable and secondary energy sources " It appears from this language that the ministry (MOI?) will have some sort of input as to what kind of power is used (hydro, oil, gas, etc), and will be able to order use of "inferior" fuels, like lignite The relationship of these powers to the National Energy Policy (discussed below) will have to be spelled out, how these powers affect the bidding process for new capacity must be established, and inability to force fuel-type changes after award of licenses and concessions and entry into contracts will have to be made clear

~~5~~ 4 Art 16(6) provides that "operating authorizations" (licenses?) may be withdrawn "when the authorized installation is at risk or is the source of disturbances, following the failing to observe the operation, maintenance and repair technical and organizational conditions " This provision again appears to give too much open-ended power to the regulator to terminate existing rights and thus discourages private investment

~~6~~ 5 Art 18(2) gives the RENEL-single buyer the power of drafting the dispatch statute, with the approval of the regulator Nowhere does this Law indicate that RENEL must dispatch the least cost power first, or otherwise limit RENEL's power not to dispatch IPP or self-generator power While Article ~~1 9(a)~~ 19(a) provides for a National Energy Dispatcher, which authorizes generation "on the basis of marginal least costs," that Dispatcher is expressly "subordinated" to the RENEL-single buyer Does this mean that RENEL appoints the Dispatcher? How does the Dispatcher gain any independence from RENEL to assure that competitive IPP power is dispatched?

~~7~~ 6 The draft provides for a National Power and Thermal Energy Policy adopted by the Parliament (See text, Chapter II) Whichever option is chosen, laws and regulations must make clear how this policy is implemented in individual bidding, licensing and other decisions Art 8 provides that the Policy is drafted at least every 5 years, but can be changed at any time In order to assure investors, the draft should clarify that such changes cannot affect existing rights

~~8~~ 7 Art 27 refers to criteria to be established by the regulator for operating authorization, but provides no substance or guidance to be followed by the regulator in imposing these criteria Do the criteria incorporate bid terms? Are they tied to the National Plan? Do they follow least-cost principles?

8 Art 41 provides that the "majority" of consumers' regulations are regulated, but does not state which are and which are not

9 Art 45 is not clear as to whether the price paid for power should include profit The opportunity to earn a reasonable rate of return on capital deployed is essential for private participation

V 2 3 Lack of an Independent Regulator

The draft also contemplates a regulator within an existing ministry The competitive market option provides for an independent regulator If the competitive market option is chosen, the draft Law should be modified to allow for such an independent regulatory body Whichever option is chosen, an independent regulator would be preferable

Art 45 provides that tariffs are promulgated ~~by the MOF, based on the regulator's proposal The~~ based on an agreement between the regulated economic agent and the regulator, subject to approval by the MOF Aside from the problem that this Article does not explain what happens if the regulator and economic agent cannot agree, or if the MOF does not approve the agreement, the relationship between tariffs and long-term contract prices must be clearly defined for any private participation under any option Art 49, for example, states that the regulator is obligated to revise tariffs any time necessary and propose them to the MOF However, new tariffs cannot

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affect the price paid for capacity under existing long-term contracts, otherwise the private investor will have no incentive to invest

~~Art 46 provides that proposals are made to the Responsible Authority as to "prices, tariffs and taxes, performance standards, and other conditions for power and thermal energy supply " The MOF then issues pricing decisions based on recommendations of the Responsible Authority~~ The draft does not state who appoints the Responsible Authority nor does it define the result if the MOF disagrees with the Responsible Authority's evaluation The draft should address these points and also should provide that the Responsible Authority must articulate the reasoning for its decisions in writing, that its evaluation process is open to the public and that its decisions are reviewable in court

V 2 4 Summary

These comments and suggestions in no way detract from the substantial achievements of the current draft The Law clearly states its purposes and goals and frames in many of the essential points required to achieve the stated objectives Given the complexity both of the electric sector and of the myriad intersections of regulatory and market issues, it is understandable that the draft Law will benefit from further analysis, specificity, and redrafting, as the GOR debates and ultimately selects its preferred structure for this crucial sector of the economy As the focus in this Section on only a few guiding principles -- clarity, predictability, reviewability -- indicates, moreover, the suggested changes to the draft share a common theme such that any revisions should be simple and straightforward, whatever option is chosen For example, these suggestions and comments do not recommend wholesale, substantive changes to the existing provisions in the draft Rather, they recommend that, after the GOR selects the appropriate restructuring model for Romania, the draft, along with other related laws and regulations, be fleshed out and expanded, with these guiding principles of clarity, predictability and reviewability in mind

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MEMORANDUM

TO: Wayne Mikutowicz
cc Howard Menaker and Jacquie DeRosa

FROM: CRConnors

RE: Bechtel-Romania--Draft Whitepaper

DATE: March 6, 1997

Howard Menaker gave me a call and asked that we send along to you a draft letter we prepared for the Deputy of Licensing at the Hungarian Energy Office explaining the benefits of increased competition in the electricity sector He thought this draft letter might be of assistance to you and Pete in expanding upon this issue in the draft whitepaper

Howard also asked me to send you one of our original outlines for our competition study in Hungary I have also attached that document.

If I can be of any further assistance, please give me a call

LIT 80344-1 DOC

DRAFT

6 March, 1997

[Dr Imre Szabó
INSERT FULL TITLE AND
ADDRESS]

[NAME AND ADDRESS OF
APPROPRIATE OFFICIAL
AT THE MINISTRY]

INSERT DATE

Dear INSERT NAME

In recent years, the electricity sector in Hungary has undergone profound change Hungary has led the region in privatization and in establishing a legislative and regulatory framework that modernizes, commercializes and harmonizes the sector with that of its western neighbors

We at the HEO believe that the current situation presents a unique opportunity to determine whether addition competition in the sector could benefit the Hungarian people and economy We intend to establish a Working Group, with the HEO's efforts led by Dr Gabor Szorenyi, to examine these critical issues The Working Group expects to review the benefits of additional competition, assess the impacts on consumers and the economy, and to make its recommendation to the Ministry and the Government by March, 1998

We seek the Ministry's participation and leadership in this effort We think it is vital that the Ministry become involved with and help guide the Working Group's efforts, in coordination with the current interministerial group examining EU harmonization issues We specifically request that you designate appropriate officials to join the Working Group We look forward to collaborating with the Ministry in performing this important task

I BACKGROUND

Two Parliamentary Acts embody the basic changes in the electricity sector to date (1) the Electricity Act of 1994 (Act XLVIII), outlining the general re-structuring of the sector, and (2) CITE OF RELEVANT PRIVATIZATION ACT, calling for the sale of utility assets or interests in those assets to private entities

Since the enactment of these laws over three years ago, the Government of Hungary has aggressively and successfully undertaken its duties to implement the statutes and advance their objectives Change has been dramatic, and many goals have been achieved

We believe that the Government should next explore the potential benefits of further change Such change could include mandatory retail wheeling or creation of a power pool

Set forth below are the principal benefits Hungary could likely achieve from increased competition in the sector, and why it is important to examine this issue now

II POTENTIAL BENEFITS FROM INCREASED COMPETITION

A Increased Competition Advances Existing Laws and Objectives.

The decision has already been made that Hungary's electricity sector should not be publicly owned or consist of a vertically integrated monopoly, but rather should be privately held and disaggregated Competitive and market principles are already embodied in existing electricity laws and regulations In order to maintain existing gains and to continue on the path to which Hungary has committed itself, further changes in the sector are warranted

For example, two fundamental principles of existing energy policy are (1) application of least cost principles and (2) disaggregation of the sector by function (generation, transmission and distribution) and size (with sales of individual generation plants and localized distribution companies)

Least cost principles constitute a core element not only of the Electricity Act (see, e g , Section 7(1)), but also of the decrees, licenses and indeed every aspect of regulation in the sector This objective is consistent with the dominant view of electricity regulation least cost principles form the basis of the modern regulatory framework for the electricity sector in almost every democratic, market-economy in the world

Similarly, the principle of disaggregation -- breaking up the vertically integrated monopoly formerly controlling the sector -- characterizes current Hungarian electricity regulation For example, the 1995 tender process prohibited bidders from purchasing more than a specified number of assets, MVM's license limits its generation ownership to secondary reserves, and distribution companies share similar ownership restrictions on generation assets As with least cost principles, this aspect of existing Hungarian law and regulation is consistent with recently adopted laws promoting disaggregation in the energy sector in other democratic, market-oriented countries

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Current developments, however, threaten success in achieving these goals For example, re-aggregation of the Hungarian electricity sector is underway, through increasingly unified ownership of generation and distribution assets Owners of certain distribution or generation companies are purchasing more plant, threatening horizontal re-aggregation Current owners of distribution assets are buying generation assets, and vice versa Right now, nothing in the Electricity Law prevents any of these consolidating owners from buying MVM when it is sold, and thereby completing a vertical re-aggregation

Similarly, despite the existing, fundamental goal of least cost principles, incorrect incentives for prioritizing dispatch of more expensive imports, as opposed to cheaper Hungarian sources, may exist

Increasing competition in the electricity sector will avoid erosion of the basic policies already chosen by the people and Government of Hungary, but advance those policies -- as reflected in other steps already taken by the Government For example, the 1995 privatization and sale process succeeded in large part due to the decision to use a competitive bidding process, and the current (1996) Establishment Plan required under Section 4(a) of the Energy Act and Decree 34/1995 includes approval of a competitive bidding process for future MVM purchases of generation

Hungary has committed itself to establishment of a free market economy Development of a more competitive free market in the electricity sector is consistent with this general policy commitment Further change in the existing sector framework may be needed to fulfill existing policy goals, and to sustain the general economic changes in Hungary since 1990

B Increased Competition Can Combat The Disadvantages Of Market Dominance -- High Prices, Energy Inefficiency, Indifferent Service, And Risk To Security Of Supply

Through its commitment to disaggregation, the Goverment recognized the problems of market dominance by too few, and too powerful, private entities Market dominance results in the lack of competitive pressures to keep prices down, inefficiency in electricity production and use, delay in or indifference to service improvements, and threats to security of supply Changes are needed in the current sector framework to avoid these adverse results of market dominance

1 Price Reduction.

A competitive market can keep prices at the lowest achievable level while advancing least cost principles Examples of price reduction through competition include the deregulation of telecommunications and airline transportation industries in various western countries, and the deregulation and privatization of water and sewer services in Argentina

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Substituting competition for regulation in the electricity market has reduced prices throughout the world Countries introducing competition in generation include England/Wales, Norway, Spain, Chile, Argentina, Australia, and New Zealand In each of these countries, prices decreased significantly, without losses (and in many cases with improvements) in reliability For example, when Argentina introduced competition in electricity generation, wholesale prices fell 100%, stabilizing to a 40% decrease (At one point, for a one-month period, the price of electricity in Argentina fell to zero) Similarly, in the United States, wholesale prices now average approximately $35/Mwh, a substantial reduction in real terms from prices before deregulation

This impact on electricity prices has a ripple effect on commodities used by sector participants, such as fuel For example, from 1991 to 1995, overall coal costs fell 20% in England and Wales, as competition among generators caused them in turn to require their suppliers to reduce the price of their fuel

The degree of competition can also effect prices For example, in Norway, with a large number of wholesale market participants prices were driven down to short-run marginal costs In contrast, in England and Wales, an oligopolistic market with only three major participants, prices remain higher The more participants in the market, the greater the competitive pressure to keep prices down

Results from other countries offer no guarantee for similar results in Hungary Prices will probably increase over the next several years, due to the need for system modernization and the fact the current prices remain below world market operating and capital costs Excess generation capacity in neighboring countries could also distort the effect competition could have in Hungary

Yet, even where prices are generally increasing, true competition will reduce the degree of the increase Whatever the general direction prices are heading due to costs, competition can provide incentives to moderate increases

Price moderation and aggressive implementation of least cost principles are top priorities in the Hungary electricity sector The social hardships and adverse inflationary effects of price increases show that every effort must be made to keep prices as low as possible Creation of a truly competitive market may be the best way to achieve that goal A focused study of the potential winners and losers in a more competitive market, both over the short and long term, could result in a transition to a re-structured sector that minimizes hardships and maximizes the price pressure benefits of a more competitive market

2 Energy Efficiency

In a competitive market, prices meet actual costs When prices approach costs, both producers and users of electricity are motivated to increase energy efficiencies

Experience in countries with market-based generation pricing, for example, shows that deregulation increases the differential between average price and peak prices This sort of pricing encourages ratepayer to shift loads from peak to off-peak periods, which, in turn, from a macroeconomic perspective, increases efficient overall use of resources

The industrial sector, vital to Hungary's economy, might benefit substantially from competitive pricing, with its incentive to increase efficiencies For example, in Argentina, after competition was introduced, a steel company, by buying on the open market, was able to cut its energy costs in half, contributing to its ability to be competitive internationally

3 Improved Service

If an electricity company must compete, it does so not only on the basis of price, but also through service improvements to customers

England and Wales provide a good example of this service phenomenon Between April and September, 1998 supply will be opened to competition -- each retail consumer will have the right to choose its own supplier The result to date has been significant investments in service improvements by supply companies in order to compete effectively For example, Southern Electric, a regional electricity company, has spent £40 million over the past three years on information technology systems and workforce training, in order to improve its competitive position and attract customers

4 Security of Supply

Finally, market dominance can cause security of supply risks, by allowing a few participants to distort the market and reduce diversity of resources

The Government has already wisely compelled diversification of supply in the Establishment Plan Laws and decrees also favor certain domestic resources, in order to avoid supply risks If one or a few owners dominate the market, they can control the flow of resources and favor their own individual interests, which might not mirror the interests of Hungary as a whole In contrast, when no particular entity controls the market, the diversification of the interests of the many market participants aids in maintaining a secure and diverse flow of resources and power

B Increased Competition Can Facilitate International Trade and EU Integration

Currently, Hungary is not an exporter of power If, however, it had a healthy, competitive electricity sector, with participants who have learned how to succeed in the market and keep costs down, the possibility exists that these participants could succeed on a broader, regional or trans-European market as well Well run, low-cost generation

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facilities, for example, could result in profitable trades on the international market and help reduce trade imbalances

Even if Hungary remains a net importer, the more competitive the international market, the lower the price Hungary must pay for those imports Hungary can only gain from healthy international trade in power By adopting a competitive domestic electricity sector, Hungary not only advances regional competition helpful to its individual needs, but displays a willingness to harmonize with its European Union neighbors Given the Government's commitment to harmonize the legal framework of the energy sector with EU requirements by 1998, prompt examination of the appropriateness of including retail wheeling and other competitive changes to underscore EU compatibility makes sense

C Increased Competition Can Increase Foreign And Domestic Investment In The Sector

To date, the Government's efforts to attract investment in both the electricity sector and the economy has a whole has succeeded well (Overall foreign investment exceeds $14 billion USD, and privatizations in the electricity sector have brought in receipts of over $3 billion USD to the Treasury) In order to continue to attract such capital, potential investors need to feel that the law is clear, that all investors have an equal opportunity to succeed, and that a reasonable opportunity exists to achieve fair profits

Expansion of the competitive aspects of the electricity sector in a way that provides clarity, equality and opportunity could bring new investors to Hungary and increase the overall amount of investment -- investment that is needed A thoughtful and clear establishment of fair, competitive ground rules, recognizing the reasonable expectations of existing investors and rewarding long-term commitment, could go a long way toward increasing investor confidence in the sector and counteracting any existing investor discomfort at recent pricing decisions

Today, Hungary remains Central Europe's most favored recipient of foreign private investment Active protection and encouragement of free market principles could help sustain such a level of investment in the electricity sector

D Increased Competition Can Avoid Uneconomic Bypass

Open access to the transmission system can avoid individual customer decisions to bypass the system that are not cost-effective in the long run The current sector framework, without such access, allows a form of limited competition whereby individual customers can bypass, *i e* build or contract with separate facilities outside the integrated system In some cases, the cost of building independent facilities may be lower than the customers' current tariffs, but higher than the true incremental cost of serving them If so, bypass of the existing system is uneconomic to sector participants as a whole, because the bypassing entities shift costs of maintaining the system onto the remaining

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customers (instead of spreading them across a broader customer base), and raise the costs of total energy production in the country Thus, equalizing opportunity to open access, and promoting competition, eliminates uneconomic bypass and reduces overall costs

E. Increased Competition Can Reduce Regulatory Costs in the Long Term

In the absence of a free, competitive market, regulation and regulatory oversight must govern, monitor and issue decisions While oversight of some sort is always required for sectors with natural monopoly influences and vital strategic resources, if a sound legal and regulatory framework clearly defines a competitive market, then, after initial comprehensive regulatory efforts, the need for and degree of day-to-day oversight is reduced over time -- in turn, reducing the Government's cost of maintaining regulatory agencies

III WHY IT IS APPROPRIATE TO EXAMINE INCREASED COMPETITION NOW

Prompt examination of change should take place for several reasons

First, the sooner any change occurs, the lower the transition costs in effecting that change The more invested participants become in the current sector structure, the more costly the change to a different structure, because reasonable investor expectations based on the current structure must be respected in order to maintain and grow those investment in the new structural environment Failure to recognize these expectations increases risk and discourages investment, which in turn increases the cost of capital and, ultimately, prices charged to the consumer Hence, change from any sector structure needs to be done in a way that assures investors and reduces perceptions of future risk

Second, EU harmonization efforts are already underway Undertaking an exploration of change in the sector contemporaneously with harmonization not only makes sense from a practical standpoint, but also shows the degree of commitment the Government places on meeting EU standards

All change entails costs How to minimize these costs and who should bear them are issues that need to be dealt with early and with great deliberation

For example, investors in distribution companies could argue that they are currently making their investments based on the assumption that these distribution companies have obtained exclusive franchises Indeed, this argument appears to form a basis of the Dedasz challenge to EMA Power's direct supply license While it may be debatable whether this assumption is reasonable under the current framework, the more quickly the sector framework changes to a compulsory open access system, the weaker investor arguments that their investments are being made based on reliance on the *status quo*, and the lower the perceived risk of future arbitrary governmental action

If change is at least contemplated, steps can be taken now to minimize transition costs for further re-structuring For example, appropriate provisions can be included in licenses or long-term contracts Minimization of current long-term promises based on the existing structure reduces the costs of change in the future

CONCLUSION

For these reasons, we should examine whether increased competition could benefit the people of Hungary, this examination should take place promptly We propose undertaking the examination with the continual input and active participation of the Ministry, in such a way that all relevant issues are examined and interested constituencies (including consumers) consulted The sooner such an effort begins, the sooner benefits can commence We therefore seek approval from the Ministry to undertake the effort, and involvement from those persons in the Ministry whom it feels can contribute and guide the project

Sincerely yours,

Dr Imre Szabo

LIT 77850-1 DOC

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OUTLINE OF ISSUES FOR COMPETITIVE RE-STRUCTURING IN HUNGARY

26 July 1996

I. EXISTING HUNGARIAN FRAMEWORK

♦ LEGAL FRAMEWORK

- Review of Key Laws and Decrees
  - » Electricity Act
  - » Enforcement Decree
  - » Operational Code
  - » other Decrees and Resolutions
- Governmental Roles
  - » Ministries
  - » HEO
  - » APV
  - » other
- Regulatory and Sector Responsibilities
  - » licensing
  - » pricing
  - » resource/capacity planning
  - » privatization
- Vehicles for Public Participation
  - » Establishment Plan
  - » dispatch
  - » tariff
- Judicial Access/Review of Decision Making
- Review of Other Relevant Hungarian Laws
  - » labor
  - » environmental
  - » background commercial laws

- ECONOMIC FRAMEWORK

  - Strengths and Weaknesses

    » economy generally
    » foreign investment
    » electricity finances
      (subsidies, profits, services, use)
    » external support and restrictions
      (World Bank, EBRD etc)

  - Market Orientation and Private Participation

- TECHNOLOGICAL CONTEXT

  - Transmission and Distribution Network
  - Generation Resources
  - Fuels

- SOCIAL AND POLITICAL CONTEXT

  - Welfare/Employment
  - Politics
  - Strategic Concerns
  - Momentum of Privatization

- INTERNATIONAL RELATIONSHIPS

  - Other Central and Eastern European Nations
  - EU/UCPTE
  - Import/Exports

II SECTOR RESTRUCTURING OPTIONS

- MODELS AND ISSUES

  - Spot Market

    - » avoid market constraints
    - » access to market data
    - » role of regulator
    - » scheduling, dispatch rules
    - » long-term contracts
    - » actors outside Hungary
    - » pricing

  - Pool

    - » spot market issues
    - » ownership
    - » operational rules
    - » reviewability of decisions
    - » outside deals
    - » pricing/contracts

  - Single Buyer/Seller

    - » who owns, controls and regulates
    - » financial capacity of buyer/seller
    - » management of purchase and sale liabilities
    - » pricing/contracts

  - Third Party Access/Wholesale and Retail Wheeling

    - » role of players - IPPs, industrial cogeneration, others
    - » limitations on customer type, size, other limitations on access
    - » pricing/contracts

- GENERAL LESSONS LEARNED

  - Experience Elsewhere

    - » Argentina spot market
    - » U S
    - » U K
    - » New Zealand
    - » Europe/EU directives
    - » Malaysia, Peru, other non-European

  - Principal Issues From Model Choices

    - » spot market - market constraints, insuring real time exchange of information
    - » single buyer - controlling buyer to induce competition
    - » third party access - stranded costs
    - » pool - see spot market

- HUNGARIAN SPECIFIC FACTORS

  - Ongoing Re-Structuring and Privatization

    - » beyond vertical integration
    - » beyond pure public ownership
    - » no voucher system
    - » existing price regulation

  - Nuclear Power

  - Scheduled/Anticipated Future Developments

    - » further privatization (generation, MVM)
    - » anticipated new resources, tender process
    - » pricing

  - Political and Social Issues

    - » labor
    - » environment
    - » budgets

- Technologies

  » constraints
  » CHP

- Security of Supply Issues

- Lessons Learned From Current Hungarian Restructuring

  » re-aggregation risks
  » dispatch
  » price clarity
  » implementation of least cost principles

III. TRANSITION ISSUES

◆ GENERAL

- Optimal Transition to New Structure

  » elimination of subsidies
  » unbundling of prices
  » transparency of process
  » establishment of reporting duties
  » public participation
  » specific laws to restructure
  » background laws to facilitate new structure

- Factors Impacting Speed

  » deregulation
  » market distortion
  » cross-elasticity

◆ TRANSITION ISSUES AND THE HUNGARIAN CONTEXT

- Existing Legal Rights, Laws Affecting Contracts, Property Rights

- Reasonable Investment Expectations (Promises)

- Potential Stranded Costs

- Minimization of Costs

  » pricing controls and lack of guarantees
  » flexibility under existing Electricity Act
  » lack of historical regulatory compact
  » investment limits to date

- Political, Social and Economic Factors, Influencing Transition

- MVM - Current Structure, Privatization Plans, Future Role

IV. RECOMMENDATIONS, CONCLUSIONS

- Steps To Take Now, To Limit Future Transition Costs

- Recommended Model, Rationale, and Implementation Timetable

- Recommendations, Rationales, and Timetables For Other Models

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PIERCE
ATWOOD
ATTORNEYS

One Monument
Square
Portland Maine
04101-1110

OUTLINE OF PROPOSED POWER PURCHASE AGREEMENT TERMS FOR ROMANIAN ELECTRIC AUTHORITY (RENEL)

1 **Parties**

- Nuclearelectrica National Company
- Independent generators
- RENEL transmission and/or distribution divisions
- RENEL generation division

2 **Term**

- Base period
- Renewal

3 **Service**

- Firmness (unit or system style)

4 **Performance Risks**

- Availability targets and penalties
- Capacity ratings (testing)
- Maintenance and other scheduled outages (notices)
- Responsibility for obtaining backup power
- Performance guarantee (sovereign or other)

5 **Construction (New IPP Capacity Only)**

- Schedule
- Monitoring

6 **Scheduling and Dispatch**

- Long and short-term load forecasts (annual, monthly, weekly)
- Scheduling
- Dispatch orders

7 **Price**

- Fixed capacity prices
- Energy rate per unit of production (adjusted to reflect fuel price changes)
- O&M rate per unit of production (variable)
- Minimum take requirements for variable costs

- Adjustments to reflect actual availability, heat rate, others

8 **Operation**

- Compliance with appropriate technical/engineering codes (national and EU)
- Emergency
- Unscheduled outages (notice)

9 **Billing and Payment**

- Monthly invoices and payments
- Late payment penalties

10 **Credit Support/Guarantees (sovereign, letter of credit, other)**

11 **Metering**

- Monthly meter reading
- Purchaser's right to be present during meter reading
- Procedures for testing and adjustment of meters

12 **Delivery**

- Transmission costs
- Ancillary services (load balancing, reactive power, etc)
- Point of Delivery

13. **Losses**

- Responsibility for transmission and distribution line losses

14 **Change in Law or Regulation**

- The potential for legal or regulatory change is not always explicitly addressed Sometimes the contract may (1) require purchaser to accept increased costs caused by change in law (such as fuel costs), or (2) obligate the parties to use best efforts to modify the contract to preserve the intentions of the original contract in the event of legal or regulatory changes
- Taxes
- Environmental regulation
- Sector restructuring (including privatization of the power purchaser and changes to merit order dispatch)

15 **Other Risks**

- Foreign Exchange Fluctuation
- Interest Rate Changes
- Reliability of Fuel Supply

16 **Force Majeure**

- Standard relief from performance for all parties during Force Majeure event

17 **Default**

- Definition
- Remedies (liquidated damages, takeover)
- Termination

18 **Dispute Resolution**

- Mandatory arbitration before a neutral expert who has adequate knowledge of the functioning of the electricity sector and power purchase agreements

19 **Representations and Warranties**

- Each party represents that it has the requisite authority and ability to enter into and perform its obligations under the contract.

20 **Conditions Precedent**

- Government or other approvals
- Execution of related contracts

21 **Supplemental Agreements**

- Transmission
- Distribution
- Interconnection
- Asset division (existing facilities only)

22 **Other Miscellaneous Business Terms**

- Liability and indemnification
- Insurance (maintain specified levels with purchaser as additional insured)
- Communications
- Assignment of the contract
- Governing law
- Audit rights, access to books and records

PIERCE
ATWOOD
ATTORNEYS

One Monument
Square
Portland Maine
04101 1110

MEMORANDUM

TO: Nicolae Liciu, Deputy Director General for Energy
Ministry of Industry and Trade

Elena Voinea, International Affairs
Electrica, S A

Mariana Vatamanu, Senior Engineer
Nuclearelectrica, S A

Bogdan Prunaiche, Dipl Eng
CONEL - Joint Ventures Department

CC: Andres Doernberg (USAID)
John Gulliver, Cathy Connors (Pierce Atwood)
Howard Menaker, Wayne Mikutowicz, Bob Hinkle (Bechtel)

FROM: James Douglass

RE: Power Purchase Agreements

DATE: September 17, 1998

Please convey my gratitude to all of the people at the Ministry and the various departments of CONEL who took time out of their busy schedules to meet with me during my trip to Bucharest this past week The meetings provided us with valuable insight into the ongoing process of commercialization within CONEL Based on the results of our meetings and my understanding of the priorities of the Ministry, we intend to proceed as follows

Nuclear PPA

Our highest priority will be given to providing assistance on drafting an agreement for the sale of the output of Cernavoda Unit No 1 Nuclearelectrica has set forth a proposal for a long-term agreement under which Electrica would purchase the output of the unit Nuclearelectrica envisions entering into a final contract by the end of the year In the meantime, Electrica would purchase the output of the unit pursuant to short-term, informal agreements In support of this effort, we will be sending the following materials next week (no later than September 25th)

1 Written comments on the draft power purchase agreement prepared by Nuclearelectrica

2 A copy of one of the power purchase agreements used by the Yankee Atomic family of nuclear power plants The basic structure of these contracts is similar to Nuclearelectrica's draft proposal The contracts require the customers to purchase the lifetime output of the plant using cost-based, formula rates

After I have sent these materials, I will contact the appropriate persons to discuss the next steps in the process of drafting a final agreement

Joint Venture Model PPA

The Ministry and the Joint Ventures Department at CONEL have asked for assistance in developing the terms of a model power purchase agreement There is particular interest in developing a model agreement that could adapt to the current circumstances in Romania in which RENEL has been separated into separate companies, and there is a continuing over-capacity situation and an inability to collect adequate revenues from customers The model PPA should also provide flexibility to adapt to future changes, including the plan to move toward a competitive power pool In support of the effort to develop a model PPA, we will provide the following materials within two weeks (no later than October 2nd)

1 A draft, generic PPA including most provisions that would be included in a final agreement This agreement will include a change-in-law provision intended to address the treatment of the agreement during the transition to a competitive generation market

2 To the extent possible, I will also provide copies of actual, final IPP-style power purchase agreements from projects outside Romania My ability to obtain and provide such agreements is limited because many such agreements are confidential However, there are at least some agreements that are not confidential

Again, I will contact the appropriate persons to discuss the next steps in the process of drafting a final model agreement after we have sent the initial materials

Please distribute this memorandum to the appropriate persons in your respective organizations Also, please feel free to contact me to discuss any questions or concerns you may have as we move forward

Phone 207 791 1326
Fax 207 791 1350
E-Mail jdouglass@pierceatwood com

PIERCE ATWOOD
ATTORNEYS

One Monument Square
Portland Maine
04101-1110

MEMORANDUM

TO Nicolae Liciu, Deputy Director General for Energy
Ministry of Industry and Trade

Elena Voinea, International Affairs
Electrica, S A

Mariana Vatamanu, Senior Engineer
Nuclearelectrica, S A

CC Andres Doernberg (USAID)
John Gulliver, Cathy Connors (Pierce Atwood)
Howard Menaker, Wayne Mikutowicz, Bob Hinkle (Bechtel)

FROM James Douglass

RE· Nuclear Power Purchase Agreement

DATE September 25, 1998

We have carefully reviewed the draft power purchase agreement between Nuclearelectrica and Electrica The draft provides a good starting point for developing a final agreement At this point, our preliminary comments primarily are intended to identify the major issues that need to be addressed before a final agreement can be drafted After you have had an opportunity to review this memorandum, we can discuss the development of specific provisions of the final agreement We also propose some organizational changes that may improve the clarity of the agreement Finally, we are sending a sample nuclear power purchase agreement from the United States

Overview of Comments

We have identified three fundamental issues that should be addressed at an early stage of the drafting process The resolution of these issues will determine how the final agreement should be drafted These three issues are

1 Whether to use a fixed rate or formula rate approach to pricing

2 Whether the final agreement should include a long-term commitment for Electrica to purchase the output of Cernavoda Unit No 1

3 Whether to include a provision in the agreement requiring renegotiation in the event of a change in law

In our detailed discussion of these fundamental issues, we outline the advantages and disadvantages associated with the different approaches to resolving these issues

We have also analyzed the overall organization of the draft agreement We recommend a number of changes to ensure that all provisions dealing with a particular subject are placed together, and that there is a separate provision for each different subject area These organizational changes should help to increase the clarity of the document We have summarized these proposed changes in an outline listing each section that, in our opinion, should be included in the agreement

Finally, as requested, we are providing a sample of a publicly available nuclear power purchase agreement used in the United States Next week we will also be providing additional samples of long-term (non-nuclear) power purchase agreements to individuals at the Ministry of Industry and Trade and CONEL We will make sure that you also get a copy of these agreements

We are prepared to move forward quickly to provide further assistance in resolving the major issues and in drafting a final nuclear power purchase agreement once those issues have been resolved At this point, I am tentatively planning a return trip to Bucharest in late October or early November if this would be a good time for purposes of working on the final agreement I will contact the appropriate persons in the Ministry, Electrica and Nuclearelectrica shortly to discuss the appropriate schedule for a return trip In the meantime, please do not hesitate to contact me if you have any questions or comments

Phone 207 791 1326

Fax 207 791 1350

E-mail jdouglass@pierceatwood com

I Fundamental Issues

1 Fixed Price or Formula Rate

The draft agreement adopts a fixed rate pricing approach Article 4 of the agreement requires the buyer to purchase electric energy from the plant at a fixed price per MWH The agreement does not specify what costs the fixed price is intended to recover However, we understand that Electrica does not collect sufficient revenues to allow it to pay a substantial contribution toward the capital investment in the plant at this time, and that certain costs of the plant are subsidized by the government

There are advantages and disadvantages to the fixed price approach, but, in our view, the disadvantages outweigh the benefits of a fixed price approach A fixed price can provide an incentive for the efficient operation of the plant The owner of the plant will only recover its costs if it meets or exceeds the predicted costs, availability factor and other assumptions used to determine the fixed price However, this incentive would only be effective if the government eliminates subsidies to Cernavoda The disadvantage of the fixed price approach is that it is often difficult to predict accurately the costs and performance of the plant, particularly a nuclear plant If the fixed price approach is adopted, it will be necessary to add provisions addressing what happens if the plant does not operate according to expectations

As an alternative to the fixed price approach, the parties should consider the formula rate approach This is the approach set forth in Section 7 of the sample nuclear power purchase agreement attached at the end of this memorandum Under this approach, the contract lists the various categories of costs associated with operating the plant and providing power to the purchaser (*i e* , the "formula") The purchaser agrees to reimburse the plant operator for the actual costs incurred under each category Operations, maintenance and other variable costs are usually billed on a monthly basis as they are incurred Large capital investments, nuclear fuel costs and other larger expenses are usually amortized over a longer period, but the amortized amount is also collected on a monthly basis

The formula rate approach has several advantages First, a formula rate ensures that the plant operator recovers its actual costs (and no more or less) Second, a formula rate avoids the inevitable problems associated with predicting future costs and performance under the fixed price approach Third, the formula rate approach is relatively simple to understand and administer

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The principal disadvantage of a formula rate is that, absent competition from lower cost generation, it provides little or no incentive for efficient operation The plant operator recovers its costs regardless of whether the plant is operated efficiently In order to mitigate this problem, a formula rate contract should provide a mechanism for the customer to monitor and challenge the reasonableness of costs For example, Section 12 of the sample nuclear power purchase agreement provides that the customers may inspect and audit the company's books and records In the United States, the costs passed through a formula rate are also subject to review by the Federal Energy Regulatory Commission, which may disallow costs that are not reasonable If the parties adopt a formula rate approach, the agreement should (1) require the seller to conform its accounts to international accounting standards, (2) provide a mechanism for the buyer to inspect and audit the buyer's accounts, and, (3) include a mechanism for the buyer to challenge the reasonableness of the seller's costs (perhaps the Ministry, or the new regulatory agency when it is created, could provide a forum for resolving such disputes)

2 Term of Agreement

The duration of the contract is a critical issue Article 3 of the draft agreement provides for a contract of unlimited duration However, we understand that the parties have not agreed on the appropriate duration of the agreement We would normally expect a seller to favor a long-term agreement that ensures the continued operation of the plant and recovery of costs regardless of market conditions In contrast, a seller often favors a shorter term to avoid being locked into a long-term commitment that may become uneconomic if market conditions change This is especially true when future market conditions are as uncertain as they are in Romania

There are a number of reasons that a long-term agreement might be appropriate for the Cernavoda plant First, a long-term agreement may be an accurate reflection of the government's commitment to the continued, long-term operation of the plant Second, a long-term agreement would accurately reflect some of the unique operational and economic characteristics associated with nuclear plants (*i e* , nuclear plants must operate as base load units because, in part, the initial capital investment to build a plant is so large and the incremental operational costs are relatively low) Finally, long-term agreements for nuclear plants are often required as a method of ensuring that funds will be available for the safe decommissioning of the plant at the end of its useful life In the case of Cernavoda, Nuclearelectrica does not expect to even begin collecting decommissioning funds for a number of years

The principal problem with a long-term agreement is that it may not be consistent with the plan to move toward a competitive electricity market At this time, plans for reforming the Romanian energy sector include the possibility (1) that Electrica will be divided into a number of separate regional distribution companies, and, (2) that at least some customers will be entitled to purchase power directly from generators Both of these issues need to be addressed before Electrica enters into any long-term agreement to purchase power from Cernavoda

The first issue may be easier to resolve If Electrica is divided into separate regional companies, it may be appropriate to allocate an appropriate share of Electrica's purchase commitment under the nuclear power purchase agreement to each of the new regional companies In order to facilitate such a solution, the agreement could include provisions allowing Electrica to assign all or a portion of its purchase commitment to any new regional distribution companies and specifying a method for allocating an appropriate share of the total purchase commitment It must be kept firmly in mind that the assignability of the final agreement will directly influence (positively or negatively) the value of any bids received when Electrica, or any successor regional distribution company, is privatized

The second issue, regarding the potential for direct supply, is more difficult to resolve The most serious problem would occur if nuclear power were to become relatively more expensive than power from other sources While Electrica would be required to continue purchasing expensive nuclear power pursuant to its long-term contract, eligible customers could contract directly with lower-priced suppliers At a minimum, this would result in Electrica's remaining customers paying significantly higher rates than direct access customers If enough customers could and did opt for direct supply, Electrica might be left with a long-term contract to purchase power and no customers to sell the power to

The risks associated with direct access could be addressed in the purchase agreement For instance, the agreement could include a provision allowing Electrica to terminate or reduce its purchase obligations if and when direct access is implemented Alternatively, the parties could enter into a medium-term agreement (e g , five years), which would essentially allocate both parties some of the risk of direct access

3 <u>Change in Law Provision</u>

At this time, there is a great deal of uncertainty regarding the future structure of the Romanian energy sector The potential for significant changes in the laws and regulations

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affecting the energy sector create risks for both buyer and seller under any power purchase agreement The parties should consider including a "change in law" provision in the contract in order to reduce these risks A change in law provision could potentially also help to reduce the risks associated with direct access discussed in the preceding section

A typical change in law provision might include several parts The first part of such a provision would cover changes in law that directly affect the seller's operating costs This part would provide for rates to be increased or decreased so that the seller and buyer remain in the same financial position as if the change in law had not taken place The draft agreement already includes such a provision Article 6 12 of the agreement provides for the buyer to pay for any increased costs caused by a change in law However, the draft provision does not provide for a rate reduction in the event that a change in law causes a decrease in costs At a minimum, the provision should be broadened to cover both increases and decreases in costs

A second part of a typical change in law provision covers broader changes in law that may substantially differ from the parties' expectations when they entered the contract These types of changes in law might include changes necessary for Romania to comply with the requirements for accession to the European Union, such as direct access A provision addressing these broader changes might require the parties to negotiate in good faith to amend the agreement to preserve, to the extent possible, the original intent of the parties

II Organization of the Agreement

1 Article 2

Article 2 of the draft agreement addresses a large number of different issues For greater clarity, this section should only address the technical operating standards to be followed by the parties Accordingly, we would retain Section 2 6 and add any other provisions that are necessary to address technical operating standards At a minimum, we would recommend adding a provision requiring the parties to adhere to "Good Utility Practice " An example of a Good Utility Practice provision follows

> **"Good Utility Practice"** shall mean, at a particular time, those practices, methods and techniques generally followed by the international electric utility industry, and that, in the exercise of reasonable judgment in light of the facts known at the time a decision was made, could have been reasonably expected to obtain the desired result in a manner reasonably commensurate with safety, performance, dependability, efficiency and economy Good Utility Practice is not intended to be limited to the optimum practice, method or technique to the exclusion of all

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> others, but rather to be a spectrum of possible practices, methods and techniques each meeting the standard set forth in the previous sentence, any one of which is acceptable

This provision could be modified to refer to more specific practices and standards that are generally adhered to by other utilities in Europe (e g , UCPTE)

The remaining subsections of Article 2 should be moved to new or existing sections as follows

- Sections 2 1, 2 2, 2 3 and 2 4 should be moved to a new section to entitled "Delivery of Energy" that should specify the delivery points and address metering issues
- Section 2 5 should be moved to a new section addressing "Scheduled and Unscheduled Outages " This section should address the coordination of planning for scheduled outages and the procedures to be followed in the event of unscheduled outages
- Section 2 7 concerns the buyer's obligation to purchase power from the plant This issue should be addressed in Article 6, which is intended to cover the buyer's and seller's obligations
- Sections 2 8, 2 9, 2 10, 2 11 and 12 all appear to address possible adjustments to the price to reflect the difference between forecast and actual operating experience These provisions should be included in the general pricing provision, Article 4

2 <u>Article 6</u>

Article 6 addresses a number of different issues We would recommend limiting this section to the primary obligations of the parties -- the seller's obligation to operate the plant in accordance with good utility practice and to make the entire output of the plant available to the buyer (Section 6 5), and the buyer's obligation to take and pay for the output of the plant (Sections 6 6 and 6 9) For purposes of clarity, the remaining subsections of Article 6 should be moved to new or existing sections as follows

- Section 6 1 deals with short-term availability forecasts This section should be moved to a new section on scheduling that would set forth the seller's obligation to provide the buyer with all appropriate short, medium and long-term forecasts
- Sections 6 2, 6 3 and 6 4 concern the seller's report of the amount of energy provided to the buyer each month These provisions relate to billing and should be properly be

included with the billing and payment provisions in Article 5 (or perhaps in the pricing section, Article 4)

- Sections 6 7 and 6 8 concern the provision of backup and maintenance power to the plant These provisions should be moved to a new section that will address only these issues
- Section 6 10 concerns the circumstances under which the buyer must pay for energy that cannot be delivered This provision should be included in either the pricing or payment provisions of the agreement (Articles 4 and 5)
- Section 6 11 obligates the buyer to deliver power to third party customers with whom the seller has entered into a supply contract This is one of several provisions which refer to the possibility of the seller entering into third party supply contracts This approach raises a number of questions We are particularly concerned about the potential asymmetry of risk that is created when the seller is able to engage in third party sales, while the buyer is obligated to purchase the remaining output of the plant This approach results in the seller having the opportunity to engage in third party sales when economic conditions are favorable, while the buyer must purchase the output of the plant when conditions are unfavorable If this approach is retained in the agreement, it should be spelled out in a separate provision
- Section 6 12 involves potential changes in law As already discussed, this issue should be addressed in an expanded form in a separate section
- Sections 6 13 and 6 14 concern possible adjustments to the monthly payments These provisions should be included in Articles 4 or 5

3 Article 7

Most of Article 7 involves penalties for late payment These provisions should be included as part of the billing and payment provisions of Article 5 Section 7 5 provides that the seller shall not be penalized for failing to comply with the contract due to the need to satisfy nuclear safety requirements imposed by CNCAN This provision should be moved to the seller's obligations provisions of Section 6 5 This provision should also be expanded to recognize the obligation of both parties to comply with applicable laws and any regulatory requirements of the Ministry of Industry and Trade or a successor regulatory agency

4 Other Provisions

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Transmission We understand that Electrica will be responsible for arranging any transmission service that is necessary for the delivery of power from the Cernavoda plant to the distribution system We recommend that this obligation be set forth in the "Delivery of Energy" section of the agreement

Insurance The agreement should include a provision addressing any necessary obligations to maintain insurance coverage

Assignability As discussed previously, the contract may include a provision on assignability, particularly in the event that Electrica is divided into separate regional companies

For your convenience, we have created an outline listing each section that should be included in the agreement based on our recommended organizational changes The outline is attached as Appendix A

III Sample Nuclear Power Purchase Agreement

As noted, we are providing a sample nuclear power purchase agreement from the United States We have selected the power purchase agreement used by Maine Yankee Atomic Power Company ("Maine Yankee") Maine Yankee was formed in the 1960's by a group of approximately ten investor-owned utilities to construct and operate an 800 MW nuclear power plant to be located in the Northeastern United States Maine Yankee was just one of several plants that were built by the same group of utilities For each plant, the group of utilities entered into virtually identical power purchase and related contracts In general, these contracts required the utility/owners to pay their designated share of the construction, operation, maintenance and other costs of the plants In return, the utilities were entitled to receive their designated share of the lifetime output of the plants

Based on our discussions in Romania, we believe that Electrica and Nuclearelectrica intend to enter into an agreement for the sale of the output of Cernavoda Unit No 1 that is very similar to the Maine Yankee power purchase agreement Specifically, Electrica will be required to purchase all of the output of the Cernavoda plant and to pay rates that will allow Nuclearelectrica to recover the costs of operating the plant We hope that the Maine Yankee power purchase agreement will provide a useful example as the parties negotiate a similar contract The Maine Yankee agreement is attached as Appendix B

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Appendix A

Outline of the Terms of the Agreement

Definitions

Article 1 Object of Contract

Article 2 Technical Standards

Article 3 Duration of Contract

Article 4 Price

Article 5 Billing and Payment

5 1 Billing
5 2 Payment
5 3 Adjustments
5 4 Disputes

Article 6 Rights and Obligations of the Parties

6 1 Seller's Rights and Obligations
6 2 Buyer's Rights and Obligations

Article 7 Delivery of Energy

7 1 Delivery Points
7 2 Transmission
7 3 Metering

Article 8 Scheduling (Forecasts)

Article 9 Scheduled and Unscheduled Outages

9 1 Coordination of Scheduled Outages
9 2 Notice of Unscheduled Outages

Article 10 Books and Records

10 1 Buyer's Right to Inspect and Audit
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Article 11 Station Service (Backup and Maintenance Power)

Article 12 Direct Sales to Eligible Customers *[if retained in agreement]*

Article 13 Change In Law

Article 14 Force Majeure

Article 15 Termination

Article 16 Civil Responsibility

Article 17 Insurance

Article 18 Assignability

Article 18 Miscellaneous

18 1 Approvals
18 2 Counterparts
18 3 Arbitration of Disputes
18 4 Applicable Law
18 5 Prior Agreements

Appendix B

Sample Nuclear Power Purchase Agreement

Maine Yankee Atomic Power Company

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EXHIBIT A

[COMPOSITE CONFORMED COPY]

POWER CONTRACT, dated as of May 20, 1968, between MAINE YANKEE ATOMIC POWER COMPANY ("Maine Yankee"), a Maine corporation, and
(The names of the Purchasers appear in the attached Appendix) (the "Purchaser")

It is agreed as follows-

1. *Basic Understandings*

Maine Yankee has been organized to provide for the supply of power to its eleven sponsoring utility companies (including the Purchaser) Late in 1966 and early in 1967, it entered into contracts for the manufacture of the major components and the services of an architect-engineer for the construction of a nuclear electric generating unit of the pressurized water type, designed to have a capability of approximately 800 megawatts electric, at a site on tidewater in the Town of Wiscasset, Maine (such unit being herein, together with the site and all related facilities to be owned by Maine Yankee, referred to as the "Unit") Construction of the Unit is now being carried out under contracts with Combustion Engineering, Inc. and Westinghouse Electric Corporation for certain major systems of equipment and Stone and Webster Engineering Corporation as Architect-Engineer

The Unit is to be operated to supply power to each of the eleven sponsoring utilities (the "sponsors"), each of which has contemporaneously agreed to purchase a stated percentage of the capacity and output of the Unit and a like percentage of Maine Yankee's stock. The names of the sponsors and their respective percentages ("entitlement percentages") of the capacity and output of the Unit are as follows

Sponsor	Entitlement Percentage
Central Maine Power Company	38 0%
New England Power Company	20 0%
The Connecticut Light and Power Company	8 0%
Bangor Hydro-Electric Company	7 0%
Maine Public Service Company	5 0%
Public Service Company of New Hampshire	5 0%
Cambridge Electric Light Company	4.0%
Montaup Electric Company	4.0%
The Hartford Electric Light Company	4.0%
Western Massachusetts Electric Company	3 0%
Central Vermont Public Service Corporation	2 0%

Maine Yankee and its other sponsors are contemporaneously entering into power contracts which are identical to this contract except for necessary changes in the names of the parties.

2. *Effective Date and Term*

This contract shall become effective upon receipt by the Purchaser of notice that Maine Yankee has entered into power contracts, as contemplated by Section 1 above, with each of its other sponsors. The term of this contract shall expire 30 years after the plant completion date.

The "plant completion date" shall be the earlier of (i) December 31, 1973, or (ii) the date on which the Unit is placed in commercial operation, as determined by Maine Yankee (the "commercial operation date")

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3 *Construction of the Unit*

Maine Yankee will proceed with due diligence with construction of the Unit, and will exercise its best efforts to complete and place it in commercial operation by May 1, 1972 within present cost estimates, and will keep the Purchaser reasonably informed as to the progress of construction, material modifications in cost estimates, and the expected plant completion date.

4. *Operation and Maintenance of the Unit*

Maine Yankee will operate and maintain the Unit in accordance with good utility practice under the circumstances and all applicable law, including the applicable provisions of the Atomic Energy Act of 1954, as amended, and of any licenses issued thereunder to Maine Yankee. Within the limits imposed by good utility practice under the circumstances and applicable law, the Unit will be operated at its maximum capability and on a long hour use basis.

Outages for inspection, maintenance, refueling and repairs and replacements will be scheduled in accordance with good utility practice and insofar as practicable shall be mutually agreed upon by Maine Yankee and the Purchaser In the event of an outage, Maine Yankee will use its best efforts to restore the Unit to service as promptly as practicable.

5 *Purchaser's Entitlement*

The Purchaser will, throughout the term of this contract, be entitled and obligated to take its entitlement percentage of the capacity and net electrical output of the Unit, at whatever level the Unit is operated or operable, whether more or less than 800 megawatts electric.

6 *Deliveries and Metering*

The Purchaser's entitlement percentage of the output of the Unit will be delivered to and accepted by it at the step-up sub-station at the site. All deliveries will be made in the form of 3-phase, 60 cycle, alternating current at a nominal voltage of 345,000 volts. The Purchaser will make its own arrangements for the transmission of its entitlement percentage of the output of the Unit

Maine Yankee will supply and maintain all necessary metering equipment for determining the quantity and conditions of supply of deliveries under this contract, will make appropriate tests of such equipment in accordance with good utility practice and as reasonably requested by the Purchaser, and will maintain the accuracy of such equipment within reasonable limits. Maine Yankee will furnish the Purchaser with such summaries of meter readings as the Purchaser may reasonably request.

7 *Payment*

With respect to each month commencing prior to the plant completion date, the Purchaser will pay Maine Yankee at the rate of 3 75 mills per kilowatt hour, for the Purchaser's entitlement percentage of the net electrical output (if any) of the Unit during the particular month.

With respect to each month commencing on or after the plant completion date, the Purchaser will pay Maine Yankee an amount equal to the Purchaser's entitlement percentage of the sum of (a) Maine Yankee's total fuel costs for the month with respect to the Unit, plus (b) Maine Yankee's total operating expenses for the month with respect to the Unit, plus (c) an amount equal to one-twelfth of the composite percentage for such month of the net Unit investment as most recently determined in accordance with this Section 7

"Composite percentage" shall be computed as of the plant completion date and as of the last day of each month thereafter (the "computation date") and for any month the composite percentage shall be that computed as of the last day of the previous month. "Composite percentage" as of a

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computation date shall be the sum of (i) nine and eight-tenths percent (9.8%) multiplied by the percentage which equity investment with respect to the Unit (other than equity investment for the financing of fuel inventory, including nuclear materials and the cost of fabrication thereof, for the Unit) as of such date is of the total capital as of such date, plus (ii) the "effective interest rate" per annum of each principal amount of indebtedness outstanding on such date for money borrowed with respect to the Unit (other than for money borrowed for the financing of fuel inventory, including nuclear materials and the cost of fabrication thereof, for the Unit), multiplied by the percentage which such principal amount is of total capital as of such date. The "effective interest rate" of each principal amount of indebtedness referred to in clause (ii) of the next preceding sentence will reflect the annual interest requirements and to the extent applicable, amortization of issue expenses, discounts and premiums, sinking fund call premiums, expenses and discounts, refunding and retirement expenses, discounts and premiums, and all other expenses applicable to the issue

"Equity investment" as of any date shall consist of the sum of (i) all amounts theretofore paid to Maine Yankee for all capital stock theretofore issued, plus all capital contributions, less the sum of any amounts paid by Maine Yankee in the form of stock retirements, repurchases or redemptions or return of capital, plus (ii) any credit balance in the capital surplus account not included under (i) and in the earned surplus account on the books of Maine Yankee as of such date.

"Total capital" as of any date shall be the equity investment with respect to the Unit, plus the total of all other securities and indebtedness then outstanding with respect to the Unit other than equity investment, securities, indebtedness and other obligations issued in connection with the financing or leasing of fuel inventory, including nuclear materials and the cost of fabrication thereof, for the Unit

"Uniform System" shall mean the Uniform System of Accounts prescribed by the Federal Power Commission for Class A and Class B Public Utilities and Licensees as in effect on the date of this contract and as said System may be hereafter amended to take account of private ownership of special nuclear material

Maine Yankee's "fuel costs" for any month shall include (i) amounts chargeable in accordance with the Uniform System in such month as amortization of costs of fuel assemblies and components and burnup of nuclear materials for the Unit, plus (ii) all other amounts properly chargeable in accordance with the Uniform System to fuel costs for the Unit less any applicable credits thereto, plus (iii) one-twelfth of nine and eight tenths percent (9 8%) multiplied by the equity investment for the financing of fuel inventory, including nuclear materials and the cost of fabrication thereof, for the Unit, plus (iv) to the extent not provided for in any of the foregoing, all payments (or accruals therefor or amortization thereof) with respect to obligations incurred in connection with the financing or leasing of fuel inventory, including nuclear materials and the cost of fabrication thereof, for the Unit.

Maine Yankee's "operating expenses" shall include all amounts properly chargeable to operating expense accounts (other than such amounts which are included in Maine Yankee's fuel costs) less any applicable credits thereto, in accordance with the Uniform System, provided, however, that for the purposes of this contract, the accrual of depreciation and amortization of the Unit as an operating expense shall commence on the plant completion date. The amount of depreciation and amortization for each period shall be at a rate at least sufficient to fully amortize the then non-salvable plant investment balance in equal amounts over the periods remaining until May 1, 2002.

The "net Unit investment" shall consist, in each case with respect to the Unit, of the net sum of (i) the aggregate amount properly chargeable at the time in accordance with the Uniform System to Maine Yankee's electric plant accounts (including construction work in progress), plus (ii) the amount of any unamortized property losses, less (iii) the amount of any reserves for depreciation and for amortization of property losses, plus (iv) such allowances for inventories, materials and supplies (other than fuel assemblies and components), prepaid items and cash working capital as may reasonably be determined from time to time by Maine Yankee.

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The net Unit investment shall be determined as of the plant completion date and thereafter as of the commencement of each calendar year, or if Maine Yankee elects, at more frequent intervals.

Maine Yankee will bill the Purchaser, as soon as practicable after the end of each month, for all amounts payable by the Purchaser with respect to the particular month. Such bills will be rendered in such detail as the Purchaser may reasonably request and may be rendered on an estimated basis subject to corrective adjustments in subsequent billing periods All bills shall be paid in full within 10 days after receipt thereof by the Purchaser

8 *Make-up Term and Option Term*

(a) The Purchaser may elect to extend the contract term by written notice to Maine Yankee upon the following conditions and for the following period or periods

(i) In the event that the Unit is not in commercial operation on the plant completion date, the contract term may be extended for a period equal to the number of consecutive days by which commercial operation is delayed beyond the plant completion date, and

(ii) if at any time after the commencement of commercial operation no deliveries are made under this contract for a period of at least 120 consecutive days, the contract may be extended for a period equal to the aggregate of such periods during which no deliveries were made.

If the term of the contract is extended pursuant to the provisions of this subsection (a), all of the contract provisions shall remain in effect for the extended term.

(b) Upon expiration of the initial term of this contract or upon expiration of the term as extended in accordance with subsection (a) of this Section 8, the Purchaser shall continue to be entitled, at its option, to its entitlement percentage of the capacity and output of the Unit upon terms at least as favorable as those obtained by any other person.

9 *Cancellation of Contract*

If deliveries cannot be made to the Purchaser because either

(i) the Unit is damaged to the extent of being completely or substantially completely destroyed, or

(ii) the Unit is taken by exercise of the right of eminent domain or a similar right or power, or

(iii) (a) the Unit cannot be used because of contamination, or because a necessary license or other necessary public authorization cannot be obtained or is revoked, or because the utilization of such a license or authorization is made subject to specified conditions which are not met, and (b) the situation cannot be rectified to an extent which will permit Maine Yankee to make deliveries to the Purchaser from the Unit,

then and in any such case, the Purchaser may cancel this contract. Such cancellation shall be effected by written notice given by the Purchaser to Maine Yankee. In the event of such cancellation, all continuing obligations of the parties, including the Purchaser's obligations to continue payments, shall cease forthwith.

The Purchaser may cancel this contract or be relieved of its obligations to make payments hereunder only as provided in the next preceding paragraph of this Section 9 Further, if for reasons beyond Maine Yankee's reasonable control, deliveries are not made as contemplated by this contract, Maine Yankee shall have no liability to the purchaser on account of such non-delivery

10 *Insurance*

Prior to the first shipment of fuel to the plant site, Maine Yankee will obtain, and thereafter will at all times maintain, insurance to cover its "public liability" for personal injury and property damage resulting from a "nuclear incident" (as those terms are defined in the Atomic Energy Act of 1954 as amended), with limits not less than Maine Yankee may be required to maintain to qualify for governmental indemnity under said Act and shall execute and maintain an indemnification agreement with the Atomic Energy Commission as provided by said Act. Maine Yankee will also at all times maintain such other types of liability insurance, including workmen's compensation insurance, in such amounts, as is customary in the case of other similar electric utility companies, or as may be required by law

Maine Yankee will at all times keep insured such portions of the Unit (other than the fuel assemblies and components, including nuclear materials) as are of a character usually insured by electric utility companies similarly situated and operating like properties, against the risk of a "nuclear incident" and such other risks as electric utility companies, similarly situated and operating like properties, usually insure against, and such insurance shall to the extent available be carried in amounts sufficient to prevent Maine Yankee from becoming a co-insurer Maine Yankee will at all times keep its fuel assemblies and components (including nuclear materials) insured against such risks and in such amounts as shall, in the opinion of Maine Yankee, provide adequate protection.

11. *Additional Units*

Maine Yankee or its nominees may install one or more additional generating units at the Wiscasset site. The installation of such unit or units shall not affect the terms of this contract, but in such case if any portion of the Unit (whether such portion constitutes land, structures or equipment) is also used with an additional unit or units, an appropriate allocation of the cost of the Unit shall be made and the net Unit investment shall be reduced accordingly, subject, however, to the limitation that the aggregate amount of the reduction in net Unit investment resulting from all such allocations shall not exceed $5,000,000 Maine Yankee may make any other necessary allocations or any necessary adjustments in its accounts with respect to the Unit (including fuel assemblies and components) and any additional unit or units, and such allocations and adjustments shall be binding on the sponsors.

12 *Audit*

Maine Yankee's books and records (including metering records) shall be open to reasonable inspection and audit by the Purchaser

13 *Arbitration*

In case any dispute shall arise as to the interpretation or performance of this contract which cannot be settled by mutual agreement and which may be finally determined by arbitration under the law of the State of Maine then in effect, such dispute shall be submitted to arbitration, and arbitration of such dispute shall be a condition precedent to any action at law or suit in equity that can be brought. The parties shall if possible agree upon a single arbitrator In case of failure to agree upon an arbitrator within 15 days after the delivery by either party to the other of a written notice requesting arbitration, either party may request the American Arbitration Association to appoint the arbitrator The arbitrator, after opportunity for each of the parties to be heard, shall consider and decide the dispute and notify the parties in writing of his decision. The expenses of the arbitration shall be borne equally by the parties.

14. *Regulation*

This contract, and all rights, obligations and performance of the parties hereunder, are subject to all applicable state and federal law and to all duly promulgated orders and other duly authorized action of governmental authority having jurisdiction in the premises.

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15 *Assignment*

This contract shall be binding upon and shall inure to the benefit of, and may be performed by, the successors and assigns of the parties, except that no assignment, pledge or other transfer of this contract by either party shall operate to release the assignor, pledgor or transferor from any of its obligations under this contract unless consent to the release is given in writing by the other party, or, if the other party has theretofore assigned, pledged or otherwise transferred its interest in this contract, by the other party's assignee, pledgee or transferee, or unless such transfer is incident to a merger or consolidation with, or transfer of all or substantially all of the assets of the transferor to, another sponsor which shall, as a part of such succession, assume all the obligations of the transferor under this contract.

16 *Right of Setoff*

The Purchaser shall not be entitled to set off against the payments required to be made by it under this contract (i) any amounts owed to it by Maine Yankee or (ii) the amount of any claim by it against Maine Yankee. However, the foregoing shall not affect in any other way the Purchaser's right and remedies with respect to any such amounts owed to it by Maine Yankee or any such claim by it against Maine Yankee.

17 *Interpretation*

The interpretation and performance of this contract shall be in accordance with and controlled by the law of the State of Maine.

18 *Addresses*

Except as the parties may otherwise agree, any notice, request, bill or other communication from one party to the other, relating to this contract, or the rights, obligations or performance of the parties hereunder, shall be in writing and shall be effective upon delivery to the other party Any such communication shall be considered as duly delivered when delivered in person or upon the lapse of 48 hours from mailing by registered or certified mail, postage prepaid, to the post office address of the other party shown following the signature of such other party hereto, or such other address as may be designated by written notice given as provided in this Section 18

19 *Corporate Obligations*

This contract is the corporate act and obligation of the parties hereto, and any claim hereunder against any stockholder (other than the Purchaser), director or officer of either party, as such, is expressly waived.

20 *All Prior Agreements Superseded*

This contract represents the entire agreement between us relating to the subject matter hereof, and all previous agreements, discussions, communications and correspondence with respect to the subject matter are hereby superseded and are of no further force and effect

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EXHIBIT A

IN WITNESS WHEREOF, the parties have executed this contract by their respective officers thereunto duly authorized as of the date first above written.

MAINE YANKEE ATOMIC POWER COMPANY

By WILLIAM H. DUNHAM
President

9 Green Street
Augusta, Maine 04330

[PURCHASER]

By

(Officer & Title)

(Address)

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EXHIBIT A

APPENDIX

Separate Power Contracts were entered into, identical in form with the foregoing except as to the execution thereof and except that on page 1 the names of the respective Purchasers were inserted.

The Power Contracts were executed by the respective parties thereto, as follows

MAINE YANKEE ATOMIC POWER COMPANY

By W H. DUNHAM
President

9 Green Street
Augusta, Maine 04330

CENTRAL MAINE POWER COMPANY

By S GIDDINGS
Executive Vice President

9 Green Street
Augusta, Maine

NEW ENGLAND POWER COMPANY

By ROBERT F KRAUSE
President

441 Stuart Street
Boston, Massachusetts

THE CONNECTICUT LIGHT AND POWER COMPANY

By SHERMAN R. KNAPP
Chairman

P O Box 2010
Hartford, Connecticut 06101

BANGOR HYDRO-ELECTRIC COMPANY

By R N HASKELL
President

33 State Street
Bangor, Maine 04401

MAINE PUBLIC SERVICE COMPANY

By C H. STETSON
Chairman

209 State Street
Presque Isle, Maine 04769

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By W C. TALLMAN
President

1087 Elm Street
Manchester, New Hampshire 03105

CAMBRIDGE ELECTRIC LIGHT COMPANY

By JOHN F RICH
President

130 Austin Street
Cambridge, Mass. 02139

MONTAUP ELECTRIC COMPANY

By GUIDO R PERERA
President

P O Box 2333
Boston, Massachusetts 02107

THE HARTFORD ELECTRIC LIGHT COMPANY

By C L DERRICK
Chairman

P O Box 2370
Hartford, Connecticut 06101

WESTERN MASSACHUSETTS ELECTRIC COMPANY

By ROBERT E BARRETT, JR.
President

174 Brush Hill Avenue
West Springfield, Mass 01089

CENTRAL VERMONT PUBLIC SERVICE CORPORATION

By L. DOUGLAS MEREDITH
President

77 Grove Street
Rutland, Vermont 05701

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PIERCE
ATWOOD
ATTORNEYS

One Monument
Square
Portland Maine
04101 1110

VIA FACSIMILE

MEMORANDUM

TO: Nicolae Liciu, Deputy Director General for Energy
Ministry of Industry and Trade

Bogdan Prunaiche, Dipl Eng
CONEL - Joint Ventures Department

CC: Andres Doernberg (USAID)
John Gulliver, Cathy Connors (Pierce Atwood)
Howard Menaker, Wayne Mikutowicz, Bob Hinkle (Bechtel)

FROM James Douglass

RE: Model Power Purchase Agreement

DATE: October 7, 1998

Attached is our initial draft of a model power purchase agreement ("PPA") for use in Romania. The basic structure of the draft PPA is complete, except for project-specific technical and other matters that are typically addressed in attachments The PPA includes a list of the attachments that are usually required It also includes a description in Appendix A of the typical components of formulas for pricing energy and capacity

The draft PPA assumes the construction of a new power plant from which the seller will provide energy and capacity to the purchaser However, the draft could easily be modified for use in conjunction with the transfer of an existing power plant to a non-utility owner The required modifications would mostly involve the deletion of provisions related to construction of a new plant

The draft PPA includes a provision (Section 18) providing for a government guarantee of the purchaser's obligations We understand that the Government of Romania seeks to avoid such guarantees We have included a guarantee provision in this preliminary draft to serve as a focal point for further discussion of this issue Moreover, it is safe to assume that foreign investors are likely to demand such a guarantee, particularly in light of recent turmoil in world financial markets

The draft PPA allows the purchaser to make payments in Lei However, the pricing provisions include mechanisms to protect the seller from local currency devaluation The

provisions include local currency depreciation mechanisms referenced in the pricing formulas discussed in Appendix A The agreement also includes a true-up mechanism (*See* Section 8 4, "Balancing Adjustment") designed to protect the seller from any currency fluctuations from the time that payment is received until the time that such payment is converted to foreign currency We believe that any foreign investor would insist on such protections, particularly given the recent volatility in global financial markets

The draft agreement also provides mechanisms for ensuring the seller's ability to convert payments in Lei to foreign currency and to repatriate foreign currency outside of Romania While the draft agreement specifies conversion to U S Dollars, it could easily be modified to provide for use of DM, pounds sterling or any other foreign currency Again, we believe that foreign investors will almost certainly require currency conversion and repatriation provisions similar to those in the draft agreement

A PPA is just one of several agreements that are required to support the construction of a new IPP-style power plant (or the transfer of an existing plant to a non-utility owner) Possible additional agreements include an implementation agreement, a fuel supply agreement, a transmission/interconnection agreement, and a joint venture agreement

- An implementation agreement typically sets forth any government guarantee of the payment obligations of the purchaser under the PPA, and the right of the seller under the PPA to convert local currency to dollars and to repatriate dollars outside the host country An implementation agreement usually also requires the government of the host country to support the project by providing assistance in obtaining necessary permits and approvals (An implementation agreement would replace the guarantee provision in Section 18 of the draft PPA)

- The fuel supply agreement is designed to match the allocation of the risks and obligations for obtaining fuel for the power plant with the allocation of the seller's and purchaser's risks and obligations under the PPA If the fuel supplier is state-owned, the implementation agreement usually requires the government to guarantee the obligations of the fuel supplier

- The transmission/interconnection agreement sets forth the basic right of the seller to connect to the transmission grid, the largely technical requirements related to connecting a power plant to the grid, and the price and other terms for the delivery of power to the purchaser

- A joint venture agreement would specify the rights and obligations of the participants in the project if it were developed as a joint venture

In addition to the major agreements listed above, an IPP-style project would typically require additional contracts concerning the engineering, procurement and construction of the project, operations and maintenance/labor, waste disposal, fuel transport, financing and other issues

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For your information, we are also providing two other power purchase agreements The first agreement involves the transfer of an existing, outmoded coal-fired power plant in the United States from a utility owner to a non-utility developer that will rehabilitate the plant The agreement requires the utility owner to purchase the plant's output for fifteen years after the transfer The second agreement is a model agreement for new power plants drafted for Hungary's transmission company, MVM This agreement does not specify a recommended duration However, it does include interesting provisions in Sections 12 7 and 12 8 dealing with changes in law necessary to gain accession to the European Union, and the termination of political force majeure protection in the event of accession

I will send electronic copies of the model Romanian PPA via e-mail I will send paper copies of all three PPAs via overnight delivery to the Ministry, the CONEL joint ventures department, USAID and Bechtel After you have had a chance to review these materials, we look forward to discussing a process for making further revisions to the model PPA I am tentatively planning a trip to Bucharest later this month or in early November to follow up on PPA-related matters

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Romanian Model Power Purchase Agreement

Draft of October 6, 1998

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102.

POWER PURCHASE AGREEMENT

THIS POWER PURCHASE AGREEMENT, dated as of *[_____ 19__]*, (the "Agreement") is made by and between *[Power Company]* a*[public utility company]* organized under the laws of Romania (the "Purchaser") and *[Project Company]*, a *[corporation/partnership]* organized under the laws of *[Nation]* (the "Seller")

PRELIMINARY STATEMENTS

WHEREAS, the Government of Romania has allowed and is encouraging the private development of electric power generation facilities in order to further economic development within the country, and

WHEREAS, the Seller desires to design, develop, finance, construct, own, operate and maintain a *[____]* MW nominal net design capacity, baseload, *[Fuel]*-fired electric generating plant to be located at *[location]*, and

WHEREAS, the Seller wishes to sell to the Purchaser, and the Purchaser wishes to purchase from the Seller, the Net Dependable Capacity of the Complex and the Energy to be generated at the Complex on the terms and conditions as set forth herein, and

WHEREAS, as a necessary precondition for financing, constructing and operating the Complex, the Seller considers it essential that it obtain either (a) a long-term commitment from the Purchaser for the sale of the Net Dependable Capacity of the Complex and the Energy to be generated at the Complex, or (b) such other adequate assurance of Seller's ability to sell the Energy generated at the Complex, and repay debt financing, that is acceptable to Seller and the Financing Parties, and

WHEREAS, the Purchaser and the Seller each desire to define their respective rights and obligations with respect to the Complex, the Project and this Agreement

NOW, THEREFORE, in view of the foregoing premises and in consideration of the mutual covenants and agreements hereinafter set forth, the Purchaser and the Seller hereby agree as follows

ARTICLE I
DEFINITIONS AND INTERPRETATION

Section 1 1 Definitions Unless the context otherwise requires, capitalized terms used in this Agreement, including the Preliminary Statements, shall have the respective meanings given to them below

(a) "**Affiliate**" shall mean as to any specified Person, any other Person who, directly or indirectly, (i) owns or is owned by, (ii) is in control of or is controlled by, or (iii) is under common ownership and control with, such specified Person For purposes of this definition, "control" and "controlled" shall mean (a) the ownership of more than ten percent (10%) of voting securities, (b) the ability to elect a majority of directors, or (c) the exercise of management control over an entity, either through contract or otherwise

(b) "**Agreement**" shall mean this Agreement, as defined in the first paragraph hereof, together with all Appendices and Schedules hereto, as the same may be supplemented or amended from time to time

(c) "**Base Term**" shall have the meaning given to it in Section 13 2

(d) "**Balancing Adjustment**" shall have the meaning given to it in Section 8 4

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(e) "**Business Day**" shall mean any Day excluding Saturday, Sunday, and any Day which shall be in Romania a legal holiday or a Day on which banking institutions are permitted to be closed

(f) "**Capacity Payment**" shall mean the fee payable by the Purchaser to the Seller with respect to the Net Dependable Capacity of the Complex, as more fully described in Appendix A

(g) "**Change In Law**" shall mean any of the following events occurring after the date of this Agreement (i) the enactment, adoption, promulgation or making of a new Governmental Requirement, (ii) the repeal, modification or change in the interpretation of any existing Governmental Requirement, (iii) a cancellation, non-renewal or other change in the conditions applicable to any Governmental Requirement, (iv) commencement of any Governmental Requirement that has not yet entered into effect as of the date of this Agreement, (v) any action by a Governmental Authority which renders all or any portion of any Project Agreement, including this Agreement, or any Financing Agreement unenforceable, invalid or void, or makes it illegal for any Person to receive, enjoy or enforce any material right under any Project Agreement, including this Agreement, or any Financing Agreement, or (vi) a change in the manner in which a Governmental Requirement is applied including any change in, or other alteration of, the application to the Seller or its shareholders of any Tax, including depreciation schedules

(h) "**Closing Date**" shall have the meaning given to it in Section 12 1(b)

(i) "**Commission Date**" shall have the meaning given to it in Section 5 4

(j) "**Seller**" shall have the meaning specified in the first paragraph of this Agreement

(k) "**Seller Event of Default**" shall have the meaning specified in Section 13 4

(l) "**Complex**" shall mean the MW nominal net design capacity, baseload, *[Fuel]*-fired electric generating plant located at *[location]* together with all Governmental Requirements granted with respect to the Project and all ancillary buildings, structures, improvements (including any ash or other waste disposal sites) and equipment thereto, including the Metering System and all fixtures, fittings, machinery and tools at the Site which are used in connection with the Project, but excluding the Interconnection Facilities and any portion of the Grid System

(m) "**CPI**" shall mean the most recently available Consumer Price Index for the *[United States]* as reported by the *[United States Bureau of Statistics]* (or if such index is no longer available on a timely basis or no longer published, such similar index as the Parties may mutually agree is most nearly comparable to the CPI), and "**CPI_b**" shall mean the CPI for the Month in which this Agreement is executed

(n) [reserved]

(o) "**Day**" shall mean the 24-hour period beginning and ending at 12 00 midnight Romanian time

(p) "**Date of Full Commercial Operation**" shall mean the first Day after the Commission Date of the final Unit to be commissioned

(q) "**Date of Initial Commercial Operation**" shall mean the first Day after the Commission Date of the first Unit to be commissioned

(r) "**Delivery Point**" shall mean the contact point, as more specifically shown on Exhibit E, between the Seller's high voltage switchyard and the Purchaser's transmission line, at which point the Energy is delivered to the Purchaser *[to be conformed to the technical requirements of the Project]*

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(s) "**Dispatch**" shall mean instructions issued by the Purchaser in accordance with Section 5 7 for the Seller to schedule and control the generation of electricity by the Complex in order to increase or decrease the Energy delivered to the Delivery Point

(t) "*[Dollar]* **Interest Rate**" shall mean interest accruing at LIBOR plus *[___]* basis points, compounded monthly

(u) "*[Dollar]*" or "*[Dollars]*" shall mean the lawful currency of the *[United States of America]*

(v) "**Effective Date**" shall have the meaning given to it in Section 12 3

(w) "**Emergency**" shall mean a condition or situation caused by unforeseen circumstances which (i) presents an imminent physical threat of danger to life or significant threat to health or property, (ii) could reasonably be expected to cause a significant disruption on or damage to the Grid System, the Complex or any portion thereof, or (iii) could reasonably be expected to significantly and adversely affect the Purchaser's ability to provide safe, adequate and reliable electric service to its customers, provided, however, that neither a transient condition resulting in a surge on, nor any sustained increase in energy demand from end users of, the Grid System shall be treated as an Emergency

(x) "**Energy**" shall mean the electric power (expressed in kVh) generated by the Complex which is delivered to the Delivery Point and measured in accordance with Article 6

(y) "**Energy Payment**" shall mean the fee payable by the Purchaser to the Seller with respect to the Energy supplied by the Seller to the Purchaser pursuant to this Agreement, as more fully described in Appendix A

(z) "**Financing Agreements**" shall mean all loan agreements, notes, mortgages indentures, security agreements, hedging agreements and other documents, if any, executed by the Seller to finance, (including any refinancing, modification or amendment thereof), from time to time, any portion of the Project

(aa) "**Financing Parties**" shall mean each Person, other than a shareholder of the Seller, who (i) is a Party to any of the Financing Agreements and provides debt financing to the Seller or any Affiliate thereof for any part of the Project, or (ii) provides credit support or credit enhancement for any construction or debt financing of the Project, in each case either initially or in connection with a refinancing

(bb) "**FM Event**" shall have the meaning specified in Section 11 1

(cc) "**FM Ratio**" shall have the meaning specified in Section 11 6(b)

(dd) "**Force Majeure Event**" shall have the meaning specified in Section 11 2

(ee) "**Forced Outage**" shall have the meaning specified in Section 5 9

(ff) "**Fuel Supply Agreement**" shall mean the fuel supply agreement between *[Fuel Supply Company]* and the Seller for the supply of *[fuel]* to the Project

(gg) "**Government**" shall mean the national Government of Romania.

(hh) "**Governmental Authority**" shall mean any (i) national, federal, state, provincial, city, municipal, public or local government, department, central bank, court, council, commission, board, bureau, tribunal, agency or instrumentality of Romania, (ii) any subdivision, agent, commission, board or authority of any of the foregoing, or (iii) any quasi-governmental or private body exercising any regulatory, expropriation, fee collecting or Tax

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authority under or for the account of any of the foregoing, whether acting under its own authority or authority delegated to it by any of the foregoing

(ii) "**Governmental Requirements**" shall mean all laws, statutes, orders, ordinances, injunctions, constitutional provisions, treaties, policies, licenses, notifications, rules, rulings, regulations, acknowledgements, concessions, decisions, authorizations, consents, decrees, permits, waivers, proclamations, instructions, certifications, judgements, verdicts, ratifications, privileges, edicts, approvals, filings, petitions, mandates, visas, directives or similar items of, or granted or required by, any Governmental Authority which are applicable to the Seller, its shareholders or any Affiliates thereof, the Project, the financing of the Project or this Agreement

(jj) "**Grid System**" shall mean any and all transmission and distribution facilities through which Energy will be distributed by the Purchaser from the Delivery Point to end users of electricity

(kk) "**Guarantee**" shall have the meaning given to it in Article 18

(ll) *[reserved]*

(mm) "**Interconnection Facilities**" shall mean the facilities to be engineered, designed, procured, constructed, installed, tested, commissioned, owned and maintained by the Purchaser to provide for the transfer of Energy from the Delivery Point to the Grid System, including all relay-protection equipment and transmission lines, as more particularly described in Appendix E, and all other facilities from time to time determined to be necessary by mutual agreement of the Seller and the Purchaser to enable the Seller to deliver and the Purchaser to receive Energy from the Complex

(nn) "**Interest**" shall mean (i) for principal originally denominated in Lei, interest which accrues at the Lei Interest Rate, and (ii) for principal originally denominated in all other currencies, including *[Dollars]*, interest which accrues at the *[Dollar]* Interest Rate, as applicable

(oo) "**Invoice**" shall have the meaning given to it in Section 8 1

(pp) "**kW**" shall mean kilowatt

(qq) "**kWh**" shall mean kilowatt-hours

(rr) "**kWm**" shall mean kilowatt-Months

(ss) "**Letter of Credit**" shall have the meaning given to it in Section 4 5

(tt) "**LIBOR**" shall mean the three (3) Month London Interbank Offering Rate for *[Dollars]* in effect as of the first Business Day of any Month as determined by reference to the *Financial Times*, *Wall Street Journal*, or such similar publication of record as the Parties may mutually agree

(uu) "**Leu**" or "**Lei**" shall mean the lawful currency of Romania.

(vv) "**Romanian Interest Rate**" shall mean interest which accrues at the Local Bank Reference Rate plus *[__]* basis points, compounded Monthly, provided, however, that if the RoCPI has increased by more than fifteen percent (15%) over the preceding twelve (12) Month period from the Day such interest accrues, then the Romanian Interest Rate shall be compounded Weekly

(ww) "**Local Bank Reference Rate**" shall mean the reference interest rate at the Seller Local Bank as specified on Appendix K

(xx) "**MW**" shall mean megawatts

(yy) "**Metering System**" shall mean all meters, metering devices and related instruments used to measure and record (i) the Net Dependable Capacity of the Complex, and (ii) the delivery and receipt of Energy at the Delivery Point, as further described in Appendix L

(zz) "**Month**" shall mean a calendar month (in accordance with the Gregorian Calendar), provided, however, that if either the Date of Initial Commercial Operation or the Termination Date fails to occur on the first or last Day of a Month, then the first and last Months of the Term of Operation shall be deemed to be that fraction of a Month which occurs (i) from the Date of Initial Commercial Operation until the last Day of such Month, and (ii) from the first Day of a Month until the Termination Date, respectively, and "**Monthly**" shall mean once per Month

(aaa) "**RoCPI**" shall mean the most recently available Romanian Consumer Price Index as reported by *[Romanian statistics bureau]* and published in *[official Government publication]* (or if such index is no longer available on a timely basis or no longer published, such other index as the Parties mutually agree is most nearly comparable to the RoCPI), and "**$RoCPI_b$**" shall mean the RoCPI for the Month in which this Agreement is executed

(bbb) "**Net Dependable Capacity**" shall mean the aggregate output capability that the Complex is capable of generating (expressed in kW) as established in accordance with the testing procedures set forth in Appendix F, and "**Unit Net Dependable Capacity**" shall mean that portion of the Net Dependable Capacity attributable to a Unit

(ccc) "**Nominated Capacity**" shall mean *[___]* MW

(ddd) "**Non-Discriminatory**" shall mean the equal treatment of the Seller so as to ensure that a higher standard is not applied to the Seller than is or was applied to Persons in comparable situations with the effect of depriving the Seller of any benefits or profits or forcing the Seller to incur additional costs

(eee) "**Operating Committee**" shall have the meaning given to it in Section 5 2

(fff) "**Operating Procedures**" shall mean the procedures set forth in Appendix H

(ggg) "**Party**" shall mean the Seller or the Purchaser, individually, and "**Parties**" shall mean the Seller and the Purchaser, collectively

(hhh) "**Person**" shall mean individuals, corporations, partnerships, joint ventures, trusts and other commercial entities, whether public or private, and any Governmental Authority

(iii) "**Project**" shall have the meaning given to it in Section 3 1(a)

(jjj) "**Project Agreements**" shall mean this Agreement, the Guarantee, the Fuel Supply Agreement, the lease and all other legal instruments executed in relation to or concerning the Site, and *[addition of other materials as appropriate]*

(kkk) "**Prudent Utility Practices**" shall mean, at a particular time, those practices, methods and techniques generally followed by the international independent power industry with respect to the operation and maintenance of electric generating equipment of the type applicable to the Complex, and that, in the exercise of reasonable judgment in light of the facts known at the time a decision was made, could have been reasonably expected to obtain the desired result in a manner reasonably commensurate with safety, performance, dependability, efficiency and economy Prudent Utility Practices are not intended to be limited to the optimum practice, method

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or technique to the exclusion of all others, but rather to be a spectrum of possible practices, methods and techniques each meeting the standard set forth in the previous sentence, any one of which is acceptable

(lll) **"Purchaser"** shall have the meaning specified in the first paragraph of this Agreement

(mmm) **"Purchaser Event of Default"** shall have the meaning specified in Section 13 5

(nnn) **"Reference Exchange Rate"** shall mean for any Day, the most recently published rate of exchange for the purchase of *[Dollars]* with Lei by *[Foreign Exchange Bank]*, as determined by reference to the *[Publication]* or such similar publication as the Parties may mutually agree

(ooo) **"Renewal Term I"** and **"Renewal Term II"** shall have the meanings given to them in Section 13 3

(ppp) **"Sales Price"** shall mean, collectively, the Capacity Payment, the Energy Payment and the Balancing Adjustment

(qqq) **"Scheduled Outage"** shall have the meaning given to it in Section 5 8

(rrr) **"Senior Debt"** shall mean that portion of the initial borrowing under the Financing Agreements which shall be senior in right to all other debt of the Project

(sss) **"Site"** shall mean the land on which any part of the Complex is located together with all property rights thereto, as more particularly described in Appendix M

(ttt) **"Special Force Majeure Event"** shall have the meaning specified in Section 11 3

(uuu) **"Target Commission Date"** shall mean, for each Unit, that date that the Seller expects to achieve the Commission Date of such Unit, as listed for each Unit on Exhibit D, and as such date may be revised from time to time in accordance with this Agreement

(vvv) **"Target Completion Date"** shall mean that date which is Months from the Day the Seller issues the notice to proceed to the engineering, procurement and construction contractor for the Complex, which is the date the Seller expects to achieve the Date of Full Commercial Operation, as such date may be revised from time to time in accordance with this Agreement

(www) **"Tax"** shall mean any and all forms of taxes and fees, including any imposition, duty, assessment, excise, surcharge, tariff, toll, fee, value added tax, contribution, stamp tax, levy or similar charge imposed or levied by any Governmental Authority, including all employment taxes and any deductions or withholdings of any sort, those pertaining to any import or export, and all penalties, costs and interest relating to the foregoing

(xxx) **"Technical Limits"** shall mean the limits and constraints described in Appendix C relating to the operation, maintenance and Dispatch of the Complex

(yyy) **"Term"** shall mean the time from and after the Effective Date until the Termination Date

(zzz) **"Term of Operation"** shall mean the time from and after the Date of Initial Commercial Operation until the Termination Date

(aaaa) **"Termination Date"** shall have the meaning given to it in Section 13 1

(bbbb) **"Unit"** shall mean each of the *[Fuel]*-fired steam generation and turbine units as described in Appendix B

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(cccc) "**Week**" shall mean each period of seven (7) Days beginning each Monday, and "**Weekly**" shall mean once per Week

(dddd) "**Year**" shall mean a twelve (12) Month period beginning each January 1st, provided, however, that if either the Date of Initial Commercial Operation or the Termination Date fails to occur on the first or last Day of a Year, then the first and last Years of the Term of Operation shall be deemed to be that fraction of a Year which occurs (i) from the Date of Initial Commercial Operation until December 31st", and (ii) from January 1st until the Termination Date, respectively, and "**Yearly**" shall mean once per Year

Section 1 2 Interpretation In this Agreement, unless the context requires otherwise

(a) all Article and Section titles and headings are for convenience only and neither constitute a part of this Agreement nor shall be utilized in construing any meaning hereunder,

(b) words denoting the singular shall include the plural and vice versa, and words denoting one gender shall include all others,

(c) references to Articles and Sections are, unless otherwise noted, references to Articles and Sections in this Agreement,

(d) in carrying out its obligations and duties under this Agreement, each Party shall have an implied obligation of good faith,

(e) the terms "include" and "including" shall mean "without limitation" unless otherwise stated,

(f) a reference to any agreement shall be a reference to that agreement as amended, varied, added to, substituted, replaced, renewed or extended, and

(g) no portion or part of this Agreement shall be interpreted for or against either Party solely on the basis of drafting responsibility

ARTICLE 2
SALE AND PURCHASE OF ENERGY AND CAPACITY

Section 2 1 Sale and Purchase From and after the Date of Initial Commercial Operation and subject to and in accordance with the terms and conditions of this Agreement (a) the Seller agrees to make available the Net Dependable Capacity of the Complex and to deliver to the Purchaser such Energy as the Purchaser may Dispatch from time to time consistent with the terms of this Agreement, and (b) the Purchaser agrees to accept and pay for all Energy it Dispatches which is delivered to it by the Seller and to pay for the Net Dependable Capacity of the Complex, for the Sales Price set forth herein

Section 2 2 Delivery of Energy The place for delivery of Energy shall be the Delivery Point The Parties acknowledge that the Complex shall be a baseload facility operated on a dispatchable basis subject to the Purchaser's giving the necessary notice of Dispatch pursuant to Section 5 7 The Purchaser shall only be obliged to accept and pay for Energy that has both been Dispatched and subsequently delivered to the Delivery Point

Section 2 3 Sales During Testing Notwithstanding the provisions of Section 2 1 and 2 2, during commissioning tests of each Unit and any capacity testing of the Complex, including testing pursuant to Section 5 5, the Purchaser shall take and pay for all Energy generated by the Complex and delivered to the Delivery Point at the price set forth in Appendix A, whether or not such Energy is Dispatched

Section 2 4 Quantity The quantities of Energy delivered to the Purchaser by the Seller shall be metered, monitored, measured and recorded in accordance with the provisions of Article 6 and Appendix L

Section 2 5 Cooperation The parties hereto shall mutually and reasonably cooperate with each other in order to achieve the objectives of this Agreement

ARTICLE 3
OBLIGATIONS OF THE SELLER

Section 3 1 General Obligations of the Seller The Seller shall cause and be responsible for

(a) the design, planning, permitting, construction, equipping, testing, commissioning, management, ownership, operation and maintenance of the Complex, and all activities related thereto (the "Project"),

(b) arranging, on terms and conditions acceptable to the Seller in its sole and absolute discretion, all necessary financing for the Project, whether debt or equity, and negotiating all Financing Agreements with the Financing Parties and other Persons, provided, however, that nothing in this Section 3 1(b) shall be construed as obligating the Seller to successfully finance the Project,

(c) the due and proper application for and diligent effort to obtain, with the cooperation of the Purchaser, all Governmental Requirements,

(d) negotiating and entering into a lease or other legal instrument for the purpose of obtaining possession and land use rights over the Site *[conform to specific site arrangement]*,

(e) constructing, testing, operating and maintaining the Complex in accordance with Section 5 1,

(f) the awarding of all contracts, the appointment of all professional advisors and the purchase of all equipment, supplies and materials which may be necessary to complete the Project,

(g) procuring, *[importing]* and storing *[fuel]* and other such fuels, if any, as may be necessary to operate the Complex in accordance with the requirements of this Agreement,

(h) recruiting, training and managing all labor (local or foreign) necessary or desirable to construct, operate and maintain the Complex during the Term, and obtaining all visas and work permits for foreign personnel,

(i) providing the Purchaser with the certificate required in Section 12 1(f), and all notifications required under Section 12 2,

(j) complying with the Purchaser's Dispatch instructions in accordance with Section 5 7, and

(k) fulfilling all other Seller obligations under this Agreement

Section 3 2 Costs Except as specifically allocated hereunder to the Purchaser, all expenses incurred by the Seller in connection with the Project shall be borne by the Seller

ARTICLE 4
OBLIGATIONS OF THE PURCHASER

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Section 4 1 General Obligations of the Purchaser The Purchaser shall cause and be responsible for

(a) assisting the Seller in obtaining, and maintaining ongoing compliance with, all Governmental Requirements,

(b) providing the Seller with the Guarantee, the legal opinion required in Section 12 1(e), the certificate required in Section 12 1(f) and all notifications required under Section 12 2,

(c) assisting the Seller in ensuring that the Seller has full and legally documented rights to free and clear use and quiet enjoyment of the Site (in form and substance satisfactory to the Seller) and that the Site is suitable for the construction and operation of the Complex in compliance with all applicable laws and regulations of Romania,

(d) assisting the Seller to ensure that all necessary access to and from the Site (for both foreign and local workers) is made available to the Seller and its employees, contractors, subcontractors and advisors The Purchaser shall also assist the Seller on a best efforts basis in obtaining all visas and work permits for foreign personnel, and the recruitment of local labor,

(e) ensuring that all necessary utilities (including start-up electricity for the account of the Purchaser) are made available at the Site in a timely manner as necessary for the construction, testing, commissioning and operation of the Complex,

(f) assisting the Seller in arranging for the issuance of all Governmental Requirements which may be needed to allow the Seller to (i) procure all necessary fuel (ii) deliver such fuel to the Complex, and (iii) store such fuel at the Site for future use at the Complex, *[import fuel as needed into Romania]*

(g) assisting the Seller in arranging for the issuance of all Governmental Requirements which may be needed to allow the Seller to dispose of all waste products generated or discharged at or by the Complex, whether or not such disposal is on or off Site, and

(h) fulfilling all other Purchaser obligations under this Agreement

Section 4 2 Cooperation As requested by the Seller, the Purchaser shall cooperate with and assist the Seller in (i) working with the Financing Parties to achieve the Closing Date for the Project, and (ii) identifying and working with potential or committed equity participants in the Project, which cooperation and assistance will include discussing the Project with the Financing Parties and potential or committed equity participants and providing such parties all necessary information (including, with respect to the Financing Parties, legal opinions obtained by the Purchaser) regarding the Purchaser and relevant Governmental Authorities

Section 4 3 Payment Obligations For purposes of the Purchaser's payment obligations, in the event the Seller shall be unable to conduct or complete commissioning tests of a Unit by the applicable Target Commission Date for such Unit due to (a) a Special Force Majeure Event or a Force Majeure Event which is declared by the Purchaser, (b) any delay caused by the Purchaser or an Affiliate thereof including any failure by the Purchaser to perform its obligations under this Article 4, (c) the failure of the Seller to obtain, after the due application for, any Governmental Requirement despite the Seller's compliance in all material respects with the procedural and substantive requirements of such Governmental Requirement as applied in a Non-Discriminatory manner, or (d) a Purchaser Event of Default, then the Purchaser shall be obligated to pay for the full Unit Net Dependable Capacity with respect to such Unit as if such Unit was commissioned on the Target Commission Date This Section 4 3 shall apply to each Unit at the Complex If the provisions of this Section 4 3 become applicable to the first Unit to be commissioned by the Seller, then for purposes of Section 8 1, the Target Commission Date of such Unit shall be deemed to be the Date of Initial Commercial Operation

ection 4 4 Interconnection Facilities The Purchaser shall cause to be constructed and made ready to receive Energy, by not later than one hundred eighty (180) Days prior to the Target Commission Date for the first Unit, the

Interconnection Facilities, and the Purchaser shall maintain the same in compliance with Prudent Utility Practices throughout the Term of this Agreement

Section 4 5 Maintenance of Letter of Credit On or before the Date of Initial Commercial Operation, the Purchaser shall deliver to the Seller, in the form attached hereto as Schedule A, an irrevocable letter of credit issued by the Letter of Credit Bank specified in Appendix K in favor of the Seller in the amount of *[insert the amount in Dollars that is equivalent to six Months of Invoice payments]* (the "Letter of Credit") The Purchaser shall at all times thereafter maintain the Letter of Credit at the Letter of Credit Bank or such successor designated pursuant to Appendix K, until it shall be returned to the Purchaser in accordance with Section 13 11 At all times in the event of a draw under the Letter of Credit, the Purchaser shall immediately reinstate the Letter of Credit to the full amount as provided for hereunder within five (5) Business Days after any drawing upon it by the Seller

Section 4 6 Costs All expenses incurred by the Purchaser in connection with this Article 4 shall be borne by the Purchaser

ARTICLE 5
OPERATION AND MAINTENANCE

Section 5 1 Operating Standards The Seller shall at all times, including during an Emergency, use its best efforts to perform or cause to be performed the testing, commissioning, operation and maintenance of the Complex in accordance with (a) Prudent Utility Practices, (b) the Operating Procedures and the Technical Limits, (c) the terms and conditions of this Agreement, and (d) such laws of Romania as may be applicable to the Complex

Section 5 2 Safety and Technical Guidelines The Parties shall organize an operations steering committee (the "Operating Committee"), comprised of four (4) members, two (2) of whom shall be selected by the Purchaser and two (2) of whom shall be selected by the Seller, with the chairman of the Operating Committee being one of the Seller's representatives The Operating Committee shall meet from time to time to discuss and mutually agree upon safety and technical guidelines for the operation of the Complex In the event the Operating Committee shall not agree on any issue, the vote of the chairman of the Operating Committee shall control The Seller shall maintain ongoing communications with the Purchaser and shall operate the Complex within such agreed-upon safety and technical guidelines, provided, however, that the Seller shall not be required to comply with any rules or guidelines established by the Operating Committee or any other requests by the Purchaser which (a) might cause a material increase in the cost to the Seller of operating or maintaining the Complex unless the Purchaser agrees, to the Seller's satisfaction, to fully reimburse the Seller for such increased costs, as such may be included thereafter on any Invoice, or (b) are inconsistent with Section 5 1

Section 5 3 Testing Standards The Operating Committee shall develop procedures, standards, methods, settings and a program to be followed by the Seller for the testing of the capacity of the Complex in accordance with the Operating Procedures and Prudent Utility Practices The Seller shall give the Purchaser not less than twenty (20) Business Days (or such lesser period as the Parties may agree) prior notice of its intention to commence any testing of a Unit Although the Seller shall be solely responsible for conducting all testing and commissioning of the Units, a representative of the Purchaser shall be entitled to be present at any such testing, provided, however, that tests may be conducted validly at the notified times in the absence of the Purchaser's representative

Section 5 4 Certification Forthwith upon the successful completion of the testing of each Unit, the Seller shall certify to the Purchaser in writing that such Unit has satisfied such tests and that such Unit is fully capable of and available for producing Energy at the nominated capacity as listed on Appendix B, provided, however, that the Seller may certify that a Unit has successfully completed its testing notwithstanding that such Unit is unable to meet the nominated capacity listed in Appendix B, but in that event adjustments shall be made to Capacity Payments pursuant to the provisions of Appendix

A The Day upon which the Purchaser receives such certification shall be the date of commission (the "Commission Date") for such Unit

Section 5 5 Testing for Capacity To determine the ongoing Net Dependable Capacity of the Complex, the Seller shall test the Complex at least twice per Year at such times as are determined by the Operating Committee and in accordance with the Section 5 1 and Appendix F

Section 5 6 Title to Energy Delivery of Energy shall be completed when the Energy is received at the Delivery Point, and title to such Energy shall pass to the Purchaser upon delivery to the Delivery Point

Section 5 7 Dispatch The Purchaser shall have the right to Dispatch the Complex from time to time, provided, however, that at all times such Dispatch shall (a) be in -accordance with Prudent Utility Practices, (b) conform to the Operating Procedures and Technical Limits, (c) be consistent with the terms and conditions of this Agreement, (d) be, so far as is material to the Complex, in accordance with the laws of Romania, and (e) not at any time exceed the Net Dependable Capacity (as adjusted for Scheduled and Forced Outages) of the Complex unless agreed to by the Seller The Operating Committee shall establish dispatching procedures based upon the provisions of this Section 5 7 and the Purchaser's load requirements

Section 5 8 Scheduled Outages It is understood and agreed to by the Parties that, in order to undertake necessary inspection, overhaul, maintenance and repair of the Complex and to allow for its operation in accordance with Section 5 1, the Seller shall be entitled to shut down the Complex, either in whole or part (a "Scheduled Outage"), for periods of downtime as provided for in Section 5 10

Section 5 9 Forced Outages It is understood and agreed to by the Parties that, from time to time, the Seller may need to shut down the Complex, in whole or part, because of a Forced Outage, which shall be any decrease in the Net Dependable Capacity of the Complex that is not the result of (a) a request by the Purchaser in accordance with this Agreement, (b) a Scheduled Outage, (c) an FM Event, (d) a Purchaser Event of Default, or (e) a condition caused wholly or in part by the Purchaser, an Affiliate of the Purchaser or the Grid System, to the extent such condition was not caused by the Seller (a "Forced Outage") Upon the occurrence of a Forced Outage, the Seller shall immediately notify the Purchaser regarding the scope of such outage and the Seller's best estimate of the probable duration thereof

Section 5 10 Scheduling of Scheduled Outages

(a) Not later than October 1st of each Year after the Date of Initial Commercial Operation, the Seller shall submit to the Purchaser its desired schedule for Scheduled Outage periods for the following Year

(b) Not later than December 1st of each Year during the Term of Operation the Purchaser shall notify the Seller in writing whether the proposed schedule of Scheduled Outages for the following Year is acceptable, provided, however, that if the first Year of the Term of Operation begins on or after October 1st, then the provisions of Section 5 10(c) shall control for the first, and to the extent applicable, second Year of the Term of Operation If the Purchaser does not accept one or more of the requested Scheduled Outage periods referred to above, the Purchaser shall advise the Seller in its written notification of a period when the Purchaser determines any such unacceptable Scheduled Outage period can be rescheduled Such rescheduled period shall (i) be as close as reasonably practicable to the requested period, (ii) comply with the Technical Limits, (iii) be of equal duration as the requested period, and (iv) be consistent with the projected Net Dependable Capacity for the Year involved Within ten (10) Business Days of the receipt of such notice by the Seller, the Parties shall thereafter meet and come to an agreement on the schedule of Scheduled Outages If the Purchaser does not advise the Seller within the applicable time period of the unacceptability of any requested Scheduled Outage period or, if having done so, does not advise the Seller of a rescheduled period which is consistent with the conditions stated in this Section 5 10(b), then the Scheduled Outage periods originally requested by the Seller shall be deemed to have been accepted by the Purchaser for such Year

(c) For the first Year of the Term of Operation, and for the second Year of the Term of Operation if the first Year of the Term of Operation begins on or after October 1st, the Scheduled Outage periods for the Complex shall be mutually agreed upon by the Parties at least thirty (30) Days before the beginning of the Year in question, provided however, that if the Initial Date of Commercial Operation falls in December, then the Scheduled Outage periods for the Complex for the second Year of the Term of Operation shall be mutually agreed upon by the Parties within thirty (30) Days after the Date of Initial Commercial Operation

(d) The Purchaser shall use its best efforts to perform any maintenance on the Interconnection Facilities during the Seller's Scheduled Outage periods

Section 5 11 Scheduling of Dispatch

(a) In order to assist with the delivery of fuel, the efficient scheduling of the Complex, and to allow the Seller to meet the Purchaser's Dispatch instructions in an effective and efficient manner, the Parties hereby agree that the following procedure shall be followed

(i) Year Ahead Notification Not later than October 15th of each Year the Purchaser shall submit to the Seller, in reasonable detail on a Month-by-Month basis, its anticipated requirements for Energy for the following Year

(ii) Quarter Ahead Notification Not less than sixty-two (62) Days before the beginning of each three Month period beginning on January 1st of each Year, the Purchaser shall provide to the Seller, in reasonable detail on a Week-by-Week basis, its anticipated requirements for Energy for the following three (3) Month period, and revised estimates, if any, for the remaining Months in the current Year

(iii) Week Ahead Notification Not less than forty-eight (48) hours before the beginning of each Week, the Purchaser shall provide to the Seller, in reasonable detail on an hour-by-hour basis, its anticipated requirements for Energy for the following Week

(iv) Day Ahead Notification By noon of each Day, the Purchaser shall provide to the Seller, in reasonable detail on an hour-by-hour basis, its anticipated requirements for Energy for the following Day

(b) Section 5 11(a) shall become applicable to the Complex on the Date of Initial Commercial Operation, provided, however, that to assist the Seller in the preparation of the Complex during the initial testing, commissioning and operation periods for each Unit, prior to the Date of Initial Commercial Operation the Purchaser shall provide the information described in Section 5 11(a) upon request by the Seller, provided, further, that nothing in this Section 5 11 shall relieve the Purchaser from its obligation to accept and pay for Energy during commissioning and testing of the Complex pursuant to Section 2 3

(c) Although it is understood that the Purchaser may Dispatch the Complex at levels different than those notified to the Seller in Section 5 11 (a), the Purchaser shall (i) use its best efforts to ensure that the information forwarded to the Seller pursuant to Section 5 11(a) represents its best estimates of future Dispatch requirements, (ii) shall provide to the Seller, upon request, a written explanation which shall show the reasons and causes for any deviation from the estimates given the Seller in Section 5 11(a) whenever actual Dispatch of the Complex by the Purchaser is either greater than or less than *[__]* % of the estimates delivered to the Seller pursuant to Section 5 11 (a), and (iii) *[possible penalty or reimbursement payments from Purchaser or minimum Dispatch requirements for the Complex may be necessary in the event that the estimates of Dispatch provided to the Seller by the Purchaser in Section 5 11(a) exceed actual Dispatch of the Complex such that the Seller accumulates a significant surplus of fuel at the Complex]*

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(d) All notices provided to the Seller under this Section 5 11 shall take into account, as appropriate, any Scheduled Outages of the Complex

Section 5 12 Operation Records

(a) The Seller shall at all times keep an accurate and detailed operations log for the Complex which shall include information known to the Seller on Unit availability, Scheduled Outages, Forced Outages, circuit breaker trips requiring a manual reset and any significant events related to the operation of the Complex, and such log shall be available for review and photocopy by the Purchaser during regular business hours, from time to time and upon request

(b) The Purchaser shall at all times keep accurate and detailed operations records to the Complex, Dispatch and the Interconnection Facilities Such records shall be available for review and photocopy by the Seller during regular business hours, from time to time and upon request

Section 5 13 Environmental Impact The Seller shall engineer and construct the Project to comply with the applicable environmental laws of Romania including compliance with any applicable environmental rules and regulations issued by the environmental protection agency of Romania and will meet or exceed the standards set by such agency for the operation of the Complex pertaining to noise, air emissions, the discharge of waste water and the disposal of waste materials and residues, provided, however, that the Seller shall not be liable under any law of Romania for exceeding any environmental standard or law issued by the environmental protection agency of Romania or by any other Governmental Authority, provided, however, that nothing in this Section 5 13 shall require the Seller to exceed any such standard or law

Section 5 14 Emergency The Complex shall, during an Emergency (a) as directed by the Purchaser, supply such power as the Complex is able to generate and the Purchaser is able to receive, and in the event the Seller has scheduled a Scheduled Outage during such time, the Seller shall make all reasonable efforts to reschedule the Scheduled Outage or, if such Scheduled Outage has begun, either to reschedule the Scheduled Outage or to expedite the completion of the maintenance work and restore power as soon as possible, or (b) as directed by Purchaser or as the Seller may feel necessary after consultation with Purchaser, disconnect or shut down the Complex in order to prevent any material damage to the Complex or the Grid System, provided, however, that all actions of the Seller during an Emergency shall conform to the requirements of Section 5 1 and, provided, further, that any costs incurred by the Seller under this Section 5 14 which would not otherwise have been incurred by the Seller but for the Emergency shall be paid by the Purchaser to the Seller, as may be included on any Invoice

ARTICLE 6
METERING

Section 6 1 Ownership of Metering System The Seller shall procure, construct, own and maintain the Metering System Within ten (10) Business Days prior to the Date of Initial Commercial Operation, the Metering System will be tested for accuracy in the presence of the Seller and the Purchaser Thereafter, the Metering System shall be appropriately sealed, which seals shall only be broken in the presence of representatives of both the Seller and the Purchaser The Purchaser shall be notified of and shall have a representative present at any test, inspection, adjustment, maintenance or replacement of any part of the Metering System performed by the Seller or its agent The Purchaser may, at its own cost and expense, install, own and maintain a backup Metering System

Section 6 2 Records The Seller shall at all times keep accurate and detailed records of the metering of the Complex, and such records shall be available for review and photocopy by the Purchaser during regular business hours, from time to time and upon request

Section 6 3 Testing of Metering System The Seller shall test the Metering System for accuracy at intervals of no greater than one hundred eighty (180) Days and at such times as are determined by the Operating Committee In addition, the

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Seller will also conduct a test, at any time within ten (10) Business Days after a request by the Purchaser if the Purchaser believes that the Metering System is inaccurate by more than one-half percent (0 5%), after giving the Purchaser no less than two (2) Business Days' notice The Purchaser may have a representative present during all testing The costs of such tests requested by the Purchaser shall be borne by the Seller, provided, however, that if a test requested by the Purchaser indicates that the Metering System is accurate to within one-half percent (0 5%), the Purchaser shall bear the costs of such test

Section 6 4 Retroactive Adjustment If any seal securing the Metering System is found broken, if the Metering System fails to register, or if the measurement made by the metering device is found upon testing to vary by more than one-half percent (0 5%) from the measurement made by the standard meter used in the test, an adjustment shall be made correcting all measurements of energy made by the Metering System during the period of inaccuracy as may be established by the Parties on the basis of any relevant information, including data from any back up metering system If the actual period cannot be determined to the good faith mutual satisfaction of the Parties, such period shall be deemed to be one-half of the period from the date of the last test of the Metering System to the date such failure is discovered or such test is made The Purchaser shall receive a debit or credit, as the case may be, for any amounts calculated due under this Section 6 4 on the next Invoice which is issued by the Seller after a determination is made hereunder and agreed to by the Parties

Section 6 5 Reading of Meters The Metering System shall be read Monthly on the last Business Day of each Month (or on such other Day as may be mutually agreed upon by the Parties) for the purpose of determining the net amount of Energy delivered to the Purchaser since the previous reading The Seller shall read the Metering System during normal business hours and the Purchaser shall have the right to have a representative present during all meter readings When a representative of the Purchaser is present at a reading of the Metering System, such reading shall be jointly taken and recorded When a representative of the Purchaser is not present at a Monthly reading, then the Seller's representative shall take and record such reading and make a dated photographic record thereof

ARTICLE 7
SUPPLY OF FUEL

Section 7 1 Supply of Fuel Throughout the period from the testing and commissioning of the Complex until the end of the Term of Operation, the Seller shall at all times, at its sole expense, cause to be supplied and delivered to the Site *[fuel]* as necessary for the operation of the Complex

Section 7 2 Fuel Supply Agreement The Seller shall negotiate and execute the Fuel Supply Agreement with one or more *[fuel]* suppliers which will ensure timely delivery to the Complex of sufficient quantities of *[fuel]* which, in the reasonable opinion of the Seller, will enable the Seller to meet its obligations under this Agreement

ARTICLE 8
COMPENSATION, PAYMENT AND BILLING

Section 8 1 Billing From and after the Date of Initial Commercial Operation, the Seller shall deliver an invoice ("Invoice") to the Purchaser after the first (1st) but before the seventh (7th) Business day of each Month, denominated in Lei, in respect of (a) the Capacity Payment as determined in accordance with Appendix A, (b) the Energy Payment as determined in accordance with Appendix A, (c) the Balancing Adjustment as determined in accordance with Section 8 4, and (d) any other amounts which might be due under this Agreement, each for the previous Month or for an earlier Month to the extent then available for invoicing by the Seller The initial Invoice issued by the Seller to the Purchaser shall include all amounts owed the Seller pursuant to Section 2 3 which had accrued prior to the Date of Initial Commercial Operation

ection 8 2 Payments The Purchaser shall remit payment for 100% of the amount of each Invoice, regardless of any dispute which may arise with respect to such Invoice, in Romania by the fifteenth (15th) Business Day of the Month in

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which the Invoice was issued by transfer of immediately available funds to the account of the Seller at the Seller Local Bank listed on Appendix K In the event that any amount of an Invoice is disputed by the Purchaser, the provisions of Section 8 8 shall apply

Section 8 3 Seller Delays Any delay by the Seller in submitting an Invoice to the Purchaser as provided for in Section 8 1 shall allow the Purchaser to delay, without penalty, payments due under Section 8 2 for an equal number of Days as the Seller was late in delivering the Invoice to the Purchaser

Section 8 4 Balancing Adjustment In each Invoice, the Seller shall include (a) a statement of the Reference Exchange Rate for the purchase of *[Dollars]* with Lei on the Business Day immediately preceding the Day such Invoice is issued, and (b) a statement of the rate of exchange actually achieved (after deduction of commissions and any other charges related to such exchange) by the Seller in purchasing *[Dollars]* with Lei received by way of the previously issued Invoice (the "Achieved Exchange Rate") An adjustment (the "Balancing Adjustment") shall be made in each Invoice in order to take into account any differences between the Reference Exchange Rate for the most recent prior Invoice and the Achieved Exchange Rate for the funds actually received from that Invoice, so as to ensure that the rate of exchange for the former is equivalent to the rate of exchange for the latter The Balancing Adjustment shall be calculated in *[Dollars]*, being the amount by which the Lei actually received by the Seller, as converted to *[Dollars]* at the Reference Exchange Rate notified to the Purchaser in the prior Invoice, is greater or lesser than such amount as actually converted to *[Dollars]* at the Achieved Exchange Rate Each Invoice shall include the computation of the Balancing Adjustment and shall state such amount as converted to Lei using the Reference Exchange Rate for that Invoice The Balancing Adjustment shall be added to or deducted from, as applicable, the amounts otherwise due to the Seller under the current Month's Invoice The Seller shall use all reasonable efforts to purchase *[Dollars]* with Lei received from the Purchaser as soon as practicable following the receipt thereof, and shall, to the extent possible, minimize the transaction costs of each such purchase

Section 8 5 Free and Clear All sums payable under this Agreement shall be paid free from any restrictions or conditions, and without deduction, withholding, set-offs or counterclaims, in respect of any Tax or otherwise

Section 8 6 Interest Late payments by either Party of any amounts due the other Party-under this Agreement shall bear Interest from the Day on which such payment was due until the Day that such payment is actually received

Section 8 7 Use of Letter of Credit In the event that an Invoice remains unpaid on the first Day of the Month succeeding the Month the Invoice was issued, the Seller may, at its option and in lieu of collecting an equivalent amount from the Purchaser, draw on the Letter of Credit, as provided in Section 4 5, for 100% of the amount of such unpaid Invoice, plus accrued Interest in *[Dollars]*, as converted at the Reference Exchange Rate applicable to such Invoice

Section 8 8 Dispute of Amounts Owed In the event the Purchaser disputes any amount contained in an Invoice and paid to the Seller as required under Section 8 2 (an "Invoice Dispute"), the Purchaser shall notify the Seller within ninety (90) days of the date of such Invoice Designated officials from the Purchaser and the Seller shall thereafter enter into informal negotiations in order to resolve the Invoice Dispute, and if any such dispute shall be settled in favor of the Purchaser, then payment shall be made by the Seller to the Purchaser, at the Purchaser Local Bank as listed on Appendix K, within fifteen (15) Business Days of the Purchaser's and the Seller's mutual agreement as to the actual Invoice amount If thirty (30) Days after the receipt by the Seller of a notice of an Invoice Dispute no agreement has been reached with respect to such Invoice Dispute, then either Party may thereafter submit the Invoice Dispute for resolution in accordance with the provisions of Article 16 Any sum paid to the Purchaser following the resolution of an Invoice Dispute shall bear Interest from the date such sum was originally due until the date such sum is actually refunded During the pendency of the dispute resolution process under this Section 8 8 or Article 16, the Seller shall retain any amounts previously paid to it which are in dispute

Section 8 9 Taxes The Purchaser shall be responsible for the payment in full of all Taxes which may become due under the laws of Romania to which the Purchaser, the Seller or its shareholders may at any time be or become subject to in or in relation to the performance of their respective obligations under, or any transactions contemplated by, the Project,

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provided, however, that the Seller shall be responsible for the payment of (i) any Taxes imposed on the basis of the net income of the Seller, (ii) all fees and charges with respect to any Governmental Requirements acquired by the Seller, (iii) ll real estate taxes and assessments and other charges with respect to the Site and the buildings and improvements ıereon, and (iv) any taxes levied on the Seller or its shareholders outside of Romania which are not for the benefit of any Governmental Authority Any and all Taxes other than those listed in subsections (i) through (iv) above which the Seller or its shareholders are obligated to pay shall be paid either directly by the Purchaser or by the Seller and subsequently billed to the Purchaser on any Invoice In addition, all fees and other amounts payable to the Seller or any shareholder of the Seller pursuant to any Invoice (including any Taxes listed on such Invoice for purposes of reimbursement by the Purchaser pursuant to this Section 8 9) shall be paid in full by the Purchaser in an amount which ensures that after the Purchaser has deducted therefrom any and all Taxes required to be deducted therefrom under the laws of Romania there remains a sum equal to the amount which would have been payable to the Seller or such shareholder had there been no deduction or withholding of such Taxes The Purchaser shall assist the Seller and its shareholders in obtaining all necessary documentation from the appropriate Tax authorities to determine, under current laws and regulations, any Taxes which may be due The Purchaser shall use its best efforts to assist the Seller and its shareholders in gaining the most preferential Tax treatment available for its investment in the Complex *[Tax provisions may require modification depending on Romanian law as advised by local counsel]*

Section 8 10 Adjustment In Certain Events The Purchaser shall incur all costs and receive all savings which are realized by the Seller upon the occurrence of certain events, such as a Change In Law or certain acts, delays or omissions by the Purchaser or a Governmental Authority, as provided for in Appendix G

ARTICLE 9
INSURANCE

Seller shall maintain in full force and effect throughout the Term of Operation of this Agreement such insurance olicies and coverages (including exclusions, limitations, deductibles and endorsements) with respect to the Complex, in such forms and amounts, and against such casualties and events, as may be generally consistent with practices in the international independent power industry for projects of similar scope, type and design The Seller shall, from time to time and upon request, provide the Purchaser with certificates evidencing that the policies of insurance are at all times in full legal force and effect

ARTICLE 10
INDEMNIFICATION AND LIABILITY

Section 10 1 Indemnification

(a) The Seller hereby agrees to indemnify, defend and hold harmless the Purchaser and its officers, directors, agents, partners, employees and Affiliates from and against all loss, damage, expense and costs incurred by the Purchaser, and any liability to third persons for injury or death of persons or for injury to Persons or property caused by or arising out of (i) the gross negligence or willful misconduct of the Seller or its employees, contractors or agents with respect to the construction, ownership, operation or maintenance of the Complex or other actions relating to the Seller's performance under this Agreement, or (ii) any damage to the Purchaser's Grid System caused by the gross negligence or willful misconduct of the Seller or its employees, contractors or agents (not caused by the Purchaser)

(b) The Purchaser hereby agrees to indemnify, defend and hold harmless the Seller and its officers, directors, agents, shareholders, partners, employees and Affiliates from and against all loss, damage, expense and costs incurred, including loss to third persons for injury to Persons or property caused by or arising out of (i) the gross negligence or willful (i) misconduct of the Purchaser or its employees, contractors or agents with respect to the construction,

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ownership, operation or maintenance of the Interconnection Facilities, the Grid System or other actions relating to the Purchaser's performance under this Agreement, or (ii) any interruption or surge in the supply of electricity from the Purchaser's Grid System to the Purchaser's customers

(c) Without limiting the scope of the preceding paragraph, the Purchaser hereby agrees to indemnify, defend and hold harmless the Seller and its officers, directors, agents, shareholders, partners, employees and Affiliates from and against all losses, damages, liabilities and expenses (including the reasonable costs of investigation, testing, containment, removal, cleanup, abatement, remediation, fines and penalties, all costs of remedying violations, and reasonable attorneys' and consultants' fees and costs) relating to, or arising from, any of the following

(i) acts, omissions, occurrences or conditions happening or existing at the Site prior to the date the Site is transferred to the Seller (including prior conditions which continue after the date the Site is transferred to the Seller), including the generation, storage, treatment, disposal, handling, emission, spilling, leaking, release of, and exposure to, hazardous waste, solid waste, hazardous substances, hazardous materials, toxic materials and other substances (whether solids, liquids or gases) potentially harmful to the environment or human health at, on, under or from the Site prior to date the Site is transferred to the Seller, including acts, omissions, occurrences or conditions happening or existing at the Site prior to the date the Site is transferred to the Seller, which at any time during the Term effect in any way the Seller's quiet enjoyment or free and clear use of the Site,

(ii) any hazardous waste, solid waste, hazardous substances, hazardous materials and other toxic materials (whether solids, liquids or gases) located at the Site prior to the date the Site is transferred to the Seller, or

(iii) the violation by the Purchaser, its agents, employees, contractors, or any other violation in connection with the Site, prior to the date the Site is transferred to the Seller of any Laws of Romania (including Laws of Romania governing the generation, storage, treatment, disposal, emission, release, spilling or leaking of or exposure to hazardous waste, solid waste, hazardous substances, hazardous materials, toxic materials or other substances (whether solids, liquids or gases) potentially harmful to human health or the environment)

(d) In the event that any loss under this Section 10 1 results from any joint or concurrent negligence by the Parties, each Party shall be liable to the other in proportion to its relative degree of fault, as determined by the Parties or by an arbitration panel in accordance with Article 16

Section 10 2 <u>Notice and Resolution of Claims for Indemnification</u> With respect to claims of indemnification which involve third parties, each Party hereto shall promptly furnish the other Party with written notification (but in no event later than thirty (30) Days prior to the time at which any response is required by law) after such Party becomes aware of any event or circumstance which might give rise to a claim for indemnification hereunder At the indemnified Party's request, the indemnifying Party shall defend any suit asserting a claim covered by such indemnity and shall pay all costs and expense (including reasonable attorney's fees and expenses) that may be incurred in enforcing this indemnity The indemnified Party may, at its own expense, retain separate counsel and participate in the defense of any such suit or action The indemnifying Party shall not compromise or settle any claim hereunder without the prior written consent of the indemnified Party, provided, however, that in the event the indemnified Party withholds its consent to any such settlement or compromise, then the liability of the indemnifying Party shall be limited to the aggregate of the amount of the proposed compromise or settlement, the amount of attorney's fees and expenses outstanding at the time such consent shall have been withheld and the amount of any outstanding claim against which indemnification applies and which is not covered by the proposed compromise or settlement (together with all costs and expenses associated with such outstanding claim) Thereafter, the Party withholding such consent shall hold harmless and reimburse the indemnifying Party, upon demand, for the amount of any additional liability, attorneys fees and expenses incurred by the indemnifying Party over and above the amount described above after the time such consent shall have been withheld

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Section 10 3 Limitation of Liability Each Party hereby agrees that any claim by a Party against the other that may arise hereunder shall be made only against such Party and its assets and that no officer, director, agent, shareholder, employee or Affiliate of the Purchaser or the Seller, as the case may be, shall have any liability with respect to any such claim except in connection with an independent contractual obligation separate from this Agreement

ARTICLE 11
FORCE MAJEURE

Section 11 1 Events of Force Majeure An event of force majeure shall mean a Force Majeure Event or Special Force Majeure Event (individually or collectively an "FM Event") which materially and adversely affects, in cost or time, the ability of a Party to perform its obligations under or pursuant to this Agreement, provided, however, that no event or circumstance or combination thereof shall constitute an FM Event hereunder to the extent that it could have been prevented, overcome or remedied in whole or in part by the affected Party through the exercise of reasonable diligence and due care, it being understood that reasonable diligence and due care (a) shall include the use of Prudent Utility Practices, and (b) shall not be construed as requiring the optimum practice or method to the exclusion of all others but rather to be a spectrum of possible practices, methods and techniques, any one of which may be acceptable

Section 11 2 Force Majeure Events A "Force Majeure Event" shall mean, to the extent that it satisfies the conditions of Section 11 1, any event or circumstance, or combination of events or circumstances, that is both beyond the reasonable control of a Party and not a Special Force Majeure Event, including the effect of (a) any explosions, implosions, fires, conflagrations, accidents or contamination, (b) weather conditions such as floods, volcanic activity, storms, gales, torrential rain, hail, tornadoes, typhoons, cyclones, hurricanes, lightning, tide (other than normal tides), tidal waves, tsunamis or perils of the sea, earthquakes, blizzards, unexpected ice flows, unanticipated geological or ground conditions, severe drought or desiccation, and other natural calamities or acts of God, (c) epidemic, famine, plague, pestilence, outbreak, quarantine, and other such calamities, (d) any strikes, work to rule, go slows or other labor disturbances (other than those listed in Section 11 3(b)), (e) any accident or breakdown of any equipment used in the Complex not attributable to a failure to follow Prudent Utility Practices, (f) any event affecting the performance of any Person that is a party to any material contract with a Party which event would have constituted a Force Majeure Event if experienced by the Party, or (g) any event or circumstance having an effect similar to any of those listed or referred to herein, provided, however, that in no event will the unavailability of funds or changes in the demand for electricity constitute a Force Majeure Event

Section 11 3 Special Force Majeure Events A "Special Force Majeure Event" shall mean, to the extent that it satisfies the conditions of Section 11 1, any legal or political event or circumstance, or combination of such events or circumstances, including the effect of (a) any failure or inability by the Seller to obtain or renew, upon the due application of the Seller, any Governmental Requirement on terms and conditions at least as favorable as those contained in the original authorization, provided that the Seller had diligently attempted to obtain such Governmental Requirement, (b) any strikes, work to rule, go-slows or other labor disturbances that extend beyond the Complex, are widespread or nationwide, or are of a political nature, including labor actions associated with or directed against a Romanian political party, or those that are directed against the Seller (or its Affiliates, contractors or suppliers) either alone or as part of a broader pattern of labor actions against companies or facilities with foreign ownership or management, (c) expropriation, requisition, confiscation, impoundment, seizure, nationalization or compulsory acquisition of the Complex or any part thereof, any material assets of the Seller or any shares or other interests in the Seller, (d) any Change In Law, (e) acts of war (whether or not declared), open hostilities, invasion, carnage, blockade or embargo, (f) acts of the public enemy, acts or threats of terrorism or threats from terrorists, riot, public disorder, violent demonstrations, insurrection, rebellion, coups, revolts, revolution, uprisings, civil commotion, kidnapping and sabotage, (g) the closing or drastic reduction in capacity of harbors, ports, docks, canals, roads, airports or other infrastructure, the rationing thereof or any import or export restrictions, (h) the unavailability or interruption in the supply of water or other utility services or materials necessary for the operation of the Complex or the pursuit of the Project, (i) any event affecting the performance of any Person that is a party to any material contract with the Seller which event would have constituted a Special Force Majeure

Event if experienced by the Seller, or (j) any other event, act, omission, matter or development, whenever occurring, which shall be within the reasonable control of the Purchaser or any Governmental Authority *[If fuel supplier is government owned, seller may require addition of interruption of fuel supply]*

Section 11 4 Notice of Force Majeure, Procedure

(a) Within the later of (i) forty-eight (48) hours following the date of commencement of any FM Event, and (ii) twenty-four (24) hours after the resumption of any means of providing notice between the Seller and the Purchaser, if either Party desires to invoke such FM Event as a cause for delay in the performance of, or failure to perform, any obligation hereunder which is subject to the provisions of this Article 11, it shall advise the other Party in writing (an "FM Notice"), to the extent ascertainable, of (i) the occurrence and nature of such FM Event, (ii) the date and expected duration of such FM Event, and (iii) any action being taken by the affected Party to avoid or minimize the effects thereof Any delay in the notification provided for in this Section 11 4(a) shall not affect a Party's right to declare an FM Event, provided, however, that notwithstanding Section 11 5(a) and (b), no Party shall be allowed to claim relief from an FM Event during that period of time between the date when notice should have properly been given under this Section 11 4(a) and the date such notice is actually received by the non-declaring Party

(b) Within forty-eight (48) hours following the cessation of an FM Event, the Party having invoked such FM Event as a cause for such delay shall submit a written notice to the other Party which shall specify that a cessation of the FM Event has occurred All of the Party's obligations which were suspended by reason of the FM Event shall resume in full force and effect on the next Business Day after a cessation notice provided for in this Section 11 4(b) is received by the non-declaring Party

(c) The Parties (i) shall make all reasonable efforts to prevent, remove, avoid and mitigate the effects of any FM Event, including recourse to alternate acceptable sources of services, equipment, supplies and materials, and (ii) shall use all reasonable efforts to ensure prompt resumption of normal performance of this Agreement after the cessation of an FM Event, provided, however, that this Section 11 4(c) shall not require the Seller to settle any strike, labor dispute or work stoppage on terms or conditions that the Seller may feel, in its sole discretion, are not in its best interests

(d) If a Party hereto disputes the occurrence of an FM Event after receiving notice thereof by the other Party, such dispute shall be resolved as provided for in Article 16

Section 11 5 Certain Effects of Force Majeure

(a) From and after the date provided in an FM Notice, a Party shall be excused from performance and shall not be construed to be in default in respect of any obligation hereunder for so long as and to the extent that any delay or failure to perform shall be due to a Force Majeure Event

(b) From and after the date provided in an FM Notice, the Seller shall be excused from performance and shall not be construed to be in default in respect of any obligation hereunder for so long as and to the extent that any delay or failure to perform such obligation shall be due a Special Force Majeure Event

(c) For each Unit, if an FM Event occurs prior to its Commission Date, then the applicable dates set forth in the Appendix D shall be extended by a number of Days equal to the number of Days the Seller was delayed by the effects of such FM Event, which number of Days the Seller shall in good faith determine

(d) If an FM Event is declared by the Seller before the Date of Initial Commercial Operation, the Term of Operation of this Agreement shall be extended pursuant to Section 13 7

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(e) During the pendency of a Force Majeure Event, but no more frequently than once in any Month, either Party may request that a Net Dependable Capacity test be performed in order to determine the FM Ratio applicable in Section 11 6(b)(i), and thereafter such new FM Ratio shall be used to compute the payments to be made by the Purchaser to the Seller

Section 11 6 Payments During Force Majeure Upon the occurrence of an FM Event after the Date of Initial Commercial Operation and during the pendency thereof, the Purchaser shall pay to the Seller

(a) the Energy Payment for Energy dispatched and delivered, if any, during the pendency of the FM Event, and

(b) the Capacity Payment due to the Seller as modified by multiplying the Capacity Payment (as most recently established before the FM Event) by a ratio (the "FM Ratio") as follows

(i) in the case of a Force Majeure Event declared by the Seller where the Complex is capable of partial operation, the FM Ratio shall be *[formula to be inserted],*

(ii) in the case of a Force Majeure Event declared by the Seller where the Complex is not capable of partial operation, the FM Ratio shall be zero (0), and

(iii) in the case of either (i) a Special Force Majeure Event, or (ii) a Force Majeure Event declared by the Purchaser, the FM Ratio shall be one (1)

Section 11 7 Suspension of Performance The suspension of performance under an FM Event shall be no greater in scope and no longer in duration than is reasonably necessary and the excused Party shall use its best efforts to remedy its inability to perform hereunder in a prompt and efficient manner

Section 11 8 No Obligation to Reinstate Notwithstanding other provisions of this Agreement, if an FM Event occurs that causes damage sufficient to make the Complex (or partially constructed Complex) a total loss, and such event or such damage was not insurable by the Seller at reasonably commercial rates, then the Seller shall not be obligated to rebuild or reinstate the Complex or, as the case may be, to complete the building of the same, unless and until the Par-ties have agreed upon the terms of such reinstatement or completion If such FM Event makes only part of the Complex a total loss, and the Complex is capable of partial operation, then at the option of the Seller the Complex may be derated and the terms of this Agreement shall continue in full force and effect at the newly tested Net Dependable Capacity

ARTICLE 12
CONDITIONS PRECEDENT

Section 12 1 Conditions Precedent Other than as specified in Section 12 4, the enforceability and effectiveness of each of the Party's obligations under this Agreement are conditioned upon the prior fulfillment of the following events to the satisfaction of the Seller and, with respect to Section 12 1(f), the Purchaser

(a) the Guarantee executed in conjunction with this Agreement shall be in full force and effect,

(b) the initial drawdown of the Senior Debt shall have occurred (such date the "Closing Date") and all conditions precedent contained in any of the Financing Agreements shall have been fulfilled,

(c) all Governmental Requirements which are listed on Sections A(l) and B(l) of Appendix J shall have been obtained and be in full force and effect,

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(d) a lease or other legal instrument satisfactory to the Seller and to the Financing Parties which provides for the exclusive right of the Seller to possess, use and quietly enjoy the Site for the Term of Operation of this Agreement shall have been obtained by the Seller,

(e) the Seller shall have received a legal opinion from the chief legal counsel of the Purchaser substantially in the form set forth in Schedule D, and

(f) the representations and warranties of each Party contained herein shall be true and correct in all material respects and each Party shall have received a certificate to the foregoing effect signed by a duly authorized officer of the other Party

(g) *[reserved for any additional conditions]*

Section 12 2 Notice As each condition in Section 12 1 is satisfied, the applicable Party shall notify the other Party in writing, provided, however, that if at any time before the Effective Date any of the notifications received by a Party pursuant to this Section 12 2 shall relate to a condition in Section 12 1 which is no longer in full force and effect, a notice to that effect shall be sent to the Party who received the original notice as provided for above which shall inform such Party of the current status of such Section 12 1 condition

Section 12 3 Effective Date Within five (5) Days of the satisfaction of all events listed in Section 12 1, the Seller shall send written notice to the Purchaser notifying the Purchaser of the satisfaction of all of the Section 12 1 conditions precedent The Day such notice is received by the Purchaser shall be the effective date (the "Effective Date") of this Agreement If on or before *[date]* (or such later date as the Parties may mutually agree) the Effective Date has not occurred due to a failure of a condition precedent pursuant to Section 12 1(a), (c) or (e), unless, in the case of Section 12 1(c), such failure is due to the Seller's failure to comply with the procedural and substantive requirements of such Governmental Requirement as applied in a Non-Discriminatory manner, the Purchaser shall reimburse and indemnify the Seller for the aggregate of all the costs, expenses and liabilities incurred by the Seller and its Affiliates in connection with the Project, including Interest, as such may be determined by an independent accounting firm jointly appointed by the Parties

Section 12 4 Immediate Effect of Certain Obligations Notwithstanding any other provision in this Agreement, and except for the provisions in Sections 3 1(a) (solely as it relates to design, planning and permitting), (b), (c) and (h), 4 1 (a), (b), (c), (d) and (e), 4 2, 8 9 and 15 4(c) and (d), and Articles 10, 12, 13, 16 and 19 which shall be in full force and effect from the date above first written, the rights, obligations and liabilities of the Parties hereunder shall not commence until the Effective Date

ARTICLE 13
TERM AND TERMINATION

Section 13 1 Termination Date This Agreement shall terminate on the earlier of (a) termination by the Seller pursuant to Sections 13 6 or 13 8, (b) termination by the Purchaser pursuant to Sections 13 6 or 13 8, (c) the last Day of the Base Term if the Seller decides not to extend the Term pursuant to Section 13 3, (d) the last day of Renewal Term I if the Seller decides not to extend the Term pursuant to Section 13 3, and (e) the last Day of Renewal Term II (the "Termination Date")

Section 13 2 Base Term of Agreement The initial term of this Agreement shall commence on the *[Effective Date]* and shall remain in full force and effect for a period expiring on the *[_____] [(___th)]* Yearly anniversary of the Date of Full Commercial Operation plus such period of time, if any, as such term may be extended under Section 13 7 (the "Base Term")

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Section 13 3 Renewal Terms At the expiration of the Base Term, the Term of this Agreement shall automatically extend for two (2) successive periods of five (5) years each plus such period of time, if any, that each such five (5) year term may be extended under Section 13 7 (as each may be extended, the first such term "Renewal Term I" and the second "Renewal Term II"), unless the Seller provides written notification to the Purchaser no later than eighteen (18) Months prior to the expiration of the Base Term or Renewal Term I, as the case may be, that it does not wish to extend this Agreement

Section 13 4 Seller Events of Default Each of the following events shall be a "Seller Event of Default"

(a) the failure of the Seller to achieve the Date of Initial Commercial Operation within *[___]* Months after the Target Completion Date as set forth in Appendix D,

(b) the willful and unexcused failure by the Seller to operate any Unit which is in good working order for more than sixty (60) consecutive Days after the Commission Date of such Unit without the written consent of the Purchaser,

(c) the breach by the Seller of any of its material obligations under this Agreement which is not remedied within ninety (90) Days after notice from the Purchaser to the Seller (i) stating that such a breach has occurred, and (ii) identifying the breach in question in reasonable detail,

(d) *[reserved]*

(e) the occurrence of any of the following events (i) the passing of a resolution for the bankruptcy, insolvency, winding up, liquidation of, or other similar proceeding relating to the Seller, (ii) the appointment of a trustee, liquidator, custodian, provisional manager or similar person in a proceeding referred to in clause (i), which appointment has not been set aside or stayed within ninety (90) Days of such appointment, or (iii) the making by a court having jurisdiction of an order winding up or otherwise confirming the bankruptcy or insolvency of the Seller, which order has not been set aside or stayed within ninety (90) Days, and

(f) Any statement, representation or warranty made by the Seller herein or in any of the other Project Agreements to which the Purchaser is a party prove to have been incorrect, in any material respect, when made or when deemed to have been made and such failure or incorrect statement, representation or warranty has a material adverse effect on the Purchaser's ability to perform its obligations under this Agreement

Subject to Section 13 4(a), the failure of the Seller to meet the dates set forth in the Project Schedule of Appendix D shall not constitute a Seller Event of Default

Section 13 5 Purchaser Events of Default. Each of the following events shall be a "Purchaser Event of Default"

(a) the failure by the Purchaser to make any payment under this Agreement when due and payable and such failure continues for a period of thirty (30) Days after receipt of written notice thereof from the Seller, or such failure to pay when due occurs more than two (2) times in any Year,

(b) the Purchaser fails to maintain the Letter of Credit as required in Section 4 5,

(c) the dissolution, merger, consolidation, amalgamation, reorganization, reconstruction or privatization of the Purchaser, except to the extent, as determined in the Seller's sole discretion, that it does not affect the ability of the resulting entity to perform its obligations under this Agreement,

(d) the Guarantee is modified, altered, terminated or ceases to be in full force and effect,

(e) *[reserved]*

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(f) *[reserved]*

(g) the inability of the Seller to either convert Lei into *[Dollars]* or repatriate such *[Dollars]* from Romania for more than *[_____ (__)]* Days,

(h) the occurrence of any of the following events (i) the passing of a resolution for the bankruptcy, insolvency, winding up, liquidation of, or other similar proceeding relating to the Purchaser, (ii) the appointment of a trustee, liquidator, custodian, provisional manager or similar person in a proceeding referred to in clause (i), which appointment has not been set aside or stayed within ninety (90) Days of such appointment, or (iii) the making by a court having jurisdiction of an order winding up or otherwise confirming the bankruptcy or insolvency of the Purchaser, which order has not been set aside or stayed within ninety (90) Days,

(i) the breach by the Purchaser of any of its material obligations under this Agreement (except for its obligations to make payments when due and payable pursuant to Section 13 5(a), the breach of which shall be subject to the grace period specified therein) which is not remedied within ninety (90) Days after written notice from the Seller to the Purchaser stating that (i) such a breach has occurred, (ii) identifying the breach in question in reasonable detail, and (iii) demanding remedy thereof, and

(j) any statement, representation or warranty made by the Purchaser herein or in any of the other Project Agreements to which the Seller is a party proves to have been incorrect, in any material respect, when made or when deemed to have been made and such failure or incorrect statement, representation or warranty has a material adverse effect on the Seller

Section 13 6 <u>Termination Procedure</u> Upon the occurrence of either a Seller Event of Default or a Purchaser Event of Default, the following procedure shall apply

(a) the Party that is not the defaulting Party may give a notice of termination to the other Party (a "Notice of Intent To Terminate"), specifying in reasonable detail the Seller Event of Default or Purchaser Event of Default, as the case may be, provided, however, that if the Seller is the defaulting Party and the Purchaser gives a Notice of Intent To Terminate to the Seller, it shall concurrently give a co of such notice to the Financing Parties,

(b) following the giving of a Notice of Intent To Terminate, the defaulting Party shall use its best efforts to cure such default within ninety (90) Days from the receipt of such notice, provided, however, that if the Seller is the defaulting Party, the Financing Parties shall be given an additional ninety (90) Days to cure the default, provided, further, that if such event of default cannot reasonably be cured within such cure period, then the defaulting Party (or the Financing Parties, if the Seller is the defaulting Party and the Financing Parties have assumed control of the Complex) shall be given an additional reasonable period of time to cure the default, which period shall not exceed twelve (12) Months, provided that the defaulting Party diligently strives to cure the default within such period,

(c) at any time and for sixty (60) days after the expiration of the latest cure period which may occur pursuant to Section 13 6 and unless the Parties shall have otherwise agreed or the Seller Event of Default or Purchaser Event of Default, as the case may be, shall have been cured, the Party having given the termination notice may terminate this Agreement by giving written notice thereof to the defaulting Party (and to the Financing Parties if the Seller is the defaulting Party), whereupon this Agreement shall terminate and Section 13 9 shall apply, and

(d) notwithstanding the provisions of this Section 13 6 and Section 13 5(g), a Purchaser Event of Default declared under Section 13 5(a) shall be deemed to be curable, notwithstanding the circumstances surrounding such Event of Default, within sixty (60) Days from the receipt by the Purchaser of a Notice of Intent to Terminate, and if such Event of Default is not cured in full within such sixty (60) Day period, the Seller may terminate this Agreement at any time after such sixty (60) Day period while such Event of Default is continuing, and if this Agreement is so terminated, Section 13 9 shall apply

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Section 13 7 Force Majeure Extension The Base Term, Renewal Term I and Renewal Term II of this Agreement shall each automatically be extended by that period of time, if any, equal to the aggregate number of Days declared by the Seller to be a Force Majeure Event during the Base Term, Renewal Term I and Renewal Term II, respectively, with each such Day being first multiplied by one (1) minus the FM Ratio in effect on each Day of a Force Majeure Event

Section 13 8 Termination by Mutual Agreement The Parties may terminate this Agreement at any time by written agreement between them upon such terms and conditions as they may agree

Section 13 9 Consequences of Termination

(a) If the Termination Date occurs after the Date of Initial Commercial Operation, then

(i) in the event of a termination of this Agreement due to a Purchaser Event of Default the Seller shall have the option, but not the obligation, to require the Purchaser to purchase the Complex in accordance with Section 14 2, and

(ii) in the event of a termination of this Agreement due to a Seller Event of Default, the Purchaser shall have the option, but not the obligation, to purchase the Complex in accordance with Section 14 3

(b) If the Termination Date occurs prior to the Date of Initial Commercial Operation pursuant to a Purchaser Event of Default, the Seller shall be paid by the Purchaser the aggregate of all the costs, expenses and liabilities incurred by the Seller and its Affiliates in connection with the Project, including Interest on such costs, expenses and liabilities, as such may be determined by an independent accounting firm jointly appointed by the Parties

Section 13 10 Cumulation The termination remedies of this Article 13 are cumulative, and the exercise of, or failure to exercise, one or more of them by a Party shall not limit, affect or preclude the exercise of, or constitute a waiver of, any other remedies available to such Party under Article 16 or otherwise

Section 13 11 Return of Letter of Credit Within ten (10) Business Days after the later to occur of (i) the Termination Date, and (ii) the fulfillment by the Purchaser of all of its payment obligations to the Seller under this Agreement, the Seller shall return to the Purchaser the Letter of Credit

Section 13 11 Wheeling In the event this Agreement terminates pursuant to Section 13 1(a), (c), (d) or (e), at the request of the Seller, the Purchaser shall make available the Grid System and shall assist the Seller in wheeling electricity generated at the Complex to such end users as the Seller may specify

ARTICLE 14
POSSESSION AND TRANSFER OF THE COMPLEX

Section 14 1 Possession of the Complex The Seller shall at all times during the Term have the right to full possession, use, and quiet enjoyment of the Complex and the Site The Purchaser shall at all times during the Term own the Interconnection Facilities and all other facilities constructed by or on behalf of the Purchaser at the Purchaser's expense

Section 14 2 The Seller's Option To Sell The Complex The Seller shall have an irrevocable right to sell the Complex to the Purchaser, at its option, upon termination of this Agreement pursuant to a Purchaser Event of Default under Section 13 6 If the Seller chooses to exercise this sell option, it shall notify the Purchaser in writing (the "Sell Notice") within thirty (30) Days after the Termination Date After the receipt of a Sell Notice under this Section 14 2 and within sixty (60) days after the Termination Date, the Purchaser shall pay to the Seller, in *[Dollars]* in immediately available funds at the Overseas Bank specified on Appendix K, the amount specified on Appendix I corresponding to a sale pursuant to this

Section 14 2 Payments due under this Section 14 2 which are not made within sixty (60) Days of the Termination Date shall bear Interest

Section 14.3 Purchaser's Option To Buy the Complex The Purchaser shall have an irrevocable right to buy the Complex from the Seller, at its option upon termination of this Agreement pursuant to a Seller Event of Default under Section 13 6 If the Purchaser chooses to exercise this purchase option, it shall notify the Seller in writing (the "Buy Notice") within thirty (30) Days after the Termination Date After the issuance of a Buy Notice under this Section 14 3 and within sixty (60) Days after the Termination Date, the Purchaser shall pay to the Seller, in *[Dollars]* in immediately available funds at the Overseas Bank specified on Appendix K, the amount specified on Appendix I corresponding to a purchase pursuant to this Section 14 3 Payments due under this Section 14 3 which are not made within sixty (60) Days of the Termination Date shall bear Interest

Section 14 4 Transfer Upon Termination Upon the later to occur of (i) the expiration of the Base Term, Renewal Term 1, and Renewal Term II, (ii) the exercise of either the sell option pursuant to Section 14 3 or the purchase option pursuant to Section 14 4, and (iii) the date at which the Purchaser has made payment in full of all amounts due to the Seller including Interest, if any, pursuant to this Agreement, the Seller shall convey to the Purchaser, free and clear of all debt and liabilities, all of the Seller's right, title and interest in and to the Complex, the Site and all of the fixtures, fittings, machinery and equipment (including all information, technical documents, special tools and related agreements pertaining to the Complex) at the Site used in connection with the Complex The Complex, the Site and all such ancillary materials shall be conveyed to the Purchaser on an "AS IS, WHERE IS" basis, and any warranties that might otherwise be implied by statute or otherwise, will be excluded The Seller shall thereafter have no further obligations or liabilities to the Purchaser or any other Person with respect to the Complex or its operation The Purchaser shall be responsible for the payment of any costs incurred in Romania which are related to the transfer of the Complex The Seller shall be responsible for the payment of any costs incurred outside of Romania which are related to the transfer of the Complex

ARTICLE 15
REPRESENTATIONS, WARRANTIES AND COVENANTS

Section 15 1 Representations and Warranties of the Seller The Seller hereby represents and warrants to the Purchaser that

(a) the Seller is duly incorporated, validly existing and in good standing under the laws of *[Nation]*,

(b) the Seller has all requisite legal power and authority to conduct its business, to own its properties and to execute, deliver and perform its obligations under this Agreement,

(c) there are no actions, suits or proceedings pending or, to the Seller's knowledge, threatened, against or affecting the Seller before any court or administrative body or arbitral tribunal which might materially adversely affect the ability of the Seller to meet and carry out its obligations under this Agreement, and

(d) this Agreement has been duly authorized, executed and delivered by it and constitutes the legal, valid and binding obligation of the Seller, enforceable in accordance with its terms, except as the enforceability may be limited by applicable bankruptcy, insolvency or other similar laws affecting creditors' rights generally

Section 15 2 Covenants of the Seller The Seller hereby covenants as follows

(a) the Seller shall own, operate and maintain the Complex in accordance with the provisions of Section 5 1,

(b) the Seller shall, during the Term of Operation, have fuel supply arrangements in full force and effect for the supply of *[fuel]* of a quantity sufficient to meet its potential Dispatch obligations with respect to the Net Dependable Capacity,

(c) the Seller shall advise the Purchaser of any temporary operating constraints and limits which may from time to time apply to the Complex,

(d) the Seller shall obtain and maintain the insurance coverage required by Article 9 of this Agreement,

(e) the Seller shall, so far as material to the Purchaser's rights and obligations under this Agreement, (i) comply with all applicable laws of Romania, (ii) give all required notices and procure and maintain all Governmental Requirements, and (iii) pay all charges and fees in connection therewith,

(f) the Seller shall keep proper books of record and accounts pursuant to Sections 5 11 and 6 2 and in sufficient detail to permit the Purchaser to calculate and evaluate the component costs included in Appendix A, and

(g) the Seller will at all times comply with the confidentiality provisions of Section 19 7

Section 15.3 Representations and Warranties of the Purchaser The Purchaser hereby represents and warrants to the Seller that

(a) it is duly created pursuant to, and has complied fully with, all applicable Romanian laws,

(b) it has all requisite power and authority to conduct its business, to own its properties and to execute deliver and perform its obligations under this Agreement,

(c) there are no actions, suits or proceedings pending or, to the Purchaser's knowledge, threatened, against or affecting the Purchaser before any court or administrative body or arbitral tribunal which might materially adversely affect the ability of the Purchaser to meet and carry out its obligations under this Agreement,

(d) this Agreement has been duly authorized, executed and delivered by it and constitutes the legal, valid and binding obligations of the Purchaser, enforceable in accordance with its terms, except as the enforceability may be limited by applicable bankruptcy, insolvency or other similar laws affecting creditor's rights generally,

(e) it has, as of the date hereof, such permits, licenses and approvals required by all Governmental Authorities with jurisdiction over the Purchaser as are necessary to enable the Purchaser to enter into the Project Agreements, to conduct its operations, to own and operate the Grid System and to construct, own and operate the Interconnection Facilities,

(f) as of the date of this Agreement, all of the Governmental Requirements which may be needed by the Seller or are in any way necessary for successful completion of the Project are listed in Appendix J, and

(g) all of the legal, tax and accounting assumptions regarding the Project as listed in Schedule C are, as of the date of this Agreement, true and correct *[alternative legal opinion stating same as a condition precedent to the Effective Date]*

Section 15 4 Covenants of the Purchaser The Purchaser hereby covenants as follows

(a) the Purchaser shall operate and maintain the Interconnection Facilities substantially in accordance with the Operating Procedures, Prudent Utility Practices and in a manner that will not have an adverse effect on the Complex,

(b) the Purchaser shall Dispatch the Complex in accordance with Section 5 7 and shall ensure that the Grid System remains capable of accepting the Energy which it may Dispatch,

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(c) the Purchaser shall, so far as material to the Seller's rights and obligations under this Agreement, (i) comply with all applicable laws of Romania, (ii) give all required notices and procure and maintain all approvals, consents, authorizations, notifications, licenses and permits required to be obtained from any Governmental Authority that are necessary for its performance of this Agreement, and (c) pay all charges and fees in connection therewith,

(d) the Purchaser shall provide its full and timely cooperation in connection with the Seller's efforts to construct and finance the Project on a non-recourse, project finance basis including all reasonable requests for information regarding the Purchaser's operations and the status of this Agreement,

(e) the Purchaser shall provide all Dispatch schedules in a timely manner pursuant to Section 5 11,

(f) the Purchaser shall make all payments due under this Agreement in a timely manner, and

(g) the Purchaser shall at all times comply with the confidentiality provisions of Section 19 7, maintain the Letter of Credit pursuant to Section 4 5 and will keep accurate records in accordance with Section 5 11(b)

ARTICLE 16
SETTLEMENT OF DISPUTES

Section 16 1 Regular Meetings Throughout the Term of this Agreement, representatives of the Parties shall meet regularly to discuss the progress of the Project and the operation of the Complex in order to ensure that the arrangements between the Parties hereto proceed in an orderly and mutually satisfactory manner

Section 16 2 Amicable Settlements of Disputes Any and all disputes arising out of or in connection with this Agreement, including disputes regarding the interpretation, scope or validity of this Agreement or any alleged breach of any provision contained herein or any money owed hereunder (a "Dispute"), shall be addressed by the Parties pursuant to this Article 16, provided, however, that Invoice Disputes shall first be subject to Section 8 8 In the event either Party raises a Dispute, it shall promptly provide the other Party written notice thereof, which notice shall include (a) a description of the Dispute, (b) the grounds on which the Parry relies in seeking to have the Dispute determined in its favor, and (c) any written material in support of the Party's position Upon receipt of such notification, the Purchaser and the Seller shall each cause an officer of their respective companies to meet, negotiate and attempt to resolve the Dispute on an amicable basis within twenty-five (25) Business Days If such officers do not mutually agree to a written resolution of the Dispute within such period, then the chief executive officers of the Seller and the Purchaser shall attempt to resolve the Dispute through friendly means within an additional twenty-five (25) Business Day period If the chief executive officers of the Seller and the Purchaser do not mutually agree to a written resolution of the Dispute within such period, then the arbitration provisions of this Article 16 shall apply

Section 16 3 Arbitration If the Dispute cannot be settled within the period of time as prescribed by Section 16 2, then either Party may submit the Dispute to the International Chamber of Commerce (the "ICC") for arbitration under and in accordance with the arbitration rules contained in Resolution 31/98 adopted by the United Nation's General Assembly on December 15, 1976 and entitled "Arbitration Rules of the United Nation's Commission on International Trade Law" as in force at the time such arbitration is commenced ("UNCITRAL Rules"), for final resolution, provided, however, that to the extent UNCITRAL Rules conflict with the provisions of this Article 16, the provisions of this Article 16 shall control The Party electing arbitration shall so notify the other Party in accordance with UNCITRAL Rules

Section 16 4 Selection of Arbitrators The Dispute shall be settled by a panel consisting of three (3) arbitrators who shall each be appointed by the ICC within twenty-five (25) Days of the date of a request to initiate arbitration, provided, however, that any Party may reject one (1) appointed arbitrator within ten (10) Days of the date of such arbitrator's appointment, in which case such arbitrator shall be removed and a new arbitrator shall be appointed by the ICC Each

arbitrator shall be fluent in the English language and shall be familiar with the legal, financial or operational aspects of the international power industry No arbitrator shall be a national or resident of either Romania or the *[U S]* The Seller and the Purchaser acknowledge and agree that under certain disputes which may arise under other Project Documents may be consolidated before the arbitration panel appointed pursuant to this Section 16 4, and that in the event of such consolidation, certain parties to those Project Agreements may have the right to reject arbitrators selected pursuant to this Section 16 4

Section 16 5 Location and Language The site of the arbitration shall be *[city in neutral country with experience in international arbitrations, e g London, Vienna]* The arbitration proceedings shall be conducted in the English language, and all documents and evidentiary materials submitted by the Parties shall be submitted in the English language Each Party waives any objection it may now or hereafter have to the above venue and specifically waives any objection that any Dispute resolved under this Article 16 was brought in any inconvenient forum and agrees not to plead or claim the same

Section 16 6 Substantive Law The Parties agree that the arbitration tribunal need not be bound by strict rules of law when they consider the application thereof to particular matters to be inconsistent with the spirit of this Agreement and the underlying intent of the Parties, and as to such matters their conclusions shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct enforcement of this Agreement in accordance with such terms

Section 16 7 Facilitation Each Party agrees to facilitate the arbitration by (a) making available to each other and to the arbitrators for inspection all documents, books, records and personnel under their control as the arbitrators shall determine to be relevant to the Dispute, (b) conducting arbitration hearings to the greatest extent possible on successive, contiguous Days, and (c) strictly observing the time periods established by the UNCITRAL Rules or by the arbitrators for the submission of evidence and briefs

Section 16 8 Monetary Awards Any monetary award of the arbitration tribunal shall be made and payable in *[city where arbitration is held]*, in *[Dollars]* Any such monetary award shall accrue Interest from the date of the notification of the Dispute in accordance with Section 16 3 to the date when the award is paid in full

Section 16 9 Arbitration Costs The prevailing Party in any arbitration proceeding shall be entitled to recover all of its reasonable costs of arbitration and all expenses related thereto (including attorneys' fees and expenses), in *[Dollars]*, from the nonprevailing Party, provided, however, that if a Party is nonprevailing only in part, such Party shall bear the prevailing Party's costs in proportion to the extent to which it is nonprevailing Any costs due and payable to either Party under this section 16 9 shall be apportioned by and, in the event as to a dispute over any amount, finally determined by the arbitrators appointed in Section 16 4

Section 16 10 Description of Award The arbitral award rendered by the arbitration tribunal shall be in writing and shall set forth in reasonable detail the facts of the dispute and the reasons for the arbitration tribunal's decision

Section 16 11 Binding Effect The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties (absent fraud or willful misrepresentation, a claim of which shall be a Dispute subject to this Article 16) and judgment thereon may be entered in any court having jurisdiction for its enforcement Each Party hereby waives, to the extent permitted by law, any rights to appeal such award to, or to have such award reviewed by, any court or tribunal, and agrees that the arbitral award may be enforced against it and its assets wherever they may be found The Parties agree that the award of the arbitration tribunal shall be the sole and exclusive remedy between them regarding any and all Disputes submitted for arbitration hereunder, including all claims, counterclaims, issues and accounting presented to the arbitrators, irrespective of the magnitude thereof In addition, the Parties agree that neither Party shall have any right to commence or maintain any suit or legal proceeding concerning a Dispute hereunder until the Dispute has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration

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Section 16 12 Obligation to Continue Performance During the pendency of any arbitration (a) the Seller shall, to the extent possible, continue to perform its obligations hereunder to produce and deliver Energy and make available the Net Dependable Capacity, (b) the Purchaser shall continue to pay all amounts invoiced by the Seller 'in good faith, without set-off, during the pendency of such arbitration, and (c) neither the Purchaser nor the Seller shall exercise any other remedies arising by virtue of the matters in dispute, provided, however, that the right to terminate this Agreement pursuant to Article 13 may be exercised notwithstanding pendency of any arbitration unless such right to terminate is itself the subject of pending Arbitration

Section 16 13 International Arbitration Any arbitration pursuant to this Article 16 shall be an international arbitration, governed by and conducted under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (the "New York Convention") and shall not be deemed a domestic arbitration under the laws of Romania or any other jurisdiction If at any time Romania ceases to be a signatory to the New York Convention, the Parties agree to execute an amendment to this Agreement which shall ensure, to the fullest extent allowed by law, that the provisions of the New York Convention applicable to this Agreement are inserted into this Agreement and become binding on the Parties

ARTICLE 17
ASSIGNMENT

Section 17 1 General Neither Party may sell, assign, or otherwise transfer its rights or obligations under or pursuant to this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld conditioned or delayed, provided, however, that the Seller may, for the purpose of financing the Project, assign or create a security interest in its rights and interests under or pursuant to this Agreement, the Complex or any part thereof, including the moveable property and intellectual property of the Seller or the revenues or any of the rights or assets of the Seller Any actual, attempted or purported sale, assignment or other transfer by a Party of any of its rights or obligations or interests in, under or pursuant to this Agreement that does not comply with the terms of this Article 17 shall be null, void and of no force or effect

Section 17 2 Purchaser Consent The Purchaser hereby irrevocably consents to an assignment of the Seller's rights hereunder to the Financing Parties and agrees, (a) as required by the Financing Parties, to execute a consent and any other documents necessary or desirable to create a valid collateral assignment to the Financing Parties, (b) to make payments owing from the Purchaser to the Seller directly into a collateral security account, which account will be pledged to the Financing Parties thereunder without right of set-off, and (c) to afford such Financing Parties the opportunity, during the period of time provided in Section 13 6, to remedy any event giving rise to a Notice of Intent to Terminate prior to giving effect to any termination of this Agreement

Section 17 3 Succession of Financing Parties If the Seller's interest in the Project shall be acquired by one or all of the Financing Parties or an Affiliate thereof by reason of a Seller Event of Default or through exercise of rights under the Financing Agreements, then the Purchaser agrees that the Financing Parties shall succeed to the interests of the Seller under this Agreement, which shall continue undisturbed and in full force and effect, and the Purchaser agrees further to attorn to the Financing Parties upon such succession, with respect to this Agreement

ARTICLE 18
GUARANTEE

The Purchaser shall cause the Government to issue to the Seller, simultaneously with the execution of this Agreement, a guarantee (the "Guarantee") in the form attached hereto as Schedule B The obligations of Government under the Guarantee shall survive the termination of this Agreement, and any privatization, restructuring or other reorganization of the Purchaser

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ARTICLE 19
MISCELLANEOUS

Section 19 1 Successors and Assigns Subject to Article 17, this Agreement shall be binding upon, and inure to the benefit of, the Parties and their respective successors, transferees and assigns

Section 19 2 Effect of Agreement An undertaking by a Party hereto under any provision of this Agreement shall neither constitute a dedication of any portion of the Complex to either the other Party or to the public, nor affect the status of the Purchaser or the Seller

Section 19 3 No Third Parties This Agreement is intended solely for the benefit of the Parties Except as provided in Sections 13 6, 17 2 and 17 3 as to the Financing Parties, nothing in this Agreement shall be construed to create any duty, standard of care or liability to, nor confer any right of suit or action on, any Person other then the Purchaser and the Seller

Section 19 4 No Consequential Damages Notwithstanding anything to the contrary elsewhere in this Agreement, no Party shall, in any event, be liable to any other Party, whether by way of indemnity or otherwise, for any indirect, incidental, punitive, special or consequential damages, including loss of revenue or profit, cost of capital, loss of business reputation or opportunity costs due to delays in payment, whether any such damages arise out of contract, tort (including negligence), strict liability or otherwise

Section 19 5 Survival Expiration or termination of this Agreement shall not relieve either Party of any obligation that by its nature should survive such expiration or termination, including Sections 6 2, 6 4, 11 9, 13 9, 13 11 and 13 12 and Articles 8 (except Section 8 1), 10, 14, 16 and 19 and the obligations of the Purchaser shall survive any privatization, restructuring or other reorganization of the Purchaser

Section 19 6 Notices Any notice or other communication to be given shall be in writing and shall be sufficiently given if (a) sent by registered mail, (b) hand-presented against written receipt, or (c) transmitted and clearly received by facsimile, and delivered

(a) in the case of the Seller, to

[Project Company]

Attention
Facsimile No
Telephone No
E-mail

(b) in the case of the Purchaser, to

[Power Company]

Attention
Facsimile No
Telephone No
E-mail

(c) and in the case of the Financing Parties, to

[Financing Parties]

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Attention
Facsimile No
Telephone No
E-mail

or sent to such other Person at such other address as a Party or the Financing Parties may designate for itself by notice given in accordance with this Section 19 6 Any and all notices hereunder shall be deemed to have been received on the date of delivery

Section 19 7 Confidentiality

(a) Each Party agrees that it will, and will ensure that its employees, officers and directors will, and will make reasonable efforts to ensure that its agents will, hold in confidence all information, documentation, data or know-how disclosed to it by the other Party ("Confidential Information"), and will not disclose to any third party or use Confidential Information or any part thereof without the other Party's prior written approval, provided, however, that Confidential Information may be disclosed (i) to a Governmental Authority pursuant to legal requirements, and (ii) to financial institutions, bona fide potential purchasers, legal counsel, consultants and contractors employed in connection with the Project and whose duties reasonably require such disclosure, provided that, with respect to disclosures pursuant to subsection (a)(ii), the other party shall first have agreed not to disclose the relevant Confidential Information to any other Person for any purposes whatsoever except as provided for under subsection (a)(i)

(b) The restrictions in this Section 19 7 shall not apply, or shall cease to apply, to any part of the Confidential Information that (i) is in the public domain other than by reason of a breach of Section 19 7(a), (ii) was in the rightful possession of the recipient Person or an employee, officer, shareholder or director of the recipient Person at or prior to the time of the disclosure, or (iii) was obtained by the recipient Person in good faith from a third party entitled to disclose it

Section 19 8 Severability of Provisions A holding of any court of competent jurisdiction or by an arbitral tribunal under Article 16 that any provision of this Agreement is invalid or unenforceable shall not result in invalidation of the entire Agreement Instead, this Agreement shall be construed, to the extent possible, in a manner to give full effect by means of valid provisions to the intent of the Parties to the particular provision held to be invalid, and, in any event, all other terms shall remain in full force and effect Following any such holding, the Parties shall negotiate new provisions to restore, to the extent possible, the original intent and effect of this Agreement

Section 19 9 Waiver in General Neither Party shall be deemed to have waived any right under this Agreement unless such Party shall have delivered to the other Party a written waiver signed by an authorized officer of such waiving Party No delay or omission in the exercise of any power or remedy shall be construed to be a waiver of any default or an acquiescence therein, with the exception of any notice provision hereunder (with the exception of Section 11 4(a))

Section 19 10 Waiver of Sovereign Immunity With respect to this Agreement and the Complex, each of the Purchaser and its Affiliates hereby unconditionally and irrevocable (a) agrees that the execution and performance by it of this Agreement constitute private and commercial acts, (b) agrees that no immunity from any proceedings brought against it or its assets will be claimed, and (c) waives any right of immunity which it or its assets now has or may acquire in the future in any jurisdiction and to the fullest extent permitted by law

Section 19 11 Amendment This Agreement may only be amended or modified by a written instrument signed by each of the Parties

Section 19 12 Entire Agreement This Agreement constitutes the entire agreement between the Seller and the Purchaser concerning the subject matter hereto, and all previous documents, undertakings and agreements, whether verbal, written r otherwise, between the Parties concerning the subject matter hereof are hereby cancelled and annulled and shall not affect or modify any of the terms or obligations set forth in this Agreement

Section 19 13 Further Acts and Assurances Each of the Parties agrees to execute and deliver all documents, papers and instruments and to do and perform all such further acts and things, as shall be necessary or convenient to carry out the provisions of this Agreement

Section 19 14 Expenses Each Party shall pay its own costs and expenses (including the fees and expenses of its agents, representatives, advisors, counsel and accountants) necessary for the negotiation, preparation, execution, delivery, performance of and compliance with this Agreement, subject to the apportionment of expenses pursuant to Sections 12 3 and 13 9(b)

Section 19 15 Choice of Language This Agreement shall be negotiated and executed in the English language, and shall be translated into the Romanian language as soon as practicable after execution, provided, however, that if there is a dispute regarding the terms of this Agreement, the English language version shall govern

Section 19 16 Relationship of Parties The duties, obligations and liabilities of the Purchaser and the Seller hereunder are several and not joint or collective Nothing contained in this Agreement shall ever be construed so as to create an association, trust, partnership or joint venture between the Purchaser, on the one hand, and the Seller its shareholder or any Affiliate thereof, on the other, and neither the Seller nor the Purchaser shall be deemed to be a principal or agent of the other, and each shall be individually and severally liable for its own obligations under this Agreement

Section 19 17 Governing Law This Agreement shall be governed by and construed in accordance with the laws of Romania.

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed in duplicate originals, each of which shall be deemed to be an original as of the day and year first above written

[POWER COMPANY]

By _____
Name
Title

[PROJECT COMPANY]

By _____
Name
Title

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APPENDIX A

CAPACITY PAYMENTS AND ENERGY PAYMENTS

Appendix A will set out pricing formulas for calculating monthly Capacity Payments and Energy Payments All amounts will be denominated in Lei Exact formulas for Capacity Payments and Energy Payments will be inserted for each of the following

1 Capital Cost Recovery Charge Rate
2 Fixed Operation and Maintenance Costs Recovery Charge Rate
3 Fuel Cost Recovery Charge Rate
4 Variable Operation and Maintenance Costs Recovery Charge Rate

I Capacity Payments

The Monthly Capacity Payment will consist of two components, A and B

A Component A will be designed to reimburse the Seller for its fixed costs, including financing costs, development expenses and a return on capital investment Component A will be calculated on the basis of a Capital Cost Recovery Charge Rate (which may be reduced during the Term of Operation) multiplied by the proven Net Dependable Capacity applicable to a Guaranteed Power Generation Period

1 In calculating the Capacity Payment, an adjustment will be made for the actual availability of the Plant (the "Availability Factor") during the guaranteed power generation period for the Month in question- In determining the Availability Factor, credit will be given for (i) periods during which the Plant does not generate Energy due to the Purchaser's dispatch instructions, and (ii) deemed dispatch credit hours during such Month as provided for in the Agreement *(e g*, credit for the Purchaser delays, Scheduled Outages and Special Force Majeure)

2 Component A will be subject to escalation to the extent that the Lei depreciates against the *[Dollar]*, and Component A will also be indexed to *[U S]* inflation *(e g*, CPI/CPI_b*)*

B Component B will be designed to reimburse the Seller for its fixed O&M costs Component B will be calculated by multiplying a Fixed Operation and Maintenance Costs Recovery Charge Rate by the Net Dependable Capacity, with an adjustment for the applicable Availability Factor

1 That portion of Component B linked to expenditures in Lei will be indexed to Romanian inflation *(e g*, $RoCPI/RoCPI_b$)

2 That portion of Component B linked to expenditures outside of Romania will be subject to escalation to the extent that the Lei depreciates against the *[Dollar]*, and Component B will also be indexed to *[U S]* inflation *(e g*, CPI/CPI_b*)*

II Energy Payments

The Monthly Energy Payment will also consist of two components, C and D

A Component C will be designed to reimburse the Seller for its fuel costs and will be structured as a pass-through from the Seller to the Purchaser of delivered fuel costs multiplied by a guaranteed heat rate based upon a heat rate curve (which will account for partial load dispatch as well as the degradation of

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the Plant's fuel efficiency over its useful life) Component C will be calculated by multiplying a Fuel Cost Recovery Charge Rate by the Energy output during the Month in question The actual delivered fuel cost on which the Fuel Cost Recovery Charge Rate is based will be indexed to *[Dollars]* or another foreign currency to the extent the fuel supply is paid for in such foreign currency

B Component D will be designed to reimburse the Seller for its variable O&M Costs Component D will be calculated by multiplying a Variable Operation and Maintenance Costs Recovery Charge Rate by the Energy output during the Month in question

1 That portion of Component D linked to expenditures in Romania will be indexed to Romanian inflation *(e g*, $RoCPI/RoCPI_b$)

2 That portion of Component D linked to expenditures outside of Romania will be subject to escalation to the extent that the Lei depreciates against the *[Dollar]* and will be indexed to *[U S]* inflation *(e g*, CPI/CPI_b)

III *[Heat Rate Bonus and Penalty, if appropriate]*

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ATWOOD
ATTORNEYS

VIA DHL EXPRESS MAIL

CATHERINE R. CONNORS
DIRECT
207 791 1389
E MAIL
CConnors@
PierceAtwood com

Dr Miron Nicolescu
Senior Advisor
Strategy & Reform Committee
Romania RENEL
Bld, Gen Gh Magheru Nr 33
Bucuresti, Sect 1
ROMANIA 70164

10 September 1997

Dear Dr Nicolescu

In continuing the assistance being provided the Government of Romania and RENEL under the USAID energy sector re-structuring and regulatory reform program, Howard Menaker, I and the rest of the USAID/Bechtel team are happy and eager to work with you in developing the Romanian Energy Law We have translated a copy of the draft of that Law into English, and are in the process of reviewing it now

It is our understanding that there are two basic goals to the draft law (1) to set up an independent regulatory body, and (2) to inject competition into the sector, by, among other things, (a) re-structuring the components of the existing RENEL organization, (b) working towards privatization of the disaggregated elements of RENEL, and (c) creating a mechanism for third-party access, specifically a pool for energy exchange We will review the draft law with these goals in mind

In the meantime, while we are engaging in this review, we are happy to assist you regarding your request for copies of laws from other countries to provide the drafting committee with relevant background We are enclosing (in English) (1) the Polish Energy Law; (2) the Hungarian Electricity Law, (3) Act 222, the Czech Energy Law; (4) a Latvian law; and (5) an English law enacted when the United Kingdom privatized and broke up its government-owned electricity monopoly

None of these laws fits precisely the model contemplated in Romania for re-structuring The Czech law, in particular, will be of limited relevance, as it does not (1) set out the necessary provisions for empowering an independent regulatory body, (2) require third party access or (3) privatize We will be happy to discuss the merits of particular provisions in any of these laws at your convenience if you so desire

To aid the development of the draft Romanian law, we also thought you might find useful our previous analyses comparing the provisions of other countries'

One Monument Square
Portland, Maine
04101-1110
VOICE
207 791 1100
FAX
207 791 1350

laws and the requirements of the recent European Union directive on liberalization of the electricity market As you undoubtedly know, the directive shares the two basic goals of the draft Romanian law we set out above (1) creating a process for review of license applications that meets due process requirements (such as through independent agency review), and (2) opening the electricity market throughout the Member States to competition (by requiring Members to allow at least some segment of the retail consumer population to contract directly with generators) We have enclosed our analyses of what needs to be done to harmonize draft or existing laws in Hungary, the Czech Republic and Latvia with the directive

We will contact you shortly after we have reviewed the draft Romanian law, identified any questions we have regarding the intent and content of the law, and determined what additions, deletions or changes could help reach the goals for the law we have set forth above In the meantime, if you have any questions, comments or suggestions, you can either contact us directly in English (my fax is 207-791-1350, my phone is 207-791-1100 or 207-791-1389, my e-mail is cconnors@PierceAtwood com), or, if you would like to pass on your communications in Romanian, you can speak to our colleague in Romania, Despina Furth Oprisan at 14 Austrului Street in Bucharest (phone and fax – 642-5782, cell phone 92 260 514) She will then pass your comments on to us

Again, we are happy to be working with the Government of Romania and RENEL in re-structuring the electricity sector and drafting a law that meets all of Romania's re-structuring goals We look forward to speaking and meeting with you soon

Sincerely,

Catherine R Connors

Catherine R. Connors

cc Gordon Weynand (via fax, without enclosures)
Jacqueline DeRosa (")
Roberto Figueredo (")
Howard Menaker (")
Despina Fruth Oprisan (via express mail, with enclosures)

PIERCE ATWOOD
ATTORNEYS

MEMORANDUM

TO: Dr Miron Niculescu

FROM: Catherine R Connors

CC D Fruth Oprisan, H Menaker, G Weynand, J DeRosa

RE· Questions on regulation in other European Union countries

DATE October 6, 1997

This memorandum follows up on questions you raised regarding the treatment of certain energy issues in other countries, particularly in members of the European Union Set forth below are some general answers

By separate cover, we are sending you and the Ministry our general comments and questions on the Romanian draft energy law

Time, space and practicality do not make these written communications the optimal means to discuss these issues Obviously, an oral, in-person dialogue would be preferred We would be very happy, therefore, and are in fact eager, to discuss these points and the draft Law with you in more detail, in Romania, at a time convenient to you USAID would like to assist RENEL and the Government in enacting an energy law that meets Romania's goals Ms Fruth Oprisan and our USAID personnel in Romania will follow up with you on setting up appointments for appropriate members of our team to meet with you and others to discuss (1) the questions and answers contained here, (2) our separate questions and comments on the draft Energy Law, and (3) any other matter you would like We look forward to meeting with you soon

One Monument Square
Portland Maine 04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

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Question #1 Are electrical and heat issues typically treated in one, or separate laws?

The issue whether electrical and heat issues should be treated in one or separate laws is a sub-set of the question of how many utilities should be one law in general For example, some countries have considered enactment of one umbrella law for all utilities, including telecommunications, railroads and energy sector participants (*e g* , Latvia has contemplated this approach) Other countries treat each utility separately (*e g* , Hungary's Electricity Law) Other countries treat energy participants together, leaving other utilities to separate laws (*e g* , Poland and the Czech Republic)

We were asked in Latvia whether an "umbrella" approach made sense, and prepared a short memorandum on the topic, which we would be happy to share with you if you like The short answer is that there is no one "correct" approach For example, even within the United States, some states combine certain utility regulations into one law, while other states separate them

The guiding principle should be administrative convenience To the extent that the utilities are governed by the same regulator, and the same regulatory principles should apply to each utility, then it makes sense to treat those utilities in one law, to avoid inconsistent regulation Applying that principle here, because the NAER will govern both the electricity and heat sectors, it makes sense to treat them in one law Regulatory details, which can differ for electricity and heat, can be dealt with outside the law itself, in secondary legislation or agency rules

Question #2 Are hydro-electric plants public or private property?

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The answer to this question depends on the constitutional principles of each country Therefore, Ms Fruth Oprisan will provide you with a separate analysis of this question based on Romanian law

Generally speaking, the flow of a river is public property The state then licenses (or offers concessions for) the use of that flow, allowing these licensees/concession holders to build improvements, such as dams At the end of the license period, the state can then require the improvements to become state property (with or without compensation), or leave ownership of the improvement with the licensee -- although in the latter case, the state has the right to require the licensee to remove the improvement

Thus, for example, in the United States, a hydro-electric plant is owned by the private utility which builds it Practically speaking, however, because the U S owns the flow of the river, the value of that plant – through its use – is governed by the state The U S (through the federal regulator, the Federal Energy Regulatory Commission, or "FERC") licenses plant construction and operation, and, at the end of a license period, can require the licensee to remove the dam

Question #3: What are the prerogatives of the regulatory bodies?

This issue is discussed in our general comments and questions on the draft Romanian Energy Law

Generally speaking, regulators are given a spectrum of powers, with different levels of independence, varying from country to country

Regulatory bodies are given the most power and independence in countries like the United States and United Kingdom Continental countries tend to retain more governmental and ministry control over regulators

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In countries where regulators are given more control and independence, the laws governing the procedures before those regulators are stronger This approach seeks to give regulators the flexibility and power to enact *substantive* rules (within broad legislative parameters), and focuses on the *procedures* regulators use to enact those rules, in order to ensure transparency, objectivity and non-discrimination

We strongly recommend this approach The experience to date in Europe has underscored the need to provide regulators with independence and authority to police the sector effectively The greater the regulator's independence, the easier to ensure private investors that the system is fair, and, therefore, to encourage their investment

Question #4 do tariffs include a development tax?

JWG DO YOU KNOW? OTHERWISE, I'LL ASK FLOYD

Question #5 Are the consumers classified as eligible and captive?

The European Union Directive on liberalization of the electricity market identifies one class of consumer – those able to contract directly with producer/suppliers – as "eligible " It does not provide a title for the remaining consumers, but they are effectively "captive "

The Directive provides the minimum as to who falls into the category of eligible consumers – basically, the largest industrial consumers – and a timetable for requiring expansion of this minimum to gradually smaller consumers Many jurisdictions take this approach – opening up competition first to the largest industrial consumers Other jurisdictions deem this approach unfair, because it does not give smaller consumers equal opportunity to enjoy the benefits of competition Hence, some jurisdictions, such as

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California, expressly reject this approach, and require equal eligibility for smaller consumers

Question #6 how is demand side management regulated?

Generally speaking, as jurisdictions take a more competitive approach, demand side management ("DSM") becomes a product of free market economics, not positive regulation The important aspect in encouraging DSM in the competitive model is ensuring that costs are accurately treated

If the cost of any added increment of power purchase is accurately measured, then buyers' choices naturally lead to DSM

Question #7 who grants concessions and which energy objectives apply to concessions?

Concessions are used to allow private parties the use of public property, to benefit the public Who grants them varies from country to country and can depend on the interest being conceded, what is important is the process by which they are granted, and who regulates that process

The draft Romanian Energy Law properly envisions a bidding process, overseen by the NAER As long as that process is transparent, objective and non-discriminatory, it will meet EU requirements

CONCLUSION

You have asked several important questions, which we have treated very broadly here Obviously, it would make more sense to carry on this dialogue in person Again, we look forward to meeting with you soon In the meantime, if we can assist you in any other way, please don't hesitate to tell us

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VIA E-MAIL AND FAX

MEMORANDUM

TO. R Ichord, A Doernberg, R Figueredo

CC H Menaker, J Gulliver

FROM· C Connors

RE: Interim Romanian Regulatory Agency

DATE: August 3, 1998

The following situation, which I have discussed with Howard and John, has arisen in Romania We now seek guidance as to what position we would like to take and the steps to be taken to forward that position

As you know, the Government of Romania recently issued an Order restructuring RENEL A draft energy law has also been approved by the Government and is awaiting legislative action Estimates as to when the law will be passed vary, the most realistic view is that it will not pass until the end of the year

While action on the energy law is pending, the Government wants to create a regulatory body to oversee the energy sector Pursuant to our project, we have advised the Minsitry as to the scope, structure and powers of this body The EU has agreed to fund the salaries and hardware for the new body The EU has also stated, consistent with our previous communications to the Government, that it wants the body to be independent

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
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Two weeks ago, when I was in Romania, we gave the Ministry drafts of ordinances to create a temporary body These drafts are attached They create a temporary body with significantly independent powers (albeit not as independent as an autonomous regulatory commission created by law)

In response to our drafts and communications, we were initially told (by an adviser to the Minister) that the Government agrees that the body should be as independent as possible Romanian legal restrictions, however, they said, limit the actual independence of the temporary body until the law is passed

The Ministry now contemplates issuing a Ministry Order to create the temporary regulatory body The Minister is returning to Romania on Friday The Ministry lawyer intends to obtain approval to draft and issue the Order from the Minister shortly after his return

Our local Romanian legal advisors report that any body created by a Ministry Order will not have any real power It will be completely subordinate to the Ministry It is doubtful whether the body could issue any licenses or be anything other than consultative The general view in the Ministry seems to be that the creation of a regulatory body via Ministry Order is acceptable, despite the fact that the body cannot have any real independence because (a) a Ministry Order is simple and quick, and (b) eventually the body will be replaced by a more independent agency after the passage of the draft energy law

Based again on advice from our Romanian counsel, I also believe, however, that an alternative mechanism could be used to create the temporary regulatory body An existing Governmental Decision structuring the Ministry could be amended to create a

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Portland Maine
04101-1110

207 791 1100

207 791 1350

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regulatory branch This branch would still be subordinate to the Ministry, but, I believe, could have many indicia of independence- e g , it could issue licenses itself It would at least make the body more independent than if only a Ministry Order were used

This alternative has been raised with the Ministry lawyer She – with whom we have a good relationship – sees the Governmental Decision alternative as taking too long She has been told that speed is of the essence

The question presented is what position do we want to take and how do we want to present it Our view is that the temporary agency should be as independent as possible, and that independence is more important than speed We have no idea how long the "temporary" agency will exist, therefore, we should try to make it as independent as practically and legally feasible

If we agree that it is important to try to obtain this alternative, instead of a weak Ministry Order, that position needs to be communicated by someone with authority to the highest Government official possible – ideally the Minister himself, who will be discussing this matter with his lawyer Friday or early next week Such communications with the Government should probably take place as soon as possible, while the drafting of the Ministry Order is still in its nascent stages Should Roberto and/or Andres meet with the Minister Friday or Monday to present our position? If Roberto and/or Andres would like to meet with our local lawyers, I would be happy to set that up I would also be happy to have a conference call on this topic at any time convenient to you

The EU representative in Romania agrees in principal that the temporary body should be as independent as legally and practically feasible I have not spoken to him yet about this recent development, *i e* , the decision to use a Ministry Order

One Monument Square
Portland Maine
04101-1110
20 791 1100
FAX
207 791 1350
E MAIL
PierceAtwood com

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One Monument Square
Portland, Maine
04101-1110

MEMORANDUM

Via E-mail
Via Fax

TO: Rodica Dimitriu

CC: R Ichord, A Doernberg, H Menaker, J Gulliver

FROM: C Connors

RE: Creation of Regulatory Body through Ministry or Government Order

DATE: August 5, 1998

This memo follows up on our prior meetings and your conversations with Alina Vencu

It is our understanding that you have presented two options to the Minister to create a temporary body to regulate the energy sector This temporary body would act until the draft Energy Law is passed, at which time an autonomous, permanent regulatory body would be created The first option is a Ministry Order, the second, a Governmental Order We understand that the Governmental Order would amend the existing Governmental Order creating the structure of the Ministry B an option Ms Vencu and I discussed with you previously

We strongly urge the Ministry to adopt the second option, the Government Order, for the reasons set out below

The only advantage of a Ministry Order is that it can be issued more quickly The disadvantage is that the temporary regulatory body created would have very little power, even its ability to issue licenses would be doubtful If created by a Ministry Order, the temporary regulatory body would essentially be only consultative to the Ministry This

limitation is serious and severely limits the effectiveness of the temporary body

With a Government Order, the temporary regulatory body would still be subordinate to the Ministry We understand, however, that more independence could be granted to the body through use of a Governmental Order For example, the Government Order could permit licenses to be issued directly by the body The only disadvantage is that it would take longer to enact than a Ministry Order, because it would need the approval of multiple ministries

With this background, you asked us to summarize our position as to which option is preferred We very firmly believe a Governmental Order is the better choice

The most important priority is to maximize regulatory independence Even if this body is only temporary, we do not know how long it will exist, when the draft Energy Law will be passed, and when the permanent autonomous regulatory body could be established Therefore, balancing the time limitation against the advantage of increased independence, increased independence is, in our view, substantially more important A Governmental Order should be written to amend the existing order establishing the Ministry structure in a way that maximizes the independence of the regulatory body We have outlined these most important characteristics of independence to you previously in the draft ordinances presented to you, Nicolae Liciu and Dan Ionescu two weeks ago Please feel free to use them again

Thank you for giving us the opportunity to express our position We would be happy to provide any additional information or support you think would be helpful We look forward to working with you to create a sound, independent regulatory structure for the Romanian energy sector, to the benefit of the country as a whole

PIERCE ATWOOD
ATTORNEYS

One Monument Square
Portland Maine
04101-1110

MEMORANDUM

TO. R Figueredo

FROM J Gulliver, C Connors

RE Documents needed to provide assistance

DATE June 3, 1998

Following up on our conversations this week, the following is a list of documents we need to provide the assistance described in our outline of assistance given to the Ministry on June 4, 1998 We understand that you will do your best to retrieve these materials from RENEL and other appropriate sources We also understand that the deadline on providing assistance in at least some areas is very short, so we should be receiving whatever is available as soon as possible

Obviously, if you can think of any other documents that would be helpful, please give them to us If we have additional requests, we will e-mail you

Thanks for your help If you have any questions or comments, please call us at (207) 791-1296 (John) or (207) 791-1389 (Cathy), or e-mail us (cconnors@PierceAtwood com, jgulliver@PierceAtwood com) Thanks again

LAWS

- The existing Romanian administrative procedure act
- Existing civil service laws, regulations
- Best existing law/ordinance/regulation creating an independent regulatory body (if any)
- Existing law on maintaining confidence of materials submitted to government (e g , any Freedom of Information Act)

- Law 29/90, the General Law on Disputes, with amendments if any
- Law 15/90 on Concession and privatizations, with amendments if any

OTHER DOCUMENTS

- Materials created to date by RENEL for secondary legislation on agency creation and development, power flow governance and tariff methodology (e g , Action Plan)
- Existing PPAs (Gouana, Bravela, Amoco/Bucharesti North, CEC/Slatina, IFC materials Eisenberg Tomen/Bucharesti South)
- Materials provided to date by EU Phare, German assistance
- Terms of Reference for EU Phare Assistance to Ministry
- Letter from Staiculescu to USAID requesting assistance and response from USAID

DRAFT
OUTLINE OF ASSISTANCE

June 4, 1998
USAID
John Gulliver – Catherine Connors
Pierce Atwood
One Monument Square
Portland ME USA 04101
(207) 791-1100
jgulliver@PierceAtwood com
cconnors@PierceAtwood com

Scope of Assistance

I FORMATION OF THE REGULATORY BODY

[All Phase 1 – see attached calendar]

- Develop general framework of the regulatory body (with charts)
  - Interim/permanent options regarding
    - Structure (relationship with MIT)
    - Internal organization-functions
    - Size, positions
    - Qualifications of key personnel
    - Appointment and removal criteria
    - Funding
- Provide advice on appropriate legal mechanism to create and control regulatory body
- Develop framework for the role of the regulatory body
  - Tariff authority
  - Authorizations-concessions
  - Role in RENEL restructuring
  - Consumer relations
  - IPP and commercial relations
  - Compliance monitoring and enforcement
- Develop protocol for information flow within and without the regulatory body, with flow charts and calendars

- Develop a protocol for decision-making criteria consistent with governing legislation

- Develop administrative procedures

  - Nature of participation by interested parties
  - Hearing procedures
  - Public access – publication, right to know rules
  - Standards for written decisions

- Develop dispute resolution procedure

  - Consumer disputes
  - Between authorized entities

II DEVELOPMENT OF COMMERCIAL FRAMEWORK FOR THE SECTOR

- Provide model contracts for

  - Power purchase agreements between National Electric Company and IPPs [Phase 1]

    - New participants
    - Former RENEL producers
    - Existing autoproducers

  - Fuel acquisition agreements between IPPs and fuel sources – [Phase 1-2]

  - Import-export contracts – [Phase 2]

  - Form contract for residential customers – [Phase 2]

  - Sample contract for industrial customers – [Phase 1-2]

- Provide protocols/codes [all Phase 1-2] for

  - Relations between bodies within the National Electric Company

    - Between the transmission system operator and the distribution units
    - Between the distribution units and the generation units
    - Eligible Customers
    - Third Party Access

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- Electricity exchange market [Phase 3]
    - Short-term
    - Long-term
    - International

III TARIFF PRINCIPLES

[Phase 1-2]

- Secondary legislation for
    - Which prices are subject to regulation, which are competitive
    - Tariffs for captive customers (retail end-users)
    - Transmission fees for use of the grid
    - How to develop performance based rates

IV GRID CODE POLICY

[All Phase 2]

- Identification of scope and policies
    - Commercial
    - Technical
    - Transmission grid
    - Distribution grid
- Coordination of Grid Code with other norms for regulatory body and model commercial agreements
- Advice on process and participation in Code drafting

V TRANSMISSION TARIFF FORMULATION

[All Phase 3]

- Cost of service identification
    - Collection of data
    - Analysis of data by customer type

- Drafting of transmission tariffs

VI GRID CODE DRAFTING

[All Phase 3]

- Draft of the Code itself

VII OTHER SECONDARY LEGISLATION

[All Phase 2]

- Authorizations - legislation on information required from authorization applicants, draft authorizations
- Capacity tender rules
- Concessions – legislation on what is concessioned, applicable rules, model concession contract
- Competition policy – principles for avoidance of market abuse

Notes

1 All materials produced will be consistent with European Union treaties, charters, laws, directives and precedent

2 Work papers will present options on core decisions

3 Training sessions will take place as appropriate

4 Preparation of workpapers and achieving deadlines is dependent upon active involvement from the taskforce and USAID

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Calendar

Phase I - JUNE-AUGUST 1998

- Regulatory Body

  Initial advice/drafts – by June 30

  Final versions – July 31

  Consultations in Bucharest with counterparts in June and July

- Commercial Framework (see outline for which portions)

  Initial advice/drafts – by July 15

  Final versions – August 31

  Consultations in Bucharest with counterparts in June-August

- Tariff Principles

  Initial advice/drafts – August 1

  Final versions – August 31 - Phase II

  Consultation in Bucharest with counterparts in July-August-Phase II

Phase II - SEPTEMBER-DECEMBER 1998

- Commercial Framework (see outlines for which portions)

  Initial advice/drafts – by October 15

  Final versions – November 30

  Consultations in Bucharest with counterparts in October-November

- Grid Code Policies

  Initial advice/drafts – by October 1

  Final versions – November 15

  Consultations in Bucharest with counterparts in October-November

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- Other Secondary Legislation

  Initial advice/drafts – by November 1

  Final versions – December 1

  Consultations in Bucharest with counterparts in November-December

Phase III - JANUARY 1999 - Completion

To be developed

TENTATIVE CALENDAR OF CONSULATIONS IN BUCHAREST FOR PHASE I and II
(subject to discussion and approval from USAID & Romanian Counterparts)

- June 25-June 30
- July 13-20
- August – subject to discussion
- September 14 – 28
- October 21-31
- November 16-20
- December 7-11

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ATTORNEYS

One Monument
Square
Portland Maine
04101 1110

AGENDA

23 July 1998

Follow-up Work from Draft Outline of Assistance

I Formation of the Regulatory Body

- Comments from Ministry on draft documents (1 Commission with Transition Period, 2 Interim Agency, 3 Job Descriptions 4 Explanatory Memo)
- Follow-up on draft documents
- Legal mechanism for creation of interim/transition regulatory body

II Development of Commercial Framework

- Identification of priority contracts
  - Identification of needed documents (existing contracts, if any, drafts of contracts)

- Identification of priority licenses (for existing, operating entities)
  - Identification of needed documents

- Calendar for follow-up on contract work
  - Receipt of documents
  - Visit to Bucharest
    - Meetings with Ministry on concerns about existing arrangements, existing draft contracts
    - Meetings with parties on concerns about existing arrangements, existing draft contracts
  - Re-draft contracts

- Calendar for follow-up on license work

  - Receipt of documents
  - Visit to Bucharest
    - Meetings with Ministry on concerns about existing arrangements
    - Meetings with parties on concerns about existing arrangements
  - Draft licenses

PIERCE
ATWOOD
ATTORNEYS

CATHERINE R
CONNORS

DIRECT
207 791 1389

E MAIL
CConnors@
PierceAtwood com

August 21, 1998

Dr Eng Nicolae Liciu
Deputy General Director
Directorate-General for Energy, Oil and Gas
152 Calea Victoriei
Bucharest Romania

BY FAX 011 401 650 2968

Dear Dr Liciu

Based on my conversations with Ms Dumitriu and USAID, it appears that the best time for me to return is the week of September 7 I anticipate that we will be working on the following items

Creation of the Ministry

I understand that a Government Order has been approved by the Ministry to create a body within the Ministry to act as the regulator until a permanent, separate agency can be created after enactment of the draft Energy Law I have reviewed a copy of that Order Ms Dumitriu has indicated that the week of September 7 would be the best time to work with her on fleshing out the Order As you know, we want to ensure that the body is as independent as possible We have work to do to achieve this result

I would like to set up meetings with you and whomever you believe appropriate on this issue By copy of this letter to Mr Raducu, I would ask him to speak to Mr Barbu and set up a meeting with him for that week, along with whomever Mr Barbu and Mr Raducu believes appropriate Obviously, it would be helpful if Mr Brown were available, and I ask Mr Raducu to follow up with him, also

Please give me dates and times of appropriate meetings E-mail me at cconnors@PierceAtwood com, fax me at 207 791-1350, and/or call me at 207 791 1389 I look forward to hearing from you and Mr Raducu soon

Power Purchase Agreements

Following up on your request that we help with drafting power purchase agreements between the nuclear entity and the transmission company, and between the transmission company and independent power producers, I intend to return to Romania the week of September 7th with Jim Douglass, a colleague at my firm with broad experience in drafting and reviewing PPAs (before he came to our firm, he worked at the Federal Energy Regulatory Commission)

One Monument
Square
Portland, Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
o@PierceAtwood com

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I would like to arrange times and dates to meet with you on this subject matter, and with anyone else whom you think appropriate I am told that the following people at RENEL (or CONEL now?) could be the appropriate people to speak to, although with re-organization there I of course cannot be certain

Alexandru Binig
Anton Rosu
Gabriel Poenaru
Ion Conecini
Bogdan Prunaiche
Dan Reghis
Jean Constantinescu
Georghe Indre

I suggest that you speak to Gabriela Vladescu at RENEL/CONEL, who has helped us arrange meetings in the past She may be able to provide further guidance as to the appropriate people at RENEL/CONEL to speak to

To assist us in this work, Mr Douglass has prepared a list of relevant terms for PPAs I have enclosed a copy of that list, which follows up on the list you gave me during my last visit to Romania.

As always, we would like to follow a work plan that makes the best sense to you, and provides the assistance you need My goal is to make the trip the week of September 7th as productive as possible If you have any suggestions as to how to maximize that productivity, we would appreciate your input.

At this point, I am only planning to stay the week, arriving on Tuesday I can stay longer, through the next week also, if you think that makes sense

Please get back to me as soon as convenient for you with your thoughts – how long you think I should stay, whom I should speak to, and the dates and times of meetings with these people

If there is anything else you would like us to do, please tell us

Sincerely,

Catherine R. Connors

Cc Rodica Dumitriu
Jim Douglass
Howard Menaker
Andres Doernberg
Dan Ionescu
Aura Raducu
Ian Brown

PIERCE ATWOOD
ATTORNEYS

One Monument Square
Portland, Maine
04101 1110

MEMORANDUM

TO A Doernberg

FROM: C Connors

RE· Status of pending tasks, potential future tasks

DATE September 10, 1998

Pending Tasks

1 Creation of Agency

Status of current action

- The draft energy law - creates an autonomous agency
  - not likely to be passed this year
- The draft emergency ordinance
  - creates an agency subordinate to MOIT
  - signed by Bureanu
  - not likely to be enacted
  - the more independent the agency is, the more questionable the legality

Our latest input

- Latest comments (to create more independence) given 8/10/98 to MOIT (Rodica Dimutriu) and CONEL (Jean Constantinescu)
- Discussions with Ian Brown on coordinated position

Follow up strategy

- Pressure to advance law? (Step #1 – get Bureanu to get other ministers to sign and send to Parliament)
- Pressure on Bureanu to advance ordinance?
- Work with local lawyers/Dimutriu/Steculescu on alternative government order re-structuring within Ministry?

To do in Houston

- Id fiom Liciu and Ionescu their latest views

2 Power Purchase Agreements

Status of current action

- Working with Nuclearelectrica, Electrica and Jean Constantinescu on PPA
- Collecting existing proposals for generation-Electrica agreements

Follow up strategy

- Draft nuclear PPA – use Bogdan Prunaiche and Mariana Vatamanu as contacts to move forward
- Explore drafting generation agreements
- Need Coopers study to follow through on generation agreements (Portfolio contracts?)
- IPPs?

To do in Houston

- Brief Liciu, Ionescu on status of discussions

Potential Next Tasks

1 Transmission Agreements (Transmission-Distribution/Transmission-Generators)

- Both Liciu and Constantinescu have identified this as an important priority

To do in Houston

- Listen to Liciu's views on what the agreements should look like
- Identify from Liciu, Ionescu, Constantinescu who should be contacted

Other follow-up

- Contact Bodan Vifli Popescu & Dep Gen Dir Miulescu (id-ed by Constantinescu)

1 Ancillary Services agreements

- Both Liciu and Constantinescu have identified this as an important priority

To do in Houston

- Listen to Liciu and Ionescu's views on what the agreements should look like
- Identify from Liciu who should be contacted
- Identify from Constantinescu who wrote existing memo and obtain it

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1 **Captive Consumer Contract**

- Liciu has identified this as an important priority

To do in Houston

- Confirm with Liciu that this is a priority
- Identify with Liciu and Constantinescu the appropriate Ministry/CONEL personnel to work with

Other Follow-up

- Obtain and translate Hungarian consumer regulation-form contract, UK agreement?

1 **Licenses**

- This should be a first priority
- Ian Brown agrees it is a top priority, and has left it out of the EU work plan with the understanding that we will work on this subject matter

To do in Houston

- Get Liciu to agree this is a priority, we should work on it, and id the right people to work with

GET LICIU/IONESCU/CONSTANTINESCU TO AGREE TO A SCHEDULE FOR THIS WORK?

- From past experience, Liciu will say he needs to talk to his minister – any way to preempt this? (note these 4 items are sub-sets of previous draft outline of assistance, which we never obtained formal agreement to do, but had some limited ok from Steculescu)
- Does/can/should the schedule be put into the memo of understanding?
- How do we prevent any new schedule from failing to obtain buy-in from Liciu like last draft outline of assistance?

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PIERCE
ATWOOD
ATTORNEYS

One Monument
Square
Portland Maine
04101-1110

QUESTIONS AND COMMENTS ON DRAFT ROMANIAN ENERGY LAW

Introduction

The following are questions and comments on the draft Romanian Energy Law Our remarks should be considered suggestions and recommendations to clarify or continue the development of what is already a well-written law that takes giant steps in achieving Romania's goals

I The Perspective from which We Examined the Draft Law

We understand, from both the text of the Law itself, and conversations with RENEL and government officials, that the goal of the Law is to make the changes in the energy sector outlined in the white paper previously prepared by RENEL and submitted to the Ministry The white paper contemplates a competitive sector structure, with RENEL privatized and disaggregated, and power sold through a pool spot market

More broadly, as articulated in the draft Law, Romania wants to harmonize its system with that of the European Union We understand that the Government also seeks to modernize the sector and promote private investment, and wants to take the steps needed to achieve these goals

With these goals in mind, we have examined the draft law from two perspectives (a) process and (b) substance The first point, process, is as important if not more important than the second, substance In order to meet the requirements of both investors and the EU Directive on liberalization of the electricity market, the administrative system regulating the sector must be open, objective and non-discriminatory No matter what the substance of the law is what type of sector re-structuring is implemented the process by which those substantive rules are implemented is of utmost importance

As to substance, in analyzing the draft Law, we have assumed that the goals of the Law are as described above to meet EU requirements, introduce competition, encourage private investment, and implement the specific changes described in the white paper

Finally, are comments are based on experiences with new or amended energy laws in the United States, England and Wales, Central and Eastern Europe (e g , Czech, Hungary, Poland, Latvia), Argentina, Australia and elsewhere For example, these experiences teach, among other things (1)

the importance of an independent regulator in order to encourage investment, (2) the need for consistent and open procedures to reduce controversies surrounding tariff decisions, and (3) setting the proper balance as to where substantive rules should appear in the law, in secondary legislation, in rules promulgated by the regulator, and in an Operational Code

General Comments and Questions

Overall, we think the draft Law is a very good start It covers the many of the important points, includes the relevant objectives, and sets out to achieve those objectives both procedurally and substantively in a way that meets EU requirements

One important addition that we recommend are provisions fleshing out the duties and powers of the competent authority, the National Agency for Energy Regulation (NAER) Logically, we think it makes sense to put these provisions about the role of the NAER and other authorities in the beginning of the Law (e g , as Chapter II), instead of toward the end of the Law (currently Chapter VIII) These provisions should create a strong, independent administrative body with broad powers Provisions giving the NAER independence such as making its head removable only for cause and allowing it some control over its budget -- should be included in the Law itself

The Law should include not only provisions indicating that the NAER is the decision-maker on most administrative determinations, but should describe the process by which its decisions are made To meet EU and international norms for due process, these procedures should allow for notice, an opportunity to be heard, the ability to appeal, and, in general, follow the EU's overarching call for transparency, objectivity and non-discrimination

The shorter and simpler the Law, the better Some streamlining could take place, eliminating some redundant, inconsistent or unimportant definitions and making the text more concise The regulator should be in charge of details, and should be given flexibility to respond to evolving circumstances Efforts should be made to avoid micromanaging in the Law itself, and leaving details to the NAER The Law should set out broad goals and broad parameters within which the NAER can act, and should then allow the NAER to fill in and enforce rules within those parameters Regulation through Government decision, as opposed to through the Law itself and through the regulations promulgated by the NAER, reduces administrative continuity, democracy and devotion of power to the entity with the most knowledge on the subject

Conciseness and simplicity is also preferred because the sector participants should be given the freedom to act according to their own wills whenever possible In a perfect world, there is no regulation Everyone acts according to his or her own volition Because energy is a vital commodity, transmission and distribution are natural monopolies, and we do not live in a perfect world, regulation is necessary But regulation should be limited to only those rules truly needed Whenever given a choice, the option of no rule should be selected

One way to reduce the size and scope of the law, allow the NAER to control the technical standards in which it has expertise, and permit public participation in the promulgation of such standards, so that investors and other interested parties have a say in the process, is to create an Operational or Grid Code The Law could either establish a committee to enact and amend the Code, or

empower the NAER to enact such a Code itself

Specific Comments and Questions

Chapter I, Article V (definitions)

Before our discussion of specific definitions, it may be helpful for us to describe generally the chain of actors in the energy sector, particularly in the electricity context

The producer, or generator, generates power in its power station The transmitter, or transmission company, transports that power on high-voltage wires The distributor transports the power on lower voltage wires into the end-users' buildings (Some large end-users can connect directly to a transmission wire)

Suppliers are those entities that sell power to end-users they meter, send out bills, and are the actual retail providers of electricity Often the local distributor acts as a supplier, particularly during a transitory phase toward full competition, when some end-users are captive In such an environment, the local distributor-supplier is given an exclusive license by the regulator to serve the captive consumers in a particular geographic location In return, that local distributor-supplier has an obligation to serve the consumers in that location

Producers can also be suppliers They can sale directly to the non-captive, or eligible consumers Thus, in a competitive environment, some or all end-users can choose the supplier they want. Their supplier may be the owner of the local distribution wires, or the individual end-user can contract with a supplier who does not own the local wires In the latter situation, the local distributor who does own those wires gets a fee for transporting the power to the end-user on behalf of the non-local supplier

With this understanding of the chain from production to end-use, we have the following questions and comments

Local producer of electricity and/or heat What does of local interest mean as used here? If read broadly, couldn't all production be viewed to be of local as well as national interest?____

Consumer Why limit this definition to anyone who contracts with and receives power from a distributor? Some end-users (e g , large factories) can connect directly to the transmission line (as the current definition of Electricity transmission in the draft Law recognizes) Some (eligible) consumers contract directly with producers or suppliers who are not their local distributors
Why not define a consumer as an end-user someone who buys or consumes power for his, her or its own use? (own use could include supply to subconsumers, see discussion below)
Why does the Law need to define customers as well as consumers? Why does it need to define whole-sale and end customers and system users? Can the Law be simplified by just defining consumer and using that term consistently throughout?

Eligible and Captive consumers Currently, these are defined in the draft Law as those consumers who can or cannot contract with the *producer* they choose Conceptually, and given the fact that Romania will be allowing competition beyond the minimum required under the EU Directive, it makes more sense to define these consumers as those who can or cannot contract with the

supplier they choose

Main consumer and Subconsumer We understand that the reason for dividing up these types of consumers is to account for consumers like tenants, who receive heat or electricity from their landlords
Currently, the draft Law distinguishes between these two types of consumers by defining subconsumers as consumers who are supplied by main consumers, and main consumers as consumers who supply other consumers who have not entered into a supply contract This definition may be too broad or vague, in that it could allow captive consumers to be sold power by main consumers within a distributor-supplier's exclusive service territory, as long as these captive consumers do not enter into supply contracts
In order to limit subconsumption truly to situations like the landlord-tenant context, it may be preferable to include in the definition a requirement (as in Hungary), that subconsumption can only take place in one specific, contiguous place of consumption (like an apartment building)

Supply and supplier Our question on this definition could be a product of the translation It appears, from the translation, that supply is defined as all-requirements supply that is, suppliers must always provide consumers with all the power they ask for at any time If this is the case, we do not understand why all supply should be so defined There could be supply contracts where the consumer agrees only to a finite amount of power, or to be interrupted, or to be subjected to other limitations, in return for a better price We suggest that supply be defined as the sale and provision of energy, and that a supplier be defined as the seller and provider of energy

User's electrical installation Why is for a useful purpose included in this definition? Isn't it up to the consumer whether his, her or its purpose is useful to him, her or it?

Through-line We don't understand this definition is it a redundant transmission line?

Elimination of definitions Can some definitions in Chapter I be eliminated? (E g , all the station definitions, energy transformation, energy conversion, primary energy, secondary energy, useful energy, end (supplied) energy, energy source, power technologies and energy potential) Does the Law really need to include definitions of these concepts?

Are some definitions repetitive? Why, for example, is a definition of transport and distribution included in Chapter III and IV, when electricity and heat transmission is already defined in the definition section? Why is transport defined in Chapter III, Article 10 as the activity by which fuels and energy are transported from extraction or production to be delivered up to energy distributors or end users ? Doesn't such a definition include distribution within the definition of transport? Why isn't the definition in Chapter I sufficient? Shouldn't the definition of supply be in the definition section and not in Article 23? Why aren't the definitions of renewable resources in the Chapter I definition section, instead of Article 77?

Additional definitions Should the definition of the energy exchange market, or pool, be included? Definitions of associated pool entities would also be helpful e g , the independent system operator and economic exchange operator

Chapter II Production

Article 6(1) suggests that all producers need licenses
Can't some producers be exempt from license? (E g , autoproducers who sell no power on the grid? Producers under 50 or 20 MW?)

Article 6(2) provides that the requirements for grant of a license shall be established by Government decision
In order to provide some security for investors and demonstrate that EU requirements for objectivity, transparency and non-discrimination will be met, broad parameters for license requirements should be included in the Law itself, indicating that equal and reasonable access to licensing will be available Beyond such broad parameters, it would be preferable to have license requirements set by the NAER, not the Government Thus, the Law could state that the NAER shall have the power to promulgate requirements for licenses, as long as these requirements are applied equally to everyone, follow a public promulgation process before application, and do not unreasonably restrict accessibility to authorization
Alternatively, the draft Law could set forth the license requirements in the Law itself, indicating that no other requirements will be applied Either way, the goal is to make clear that the licensing process shall be fair, public and contain minimum burdens, and that all the requirements are clearly known and equally applicable to all

Article 8(1) sets out producer obligations
Consistent with our comments on Art. 6(2), why can't the Law simply provide that the producer must obey the conditions and parameters set forth in its license, and leave the rest to the NAER to include in the license?
Why does Art 8(1)(b) require producers to supply any distributor or consumer who seeks to be served by that producer? Why can't the producer choose? What if the producer is in one location of Romania and wants to limit service to that geographical location? What if the producer only wants to serve large load, or loads with certain types of load levels?
What does Art 8(1)(d)'s reference to their own operator's staggered grades mean?

Article 9(1) sets out producer rights
Art 9(1)(a) very properly sets out the producers' right to contract with eligible consumers and the NES Somewhere, however, the identification of who falls into the category of eligible consumers needs to be set forth
Perhaps the most appropriate way to identify these consumers is to state in the Law that the consumers falling within this category will be identified in a Government decision, but that, at a minimum, eligible consumers shall include customers of a specific MW usage size or more, including distributors, and shall be expanded over time consistent with a explicit schedule that comports with the EU Directive

Chapter III Transport

Section 1 General provisions

Article 10 defines transport
See previous comment in definition section, Chapter I, above

Article 11 sets out transporters' planning duties

Art 11(1) sets out a general duty, while Art 11(2) provides that plans should be submitted for approval to the competent authority, later identified (in Chapter VIII) as the NAER Confusion could be eliminated by putting Chapter VIII ahead of Chapter II, and coordinating who has what planning duty with more clarity The State can set National Energy Policy, the NAER can try to achieve and enforce that Policy, and sector participants, such as transporters, can be required to take steps outlined by the NAER to achieve and enforce the Policy
Under such a division of duties, as pertains to transporters, the Law should simply provide that transporters shall submit planning information to the NAER as the NAER requires through properly promulgated rules and regulations The NAER can then indicate what planning information it will require how long a forecast should go into the future, and how transporters should coordinate planning recommendations with distributors, producers and suppliers
Finally, the Law should provide protection for submission of proprietary or confidential information supplied pursuant to planning duties, and indicate how the planning process then unfolds what the NAER does with the planning information Does the NAER engage in any decision-making or approvals of the information? Are reports issued? If so, to whom, and how does the public review and participate in this process?

Section 2 development and exploitation of the national electricity transmission system

Article 12(1) declares that the electricity transmission system is public property possessed by the NES through concession
This section should clarify whether all 220 kV, 400 kV and higher voltage lines and transformer stations throughout the country are owned by the State The section should also clarify what it means by under the terms of the law - this particular law? A separate concession law? All laws, Government decisions and regulations?
The most efficient distribution of administrative authority is to have broad parameters in the Law, details left to the NAER, and a minimum of regulation by Government decision Regulation through Government decision, as opposed to through the Law itself and through the regulations promulgated by the NAER, reduces administrative continuity, democracy and devotion of power to the entity with the most knowledge on the subject

Article 12(2) sets out the duties of the NES
This section references applicants who have fulfilled the requirements of this law what requirements? To be licensed? To be an eligible customer?
Article 12(2)(a) references a transport operator and a system operator, without previously presenting a clear distinction between the two
Article 12(2)(b) references trade activities apparently relating to a pool and spot market, without first describing the creation of such a pool/spot market
Perhaps it would make more sense, structurally, to include an Article before Article 12 and after Article 11, describing the creation and operation of the pool Article 12 could then be clearer about the NES's duties as both an independent system operator and operator of the economic exchange

Somewhere in either Article 12 or in a new article preceding Article 12 on the pool, the independence of NES's technical system operation from its role as exchange operator must be made clear The EU Directive requires that the system operator be independent

Article 12(2)(c) focuses on planning duties of the NES

Is this redundant of Article 11? It might be preferable to remove 12(2)(c) and revise Article 11 as recommended as above
As currently written, Article 12(2)(c) also raises difficult questions about the coordination of transmission and production planning and what is meant by this section's reference to minimizing costs costs of what? Transmission? Production? Overall cost?
No one is identified as an arbiter of these cost decisions the NAER should be identified as the recipient of any planning information Typically, moreover, production drives transmission construction, and not vice versa someone wants to build a plant in a certain area, which results in certain additional transmission needs, and the costs of building that additional transmission must be incorporated into tariff structures If there are existing transmission constraints, they should be dealt with at the NAER level and in an Operational Code

Article 12(2)(d) references interconnections with other transmission systems and their exploitation does that mean other systems within Romania? If so, what are these systems? Does it mean international connections? If so, why is NES in charge of creating these agreements, without any governmental input into deciding what agreements should be made, and how their costs should be treated?

Article 12(2)(e) references the NES's duties to create network access for the import-export activities Who, however, makes the decision as to what transmission plant should be installed to meet any such activities, and who should pay for those installations? Again, there should be some governmental and/or NAER input otherwise the NES could pragmatically control all export and import, and restrict such activities, contrary to EU requirements

In sum, Article 12(2) needs revision to clarify the independence of the system operator, limit the NES's powers, identify the Government and the NAER's control over planning and policy decisions, and describe the creation and operation of the pool

Article 13 provides that the NES shall prepare objective and non-discriminatory technical specifications for production, transmission and distribution plants and installations and equipment connected to the grid, which shall receive an opinion from the competent authority
Again, confusion could probably be reduced by putting Chapter VIII before Chapter II
Technical specifications should also be determined either by the NAER directly, or as set forth in an Operation Code created by a Code Committee with significant control by the NAER.
Technical specifications, particularly as to non-transmission related aspects of plant, should not be determined by the NES alone, with only a non-binding opinion from the NAER

Article 14 describes the duties of the system operator
Again, it must be made clear that the system operator works independently of the economic exchange The duty of the system operator is to maintain the transmission network from a technical point of view and to ensure that efficient transmission occurs from that technical perspective The exchange market is entirely separate from this technical operation For example, the system operator arm of the NES determines what voltage stability services are needed The marketing arm of NES then referees the bid process by which the cheapest bidder to provide such services is determined The marketing arm then tells the system operator arm who won the bid, and the system operator then technically dispatches the power from the winning bidder
To the extent Article 14 does not recognize the separateness of these two arms, it must be

re-written

Article 14(d) provides that the system operator shall valorize the amount of supplied or purchased energy within the transmission system The meaning of this provision is unclear The system operator does not identify a price for any power It identifies the cost of transmission services, and can calculate line losses

Article 16 discusses the establishment of protection and safety areas
Why is the size of such areas determined by Government decision instead of by the NAER?
Article 63(1) says that the competent authority establishes the size of protection areas Are these Articles inconsistent and/or redundant?

Section 3 exploitation and development of heat transmission plants

Article 18 discusses heat transmission
Why isn't the NAER in ultimate charge of ensuring proper coordination of heating stations connected to the NES?
The appropriate place to put the technical norms references in Article 18(3) could be an Operational Code

Chapter IV- Distribution

Article 19 discusses distribution
Article 19(1) defines distribution See comments above regarding definitions

Article 19(2) references specific marking points if this means the identification of where transmitters' and consumers' equipment ends, this is an appropriate subject for an Operational Code

Article 19(3) refers to technical and safety norms contained by regulations in force These types of norms are appropriately included in an Operational Code

Article 20 discusses distributors' rights and obligations
Article 20(1) provides that the NES may be a distributor, along with any company licensed to distribute and supply within a given area. Why does the NES need a distribution license? Will the NES be permitted to be both the transmission company (independent system operator and economic exchange operator) and a distributor in one or more service territories? Won't this situation result in market dominance?

Article 20(2)(a) appears to impose an obligation to serve on distributors within their service territories Are distributors going to be given exclusive licenses to supply (at least captive consumers) within their territories? This is apparently the chosen system, but is not made clear in the text

Article 22 discusses isolated localities
Article 22(1) requires local producers to provide distribution in isolated localities What if there is more than one generation plant within such a locality? Why require a generator to provide distribution if anyone is going to be required to provide distribution, why not a distributor given

an exclusive license to serve an adjoining service territory?

Articles 22(2) and (3) require uniform tariffs between consumers served in isolated territories and other consumers, and provides that the NAER and Finance Ministry shall establish how the local producer is recompensed for such subsidies
These provisions suggest that there will be uniform tariffs throughout the country Does this mean for all classes of consumers? Later provisions suggest not that rates can be different for different classes but this point is not made clear
Uniform national tariffs create difficulties in a competitive sector structure generally How can there be uniform tariffs throughout the country if eligible consumers can contract directly with the producer of their choice? Assuming that these tariff rules only apply to captive consumers, is a uniform tariff for all such customers fair when costs can vary throughout the country? Is it fair to the suppliers? What happens if the NAER disagrees with the Finance Ministry? What is the process by which subsidies are determined is there any transparency to this process?

Article 22(3) provides that the NAER, together with the Finance Ministry, establishes the minimum requirements regarding continuity and quality of supply Why is the Ministry involved with this technical issue? ___

Chapter V Energy Supply and Utilization

Article 23 deals with energy supply _
Article 23(1) defines supply See discussions above regarding definitions

Article 23(1) requires suppliers to enter into supply contract with consumers based on a model contract prepared by the NAER. It makes sense to have generic contracts for captive and small consumers But why should contractual relationships between eligible and large consumers be limited by model provisions?

Article 23(2) requires energy to be billed based upon the metering equipment index what does this mean? Again, why should relations between suppliers and eligible consumers be so regulated?

Article 25 imposes additional restrictions on suppliers' contracts
These provisions suggest that any supplier must contract with any consumer asking for a contract this does not make sense if the supplier does not serve that territory, or if competition is available These provisions appear to intend to mean that only the local distributor-supplier has such an obligation to serve, but this point is not made clear
Similarly, as to eligible consumers, why impose restrictions on contractual free will? Also, as to large customers, some thought should be given to exit fees, re-entry fees, or other ways to deal with customers entering and exiting the system on a short, 30 days notice
In sum, we believe that the Law should make clear that an obligation to serve is imposed only on distributor-suppliers given exclusive or semi-exclusive service territories, and that contractual limitations should only be imposed on contracts between captive consumers and such distributor-suppliers As between other suppliers and consumers, they should be permitted to negotiate their own terms, including notice periods

Article 26 goes to subconsumption

Article 26(1) allows subconsumption only with the supplier's consent Which supplier the local distributor-supplier with an exclusive license? While some, perhaps most, consumers in a service territory may, at least in the beginning, be captive consumers served by such a distributor-supplier, eligible customers can choose any producer-supplier they want Why should such an eligible consumer's distributor be the final arbiter of any subconsumption decisions it makes? Even as to captive consumers, there may be situations where the NAER should be able to overrule a supplier's objections and permit subconsumption In the absence of such ultimate agency control, as more competition is introduced, the distributor-supplier serving the diminishing group of captive customers in its service territory could try to argue in favor of payment of stranded costs

Articles 26(2) and 26(3) appear to require a main consumer to provide subconsumers with electricity without any additional charges from the price the main consumer pays its supplier for electricity Are there no circumstances under which a main consumer might incur additional costs that should be covered for providing subconsumption?

Article 26(3) requires subconsumers to enter into supply contracts with main consumers Does this mean all tenants must enter into supply contracts with their landlords? Isn't this inconsistent with the definition of main consumer in Chapter I defining a main consumer as a consumer who supplies other consumers who have not engaged into the supply contract ?

Article 26(4) requires suppliers to contract to supply energy to a main consumer when the main consumer is serving a community in the supplier's responsibility As elsewhere, however, and as discussed above with respect to those other provisions, the Law does not make clear that only certain suppliers are responsible for consumers in particular territories only the distributor-supplier given an exclusive license to serve captive consumers within that location, and not other producer-suppliers serving eligible consumers Theoretically, all suppliers could be responsible for all consumers in the country as the Law's language stands now
Assuming that this provision intends to make only the distributor-supplier given an exclusive license to serve captive consumers in a particular territory responsible, how is this provision consistent with Article 26(1)? Article 26(1) seems to give suppliers discretion in allowing subconsumption, while Article 26(4) seems to require them to allow subconsumption

Article 26(5) provides that changes in a distribution network to enable direct supply by a supplier to a subconsumer shall be made by the supplier alone on written request from the subconsumer Does this mean that any subconsumer any apartment tenant, for example can force any supplier to provide it with direct supply upon request?

Article 26(6) provides that expenses incurred by changes in public distribution plants shall be borne by the responsible party, with the modifications remaining the supplier's property Should we assume that the referenced supplier owns the distribution plant at issue in the first place? What is public distribution plant as opposed to any other distribution plant?

Article 27 goes to cut-offs
Who decides whether the supplier has obeyed the terms of Article 27, or whether a consumer should receive damages? What process is used to make this determination?
Does a strike fall within the terms of Article 27(4)?

Articles 29-31 go to supplier liability
Who decides whether the supplier or consumer has breached or violated the rules described here? Later provisions in Chapter VIII suggest it is the NAER, but this is not clear here Putting Chapter VIII ahead of these other chapters could clarify this point

Chapter VI Pricing and Tariffs

Article 32 goes to the inclusion of costs in tariffs
Should this Article make clear that costs include a reasonable profit?

Article 33 goes to entitlement to applicable pricing systems
This is probably a translation issue – the meaning of this Article is unclear

Article 34 establishes two types of tariffs
Article 34(1)(b) provides indirectly that captive consumers are supplied by distribution companies As stated earlier, it would be helpful to make clear earlier and explicitly in the Law that distribution companies will be awarded exclusive service territories to serve captive consumers, that those particular distributors-suppliers shall have the obligation to serve the consumers in their territories, and that eligible consumers can be served by any supplier of their choice

Article 34(2) provides that captive consumers have a national, uniform tariff See previous comments on the difficulties arising from such tariffs when costs vary from location to location

Article 36 goes to pricing principles
Article 36(1)'s reference to proposed grids is unclear
Article 36(1)(c)'s reference to differentiated tariffs is unclear If this means that suppliers should offer different types of pricing options (e g , a high energy and low capacity charge, or vice versa), then this is fine
Article 36(1)(g)'s reference to local heat tariffs seems inconsistent with Article 34(2)'s requirement for uniform tariffs

Article 38 goes to regulatory review of tariffs
The review process should be detailed to show that due process is provided, and that both the process and the results shall be transparent, objective and non-discriminatory
Can tariff decisions be appealed?

Chapter VII Authorization and Concession

Article 42 goes to who needs a license
See previous comments on exempting plant not connected to the grid or under 25 or 50 MW

Article 43 goes to license criteria
Instead of using may , shall might be preferred, in order to meet EU Directive requirements that all license criteria be transparent, objective and non-discriminatory

Article 45 goes to construction licenses
See previous comments about exempting some smaller plants or plants not connected to the grid

Should, for example, a factory owner building a self-generation facility be compelled to go through the same license process as a large plant serving the public?
See previous comments on setting forth provisions ensuring due process in the license review process

Article 46(1) goes to documentation for construction of plant
Why is all such documentation subject to a public bid? If a public entity, e g , NES, wants to build transmission plant, then a public bidding process makes sense But if a private entity wants to build a plant, why should it be required to go through a public bidding process?

Article 48 goes to operation licenses
See previous comments about the need to provide due process and make clear all the criteria for acquisition of the license
How does Article 48(1)'s reference to a predetermined license period comport with Article 44's ten year limit?

Article 49 goes to transmission and distribution licenses
Article 49(2) is unclear as to whether it applies only to transmission and distribution licenses (which makes sense), or to all operation licenses

Article 50 goes to operation licensee obligations
Article 50(1)'s technical standards are the appropriate subject of an Operational Code

Article 50(3)'s reference to processing any registered data is unclear

Article 51(e) goes to a licensee's right to water
Does the reference to buildings, courtyards, gardens, churches and cemeteries mean that no hydroelectric facilities can be built where someone, for example, plants a garden?

Article 52 goes to modifications and fines
Article 52(2)'s meaning is somewhat unclear By exclusive right, does this mean NES or a distributor-supplier with an exclusive service territory for serving captive consumers? What does the reference to the interested parties mean?
The due process protections for the procedure in establishing fines should be spelled out The language in Article 52(4) as was expected of him and Article 52(5) from the ascertaining could be more precise

Article 53 appears to go to when licensees can change their form and retain their licenses
The meaning of this Article is unclear If the meaning is as indicated above, then more precision is needed as to when changes in a licensee require approval of the NAER, and what criteria are applied for that approval

Article 54 goes to withdrawals and takeovers of licensees
Why does the ministry, and not the NAER, obligate licensees to continue operations? Should the NAER also have the power to force a licensee who has not violated any rule to continue to operate past its license period for a fixed time, for compensation, in emergency situations?
The procedure for the decision-making on these issues (e g , the right to appeal) should be spelled out

Article 56 goes to right of entry
Is Art 56(2)'s preclusion of appeal constitutional?

Article 58 goes to right of passage
The meaning of Articles 58(2) and 58(4) are unclear If Art 58(4) means that the parties cannot mutually agree to give back a right of passage, then the reason for such a provision is also unclear _

Article 61 goes to easements
Why are passage rights, usage rights, easements, protection areas etc the subject of multiple articles? Can these Articles be unified and streamlined?

Article 62 goes to expropriation
What is the procedure for land expropriation referenced in Article 62(1) a court proceeding?
Why would the right to expropriation apply to building generation plant in general? While there may be a reason for some types of generation, e g , hydroelectric facilities, to be able to condemn a particular piece of property, why should an ordinary generation plant be able to expropriate land?
What are the criteria for determining when land can be expropriated?
Why does the land become state property under Article 62(4)? In the United States, for example, when land is expropriated by private utilities to build transmission and distribution networks, or pipelines, the property belongs to the utilities, who paid for it If the state owns the expropriated land under Article 62, does the state pay for it?

Article 63 goes to protection areas
See comments above regarding Article 16

Article 64 goes to concessions
It is unclear which energy activities require concessions and which only require licenses We assume that concessions will be required for activities using public property, including hydroelectric facilities, the NETS (as provided in Art 12(1)) and perhaps nuclear resources Article 62 also suggests that concessions will be needed for those parts of gas transmission and gas and electric distribution lines that require the use of expropriated land

Article 64(3)'s reference to the general criteria is unclear which general criteria?
The criteria listed under Art 64(3) appear intended to apply generally to all concessions, yet Article 64(3)(b) and (c) refer only to heat transmission and distribution

Why does the government, and not the NAER, establish the generic bidding rules in Article 64(4)? Why would there be bidding on electric transmission property, when the NETS holds the concession under Article 12 and operates all transmission? Similarly, if there are distributors who must use expropriated land for only parts of their distribution lines, how can a bidding process be used to award their concessions for that land?

What are the criteria, and/or who decides what the criteria are, for obtaining a temporary license under Article 64(5)?

Why are the time periods for concessions in Article 64(6) different from the time periods for licenses? (See Article 44)

Under Article 64(8), must the grantor approve every investment, no matter how small, during the last ten years of a concession?

Article 65 goes to concession transfers
As with Article 54, provisions should be made as to when the transformation of a concession holder invalidates the concession or requires NAER approval

Does Article 65(2) mean that the original concession holder can never avoid liability, even after an approved transfer?

Article 67 goes to termination of concessions
What does reinstated mean in Art 67(3)?

Article 68 goes to concession waiver
Should the reference to competent authority in Art 68(1)(a) really be to grantor ?
Who decides, and how is it decided whether the requirements in Art 68(1) have been fulfilled?

Is there any statute of limitations under Article 68(2)?

Article 69 goes to concession withdrawal
The process by which the grantor makes a withdrawal determination should be outlined somewhere, showing that minimal due process protections, such as notice and an opportunity to be heard, have been met

Chapter VIII Competent Authorities and Their Powers

Section 2 Powers and Duties

Article 72 goes to the powers and duties of the competent ministry
Why isn't the right ministry specifically named?

Article 72(f)'s reference to the promotion of indigenous resources should keep in mind the EU's limits on such promotion

Article 73 goes to the competent authority
If the competent authority is the NAER, why not simply refer to it as such throughout, instead of competent authority ?

Article 73(1)'s reference to subordination and Article 73(3)'s reference to Government decision brings up the issue of regulator independence, discussed in our general comments, Section II, above

Article 73(2)(g) does not make clear whether the NAER's contract resolution is appealable to court
As indicated earlier, provisions should be included demonstrating that due process concerns are

met in the NAER's decision-making processes in general

Article 75 spells out the powers and duties of local councils
Are there any limits to the local council's ability to take over heating plant and networks any time limits, or requirements to pay compensation, for example?
Article 75(4)'s reference to access to information should include protection from public dissemination of proprietary or confidential information

Chapter IX Renewable Energy Resources

Article 77 defines renewable energy resources
See earlier comments on insertion of definitions into definition sections

Why does Article 77(1) limit renewables to household waste, instead of all waste?

Chapter X Liabilities and Sanctions

Article 81 goes to misdemeanors
If sanctions are imposed by the NAER, why are the inspecting agents authorized by Government decision under Article 81(1)?

Chapter XI Transitory and Final Provisions

Additional transitory provisions be included, such as the dates for disaggregating and privatizing RENEL, the date for setting up a pool, the identity of eligible consumers and how and when that category expands

PIERCE
ATWOOD
ATTORNEYS

MEMORANDUM

TO: H Menaker, W. Mikutowicz

FROM: J Gulliver, C. Connors

RE: Romanian Electricity and Heat Law

DATE: August 14, 1997

Attached is the draft Romanian Electricity and Heat Law Comments on the text of the law are included in brackets

In general, we (1) drafted the law to incorporate the specific sector structure proposed in Wayne and Pete's paper; (2) included provisions on district heating, and (3) provided explanation as to why we included the provisions we did.

One basic question we need to discuss internally, before a draft is sent to RENEL, lis how detailed we want to get in this law about the substance of the sector changes As written, the draft is not detailed It sets the broad policy bases for the changes (*e g*, Article 14), and provides for the commencement of the transition as that will be reflected and detailed in other, separate laws (see Article 15) The draft itself only requires the minimum changes required under the EU Directive (see Article 15(3) and (4)), although it specifically chooses the mandatory wheeling option (consistent with a pool) as opposed to the single buyer option (see Article 16)

One Monument
Square
Portland, Maine
04101-1110

VOICE
207 791 1100
FAX
207 791 1350
E MAIL
info@PierceAtwood com

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There are advantages and disadvantages to including the actual detailed changes in this law, or leaving those concrete steps to a separate transition law. On the one hand, there may be momentum now to get the changes done and, therefore, we may want to put as much as possible in this law and get the changes through quickly. On the other hand, it may make more sense to have a general law that can go into effect now, and leave thrashing out the details to another law. For example, if we get into details and set deadlines for specific changes in this law, the whole law could get bogged down, and on parts of the law could get passed until the distant future We don't know which alternative is the most sensible politically, we need insight from Wayne and others to answer these questions If all things were equal from a clean legal perspective, it would be better to have two laws (which is why we have drafted it as such here)

We look forward to your comments

DRAFT – August 14, 1997

ROMANIAN ELECTRICITY AND HEAT LAW

[The sources for the drafting of this Law are diverse They include the paper, "A Proposed Structure for the Romanian Power Sector," and previous drafts of a Romanian electricity law (e g, a draft from March 1996) Draft or enacted legislation from other Central and East European countries was reviewed, including Poland, the Czech Republic, Hungary and Latvia Finally, given the sector model chosen by the Government of Romania (transitory toward full competition, with a pool), British and California legislation was also examined.]

CHAPTER I

General Provisions

Article 1 – Scope and Purpose

1 This Act governs the production, transport, supply and consumption of electric energy and heat.

2 The purpose of this Act is to establish a structure and goals for the electricity and heat sectors of the country which are consistent with the public interest and with other requirements of the law.

3 The objectives of this Act are

(a) security of supply through

(i) balance and diversification of fuel sources in the national energy mix;

(ii) promotion of renewable energy resources,

(iii) adherence to uniform technical standards conforming with international norms and facilitating cross-border exchange, and

(iv) [*if deemed necessary or prudent*] maintenance and appropriate use of security reserves,

(b) market liberalization and competition within the electricity sector, in order to rationalize prices, promote energy efficiency, promote private ownership, increase investment, modernize infrastructure, provide for sustainable development and expand consumer choice,

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(c) rational and economical use of energy resources through application of least cost principles and promotion of energy efficiency, including demand side management,

(d) open access to international markets,

(e) promotion of environmentally sound energy practices, and

(f) protection of consumers and consumer rights

[The purpose of this provision (and Article 1(2)) is to set objectives, consistent with the energy Sector Statement, which are general enough to be flexibly applied, yet specific enough to provide a substantive legal basis for implementing regulation. We need to confirm with local counsel on the relationship between primary and secondary legislation, what level of detail is required in the basic electricity and heat law, and what can be left for secondary legislation Ideally, the basic law should set out a general framework, with the agency providing detail through its regulation. Sometimes, however, agencies do not have the power to enact regulations, and details must be included in the basic law, or in decrees issued by the cabinet

We have included security of supply as the first objective, because it is usually the paramount concern of governments in Central and Eastern Europe The first concern of any government is, obviously, that the lights do not go off and the citizens don't freeze That said, however, it does not follow that intense governmental oversight and involvement in the sector is the best way to achieve this objective For example, the means for achieving the goal of security of supply set forth in Article 1(3(a)(i) – diversification of resources – need not be mandated through substantive rules and limits, rather, market forces themselves can and should result in a portfolio of generation alternatives

Similarly, the means for achieving security of supply set forth in Article 1(3)(a)(iv) – security reserves – may not be necessary if a truly competitive sector structure is established. We have included this goal only as an option, if it is determined that immediate economic circumstances require continued government involvement to this degree Security reserves can be maintained either by the government, or by private sector participants through mandate (see, e g, the draft Latvian law, which contemplates both) We have also included promotion of renewable energy resources as a means for achieving security of supply (Article 1(3)(a)(ii)), although inclusion of such a means is also optional and dependent upon various fact-sensitive issues, such as the current and anticipated state of the economy, the amount and nature of indigenous resources, and environmental conditions]

Article 2 – Definitions

[The following terms will need definitions, we have left the definitions out for the time being, while the substantive provisions of the law are still in flux]

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autoproducer *[This definition should be limited to entities using 100% of the power they produce themselves because autoproducers are exempt from licensing under Article 8(2)(c)]*

consumer *[This definition should include any end-user of power, in order to distinguish between all users of electricity and the sub-set of eligible customers (see below)]*

distribution *[This definition should be limited to wires only, as supply and distribution are separate concepts throughout the law, in order to permit and encourage competition in supply]*

eligible customer *[This definition should comport with that provided in the European Union Directive on liberalization of the electricity market – those entities entitled to contract directly with generators or suppliers other than the local distributor. For clarity, the definition should list who they are, e g , consumers larger than 100 gwh, suppliers, etc)]*

emergency *[This definition needs to identify exceptional conditions calling for direct governmental intrusion. A policy decision needs to be made whether labor disputes should be included in the definition. This decision involves economic, legal and political considerations On the legal front, we need to check with local counsel on existing labor laws and whether they already deal with the issue of requiring continued work during strike situations]*

generation

grid *[This definition should include both the transmission and distribution network.]*

heat *[This definition should include something like thermal energy in hot water or steam or other carrying agents]*

heat supplier

interested party *[This definition should include persons or entities aggrieved or affected by a decision or rule and is based on concepts of due process]*

major decision *[This definition also flows out of due process concepts, and should include governmental actions such as issuing, transferring or terminating a license, adjusting a tariff more than 5% and other non-de minimis changes in the status quo]*

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supply *[This definition should include sales, as distinguished from the wire function of distribution – see the definition of distribution.]*

transmission

CHAPTER II

The Romanian Energy Board

Article 3 – Scope of Duties

The Romanian Energy Board ("REB") shall regulate activities within the electricity and heat sectors

[We need input from local counsel on how much power we can give to the REB – e g , can it issue general regulations, as opposed to specific decisions? (We assume below that the REB can be given power to issue general regulations/decrees/resolutions) We also need to know how much of the REB's procedures can/should/must be governable by an existing civil administrative procedure and and/or a civil service act]

Article 4 – Board Structure

1 The REB shall consist of a Chairman, two other board members, and support staff

[The paper on the proposed structure for the Romanian power sector (3 4) states that "the regulator" is appointed by the President and approved by Parliament This language implies, but does not state specifically, that only one chief executive is appointed, as opposed to the board suggested here The structure of the chief executive is flexible, and can be either one or multiple persons Some countries, e g Hungary, have only one chief executive instead of a board, presumably for efficiency In the United states, a board is used in order to obtain the benefits of multiple views and expertise, democratize decisionmaking and achieve institutional continuity Poland compromised on this issue by having one head, but advised by a Consultative Council If not already determined and foreclosed, we recommend a small – three person – board, to maximize the benefits of both views a small size for efficiency, with multiple members to obtain the advantages of a board structure]

2 The Chairman and other board members shall be appointed by the President and approved by Parliament. They shall sit for five-year terms, except that the initial terms of the Chairman and other members shall be five, four and three years respectively, so that, in the future, the terms of the Chairman and other board members shall terminate in different years

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[This five-year term is similar to Poland and the United Kingdom, and many U S state commissions Boards are typically staggered for continuity]

3 The Chairman and board members may be removed before the end of their five-year terms only due to physical or mental incapacity, conviction of a felony, or resignation

[This is similar to the definition of cause used in Poland, the U K. and most U S commissions]

Article 5 – Decisionmaking Process

1. REB decisionmaking shall take place through the majority vote of the Chairman and the two other board members

2 Upon its own initiative, or if requested by an interested party, the REB shall hold a public hearing before issuing a major decision

[We need to check with local counsel on any existing applicable public hearing laws If there are none, or public hearing is not otherwise a commonly understood term, then we need to include a definition of public hearing We have limited public hearings to major decisions so that the REB's resources are not depleted holding hearings on a potentially vast number of minor determinations it may make]

[The purpose of this provision and the provisions below is to meet transparency standards generally recognized in the European Union directive on liberalization of the market and Western due process requirements]

3 All REB decision shall be in writing and made available to the public All major decisions shall be published in the official newspaper of Romania. *[Alternate forms of publication can be used if desired or preferred under Romanian law – the Polish Energy Law required the ERA to issue its own bulletin, the UK Electricity Act of 1989 leaves the mode of publication of decisions to the Secretary of State or Director]*

4 All REB decisions are appealable *[in accordance with civil procedure act? or name the appropriate court]*

Article 6 – Board Funding and Staffing

1 The REB shall be financed by fees imposed on sector participants The type and amount of these fees shall be set by the Chairman and other board members *[Reviewable by the Energy Minister?]*

[The purpose of this provision is to provide agency independence Many jurisdictions fund energy regulatory boards from sector participant fees – e g , Hungary, Poland, the

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U K., many U S commission.]

2 Fees charged by the REB shall be non-discriminatory The REB shall set fees annually and publish them in the official newspaper of Romania prior to their effective date

3 Staffing levels, organization and qualifications shall be determined by the Chairman and other board members *[Reviewable by the Energy Minister?]*

[Are salaries and who can be chosen to be staff set by the civil service act or can the board members have input? If legal, inclusion of a provision such as the Polish Law's Art 29, allowing for different remuneration of ERA employees from other civil servants, considering wages in the energy sector, would be helpful to obtain qualified personnel]

[Do we need to insert ethical and conflict of interest rules here or do they already exist for government workers elsewhere in the law?]

Chapter III

Planning

[We recommend that central governmental planning in the electricity sector be minimized as much as possible By "planning," we mean the determination and imposition of an overall sector strategy, beyond the general Energy Sector Statement already issued by the Government – for example, a declaration that a certain number of new generation plants should be developed by a certain year, or specifics as to where new plants should locate and what energy sources they should use

Some more specific planning can and should occur in areas in which the government maintains broad regulatory control, e g , grid expansion, nuclear generation, and hydro facilities Such planning determinations, however, should be dealt with in the context of individual regulatory decisions, or in other, more specific legal provisions on that particular subject For example, the procedure for grid expansion oversight should be included in the Grid Code (see Article 20 herein) See also the questions at the end of this document on nuclear power and hydro facilities

As to broader planning decisions, formal, governmental imposition of an overall sector strategy should not be necessary with a competitive sector structure market forces should ensure the development of efficient supply The following provisions are only suggested if, nevertheless, some overall policy oversight is required. They are a modification of the establishment plan procedure in Hungary and the energy policy guideline procedure in Poland, altered to grant more planning authority to the REB and to streamline the process As an alternative, the Energy Minister or Cabinet could establish the policy in consultation with the REB]

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Article 7 – Electricity *[energy]* Policy

1 All laws and regulations relating to the electricity and heat sector shall be compatible with the long term Electricity *[Energy]* Policy of Romania.

[While this law can and should focus on electricity and heat alone, some thought should be given to coordination with other energy resources For example, planning could be done as to energy strategy in general, not just electricity in isolation. Similarly, the REB can and should regulate issues relating to other energy resources, e g gas]

2 The Electricity *[Energy]* Policy shall be established in the following manner The REB shall periodically gather information from sector participants which the REB in its discretion determines will be useful in drafting an Electricity *[Energy]* Policy to be followed for the next ten years Based upon this information and other relevant materials, the REB shall draft a new Electricity *[Energy]* Policy every two years The Electricity Policy shall comport with the goals and purpose of this Law and shall include, without limitation

(a) a description of the desired fuel supply mix for the electricity *[energy]* sector, identifying general desired percentages for sources of production, such as hydropower, fossil fuels and renewable energy,

(b) a forecast of electricity *[energy]* needs within the relevant five-year time frame, and

(c) a general approach for attaining the desired electricity *[energy]* mix and meeting the forecasted electricity *[energy]* needs within that time

[A ten-year period has been chosen for long-term planning, because, generally speaking and more particularly in recent years, with rapid changes in sector structure throughout the world, it has become very difficult to forecast meaningfully for any period longer than ten years Provisions regarding confidentiality of information and the power to require production in response to information requests are included in Article 8, and not in Article 7, because the power to require such action should be limited to licensed sector participants in order to minimize government intrusion into private enterprise]

3 The Electricity *[Energy]* Policy shall be reviewed and approved by the *[Energy Minister or name minister responsible for energy, e g ministry of industry and trade – we need to check]*, followed by approval by the Cabinet of Ministers *[and confirmation by the Parliament]*

4 Both when proposed by the REB and after approval by the Cabinet, the Electricity *[Energy]* Policy shall be published in the official newspaper of Romania.

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CHAPTER IV

Licensing

Article 8 – Licensed Entities

1 All transmission companies, distributors and suppliers, including heat suppliers *[any exceptions for small or municipally owned heat supplies?]* must be licensed by the REB

[Do we want to require licensing of power marketers]-

[As noted in the definition section, this draft segregates distribution functions from supply functions to facilitate competition in the supply function. Distribution is defined to mean wires activities alone Supply means sales and related functions, such as metering While distribution functions, so defined, are monopoly functions (only one wire system in an area is feasible), supply functions, so defined, are not (See, for example, the sector structure in England and Wales)]

2 All generators must be licensed unless they are (a) under 50 MW, (b) not attached to the grid, or (c) autoproducers All parties ordering the construction of a generation plant larger than 20 MW which is exempt from license requirements must notify the REB at least one year prior to the date of the planned commencement of production at the plant.

3 The REB may require all licensees and applicants for licenses to submit to it information concerning their activities Trade secrets and confidential proprietary information shall not be made available to the public, the public may have access to all other information submitted to the REB by section participants *[Is there a trade secret act that defines protected information that we can incorporate and use the same definitions? Is there an existing freedom of access act? Do we want to include a provision like UK's Section 28(2)(5), which imposes fines for destruction of requested information?]*

Article 9 – License Periods

1 Transmission licenses shall be for a period of no less than 20[?] years and no greater than 50[?] years

2 Distribution licenses shall be for a period of no less than 20[?] years and no greater than 50[?] years

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3 Generation licenses shall be for a period of no less than 5[?] years and no greater than 40[?] years

4 Supply licenses shall be for a period of no less than 5[?] years and no greater than 40[?] years

[These periods are somewhat arbitrary, but generally comport with license terms elsewhere – e g , standard nuclear licensing for 40 years in the U S The goal is to use a period which is long enough to permit reasonable return on large-scale investment, but short enough to encourage competition. Hence, the minimum license period for suppliers, which make small investments, can be shorter than the period for transmission companies, which make large investments]

[Should we say anything about renewal?]

Article 10 – License Criteria

1 The criteria for obtaining a license shall be objective, transparent and non-discriminatory

[This is the language used in the EU Directive]

2 Prerequisites for acquisition of a license shall be

(a) payment of the fee established by the REB,

(b) a registered office in Romania,

(c) no felony convictions by the proposed licensee or any controlling entity or person within INSERT days of license application,

(d) financial and technical capability to perform licensed activities,

(e) acquisition of all other necessary authorizations to perform the licensed activity, such as environmental permits, and

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(f) a finding by the REB, in consultation with the Office for the Protection of Competition, that issuance of a license to the applicant would not unreasonably decrease competition in the sector

[Any special rule about nuclear? (See also general question about nuclear at the end of this document) Do licensees in Romania need authorized representatives?]

[Most of these requirements are similar to those in Poland, Hungary and the Czech Republic]

3 Details as to what shall constitute financial and technical capability shall be established by the REB by *[resolution? decree? can a governmental agency in Romania issue general regulations or must they be issued by a ministry?]* Details as to what types of activities or ownership arrangements shall be deemed anti-competitive shall be established by the REB by *[resolution? decree?]* in consultation with the Office for the Protection of Competition

4 Such *[decrees/resolutions]* shall be published in the official newspaper of Romania prior to their effective dates and shall be appealable by any interested party *[as established in the administrative procedure act or name court]*

[The general purpose of these requirements, aside from meeting general needs to assure safe and secure supply, is to comport with EU requirements In addition to the general requirements that licensing criteria by "objective, transparent and non-discriminatory," the EU Directive essentially demands two things as to such criteria (1) all the criteria must be clearly spelled out in law or regulation, and (2) there must be a process for appealing licensing decisions To meet these EU requirements, Art 10(1) recites fulfillment of the Directive's general requirements, Art 10(2) then lists all the applicable criteria (meeting the requirement to spell out all criteria and the general clarity requirement), Art 10(3) provides that details on the more general criteria will be set forth in regulation (also meeting the requirement to spell out criteria and the general clarity requirement), and Art 10(4) requires publication of the criteria and explanatory regulation and provides for appeal (meeting the Directive's general transparency requirement and access to appeal requirement)]

Article 11 – License and Application Contents

1 An application for a license and a license shall be in the form required by the REB by *[decree/resolution]*

2 The REB may

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(a) grant a license if the applicant meets the criteria set forth in Article 10 as further described by *[decree/resolution]*,

(b) reject a license if the applicant fails to meet the criteria set forth in Article 10 as further described by *[decree/resolution]*,

(c) impose conditions on the issuance of a license relevant to the criteria set forth in Article 10 as further described by *[decree/resolution]*, or

(d) request further information from the applicant if necessary to determine whether the criteria are met.

[Do we need time limits on requests for further information, or is this dealt with in existing procedural acts?]

Article 12 – License Transfer, Modification, Suspension, Termination and Penalties

1 The REB may transfer, modify, suspend, or terminate license and may impose penalties for failure to obey the terms of a license, this Law or implementing regulations

2 The REB may transfer a license upon the request or consent of the licensee if the transferee meets license acquisition qualifications Any direct or indirect change in control of a licensee shall be deemed a transfer and shall require REB approval *[We need to define control in conformance with Romanian law in a way that captures the entire chain of ownership]*

3 The REB may temporarily transfer a license upon its own initiative in an emergency situation if (a) the licensee is incapable of performing its licensed activities, (b) safety or security of supply is endangered bay the licensee's activities, and (c) the transferee meets license acquisition qualifications Such a transfer cannot exceed a period of INSET TIME PERIOD If necessary to protect security of supply, the REB can require the licensee whose license is being transferred to delivery its property necessary for the continuous and safe production, transmission, distribution or supply of electricity to the transferee *[These provisions are somewhat similar to those contained in the Hungarian Electricity Act, we need to check with local counsel on whether such delivery is legally feasible, and, if so, how it should be phrased – e g , whether compensation to the licensee is required.]*

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4 The REB may modify a license upon the request or consent of the licensee if the modification does not alter the licensee's ability to meet license acquisition criteria.

5 The REB may suspend a license upon the request or consent of a licensee, on its own initiative, the REB may suspend a license for failure to obey license conditions

6 The REB may terminate a license upon the request or consent of a licensee, on its own initiative, the REB may terminate a license for (a) persistent and repeated failure to obey license conditions, or (b) breach of a license condition which seriously endangers safety

7 The REB may impose financial penalties of up to INSERT AMOUNT for failure to obey the terms of a license, this Law or implementing regulations The REB cannot impose a penalty for any alleged breach committed more than INSERT TIME PERIOD prior to the time the REB becomes aware of the alleged breach.

[We need to insert a provision relating to licensee bankruptcies consistent with Romanian bankruptcy law, including, if possible, the ability to order transfer of possession of property used to fulfill licensed activities]

Article 13 – License Process

1 The process for obtaining, transferring, modifying, suspending or terminating a license shall be objective, transparent and non-discriminatory

[The purpose of this provision is again to reflect accord with the EU Directive]

2 The procedural details for licensing decisions not set forth in *[name of civil procedural act]* or herein shall be established by the REB by *[resolution/decree]*

3 Such [*decrees/resolutions*] shall be published in the official newspaper of Romania prior to their effective date and shall be appealable [*as established in the administrative procedure act or name court*]

CHAPTER V

Sector Structure

Article 14 – Monopoly and Non-Monopoly Activities

1 Transmission and distribution are natural monopolies The REB shall issue a license to only one entity at a time to engage in transmission activities within Romania, and this entity shall have the exclusive right to build and operate the transmission property forming part of the grid The REB may issue multiple distribution

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licenses, but each licensee shall be entitled to a service territory, within which that licensee shall have the exclusive right to build and operate the distribution property forming part of the grid

2 Generation and supply are not natural monopolies, and competition shall be encouraged and protected as to these activities

3 Distributors shall have the obligation to supply consumers who wish to enter public supply contracts with them as described in Article 20

Article 15 – Sector Transition

1 Sector re-structuring shall occur during a transitory period after the effective date of this Act, in accordance with other laws and implementing regulations, pursuant to which the sector shall be disaggregated and privatized to the extent feasible

2 Upon the effective date of this Act, RENEL (*full name*) and all other legally operating sector participants shall be permitted to engage in the activities they were legally entitled to engage in without a license prior to enactment of this Act, for a period of no longer than INSERT TIME PERIOD

3 Upon the effective date of this act RENEL or its successors shall continue its ongoing unbundling of generation, transmission and distribution functions and shall create separate accounting for each function. Such unbundling shall be completed no later than INSERT DATE

[This provision is essentially required by the EU Directive]

4 The REB shall ensure that RENEL or its successor transmission company engages in economic dispatch, and does not discriminate against any generator, distributor, supplier or consumer

[This is also required under the Directive]

Article 16 – Third-Party Access

The transmission company and distributors must wheel power upon the request of eligible customers, if such wheeling is technically feasible, at prices approved by the REB in accordance with Article 18

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CHAPTER VI

Tariffs

Article 17 – Pricing Principles

1 The REB shall establish tariffs for sector participants which adhere to the following principles

(a) tariffs shall be objective, transparent and non-discriminatory,

(b) prices shall be at cost *[marginal? or embedded?]*, to be established through competition whenever feasible, and shall include both a return of and reasonable return on investment, and

(c) cross-subsidies among different consumer classes shall be eliminated

[Do we need to define a class? How detailed do we want to get in the law as opposed to leaving it to the REB as to rate-making principles? For example, do we want explicitly to require cost-based pricing? (See comments at the end of Article 1 also on this issue) If we do want to include that requirement, do we require marginal cost or embedded cost? Long-term or short term marginal?]

2 The REB may, in establishing tariffs, give favorable treatment to electricity produced through renewable energy resources

[The EU Directive permits this favoritism. It does not permit favoritism for indigenous fuels or production.]

3 The REB shall not, in establishing tariffs, allow discriminatory treatment of electricity produced outside Romania, or produced from fuel obtained outside Romania

Article 18 – Wheeling Tariffs

1 The REB shall ensure that the prices charged by the transmission company and distributors for wheeling power from generators to eligible customers are fair, reasonable and do not limit competition, and shall ensure that the transmission company and distributors do not discriminate against any generator or supplier

[This provision is required by the EU Directive]

Article 19 – Decisionmaking

[These procedures are adapted from the Polish Energy Law and procedures used by U S commissions They may need alteration to conform with existing administrative

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procedure acts, or more explicit provisions may be needed herein to indicate that existing procedures are being superseded.]

1 Implementation of new tariffs and changes to existing tariffs shall occur using the following procedure

2 The party seeking the new or changed tariff shall propose to the REB the tariff it desires The REB shall then publish that proposal in the official newspaper of Romania and shall include in that published notification a reasonable schedule for all other interested parties to submit their comments on the proposal to the REB

3 After the published deadline for submission of comments, the REB must, within INSERT TIME PERIOD, take one of the following actions (a) grant the application as requested, (b) reject the application, (c) grant the request with modifications and/or conditions, (d) seek further information from the applicant or any other interested party, or (e) decide to hold a public hearing before ruling on the application If the application seeks a major decision, a public hearing must be held upon the request of any interested party, as provided in Article 5(2) If the REB chooses to seek further information. or a public hearing is held, a final decision must be taken on the application within INSERT TIME PERIOD If the REB does not make a final decision within this time period, the application will be deemed *[granted/denied]* and may be appealed as of that date by any interested party

4 The REB may change a tariff upon its own initiative if it gives interested parties notice and opportunity to be heard prior to any such change If the REB contemplates making a major decision, it must so indicate prior to making the change, and a public hearing must be held upon the request of any interested party before making the change, as provided in Article 5(2)

5 In setting a tariff, the REB may provide indicate that no future changes in the tariff shall occur during a specified period of time *[not to exceed insert time period?]* During this specified period of time, the REB shall summarily reject any request for a change in tariff, without a hearing, unless the REB determines that an extraordinary change in circumstances requires review, in which case the REB shall hold a public hearing prior to making any change in the tariff

CHAPTER VII

Technical standards

Article 20 – Grid Code

[Grid codes are commonly used when the vertically integrated monopoly has been disaggregated, e g the UK and Hungary]

1 In order to ensure system safety and efficiency, the REB shall promulgate a grid code setting the technical standards to which all licensees and consumers attached to the grid must comply

2 The grid code shall be promulgated by the REB within INSERT TIME PERIOD from the date of this Act.

3 Prior to promulgation of the grid code, the REB shall consult with sector participants to obtain their views as to the appropriate contents of the grid code

[This consultation can be made more formal, e g , Hungary, which set up a formal committee to draft the Code (to be approved by the Hungarian Energy Office)]

1 The grid code shall promote uniformity of standards in a manner maximizing ability to connect the grid internationally and facilitate cross-border exchange

[Is there any need for the REB to approve licensees' business rules?]

CHAPTER VIII

Consumer Protection

Article 21 – Contracts

1 Relations among the transmission company, distributors, generators, suppliers and consumers of electricity shall be governed by contract. All such contracts shall incorporate REB tariff charges when applicable

2 Consumers may enter into one of two types of supply contracts in order to obtain service public contracts or individual contracts

3 Individual contracts between consumers and suppliers shall be negotiated between the parties and shall include terms agreed upon by the parties Absent agreement of the distributor serving the territory in which the consumer is located, only eligible customers may enter into individual contracts with suppliers other than that local distributor

4 Public contracts shall be for an indefinite term and shall be submitted as to form by distributors to the REB for approval before they can become effective Any consumer who cannot or does not agree to terms of an individual contract shall be entitled to enter into a public contract with the distributor serving the territory in which the consume id located, if technically and economically feasible The REB shall establish criteria for such feasibility by *[decree/resolution]* and shall resolve any dispute

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between any consume and distributor regarding such feasibility

5 Eligible customers switching to or from individual contract with suppliers other than the distributor serving the territory in which the eligible customer is located must give that local distributor at least INSERT TIME PERIOD notice before making the switch

[Many countries, e g , Poland, base consumer relations on the contract concept These provisions are adapted from the Hungarian Electricity Act, modified to meet EU Directive requirements]

Article 22 – Dispute Resolution

1 The REB shall resolve all disputes between consumers and suppliers

2 Pursuant to its authority to resolve consumer disputes, the REB shall publish a procedure through which consumers may file complaints to the REB and have their complaints investigated and resolved promptly *[Reviewable by court?]*

[Do we want to expand REB jurisdiction not just to consumer disputes but disputes between other sector participants, e g , between a transmitter and distributor, or distributor and supplier? Do/can we give the REB the power to force the supplier to continue to supply consumers while a dispute is being adjudicated? Do we want to include any general rules in this law about cut-offs, e g , explicitly allow then for failure to pay and/or limit them in the winter? Do we want/need to add any due process provisions regarding the nature of the REB's review? Do we want to add a provision for initial attempted resolution or complaints by the supplier first, as in U K. Section 42B and many U S laws?]

CHAPTER IX

Emergencies

Article 22 – Order of Restriction

[This is a streamlined version of similar provisions in the Hungarian Electricity Act and implementing regulation.]

1 The REB shall promulgate an order of restriction to be followed when, due to emergency situations, an insufficient supply of electricity exists to serve all consumer demand

[Alternatively, the Independent System Operator (or RENEL until a separate ISO is

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created) could submit a proposed order of restriction, to be approved by the REB Or the order of restriction can be left to the grid code]

2 The order of restriction shall be approved by the Cabinet of Ministers

[Do we need additional emergency provisions to establish reserves (such as in Polish and the draft Latvian laws)? Do we need to grant emergency powers to allow the REB to temporarily compel a licensee to continue to serve after expiration of a license period?]

CHAPTER X

Heat

[Heat issues are, for the most part, left to local control to the extent possible in other countries (e g , Poland) This arrangement is followed here, and many of the provisions set forth below are based on the Polish Energy Law]

Article 23 – Planning and Grid Code Enforcement

1 Issues regarding heat supply shall be delegated to local municipalities to the extent practicable *[We need to check with local counsel on the general law relating to local v national control, and whether "local municipalities" covers all areas in which heat supply is available]*

2 Local municipalities shall draft heat supply plans for the territory within their jurisdictions *[if planning is used as set forth in Article 7 above – ensuring that such plans are consistent with the national Electricity[energy] Policy]* The draft plan shall be made available for public review for INSERT TIME PERIOD, to be announced in the manner usually used in that territory During that time period, interested parties within the territory shall have the opportunity to be heard on the local heat supply plan The *[Town Council]* shall then adopt a final heat supply plan, taking due consideration of public input. *[Should the REB have the right to veto a final plan?]*

3 Local municipalities shall enforce conformance of heat supply within their jurisdictions to grid code standards *[We need to check with local counsel how local municipalities can enforce such rules, and whether we need to or can expand on their methods of enforcement here]*

[Do we need to say anything about public lighting?]

Article 24 – Tariffs

1 Tariffs for heat supply shall be established in conformance with the principles and procedures set forth in Articles 17 and 19, except that the local municipality shall be a party to any tariff proceeding

CHAPTER XI

Condemnation Powers

INSERT *[We need to consult with local counsel on what we need to do to give the transmission company and distributors the right to condemn property needed for the grid. We also need to check on whether property ownership limitations still exist that could affect any provisions in this Law We also need a provision in the appropriate place giving licensees the ability to enter property to maintain security of supply, in language conforming to Romanian law Do we need to say anything about civil liability for injuries from power lines?]*

Other potential provisions to include

[What do we want to include about nuclear power and hydro facilities? In nuclear generation to be owned solely by the government? Do we want to include specific provisions about nuclear power in this law, or leave it to a separate law? Similarly, with respect to hydro facilities, we first need to check with local counsel on the constitutional constraints on private control such facilities, then, if concession processes are to be used, we should examine the Oil and Gas laws to provide consistency if achievable We also need to determine whether such issues are best dealt with in this law, or a separate law on hydro concessions]

[Do we want to include an obligation on the REB to present an annual report as does the HEO and the Polish ERA? If so, to whom should it report – the Energy Minister, head of the Cabinet/Prime Minister or Parliament?]

[Do we need provisions about theft of electricity or do adequate laws already exist??]

[Do we want provisions about electrical inspections (e g , UK Section 30, and Czech Act 222 and draft Latvian references to inspectors) to ensure line/plant/personnel quality? Can the grid code provide for this review?]

[The Law will need closing provisions indicating what existing laws are superseded and cancelled by enactment of the Law]

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ROMANIAN ELECTRICITY AND HEAT LAW

CHAPTER I

General Provisions

Article 1 – Scope and Purpose

1 This Act governs the production, transport, supply and consumption of electric energy and heat

2 The purpose of this Act is to establish a structure and goals for the electricity and heat sectors of the country which are consistent with the public interest and with other requirements of the law

The objectives of this Act are

(a) security of supply through

balance and diversification of fuel sources in the national energy mix,

promotion of renewable energy resources,

adherence to uniform technical standards conforming with international norms and facilitating cross-border exchange, and

[*if deemed necessary or prudent*] maintenance and appropriate use of security reserves,

market liberalization and competition within the electricity sector, in order to rationalize prices, promote energy efficiency, promote private ownership, increase investment, modernize infrastructure, provide for sustainable development and expand consumer choice,

rational and economical use of energy resources through application of least cost principles and promotion of energy efficiency, including demand side management,

open access to international markets,

promotion of environmentally sound energy practices, and

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protection of consumers and consumer rights

Article 2 – Definitions

[The following terms will need definitions, we have left the definitions out for the time being, while the substantive provisions of the law are still in flux]

autoproducer *[This definition should be limited to entities using 100% of the power they produce themselves because autoproducers are exempt from licensing under Article 8(2)(c)]*

consumer *[This definition should include any end-user of power, in order to distinguish between all users of electricity and the sub-set of eligible customers (see below)]*

distribution *[This definition should be limited to wires only, as supply and distribution are separate concepts throughout the law, in order to permit and encourage competition in supply]*

eligible customer *[This definition should comport with that provided in the European Union Directive on liberalization of the electricity market – those entities entitled to contract directly with generators or suppliers other than the local distributor For clarity, the definition should list who they are, e g , consumers larger than 100 gwh, suppliers, etc)]*

emergency *[This definition needs to identify exceptional conditions calling for direct governmental intrusion. A policy decision needs to be made whether labor disputes should be included in the definition. This decision involves economic, legal and political considerations On the legal front, we need to check with local counsel on existing labor laws and whether they already deal with the issue of requiring continued work during strike situations]*

generation

grid *[This definition should include both the transmission and distribution network.]*

heat *[This definition should include something like thermal energy in hot water or steam or other carrying agents]*

heat supplier

interested party *[This definition should include persons or entities*

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aggrieved or affected by a decision or rule and is based on concepts of due process]

major decision *[This definition also flows out of due process concepts, and should include governmental actions such as issuing, transferring or terminating a license, adjusting a tariff more than 5% and other non-de minimis changes in the status quo]*

supply *[This definition should include sales, as distinguished from the wire function of distribution – see the definition of distribution]*

transmission

CHAPTER II

The Romanian Energy Board

Article 3 – Scope of Duties

The Romanian Energy Board ("REB") shall regulate activities within the electricity and heat sectors

Article 4 – Board Structure

The REB shall consist of a Chairman, two other board members, and support staff.

[The structure of the chief executive is flexible, and can be either one or multiple persons Some countries, e g Hungary, have only one chief executive instead of a board, presumably for efficiency In the United States, a board is used in order to obtain the benefits of multiple views and expertise, democratize decisionmaking and achieve institutional continuity Poland compromised on this issue by having one head, but advised by a Consultative Council We recommend a small – three person – board, to maximize the benefits of both views a small size for efficiency, with multiple members to obtain the advantages of a board structure]

The Chairman and other board members shall be appointed by the President and approved by Parliament. They shall sit for five-year terms, except that the initial terms of the Chairman and other members shall be five, four and three years respectively, so that, in the future, the terms of the Chairman and other board members shall terminate in different years

[This five-year term is similar to Poland and the United Kingdom, and many U S state commissions Boards are typically staggered for continuity]

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3 The Chairman and board members may be removed before the end of their five-year terms only due to physical or mental incapacity, conviction of a felony, or resignation

[This is similar to the definition of cause used in Poland, the U K. and most U S commissions]

Article 5 – Decisionmaking Process

REB decisionmaking shall take place through the majority vote of the Chairman and the two other board members

Upon its own initiative, or if requested by an interested party, the REB shall hold a public hearing before issuing a major decision

[If there are no definitions of a public hearing in existing procedural and administrative laws, or public hearing is not otherwise a commonly understood term, then we need to include a definition of public hearing We have limited public hearings to major decisions so that the REB's resources are not depleted holding hearings on a potentially vast number of minor determinations it may make]

[The purpose of this provision and the provisions below is to meet transparency standards generally recognized in the European Union directive on liberalization of the market and Western due process requirements]

All REB decision shall be in writing and made available to the public All major decisions shall be published in the official newspaper of Romania. *[Alternate forms of publication can be used if desired or preferred under Romanian law – the Polish Energy Law required the ERA to issue its own bulletin, the UK Electricity Act of 1989 leaves the mode of publication of decisions to the Secretary of State or Director]*

All REB decisions are appealable *[in accordance with civil procedure act? or name the appropriate court]*

Article 6 – Board Funding and Staffing

The REB shall be financed by fees imposed on sector participants The type and amount of these fees shall be set by the Chairman and other board members *[Reviewable by the Energy Minister?]*

[The purpose of this provision is to provide agency independence Many jurisdictions fund energy regulatory boards from sector participant fees – e g , Hungary, Poland, the U K, many U S commission]

Fees charged by the REB shall be non-discriminatory The REB shall set fees

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annually and publish them in the official newspaper of Romania prior to their effective date

Staffing levels, organization and qualifications shall be determined by the Chairman and other board members *[Reviewable by the Minister of Industry and Trade?]*

[Are salaries and who can be chosen to be staff set by the civil service act or can the board members have input? If legal, inclusion of a provision such as the Polish Law's Art 29, allowing for different remuneration of ERA employees from other civil servants, considering wages in the energy sector, would be helpful to obtain qualified personnel]

[Do we need to insert ethical and conflict of interest rules here or do they already exist for government workers elsewhere in the law?]

Chapter III

Planning

[We recommend that central governmental planning in the electricity sector be minimized as much as possible By "planning," we mean the determination and imposition of an overall sector strategy, beyond the general Energy Sector Statement already issued by the Government –for example, a declaration that a certain number of new generation plants should be developed by a certain year, or specifics as to where new plants should locate and what energy sources they should use

Some more specific planning can and should occur in areas in which the government maintains broad regulatory control, e g , grid expansion, nuclear generation, and hydro facilities Such planning determinations, however, should be dealt with in the context of individual regulatory decisions, or in other, more specific legal provisions on that particular subject For example, the procedure for grid expansion oversight should be included in the Grid Code (see Article 20 herein) See also the questions at the end of this document on nuclear power and hydro facilities

As to broader planning decisions, formal, governmental imposition of an overall sector strategy should not be necessary with a competitive sector structure market forces should ensure the development of efficient supply The following provisions are only suggested if, nevertheless, some overall policy oversight is required They are a modification of the establishment plan procedure in Hungary and the energy policy guideline procedure in Poland, altered to grant more planning authority to the REB and to streamline the process As an alternative, the Energy Minister or Cabinet could establish the policy in consultation with the REB]

Article 7 – Electricity *[energy]* Policy

All laws and regulations relating to the electricity and heat sector shall be

compatible with the long term Electricity *[Energy]* Policy of Romania

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a description of the desired fuel supply mix for the electricity *[energy]* sector, identifying general desired percentages for sources of production, such as hydropower, fossil fuels and renewable energy,

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a general approach for attaining the desired electricity *[energy]* mix and meeting the forecasted electricity *[energy]* needs within that time

[A ten-year period has been chosen for long-term planning, because, generally speaking and more particularly in recent years, with rapid changes in sector structure throughout the world, it has become very difficult to forecast meaningfully for any period longer than ten years Provisions regarding confidentiality of information and the power to require production in response to information requests are included in Article 8, and not in Article 7, because the power to require such action should be limited to licensed sector participants in order to minimize government intrusion into private enterprise]

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[As noted in the definition section, this draft segregates distribution functions from supply functions to facilitate competition in the supply function Distribution is defined to mean wires activities alone Supply means sales and related functions, such as metering While distribution functions, so defined, are monopoly functions (only one wire system in an area is feasible), supply functions, so defined, are not (See, for example, the sector structure in England and Wales)]

All generators must be licensed unless they are (a) under 50 MW, (b) not attached to the grid, or (c) autoproducers All parties ordering the construction of a generation plant larger than 20 MW which is exempt from license requirements must notify the REB at least one year prior to the date of the planned commencement of production at the plant

The REB may require all licensees and applicants for licenses to submit to it information concerning their activities Trade secrets and confidential proprietary information shall not be made available to the public, the public may have access to all other information submitted to the REB by section participants *[Is there a trade secret act that defines protected information that we can incorporate and use the same definitions? Is there an existing freedom of access act? Do we want to include a provision like UK's Section 28(2)(5), which imposes fines for destruction of requested information?]*

Article 9 – License Periods

Transmission licenses shall be for a period of no less than 20[?] years and no greater than 50[?] years

Distribution licenses shall be for a period of no less than 20[?] years and no greater than 50[?] years

Generation licenses shall be for a period of no less than 5[?] years and no greater than 40[?] years

Supply licenses shall be for a period of no less than 5[?] years and no greater than 40[?] years

[These periods are somewhat arbitrary, but generally comport with license terms elsewhere – e g , standard nuclear licensing for 40 years in the U S The goal is to use a

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period which is long enough to permit reasonable return on large-scale investment, but short enough to encourage competition Hence, the minimum license period for suppliers, which make small investments, can be shorter than the period for transmission companies, which make large investments]

[Should we say anything about renewal?]

Article 10 – License Criteria

The criteria for obtaining a license shall be objective, transparent and non-discriminatory

[This is the language used in the EU Directive]

Prerequisites for acquisition of a license shall be

payment of the fee established by the REB,

a registered office in Romania,

no felony convictions by the proposed licensee or any controlling entity or person within INSERT days of license application,

financial and technical capability to perform licensed activities,

acquisition of all other necessary authorizations to perform the licensed activity, such as environmental permits, and

a finding by the REB, in consultation with the Office for the Protection of Competition, that issuance of a license to the applicant would not unreasonably decrease competition in the sector

[Do licensees in Romania need authorized representatives?]

[Most of these requirements are similar to those in Poland, Hungary and the Czech Republic]

Details as to what shall constitute financial and technical capability shall be established by the REB by *[resolution? decree?]* Details as to what types of activities or ownership arrangements shall be deemed anti-competitive shall be established by the

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REB by *[resolution? decree?]* in consultation with the Office for the Protection of Competition

Such *[decrees/resolutions]* shall be published in the official newspaper of Romania prior to their effective dates and shall be appealable by any interested party *[as established in the administrative procedure act or name court]*

[The general purpose of these requirements, aside from meeting general needs to assure safe and secure supply, is to comport with EU requirements In addition to the general requirements that licensing criteria by "objective, transparent and non-discriminatory," the EU Directive essentially demands two things as to such criteria (1) all the criteria must be clearly spelled out in law or regulation, and (2) there must be a process for appealing licensing decisions To meet these EU requirements, Art 10(1) recites fulfillment of the Directive's general requirements, Art 10(2) then lists all the applicable criteria (meeting the requirement to spell out all criteria and the general clarity requirement), Art 10(3) provides that details on the more general criteria will be set forth in regulation (also meeting the requirement to spell out criteria and the general clarity requirement), and Art 10(4) requires publication of the criteria and explanatory regulation and provides for appeal (meeting the Directive's general transparency requirement and access to appeal requirement)]

Article 11 – License and Application Contents

An application for a license and a license shall be in the form required by the REB by *[decree/resolution]*

The REB may

grant a license if the applicant meets the criteria set forth in Article 10 as further described by *[decree/resolution]*,

reject a license if the applicant fails to meet the criteria set forth in Article 10 as further described by *[decree/resolution]*,

impose conditions on the issuance of a license relevant to the criteria set forth in Article 10 as further described by *[decree/resolution]*, or

request further information from the applicant if necessary to determine whether the criteria are met

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[Do we need time limits on requests for further information, or is this dealt with in existing procedural acts?]

Article 12 – License Transfer, Modification, Suspension, Termination and Penalties

The REB may transfer, modify, suspend, or terminate license and may impose penalties for failure to obey the terms of a license, this Law or implementing regulations

The REB may transfer a license upon the request or consent of the licensee if the transferee meets license acquisition qualifications Any direct or indirect change in control of a licensee shall be deemed a transfer and shall require REB approval *[We need to define control in conformance with Romanian law in a way that captures the entire chain of ownership]*

The REB may temporarily transfer a license upon its own initiative in an emergency situation if (a) the licensee is incapable of performing its licensed activities, (b) safety or security of supply is endangered bay the licensee's activities, and (c) the transferee meets license acquisition qualifications Such a transfer cannot exceed a period of INSET TIME PERIOD If necessary to protect security of supply, the REB can require the licensee whose license is being transferred to delivery its property necessary for the continuous and safe production, transmission, distribution or supply of electricity to the transferee *[These provisions are somewhat similar to those contained in the Hungarian Electricity Act, we need to check whether such delivery is legally feasible, and, if so, how it should be phrased – e g, whether compensation to the licensee is required.]*

4 The REB may modify a license upon the request or consent of the licensee if the modification does not alter the licensee's ability to meet license acquisition criteria

5 The REB may suspend a license upon the request or consent of a licensee, on its own initiative, the REB may suspend a license for failure to obey license conditions

6 The REB may terminate a license upon the request or consent of a licensee, on its own initiative, the REB may terminate a license for (a) persistent and repeated failure to obey license conditions, or (b) breach of a license condition which seriously endangers safety

7 The REB may impose financial penalties of up to INSERT AMOUNT for failure to obey the terms of a license, this Law or implementing regulations The REB cannot impose a penalty for any alleged breach committed more than INSERT TIME PERIOD prior to the time the REB becomes aware of the alleged breach

[We need to insert a provision relating to licensee bankruptcies consistent with

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Romanian bankruptcy law, including, if possible, the ability to order transfer of possession of property used to fulfill licensed activities]

Article 13 – License Process

1 The process for obtaining, transferring, modifying, suspending or terminating a license shall be objective, transparent and non-discriminatory

[The purpose of this provision is again to reflect accord with the EU Directive]

2 The procedural details for licensing decisions not set forth in *[name of civil procedural act]* or herein shall be established by the REB by *[resolution/decree]*

3 Such [*decrees/resolutions*] shall be published in the official newspaper of Romania prior to their effective date and shall be appealable [*as established in the administrative procedure act or name court*]

CHAPTER V

Sector Structure

Article 14 – Monopoly and Non-Monopoly Activities

1 Transmission and distribution are natural monopolies The REB shall issue a license to only one entity at a time to engage in transmission activities within Romania, and this entity shall have the exclusive right to build and operate the transmission property forming part of the grid The REB may issue multiple distribution licenses, but each licensee shall be entitled to a service territory, within which that licensee shall have the exclusive right to build and operate the distribution property forming part of the grid

2 Generation and supply are not natural monopolies, and competition shall be encouraged and protected as to these activities

3 Distributors shall have the obligation to supply consumers who wish to enter public supply contracts with them as described in Article 20

Article 15 – Sector Transition

1 Sector re-structuring shall occur during a transitory period after the effective date of this Act, in accordance with other laws and implementing regulations, pursuant to which the sector shall be disaggregated and privatized to the extent feasible

2 Upon the effective date of this Act, RENEL (*full name*) and all other legally operating sector participants shall be permitted to engage in the activities they were legally entitled to engage in without a license prior to enactment of this Act, for a

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period of no longer than INSERT TIME PERIOD

3 Upon the effective date of this act RENEL or its successors shall continue its ongoing unbundling of generation, transmission and distribution functions and shall create separate accounting for each function. Such unbundling shall be completed no later than INSERT DATE

[This provision is essentially required by the EU Directive]

4 The REB shall ensure that RENEL or its successor transmission company engages in economic dispatch, and does not discriminate against any generator, distributor, supplier or consumer

[This is also required under the Directive]

Article 16 – Third-Party Access

The transmission company and distributors must wheel power upon the request of eligible customers, if such wheeling is technically feasible, at prices approved by the REB in accordance with Article 18

CHAPTER VI

Tariffs

Article 17 – Pricing Principles

1 The REB shall establish tariffs for sector participants which adhere to the following principles

(a) tariffs shall be objective, transparent and non-discriminatory,

(b) prices shall be at cost *[marginal? or embedded?]*, to be established through competition whenever feasible, and shall include both a return of and reasonable return on investment, and

(c) cross-subsidies among different consumer classes shall be eliminated

2 The REB may, in establishing tariffs, give favorable treatment to electricity produced through renewable energy resources

[The EU Directive permits this favoritism It does not permit favoritism for indigenous fuels or production]

3 The REB shall not, in establishing tariffs, allow discriminatory treatment

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of electricity produced outside Romania, or produced from fuel obtained outside Romania.

Article 18 – Wheeling Tariffs

1 The REB shall ensure that the prices charged by the transmission company and distributors for wheeling power from generators to eligible customers are fair, reasonable and do not limit competition, and shall ensure that the transmission company and distributors do not discriminate against any generator or supplier

[This provision is required by the EU Directive]

Article 19 – Decisionmaking

[These procedures are adapted from the Polish Energy Law and procedures used by U S commissions They may need alteration to conform with existing administrative procedure acts, or more explicit provisions may be needed herein to indicate that existing procedures are being superseded]

1 Implementation of new tariffs and changes to existing tariffs shall occur using the following procedure

2 The party seeking the new or changed tariff shall propose to the REB the tariff it desires The REB shall then publish that proposal in the official newspaper of Romania and shall include in that published notification a reasonable schedule for all other interested parties to submit their comments on the proposal to the REB

3 After the published deadline for submission of comments, the REB must, within INSERT TIME PERIOD, take one of the following actions (a) grant the application as requested, (b) reject the application, (c) grant the request with modifications and/or conditions, (d) seek further information from the applicant or any other interested party, or (e) decide to hold a public hearing before ruling on the application. If the application seeks a major decision, a public hearing must be held upon the request of any interested party, as provided in Article 5(2) If the REB chooses to seek further information, or a public hearing is held, a final decision must be taken on the application within INSERT TIME PERIOD If the REB does not make a final decision within this time period, the application will be deemed *[granted/denied]* and may be appealed as of that date by any interested party

4 The REB may change a tariff upon its own initiative if it gives interested parties notice and opportunity to be heard prior to any such change If the REB contemplates making a major decision, it must so indicate prior to making the change, and a public hearing must be held upon the request of any interested party before making the change, as provided in Article 5(2)

5 In setting a tariff, the REB may provide indicate that no future changes in

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the tariff shall occur during a specified period of time *[not to exceed insert time period?]* During this specified period of time, the REB shall summarily reject any request for a change in tariff, without a hearing, unless the REB determines that an extraordinary change in circumstances requires review, in which case the REB shall hold a public hearing prior to making any change in the tariff

CHAPTER VII

Technical standards

Article 20 – Grid Code

[Grid codes are commonly used when the vertically integrated monopoly has been disaggregated, e g the UK and Hungary]

In order to ensure system safety and efficiency, the REB shall promulgate a grid code setting the technical standards to which all licensees and consumers attached to the grid must comply

The grid code shall be promulgated by the REB within INSERT TIME PERIOD from the date of this Act

Prior to promulgation of the grid code, the REB shall consult with sector participants to obtain their views as to the appropriate contents of the grid code

[This consultation can be made more formal, e g, Hungary, which set up a formal committee to draft the Code (to be approved by the Hungarian Energy Office)]

The grid code shall promote uniformity of standards in a manner maximizing ability to connect the grid internationally and facilitate cross-border exchange

[Is there any need for the REB to approve licensees' business rules?]

CHAPTER VIII

Consumer Protection

Article 21 – Contracts

Relations among the transmission company, distributors, generators, suppliers and consumers of electricity shall be governed by contract All such contracts shall incorporate REB tariff charges when applicable

Consumers may enter into one of two types of supply contracts in order to obtain service public contracts or individual contracts

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Individual contracts between consumers and suppliers shall be negotiated between the parties and shall include terms agreed upon by the parties Absent agreement of the distributor serving the territory in which the consumer is located, only eligible customers may enter into individual contracts with suppliers other than that local distributor

Public contracts shall be for an indefinite term and shall be submitted as to form by distributors to the REB for approval before they can become effective Any consumer who cannot or does not agree to terms of an individual contract shall be entitled to enter into a public contract with the distributor serving the territory in which the consume id located, if technically and economically feasible The REB shall establish criteria for such feasibility by *[decree/resolution]* and shall resolve any dispute between any consume and distributor regarding such feasibility

Eligible customers switching to or from individual contract with suppliers other than the distributor serving the territory in which the eligible customer is located must give that local distributor at least INSERT TIME PERIOD notice before making the switch

[Many countries, e g, Poland, base consumer relations on the contract concept These provisions are adapted from the Hungarian Electricity Act, modified to meet EU Directive requirements]

Article 22 – Dispute Resolution

The REB shall resolve all disputes between consumers and suppliers

Pursuant to its authority to resolve consumer disputes, the REB shall publish a procedure through which consumers may file complaints to the REB and have their complaints investigated and resolved promptly *[Reviewable by court?]*

[Do we want to expand REB jurisdiction not just to consumer disputes but disputes between other sector participants, e g, between a transmitter and distributor, or distributor and supplier? Do/can we give the REB the power to force the supplier to continue to supply consumers while a dispute is being adjudicated? Do we want to include any general rules in this law about cut-offs, e g, explicitly allow then for failure to pay and/or limit them in the winter? Do we want/need to add any due process provisions regarding the nature of the REB's review? Do we want to add a provision for initial attempted resolution or complaints by the supplier first, as in U K Section 42B and many U S laws?]

CHAPTER IX

Emergencies

Article 22 – Order of Restriction

[This is a streamlined version of similar provisions in the Hungarian Electricity Act and implementing regulation]

The REB shall promulgate an order of restriction to be followed when, due to emergency situations, an insufficient supply of electricity exists to serve all consumer demand

[Alternatively, the Independent System Operator (or RENEL until a separate ISO is created) could submit a proposed order of restriction, to be approved by the REB Or the order of restriction can be left to the grid code]

The order of restriction shall be approved by the Cabinet of Ministers

[Do we need additional emergency provisions to establish reserves (such as in Polish and the draft Latvian laws)? Do we need to grant emergency powers to allow the REB to temporarily compel a licensee to continue to serve after expiration of a license period?]

CHAPTER X

Heat

[Heat issues are, for the most part, left to local control to the extent possible in other countries (e g , Poland) This arrangement is followed here, and many of the provisions set forth below are based on the Polish Energy Law]

Article 23 – Planning and Grid Code Enforcement

Issues regarding heat supply shall be delegated to local municipalities to the extent practicable *[We need to check on the general law relating to local v national control, and whether "local municipalities" covers all areas in which heat supply is available]*

1 Local municipalities shall draft heat supply plans for the territory within their jurisdictions *[if planning is used as set forth in Article 7 above – ensuring that such plans are consistent with the national Electricity[energy] Policy]* The draft plan shall be made available for public review for INSERT TIME PERIOD, to be announced in the manner usually used in that territory During that time period, interested parties within the territory shall have the opportunity to be heard on the local heat supply plan The *[Town Council]* shall then adopt a final heat supply plan, taking due consideration of public input *[Should the REB have the right to veto a final plan?]*

2 Local municipalities shall enforce conformance of heat supply within their jurisdictions to grid code standards *[We need to check how local municipalities can*

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enforce such rules, and whether we need to or can expand on their methods of enforcement here]

[Do we need to say anything about public lighting?]

Article 24 – Tariffs

Tariffs for heat supply shall be established in conformance with the principles and procedures set forth in Articles 17 and 19, except that the local municipality shall be a party to any tariff proceeding

CHAPTER XI

Condemnation Powers

INSERT *[We need to consult on what we need to do to give the transmission company and distributors the right to condemn property needed for the grid. We also need to check on whether property ownership limitations still exist that could affect any provisions in this Law We also need a provision in the appropriate place giving licensees the ability to enter property to maintain security of supply, in language conforming to Romanian law Do we need to say anything about civil liability for injuries from power lines?]*

[Do we want to include an obligation on the REB to present an annual report as does the HEO and the Polish ERA? If so, to whom should it report – the Energy Minister, head of the Cabinet/Prime Minister or Parliament?]

[Do we need provisions about theft of electricity or do adequate laws already exist?]

[Do we want provisions about electrical inspections (e g, UK Section 30, and Czech Act 222 and draft Latvian references to inspectors) to ensure line/plant/personnel quality? Can the grid code provide for this review?]

[The Law will need closing provisions indicating what existing laws are superseded and cancelled by enactment of the Law]

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PIERCE ATWOOD
ATTORNEYS

One Monument Square
Portland Maine
04101-1110

MEMORANDUM

TO: Dr Miron Niculescu

FROM: John Gulliver, Catherine R Connors

CC: D Fruth Oprisan, H Menaker, G Weynand, J DeRosa

RE: Questions on regulation in other European Union countries

DATE December 1, 1997

This memorandum follows up on questions you raised regarding the treatment of certain energy issues in other countries, particularly in members of the European Union Set forth below are our answers

By separate cover, we are sending you and the Ministry our general comments and questions on the Romanian draft energy law

Time, space and practicality do not make these written communications the optimal means to discuss these issues Obviously, an oral, in-person dialogue would be preferred We would be very happy, therefore, and are in fact eager, to discuss these points and the draft Law with you in more detail, in Romania, at a time convenient to you USAID would like to assist RENEL and the Government in enacting an energy law that meets Romania's goals Ms Fruth Oprisan and our USAID personnel in Romania will follow up with you on arranging times for appropriate members of our team to meet with you and others to discuss (1) the questions and answers contained here, (2) our separate questions and comments on the draft Energy Law, and (3) any other matter you would like to discuss We look forward to meeting with you soon

Question #1 Are electrical and heat issues typically treated in one or separate laws?

This issue is a sub-set of the general question of how many utility services should be covered in one law For example, some countries have considered enactment of one umbrella law for all utilities, including telecommunications, railroads and energy sector participants (*e g* , Latvia has contemplated this approach) Other countries treat each utility separately (*e g* , Hungary's Electricity Law) Still other countries treat energy utilities in one law, leaving other utilities to separate laws (*e g* , Poland and the Czech Republic)

We were asked in Latvia whether an "umbrella" approach made sense, and prepared a short memorandum on the topic We would be happy to share that memo with you The short answer is that there is no one "correct" approach For example, even within the United States, some states combine certain utility regulations into one law, while other states separate them

The guiding principle should be administrative convenience To the extent that utilities are governed by the same regulator, and the same regulatory principles should apply to each utility, then it makes sense to cover those utilities in one law, to avoid inconsistent regulation Applying that principle here, because the National Agency for Energy Regulation (NAER) will govern both the electricity and heat sectors, it makes sense to cover both sectors in one law Regulatory details, which can differ for electricity and heat, can be dealt with outside the law itself, in secondary legislation or agency rules

Question #2 Are hydro-electric plants public or private property?

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The answer to this question depends on the constitutional principles of each country Therefore, Ms Fruth Oprisan will provide you with a separate analysis of this question based on Romanian law

Generally speaking, the flow of a river is public property The state then licenses (or offers concessions for) the use of that flow, allowing the licensee/concession holders to build improvements, such as dams At the end of the license period, the state can then renew the license/concession, require the licensee/concession holder to transfer ownership of the improvements, or require the licensee to remove the improvements Thus, the licensee/concession holder owns the improvements, but the state governs their use

Thus, for example, in the United States, a hydro-electric plant is owned by the private utility which builds it Practically speaking, however, because the U S owns the flow of the river, the value of that plant – through its use – is governed by the state The U S (through the federal regulator, the Federal Energy Regulatory Commission, or "FERC") licenses plant construction and operation At the end of a license period, FERC can re-new the license, require the licensee to remove the dam, or require the licensee to transfer the improvements to a new licensee If FERC chooses the last option, a statute sets forth the measure for the compensation paid for the transferred assets

Question #3: What are the prerogatives of the regulatory bodies?

We understand you to be asking what powers the regulatory agency should have This issue is discussed at some length in our general comments and questions on the draft Romanian Energy Law

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Generally speaking, regulators are given a spectrum of powers, with different levels of independence, varying from country to country

Regulatory bodies are given the most power and independence in countries like the United States and United Kingdom Continental countries tend to retain more governmental and ministry control

Countries which give regulators more control and independence emphasize procedural restraints This approach provides regulators with the flexibility and authority to enact *substantive* rules (within broad legislative parameters), and focuses on the *procedures* regulators use to enact and apply those rules The goal, as required by the European Union Directive on liberalization of the electricity market, is to ensure transparency, objectivity and non-discrimination

We strongly recommend this approach Experience to date in Eastern Europe and elsewhere has underscored the need to provide regulators with independence and the authority to police the sector effectively The greater the regulator's independence, the easier to ensure private investors that the system is fair The more transparent, objective and non-discriminatory the system, the more likely investment interest will be maximized

Question #4 do tariffs include a development tax?

We are not sure what you mean by "development tax " We assume you mean a levy, imposed on top of the regular tariff, to fund future investment The short answer to the question, given this assumption, is that such taxes are not normally included in tariffs, rather, funding of future investment takes place through proper calculation of a rate base and application of a depreciation formula Additionally, the use of a development tax

could run afoul of EU rules, depending upon how the funds accumulated from the tax are disbursed

Ordinarily, modern jurisdictions use a cost-based tariff methodology (even competitive "RPI-X" models use a cost calculation as their starting point) Under such a methodology, tariffs are set by computing a reasonable return on and of the "rate base," *i e*, the investment already made or in the process of being made Basically, the cost approach looks backward, reimbursing the utility for the investment it has or is in the process of making The utility then funds future investment based on the assurance that it will earn on its investments as it has in the past, including, in some jurisdications, the right to earn on construction work in progress

The problem with using a cost-based approach to fund future investment arises in countries emerging from a command economy and/or with high inflation To use the cost-approach, one needs to compute the rate base properly, *i e*, set a correct value for the assets in the rate base, then apply a proper depreciation formula. Because assets were not valued accurately in the past in command economies, they need to be re-valued before applying the cost methodology High inflation makes calculation of depreciation difficult going forward (although indexing can address this issue)

Re-valuation of existing assets can be a difficult task Privatization, however, can resolve this issue -- the price paid in the transfer can set the re-valuation number Therefore, looking at the Romanian situation, proper valuation of utility assets can occur when RENEL is privatized

The second point in considering use of a development tax is EU constraints If the funds from the collection of a development tax go into the general budget, then the

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tax should not be included in tariffs, because there is no direct correlation between the customers paying the tax and the benefits from the use of the tax money If funds from the collection of the tax do go directly back to utilities, then the tax can be included as a surcharge in the tariffs Either way, however, the disbursement of the funds from the tax could violate the prohibition in Article 92 of the EU Treaty of state aid

If Romania wants to comply with EU rules, and fund future investment in the energy sector through disbursement of government funds, it can do so only if that disbursement is non-discriminatory This means that all potential investors – domestic and foreign – must have equal access to the funds Additionally, the tax to collect these funds must be imposed in such a way so as not to indirectly subsidize any domestic industries Under Article 92, state subsidies cannot distort competition in the EU market

In March 1997, a proposal was made addressing the minimum taxation on various types of energy It does not directly mention development taxes It does, however, indicate that some special tax treatment of energy intensive industries is allowed Specifically, it proposes tax exemptions to assist firms whose energy costs are between 10-20% of production costs Under this proposal, some firms could be exempted from a development tax, or any other energy tax, if it caused its energy costs to rise above the 10% level

The EU also allows certain types of subsidies for depressed regions Hence, if a tax were used to develop energy resources in one of these regions, it might be permitted

Question #5 Are the consumers classified as eligible and captive?

The European Union Directive on liberalization of the electricity market identifies one class of consumer – those able to contract directly with producer/suppliers – as

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"eligible " It does not provide a title for the remaining consumers, but they are effectively "captive "

The Directive provides the minimum as to who falls into the category of eligible consumers – basically, the largest industrial consumers – and a timetable for expansion of this minimum to gradually smaller consumers Many jurisdictions take this approach – opening up competition first to the largest industrial consumers Other jurisdictions deem this approach unfair, because it does not give smaller consumers equal opportunity to enjoy the benefits of competition Hence, some jurisdictions, such as California, expressly reject this approach, and require equal eligibility for smaller consumers

Question #6 how is demand side management regulated?

Generally speaking, as jurisdictions take a more competitive approach, demand side management ("DSM") becomes a product of free market economics, not positive regulation The important aspect in encouraging DSM in the competitive model is ensuring that costs are accurately treated

If the cost of any added increment of power purchase is accurately measured, then buyers' choices naturally lead to DSM

Question #7· who grants concessions and which energy objectives apply to concessions?

Concessions are used to allow private parties the use of public property, to benefit the public Who grants them varies from country to country and can depend on the interest being conceded, what is important is that the substantive and procedural rules by which they are granted are transparent, objective and non-discriminatory

The draft Romanian Energy Law properly envisions a bidding process, overseen by the NAER As long as that process, including the bidding rules, is transparent, objective and non-discriminatory, it will meet EU requirements

CONCLUSION

You have asked several important questions, which we have treated very broadly here Obviously, it would make more sense to carry on this dialogue in person Again, we look forward to meeting with you soon In the meantime, if we can assist you in any other way, please don't hesitate to tell us

PIERCE ATWOOD
ATTORNEYS

One Monument Square
Portland Maine
04101 1110

Dear Rodica Dimitriu

This letter follows up on our discussion yesterday, when you indicated that we should give you any suggestions for clarifying or improving the emergency ordinance (the version as of this date) creating the regulatory agency for the energy sector for incorporation into the final version of the ordinance to be signed by all necessary ministers The following are our concerns

(1) **Article 10** We understand from our conversation, that the intent of this provision is that the President of NRAE have a fixed term of 5 years, and that he cannot be fired except for very good cause We agree that such a provision makes sense, and believe that the point that he cannot be fired except for good cause should be made expressly in the language of the provision We suggest the following language, taken from the [COMPETITION LAW]

INSERT LANGUAGE

(2) **Articles 4, 5(5), 8, 13(1)** We believe that these provisions could be read to conflict with each other, and could be clarified to make clear NRAE's ability to issue licenses, norms and rules generally applicable to the sector directly, without Minister or Ministry approval Article 5(5) so indicates such a direct power Article 4, however, appears to require approval for internal NRAE rules, and uses language -- "coordinates its activity" – with unclear meaning Article 8, similarly, appears to require Ministry approval for the same types of norms which NRAE appears to be able to issue directly under Article 5(5) Finally, Article 13(1) could be read to require Minister approval for all its "programmes," again an unclear term We suggest the following changes

Article 4 – remove
Article 5(5) – leave as is
Article 8 – remove
Article 13(1) – change to "In addition to the ordinary activities of NRAE under Article 5, NRAE may also carry out programs approved by the Minister, financed from funds outside the budget "

(3) **Appealability** For purposes of clarity, it would be helpful if the ordinance made clear that all NRAE decisions are appealable directly to court (without the need, for example, of interim Ministry review) We suggest the following language, again taken from the [Competition Law]

INSERT LANGUAGE

There is other language on which we have some thoughts, but the above three points are our major concerns Thank you for the opportunity to make our suggestions We look forward to working with you, other members of the Ministry, and the new members of NRAE in ensuring the success of the new agency

Sincerely,

PIERCE ATWOOD
ATTORNEYS

CATHERINE R CONNORS
DIRECT 207 791 1389
E MAIL CConnors@PierceAtwood com

Dr Eng Jean Constantinescu
Senior Advisor
RENEL
33, Gen Gh Magheru blv
RO-070164 Bucharest 1
Romania

VIA FAX 011 40 1 659 4352

Dear Dr Constantinescu

Following up on our meeting with you, Dr Indre and Dr Poenaru on Friday, December 5, 1997, the purpose of this letter is to summarize our suggestions and discussions on clarifying and revising the draft decree to set up the regulatory agency ("CORE")

As a very general matter, we noted that the more preferable way to create the agency would be in the draft Energy Law itself The purpose of the decree is to try to expedite some restructuring of the sector, in case the Law is not passed soon Keeping in mind this goal that something be enacted soon – whether the Law or this decree – we understand that we should not become mired in details, but should only try to ensure that the general thrust of the decree is legal, makes sense and opens the market to competition We summarize our suggestions and discussions below with this understanding, and therefore, list only major issues and concepts, not minor details As we stated in our meeting, if you think it would be helpful to you in refining the decree, you should consult with Despina Furth Oprisan and Dracut Dimitriu of her office, whenever and as much as you think would be helpful

Summary of suggestions and discussions

- Jurisdictional powers (Articles 1, 7(h), 15(3), 16(2), 22(3) and 22(4))

  We discussed the difficulties in making CORE both an administrative and jurisdictional body We suggested that the decree focus on administrative powers CORE should have the power to enact regulations enforceable as to sector participants, and to penalize licenseholders for any breach of their duties But as to disputes among sector participants for damages (*e g* , consumer complaints against their suppliers), CORE can arbitrate, but not act as a court itself CORE should issue the governing regulations, but not have jurisdictional powers

One Monument Square
Portland, Maine 04101-1110
VOICE 207 791 1100
FAX 207 791 1350
E MAIL fo@PierceAtwood com

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- CORE structure (Articles 3)

  You indicated that Article 3(1) intends to give the decisionmaking power to the President alone, in close consultation with the two other regulating officers We suggested that it was preferable to have decisions made by majority vote of the three CORE members, working as a Commission If, however, it has been decided that only the President should be the decisionmaker, that fact should be made clearer in Article 3(1)

  In Article 3(2), we agreed that the second sentence should provide that CORE represents neither the President nor the Prime Minister – the agency is entirely independent CORE should, however, have the duty to report annually to Parliament

  In Article 3(3), we agreed that it would be clearer to be more specific, and identify how many members of the Advisory Council are from professional associations and how many from consumer groups In order to be fair and make this membership equal, we agreed that the number of members of the Advisory Council should total 6, not 7 (3 from professional associations, 3 from consumer groups)

  In Article 3(4), we agreed that a sentence should be added making the vice president's first term 4 years, and the general executive manager's first term 3 years, so that all the CORE members do not end their terms at the same time Thereafter, each shall have 5 year terms, so that the end of the terms of each of the members will be staggered, with only one term ending at a time

  In Article 3(7), we agreed that staff and spouses should be included, so as to remove any possibility of a conflict of interest

- Tariffs (Articles 7(b), 8)

  We strongly suggested that the ultimate power to set tariffs should lie with CORE, not any Ministry (the current draft gives this ultimate power to the Ministry of Finance in consultation with the Ministry of Industry and Trade and the Office of Competition) You indicated a willingness to give this power to CORE, if possible, unless Law 21/1996 requires the Office of Competition to set the tariff We are researching this issue now and will contact you with our conclusions soon In any event, either CORE should set the tariffs, in consultation with the Office of Competition, or, if legally required, the Office of Competition should set tariffs pursuant to the principles established by CORE, unless or until the law can be changed, which again, would be our strong recommendation The Ministries should not be involved, because tariffs should not be politicized

Article 8 needs some clarification. The intent is to have regulated tariffs for monopoly activities, which are defined to include transmission, distribution, heat produced thorugh cogeneration and supply to captive customers All other prices – meaning generation, marketing services and supply to eligible customers – will be regulated by the market We agree with this intent, we just think the intent should be made clearer in the Article's language We also discussed the need to define who is a captive and who is an eligible customer If this definition waits for a regulation issued by CORE, then the text of the decree should so indicate, by providing that the definition of captive and eligible customers shall be established by CORE through regulation

We also discussed the uniformity principle in Article 8(3)(a) We suggested that it made sense to require some uniformity of prices for captive customers sharing load characteristics, but that uniformity could not be made universal geographically without violating the principle that prices should be cost-based If it costs more to serve a captive customer in one area than another, then the price for one should be higher than the other Similarly situated captive customers should pay the same prices, but if costs differ for service to one customer from another, then those customers are not similarly situated

Finally, with respect to Article 8(6), we noted that no cross-subsidy makes economic sense You recognized this principle, but stated that other laws could require some subsidies

- Licenses, authorizations and concessions (Articles 9–14)

You indicated that it was the subject of some debate as to the difference between a license and an authorization One theory was that a license was for an open-ended term, while an authorization was for a fixed term In response, we said that the legalities of this issue were not as important as the principles that should govern issuance of the permission (whether called a license or an authorization) First, we recommended that no permission be open-ended – they should all have fixed terms Therefore, the decree should specify that a permission (whether you decide it is properly a license or an authorization) shall be granted for a fixed term, no less than X and no greater than Y years In determining what X and Y should be, you should balance the permission holder's need for security, requiring enough of a term to recoup its investment, with the government's need to react to changing circumstances Thus, a permission to engage in import and export could have a shorter term than permission to build a generating station, since the investment needed to build the station will be much greater, requiring a longer time to recoup

The second basic principle that should guide issuance of permissions is that the power to modify them after issuance should be very limited – again, in order to provide security to the permission holder and promote investment Hence, the language of Article 9(2) and 14(1), referring to "as long as the granting conditions remain the same" is much too vague The decree should specify very limited circumstances when CORE can, on its own initiative,

modify, suspend or terminate a permission We can suggest specific language to this effect if you would like

In our discussions, you indicated that you contemplate three different permissions being granted relating to new generating capacity permission to build, an establishment permission, issued when the facility is ready to go on line, and an operating permission This structure is fine – it is similar to Hungary's – but it should be made clearer in the decree, in Article 10 Also, for simplicity, you might want to streamline the permissions to two, instead of three – a permission to build, and a permission to operate You also have no minimum requirements for licensing – all sector participants appear to need permissions from CORE To reduce CORE's work, you might want to have a threshold size of a generating plant (*e g* 10 MW), before a permission is required – particularly is the plant will only be used for self-generating purposes

In Article 11(1), we agreed that, for legal reasons, the right to grant concessions may need to be removed from CORE's power Obviously, it is preferable for one agency to have the power to issue all permissions for one field Therefore, absent other legal constraints, you might want CORE to have the power to issue both license/authorizations and concessions But with the understanding that concessions involve permission to use state-owned property, you indicated that you would leave this power out of the decree to avoid legal complications Again, in a perfect world, it would be better to spell all this out in one legal document – who can obtain concessions, what concessions are needed for, who regulates them, etc Given the overriding goal of getting <u>something</u> in place soon, however, we understand your position

In Article 11(2)(a), we agreed that the language requiring a showing of financial capability should be left as general as the language in 11(2)(b) requiring technical capability You do not want to be too narrow or specific in the decree It would be helpful, however, to provide in the decree that CORE will issue regulations specifying what an applicant must do to meet these capability requirements The EU Directive on liberalization of the electricity market is clear that licensing requirements must be transparent, objective and non-discriminatory Therefore, the decree should make clear that one set of criteria will be published, applicable to all

Regarding Article 12's test requirement, we indicated that we thought this was an unusual provision, and questioned what kind of a test would be applied You indicated that these sorts of tests were of longstanding use in Romania. Again, the general concept of a test to show criteria have been met is not objectionable in itself But, to meet EU criteria, the nature of what will be tested and what an applicant must do to meet the test will have to be published and clear

In Article 13, we agreed that you will specify that the permission holder is responsible for paying the cost of publication in the Official Gazette

Finally, with respect to Article 14(2), we recommended that the types of penalties that can be imposed should be more specifically spelled out – e g , what monetary ceilings will limit the amount of a fine, when a permission can be suspended or terminated, how long from discovery CORE has to investigate and impose a fine, and what sort of procedure is used to investigate and determine sanctions

- Consumer Protection (Articles 15 and 16)

We have already noted the jurisdictional issues raised by provisions such as Article 16(2) – CORE should have the power to set standards, and penalize permission holders for failing to meet the standards required under their permissions Damages for disputes between sector participants, however, due to Romanian legal constraints, should be left to the existing courts

Another point we raised with respect to Article 15(3) was its very indirect reference to the obligation to serve The decree should set out in clearer and more positive terms who has the duty to serve and under what circumstances

- The Grid Code (Article 18(e)(1))

We noted that the power and duty to prepare a Grid Code could be left to CORE alone, as the decree now provides Alternatively, we suggested that others, such as professional associations and/or permission holders could be involved in the process of preparing the Code The process might take longer and be more cumbersome if others are involved, but the expertise others could contributute might make the Code better in the long run

- Open Access (Article 19)

We strongly agreed with the concept in Article 19 requiring open access, and giving CORE the power to set the timetable for such access (so Article 19(2) should make clear that "the open access to the grids will be granted gradually by CORE ") Again, however, this provision states CORE's power and the principle of open access in a somewhat indirect way A more substantive declaration could be clearer

- International Contracts (Article 20(2))

You clarified that Article 20(2) was intended to have a very specialized meaning, going to cooperation to avoid or repair regional blackouts or technical difficulties, and that you would make this point clearer in the next draft of the decree

- The Power Pool (Article 21(3))

  As with provisions such as Article 19, establishing the principle of open access, we strongly agree with the provision in Article 21(3) giving CORE the power to regulate a power pool Again, however, the bestowal of CORE's authority is articulated in an indirect way It would be clearer if the decree indicated that CORE has the power to establish a power pool and its operational regulations

- Appeals of regulations (Article (22) and 22(4))

  We have already discussed these provisions in the context of eliminating references to any jurisdictional power by CORE Romanian legal constraints make it easier to allow appeal both of individual decisions issued by CORE and the general regulations issued by CORE While appeal should be permitted of the regulations themselves, we suggested that you could follow the U S approach, which, while allowing appeal of regulations, limits the grounds for such appeals The only grounds for appeal could be if the regulation is totally irrational, or CORE has exceeded its legal authority

  We discussed how the reference to the Civil Code should be eliminated, as the Code is substantive, not procedural If you need to discuss further the appropriate text for this provision, allowing appeal, you should contact Ms Furth Oprisan's office

- Budgets (Article 23)

  We stated our strong support for the provisions in Articles 23(1) and (2), giving CORE the power to set its budgets, to be collected by assessments on sector participants Again, for clarification's sake, the second sentence of Article 23(2) should expressly stated that "The tariffs and contributions leveal are established yearly <u>by CORE</u> "

- Transitory provisions (Articles 25 and 26)

  We discussed the timing for the decree to come into effect and CORE to be established You clarified that the goal was to have CORE up and running, and its basic regulations issued, within six months of the publication of the decree We agree that this is an appropriate timetable, and the language of the decree should be clarified, because it could be read to allow a year (two six month periods) for this action to take place

  We also discussed how to treat existing sector participants The decree needs to indicate that existing participants – primarily RENEL – does not instantly become illegal as unlicensed upon publication of the decree On the other hand, the decree needs to give a deadline for existing sector participants to seek and obtain the necessary permissions You indicated that you would include a provision requiring existing sector participants such as RENEL to file

applications consistent with re-structuring goals, in an effort to facilitate such re-structuring We agree that this is a good idea

In sum, we would like to repeat our overall conclusion that the effort to enact a decree such as the current draft makes sense in light of currently stalled attempts to pass an Energy Law We support all your efforts to effect change as quickly as possible We strongly support RENEL's efforts to modernize, commercialize, re-structure, and have an objective, transparent and non-discriminatory legal and regulatory framework enacted for the sector If there is anything else we can do to help RENEL in these efforts, please tell us We are willing and anxious to provide whatever help we can

Sincerely,

Catherine R. Connors

cc Howard Menaker (by fax)
Roberto Figueredo (")
Despina Furth Oprison (")
Gordon Weynand (")
Jacqueline DeRoas (")

PIERCE
ATWOOD
ATTORNEYS

One Monument
Square
Portland Maine
04101-1110

Draft - July 2, 1998

Notes

(1) The ordinance must be conformed to meet relevant requirements of Romanian law, both generally and as specifically noted throughout this draft

(2) The draft includes only the most basic administrative powers of the proposed regulatory agency in order to serve as a starting point for further discussions

Ordinance to Provide Implementing Structure for the Romanian Energy Commission

Preamble

The Romanian Energy Commission is the principal state agency having regulatory authority over the electric and thermal energy sectors of the economy The Commission is charged with promoting the overall public interest in the development and maintenance of economic efficiency in the electric and thermal energy sectors of the economy The Commission is also charged with protecting and balancing the rights and obligations of consumers, regulated entities, investors and other persons affected by the electric and thermal energy sectors of the economy Finally, the Commission is responsible for assisting the Ministry of Industry and Trade in developing short and long-term policy goals and recommendations with respect to the operation of the electric and thermal energy sectors

Article 1 - Definitions

1 Definitions

(a) *"Regulated Entity"* means an entity that is engaged in the generation, transportation, distribution or supply of electric or thermal energy, and is subject to regulation by the Commission pursuant to the Energy Law

(b) *"Commission"* means the Romanian Energy Commission

(c) "decision" means a final order of the Commission disposing of a matter, including matters related to authorization or licensing

(d) "Ordinance" means the "Ordinance to Provide Implementing Structure for the Romanian Energy Commission "

(e) "Transition Period" means the period beginning on the effective date of the Ordinance and ending one year thereafter

(f) [add other definitions as appropriate after finalization of the content of the Ordinance, e g , "malfeasance," "rehabilitation and refurbishment" or "self-generation"]

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Article 2 - Organizational Structure

1 The Romanian Energy Commission

(a) The Romanian Energy Commission shall commence operations as an independent regulatory agency located within the Ministry of Industry and Trade After the Transition Period, the Commission shall exist outside the Ministry and shall be directly responsible to [the Government? the Parliament?]

(b) The principal office of the Commission shall be in Bucharest

2 Executive Functions

(a) Prior to the commencement of the Transition Period, the Ministry of Industry and Trade shall appoint a President to act as the executive officer and oversee the creation and initial operation of the Commission The President shall exercise the executive powers of the Commission throughout the Transition Period Upon the expiration of the Transition Period, the executive powers of the Commission will be transferred automatically to the Chairman and Commissioners to be appointed by the Prime Minister The Prime Minister may appoint the President to serve as a Commissioner or as Chairman following the Transition Period

(b) Following the Transition Period, the executive functions of the Commission shall be vested in three commissioners

(c) Each commissioner shall be appointed by the Prime Minister and approved by Parliament

(d) The appointment of a person to hold the office of commissioner shall be for a term of five years, except that the terms of the original three commissioners shall be for three, four and five years, respectively

(e) A commissioner may be re-appointed for one additional term only

(f) The Prime Minister shall designate one commissioner to serve as Chairman

(g) No member of Commission may be removed from office except on grounds of physical or mental incapacity or malfeasance

3 Functions of Chairman

(a) During the Transition Period, the President shall create an organized framework for the Commission that shall include, at a minimum, the designation of section chiefs and appropriate staff for offices of licensing, pricing, consumer protection and internal administration

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(b) Following the Transition Period, the Chairman shall have sole responsibility for organizing the general administrative functions of the Commission

(c) The Chairman shall have the authority to appoint, prescribe the duties, and fix the salaries of an administrative secretary, general counsel, chief engineer, chief accountant and such other officers and employees as are necessary to execute the functions of the Commission [need to coordinate this section with existing civil service law]

(d) The Chairman may authorize expenditures for salaries, wages, rent, materials, equipment and such other expenses as may be necessary in accordance with the annual budget of the Commission

4 Finances of the Commission

(a) During the Transition Period, the Commission shall be funded by appropriations from [general budget? MOIT budget?] The President shall determine the amount of funds necessary to operate the Commission in consultation with the Ministry of Industry and Trade

(b) Following the Transition Period, the Commission shall be self-financing

(c) The Chairman shall be responsible for developing and publishing the annual budget of the Commission, which shall be submitted to and approved by [Government? MOIT?]

(d) The Commission shall develop and publish a schedule of fees to be applied to applicants, licensees and regulated entities

(e) The schedule of fees may include any combination of

i annual charges assessed against applicants, licensees or regulated entities as a percentage of gross revenues, or

ii fees for processing specific applications

(f) The schedule of fees shall be designed to ensure that revenues collected by the Commission will match the estimated expenses included in the Commission's annual budget to the maximum extent practicable

5 Miscellaneous

(a) No employee of the Commission nor any Commissioner may have any financial interest in or hold any official position with a licensee, applicant or regulated entity

(b) [anti-nepotism provision conforming with existing Romanian law]

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Article III - Procedures

1 Decisions

(a) During the Transition Period, the President shall engage in decision-making in an objective, transparent and non-discriminatory manner

(b) After the Transition Period, all decisions of the Commission shall be determined by majority vote Two commissioners shall constitute a quorum for purposes of conducting business

(c) At all times both during and after the Transition Period, the decisions of the Commission shall be in writing and shall include an explanation of the reasoning upon which the decision is based Decisions shall be published [include appropriate mechanism for publishing in accordance with Romanian law]

(d) Any applicant or other person aggrieved by a decision issued by the Commission may initiate a proceeding for review of such decision by the Court of Appeals in Bucharest [conform to existing Romanian law]

(e) [other procedures could be included, e g different treatment for major or minor decisions, delegation of decisional authority to department heads]

Article IV - Pricing

1 Tariffs

(a) Entities engaged in the generation, transportation or distribution of electric or thermal energy shall prepare and file tariffs and supporting information with the Commission showing all rates, charges, terms and conditions of service applicable to each class of consumers

(b) The Commission will determine the lawfulness of proposed tariffs consistent with the requirements of Romanian law The Commission may accept, reject, suspend, modify or take any other action that is necessary or appropriate to ensure that proposed tariffs are consistent with applicable law

(c) An entity engaged in the generation, transportation or distribution of electric or thermal energy may not alter its filed tariffs without first obtaining the prior approval of the Commission

(d) The Commission shall issue regulations specifying the procedures and criteria to be used for the submission and review of tariffs The criteria for reviewing the reasonableness of tariffs may include consideration of the value of market-based and incentive-based pricing mechanisms When the Commission determines that market-based or incentive-based pricing mechanisms are not appropriate, tariffs must be cost-based, including a reasonable return on investment

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Article V - Licensing

1. Licensing of Existing Entities

(a) Existing entities engaged in the generation, transportation or distribution of electric or thermal energy shall submit an application for licensure to the Commission

(b) An application must include all information required by, and shall be in the form prescribed by, the Commission The Commission shall issue regulations specifying the form and content of information that is required to be submitted no later than [90 days] after the effective date of the Ordinance

(c) Applications by existing entities must be filed no later than [90 days] after the issuance of the regulations specified in subpart (b) of this section

(e) Within 45 days of the filing of an application, the Commission shall determine whether the application is complete and conforms with the regulations specified in subpart (b) of this section If the Commission determines that an application is deficient, the Commission shall promptly notify the applicant in writing and shall provide the applicant up to 50 days to remedy the specified deficiencies

(f) After the Commission has determined that an applicant has filed a complete and conforming application, the Commission shall review the application to determine whether it is consistent with the applicable requirements of Romanian law The Commission may then accept, reject, suspend, modify or take any other action that is necessary or appropriate to ensure that a license is consistent with applicable law The Commission must act on an application no later than [90] days after the filing of a complete and conforming application

2 Licensing of the Construction or Operation of New Facilities

(a) Any entity that proposes to engage in

i the construction or commercial operation of new facilities to be used for the generation, transportation or distribution of electric or thermal energy, or

ii the rehabilitation or refurbishment of existing facilities used for the generation, transportation or distribution of electric or thermal energy,

shall submit an application for licensure to the Commission

(b) An application for licensure under this section must include all information required by, and shall be in the form prescribed by, the Commission The Commission shall issue regulations specifying the form and content of information that is required to be submitted no later than [90 days] after the effective date of the Ordinance

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(c) Within 45 days of the filing of an application, the Commission shall determine whether the application is complete and conforms with the regulations specified in subpart (b) of this section If the Commission determines that an application is deficient, the Commission shall promptly notify the applicant in writing and shall provide the applicant up to 50 days to remedy the specified deficiencies

(d) After the Commission has determined that an applicant has filed a complete and conforming application, the Commission shall review the application to determine whether it is consistent with the applicable requirements of Romanian law The Commission may then accept, reject, suspend, modify or take any other action that is necessary or appropriate to ensure that a license is consistent with applicable law The Commission must act on an application no later than [90] days after the filing of a complete and conforming application

3 Suspension of Licenses

(a) The Commission may initiate an investigation on its own or on the application of a third party to determine whether the holder of a license has violated the terms of a license or applicable law or regulation

(b) Upon the completion of an investigation, the Commission may take such action as is necessary or appropriate, including the suspension, revocation or modification of a license, or the imposition of civil penalties as permitted by Romanian law The Commission may not suspend or revoke a license unless it finds that there have been serious or repeated violations of applicable regulations or law, or that suspension or revocation is necessary to avoid an imminent danger to public health or safety

4 Transfer of Licenses

(a) A license issued by the Commission may not be transferred without the prior approval of the Commission

5 Exemptions

(a) The Commission may issue regulations providing for exemptions from the licensing requirements of this section for certain entities, such as self-generators or small producers

Article VI - Disputes

(a) The Commission shall issue regulations requiring all disputes between ultimate consumers and their suppliers to be reviewed in the first instance by the suppliers through a framework approved by the Commission

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(b) If a dispute between an ultimate consumer and a supplier cannot be resolved in a matter acceptable to the parties using the framework specified in subpart (a) of this section, the Commission may initiate an investigation of the dispute and issue a decision resolving the dipute [if permitted by Romanian law]

Article VII - Annual Report and Information Gathering

(a) By April 1 of each year, the Commission shall submit to parliament an annual report of its activities during the previous calendar year

(b) The Commission shall assist the Ministry of Industry and Trade in formulating national energy policy by gathering and compiling information and making recommendations regarding the operation of the electric and thermal energy sectors

Article VIII - Effective Date

(a) The Ordinance shall be effective as of [date to be determined]

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PIERCE ATWOOD
ATTORNEYS
J Gulliver/C Connors
Pierce Atwood
One Monument Square
Portland ME 04101
(207) 791-1100

DRAFT

July 21, 1998

[Establishes Permanent Commission After One-Year Interim Transition Period]

Ordinance to Provide Implementing Structure for the Romanian Energy Commission

Preamble

Pursuant to the authority of Article 114, paragraph 4 of the Romanian Constitution, this Ordinance is enacted to create a regulatory agency to oversee the Romanian energy sector

Chapter 1 – Definitions

Article 1 - Definitions

"Regulated Entity" means an entity that is engaged in the generation, transportation, distribution or supply of electric or thermal energy, and is subject to regulation by the Commission pursuant to the Energy Law

"Commission" means the Romanian Energy Commission

"*Decision*" means a final order of the Commission disposing of a matter of individualized application

"*Norm*" means a standard of generalized application imposed by the Commission by regulation

"*Instruction*," means a rule of general application imposed by the Commission by regulation

"*Ordinance*" means the "Ordinance to Provide Implementing Structure for the Romanian Energy Commission "

One Monument Square
Portland Maine
04101-1110
VOICE
207 791 1100
FAX
207 791 1350
E MAIL
info@PierceAtwood.com

239

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ATTORNEYS

"*Transition Period*" means the period beginning on the effective date of the Ordinance and ending one year thereafter

"*President*" means the executive officer of the Commission during the Transition Period

[add other definitions as appropriate after finalization of the content of the Ordinance, e g , "energy sector," "relative," "significant shareholder," "malfeasance," "rehabilitation and refurbishment" and "self-generation"]

Chapter 2 – Purpose and Competence

Article 2 - Purpose

The purpose of this Ordinance is to create the Romanian Energy Commission and set forth its duties and powers

The Commission is the principal state agency having regulatory authority over the energy sector

The Commission is charged with

(1) ensuring the safe and secure supply of energy in Romania,

promoting the overall public interest in the development and maintenance of economic efficiency in the energy sector,

protecting and balancing the rights and obligations of consumers, regulated entities, investors and other persons affected by the energy sector, and

assisting the Ministry of Industry and Trade in developing short and long-term policy goals and recommendations with respect to the operation of the energy sector

Article 3 – Creation of the Commission

(a) The Romanian Energy Commission is established as an autonomous administrative authority with legal personality, directly responsible to [the Government? the Parliament?]

The Commission shall exercise its authority over the whole territory of Romania

The seat of the Commission shall be in the Municipality of Bucharesti

Article 4 – Competence of the Commission

As set forth with more particularity in the remaining Articles of this Ordinance, the Commission shall

One Monument Square
Portland Maine 04101-1110
VOICE 207 791 1100
FAX 207 791 1350
E MAIL info@PierceAtwood.com

240

PIERCE ATWOOD
ATTORNEYS

grant, modify and enforce licenses for all regulated entities,

approve tariffs for all regulated entities,

resolve disputes between consumers and regulated entities,

issue an annual report to Parliament, and

gather information as requested by the Ministry of Industry and Trade

(b) In furtherance of its duties, the Commission has the power to issue Decisions, Instructions and Norms relating to the subject matter of its competence

Chapter 3 – Eligibility for Commission Membership or Employment, Dischargeability

Article 5 – Eligibility

Commissioners must be Romanian citizens having their permanent domicile in Romania, they must be at least thirty-five years of age, and they shall have a good reputation and professional training in the energy domain, and a length of service time in their speciality of at least five years

Commissioners shall not

(i) be spouses or relatives of the President of Romania, of chairmen of the Chambers of Parliament, of members of the Government, of any member of any management board of any legal person subject to the Commission's supervision, or of any significant shareholder of such a legal person, and they shall not be related among themselves,

be members of a political party,

exercise another remunerated, private or public, office, except that of members of a university teaching staff,

be members of the management boards of legal persons subject to the supervision of the Commission, or significant shareholders of such legal persons,

have been declared bankrupt, or

have criminal record

(c) Commission employees must meet the criteria of Article 5(b)(i), (iv) and (vi)

Article 6 - Dischargeability

No Commissioner may be removed from office except on grounds of physical or mental incapacity or malfeasance

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E-MAIL
info@PierceAtwood.com

241

Chapter 4 – Commission Structure

Article 7 - Executive Functions

(a) The executive functions of the Commission shall be vested in three Commissioners

(b) Each Commissioner shall be appointed by the Prime Minister and approved by Parliament

(c) The appointment of a person to hold the office of Commissioner shall be for a term of five years, except that the terms of the original three Commissioners shall be for three, four and five years, respectively

(d) A Commissioner may be re-appointed for one additional term only

(e) The Prime Minister shall designate one Commissioner to serve as Chairman

Article 8 - Functions of Chairman

The Commission shall be organized as set forth in Schedule 1 [chart]

The Chairman shall have the authority to appoint, prescribe the duties, and fix the salaries of all officers and employees as are necessary to execute the functions of the Commission

The Chairman may authorize expenditures for salaries, wages, rent, materials, equipment and such other expenses as may in his view be necessary in accordance with the annual budget of the Commission

Article 9 - Finances of the Commission

The Commission shall be self-financing

The Chairman shall be responsible for developing and publishing the annual budget of the Commission, which shall be submitted to and approved by the Government

The Commission shall develop and publish a schedule of fees to be applied to applicants, licensees and regulated entities

The schedule of fees may include any combination of

annual charges assessed against applicants, licensees or regulated entities as a percentage of gross revenues, or

fees for processing specific applications

The schedule of fees shall be designed to ensure that revenues collected by the Commission will match the estimated expenses included in the Commission's annual budget to the maximum extent practicable

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood.com

242

PIERCE ATWOOD
ATTORNEYS

During the first three years of the existence of the Commission after the Transition Period, any discrepancies between the amounts collected by the Commission in fees and the Commission's annual budget shall be drawn from or paid to [the general fund]

Chapter 5 – Procedures

Article 10 – Norms and Instructions

All Norms and Instructions of the Commission shall be determined by majority vote Two commissioners shall constitute a quorum for purposes of conducting business

Except when the Commission finds that an emergency situation otherwise requires, before adopting a Norm or Instruction, the Commission shall publish its proposed Norm or Instruction in a manner designed to provide notice to all sector participants Interested parties shall be given a reasonable time to comment on the proposed Norm or Instruction

The Commission shall review all comments on a proposed Norm or Instruction filed in writing with the Commission before the comment deadline, before the Commission adopts the Norm or Instruction as final and effective Contemporaneously with the adoption of a Norm or Instruction, the Commission shall issue a justification for the Norm or Instruction, identifying and justifying any modifications in the Norm or Instruction from when presented in its proposed state, and explaining why any suggestions offered in any comments were or were not accepted The adopted Norm or Instruction and its justification shall be published in the Official Gazette of Romania

Norms and Instructions adopted by the Commission may be challenged by interested parties for unlawfulness by appeal in the courts of appeal The Commission shall have an active processual legitimation and may intervene in any lawsuit with regard to the Norms adopted, without obligation to prove an interest

Article 11 -Decisions

All Decisions of the Commission shall be determined by majority vote Two commissioners shall constitute a quorum for purposes of conducting business

All applicants shall have notice and a right to be heard by the Commission prior to issuance of a Decision affecting their rights The Commission shall issue Instructions setting forth how notice shall be given and how opportunity to be heard shall be provided

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

243

PIERCE ATWOOD
ATTORNEYS

Decisions of the Commission shall be in writing and shall include an explanation of the reasoning upon which the decision is based Decisions shall be published in the Official Gazette of Romania

Any applicant or other person aggrieved by a Decision issued by the Commission may initiate a proceeding for review of such Decision in the courts of appeal The Commission shall have an active processual legitimation and may intervene in any lawsuit with regard to Decisions, without obligation to prove an interest

Chapter 6 - Pricing

Article 12 - Tariffs

Entities engaged in the generation, transportation or distribution of electric or thermal energy shall prepare and file tariffs and supporting information with the Commission showing all rates, charges, terms and conditions of service applicable to each class of consumers

The Commission shall determine the lawfulness of proposed tariffs consistent with the requirements of Romanian law The Commission may accept, reject, suspend, modify, or take any other action that is necessary or appropriate to ensure that proposed tariffs are consistent with applicable law

An entity engaged in the generation, transportation or distribution of electric or thermal energy may not alter its filed tariffs without first obtaining the prior approval of the Commission

The Commission shall issue Instructions specifying the procedures and criteria to be used for the submission and review of tariffs The criteria for reviewing the reasonableness of tariffs may include consideration of the value of market-based and incentive-based pricing mechanisms When the Commission determines that market-based or incentive-based pricing mechanisms are not appropriate, tariffs must be cost-based, including a reasonable return on investment, including profit

Chapter 7 – Licensing

[NOTE the criteria for issuing a license should be included here, if the draft energy law has not yet been adopted]

One Monument Square
Portland, Maine
04101-1110

VOICE
207 791 1100
FAX
207 791 1350
E MAIL
info@PierceAtwood com

244

PIERCE ATWOOD
ATTORNEYS

Article 13 - Licensing of Existing Entities

Existing entities engaged in the generation, transportation or distribution of electric or thermal energy shall submit an application for licensure to the Commission

An application must include all information required by, and shall be in the form prescribed by, the Commission The Commission shall issue Instructions specifying the form and content of information that is required to be submitted no later than [90 days] after the effective date of the Ordinance

Applications by existing entities must be filed no later than [90 days] after the issuance of the regulations specified in subpart (b) of this section

Within 45 days of the filing of an application, the Commission shall determine whether the application is complete and conforms to the Instructions specified in subpart (b) of this section If the Commission determines that an application is deficient, the Commission shall promptly notify the applicant in writing and shall provide the applicant up to [60 days] to remedy the specified deficiencies

After the Commission has determined that an applicant has filed a complete and conforming application, the Commission shall review the application to determine whether it is consistent with the applicable requirements of Romanian law The Commission may then accept, reject, suspend, modify or take any other action that is necessary or appropriate to ensure that a license is consistent with applicable law The Commission must act on an application no later than [90 days] after the date the Commission finds an application complete and conforming

Article 14 - Licensing of the Construction or Operation of New Facilities

Any entity that proposes to engage in

the construction or commercial operation of new facilities to be used for the generation, transportation, distribution or supply of electric or thermal energy, or

the rehabilitation or refurbishment of existing facilities used for the generation, transportation or distribution of electric or thermal energy,

shall submit an application for licensure to the Commission

An application for licensure under this section must include all information required by, and shall be in the form prescribed by, the Commission The Commission shall issue Instructions specifying the form and content of information that is required to be submitted no later than [90 days] after the effective date of the Ordinance

Within 45 days of the filing of an application, the Commission shall determine

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

245

PIERCE ATWOOD
ATTORNEYS

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Article 15 - Transfer and Amendment of Licenses

A license issued by the Commission may not be transferred without the prior approval of the Commission

A license issued by the Commission may be modified with the consent of the licensee The Commission may modify a license without the licensee's consent only after notice and opportunity to be heard by the licensee, and only under limited conditions set forth in Norms published by the Commission

Article 16 - Exemptions

The Commission may issue Norms providing for exemptions from the licensing requirements of this section for self-generators or small producers

Chapter 8 – Enforcement

Article 17 – the Power to Monitor and Enforce

The Commission shall have the power to monitor compliance and to enforce its Norms, Instructions, Decisions and license terms

Article 18 – Inspections, Audits and Information-Gathering

In fulfillment of its monitoring and enforcement responsibilities, the Commission may require a regulated entity to provide the Commission with whatever information the Commission seeks, pursuant to Norms the Commission shall publish on appropriate information-gathering procedures

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

246

Commission Norms on information-gathering shall include protection of trade secrets and other confidential information

In fulfillment of its monitoring and enforcement responsibilities, with or without notice, the Commission and its staff shall be allowed to enter and inspect the premises of regulated entities whenever the Commission desires, and shall be permitted to inspect or audit the books of regulated entities whenever it desires, pursuant to Norms the Commission shall publish on appropriate inspection and audit procedures

Article 19 – Investigations and Penalties

(a) In fulfillment of its monitoring and enforcement responsibilities, the Commission may initiate an investigation on its own or on the application of a third party to determine whether the holder of a license has violated the terms of a license or Norm or Instruction

(b) Upon the completion of an investigation, the Commission may take such action as is necessary or appropriate, including the suspension, revocation or modification of a license, or the imposition of civil penalties

The Commission may not suspend or revoke a license unless it finds that there have been repeated violations of applicable license terms, regulations or law, or that suspension or revocation is necessary to avoid an imminent danger to public health or safety

(a) The Commission shall adopt Norms setting forth a schedule of potential civil penalties and the conduct ordinarily subject to such penalties The schedule shall include a maximum civil penalty which the Commission cannot exceed

Chapter 9 - Disputes

Article 20 – Creation of a Supply Complaint Process

The Commission shall issue Instructions requiring all disputes between ultimate consumers and their suppliers to be reviewed in the first instance by the suppliers through a framework approved by the Commission

Article 21 – Commission Resolution

If a dispute between an ultimate consumer and a supplier cannot be resolved in a matter acceptable to the parties using the framework specified in Article 20, the Commission may initiate an investigation of the dispute and issue a decision resolving the dispute Aggrieved parties may appeal the Commission Decision resolving a dispute in the courts of appeals

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

247

PIERCE ATWOOD
ATTORNEYS

Chapter 10 - Annual Report and Information Gathering

Article 22 – Annual Report

By April 1 of each year, the Commission shall submit to Parliament an annual report of its activities during the previous calendar year

Article 23 – Information Gathering

The Commission shall assist the Ministry of Industry and Trade in formulating national energy policy by gathering and compiling information and making recommendations regarding the operation of the electric and thermal energy sectors as requested by the Ministry of Industry and Trade

Chapter 11 – Effective Date, Transition Period, Repeal of Conflicting Law

Article 24 – Effective Date

This Ordinance shall come into effect on the date the Ordinance is published in the Official Gazette of Romania

On the effective date of this Ordinance, all provisions of the Ordinance shall take effect, except as set forth in Article 25

Article 25 – Transition Period

(a) For a one-year period after the effective date of this Ordinance the following provisions shall apply and shall supersede all conflicting provisions in the Ordinance All other provisions in the Ordinance shall be immediately effective consistent with Article 24(a)

(i) the Ministry of Industry and Trade shall appoint a President to act as the executive officer and to oversee the creation and initial operation of the Commission The President shall exercise the executive powers of the Commission throughout the Transition Period

During the Transition Period, the President shall appoint, prescribe the duties, and fix the salaries of the Commission's personnel, subject to the approval of the Minister of Industry and Trade

[NOTE the ability of the Chairman to re-organize and replace personnel chosen by the President must be dealt with in a manner consistent with Romanian labor law The Ordinance should provide that the personnel chosen by the President is hired temporarily

One Monument Square
Portland Maine
04101-1110
VOICE
207 791 1100
FAX
207 791 1350
E MAIL
info@PierceAtwood.com

248

for one year, subject to indefinite renewal by the Chairman If such temporary hiring is not permitted under Romanian law, then fixed terms must be set for the chief staff, with replacement of limited terms to unlimited terms after the transition period]

Expenses with regard to the setting up, organization and functioning of the Commission during the transition period shall be financed from the state budget

Any fees or fines collected during the Transition Period shall be made revenue to the state budget

The President shall issue Instructions, Norms and Decisions in an objective, transparent and non-discriminatory manner consistent with Articles 10 and 11

(b) After a period of one year after the effective date of this Ordinance, the superseding provisions set forth in Article 25(a) shall automatically become null and void, and all superseded provisions in the Ordinance shall automatically take effect

(c) Any Instruction, Norm or Decision issued by the President during the Transition Period shall remain in effect after the Transition Period, except that the Commission may modify, replace or abrogate Instructions or Norms issued by the President Such modifications, replacements or abrogations shall have only prospective application

(d) The office of the President shall automatically be eliminated on the last day of the Transition Period The Prime Minister may appoint the President as a Commissioner if he or she chooses to do so

Article 26 – Repealed Laws

[list]

One Monument Square
Portland Maine
04101-1110

VOICE
207 791 1100

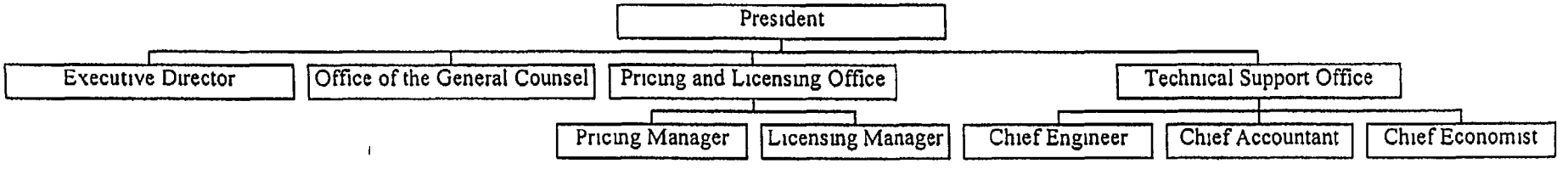
FAX
207 791 1350

E MAIL
info@PierceAtwood com

249

Romanian Energy Agency

Organizational Chart



J Gulliver/C Connors
Pierce Atwood
One Monument Square
Portland ME 04101
(207) 791-1100

DRAFT

July 21, 1998

[Establishes Interim Agency to be Replaced by Body Established by Legislation]

Ordinance to Provide Implementing Structure for the Romanian Energy Agency

Preamble

Pursuant to the authority of Article 114, paragraph 4 of the Romanian Constitution, this ordinance is enacted to create a regulatory agency to oversee the Romanian energy sector

Chapter 1 – Definitions

Article 1 - Definitions

(a) *"Regulated Entity"* means an entity that is engaged in the generation, transportation, distribution or supply of electric or thermal energy, and is subject to regulation by the Agency pursuant to the Energy Law

(b) *"Agency"* means the Romanian Energy Agency

(c) "*Decision*" means a final order of the Commission disposing of a matter of individualized application

(d) "*Norm*" means a standard of generalized application imposed by the Commission by regulation

(e) "*Instruction*," means a rule of general application imposed by the Commission by regulation

(f) "*Ordinance*" means the "Ordinance to Provide Implementing Structure for the Romanian Energy Agency "

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(g) "*Transition Period*" means the period beginning on the effective date of the Ordinance and ending one year thereafter

(h) "*President*" means the executive officer of the Agency during the Transition Period

(i) [add other definitions as appropriate after finalization of the content of the Ordinance, e g , "energy sector," "relative," "significant shareholder," "malfeasance," "rehabilitation and refurbishment" and "self-generation"]

Chapter 2 – Purpose and Competence

Article 2 - Purpose

(a) The purpose of this Ordinance is to create the Romanian Energy Agency and set forth its duties and powers

(b) The Agency is the principal state body having regulatory authority over the energy sector during the Transition Period

(c) The Agency is charged with

  (i) ensuring the safe and secure supply of energy to Romanian customers,

  (ii) promoting the overall public interest in the development and maintenance of economic efficiency in the energy sector,

  (iii) protecting and balancing the rights and obligations of consumers, regulated entities, investors and other persons affected by the energy sector, and

  (iv) assisting the Ministry of Industry and Trade in developing short and long-term policy goals and recommendations with respect to the operation of the energy sector

Article 3 – Creation of the Agency

(a) The Romanian Energy Agency is established as an autonomous administrative authority with legal personality, directly responsible to [the Government? the Parliament?]

(b) The Agency shall exercise its authority over the whole territory of Romania

(c) The seat of the Agency shall be in the Municipality of Bucharesti

Article 4 – Competence of the Agency

(a) As set forth with more particularity in the remaining Articles of this Ordinance, the Agency shall

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(i) grant, modify and enforce licenses for all regulated entities,

(ii) approve tariffs for all regulated entities,

(iii) resolve disputes between consumers and regulated entities,

(iv) issue an annual report to Parliament, and

(v) gather information as requested by the Ministry of Industry and Trade

(b) In furtherance of its duties, the Agency has the power to issue Decisions, Instructions and Norms relating to the subject matter of its competence

Chapter 3 – Eligibility for Agency Leadership or Employment, Dischargeability

Article 5 – Eligibility

(a) Agency officers must be Romanian citizens having their permanent domicile in Romania, they must be at least thirty-five years of age, and they shall have a good reputation and professional training in the energy domain, and a length of service time in their speciality of at least five years

(b) Agency officers shall not

(i) be spouses or relatives of the President of Romania, of chairmen of the Chambers of Parliament, of members of the Government, of any member of any management board of any legal person subject to the Agency's supervision, or of any significant shareholder of such a legal person, and they shall not be related among themselves,

(ii) be members of a political party,

(iii) exercise another remunerated, private or public, office, except that of members of a university teaching staff,

(iv) be members of the management boards of legal persons subject to the supervision of the Agency, or significant shareholders of such legal persons,

(v) have been declared bankrupt, or

(vi) have criminal record

(c) Agency employees must meet the criteria of Article 5(b)(i), (iv) and (vi)

Article 6 - Dischargeability

The President of the Agency shall not be removed from office except on grounds of physical or mental incapacity or malfeasance

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Chapter 4 – Agency Structure

Article 7 - Executive Functions

(a) Prior to commencement of the Transition Period, the Ministry of Industry and Trade shall appoint a President to be approved pursuant to Executive Ordinance The President shall act as the executive officer and oversee the creation and initial operation of the Agency The President shall exercise the executive powers of the Agency throughout the Transition Period

(b) Following the Transition period, the executive functions of the Agency shall be vested in a permanent regulatory body to be created by legislation The office of the President shall automatically be eliminated on the last day of the Transition Period

Article 8 - Functions of President

(a) The Agency shall be organized as set forth in Schedule 1 [chart]

(b) Agency officers shall include the President, the Executive Director, General Counsel, Pricing Manager, Licensing Manager, Chief Engineer, Chief Accountant and Chief Economist

(c) The President shall appoint, prescribe the duties, and fix the salaries of the Agency's personnel during the Transition Period, subject to the approval of the Minister of Industry and Trade

(d) The President may authorize expenditures for salaries, wages, rent, materials, equipment and such other expenses as may in his view be necessary and appropriate in accordance with the Agency budget

Article 9 - Finances of the Agency

(a) During the Transition Period, the Agency shall be funded by appropriations from [general budget? MOIT budget?] The President shall develop a budget establishing the amount of funds necessary to operate the Agency in consultation with the Ministry of Industry and Trade

(b) The Agency may develop and publish a schedule of fees to be applied to applicants, licensees and regulated entities

(c) The schedule of fees may include any combination of

  i annual charges assessed against applicants, licensees or regulated entities as a percentage of gross revenues, or

  ii fees for processing specific applications

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(d) The schedule of fees shall be designed to ensure that revenues collected by the Agency do not exceed the estimated expenses of the Agency to the maximum extent practicable

(e) Any fees collected by the agency shall be revenue to the state budget

Chapter 5 – Procedures

Article 10 – Norms and Instructions

(a) All Norms and Instructions of the Agency shall be determined by the President in consultation with relevant agency officers

(b) Except when the President finds that an emergency situation otherwise requires, before adopting a Norm or Instruction, the President shall publish the Agency's proposed Norm or Instruction in a manner designed to provide notice to all sector participants Interested parties shall be given a reasonable time to comment on the proposed Norm or Instruction

(c) The Agency shall review all comments on a proposed Norm or Instruction filed in writing with the Agency before the comment deadline, before the President adopts the Norm or Instruction as final and effective Contemporaneously with the adoption of a Norm or Instruction, the President shall issue a justification for the Norm or Instruction, identifying and justifying any modifications in the Norm or Instruction from when presented in its proposed state, and explaining why any suggestions offered in any comments were or were not accepted The adopted Norm or Instruction and its justification shall be published in the Official Gazette of Romania

(d) Norms and Instructions adopted by the Agency may be challenged by interested parties for unlawfullness by appeal in the courts of appeal The Agency shall have an active processual legitimation and may intervene in any lawsuit with regard to the Norms adopted, without obligation to prove an interest

Article 11 -Decisions

(a) All Decisions of the Agency shall be determined by the President in consultation with relevant Agency officers The President may delegate, through an Instruction, some of his or her powers or responsibilities to an agency officer

(b) All applicants shall have notice and a right to be heard by the Agency prior to issuance of a Decision affecting their rights The Agency shall issue Instructions setting forth how notice shall be given and how opportunity to be heard shall be provided

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(c) Decisions of the Agency shall be in writing and shall include an explanation of the reasoning upon which the decision is based Decisions shall be published in the Official Gazette of Romania

(d) Any applicant or other person aggrieved by a Decision issued by the Agency may initiate a proceeding for review of such Decision in the courts of appeal The Agency shall have an active processual legitimation and may intervene in any lawsuit with regard to Decisions, without obligation to prove an interest

Chapter 6 - Pricing

Article 12 - Tariffs

(a) Entities engaged in the generation, transportation or distribution of electric or thermal energy shall prepare and file tariffs and supporting information with the Agency showing all rates, charges, terms and conditions of service applicable to each class of consumers

(b) The Agency shall determine the lawfulness of proposed tariffs consistent with the requirements of Romanian law The Agency may accept, reject, suspend, modify, or take any other action that is necessary or appropriate to ensure that proposed tariffs are consistent with applicable law

(c) An entity engaged in the generation, transportation or distribution of electric or thermal energy may not alter its filed tariffs without first obtaining the prior approval of the Agency

(d) The Agency shall issue Instructions specifying the procedures and criteria to be used for the submission and review of tariffs The criteria for reviewing the reasonableness of tariffs may include consideration of the value of market-based and incentive-based pricing mechanisms When the Agency determines that market-based or incentive-based pricing mechanisms are not appropriate, tariffs must be cost-based, including a reasonable return on investment, including profit

Chapter 7 – Licensing

[NOTE the criteria for issuing a license should be included here, if the draft energy law has not yet been adopted]

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Article 13 - Licensing of Existing Entities

(a) Existing entities engaged in the generation, transportation or distribution of electric or thermal energy shall submit an application for licensure to the Agency

(b) An application must include all information required by, and shall be in the form prescribed by, the Agency The Agency shall issue Instructions specifying the form and content of information that is required to be submitted no later than [90 days] after the effective date of the Ordinance

(c) Applications by existing entities must be filed no later than [90 days] after the issuance of the regulations specified in subpart (b) of this section

(e) Within 45 days of the filing of an application, the Agency shall determine whether the application is complete and conforms with the Instructions specified in subpart (b) of this section If the Agency determines that an application is deficient, the Agency shall promptly notify the applicant in writing and shall provide the applicant up to [60 days] to remedy the specified deficiencies

(f) After the Agency has determined that an applicant has filed a complete and conforming application, the Agency shall review the application to determine whether it is consistent with the applicable requirements of Romanian law The Agency may then accept, reject, suspend, modify or take any other action that is necessary or appropriate to ensure that a license is consistent with applicable law The Agency must act on an application no later than [90 days] after the date the Agency finds an application complete and conforming

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(a) Any entity that proposes to engage in

i the construction or commercial operation of new facilities to be used for the generation, transportation, distribution or supply of electric or thermal energy, or

ii the rehabilitation or refurbishment of existing facilities used for the generation, transportation or distribution of electric or thermal energy,

shall submit an application for licensure to the Agency

(b) An application for licensure under this section must include all information required by, and shall be in the form prescribed by, the Agency The Agency shall issue Instructions specifying the form and content of information that is required to be submitted no later than [90 days] after the effective date of the Ordinance

(c) Within 45 days of the filing of an application, the Agency shall determine whether the application is complete and conforms with the Instructions

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specified in subpart (b) of this section If the Agency determines that an application is deficient, the Agency shall promptly notify the applicant in writing and shall provide the applicant up to [60 days] to remedy the specified deficiencies

(d) After the Agency has determined that an applicant has filed a complete and conforming application, the Agency shall review the application to determine whether it is consistent with the applicable requirements of Romanian law The Agency may then accept, reject, suspend, modify or take any other action that is necessary or appropriate to ensure that a license is consistent with applicable law The Agency must act on an application no later than [90] days after the date the Agency finds an application complete and conforming

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(a) A license issued by the Agency may not be transferred without the prior approval of the Agency

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The Agency may issue Norms providing for exemptions from the licensing requirements of this section for self-generators or small producers

Chapter 8 – Enforcement

Article 17 – the Power to Monitor and Enforce

The Agency shall have the power to monitor compliance and to enforce its Norms, Instructions, Decisions and license terms

Article 18 – Inspections, Audits and Information-Gathering

(a) In fulfillment of its monitoring and enforcement responsibilities, the Agency may require a regulated entity to provide the Agency with whatever information the Agency requires, pursuant to Norms the Agency shall publish on appropriate information-gathering procedures Agency Norms on information-gathering shall include protection of trade secrets and other confidential information

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(b) In fulfillment of its monitoring and enforcement responsibilities, with or without notice, the Agency and its staff shall be allowed to enter and inspect the premises of regulated entities whenever the Agency desires, and shall be permitted to inspect or audit the books of regulated entities whenever it desires, pursuant to Norms the Agency shall publish on appropriate inspection and audit procedures

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(a) In fulfillment of its monitoring and enforcement responsibilities, the Agency may initiate an investigation on its own or on the application of a third party to determine whether the holder of a license has violated the terms of a license or Norm or Instruction

(b) Upon the completion of an investigation, the Agency may take such action as is necessary or appropriate, including the suspension, revocation or modification of a license, or the imposition of civil penalties

(c) The Agency may not suspend or revoke a license unless it finds that there have been repeated violations of applicable license terms, regulations or law or that suspension or revocation is necessary to avoid an imminent danger to public health or safety

(d) The Agency shall adopt Norms setting forth a schedule of potential civil penalties and the conduct ordinarily subject to such penalties The schedule shall include a maximum civil penalty which the Agency cannot exceed

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Article 20 – Creation of a Supply Complaint Process

The Agency shall issue Instructions requiring all disputes between ultimate consumers and their suppliers to be reviewed in the first instance by the suppliers through a framework approved by the Agency

Article 21 – Agency Resolution

If a dispute between an ultimate consumer and a supplier cannot be resolved in a matter acceptable to the parties using the framework specified in Article 20, the Agency may initiate an investigation of the dispute and issue a decision resolving the dispute Aggrieved parties may appeal the Agency Decision resolving a dispute in the courts of appeals

Chapter 10 - Annual Report and Information Gathering

Article 22 – Annual Report

By April 1 of the year after his or her appointment, the President shall submit to Parliament an annual report of the Agency's activities during the previous calendar year

Article 23 – Information Gathering

The Agency shall assist the Ministry of Industry and Trade in formulating national energy policy by gathering and compiling information and making recommendations regarding the operation of the electric and thermal energy sectors as requested by the Ministry of Industry and Trade

Chapter 11 – Effective Date, After the Transition Period, Repeal of Conflicting Law

Article 24 – Effective Date

This Ordinance shall come into effect on the date the Ordinance is published in the Official Gazette of Romania

Article 25 – After the Transition Period

(a) Any Instruction, Norm or Decision issued by the President during the Transition Period shall remain in effect after the Transition Period, except that the regulatory body created through legislation to replace the Agency may modify, replace or abrogate Instructions or Norms issued by the President Such modifications, replacements or abrogations shall have only prospective application

(b) The office of the President shall automatically be eliminated on the last day of the Transition Period

Article 26 – Repealed Laws

[list]

J Gulliver/C Connors
Pierce Atwood
One Monument Square
Portland ME USA 04101
(207) 791-1100
jgulliver@PierceAtwood com
cconnors@PierceAtwood com
July 21 1998

EXPLANATORY NOTES TO DRAFT ORDINANCES ON CREATION OF A ROMANIAN ENERGY COMMISSION/AGENCY

Attached hereto are three documents

- A draft ordinance creating a Romanian Energy Commission,
- A draft ordinance creating a Romanian Energy Agency, and
- A description of job functions within the Commission/Agency

Attached to the first two documents is an organizational chart for the Commission/Agency

1 The draft ordinance creating a Romanian Energy Commission

This is the preferred draft After a one-year transition period during which one President manages the regulatory body and the body is financed from the general state budget, the President is replaced with a three-person Commission, and the body becomes self-financing

This organizational structure – a Commission instead of a one-person Director or President model -- is preferred for two reasons

- it fosters objectivity, transparency and non-discrimination – the three keys to meeting the EU Directive on liberalization of the electricity market, and
- it spreads the work across multiple persons, making the job more manageable

Commission structures are used in the United States and multiple NIS countries (e g Armenia) It is also used to manage the Romanian securities markets

2 The draft ordinance creating a Romanian Energy Agency

The second draft focuses only on the first-year, Transition Period, with a President and financing from the state budget The draft leaves the characteristics of the body into which the Agency transitions to be set forth in legislation

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If the Government of Romania prefers a permanent one-person Director or President structure, then the first draft, creating a Commission, can be easily amended to meet that structural requirement More crucial than whether one or three people head the body are the other aspects of the permanent structure of the regulatory body included in the first draft

- The President/Commissioners should have a fixed term(s), and only be removable for serious misconduct or incapacity, and
- The body should be self-financing

These are the most important characteristics of an independent regulatory body

3 Sources for the draft Ordinances

Both drafts are based primarily on the English model, with some modifications based on (a) Romanian law, (b) the U S model (FERC and state regulatory bodies), (c) the Polish Energy Law, and (d) lessons learned in other countries (e g , Hungary)

a **The British Model** Many of the provisions of the draft, such as basic due process rights (the right to notice and the opportunity to be heard), and the inability to discharge the head of the body absent malfeasance, are taken from the Electricity Act of 1989

b **Romanian law** Provisions going to the qualifications of the President/Commissioners/Agency officers and other aspects of the drafts (e g , the power to issue Decisions, Instructions and Norms) are derived primarily from the Romanian Law on securities and stock exchanges, Law No 52/July 7, 1994

c **U S , Polish and other law** Modifications to the British Model not directly derived from Romanian law are taken from lessons learned in England and Wales and elsewhere Most importantly, under the British law, licenses are granted by the Secretary of State, not the Director General of the regulatory body (The Director General amends the licenses) The Secretary of State overall has more control - <u>in theory</u>—under the British model than ministry officials have under the Romanian securities law, any U S model, and the Polish Energy Law

This change putting more power in the hands of the head of the regulatory body consistent with the U S , Polish and Romanian securities model – is crucial to the success of the energy sector in Romania In England and Wales, the British Model could succeed despite the abstract power of the Secretary of State to intervene and control events, because of the long history of rule of law, transparency and delegation in that nation While the Secretary could in theory intervene in practice, the Director General remains in primary control of the regulatory oversight of the sector

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In contrast, in countries without this long, unwritten history and practice of due process and delegation to the regulator, it is imperative that primary control by the regulator be squarely written into the law itself Potential investors require an independent regulatory body before investing large amounts of capital into a re-structured energy market in countries without a history of successful regulatory oversight and investment

Thus, for example, in Poland, the President of the regulatory body (the URE) issues licenses In Hungary, the structure is the same – the head of HEO issues licenses The general consensus is that issuance of licenses, along with other important aspects of regulatory control should remain in the hands of the regulator

Finally, it should be noted that these drafts focus on the organization and operation of the regulatory body, and not the substantive criteria it applies to, e g grant licenses or approve tariffs It is anticipated that such criteria will be developed through a draft energy law, secondary legislation and/or instructions and norms In order to allow the regulatory body to function, however, a bare minimum of substantive criteria, consistent with the criteria developed in draft Romanian legislation to date, has been included in the drafts If it is not anticipated that an energy law will be adopted in Romania soon, it may make sense to expand these aspects of the draft ordinance

CREATING THE LEGAL BASIS FOR THE RESTRUCTURED ROMANIAN POWER SECTOR

Power Options Study -- US AID/Bechtel International, Inc. Team

Bucharest, Romania

March, 1996

JOHN W. GULLIVER
CATHERINE R. CONNORS
Pierce, Atwood
One Monument Square
Portland, Maine 04101 USA
Tel: 01-207-773-6411
Fax: 01-207-773-3419

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Gahan Wilson

I. LEGAL FRAMEWORK IS TOOL TO IMPLEMENT POLICIES OF GOVERNMENT OF ROMANIA

- POLICY CHOICES DRIVE LAW, NOT VICE VERSA
- GOR POLICY GOALS FOR ELECTRIC SECTOR
  - > Increase Efficiency
  - > Reduce Costs
  - > Meet Demand

I. LEGAL FRAMEWORK IS TOOL TO IMPLEMENT POLICIES OF GOVERNMENT OF ROMANIA (cont'd)

- Minimize Adverse Environmental Impact
- Encourage Private Investment
- Encourage Competition Where Appropriate
- Facilitate Entry Into European Union

II. CORE LEGAL AREAS COMMON TO ANY MODEL

- ENABLING (OR PRIMARY) LEGISLATION -- (WHO DOES WHAT)
  - > Defines General Parameters, Establishes Overall Authority
- REGULATORY AUTHORITY AND PROCESS (HOW IS IT DONE)
  - > Follows Substantive Criteria; Functions in Open, Predictable, Reviewable Manner

II. CORE LEGAL AREAS COMMON TO ANY MODEL (cont'd)

- COMMERCIAL STRUCTURE -- (HOW PRIVATE PARTIES PARTICIPATE)
  - > Facilitates Commercial And Investment Expectations
- ANTI-MONOPOLY -- (HOW TO KEEP A COMPETITIVE MARKET COMPETITIVE)
  - > Prevents Anti-Competitive Behavior in Markets

III. PRIMARY GOALS OF LEGAL SYSTEM FOR ANY MODEL

- CLARITY
  - > Standards are Specific and Understandable
- TRANSPARENCY
  - > Open Process, Participants Can Be Heard
- PREDICTABILITY
  - > Outcomes Generally Consistent

III. PRIMARY GOALS OF LEGAL SYSTEM FOR ANY MODEL (cont'd)

- REVIEWABILITY

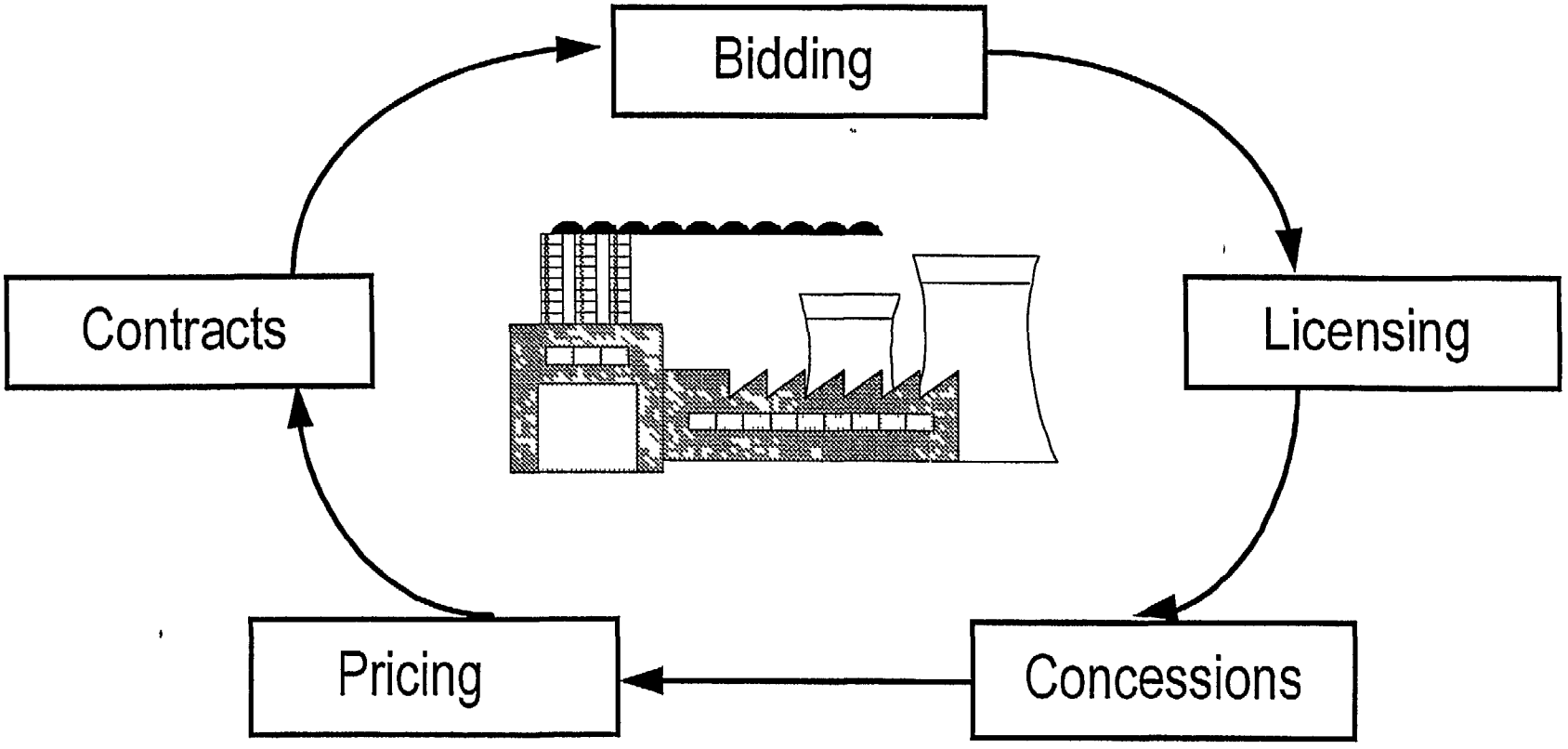
  > Decisions Reviewable By Courts, Against Established Criteria

  ALL OF THESE GOALS PROMOTE EQUALITY

  > Investors (Equity, Lender) and Other Participants Expect Equal Treatment Under Legal System

IV. KEY AREAS OF REGULATORY CONCERN COMMON TO OPTIONS 2, 3 AND 4

OPTIONS CONTEMPLATING PRIVATE INVESTORS REQUIRE STANDARDS FOR INTERRELATED AREAS



V. LEGAL ISSUES UNDER STATUS QUO

Goals \ Laws	Enabling Legislation	Regulatory Authority	Commercial	Antitrust
Clarity	●	◒	●	⊗
Transparency	⊗	●	⊗	⊗
Predictability	◒	◒	◒	⊗
Reviewability	●	●	○	⊗

○ = Generally Satisfactory

◒ = Some Issues

● = Substantial Issues

⊗ = Not Applicable

V. LEGAL ISSUES UNDER STATUS QUO -- EXAMPLES

- CURRENT LAWS REGARDING RENEL AND ELECTRIC SECTOR UNCLEAR IN CERTAIN KEY RESPECTS
  - > Role of IPPs
  - > Self-Generators Departing System
- PRICE SETTING
  - > Rates Negotiated, No Public Participation
  - > Appeal/Reviewability

V. LEGAL ISSUES UNDER STATUS QUO -- EXAMPLES (cont'd)

- PROPERTY OWNERSHIP UNDER COMMERCIAL LAWS
  - > Foreign Ownership of Real Property
  - > Patrimony Issue

VI. LEGISLATIVE REQUIREMENTS UNDER OPTION 1 -- VERTICALLY INTEGRATED MONOPOLY

- STATUS QUO ISSUES AS IDENTIFIED IN TABLE 1
- ADDITIONAL LEGAL ISSUES
  - > Licensing and Concession Regime For New Capacity
  - > No Requirement For Reasoned, Written Orders by Regulators (MOI and MOF)
- POSSIBLE COMMERCIAL REFORMS

VII. LEGISLATIVE REQUIREMENTS UNDER OPTION 2 -- SINGLE BUYER

PRINCIPAL DIFFERENCES FOR OPTION 2

- ENABLING LEGISLATION TO CREATE SINGLE BUYER
- REGULATORY STRUCTURE THAT FACILITATES SINGLE BUYER MODEL, EQUALITY OF TREATMENT FOR MULTIPLE GENERATORS

VIII. LEGISLATIVE REQUIREMENTS UNDER OPTION 3 -- OPEN ACCESS

PRINCIPAL DIFFERENCES FOR OPTION 3

- ENABLING LEGISLATION
  - > No Single Buyer
  - > Direct Sales
  - > RENEL Obligation to Wheel

VIII. LEGISLATIVE REQUIREMENTS UNDER OPTION 3 -- OPEN ACCESS (cont'd)

- REGULATORY FRAMEWORK
  - > RENEL Transmission Issues
  - > "Cherry-Picking" by IPPs of Large Retail Customers

IX. LEGISLATIVE REQUIREMENTS UNDER OPTION 4 -- COMPETITIVE MARKET

PRINCIPAL DIFFERENCES FOR OPTION 4

- ENABLING LAWS MORE COMPLEX, REQUIRE DISAGGREGATION OF RENEL
  - > New Companies, Valuation, Management, Ownership
- REGULATORY AUTHORITY
  - > Regulate Natural Monopoly Functions
  - > Regulate Power Pool

IX. LEGISLATIVE REQUIREMENTS UNDER OPTION 4 -- COMPETITIVE MARKET (cont'd)

- ANTITRUST CONCERNS
  - > Need To Preserve Competitive Market
  - > Level Playing Field for All Entrants

X. DRAFT ELECTRICITY LAW

- DRAFT ELECTRICITY LAW WILL REQUIRE FUNDAMENTAL CHANGES, REGARDLESS OF OPTION SELECTED
- DRAFT IS A POSITIVE STEP

X. DRAFT ELECTRICITY LAW

Goals \ Laws	Enabling Legislation	Regulatory Authority	Commercial	Antitrust
Clarity	◒	◒	⊗	⊗
Transparency	⊗	◒	⊗	⊗
Predictability	◒	◒	⊗	⊗
Reviewability	●	◒	⊗	⊗

○ = Generally Satisfactory

◒ = Some Issues

● = Substantial Issues

⊗ = Not Applicable

X. DRAFT ELECTRICITY LAW -- EXAMPLES

- GOAL OF LAW TO PROMOTE COMPETITION
  - > But When Single Company Generates, Transmits and Distributes -- Potential Market Constraint and Monopoly Status
- LAW CONTEMPLATES IPP PARTICIPATION
  - > But Does Not Impose On Single Buyer Duty To Purchase

X. DRAFT ELECTRICITY LAW -- EXAMPLES (cont'd)

- LAW CONTEMPLATES CONCESSION ARRANGEMENT
  - > But Does Not Indicate Scope Of Concession, Basis for Awards

XI. CONCLUSIONS

- LEGAL FRAMEWORK FOLLOWS POLICY CHOICES
  - > Write Laws Around Option Selected
  - > Don't Select Option on Basis of Existing Laws
- WHATEVER MODEL ULTIMATELY SELECTED, LAWS SHOULD PROVIDE CLARITY, TRANSPARENCY, PREDICTABILITY AND REVIEWABILITY

XII. ON LAWYERS

- LAWYERS WILL ALWAYS FIND SOMETHING TO ARGUE ABOUT, HOWEVER SIMPLE THE MODEL AND CLEAR THE LAW

  > Shakespeare: "The first thing we do, let's kill all the lawyers" -- Henry IV, Part II

UTILITY REGULATION SYMPOSIUM
FOR ROMANIA

April 28-30, 1998
Bucharest, Romania

Impact of Regulatory Reform and Industry Restructuring on the Electric Utility Industry in the U S

Catherine R Connors
Pierce Atwood
One Monument Square
Portland, ME 04101
(207) 791-1389
cconnors@PierceAtwood com

THE HISTORY OF REGULATORY REFORM IN THE UNITED STATES

- 1978 - PURPA

(Public Utility Regulatory Policies Act of 1978, Pub L No 95-617, 92 Stat 3117)

  - Creates QFs
  - Forces utilities to buy from QFs

- 1992 – EPA

(Energy Policy Act of 1992, P L 102-486, 106 Stat 2776 (1992)

  - Creates EWGs
  - Opens up wholesale transmission access

THE HISTORY OF REGULATORY REFORM
Part 2

1996 – FERC Order 888

  - Expands on and implements wholesale transmission access
  - Allows recovery of stranded costs

1998 – California, Maine etc
(West's Ann Cal Pub Util Code §§ 9600 et seq , 35-A M R S A §§3201-17)

  - Requires monopolies to divest
  - Creates state retail transmission access
  - Creates or sustains a pool, ISO
  - Usually allows recovery of stranded costs

THE RESULTS OF LEGISLATED REFORM

- The old vertically integrated monopoly is broken up

- Sometimes the old monopoly can generate, sometimes it can only distribute/transmit

- Customers can choose their generation supplier

  - Transmission, distribution remain monopolies
  - The state creates a back-up "standard offer"

WHY REFORM HAPPENED

- PURPA-EPA

  - the oil embargo
  - desire to encourage renewable energy

- OPEN ACCESS, DIVESTITURE

  - high prices
  - excess capacity
  - new gas plants and technology
  - the historical costs of big plants in $ and time

THE IMPACT OF REGULATORY REFORM

IMMEDIATE

- Prices lowered

  - To convince the public that competition is beneficial

- National power marketers gain importance

  - Enron v the old state monopoly

- The FPL sale in Maine
- Globalization and mergers

THE IMPACT OF REGULATORY REFORM
LONG-TERM

TOO SOON TO TELL, BUT

- POTENTIAL WINNERS?
  - Power Marketers
  - Big Customers
    - Knowledge = power
    - Aggregators for the smaller customers?
    - Many smaller consumers may choose the standard offer

THE IMPACT OF REGULATORY REFORM
LONG-TERM
Part 2

- POTENTIAL LOSERS?
  - Environmentalists
    - The death of DSM?
    - Will consumers choose "Green" power?
  - Integrated Resource Planning
  - Rural/low-income/expensive-to-serve customers

IMPACTS OF REGULATORY REFORM
OPEN QUESTIONS

- What will happen to capacity?
  - UK – worth little, NEPOOL – thinks more important
- Will trading be through the pool or bilateral?
- What happens when excess capacity goes away?

IMPACTS OF REGULATORY REFORM
OPEN QUESTIONS
Part 2

- How big will the savings be due to competition really?
  - Current discounts fueled by securitization
  - But results from telephone and airline deregulation show real savings
  - The non-financial value of consumer choice
- What happens to the worker?
  - Conventional wisdom – many workers lose their jobs, as utilities drive toward efficiency
  - Experience – workers choose buy-outs, can have a smoother than predicted transition (*e g*, Hungary)

LESSONS LEARNED

- Don't create stranded costs
  - Currently @ a $202 billion problem in the U S

- Don't create monopoly expectations, then switch to competition

- Avoid re-aggregation, excessive market power for new as well as old entities
  - Lesson from the UK - break up generation into many entities

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MEMORANDUM

TO Howard Menaker

CC Gordon Weynand, Jacquie De Rosa

FROM Catherine Connors

DATE· September 3, 1997

SUBJ Romanian Trip Report - August 1997

This memorandum summarizes my activities in Romania during my visit of August 25 through August 27, 1997

I arrived in Romania the afternoon of August 25, 1997 Upon my arrival, I telephoned Peter Hindley to find out what meetings had been scheduled for the week to discuss the white paper on sector restructuring and the draft implementing law Peter indicated that, in meetings he had with RENEL on Monday, it had become evident that there were some complications in finalizing the white paper and obtaining approval of the draft electricity law In particular, the Prime Minister had held a meeting the week before in which the trade union had voiced objections to restructuring, and it was unclear whether those objections were going to create obstacles to the contemplated schedule for achieving the re-structuring objective Peter also informed me that the MOIT had drafted its own energy law, and that a Mr Liciu of the Ministry, who was on the Committee to draft the law, had voiced to RENEL his impression that USAID assistance to date had focused only on RENEL and that insufficient consultation had taken place with the Ministry

On Tuesday, Peter and I met with Jean Constaninescu, the coordinator at RENEL on the white paper committee He confirmed that Mr Liciu, whom he described as a "very difficult" man, had voiced his unhappiness at the perception that USAID/Bechtel had been communicating only with RENEL I told Mr Constaninescu that we would be more than happy to speak to anyone at the Ministry, that we were talking to the people who had voiced an inclination to see us in the first place, and that we wanted to talk to anyone in the government, RENEL or anywhere else involved in the restructuring process Peter had asked Mr Constaninescu to try to set up a meeting for us with Mr Liciu this week Mr Constaninescu said that he had contacted Liciu's office, who had informed him that he could meet with us no earlier than Friday, and that Friday was not a given

Mr Constaninescu also gave us a copy of the draft law prepared by the Ministry (in Romanian) and briefly reviewed its contents with us, opining that it appeared that the law was generally consistent with the white paper and RENEL's position

I asked who else we needed or should talk to with respect to the draft law, aside from Mr Liciu He indicated that the only relevant person, focusing on the draft law, would be Mr Nicolescu, the attorney at RENEL who was on the Committee with the Ministry to draft the law Mr Nicolescu, unfortunately, however, was on vacation, and therefore we could not meet with him

Constaninescu and Peter then discussed the white paper Peter has had ongoing meetings with the RENEL Board of Directors (meaning senior people within RENEL) on the white paper, and those meetings continued this week Many questions have been raised and suggestions made for adding and clarifying the white paper These comments seem to have two goals First, there

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is a category of people, most importantly Dr Lecka, at RENEL, who generally want restructuring to go forward and are making suggestions to improve the possibilities of the white paper being accepted within the government Second, there is another faction within RENEL which does not really want change It cannot take this position publicly, however, because it knows that Dr Lecka wants change Therefore, it is trying to raise questions and suggestions in an effort to try to slow down or defeat the process (After I left Romania, RENEL accelerated the process for transmitting its restructuring proposal to the Government, probably in an effort to have that proposal in front of the Government before the trade unions could obstruct progress with objections or alternate proposals It is my understanding that a RENEL proposal has been transmitted, with many but not all the suggestions offered by USAID and Bechtel)

Constaninescu emphasized that Mr Liciu is a difficult man to get along with, and that it was very important that Liciu, the Ministry and Government in general understand that USAID wants to work with the Ministry to achieve restructuring He said it was very important for USAID to establish governmental contacts and develop support within the government for the restructuring contemplated in the white paper

He also indicated that it was unclear whether the Ministry was going to support the restructuring contemplated in the white paper after the meeting with the Prime Minister and the trade unions last week On the one hand, Constaninescu described the Ministry's draft law as basically supporting RENEL's position On the other hand, Liciu has taken this general position towards USAID and Bechtel, and the Prime Minister suggested in the meeting last week that a new commission be set up, including the trade unions, for the purpose of arriving at a restructuring proposal upon which all can agree (This would be impossible, the trade unions

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will not willingly participate in any significant restructuring) Constantinescu was unaware of any action taken after the meeting with the Prime Minister last week actually to set up such a commission RENEL has continued to take the tactic of working on its white paper, and agitating with the government for support of the white paper and a draft law that implements the changes proposed in the white paper

After the meeting with Constantinescu, Peter stayed at RENEL to attend another Board of Director meeting discussing the white paper, and restructuring strategies, while I went to the office of our local counsel, Despina Fruth Oprisan, to deliver a copy of the draft law Constantinescu emphasized in our meeting that this draft is only a first draft internal document from the Ministry that will be subject to much revision I asked Ms Fruth Oprisan to have the draft law translated as soon as possible, and to meet with me later in that day to discuss very generally an overview of the contents of the draft law and the steps we should take to follow up In the meeting with Constantinescu, I suggested that it would be helpful if we could have the local counsel attend any meeting with Mr Liciu on Friday He said he did not know whether that would be possible, and would check

After conversations with Howard Menaker and John Gulliver over the telephone after my meeting with the local counsel, we agreed that it made sense for me to come back from Romania, given that Mr Nicolescu was unavailable, the meeting with Liciu was tentative, and no other meetings had been scheduled If a meeting with Liciu did take place Friday, Peter Hindley and local counsel could attend

Tuesday afternoon I returned to local counsel's office She had only had an opportunity to review the draft MOIT law very briefly While the draft seems to accept competition on the

generation level, and sets up a regulatory body, the draft appears to fall short in important ways I discussed these issues with local counsel, and arranged for follow-up She will have the law translated as soon as possible and, in the meantime, prepare a list of questions regarding the meaning of the law and identify the areas in which the draft MOIT law differs from our draft law and the white paper

Tuesday evening, and again at breakfast Wednesday morning, Peter Hindley and I discussed the follow up he would pursue while he remained in Romania regarding the draft law He will chase Constaninescu to try to go forward with the meeting with Liciu on Friday, and if not Friday, as soon as possible He will also attempt to set up a meeting next week with local counsel, himself and Nicolescu, if he has returned from holiday, and any other relevant RENEL personnel Peter will also try to set up follow up meetings for the week of September 8th when we plan to return to Romania

Since this trip to Romania, Peter has been unsuccessful in setting up any meetings with Nicolescu or Liciu Since RENEL has transmitted its proposal to the Government, Peter will return from Romania tomorrow

MEMORANDUM

TO: H Menaker, cc J DeRosa, Gordon Weynand, Roberto Figueredo

FROM: C R Connors

RE: Trip Report for Trip to Bucharest, December 3-6, 1997

DATE: December 11, 1997

The following summarizes activities undertaken while I was in Bucharest the first week of December, 1997

I arrived in Bucharest the afternoon of December 4, 1997 I then spoke to Jean Constantinescu at RENEL to confirm meeting with him on the draft energy decree the next day I also spoke to Despina Fruth Oprisan, our local legal counsel, to insure that she could participate in the meetings with RENEL on the decree She was in the throes of finalizing a privitization deal, and therefore, had a colleague from her office, Dracut Dimitriu, participate

I met with Dracut Dimitriu for about an hour and a half Friday morning going over the draft decree, and the legal issues surrounding the decree We then met with Jean Constantinescu, Gabriel Poenaru and Gheorghe Indre of RENEL to share our recommendations and comments on the draft decree I have met with Mr Indre, a senior engineer at RENEL, multiple times since USAID's efforts began in Romania on the energy sector in 1995, so he was familiar to me I had not met Dr Poenaru before He is a senior advisor to the strategy and reform committee at RENEL, and, it is my understanding, that he has both an economic and juridical background

We began our meeting, which lasted about 4 ½ hours, by briefly overviewing the status of the Ministry's position on reform, given the changes in the government that took place on December 2 The bottom line is that RENEL had not yet been able to obtain a reading from the new Minister, formerly the Minister of Finance, to see if he supports the effort to reform the sector and enact the energy law and/or decree as soon as possible RENEL had tried to approach the Minister, but had not yet obtained a response I was also told that the Parliament had made clear that restructuring of RENEL would have to occur through a law, not through a decree, and that currently being discussed was the issue whether the re-structuring of RENEL should occur in the same draft energy law as was currently circulating, requiring amendments, or whether this restructuring of the utility should take place in a separate document

In sum, no advancement was taking place of either the law or the decree at the time of my visit, because no one knew what position the Ministry would take I was told by our local counsel that her contacts in the Ministry indicate that stiff opposition to our efforts remains in the Ministry, and that her Ministry contacts (who support our efforts) also did not yet know what the Minister's position would be

In light of the uncertainty of the situation, Mr Constantinescu and I agreed that the best we could do at this point would be to work on the decree to make it as good as we could, while RENEL tried to find out if the Ministry would support the ongoing efforts to enact a decree We therefore spent the bulk of our meeting going over the decree and discussing our recommendations to improve it

At the end of the meeting, I told Constantinescu that I would give him a letter summarizing all our recommendations We also agreed that our local legal counsel

would provide assistance to RENEL on the legal question whether the new regulatory agency, CORE, could set tariffs itself, or whether the Office of Competition would have to be the final determiner of this issue We had a long discussion about our strong recommendation that the current draft of the decree be changed so that the government would not set the tariffs, as the current draft provided RENEL agreed that it was appropriate to change this provision, taking the power out of the Ministries The remaining question is whether CORE can set the tariffs itself, or whether the Office of Competition must set prices pursuant to existing law In any event, whether or not CORE itself sets the tariffs, or CORE consults with the Office of Competition, who sets the tariffs, either approach would be an improvement over the Ministries' involvement

I asked Constantinescu whether there was anything else he wanted or needed from us at this time, reiterating USAID's desire to provide whatever assistance it could to help RENEL in its efforts to reform the sector Constantinescu indicated that nothing more was wanted from us at this time, given the current state of flux

After the meeting with RENEL, I met with Bill Quinn of the local Bechtel office briefly, in order to obtain press materials on the recent Ministry changes I also discussed the content and follow-up for the RENEL meeting with Despina Fruth Oprisan, and, separately, with Roberto Figueredo of the local USAID Mission I returned from Romania early Saturday morning, December 6, 1997

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PIERCE ATWOOD
ATTORNEYS

One Monument Square
Portland Maine
04101-1110

MEMORANDUM

TO: H Menaker

FROM: C Connors

RE: Bechtel-Romania trip report

DATE: June 8, 1998

The following summarizes events taking place during the trip to Romania from May 31 - June 6, 1998

May 31- June 1

We arrived in Bucharest on Sunday, May 31 Howard Menaker, John Gulliver, Robert Borgstrom, Robert Hinckle and I discussed the current status of communications with the Ministry of Industry and Trade, RENEL, the local USAID mission, and what we hoped to accomplish during our week's stay

The next morning, Robert Borgstrom, Robert Hinckle, John Gulliver and Howard Menaker met with Roberto Figueredo of the local USAID mission to learn of latest developments in Romania and collectively determine our goals

After that meeting, Howard Menaker, John Gulliver, Roberto Figueredo and I met with Gabriel Barbu at the Ministry's office He is the Director for Programs with International Organizations at the Ministry Mr Barbu welcomed our acceptance of the State Secretary's request to provide assistance, and explained that they needed help in developing a regulatory body and secondary legislation He gave us a room in the Ministry to do our work, and offered the help of Adrian Radu of his office for support

Mr Barbu explained that the draft law was in an advanced state, that he would give us a copy of the law, and that we should focus on regulation He explained that the Minister was committed to re-structuring the sector and creating a regulatory body, and needed swift advice He noted that the European Union had stationed a permanent advisor on energy in the Ministry, and that we could talk to him

Mr Barbu said that unfortunately a counterpart taskforce had not yet been set up He said that he and Mr Figueredo would speak to Nicolae Liciu to try to obtain an understanding on this point, Mr Barbu did not want to bother the Minsiter directly all the time They would try to involve RENEL, although he indicated that Mr Liciu might have objections

Ian Brown, the EU Phare advisor then arrived Mr Liciu arrived shortly thereafter

Mr Liciu said that the minister, in the presence of Dr Leca, discussed the issue of a regulatory body and agreed that if a delay occurred in passing the law, the Minister was prepared to represent that body According to Mr Liciu, Dr Leca wrote a letter to the Minister proposing two kinds of regulations (1) regulations under the Ministry proposed by RENEL, going to technical issues, such as a grid code, and (2) the "most important" regulation to assure an equilbirum between customers and supply Mr Licui stated that particularly this category of regulation must be the Ministry, and not RENEL's responsibility He stated that he "insisted" that the Ministry control this latter category of regulations

Mr Liciu stated that the RENEL board was meeting at that very moment to discuss the restructuring plan He stated that the Minister wanted restructuring to occur

through a law, to give it the highest legal authority, if such a law was not passed this term, then an ordinance would be used Mr Barbu indicated that the situation could always change, and that they would keep us informed

Mr Liciu said that the regulator will be autonomous, but within the Ministry in the beginning to build expertise as an interim step for three to four months He stated that the Minister had asked him for proposals, and that he had prepared a report

We indicated our desire that a task force be created as soon as possible Mr Figueredo explained that we had to work with RENEL and not proceed on two tracks He stated that we agreed that coordination should occur through the ministry, and asked Mr Liciu how we specifically could help

Mr Liciu answered that this was a complicated issues, and that the Ministry itself was restructuring He said that the Secretary and Ministry would know the answer better than he He said that a small team could be used in the beginning to work on the second category of legislation, and that Dr Leca could be asked to recommend people to work with the team and perhap begin on technical regulations

Mr Menaker suggested that the team include Ministry personnel from the energy department and a lawyer, to beging drafting regulations describing the customer-supplier relationship

Mr Liciu stated that in the past, they had three governmental decrees approving regulations for supply and use of energy, heat and natural gas Now, they thought it would be better to have framework contracts between suppliers and customers He said that "we" agreed to this point of view only if RENEL provided a contract approved by customer organizations He said he hoped RENEL and Romgaz could obtain such

contracts If they had good contracts, the the regulatory body would only need to resolve pre-contract disputes – after entry of contracts, disputes would be left to the courts He then said that we could discuss other types of secondary legislation, such as PPAs, and that there was much work to do

John Gulliver indicated our desire to work with the counterpart team that day and through the week to prioritize, assign tasks, identify a return date and prepare a detialed plan Mr Liciu said he was available as a counterpart Mr Figueredo agreed that we wanted to establish interactive assigned tasks, so that drafts could be prepared and discussed when the U S team returned

After Mr Barbu indicated that this discussion could not take place Wednesday, because the EU was coming, we agreed to meet on Thursday morning In the meantime, Mr Figeuredo asked that the counterpart team be created Mr Liciu said that he would need to discuss this with his State Secretary and present his point of view Mr Barbu asked that we prepare a tentative schedule on both regulatory body and secondary legislation issues, and what we needed from them Mr Menaker repeated that we wanted to leave at the end of the week with assignments, because we understand that we need to act quickly We wanted more than just a schedule

Mr Barbu then noted that the Ministry was understaffed had had no lawyers, nor did RENEL – otherwise they could do this work themselves Mr Gulliver said that we needed to know who could help us and to schedule a meeting with them as soon as possible We agreed that Mr Gulliver and I would meet with Mr Liciu the next morning

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Later that day we very briefly, we met with Ian Brown He indicated that his mission was essentially the same as ours – to assist in the creation and development of a regulatory body and assist in various necessary steps for commercialization and privatization He also, upon our request, provided us with a copy of what he identified as the latest draft of the Energy law

John Gulliver and I then met with Despina Fruth Oprisan about the meeting and contract issues She explained that Mr Liciu was the problem, she described the Minister, Berceanu, as tough and dangerous She indicated that Mrs Rodica Dimitriu – who is apparently the only lawyer in the Ministry for legislative matters – was involved with preparing the RENEL restructuring plan, that it was not a great plan, and that Mrs Dimitriu said she would give us a copy when other Ministries had approved it, if appropriate When we showed Mrs Oprisan our copy of the law she was surprised, saying she thought heat had been removed She said she would call Mrs Dimitriu to find out more

We then discussed some existing laws that we would need to prepare our work, such as any laws on resolution of disputes Mrs Oprisan stated that the relevant law was Law 29/90, which, among other things, set up a special court, of which Mrs Oprisan was the first president

John Gulliver and I reviewed the law and prepared for additional meetings the next day

<u>June 2</u>

John Gulliver and I met with Mr Liciu in the morning He brought with him Felicia Racasanu, who works on legislation and regulation (but was apparently not

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involved in drafting the energy law) and a Mrs Mikhaila, who works in the nuclear area Ms Racasanu left shortly after the beginning of our discussions

Mr Liciu said that the counterpart team was not yet complete He said he had discussed the issue with Mrs Dimitriu, but she did not decide to have someone here for the meeting He said that we could speak to Mrs Dimitriu directly

Mr Liciu then said that the Minister had decided on the restructuring program, which was also approved by the RENEL board He outlined the program, saying now it was looking more like the restructuring would occur by decree The plan involves splitting of 5 commercial society institutes, e g , the center for nuclear objectives, creating a national electric company, a national society for nuclear energy, and a regie autonome for heavy water Within the National Electric Company would be three societies with separate legal personalities for distribution, hydro and thermal Distribution would have 42 subsidiaries but without separate legal personality, the hydro would have 10 such subsidiaries, and the thermal also had subsidiaries He said that already existing in the sector were some IPPs and more were coming Self-generators would also sell excess power to the National Electric Company

The RENEL split, Mr Liciu said, would e done by July 31st, with some aspects delayed, such as the splitting of debts and patrimony (Later, Mr Brown told us that the split would in fact take two years – only the split on paper would occur by July 31)

Mr Liciu said that we should concentrate on the commercial relationships in The sector He said that he believed that third party access would be introduced in the beginning only for domestic producers As to privatization, any sale of the stock to be created in the split-up RENEL commercial societies was 2-3 years away

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He said that they needed a grid code, a commercial code for contracts, purchase and sale of electricity, a methodology from transmission fees, IPP regulation, including framework PPAs and a framework gas acquisition document, and other regulations, with the priority objective of EU integration

In the second phase, he said, they will need to decide who will be eligible customers and a timetable and how to set up an electricity exchange He said that he was sceptical that all EU Directive requirements could be met immediately, and that ministers from other countries had told him not to hurry

He also indicated that they needed tariff policy rules, and that the new regulatory body would be in charge of approving tariffs

After providing this explanation of priorities, he said that he had not discussed them with RENEL, but believed that RENEL was 90% in agreement with them He repeated that RENEL could participate in the technical aspects, but that commercial issues, such as IPP framework contracts and the equilibrium between suppliers and customers, had to be discussed with the Ministry, because they represented the customers

Mr Gulliver asked how Mr Liciu envisioned working with RENEL Mr Liciu responded that he would discuss that issue with the State Secretary and Minister, he had not had the opportunity to discuss the issue with the Secretary that day

Mr Liciu then saw that we had a copy of the draft Energy law He became very angry, asking where we got it We replied EU Phare He then launched into a diatribe about past relational difficulties and ordered us to get our documents from him only in

the future We were to go to Mr Radu only for "logistical" help, which apparently did not mean obtaining copies of documents

After calming down somewhat, he stated that the Ministry would be in charge of the regulatory body in the beginning and that they would need provisional advice in that area Later, they would need regulations when the body was separated, along with training

John Gulliver and I then met with Ian Brown for about an hour We warned him how incensed Mr Liciu had become when we told him we obtained a copy of the law from Phare He said that he should have explained that the law was confidential – apparently Mr Barbu had given it to him Mr Brown explained that Mr Liciu's power was being eroded – he had been passed over for director general in the energy field – and he is angry Mr Brown said that the draft he gave us is the latest one, and has been sitting in the ministry for about two months, after receiving comments from other ministers

Mr Brown explained that his charge from the EU was to do the same things we are We said that we wanted to keep our communications open with the Phare program and cooperate One difficulty he said he had was the fact that, under Phare rules, they have to decide what they are doing three years in advance, at which point some projects become obsolete He said that much technical work had taken place with RENEL – a least cost development study that was probably obsolete, ongoing tariff and cost studies, and rehabilitation studies He said that Mr Liciu, not the Ministry, would not let RENEL participate in the work we (and Phare) were going to help with – although RENEL was capable of participating

Mr Barbu then told us that we could meet with Mrs Dimitriu after noon the next day We told him about the draft law issue with Mr Liciu, Mr Barbu told us to forget the incident

After this meeting, we (John Gulliver and I) and Robert Figueredo met Howard Menaker, Robert Borgstrom and Robert Hinckle, who had met with RENEL that morning We described our meetings to each other, and discussed how to deal with Mr Liciu We explained that RENEL had to participate, and that we all needed to be candid that we were working with each other Mr Figueredo said that we were dealing with the Minster, the Secretary of State and Dr Leca We agreed that we would prepare a list of what we thought were the priority tasks, with a calendar, and a list of materials we needed Mr Figuerdo would take the last document and get us the materials we needed He said the priorities with the Ministry were the regulatory body and IPP framework We should keep trying to work with Liciu and if and when that doesn't work, he will go to the Secretary of State He asked us also to prepare a list of assignments from them, answers to questions we needed, to put a time deadline on them

June 3

We (John Gulliver, Howard Menaker and I) spent the morning drafting our (1) proposed outline of tasks and calendar, (2) questions we need answered and (3) materials we need

In the afternoon we (John Gulliver and I) met with Mr Liciu again He explained that he and Mr Barbu would be in Brussels next week, explaining to the EU where Romania was in meeting EU requirements, and going thorugh an acquis screening He said that the ministers do not understand how complicated everything is, and that they

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believe foreigners more than ministry people – so we should tell them that it's not so easy He said he needs more staff, help and lawyers He explained how he always wanted to be a lawyer but was not allowed

Mr Liciu repeated that he wanted the first, compulsory steps

We then met with Mrs Dimitriu for about 15 minutes She said she was happy we were working with them and would cooperate She confirmed that she was the only lawyer in leglisation and was extremely busy

That evening, we (John Gulliver, Howard Menaker and I) met with Roberto Figueredo to go over the draft task list, questions and materials needed

June 4

In the morning, Howard Menaker, Roberto Figueredo and I met with Messrs Barbu, Liciu and Radu We gave them our proposed tasks and calendar (attached hereto), and our list of questions we need answered

Mr Barbu gave the task list to Mr Radu to start the translation, said he would consult with the Secretary and get back to us He noted that he and Liciu would be gone the next week Mr Figueredo explained that it was our understanding from the Minister, Secretary and Ambassador that time was of the essence Mr Barbu said he would try to talk to the Secretary that night

Mr Liciu looked at the list and repeated that he wanted first steps We discussed how to get legal help We noted that Ms Dimitriu was willing to cooperate, but was very busy We knew RENEL had lawyers, and asked if they could help Mr Liciu said we should sub-contract a private lawyer We said that we could and wold do that, running

our choice by Mrs Dimitriu Mr Figueredo reiterated that the task force needed to be created with RENEL participation as soon as possible

In the afternoon Howard Menaker and I met briefly with Mrs Dimitriu who said that Despina Fruth Oprisan would be a good choice of a private lawyer to work with As we talked with her, a demonstration of RENEL workers protesting the restructuring plan marched down a nearby street

June 5

I met with Mr Figueredo, who indicated that he had traded calls with Mr Barbu, but had been unable to connect Through Mr Steculescu's office, he was told that he would receive feedback at the end of next week

I spoke with Despina Fruth Oprisan, left her copies of our task list, document list and immediate legal questions She agreed to review these materials over the weekend and talk to me on Monday as to proceeding in answering the legal questions we have

Finally, I met with Robert Hinkle and got up to speed on developments in Brasov, his plans, and how we should coordinate efforts going forward

Conclusions

It appears

- Mr Barbu is willing to cooperate and set up a task force with RENEL participants to provide swift assistance on how to set up the regulator and secondary legislation,
- Mr Liciu does not want to set up a task force with RENEL participants, wants to keep RENEL out of any planning and leave to them technical a grid code issues, and probably does not have any staff people to participate on a task force, and
- Mrs Dimitriu is willing to cooperate but will be too busy to provide significant work herself

Given this situation, we understand

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- We will have Mrs Fruth Oprisan work on answering our the legal questions as soon as possible,

- Mr Figueredo will give us the documents we need as soon as he can,

- We will start working on the priority topics on our proposed task outline,

- Mr Figueredo will continue to press Mr Barbu and the Secretary, about setting up a taskforce with RENEL participation and obtaining feedback on our tasklist and calendar,

- We should communicate to Mr Liciu and Mrs Dimitriu any additional questions or materials we need via e-mail and fax as soon as they arise, and

- We should return to Romania soon to discuss drafts of the work we have prepared in conjunction with Mrs Fruth Oprisan (*e g*, the last week in June)

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PIERCE ATWOOD

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MEMORANDUM

TO: H Menaker

FROM: C Connors

RE: Romanian Trip report

DATE: July 30, 1998

The following summarizes events on my trip to Romania, 7/19-23, 1998

I Monday, July 20

I arrived in Romania on Sunday afternoon, July 19 On Monday, I met with Robert Hinckle, of Bechtel, who summarized what had been going on as to re-structuring, the Brasov project, and the general situation in Romania

I also met with Alinu Vencu, an attorney from our local legal advisor's office, about draft ordinances we had prepared to give to the Ministry to set up an interim regulatory body until the energy law was enacted After reviewing the Romanian law creating its securities commission, I revised our draft ordinances to comport more closely with Romanian legal principles

II Tuesday, July 21

On Tuesday, I continued to revise the draft ordinances, incorporating British and Polish law principles, and drafted an explanatory memorandum as to why we drafted the materials as we did After meeting with Roberto Figueredo, Mr Figueredo and I met with Nicolae Liciu and Dan Ionescu of the Ministry We discussed the drafts and other work from the draft outline of task assignments discussed in our last trip to Romania

One Monument Square
Portland Maine 04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

PIERCE ATWOOD
ATTORNEYS

They informed us of the Government of Romania's intent to enact a Ministry Order that they said would create an "independent" agency temporarily, until the energy law was enacted and a truly autonomous agency could be created Under the structure they discussed, the agency would be within the Ministry, and any decision by the agency would have to be approved and issued by the Minister Mr Ionescu said that the EU had agreed to this course of action

We also discussed which items on our draft task list they wanted done first Mr Liciu indicated that contracts between sector participants was the most important item He envisions the Ministry drafting power purchase agreements among the segregated RENEL entities (e g , the nuclear entity and the transmission company) and between non-RENEL generators and the RENEL transmission company

Mr Liciu said he did not want to work on licenses yet, because he wants to wait until a concession law and a property law are enacted We pointed out the license issuance is usually the first task of a regulatory body

We concluded the meeting on Tuesday by asking them to review our draft ordinances, and asking Mr Liciu to prioritize the contracts he wanted to work on

After this meeting, and discussion with Mr Figueredo on follow-up, I met with Gabor Szorenyi, the head of licensing of the Hungarian Energy Office He was in Romania to give a presentation to APER We discussed what he should say in his presentation I stressed communicating the importance of an independent regulatory body

Finally, on Tuesday I met with Bob Hinckle again to discuss the ongoing re-structuring work

One Monument Square
Portland, Maine
04101-1110

VOICE
207 791 1100
FAX
207 791 1350
E MAIL
info@PierceAtwood com

315

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III Wednesday, July 22

On Wednesday I discussed with Alina Vencu how independence of the temporary regulatory body could be maximized legally, without enacting a law

We concluded, based on the Romanian Constitution, that an ordinance could not be used (ordinances need underlying laws to support them, plus, the legislature must be in session when an ordinance is promulgated) Use of a Government Decision (i e , by the whole cabinet), however, might be a mechanism to give the temporary agency more independence The agency would be subordinate to the Ministry, as it would be pursuant to a Ministry Order (there is no way to make the agency autonomous under the Constitution absent a law) But under a Government Decision amending the current Government Decision structuring the Ministry, the agency – which would be a new branch to the Ministry – might be able to have many of the indicia of independence For example, it might be able to issue decisions, such as licenses, directly, without approval of the Minister

Wednesday afternoon I attended the APER conference and a dinner afterwards with Dr Szorenyi and Ian Brown of the EU Mr Liciu and Mr Ionescu attended the conference

Mr Brown agreed that it was important to make the temporary agency as independent as possible He said that he had not agreed to a non-independent agency He agreed that it made sense to use a Governmental Decision to create the agency if that mechanism would make the agency more independent He also indicated that he had told the Government that if Mr Liciu were made head of the agency, the EU would have to revisit funding the agency (the EU has agreed to spend 400,000 ecus paying the salaries

One Monument Square
Portland, Maine 04101-1110
VOICE 207 791 1100
FAX 207 791 1350
E MAIL info@PierceAtwood com

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at RENEL levels, not lower Ministry salaries –, buying equipment and advising on the creation of the agency)

At the APER conference, Mr Ionescu briefly indicated that he had reviewed our draft ordinance, which had useful points, but "was not possible" now

IV Thursday, July 23

Roberto Figueredo, Ian Brown and I met with Dan Ionescu and Nicolae Liciu We went over a few points in our drafts to clarify them for Mr Ionescu I raised the possibility of using an amendment to the Government Decision on Ministry structure to increase agency independence Mr Ionescu agreed that the goal was to make the agency as independent as legally possible We agreed that I would follow up on this issue by discussing with Rodica Dimitriu, the Ministry's attorney, the appropriate mechanism for creating the temporary agency

Mr Liciu, Mr Ionescu and I also discussed follow-up on the contract work and the calendar for returning Mr Liciu said that he wanted to prioritize drafting contracts between the nuclear entity and the transmission company, and the transmission company and outside generators I said we needed to see the documents pursuant to which power sales were going on now – whether orders or contracts I said that, after reviewing these materials, we would then need to talk to the parties I also pointed out that many agencies do not like to involve themselves in drafting or approving PPAs

Mr Liciu said he would prefer having us talk to the parties before giving us any documents I asked for a copy of the draft energy law He said he would give us a copy when it was appropriate to do so I asked when we could meet with the parties After some discussion, Mr Liciu tentatively suggested the second week of August, although he

One Monument Square
Portland Maine
04101-1110
VOICE
207 791 1100
FAX
207 791 1350
E MAIL
info@PierceAtwood com

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noted that the boards were in the process of being chosen for the transmission company, so he was not sure what would happen Finally, I again pointed out the need to work on licenses at some point

After this meeting, I met briefly with Mrs Dimitriu She was meeting with Dr Szorenyi, who was discussing how to set up a working agency I gave Mrs Dimitriu a copy of the Polish Energy Law and our draft ordinances We agreed that Alina Vencu would follow up with her on how to create an independent agency I then left to catch my plane

V. Follow-Up

I have discussed more recent events in a separate memo, describing how Mrs Dimitriu anticipates, after consultation with the Minister, issuing a Ministry Order to create the agency She will have a draft for us to review some time mid-August Apparently, speed and ease of passage are, to the Ministry, the overriding factors favoring use of a Ministry Order A Governmental Order, requiring approval of multiple Ministries, would, in the Ministry's view, be too slow and difficult It is an open question as to whether the Ministry Order will indicate that the agency can issue licenses or take other direct action Even if it does, Ms Vencu indicates that such powers would be of questionable legality

I see follow-up steps as including the following

- As discussed in my separate memo, if we want to object to the use of a Ministry Order and militate for a Government Order, we should do so now, through high USAID officials/the Ambassador, to the Minister/high Romanian government officials In doing so, we should keep lines of communication open with Mrs Dimitriu, and inform her of our actions and preferences

One Monument Square
Portland, Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

PIERCE ATWOOD

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- Ms Vencu will speak to Mrs Dimitriu again early next week At that point, Mrs Dimitriu will have met with the Minister and will be able to confirm what the Minister wants, if he agrees on issuing a Ministry Order, and what the contents of the Order will look like I have told Ms Vencu to ask Mrs Dimitriu when we can get a copy of the draft order

- I will confirm, after these discussions next week, that we are returning mid-August to discuss the Ministry Order with Mrs Dimitriu We will then need to set up concurrent meetings with Mr Liciu, RENEL's transmission company (now CONEL) and other relevant parties to discuss drafting power purchase agreements As soon as I confirm a date for return, I will discuss setting up appropriate meetings with Mr Figueredo, Mr Doernberg, Mr Birnbaum, and/or the appropriate local USAID mission official

- I believe that Ian Brown can be an asset in working to create an independent agency The EBRD/World Bank may also be of use If the conclusion is reached to work for a more independent temporary agency than possible through the contemplated Ministry Order, we should determine how to present a united front on this point

- I also think RENEL wants an independent agency We need to develop a mechanism to coordinate our work with the Ministry and RENEL I know that Roberto Figueredo has given this serious thought over the last few months Mr Liciu is very sensitive on this point – he does not like us working with RENEL It is impossible, however, to carry on work like drafting power purchase agreements, without coordination

- It would be helpful to find out the schedule in appointing the head of the temporary agency Whoever that person is will color our strategy I understand that the leading contenders are Liciu, Gheorge Indre from RENEL and perhaps Barbu from the Ministry We have worked with Indre in the past and he would be a good candidate

One Monument Square
Portland, Maine
04101-1110

VOICE
207 791 1100

FAX
207 791 1350

E MAIL
info@PierceAtwood com

319

PIERCE
ATWOOD
ATTORNEYS

One Monument
Square
Portland Maine
04101 1110

MEMORANDUM

TO: Howard Menaker

FROM: Jim Douglass

RE: Trip Report - Romania

DATE: October 26, 1998

This memorandum reports on my trip to Romania on September 8-14, 1998 The report incorporates updated information obtained over the past month The purpose of the trip was to assist in the development of contracts or other commercial-style arrangements in preparation for the eventual privatization of the electricity sector I also assisted Cathy Connors in efforts to strengthen the proposed regulatory agency Cathy's regulatory support activities are detailed in her separate trip report

Tuesday, September 8

Arrival in Bucharest Meeting among Bob Borgstrom, Cathy Connors and myself to discuss general goals and strategy for the trip

Wednesday, September 9

Generation-Related Companies

Meeting among Wayne Mikutowicz, Cathy Connors, myself and representatives of Termoelectrica, Nuclearelectrica and CONEL Joint Ventures The discussion began with an update on the status of the disaggregation effort The new CONEL holding company structure was officially adopted only days before our arrival The actual mechanical separation had only

just begun, with the appointment of top tier managers at each of the new CONEL subsidiaries All other employees were waiting for their official assignments

After restructuring, the next highest priority is to set up "commercial" arrangements between the new CONEL subsidiaries In anticipation of this task, the distribution company, Electrica, had already sent draft power purchase agreements to each of the generating companies, Termoelectrica, Nuclearelectrica and Hidroelectrica However, the generators acknowledged that there has been no official determination as to whether the single buyer should be Electrica or the system operator/transmission division of CONEL The draft contracts proposed by Electrica are short term, annual contracts They are viewed as transitional agreements that can be changed to reflect future policy changes regarding the structure of the market

There was much discussion of Romania's specific situation The generators noted that Romania's installed generating capacity exceeds demand by a factor of three Accordingly, Termoelectrica has plans to close permanently generating units with a total capacity of roughly 12,000 MW in the next year Existing thermal plants have much lower cost than potential new generating plants built to modern efficiency and environmental standards The generators identified the problem of how to incorporate new, higher cost, but more efficient and environmentally-friendly plants into the existing system A major concern for Termoelectrica is how to preserve a viable role for itself in the future as its older, inefficient units are phased out

We agreed to hold further meetings with each of the groups represented at the meeting in order to discuss each group's thoughts about the commercialization effort in greater detail

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Wednesday, September 9

Ministry of Industry and Trade

Meeting among Andres Doernberg, Cathy Connors, myself, and Mr Barberu, Anca Dobrica and Ian Brown (PHARE) Ms Dobrica confirmed the ministry's desire for assistance with efforts to commercialize CONEL There was general discussion regarding the status of efforts to create an independent regulatory agency In the evening, Cathy Connors and I met with local counsel to prepare comments in support of strengthening the independence of the proposed agency

Thursday, September 10

Meeting among Cathy Connors, myself and Jean Constantinescu We discussed Mr Constantinescu's perspective on the current draft of the ordinance to establish an independent regulatory agency, and the appropriate structure of the electric sector following restructuring Mr Constantinescu favors a system under which generators sell directly to the distribution company, rather than a system where the transmission company is the middleman between the generators and distributors Under his model, the distribution company would arrange for transmission pursuant to regulated tariffs

Thursday, September 10

Termoelectrica/Hidroelectrica

Meeting among Wayne Mikutowicz, Pete Hindley, Bob Hinkle, myself and about a dozen top managers from Termoelectrica and Hidroelectrica These generating companies were focused on several problems facing a commercialized electric sector, including (1) the appropriate method for setting power prices, (2) control of fuel supply arrangements, (3) business separation issues regarding budgeting and accounting, and (4) how to attract foreign

investment We offered to provide assistance on financial models for determining appropriate transfer prices under various circumstances and to provide information on the necessary conditions for attracting foreign investment

Friday, September 11

Electrica

Meeting among Wayne Mikutowicz, Pete Hindley, Bob Hinkle, myself and Razvan Purdila After much effort, we were able to schedule a meeting with a representative of Electrica Unfortunately, Mr Purdila was unable to provide any information on Electrica's efforts to draft power purchase contract, or to identify who at Electrica was involved in these efforts Mr Purdila indicated that he could not provide further information because management responsibilities in the wake of the CONEL restructuring were unclear and new mid-level management for Electrica had not been designated

Monday, September 14

Nuclearelectrica

I met with Teodor Chirica and Mariana Vatamanu of Nuclearelectrica Mr Chirica described a three stage process for establishing the commercial arrangements under which Nuclearelectrica would sell power to Electrica. The three stages are as follows

1 Execute an extremely simple, interim agreement providing for Electrica to purchase all of the output of Cernavoda Unit 1 (in other words, for Nuclearelectrica to continue to supply power to the national grid in the same manner as it has been) Nuclearelectrica would like to execute this agreement in 1-2 weeks

2 Enter into a somewhat more detailed, medium-term agreement under which Electrica would continue to purchase all of the output of Unit 1 until the end of the year Nuclearelectrica would like to execute this agreement before the end of October

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3 Enter into a detailed, long-term agreement under which Electrica would purchase all of the power from Unit 1 for the life of the unit Nuclearelectrica would like to execute this final agreement by the end of the year Nuclearelectrica has already produced an initial draft of this agreement (we have a copy which has been translated into English)

Since the meeting, it has become apparent that CONEL, Electrica and Nuclearelectrica have not been able to agree quickly on a short-term arrangement Accordingly, it appears that the three stage process has been compressed to two (1) a medium-term agreement effective through the spring of 1999, and, (2) a long-term agreement In addition, it now appears that CONEL (the holding/transmission company) may be the power purchaser, rather than Electrica

During our discussion, it was agreed that we could assist the commercialization process by providing advice on the final, long-term power purchase agreement Accordingly, I agreed that we would (1) provide examples of relevant long-term power purchase agreements, and, (2) analyze and provide written comments on the initial draft of Nuclearelectrica's long-term agreement The PPA examples and comments were provided to Nuclearelectrica and Electrica on September 25th

CONEL Joint Ventures Group

Meeting among myself, Bogdan Prunaiche and Ioan Stanescu We discussed the typical conditions for foreign investment, including (1) long-term contracts, (2) sovereign guarantees, (3) commercial structure of the energy sector, and, (4) an appropriate legal and regulatory system In order to facilitate joint ventures with foreign investors, CONEL must overcome the government's reluctance to provide guarantees and the reluctance of the transmission company or Electrica to enter into long-term purchase contracts while the restructuring process remains unsettled

Mr Prunaiche indicated that CONEL would like to develop an IPP-style model PPA in order to facilitate its efforts to create the conditions for foreign investment. I agreed to develop an initial draft of a model PPA that could be used to spur further discussion I also agreed to provide examples of other PPAs The draft model PPA and several other PPA examples were forwarded to Mr Prunaiche on October 7th

Current Status

We have completed the initial tasks of preparing first drafts and comments regarding PPA's with respect to both the commercialization of CONEL and potential foreign investment through joint ventures or otherwise Officials at both CONEL and the Ministry of Industry and Trade have expressed interest in arranging further meetings to discuss the materials we have provided and to identify areas for further assistance

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PIERCE
ATWOOD
ATTORNEYS

One Monument
Square
Portland Maine
04101-1110

MEMORANDUM

TO: Howard Menaker

FROM: Jim Douglass

RE: Trip Report - Romania

DATE: December 12, 1998

This memorandum reports on my trip to Romania on November 16-20, 1998 The purpose of the trip was to follow-up on prior assistance and to bring a smooth conclusion to our current activities The chief topics of discussion during my meetings were regulatory and legal reform in the energy sector and the commercialization of relations between the new CONEL subsidiaries

Monday, November 16, 1998

Meeting with Mr Nicolae Liciu, the Deputy Director General for Energy at the Ministry of Industry and Trade, and Mr Victor Athanasovici, the President-designate of the new regulatory authority – the National Agency for Energy Regulation (ANRE) Mr Athanasovici speaks French well, but his English is limited Mr Liciu translated as necessary

Mr Liciu expressed appreciation for USAID's previous assistance He liked our comments on contractual matters and forwarded the comments to appropriate persons within CONEL Mr Liciu noted the significant work involved in setting up ANRE and expressed interest in receiving additional assistance in the future In this regard, Mr Liciu pointed out that assistance would be particularly helpful in setting up licensing and tariff regimes Now that a regulator has been created, Mr Liciu believes that the focus of assistance should be on helping to

put in place a regulatory regime, and less on helping CONEL prepare for restructuring Mr Liciu noted that CONEL has far greater resources than the ministry or ANRE Messrs Liciu and Athanasovici both expressed interest in any contact or other information that they could use to request further assistance from USAID

Mr Liciu is concerned about the continued political strength and *de facto* monopoly position of CONEL For instance, he noted that CONEL continues to act as a central buyer He also expressed concern that CONEL's generating subsidiaries could use joint ventures as a method of perpetuating their virtual monopoly position Mr Liciu very obviously views ANRE as an ally in future policy disputes with CONEL He says that CONEL is disappointed that one of its own was not appointed to head ANRE

We discussed the status of the draft energy law The current draft of the law has been presented to parliament, but there seems to be little evidence of any movement toward active consideration Mr Liciu now believes that it would have been better to pass a less perfect law earlier, and then to have amended it later to incorporate improvements

While action on the draft energy law is pending, the Ministry is contemplating other actions Mr Liciu is working on standard form or "framework" contracts with customers that he hopes to complete within a matter of weeks Mr Liciu also indicated that the Ministry views the next step in restructuring as a planned emergency ordinance to reduce employees at CONEL, ROMGAS and PETROM through a redundancy program with severance payments

We discussed the creation of ANRE through the mechanism of an emergency ordinance Although the use of emergency ordinances is currently a sensitive political issue, Mr Liciu believes that the ordinance creating ANRE is not particularly controversial In order to remove

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any lingering questions, the parliament has been presented with a law that would approve the ordinance creating ANRE

We discussed plans for the implementation of the emergency ordinance Mr Athanasovici is scheduled to leave his current position as a professor at the Bucharest Polytechnic University and take up his position at the helm of ANRE on December 1, 1998 At this time, Mr Athanasovici is primarily concerned with organizational matters He has drafted a preliminary organizational chart that would create four principal departments within ANRE – advisory, licensing, tariffs and public information The advisory department would include individuals with legal, economics or other technical expertise The tasks of the licensing and tariff departments are obvious The public information department will deal with consumer-related issues Altogether, Mr Athanasovici expects to have a total of 20-25 employees

In the first year of operations, ANRE primarily will focus on creating the procedural and substantive rules for issuing licenses and establishing tariffs After that, the agency will actually turn to implementing the licensing and tariff regimes The emergency ordinance creating ANRE specifies that licensing regulations are to be issued within four months and tariff regulations within one year after the entry into force of the ordinance We have provided Mr Athanasovici with licensing and other regulatory information that has been put together as part of the regional regulatory conference sponsored by USAID

Tuesday, November 17

Meeting with Bogdan Prunaiche Mr Prunaiche is a member of the Fuel Import and Power Project Development group within CONEL We discussed the model power purchase agreement and other sample PPAs that we have provided over the past several months We discussed the general requirements of investors with respect to credit and off-take risks, and how

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those requirements could change in the context of further structural reform within the Romanian energy sector

Mr Prunaiche stated that he expects CONEL's lawyers to provide him with a number of questions regarding certain aspects of the model contract I agreed that we could review and respond to the questions, with the understanding that our review would be limited because there is no funding for further assistance at this time

Wednesday, November 18

I attended the regional distribution company reform seminar in Brasov put together by Robert Borgstrom and Bob Hinkle I delivered a presentation on the status of legal and regulatory reform in the energy sector

Friday, November 20

Meeting with Mariana Vatamanu Ms Vatamanu is a member of the team at Nuclearelectrica that is directly involved in negotiating commercial arrangements, such as the contract for selling power from the Cernavoda nuclear plant to CONEL Nuclearelectrica is currently selling power to CONEL under a short-term agreement that expires in March 1999, but may be extended if no new contract is in place In the meantime, the parties are in the process of negotiating a 5-year fixed price contract As envisioned, the contract would allow for price adjustments for unexpected costs, and could allow Nuclearelectrica to sell to third parties in certain circumstances At this time, it appears that serious negotiations regarding the new contract will not begin until next year

We discussed contract provisions that would allow Nuclearelectrica to terminate for non-payment While commercially reasonable, it is unclear whether Nuclearelectrica could invoke such a provision as a practical matter Nuclearelectrica could theoretically attract other

customers since its production costs are lower than the average system production costs in Romania However, it is unclear whether and under what conditions Nuclearelectrica could transmit power to parties other than CONEL

Ms Vatamanu stated that the contract information we have provided, particularly regarding nuclear power contracts, has been helpful If USAID assistance continues, Nuclearelectrica would welcome further advice and input regarding the drafting of the 5-year power sales contract that will replace the current short-term agreement

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