



Honorable Law Judge of the 13th Judicial Court of Belo Horizonte/MG.

Proc. n° 95.119.796-1.

CENTRAIS ELÉTRICAS BRASILEIRAS S.A. – ELETROBRÁS, a private and public joint stock company organized by Law no. 3.890-A, of April 25, 1961, with head office in Brasília, Federal District, and main office in the City of Rio de Janeiro, at Avenida Presidente Vargas no. 642 – 10<sup>th</sup> floor, enrolled in the General Taxpayer Roll under number 00.001.180/0002-07, in the ORDINARY COLLECTION ACTION filed by ESTATE OF GERSON BARTOLOMEU, in time and by its lawyers signing hereunder, submits its ANSWER in order to require at the end the following:

#### I - PRELIMINARIES

##### 1<sup>st</sup>) THE CONNECTION

Plaintiff has already filed a procedure identical to this one having the same subject and request cause, and distributed to the 11th Federal Court of this City (procedure no. 89.9014-3). The Honorable Federal Judge has not delivered the requested jurisdiction up to date, as evidenced by the attached documents.

Thus, the connection of the reasons being verified, although in different jurisdiction at level, the privileged court principle prevails for the first one. the UNION (ex-vi 109 article, I, of the Federal Constitution) is included on the procedure list of the first action, therefore, this procedure remittance to the Hon. Federal Judge of the 11<sup>th</sup> Court of the Court Section of Minas Gerais is herein requested to Your Honor according to the 103 and 105 articles of the Civil Procedure Law.

##### 2<sup>nd</sup>) THE UNION INTEREST IN THE PROCEEDING

Although Plaintiff has not included the UNION in this demand in the position of the joint defendant, its interest is evident. Than we see:

The Union solidarity on the bearer bond, which further will become stocks originating from the Compulsory Loan, is the result of the very law 4.156 of November 28, 1962 imposition , **in litteris**:

**4<sup>th</sup> Art. ....**

**3<sup>rd</sup> § The Federative State joint liability is ensured by the par value of the securities in any event referred to in this article.**

The Federative State, which has organized the private and public joint stock company, ELETROBRÁS, is subsidiary liable for its obligations according to the 242<sup>nd</sup> article of Law 6.404/76, Corporate Law.

**242<sup>nd</sup> article – The private and public joint stock companies are not subject to bankruptcy although its assets are subject to pledge and execution, and the holding legal entity answers subsidiary by its obligations.**

The Federative State is the majority stockholder of the private and public joint stock company, which ELETROBRÁS integrates the Indirect Administration by the Public Power empowerment as an instrument for the services decentralization.

Therefore, The Federative State answers subsidiary by the assets consequences resulting from the suits against ELETROBRÁS, exactly in view of the provisions mentioned above under 242<sup>nd</sup> article of Law no. 6.404/76.

In view of such reasons and aiming to standardize the decisions that has been pronounced by the Federal Justice regarding the compulsory loan on ELETROBRÁS behalf, **a request is made to establish the term to Plaintiff to proceed with the Federal Union notice to integrate the proceedings under the penalty of the procedure dismissal according to 267<sup>th</sup> article, item IV of CPC.**

**The state of the Federal Union notice being concluded, this complete forum non conveniens is determined by Your Honor and the procedures is remitted to the Federal Justice in that Region according to the law.**

### 3<sup>rd</sup>) THE STATUTE OF LIMITATION

Plaintiff requests the payment of the monetary adjustment assessed on the securities already received in the periods mentioned by the statements at pages 07, 08 and 09.

Therefore, more than 5 (five) years has already elapsed from the first settlement marked by the plaintiff statement up to this suit filing. Such fact inexorably results on the statute of limitation effects, according to the provisions in the 1st article of the Decree no. 20.910 of January 6, 1932, **in litteres**:

**“1<sup>st</sup> Article – The Federal State, States and Cities outstanding debts as well as all and ANY RIGHT OR SUIT AGAINST THE FEDERAL, STATE OR CITY TREASURY IN ANY NATURE WHATSOEVER, ARE SUBJECT TO THE STATUTE OF LIMITATION OF FIVE YEARS FROM THE DATE OF THE ACT OR FACT ORIGINATING THEM.**

(our emphasis).

Thus, the suit right that has not been performed by the concerned party is terminated within the five-years established by LAW, and **concessa maxima venia** the compliance with the principle established in the Latin proverb is imposed which says **DORMIENTIBUS NON SUCCURRIT JUS”**.

## IN THE MERIT

The intention now deducted in Court could not be accepted in view of the Plaintiff's legal nature, that is, the private and public joint stock company, as the corporation that are subordinated to the legitimacy principle provided under 37th article of the Federal Constitution as demonstrated hereunder.

The Federative State created the BEARER BOND (DEBENTURES) by the 4th article of Law no. 4,156 of November 28th, 1962, that is subordinated to the Federal Fund of Electrification through the contributions paid by electric power consumers together with their supply bills. Such event is discerned indistinctly on the procedures.

Such issuance was subscribed compulsorily by consumers and managed by ELETROBRÁS in view of the above-mentioned law, which 4th article we transcribe hereunder:

Law no. 4.156 of November 28<sup>th</sup>, 1962:

**4<sup>th</sup> Article: During 5 (five) years from 1964 on, the electric power consumer will take the ELETROBRÁS bonds which are redeemable in 10 (ten) years at 12% (twelve percent) interests per year, corresponding to 15% (fifteen percent) on the first year and 20% (twenty percent) on the others on their bills amount.**

Such Bearer Bond (DEBENTURES) are defined by CARVALHO DE MENDONÇA as follows:

**“Debentures are bonds issued by corporations representing the loan contracted by them; each bond gives identical rights against the company to the holders of the same series”. (Carvalho de Mendonça apud Fran Martins – Comentário à Lei das Sociedades Anônimas, Editora Forense, 3<sup>a</sup> ed., pág. 311).**

The bearer bonds (debêntures) were subordinated them to the provisions of the **Decree no. 177-A of September 15, 1893**, which governed the issue up to the institution of Law 6404/76 (Corporate Law) which provided in its 1<sup>st</sup> Article:

Decree 177-A, of September 15<sup>th</sup>, 1893

**1<sup>st</sup> Article – The companies or corporation shall issue loans on Bearer Bond (debentures), according to this law provision. (our emphasis)**

In respect to the purposes of issuing such security, FRAN MARTINS lectures:

**“several times some money is required by the company to comply with commitments or mainly develop its activities, though it is not willing or could not use its own means to obtain such resources, that is, recapitalization or bank loans. Therefore such long term loan modality is used by reimbursing the amounts lent to it slowly as well as causing no great problems to the issuer company.” (in Fran Martins – Comentários à Lei das Sociedades Anônimas, Editora Forense, 3<sup>a</sup> ed., pág. 311).**

THERE COULD BE NO DOUBT, IN VIEW OF ALL EXPLAINED HEREIN, THAT THE SECURITIES ISSUED BY ELETROBRÁS ACCORDING TO THE 4<sup>TH</sup> ARTICLE OF LAW NO. 4.156, OF NOVEMBER 28, 1962 ARE DEBENTURES.

In summary, we could assure in respect to the securities issued by ELETROBRÁS herein discussed the following:

a – **they were so named** as the **Decree no. 177-A, of September 15<sup>th</sup>, 1893**, governing the issue gives BEARER BOND and DEBENTURE as synonym;

b – **the Bearer Bond legal nature created by 4th Article of Law no. 4.156 of November 28th, 1962 is DEBENTURE**, as they are securities granting the credit right to their bearers which originate from long term loans contracted; and

c – **the subsequent law, mainly the Law 6.404/76 (Corporation Law) has not changed the legal nature** and maintains the characteristic of the security originated from the loan, as provided by 52nd article, **in verbis**:

**52<sup>nd</sup> article: The company shall issue debentures granting the credit right to the bearers against it upon the conditions contained in the issuance deed and certificate.**

Such Bearer Bond, debentures, originated from the Public Law agreement (long-term loan on ELETROBRÁS behalf), which contains exorbitant clauses. Such clauses give the supremacy to such party (the compulsory loan was instituted to its benefits) thus the plaintiff credit becomes a special credit governed by the Public Law.

The exorbitant clause, on HELY LOPES MEIRELES saying, are those “exceeding the Common Law to consign an advantage or restriction to the management or contracted. The exorbitant clause would not be lawful in a private agreement as it would render the parties unequal on the covenant execution, although it is completely valid on the administrative agreement, provided derived from law and the principles governing the administrative activity, as it intends to establish a prerogative favoring one party for the perfect regard of the public interest which always surpasses the private interests. Therefore, such clauses presence in the administrative agreement is exorbitant which transmit the "la marque du droit public" as French call it, as observed by Launbadère: Cést en effet la prèsence de telles clauses dans un contrat que est le critère par excellence de son caractère administartif" (Hely Lopes Meirelles - Direito Administrativo Brasileiro - 11ª ed. atualizada [updated edition] – pág. 197).

In such ideas order, attention should be drawn to the 64th article of such Law 6.404/76 which set forth the formal requirements of the debenture certificate, among their items is not listed that the debenture could not result from the public agreement.

Well, where the law does not differentiate the interpreter is not allowed to differentiate. This rule is acclaimed in the hermeneutics of the legal norms.

**In respect to the procedures, the private interest could not surpass the collective interest in no event. The essential purpose of the Bearer Bond (debenture) issuance, and subsequently the stocks issuance resulting from the compulsory loan instituted on ELETROBRÁS behalf, was urgent public investments for the national energetic power, sufficient reason to apply the rule contained in the 5<sup>th</sup> article of the Law of the Civil Code Introduction.**

#### THE ELETROBRÁS BEARER BOND (DEBENTURE) ADJUSTMENT

There is no legal provision ensuring the Plaintiff intension regarding the securities adjustment. On the contrary, the existing law supports ELETROBRÁS, on the adjustment of the inquired bonds.

The adjustments of the ELETROBRÁS Bearer Bond will comply with the rule provided under 3<sup>rd</sup> Article of Law 4.357 of July 16<sup>th</sup>, 1964, according to the provisions of the 4<sup>th</sup> article of Law 4.156 of November 28<sup>th</sup>, 1962 subsequently amended by Law 5.073 of August 18<sup>th</sup>, 1966.

The mentioned laws are transcribed hereunder for better understanding of the explanations.

Law no. 4.156 of November 28<sup>th</sup>, 1962:

**4<sup>th</sup> article. During 5 (five) years from 1964 on, the electric power consumer will take the ELETROBRÁS bonds which are redeemable in 10 (ten) years at 12% (twelve percent) interests per year, corresponding to 15% (fifteen percent) on the first year and 20% (twenty percent) on the others on their bills amounts.**

Law no. 5.073 of 08.18.66 (which amended the former Law)

**2<sup>nd</sup> article - .....**

**1<sup>st</sup> § - From January 1, 1967, the liabilities to be taken by electric power consumers will be redeemable in 20 (twenty) years, assessing 6% (six percent) interests per year, on the updated nominal amount by the time of the respective payment, as provided under 3<sup>rd</sup> article of Law 4.357 of 07.16.64, applying the same rule at the redemption time to determine the respective amount.” (Our emphasis).**

It shall be pointed out that the redemption referred in the articles transcribed above does not occur necessarily in 20 (twenty) years, it could have a shorter term.

Then, it was set forth by Law that such bonds UPDATED AMOUNT will comply with the provisions under 3<sup>rd</sup> Article of Law 4.357/64, **in verbis**:

- LAW NO. 4.357 OF 07.16.04

**3<sup>rd</sup> article. “The monetary adjustment of the original amount of the corporation fixed assets is mandatory from the date this law is published, as foreseen by 57<sup>th</sup> article of the Law no. 3,470 of November 28<sup>th</sup>, 1958, according to the coefficient**

**annually determined by the National Council of Economy in order to translate the variation on the national currency acquisition power between the months of December of the last year and the annual average of each former years. (our emphasis).**

**18§ - The rules set forth under the paragraphs of the 57<sup>th</sup> article of Law no. 3,470 of November 28<sup>th</sup>, 1958 are applied to the monetary adjustments referred by this article except the provisions in its §§ 11, 12, 14 and 17.**

As it could be seen, the basic criteria for the ELETROBRÁS Bearer Bond adjustments is identical to that used for the adjustment of the original amount of the corporations fixed assets, that is, 3<sup>rd</sup> Article of Law. 4.357/64.

It shall be said that Law no. 3.470/58, although allowing the fixed assets adjustment, foresees the norms still in force, and perfectly applicable on the subsequent law in respect to the form, suppositions and conditions of the inquired bonds adjustments, as defined in the 1<sup>st</sup> § of the 57<sup>th</sup> article on the assessment of the bi-annual adjustment. THEREFORE, DECEMBER 31 IS THE BASE DATE TO VERIFY THE VARIATION OF THE ACQUISITION POWER INHERENT TO THE MONETARY ADJUSTMENT OF ELETROBRÁS BONDS.

Thus, ELETROBRÁS complied with the above mentioned law 4.357/64 as a corporation by applying the monetary adjustment of its fixed assets and changing the biannual criteria to annual, however, it maintained the variation of the acquisitive power of the national currency between December of the last year and the annual average of each former years, according to the provisions under 57<sup>th</sup> article of Law 3.470/58 (example, vi article 3<sup>rd</sup> and its 18§ of Law 4.357/64).

Consequently, such bonds issuance is not only based on ELETROBRÁS financial and accounting statements prepared on the accounting principles designed for the trade company but also on the norms applicable to the publicly-held company.

The verification of the company's status regarding its assets, including on the raised funds title (through the debenture loan) is updated on the verification of the balance sheet, and Plaintiff should not say that the "12 months from the redeemed bonds" were not counted, **as they were issued from the amount already adjusted.**

ELETROBRÁS, a private and public joint stock company, as a corporation, integrating the Public Administration (37<sup>th</sup> article F.C.) through its representatives complied with the laws governing the bonds adjustments belonging to the Plaintiff, at the redemption act. That is so, that Plaintiff requires no settlement of such obligations whatsoever but only causes the jurisdiction relief to request the supposed adjustment it alleges due.

Therefore, Defendant observed one of the basic principles of the Public Administration, that is, the legality principle. All administrative acts will be guided by it as the support of the public activity.

The teaching of the eminent HELY LOPES MEIRELLES shall be remembered on the theme:

**“Legality – the legality as the administration principle (FC, 37<sup>th</sup> article, heading), means the public administrator is subject to the law rules on all its functional activity as well as the requirements of the common asset, and could not be away or deviated from it under the penalty of practicing a null act and to be exposed to the disciplinary, civil and criminal liability, as applicable.” (in Hely Lopes Meirelles – DIREITO ADMINISTRATIVO, 19<sup>a</sup> edição [edition], pag. 82 and subsequent).**

ELETROBRÁS in the position of the indirect administration entity composing the Federal Public Administration shall comply with the application of such plans, which are part of the country economic policy thus fulfilling the Federal Government determinations in respect to the 37<sup>th</sup> article of the Federal Constitution.

At last, it is concluded that the legality principle was complied with, whether as the redemption and the adjustment of the inquired securities and Plaintiff could not now intend that other Power judicially established enters on other jurisdiction, by legislating on the issues prohibited by constitutional imposition.

In view of the explanations, Defendant expects the argued preliminaries are accepted; or if Your Honor understands otherwise, it expects this request is deemed groundless with the repercussions deriving therein; and sentencing the Plaintiff to the costs and lawyer's fees on 20% on the amounts assigned to the procedure.

It asseverates for all proofs accepted in Law.

Respectfully submits.

Belo Horizonte, February 15, 1996.

Signed: [illegible signature]  
HENRIQUE LAVOURA CAMPOS  
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