

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

MESA POWER GROUP, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

Witness Statement of Shawn Cronkwright

February 28, 2014

Department of Foreign Affairs,
Trade and Development
Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

I. INTRODUCTION

1. My name is Shawn Cronkwright. I live at [REDACTED] Burlington, Ontario, Canada. I was born on [REDACTED] I am currently the Director for Renewables Procurement at the Ontario Power Authority (“OPA”).

2. I received my B.Sc. Mechanical Engineering degree from Queen’s University in 1999. After graduation, I began my career in the energy industry at Siemens. I moved to the OPA in 2007 as the Manager, Technical Services in the Electricity Resources division. I held that position until November of 2010, when I was promoted to my current position.

3. As Director for Renewables Procurement, I oversee the department in charge of the renewable energy procurement programs at the OPA. As a result, I have a general knowledge of all aspects of the Feed-in Tariff Program (“FIT Program”). Although I was not yet in this position when the FIT Rules were developed, I was personally involved in, amongst other things, the implementation of the FIT Rules, the OPA’s obligations pursuant to various directions issued as a result of the *Green Energy Investment Agreement* (“GEIA”), and the direction of June 3, 2011 regarding the Bruce to Milton transmission line. In my role as Director, I was also involved in communications with FIT applicants, FIT contract holders and other interested parties.

4. I have read the witness statements of Richard Duffy and Jim MacDougall. For the sake of efficiency, I will not discuss the subjects that they have addressed with respect to the design and implementation of the FIT Program. To be clear, I agree completely with the substance of their testimony.

II. THE GREEN ENERGY INVESTMENT AGREEMENT

5. I understand that the GEIA that the Government of Ontario signed with Samsung C&T Corporation and the Korea Electric Power Corporation (the “Korean Consortium”), as well as the consequent power purchase agreements that the OPA entered into with the Korean Consortium, has been raised as an issue in this arbitration. The OPA is not a party to the GEIA. However, I am familiar with the agreement as it was the OPA that was required to enter into the power purchase agreements that would give the Korean Consortium the return for their investment into Ontario of billions of dollars.

6. The GEIA and related power purchase agreements were a separate and distinct procurement process than we were pursuing through the FIT Program. The Minister of Energy directed the OPA to negotiate power purchase agreements under the GEIA that were similar to those under the FIT Program but “with such necessary modifications as are required to reflect the terms of the Agreement.”¹ It is true that both were for the procurement of renewable energy, and both used a power purchase agreement with similar terms, but it was clear that the GEIA and the FIT Program were two separate procurement processes.

7. For example, when we were negotiating power purchase agreements pursuant to the GEIA, we were doing so with a single company which had made a major financial commitment into Ontario in exchange for preferred access and certain additional benefits. Although there was one Supplier contracting entity, both Samsung and Pattern were at the

¹ C-0079, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, CEO, Ontario Power Authority (Apr. 1, 2010). Available at: http://www.powerauthority.on.ca/sites/default/files/page/16598_April_1_2010_-_MEI_Directive_and_DM_re_KC_Apr_1_and_14_10.pdf (“Minister of Energy, April 1 Direction”).

negotiating table. We are often directed by the Ministry to negotiate bilateral contracts with various electricity generators. Such transactions differ from standard offer procurements and request for proposal procurements. As one example, when we were procuring energy pursuant to the FIT Program, we were dealing with generators who had not made financial commitments into Ontario to the degree made under the GEIA.

8. Similarly, the size of the energy generation at issue under the GEIA dwarfed any individual project in the FIT Program. Under the GEIA, the OPA was to procure from the Korean Consortium 2500MW of capacity – 5 phases of 500MW each.² No other FIT project was as large as even just one of the phases contemplated by the GEIA.

9. The phases under the GEIA were cued to the Korean Consortium hitting its investment and manufacturing targets. This was also something quite different from the FIT Program procurements where the generation capacity of the project had nothing to do with the developer meeting obligations unrelated to the energy generation in question.

10. Finally, because of the size and complexity of the GEIA, OPA and the Ministry of Energy each had an implementation team in place.³ The teams would meet at a joint working group to discuss issues related to the GEIA and its implementation. Such an approach was not necessary for FIT projects, particularly as there was no need to monitor and understand whether FIT proponents were meeting investment commitments made to the Government in the same way.

² *Ibid.*

³ *Ibid.*

III. THE JUNE 3, 2011 DIRECTION ON ALLOCATION OF BRUCE TO MILTON CAPACITY

11. As the Director for Renewables Procurement at the OPA in 2011, I was consulted on the development of the Minister of Energy's June 3, 2011 direction with respect to the allocation of the additional capacity that was to become available in the Bruce and West of London areas once the new Bruce to Milton transmission line came into service. In particular, I was in close contact with the Ministry of Energy for the purpose of ensuring that we were properly understanding and implementing their policy goals. To this end, I had regular meetings with Susan Lo to discuss the various steps.

12. The OPA and Hydro One had first developed plans to construct a new 500kV line from the Bruce area to the Milton switching station a number of years before the FIT Program was even announced.⁴ While the line was being built primarily to deal with the additional capacity coming out of the Bruce Nuclear Generating Station, both the OPA and industry knew from the beginning that it would also free up some capacity for renewable energy projects in the area.⁵ In fact, even the rough numbers of capacity that would be available, approximately 1000 MW, were well known from at least near the beginning of the FIT Program.

13. The OPA first heard in September 2009 that the Bruce to Milton transmission line had received the Niagara Escarpment Commission's ("NEC") approval. However, in

⁴ **R-036**, Letter from Jan Carr, CEO, Ontario Power Authority to Laura Formosa, President and CEO (Acting), Hydro One Inc. (Mar. 23, 2007). Available at: http://www.hydroone.com/Projects/BrucetoMilton/Documents/PDFs/OPA_letter_March23_2007.pdf.

⁵ **R-040**, Ontario Energy Board, *Notice Of Amended Application – Leave to Construct a Transmission Reinforcement Project Between the Bruce Power Facility and Milton Switching Station, All in the Province of Ontario (Bruce to Milton Transmission Reinforcement Project)* (Dec. 11, 2007), p. 33. Available at: http://www.hydroone.com/Projects/BrucetoMilton/Documents/Final%20EA/Appendix_E/Appendix_E_Community_and_Stakeholder_Consultation_Part4.pdf.

October that approval was appealed at the NEC, and a difficult and contentious appeal process followed.⁶

14. The approval of the NEC was really the final regulatory hurdle for the completion of the Bruce to Milton transmission line. But it was one that could not be taken for granted. The NEC is a commission established under the auspices of the *Niagara Escarpment Planning and Development Act*, and reports to the Ministry of Natural Resources, and its role is to preserve the Niagara Escarpment as a continuous natural landscape.⁷ It permits appeals of its decisions which result in regulatory hearings with the presentation of evidence and a reasoned recommendation at the end which must be decided upon by the Minister of Natural Resources.⁸

15. At the OPA, we had no desire to move forward with a process for awarding power purchase agreements that would be dependent upon the Bruce to Milton transmission line until we were virtually certain of the timing for completion of the construction of the line. Thus, during the period when the appeal was ongoing, we worked on different options on how any extra capacity available on the Bruce to Milton transmission line should be awarded, but we did not recommend that the allocation proceed at that time. The primary option that we contemplated was awarding the additional capacity pursuant to the first

⁶ **R-105**, Ministry of Natural Resources, Notice of Decision made under the provision of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990 (May 10, 2011). Available at: <http://www.hydroone.com/Projects/BrucetoMilton/Documents/09130d1.pdf> (“Ministry of Natural Resources, Notice of Decision”).

⁷ **R-151**, Niagara Escarpment Commission website excerpt, “Welcome to the Niagara Escarpment Commission”. Available at: <http://www.escarpment.org/home/index.php>.

⁸ **R-150**, Niagara Escarpment Commission website excerpt, “Appeals”. Available at: <http://www.escarpment.org/commission/guidelines/appeals/index.php>.

Economic Connection Test (“ECT”) to be run by the OPA for the entire province.⁹ This would have been a simple way to allow stakeholders to review and change their connection points, opt to be enabler facility requested, or opt out of being one and select a connection point, and consider generator paid upgrades – all of which were standard aspects of the ECT that we had been describing to the public for years.

16. On May 10, 2011, the Minister of Natural Resources finally reached a decision and directed the NEC to issue the development permit to Hydro One.¹⁰ This decision was the motivating factor for finally moving forward with a process to allocate the capacity on the soon-to-be-completed Bruce to Milton transmission line, and within a month from then, we had begun the process for allocating the Bruce to Milton capacity. However, in terms of the FIT Program, the energy policy and Ontario’s energy needs, much had changed in Ontario since 2009.

17. In the end, the June 3rd direction required the OPA to conduct what amounted to a regionalized and modified ECT. In short, the process contained almost all of the same elements as the first stage of a standard ECT would have.¹¹ This was important as the OPA’s constant objective was to make sure that we were being clear to the stakeholders.

⁹ C-0034, Ontario Power Authority Presentation, “The Economic Connection Test Process” (Mar. 23, 2010). Available at: http://fit.powerauthority.on.ca/Storage/10963_ECT_Stakeholder_Presentation_v12_22Mar10_FINAL.pdf

¹⁰ R-105, Ministry of Natural Resources, Notice of Decision.

¹¹ R-011, Letter (Direction) from the Honourable Brad Duguid, Minister of Energy to Colin Andersen, CEO, Ontario Power Authority (Jun. 3, 2011). Available at: http://www.powerauthority.on.ca/sites/default/files/new_files/about_us/pdfs/June%203%2C%202011%20-%20Bruce%20and%20West%20of%20London%20Transmission%20Areas.pdf (“Minister of Energy, June 3 Direction”).

18. As I mentioned above, under the GEIA, the Korean Consortium was entitled to priority connection access for 500MW in each of the five phases of the agreement.¹² In the fall of 2010, the Korean Consortium had indicated that they would be selecting connection points for Phase 2 in the Bruce region. As such, in a September 17, 2010 direction, the Minister of Energy directed the OPA to hold 500MW in reserve for them.¹³

19. However, the Korean Consortium delayed in finalizing their connection points, and eventually in the June 3 direction, the OPA was directed not to wait for them to do so.¹⁴ Ultimately, the Korean Consortium had 500MW of capacity set aside for them in the Bruce Region, but they did not get to exercise priority in terms of selecting their connection points.

20. Partly because of this, I requested that the Minister of Energy make the June 3rd direction as specific as possible with respect to the allocations for each region and the timing. Most of the other directions from the Minister of Energy to the OPA were usually a single page in length and general in scope, while the June 3rd Bruce to Milton direction was a few pages long and much more detailed.

IV. COMMUNICATIONS WITH MESA POWER GROUP AND ITS REPRESENTATIVES

21. On May 20, 2011, ten days after the Ministry of Natural Resources' decision to the NEC cleared the final regulatory hurdle for the Bruce to Milton transmission line, Mesa

¹² C-0079, Minister of Energy, April 1 Direction.

¹³ C-0119, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, CEO, Ontario Power Authority (Sep. 17, 2010). Available at: http://www.powerauthority.on.ca/sites/default/files/page/17131_MEI_Directive_re_KC_Siemens_Sept_17_10.pdf.

¹⁴ R-011, Minister of Energy, June 3 Direction.

Power Group (“Mesa”) sent the OPA a letter requesting clarification of the ranking process, as well as the access rights dates used for its applications for the Arran and TTD projects.¹⁵

22. As Director for Renewables Procurement, I was responsible for responding to the letter and thus I reviewed it, and worked on our response. Contrary to what is said in the Memorial that has been filed in this arbitration¹⁶, Mesa did not request in its letter of May 20, 2011 that the OPA provide it the “supporting calculations” so “that it could itself verify the ranking”.¹⁷ Mesa simply stated that it would “appreciate some confirmation that our understanding of the ranking process is in-line with the actual process employed by the Ontario Power Authority”. After setting out its (erroneous) understanding of the process, Mesa concluded by saying that it would appreciate the OPA’s “feedback as to whether we have interpreted the OPA process correctly”. Nowhere does Mesa allege that the ranking process was unfair or lacked transparency.

23. Mesa’s understanding of the ranking process was not correct, and this concerned me. I therefore decided to make sure they were given as clear and complete an answer as possible in the circumstances.

24. They posed two questions to the OPA in their letter. The first question sought our confirmation of their understanding of the ranking process, while the second sought our confirmation of the access right dates used.

¹⁵ C-0098, Letter from Mark Ward, Mesa, Chuck Edey, Leader Resources and Michael Bernstein, Capstone Infrastructure to Shawn Cronkwright, Ontario Power Authority (May 20, 2011).

¹⁶ Claimant’s Memorial, ¶ 200.

¹⁷ *Ibid.*

25. In my response letter of June 17, 2011, I first addressed Mesa's requested clarifications on the ranking process and, in particular, corrected some of their misunderstandings including with respect to the provincial rankings.¹⁸ I also pointed to the fact that the OPA had retained the services of an Evaluation Monitor to ensure that "the process was conducted consistently and fairly for all applications". I also explained that a review team had been organized, and that when unsatisfactory evidence had been provided by the FIT Applicant, the OPA did not award the criteria point(s) and reduced its COD Acceleration Days, as defined in the FIT Rules, version 1.1 accordingly.

26. I did not discuss the specific reasons for the launch period rankings of Mesa's particular projects. Of course, Mesa had not even asked for this information, but even if they had, I would have had to refuse. The OPA does not often provide the specific results of a procurement evaluation process. We take this approach for two reasons. First, providing individualized feedback is incredibly burdensome for the OPA. It involves a number of OPA employees, as well as a fairness monitor (where one has been appointed), meeting with the proponent for approximately an hour, in addition to the several hours of required prep time. Second, when the OPA gives feedback to a proponent on the score it received, it is essentially providing advice to that proponent on how to better prepare its responses to our procurement programs. That gives that proponent an unfair advantage if an equivalent session is not offered to all unsuccessful proponents.

27. For these reasons, in only a limited number of programs has the OPA ever offered to debrief proponents, and where we have made such offers, we have made them to every

¹⁸ C-0154, Letter from Shawn Cronkright, Ontario Power Authority to Mark Ward, Mesa, Chuck Edey, Leader Resources and Michael Bernstein, Capstone Infrastructure (Jun. 17, 2011).

proponent that participated in the procurement program. This only works where there are a small number of proponents who participated in the procurement process. Due to the high volume of applications to the FIT Program, it was not feasible to envisage this same process for the FIT Program.

28. Finally, I confirmed to Mesa that the date of the first lease was in fact the date used as the “Access Rights Dates” for its projects.

29. I did not receive any written response from Mesa to my letter. On June 17, 2011, Mesa contacted me to obtain a meeting. Mesa then tried to obtain meetings with the Ministry of Energy. I refused to hold such a meeting, as the OPA had not yet awarded FIT contracts for the Bruce to Milton transmission line. I heard nothing further from Mesa until I was made aware that they had brought this arbitration against Canada.

Dated: *February 27, 2014*


Shawn Cronkwright