

**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 Susan Lo

February 28, 2014

Department of Foreign Affairs,
Trade and Development
Trade Law Bureau
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I. INTRODUCTION

1. My name is Susan Lo. I was born [REDACTED] and reside at [REDACTED] [REDACTED] Toronto, Ontario. I have a degree in Geotechnical Engineering from the University of Toronto and I am currently the Assistant Deputy Minister of the Drinking Water Management Division of the Ministry of the Environment.

2. I began my career in the Ontario public service in 1982. Over the last 30 years, I have held various positions, including positions in technical and policy related areas. In October 2008, I was appointed the Assistant Deputy Minister of Road User Safety at the Ministry of Transportation. I held that position until June 2009, when I was appointed the Assistant Deputy Minister of the Renewables and Energy Efficiency Division (“REED”) of the Ministry of Energy.

3. As the Assistant Deputy Minister of REED, I was responsible for providing strategic leadership and advice in the implementation of the *Green Energy and Green Economy Act, 2009* (the “GEGEA”). In May 2010, I also took on the responsibility for providing strategic oversight of the implementation of the *Green Energy Investment Agreement* (the “GEIA”). In addition, I played a key role in developing and communicating the Ministry's *Long-Term Energy Plan, 2010* (the “2010 LTEP”) and was involved in leading an extensive consultation and evaluation process to support the Feed-in Tariff Program Review in 2012.

II. ENACTMENT OF THE GREEN ENERGY AND GREEN ECONOMY ACT, 2009

4. On May 14, 2009, the Government of Ontario enacted the GEGEA.¹ I am familiar with the motivations and rationale for the GEGEA as a result of my close involvement with its implementation as well as my interactions with the senior officials and politicians who were responsible for its development.

5. The GEGEA signalled a fundamental shift in Ontario's approach to energy generation. Prior to the enactment of the GEGEA, Ontario had been struggling for about a decade with an electricity system that had been failing to invest in new forms of generation to meet growing demand.² Moreover, it was a system that was heavily reliant on coal-burning generation plants, which polluted the air and possibly increased the risk of respiratory illness. Studies that the Government of Ontario had done indicated that the potential health and social costs of relying on coal-generated electricity were in the order of billions of dollars annually.³

6. Consequently, in 2006, the Government of Ontario publically reaffirmed its commitment to eliminate coal fired plants by 2014.⁴ At the time, a significant portion of

¹ **R-057**, Green Energy and Green Economy Act, S.O. 2009, c. 12.

² **C-0414**, *Ontario's Long-Term Energy Plan*, Ministry of Energy (Nov. 23, 2010), pp. 2 and 6 ("Ministry of Energy, 2010 LTEP").

³ *Ibid.* **R-028**, Ministry of Energy, "New Study Confirms Benefits of Replacing Coal-Fired Electricity in Ontario" (Apr. 27, 2005), Archived Release. Available at: <http://news.ontario.ca/archive/en/2005/04/27/New-Study-Confirms-Benefits-Of-Replacing-CoalFired-Electricity-In-Ontario.html>; **R-027**, DSS Management Consultants Inc. and RWDI Air Inc., "Cost-Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation", prepared for Ontario Ministry of Energy (Apr. 2005). Available at: http://www.energy.gov.on.ca/docs/en/coal_cost_benefit_analysis_april2005.pdf.

⁴ **R-035**, CBC News, "New date for coal plant closures: 2014" (Nov. 14, 2006). Available at: <http://www.cbc.ca/news/canada/toronto/new-date-for-coal-plant-closures-2014-1.578209>.

Ontario's generation capacity came from coal-fired plants.⁵ As a result, Ontario knew that the move away from coal would require major investments into Ontario's electricity generation capacity.

7. In 2008, the financial crisis occurred, sparking a global recession, with numerous systemic effects in terms of Ontario's planning for its electricity system. The financial crisis resulted in major decreases in investment, particularly in capital intensive developments such as power generation. Not only were investors concerned about the state of the economy and the associated risks of investment, financing from banks was also proving very difficult to obtain as a result of what was generally called the "credit crunch." Second, the global recession was affecting the province's manufacturing sectors, which further risked the loss of thousands of jobs.⁶

8. The confluence of the need for a new approach to energy generation and the need for an economic stimulus that would generate jobs led to the development of new legislation. The GEGEA sought to address a number of policy objectives, including: (i) promoting clean energy to reduce potential health costs and greenhouse gas emissions for the benefit of the environment; (ii) attracting investment and creating manufacturing jobs in renewable energy; and (iii) providing support for aboriginal and rural communities which were being hard hit by the recession. Ontario knew that the development of a renewable energy sector would not only result in environmental and potential health

⁵ **C-0414**, Ministry of Energy, 2010 LTEP, p. 6; **R-029**, Office of the Premier, "McGuinty Government Closes Lakeview Generating Station For Cleaner Air and Better Health", Archived News Release (Apr. 28, 2005). Available at: <http://news.ontario.ca/opo/en/2005/04/mcguinty-government-closes-lakeview-generating-station-for-cleaner-air-and-better-health.html>.

⁶ **R-041**, Canwest News Service, "Ontario now in recession: report", Canada.com (Mar. 25, 2008). Available at: <http://www.canada.com/windsorstar/news/story.html?id=66c28a64-b94e-4aa9-b8af-b352c7ba64a3&k=52712>.

benefits, but would also require major investments in equipment and infrastructure, which in turn, would help to create jobs and investment opportunities in the province.⁷

9. In order to expedite the development of renewable energy and be able to respond to the dynamic nature of a renewable energy sector, the GEGEA provided the Minister of Energy with the authority to issue directions to the OPA with respect to the procurement of renewable energy.⁸

III. DEVELOPMENT OF THE FEED-IN TARIFF PROGRAM

10. On a trip to Europe in 2008, the Minister of Energy for Ontario had witnessed the success of early feed-in tariff programs in Germany, Spain and Denmark.⁹ This sparked an interest in fostering the growth of renewable energy in Ontario through a similar program.¹⁰ For this reason, the GEGEA contained a provision to amend the *Electricity Act, 1998* (the “*Electricity Act*”) to include a new section 25.35 to authorize the Minister of Energy to direct the OPA to develop a Feed-in Tariff Program (the “FIT Program”).

⁷ C-0414, Ministry of Energy, 2010 LTEP, p. 10.

⁸ C-0228, Office of the Auditor General of Ontario, *2011 Annual Report of the Auditor General of Ontario* (2011), pp. 88-89 (“Auditor General of Ontario, 2011 Annual Report”).

⁹ R-049, Legislative Assembly of Ontario, “Committee Transcripts: Standing Committee on Estimates- November 26, 2008 – Ministry of Energy” (Nov. 28, 2008). Available at: http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=2008-11-26&ParlCommID=8857&BillID=&Business=Ministry+of+Energy&DocumentID=23518.

¹⁰ R-048, Tyler Hamilton, “The wind at his back”, *Toronto Star* (Sep. 27, 2008). Available at: http://www.folkecenter.net/mediafiles/folkecenter/awards/Smitherman_The_wind_at_his_back.pdf; R-047, Murray Campbell, “Doug’s take warning: Curious George is keen on green”, *Globe and Mail* (Sep. 25, 2008). Available at: <http://www.theglobeandmail.com/news/national/dougs-take-warning-curious-george-is-keen-on-green/article716206/>.

11. Pursuant to sections 25.32 and 25.35 of the *Electricity Act*, the Minister of Energy directed the OPA to create the FIT Program on September 24, 2009.¹¹ The purpose of the FIT Program was to encourage and promote investment into renewable energy electricity generation projects, including wind, hydro, renewable biomass, bio-gas, landfill gas and solar photovoltaic. The program was to be the first comprehensive program in North America for the procurement of renewable electricity.¹²

12. As I noted above, in order to understand the terms of the FIT Program, one has to understand the context in which it was created – in terms of Ontario’s electricity system, the environment, and the general state of the economy. Ontario was firmly committed to phasing out coal-fired generating plants for environmental reasons and potential health concerns. This meant that new generation facilities would have to be constructed to provide the electricity previously produced by these coal-fired plants, as well as to meet the growing demand caused by Ontario’s growing population.¹³ However, with the global financial crisis and recession, it was difficult to obtain the sort of capital intensive investment needed for the construction of new generating facilities. Accordingly, the government knew that it would have to run a specialised procurement process that offered sufficiently attractive terms to ensure that investors would be willing to take the commercial risks necessary to develop a renewable energy sector that would be sufficiently robust to meet the province’s future needs.

¹¹ **R-001**, Letter (Direction) from the Honourable George Smitherman, Minister of Energy and Infrastructure to Colin Andersen, CEO, Ontario Power Authority (Sep. 24, 2009). Available at: http://www.powerauthority.on.ca/sites/default/files/page/15420_FIT_Directive_Sept_24_09.pdf (Minister of Energy, September 24 Direction).

¹² **R-147**, Ministry of Energy, “About the Ontario Feed-in Tariff (FIT Program)”. Available at: <http://www.energy.gov.on.ca/en/fit-and-microfit-program/#.UuAF26Uo7Qc>; **C-0414**, Ministry of Energy, 2010 LTEP, p. 28.

¹³ **C-0414**, Ministry of Energy, 2010 LTEP, p. 9.

13. At the same time, the Government of Ontario was trying to deal with the effects of the recession on the job market in Ontario, and particularly the job market in the manufacturing sector. The Government of Ontario believed that in exchange for its procuring renewable energy on favourable terms, generators should have to commit to using Ontario-made products and services so as to promote the development of an Ontario-based manufacturing industry.

14. The Ministry of Energy's role in the development and implementation of the FIT Program was to provide the OPA with policy advice and directional guidance related to the above purposes of the FIT Program. In the beginning, this entailed giving not only specific direction on the domestic content requirements to be included in the program, but also making clear to the OPA that in order to achieve the Government of Ontario's goals in this procurement program, it would be necessary for projects to begin development quickly. We made sure that the OPA was aware that in administering the FIT Program, it should be looking first and foremost for "shovel-ready" projects – this type of project was the fastest way to achieve economic stimulus during the recession and to ensure job creation.

15. The OPA was responsible for the FIT Program's detailed design and implementation.¹⁴ In particular, the OPA was responsible for the technical processes, the drafting of specific clauses of the FIT Contract, and most importantly, the determination of who would be awarded a contract.

¹⁴ R-161, Ontario Power Authority website excerpt, "FIT Program". Available at: <http://fit.powerauthority.on.ca/fit-program>.

16. In exchange for guaranteed, long-term (20 year) fixed pricing for the output of their renewable generating facilities, the FIT Contract required developers to design, build and operate a renewable generating facility in accordance with the domestic content requirements of the program.

17. In order to provide yet more certainty for investors, and ensure the development of a significantly robust sector, the FIT Program was also initially developed to offer attractive prices for the renewable energy so as to compete for scarce investment capital. This was meant to attract investors to invest in renewable energy projects in Ontario.

18. Given that the level of interest in the program was unknown at the time of its development, the FIT Program was initially developed with no target or limit set on the amount of renewable energy that was to be procured. As such, the Minister of Energy's direction to the OPA of September 24, 2009 provided for a two year review of the FIT Program, FIT Rules, FIT Contract and Price Schedule (each two-year review was referred to as a "Scheduled Program Review").¹⁵ The FIT Rules also provided the OPA with the flexibility to make amendments outside the Scheduled Program Review in order to respond to ministerial directions, changes in laws and regulations, significant changes in market conditions or other circumstances.¹⁶ The ability to adapt the program to changing circumstances meant that the FIT Program was subject to change from time to time. This was clearly communicated to all developers.

¹⁵ C-0258, Ontario Power Authority, FIT Program Rules, v. 1.1 (Sep.30, 2009), s. 10.1.

¹⁶ *Ibid.*

IV. THE GREEN ENERGY INVESTMENT AGREEMENT

19. During the development of the GEGEA in 2008, the Minister of Energy was approached by Samsung C&T Corporation and Korea Electric Power Corporation (together, the “Korean Consortium”) to negotiate a large scale renewable energy investment agreement.¹⁷

20. Negotiations continued over the following months, and on September 30, 2009, the Minister of Energy issued a direction to the OPA to hold in reserve a total of 240 MW of transmission capacity in Haldimand County and a total of 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for certain renewable generating facilities.¹⁸

21. The Minister’s direction publically acknowledged that this capacity was being set aside because the province was exploring investment opportunities in the renewable energy sector and that it was looking to sign a “province-wide framework agreement” with certain proponents to further enable the development of Ontario’s green industry.

23. The Government of Ontario officially entered into the GEIA with the Korean Consortium on January 21, 2010. Valued at \$7 billion, the GEIA was the single largest investment in renewable electricity generation in the province’s history.¹⁹

¹⁷ C-0228, Auditor General of Ontario, 2011 Annual Report, p. 108.

¹⁸ C-0105, Letter (Direction) from the Honourable George Smitherman, Minister of Energy and Infrastructure, to Colin Andersen, CEO, Ontario Power Authority (Sep. 30, 2009). Available at: http://www.powerauthority.on.ca/sites/default/files/page/15444_Tx_FIT_Sept_30_09.pdf (Minister of Energy, September 30 Direction).

¹⁹ R-076, Ministry of Energy, Archived Backgrounder, “Ontario Delivers \$7 Billion Green Investment” (Jan. 21, 2010). Available at: <http://news.ontario.ca/mei/en/2010/01/backgrounder-20100121.html>.

24. Pursuant to the terms of the GEIA, the Korean Consortium was required to establish and operate manufacturing facilities for wind and solar generation equipment and components in Ontario, which was expected to create approximately 16,000 green energy jobs over six years in Ontario.²⁰ Furthermore, the Korean Consortium also undertook to negotiate a 10% equity interest with the Six Nations community for projects partially located on Ministry of Infrastructure controlled lands in the Haldimand Tract area, which contributed to the province's goal of providing support for Aboriginal and rural communities.²¹

25. In exchange, the Korean Consortium would have priority access to 2,500 MW of transmission capacity in Ontario. This development was to be conducted in five phases over five years, with each phase targeting approximately 500 MW of generation capacity.²² The GEIA specifically provided that the assurance of transmission capacity in subsequent phases was contingent on the Korean Consortium being able to deliver on its commitments to establish and operate four manufacturing plants in accordance with the GEIA schedule.²³

²⁰ **C-0414**, Ministry of Energy, 2010 LTEP, p. 29; **C-0020**, Samsung C&T, "Samsung C&T to Build World's Largest Wind, Solar Panel Cluster in Ontario" (Jan. 22, 2010). Available at: http://www.samsungcnt.com/EN/trading/ne/501000/articleRead.do?board_id=6&article_id=1805&page_index=4.

²¹ See Article 10 of **C-0322**, *Green Energy Investment Agreement*, (Jan. 21, 2010); **C-0252**, Letter (Direction) from the Honourable Brad Duguid, Minister of Energy, to Colin Andersen, CEO, Ontario Power Authority (Jul. 29, 2011). Available at: http://www.powerauthority.on.ca/sites/default/files/new_files/about_us/pdfs/Direction%20re%20KC%20PPAs%20%20Option%20Agreements%20REVISED%20%28signed%29.pdf (Minister of Energy, July 29 Direction").

²² Pursuant to section 3.2 of original GEIA, each phase targeted generation capacity of 400 MW of wind and 100 MW of solar energy, **C-0322**, *Green Energy Investment Agreement*, (Jan. 21, 2010), s. 3.2.

²³ **C-0322**, *Green Energy Investment Agreement*, Articles 7 (Undertakings) and 8 (Manufacturing Commitment), specifically s. 7.4 and s. 8.1.

26. There were numerous reasons that the Government of Ontario decided to enter into a framework agreement with the Korean Consortium that was separate from and in addition to the procurements through the FIT Program.

27. First, as I mentioned above, the Government of Ontario was uncertain of how much interest the FIT Program would generate because of the economic conditions at the time. Entering into a separate framework agreement with the Korean Consortium was seen by Ontario as a prudent means of establishing a foundation for renewable energy generation in the province. The Korean Consortium would provide an “anchor tenant” for Ontario’s renewable energy sector. Thus, even if the FIT Program failed to generate considerable interest, there would still be a significant increase in the amount of renewable electricity being generated for the province.

28. Second, the GEIA assured the establishment of a green energy manufacturing sector in Ontario. As mentioned above, the FIT Program contained requirements that developers source goods and services from Ontario in order to stimulate economic development and job growth. However, at the time, there was almost no local manufacturing available to meet these requirements. The manufacturing facilities required by the GEIA would assist the other renewable energy developers in the FIT Program to meet their domestic content requirements.

29. Third, a partnership with an established company, such as Samsung, would boost investor confidence and attract new investors to Ontario’s renewable energy sector. In particular, the government believed that the fact that the Korean Consortium was willing to invest in Ontario would assure other investors that Ontario was a good place to invest.

In fact, it was envisioned that the GEIA would be the first of many major investments to result from the enactment of the GEGEA.²⁴ I recall that in response to a question from the media during the public announcement of the GEIA at the Toronto Stock Exchange on January 21, 2010, Premier Dalton McGuinty stated that Ontario was open to exploring investment opportunities with other companies to help establish Ontario's manufacturing sector in renewable energy. He said "[i]f there are other companies out there who have in mind to put in place this kind of manufacturing infrastructure that enables us to go beyond meeting our own demand, our own needs here in Ontario, to reach into the American market, we're all ears".²⁵

30. Due to the scope of the GEIA, it was necessary to establish a joint OPA and Ministry of Energy "Implementation Task Force" to coordinate the OPA and the Ministry of Energy's work in implementing the GEIA and to ensure that it was on track to achieve each milestone in the agreement.²⁶ For example, the Implementation Task Force was responsible for monitoring whether the Korean Consortium was meeting its manufacturing obligations and was thus entitled to the set aside guaranteed capacity during each phase of development.²⁷

31. The Government of Ontario was as transparent as possible about the GEIA's existence and implementation, recognizing that it is a commercial arrangement and some

²⁴ **R-076**, Ministry of Energy, "Ontario Delivers \$7 Billion Green Investment", Archived Backgrounder, (Jan. 21, 2010). Available at: <http://news.ontario.ca/mei/en/2010/01/backgrounder-20100121.html>.

²⁵ **R-078**, CityNews, "Korean Deal Approved: Wind Solar Farms Coming to Ontario" (Jan. 21, 2010).

²⁶ **C-0322**, *Green Energy Investment Agreement*, (Jan. 21, 2010), s. 5.2.

²⁷ **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").

business confidentiality is required.²⁸ In particular, the transmission capacity that has been set aside for the Korean Consortium has always been announced publically through ministerial directions.²⁹

V. ONTARIO'S 2010 LONG-TERM ENERGY PLAN

32. During the early fall of 2010, approximately one year after the launch of the FIT Program, the Ministry of Energy began its review for the 2010 LTEP. The purpose of the 2010 LTEP was to reassess Ontario's energy supply mix, demand forecast and transmission capacity, in light of the province's future energy needs, the success of the FIT Program to date, and the signing of the GEIA.

33. Since 2008, the province's energy procurement strategy had focused on efforts to eliminate coal fired plants, promote energy conservation and increase Ontario's reliance on renewable energy. This shift in energy policy meant that Ontario's energy outlook had been drastically altered by 2010.³⁰

34. On the demand side, not only did the continuing economic difficulties result in a lower demand from large industrial and commercial customers, conservation promotion

²⁸ See for example, **R-133**, *Amended and Restated Green Energy Investment Agreement*, (June 20, 2013). Available at: <http://www.energy.gov.on.ca/docs/en/amended-GEIA-en.pdf>. The first Amended and Restated GEIA was published on the Ministry of Energy's website on July 29, 2011.

²⁹ See for example, **C-0105**, Minister of Energy, September 30 Direction; **C-0079**, Minister of Energy, April 1 Direction; **C-0119**, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, CEO, Ontario Power Authority (Sep. 17, 2010) ("Minister of Energy, September 17 Directon); and **C-0252**, Minister of Energy, July 29 Direction.

³⁰ **C-0414**, Ministry of Energy, 2010 LTEP, pp. 6-7.

efforts had also been quite successful. Therefore, Ontario's electricity outlook was determined to be "medium growth" as part of the 2010 LTEP.³¹

35. Further, Ontario's FIT Program had been far more successful in the first couple of years than had been originally envisaged. As I explained above, the concern of the Government of Ontario had been that, with the economic recession, there might not be sufficient uptake of the FIT Program to meet Ontario's requirements. However, quite to the contrary, the FIT Program had generated huge interest amongst investors, and the OPA was being overwhelmed with FIT applications.

36. In fact, the number of applications was growing at a rate that far exceeded the ability of the physical electricity system (i.e. transmission and distribution infrastructure) to accommodate new renewables projects. If all of the companies which applied for FIT contracts were awarded such contracts, a far greater proportion of Ontario's supply mix would be made up of renewable energy than had been recommended by experts, which in turn, would make the operation of the electricity system difficult to manage.³² Unexpectedly, considering the economic climate, the FIT Program had generated more proposals for generating capacity than were actually needed to meet Ontario's requirements.

37. Moreover, if all of the applications for FIT projects were awarded contracts under the program the impacts on ratepayers would be significant. The Government of Ontario had offered attractive terms in order to spur investment, but only a year into the program,

³¹ C-0414, Ministry of Energy, 2010 LTEP, pp. 8 and 13-15.

³² RWS-Jennings, ¶ 8.

the positive response had been far greater than anticipated. Initially, when the GEGEA was passed, the Ministry of Energy had estimated that it would result in a modest increase in electricity bills of one percent annually over and above already forecasted increases.³³ In the 2010 LTEP, increases in residential prices for electricity were forecasted to average 7.9 percent over the next five years (2010-2015) for a cumulative increase of 46 percent. Incorporating better information on the actual extent of the take-up of the FIT Program, investment in new renewable energy was expected to account for 56 percent of this increase.³⁴ Investment in new renewable generation was expected to increase residential electricity bills by 26 percent over five (5) year, an average annual increase of about 4.5 percent per annum. Over the full 20 years of the 2010 LTEP (2010-2030) the residential price was expected to increase at an annual average rate of 3.5%.³⁵ As such, cost impact to ratepayers was becoming a growing concern.³⁶ With continuing economic hardships, the government had to be acutely aware of how much more financial burden ratepayers could bear.

38. The culmination of these supply and demand factors confirmed to the Government that Ontario would need to slow down the rate of its procurement of renewable energy. Accordingly, the 2010 LTEP introduced a target amount for Ontario to

³³ C-0228, Auditor General of Ontario, 2011 Annual Report, p. 89.

³⁴ The issue of cost became a main focus during the FIT Program's first Scheduled Program Review, which began in October 2011. The review determined that the price paid under the original FIT Contract needed to be reduced to reflect market prices C-0414, Ministry of Energy, 2010 LTEP, p. 59; R-127, Affidavit of Susan Lo in *Skypower et al. v. Minister of Energy (Ontario) and Ontario Power Authority*, Ont. Sup. Ct., Court File No. 352/12, sworn August 3, 2012.

³⁵ C-0414, Ministry of Energy, 2010 LTEP, pp. 3, 11, 59.

³⁶ *Ibid.*, Section 7.

procure a total of 10,700 MW of renewable energy capacity by 2018.³⁷ This target was based on Ontario's planned transmission expansion, the overall demand for electricity and the ability to integrate renewables into the system.

39. The introduction of this target had implications for the FIT Program. The FIT Rules originally contemplated the running of an Economic Connection Test ("ECT") in order to determine whether and where to build out further transmission capacity for FIT projects to connect.³⁸ However, when the 2010 LTEP was published on November 23, 2010, Ontario was already quickly approaching the 10,700 MW target and the number of FIT applications continued to grow.

40. At the time, it was also unclear whether all of the awarded contracts would result in actual operating generation facilities. I recall that the OPA had advised us to expect a relatively high attrition rate amongst projects due to financing failures and difficulties getting needed regulatory approvals. On the one hand, if the expected attrition did occur and conditions improved in terms of supply, demand and transmission capacity, then there may have been a need to do an ECT. On the other hand, if the expected attrition did not occur and conditions remained as they were in terms of supply, demand and transmission capacity, then there would be no need to do an ECT. In the latter situation, no further projects would have been economical to develop as Ontario would have all the renewable energy it had determined it needed. Thus, we felt that it was premature to rule out the ECT in the 2010 LTEP because of the uncertainties which still prevailed.

³⁷ C-0414, Ministry of Energy, 2010 LTEP, p. 37.

³⁸ C-0414, Ministry of Energy, 2010 LTEP, p. 31.

VI. THE ALLOCATION OF CAPACITY ON THE BRUCE TO MILTON TRANSMISSION LINE

41. While the need to conduct an ECT in 2010 remained unclear, Ontario was aware that it was going to be necessary to devise a method to award the new transmission capacity on the Bruce to Milton transmission line.

42. The Bruce to Milton transmission line had been long contemplated. The completion of this transmission line was widely anticipated due to the requirement to keep up with growing energy demand and development in this region.³⁹ In particular, it was necessary to allow for the reopening of several reactors at the nuclear generation facilities in the Bruce region of Ontario.

43. Public consultations for expansions to the transmission system in the Bruce to Milton region began in November 2006 and the development of the Bruce to Milton transmission line was officially announced by the OPA and Hydro One on March 26, 2007.⁴⁰ By the time we were working on the 2010 LTEP, the final appeal hearings of the Niagara Escarpment Commission Development Permit had been completed and a final decision from the Minister of Natural Resources was expected in early 2011.⁴¹

³⁹ **R-036**, Letter from Jan Carr, CEO, Ontario Power Authority to Laura Formusa, 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.

⁴⁰ **R-039**, Hydro One, Amended Record of Consultation, Bruce to Milton, Transmission Reinforcement Project (Oct. 2007), p. 5. Available at: http://www.hydroone.com/Projects/BrucetoMilton/Documents/Record_of_Consultation-Amended-Nov02%5b1%5d.pdf.

⁴¹ **R-144**, Hydro One website excerpt, "Project News". Available at: <http://www.hydroone.com/Projects/BrucetoMilton/Pages/Project%20News.aspx> ("Hydro One was initially granted the conditional permit by the NEC in October 2009, but several individuals appealed that decision. The appeal hearing was conducted by the Niagara Escarpment Hearing Office from January to April 2010. The Hearing Officer who heard the appeal submitted his report to the Minister of Natural Resources on October 29, 2010, and the Minister issued her decision on May 10, 2011.").

44. It was expected that the Bruce to Milton transmission line would add enough capacity for the refurbishment of several reactors at the Bruce Nuclear Facility, and that it would also free up approximately 1200 MW of transmission capacity in the Bruce Region.⁴²

45. On September 17, 2010, the Minister of Energy issued a direction to the OPA requiring it to hold 500 MW of transmission capacity in the Bruce area in reserve for the Korean Consortium's projects. According to the direction, this was to be done "in anticipation of the completion of the Bruce-Milton Transmission Reinforcement".⁴³ As such, there was approximately 700 MW of capacity expected to be available to FIT applicants.

46. Prior to the 2010 LTEP, the OPA had indicated that any such available capacity on this new line would be awarded as part of an ECT. This was made publicly known.⁴⁴ When it became unclear if any ECT would be run in the near future, we began to work with the OPA to develop a process for allocating transmission capacity on the Bruce to Milton transmission line. This began during the spring of 2011. The goal was to develop a fair process for allocating this capacity that would meet developer expectations by including the relevant components of an ECT, without actually being a province-wide ECT. In particular, we were aware that any process would have to provide for a possibility for projects to change their connection points in response to the information

⁴² R-095, IESO Wind Power Standing Committee Meeting Minutes (Sep. 23, 2010), Action Item #52. Available at: <http://www.ieso.ca/imoweb/pubs/consult/windpower/wpssc-20100923-Minutes.pdf>.

⁴³ C-0119, Minister of Energy, September 17 Direction.

⁴⁴ C-0414, Ministry of Energy, 2010 LTEP, p. 31; C-0269, Ministry of Energy Presentation, "Bruce to Milton Transmission Line FIT Contract Awards" (Undated), slide 2: ("...Industry/developers may expect that the next step of the FIT program is the 'Economic Connection Test'").

published by the OPA about where other projects were seeking to connect.⁴⁵ This window to change connection points had always been one of the fundamental aspects of the contemplated ECT process, and we were aware that developers were expecting it to happen with respect to any allocation of the capacity on the Bruce to Milton transmission line.⁴⁶

47. As we were working to develop the Bruce to Milton allocation process, the Korean Consortium was still unable to finalize the points at which they wished to interconnect in the Bruce region. The Minister's Office, Cabinet Office and Premier's Office was briefed about the planning of the Bruce to Milton allocation process. They indicated their preference to award contracts at the earliest stage possible.⁴⁷ Thus, the government decided that while the Korean Consortium was contractually entitled to a set aside, the Bruce to Milton allocation process should not be delayed by the time required by the Korean Consortium to finalize its connection points.

50. On June 3, 2011, the Minister of Energy directed the OPA to procure 750 MW of generating capacity in the Bruce region and 300 MW in West of London as part of the Bruce to Milton allocation process. As part of the process, a five day change in

⁴⁵ **C-0269**, Ministry of Energy Presentation, "Bruce to Milton Transmission Line FIT Contract Awards" (Undated), slide 7: "Change Window Process and Generator Paid Upgrades".

⁴⁶ See for example, **C-0258** Ontario Power Authority, FIT Program Rules, v. 1.1 (Sep.30, 2009), ss. 5.3(d), 5.5(d) and 5.6(b); and **R-113**, Letter from Robert Hornung, President of CanWEA, to the Honourable Brad Duguid, Minister of Energy (May 27, 2011): ("As you know, developers were told by the OPA on numerous occasions that the opportunity would exist to change their point of interconnections before the running of the Economic Connection Test (ECT) and the awarding of contracts.") ("CanWEA Letter").

⁴⁷ **R-113**, CanWEA Letter: ("a majority of our members believe the [change of connection point] window only needs to be open for a short period of time. We believe that following through on this key step must be done quickly and should not impact the ability of the OPA to offer contracts in June"); and **C-0083**, E-mail from Sue Lo, Ministry of Energy, to Pearl Ing, Ministry of Energy, Mirrun Zaveri, Ministry of Energy, Sunita Chander, Ministry of Energy and Samira Viswanathan, Ministry of Energy (May 12, 2011, 5:28 PM): ("Bruce to Milton - PO's expectation to award contracts in 2nd to 3rd week of June rather than in July...").

connection point window, which was effective from June 6 to 10, 2011, was permitted to enable FIT applicants to change their connection points in the Bruce and West of London regions. The period of 5 days was chosen because both the Premier's Office and the Canadian Wind Energy Association ("CanWEA"), an industry association, had also expressed a desire for a short change window in order to avoid delaying the process of awarding further contracts.⁴⁸ The reduced timeframe enabled contracts to be awarded on July 4, 2011. Importantly, this process allowed FIT applicants to select their connection points in the Bruce region *prior* to the Korean Consortium having the opportunity to finalize its connection points.

51. After this change in connection points was allowed, projects were awarded FIT contracts on the basis of provincial FIT priority rankings. As with the connection point change window, this process was conducted by the OPA, without the involvement of the Ministry of Energy.⁴⁹ As such, the Ministry of Energy had no prior knowledge or influence on the actual outcome of the Bruce to Milton allocation process.

VII. COMMUNICATIONS WITH FIT DEVELOPERS AND MANUFACTURERS

52. After the initial development of the FIT Program, the Ministry of Energy's role was primarily coordinating with other provincial ministries that were involved in the development of renewable energy projects, as well as working with developers, stakeholders and other ministries to streamline the renewable energy approvals process.

⁴⁸ *Ibid.* R-112, E-mail from Sue Lo, Ministry of Energy to Rick Jennings, Ministry of Energy (May 20, 2011): ("Ideally, MO/PO would like to have the change window process in place. However, they also want contract awards in June. So not having the change window is probably an option of last resorts if decisions can't be made next week re: CAE awards and moving the Directive of BxM forward.").

⁴⁹ R-109, E-mail from Bob Chow, Ontario Power Authority to Sue Lo, Ministry of Energy (May 13, 2011).

In particular, to assist with the development of new renewable energy projects, the Renewable Energy Facilitation Office (“REFO”) was established as part of REED during the spring of 2009.⁵⁰ It provided a centralized access point for individuals, communities and municipalities with renewable energy projects to obtain information and connect with the appropriate government and agency resources. As a facilitator for renewable energy projects, REFO staff regularly met with developers and other stakeholders to discuss their renewable energy projects. It was open to anyone to request a meeting with REFO.

53. As the Assistant Deputy Minister of REED, I regularly met with FIT applicants, potential proponents, industry stakeholders, technical specialists, developers, farmers, financiers and representatives of the banking and insurance industries and manufacturers in the context of the FIT Program. In essence, if someone requested a meeting it was part of my job to meet with them. Although it is difficult to put an exact number on the amount of different proponents that I met with, it was likely in the hundreds.

54. During these meetings, the Ministry of Energy staff’s role was primarily to listen to questions and concerns raised. At no time were any special promises made to individual developers, and at no time were any special preferences accorded. Other than wanting the most shovel-ready projects, the Government of Ontario had no particular preference as to which developers would be awarded contracts as long as its policy goals were being met. We would provide people with access to information on the regulatory approvals process, guidance on resources available through various ministries, agencies and governments involved in the renewable energy process and assistance in setting up

⁵⁰ R-123, Ministry of Energy website excerpt, “Renewable Energy Facilitation Office”. Available at: <http://www.energy.gov.on.ca/en/renewable-energy-facilitation-office/#.UuFJWJIo7Qc>.

coordinated scoping meetings on specific project requirements.⁵¹ Any information provided was publically available.

55. In particular, throughout the development of the Bruce to Milton allocation process, the Ministry of Energy and REFO continued to meet with FIT applicants. These meetings served to provide FIT applicants with the continued opportunity to express their opinions on various aspects of Ontario's renewable energy policy and provide information with respect to the progress of their projects. However, developers were never given preferential access to information about the Bruce to Milton allocation process such as when it would occur or what it would entail. Nor did the Ministry of Energy ever make any promises or commitments during these meetings.

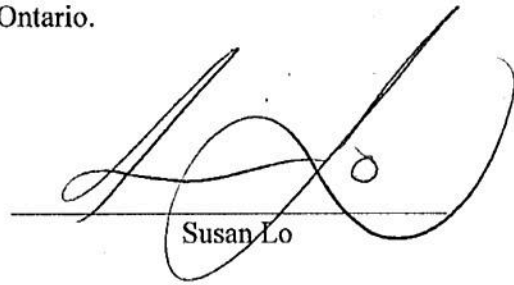
56. Although developers were well-aware of the possibility that a connection point change window would be part of any process for allocating capacity on the Bruce to Milton transmission line, no developer was given advance notice or preferential access to information regarding the details of the Bruce to Milton allocation process that we were developing. In its responses to developers, the Ministry of Energy only commented generally on what an application for a change of connection point would entail under the FIT Rules.

57. Of the hundreds of proponents I met, I never met with any representatives of Mesa Power Group, LLC while I was the Assistant Deputy Minister of REED. In fact, I

⁵¹ **R-163**, Ontario Power Authority website excerpt, "Ministry of Energy". Available at: <http://fit.powerauthority.on.ca/fit-program/introduction/fit-program-partners/ontario-ministry-energy>.

have no recollection of them ever requesting a meeting with me.⁵² Had they requested a meeting, I would have met with them, as I did with other stakeholders who requested a meeting. However, as with other stakeholders, such a meeting would in no way have changed our policy position to allow a connection point change window so we could get the best shovel-ready projects for the ratepayers of Ontario.

Dated: February 27/2014



Susan Lo

⁵² I understand that REFO staff met with representatives of Leader Resources Services Corp., an entity acting on Mesa's behalf, on February 23, 2011. However, I did not personally attend this meeting.