



Mesa Power Group, LLC and the Government of Canada

Analysis of the London
Economics International
Report Dated March 31,
2010 and of the Ontario
Power Authority
Evaluation of the Feed-in
Tariff Program Criteria



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April 28, 2014

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Subject: Mesa Power Group, LLC and the Government of Canada

1. Deloitte has been retained, as independent consultants, by Appleton & Associates International Lawyers (“**Counsel**”), on behalf of Mesa Power, LLC, to assess and evaluate a report prepared by London Economics International LLC (“**LEI**”), dated March 31, 2010, titled “*Feed-in Tariff Launch Period Criteria Evaluation Independent Process Review*” and provide comments on the Ontario Power Authority evaluation of the Feed-in Tariff Program criteria in relation to the applications submitted by Mesa.
2. Deloitte was retained through the engagement agreement between Counsel to the Plaintiff (or “**the Client**”) and Deloitte (the “**Engagement Agreement**”) dated March 28, 2014, to prepare an expert report in this matter (the “**Report**”). The terms of the Engagement Agreement provide that Deloitte is to be paid a fee for the Report based on time spent. In addition, Deloitte is to be reimbursed for its reasonable out-of-pocket expenses. No part of Deloitte’s fee is contingent upon the conclusions reached in the Report or any action or event contemplated in the Report. The principal expert and other staff involved in the preparation of the Report acted independently and objectively in completing this engagement.

Purpose

3. We understand that this Report will be used in connection with the ongoing arbitration between the Claimant and the Respondent.

Restrictions, qualifications and major assumptions

4. This letter should be read in conjunction with the attached Report. Further restrictions, qualifications and major assumptions are outlined in **Section 3** of this Report.
5. The attached Report was prepared by a team of Deloitte professionals, including Guillaume Vadeboncoeur, a Senior Manager in our Financial Advisory practice. I have reviewed the content of this report prior to its issuance and the conclusions contained therein are mine.

Scope of review

6. Our scope of review is contained in **Appendix A** of this Report.



Mr. Barry Appleton
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Should you have any questions or require any other information, please feel free to call me at 613-751-5378.

Yours truly,

A handwritten signature in blue ink that reads "Deloitte LLP". The signature is written in a cursive, flowing style.

Gary Timm, CPA, CA•IFA, CFE, CFF
Partner, Financial Advisory
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Enclosure

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1 Background

Introduction

- 1.1 The following represents our understanding of certain salient background facts relating to this matter. It should be noted that some of the following background statements have been alleged by the Claimant or the Respondent and are disputed by the other party. The validity of the background statements presented below will be based on findings of fact by the Tribunal.
- 1.2 American Wind Alliance, a joint venture of Mesa Power Group, LLC (“**Mesa**”) and GE Energy, filed applications to the Ontario Power Authority’s (“**OPA**”) Feed-in Tariff (“**FIT**”) Program under the names of TTD Wind Project LLC (“**TTD**”) and Arran Wind Project LLC (“**Arran**”). We understand that these applications did not result in Mesa obtaining FIT contracts. Further, we understand that Mesa has initiated a claim against the Government of Canada under chapter 11 of the North American Free Trade Agreement (“**NAFTA**”) as a result of the OPA evaluation of Mesa’s applications under the OPA FIT Program.
- 1.3 As part of the Counter-Memorial and Reply on Jurisdiction, dated February 24, 2014, it is noted that London Economics International LLC (“**LEI**”) was retained by the OPA as an “independent fairness monitor”. We understand that LEI prepared a report (the “**LEI Report**”) for the OPA, dated March 31, 2010, entitled *Feed-in Tariff Launch Period Criteria Evaluation Independent Process Review*.

Retainer of Deloitte

- 1.4 Deloitte has been retained, as independent consultants, by Appleton & Associates International Lawyers, on behalf of Mesa, to assess and evaluate the LEI Report and provide comments on the OPA evaluation of the FIT Program criteria in relation to the applications submitted by Mesa.
- 1.5 More specifically, Deloitte was asked to provide assistance in identifying, reading, interpreting and analyzing the information and other data relevant to this matter related to the LEI Report produced in connection to the arbitration. According to the LEI Report summary, the LEI Report is “... *an independent process review of the Feed-in Tariff (FIT).*” Further, according to the summary, “*LEI independently monitored the OPA’s evaluation and conducted a sample audit evaluation.*” Deloitte was asked to assess and evaluate the LEI Report and process undertaken by it, including the conclusion arrived at by LEI.
- 1.6 Deloitte was also asked to assess and evaluate the available documentation with respect of the OPA evaluation, and provide comments, if any, related to the evaluation, including instances where the OPA evaluation may have differed from the FIT Program rules.

2 Executive summary

Conclusions on the LEI Report

- 2.1 Based on our review of the LEI Report, we have identified a number of issues which cause us to question LEI's role in the evaluation process and whether the OPA evaluation was fair and consistent.
- The evaluation spreadsheet and related evaluation checklist questions, used by the OPA evaluators appears to include interpretations (or additional requirements) which do not appear to have been explicitly part of the FIT Rules and may have changed or evolved through the evaluation period.
 - There is a possibility that members of the Launch Period Criteria Team were also involved directly or indirectly with applicants. This would create a conflict of interest situation in relation to the evaluation of the applications by these OPA staff.
 - Since the pre-screen was conducted while OPA was still receiving completed applications from other OPA departments, it created a situation whereby later applicants could have received information related to the pre-screen completed to that point, or received different information.
 - The applicants who identified themselves as having misinterpreted the rules received a second communication. The result is that not all applicants received the same information, creating a potential fairness-related issue.
 - LEI appears to have only monitored the first day of evaluations. We question how LEI can provide assurance as to the fairness of the evaluation process undertaken after the first day of the evaluation process.
 - The completion of the sample audit by LEI resulted in the identification of discrepancies in scoring between LEI and the OPA, and apparent adjustments to scores by the OPA. Also, the completion of the sample audit by LEI using the evaluation checklist does not provide assurance that the evaluation process was actually conducted in a manner that was fair to the applicants.
- 2.2 The role of LEI in the FIT Launch Period Criteria Evaluation was broader than that of a fairness monitor. Given LEI's involvement in multiple aspects of the process, we do not believe that LEI's opinion should be viewed as that of an independent and impartial fairness monitor as there are many instances of LEI reviewing their own work and processes and then attempting to form an opinion on the fairness of those same processes. Examples of roles that are in conflict to that of a fairness monitor include the following:
- LEI provided guidance and input in the process set-up¹. What impact did this guidance and input have on the evaluation process? As part of the monitoring of the evaluation process, LEI was effectively reviewing and monitoring the process for which they had guided the design, including suggesting changes to the evaluation

¹ R-82, LEI Report, section 3.1, page 13.

framework and spreadsheet. As such, we question how LEI was an independent monitor of the evaluation process.

- LEI provided direction on an unknown number of issues during the evaluation process, including guidance on interpretation of the FIT Rules². What impact did this direction have on the evaluation process? As part of the monitoring of the evaluation process, LEI was effectively reviewing and monitoring a process in which they provided guidance on interpretation of the FIT Rules. As such, we question how LEI was an independent monitor of the evaluation process.

2.3 As part of our review, we would have expected to see disclosure of documents prepared by, used by or relied upon, by LEI in the preparation of their report and underlying work. We understand from Counsel that no documents prepared by, used by or relied upon by LEI with respect to the evaluation of launch period applications was produced.

Conclusions on the OPA Evaluation

2.4 Based on our review of documents related to the OPA evaluation, we identified instances of apparent premature conclusion of the evaluation in relation to the prior experience criterion and the financial capacity criterion.

- In the case of the prior experience criterion, the apparent premature conclusion of the evaluation was as a result of what appears to be an additional and/or hidden evaluation criterion.
- A conclusion on the evaluation of the TTD and Arran applications, more specifically on the financial capacity criterion, appears to have been premature and not consistent with the information contained in the applications.

2.5 In addition, we noted a discrepancy in the rationale for not allowing the claimed financial capacity criterion between the statement of Richard Duffy and the OPA Evaluation Criteria – Checklist document. If the statement of Richard Duffy is accurate, then we question the validity of the OPA Evaluation Criteria – Checklist document, which we understand is the only document provided by the OPA to support and validate the results of its evaluation of the FIT program launch applications.

² R-82, LEI Report, section 3.2, page 13.

3 Restrictions, qualifications and major assumptions

- 3.1 This Report is not intended for circulation or publication, nor is it to be reproduced for any purpose other than as described herein, without our prior express written permission in each specific instance. We do not assume any responsibility for losses incurred by any party as a result of circulation, publication, or reproduction of this Report contrary to the provisions of this paragraph.
- 3.2 Our work does not constitute an audit as defined by the Canadian Institute of Chartered Accountants. Consequently, said work, and the resulting Report, does not constitute an auditor's opinion. Further, our work cannot be used to provide assurance that it revealed all errors, omissions, or irregularities.
- 3.3 This Report must be considered as a whole and selecting portions of the Report or the factors noted by us, without considering all factors and analyses together could create a misleading view of the process underlying this Report. Any attempt to do so could lead to undue emphasis on any particular factor, calculation, or analysis.
- 3.4 This Report has been based on information, documents and explanations that have been provided to us and therefore the validity of our conclusions rely on the integrity of such information. Our scope of review is listed in **Appendix A**. We were not under any obligation or agreement to investigate the accuracy of any third-party information, nor have we performed any investigative procedures to independently verify the accuracy of any third-party information.
- 3.5 Should any of the information provided to us not be factual or correct, or should we be asked to consider different information or assumptions, our conclusions as set out in this Report could be significantly different.
- 3.6 We reserve the right, but will be under no obligation, to review this Report, and if we consider it necessary, to revise this Report in light of any information which becomes known to us after the date of this Report.
- 3.7 In preparing this Report, we have made certain assumptions as described in this section and throughout this Report. Should any of these assumptions prove inappropriate, our analyses, as expressed in this Report could change, perhaps materially. We caution the reader in this regard.

4 Comments on the LEI Report

Roles of LEI in FIT launch period ranking process

- 4.1 In the Counter-Memorial, the Government of Canada has stated the following regarding the retention of an Independent Fairness Monitor:

“with respect to the FIT launch period ranking process, the OPA published a Request for Quote on its website on November 30, 2009 for an independent fairness monitor to conduct an independent process review of the launch period criteria evaluation. Four companies responded. The OPA interviewed the top two candidates, and on December 17, 2009, LEI was selected.”³

- 4.2 LEI described its role as follows in its report:

“LEI’s role in the launch period criteria evaluation was that of an independent monitor and process evaluator. LEI contributed to the evaluation and process on three distinct fronts. The first component of LEI’s role was as an advisor during the OPA’s initial setup of the evaluation process. The second component included providing guidance on key issues as they arose over the course of the engagement. The final component included the independent monitoring of the evaluation, including a sample audit evaluation and review of the results.”

LEI’s overall role was broader than that of a fairness monitor

- 4.3 The Government of Canada has identified the work conducted by LEI as that of an independent fairness monitor. LEI has described its role in relation to the FIT launch period ranking process to be broader than that of a fairness monitor in that it included the following main roles:

- a) Advisor during the initial set-up of the evaluation process, including *“actively suggesting changes to the evaluation framework and spreadsheet”*
- b) Provided guidance on key issues over the course of the engagement
- c) Conducted monitoring of the first day evaluations and undertaking a sample audit

- 4.4 Normally, the role of a fairness monitor is that of an observer during the process being monitored. This role can take place from the start to the end of the process being monitored, including monitoring of the set-up of the evaluation process, monitoring of the communications (documents, questions, and other interaction) between the proponent of the process and the potential applicants and bidders, and monitoring of the evaluation process. The role of the fairness monitor is to ensure that that process is conducted in a fair, open and transparent manner on a foundation of accountability, repeatability and auditability. A fairness monitor can also provide factual observations and analysis

³ Mesa Power Group, LLC v. Government of Canada, Counter-Memorial and Reply on Jurisdiction, February 28, 2014, paragraph 147.

through a procurement process on observed fairness issues and these are left to the procuring agent (or contracting authority) to address or not.

- 4.5 During the process set-up, LEI provided guidance, identified strengths and weaknesses with the proposed approach, and identified the most appropriate course of action. According to the LEI Report, this included guidance on the following process parameters: composition of the evaluation team and how to assign roles within the team, the medium and the content of the evaluation checklist and the design of the evaluation spreadsheet, including actively suggesting changes to the evaluation framework and spreadsheet. As such, LEI appears to have had significant input in the process. In terms of monitoring of the evaluation process, LEI was effectively reviewing and monitoring the process they had been involved in designing. Given that LEI provided guidance and input in the process set-up, we question how LEI was an independent monitor of the evaluation process.
- 4.6 During the evaluation process, LEI provided direction on an unknown number (apparently “a handful”⁴) of issues. According to the LEI Report, this included the provision of guidance on the appropriate interpretation of the criteria requirements of the FIT Rules. The LEI Report does not provide an indication of the specifics of this guidance on the interpretation of the FIT Rules, nor were we provided any documentation which sets out the issues and related guidance. Given that documentation related to the guidance was not provided, we can’t determine whether LEI’s interpretation had a significant impact in how individual applications were evaluated. The role of an independent fairness monitor should not include guidance on the interpretation of technical rules. Normally, the process would be for the independent fairness monitor to identify the potential fairness-related issue, leaving the persons or organization responsible for the process to address the issue. Again, LEI was effectively reviewing and monitoring a process in which they provided guidance on interpretation of the FIT Rules. Given that LEI provided direction and guidance on the interpretation of the FIT Rules, we question how LEI was an independent monitor of the evaluation process.
- 4.7 Based on the LEI Report, there is no indication that the principles of accountability (such as providing a clear definition on the roles and responsibilities of OPA employees and LEI representatives) and auditability (such as ensuring that sufficient documentation is maintained to support all decisions taken during the evaluation process) of the evaluation process were taken into consideration in all major decisions. These principles are not mentioned in the LEI Report.
- 4.8 Overall, two of the three different roles identified and completed by LEI in relation to the FIT launch period ranking process are not compatible with the role of an independent fairness monitor. Given the apparent nature of the LEI involvement in the process set-up and consultation during the evaluation process, LEI should not be considered to have been an independent fairness monitor of the evaluation process.

LEI’s role in the evaluation spreadsheet

- 4.9 LEI indicates at section 2.1.1 of their report that they provided support in the development of the spreadsheet that was used for the evaluation of the applications. The checklist includes a list of questions that were answered by the reviewers. LEI notes that “*for each criterion the requirements were decomposed into a logical progression*”⁵.

⁴ R-82, LEI Report, section 3.2, page 13.

⁵ R-82, LEI Report, section 2.1.1, page 7.

- 4.10 We note that some of the evaluation checklist questions include what appear to be interpretations (or additional requirements) which do not appear to have been explicitly part of the FIT Rules. It is not clear as to whether these “interpretations” are those of the OPA or LEI.
- 4.11 For example, for the criterion related to prior experience there were evaluation checklist questions which do not appear to be explicit to the FIT rules:

[REDACTED]

[REDACTED]

In terms of these example items, successfully developed was not defined in the FIT Rules and the FIT Rules are silent on any statement being required related to experience as set out by in the following FIT Rules:

“13.4(a) Where, in respect of a Launch Application, the Applicant or the Project satisfies any of the criteria set out below, the Applicant may include, along with the other materials required pursuant to Section 3.1, evidence demonstrating that it satisfies such criteria:

...

*(iii) The Applicant Control Group has, or any three full-time employees of the Applicant Control Group each have, **successful experience** with planning and developing one or more Similar Facilities. The Similar Facility(ies) used to support this requirement must have been developed under circumstances where the Applicant Control Group had, or the three full-time employees each had, as applicable, primary responsibility for such Similar Facility(ies), either for planning and development or as design/builder*

...

For each criteria set out in Section 13.4(a), where the Applicant has provided evidence satisfactory to the OPA, acting reasonably, that the Project satisfies such criteria, the Launch Application will be awarded one point, for a maximum possible Criteria Score of four points”⁶.

- 4.12 The LEI Report does not address the issue that interpretations (or additional requirements) were part of the evaluation questions.
- 4.13 The LEI Report mentions that “each lead evaluator was assigned a separate version of the evaluation spreadsheet” and that “the evaluator keyed the results of the review into the spreadsheet, and at the end of each day the results were compiled in a master version”⁷. We have only been provided with one version of the evaluation spreadsheet, and we understand that the separate versions of the evaluation spreadsheet used by each of the lead evaluators have not been produced. The LEI Report is not clear on the quality assurance process undertaken by the evaluation team to ensure that the master version reflected the actual results of the evaluators. If a copy of the individual spreadsheets was not kept, it would limit the auditability of the evaluation process.

⁶ C-0258, Feed-in Tariff Program, FIT Rules, Version 1.1, September 30, 2009, section 13.4(a).

⁷ R-82, LEI Report, section 2.1.3, page 9.

LEI's role in the pre-screen process

4.14 The pre-screen process is described as follows in the LEI Report:

“The pre-screen was conducted over a multi-day period to accommodate the pace with which the Launch Period Criteria Team received completed applications from other OPA departments.

One of the difficulties the OPA experienced in the early part of the overall evaluation process was the back and forth that continued between the applicant's case manager within the OPA and the applicant. This back and forth was in regard to missing information necessary to deem the application complete. For the most part only those applications that were deemed complete were considered for the criteria evaluation. It should be noted that no additional information pertaining to the criteria evaluation was allowed to be submitted after the original application was received. Any additional information that may have been provided was not considered”⁸.

4.15 LEI did not identify any potential or actual fairness-related issues with the pre-screen process as described in their report.

4.16 Based on our review of the LEI Report, we note the following regarding the pre-screen process:

- The pre-screen was conducted by what LEI describes as the Launch Period Criteria Team. We understand that this team included OPA staff. We do not know whether any of the OPA staff assigned to the Launch Period Criteria Team were also involved directly or indirectly with applicants.
- The pre-screen was conducted while OPA was still receiving completed applications from other OPA departments.
- The pre-screen was conducted while there was still “back and forth between the applicants and their OPA case managers regarding missing information to deem the application complete”, which we presume would have included discussions and communications.

4.17 As such, we note the following potential issues:

- There was a potential for conflict of interest to arise in relation to the evaluation of the applications, if members of the Launch Period Criteria Team were also involved directly or indirectly with applicants.
- As the pre-screen was conducted while OPA was still receiving completed applications from other OPA departments, it created a situation whereby later applicants could have received information related to the pre-screen completed to that point.
- Applicants were in communication with the OPA and providing additional information as applications were being pre-screened. The LEI Report states that “no additional information pertaining to the criteria evaluation was allowed to be submitted after the original application was received” but does not describe the processes and safeguards implemented to ensure that this was the case. Based on the information we have been provided, there is no indication as to the nature and extent of the

⁸ R-82, LEI Report, section 2.1.2, page 8.

- additional information provided by the applicants, and which applicants were asked to provide and provided additional information.
- 4.18 LEI's description of the pre-screen process raises concern as to the transparency and fairness of the process.
 - 4.19 The LEI Report does not specifically identify LEI's role in providing advice and guidance with respect to the pre-screening process.

Process resulted in groups of applicants having received different information

- 4.20 The LEI Report describes an external issue regarding the assessment of criteria points, whereby "*OPA consulted with LEI extensively on the matter and in the end the decision was made to send a notice out to all applicants requesting an indication as to whether or not they had made the same misinterpretation of the rules*". This notice, presented at Appendix B to the LEI Report, was described as having been sent out to all applicants.
- 4.21 The applicants who identified themselves as having misinterpreted the rules received a second communication. The result is that not all applicants received the same information, creating a potential fairness-related issue.
- 4.22 LEI concluded that "*OPA dealt with the issue in a fair and consistent manner*". Based on our review of the documents, we believe that the clarification process used by the OPA could have been completed using a single communication (including the information from both communications) thereby eliminating a situation whereby different information was provided to different groups of applicants and could potentially raise the broader issue of having an undisclosed criteria as there was clearly a re-interpretation of criteria requirements.
- 4.23 Given that LEI was consulted extensively on the matter, we question how LEI can provide an independent fairness opinion on the course of action adopted by OPA.

LEI did not attend all of the evaluation days

- 4.24 We are unclear as to the period of time that the evaluation of the 498 applications received by OPA took place. The LEI Report indicates at section 2.1 that the evaluation took place over a period of approximately three weeks, while it also indicates at section 2.1.3 that the evaluation of individual applications was conducted over a consecutive two-week period.
- 4.25 The LEI Report indicates that LEI monitored the first day of evaluations⁹. This comment implies that LEI did not monitor the evaluation from the second day forward, and may not have monitored the critical period of initial review of the applications to determine compliance with submitted requirements.
- 4.26 Despite having monitored only the first day of evaluation, LEI describes, at section 2.1.3 of its report, that the evaluation process was undertaken during a two-week period. While we understand that the process described may have occurred during the first day of evaluation (the only day monitored by LEI), we question how LEI can provide assurance as to the fairness of the evaluation process undertaken after the first day of evaluation process.

⁹ R-82, LEI Report, section 2.1, page 7.

Issues with LEI's sample audit

- 4.27 The LEI Report describes at section 3.3, a process whereby LEI staff conducted a sample audit of 72 applications to benchmark against the results of the OPA evaluation.
- 4.28 LEI described the following process for the review of the 72 applications:
- “A total of four LEI staff members were involved in the review which took place over a consecutive three-day period. Each application was independently reviewed and scored by two LEI staff members. In instances where there was discrepancy between the two scores, the two evaluators re-examined the application in order to reach a consensus or escalated the review of the application for discussion amongst the broad group. The applications were reviewed by LEI staff members using the same checklist as used by the OPA evaluation team”¹⁰.*
- 4.29 The evaluation process described by LEI for the sample audit was more thorough than the process apparently used by the OPA for the actual evaluation. The LEI Report identifies situations where two LEI evaluators arrived at a different score, leading to a re-examination of the applications to reach a consensus score. We understand that the OPA evaluation team did not employ this process. Rather, we understand that four OPA evaluators were assigned to be a lead on an individual criterion, and two OPA evaluators took on oversight, advisory and reviewer roles. The result is that the individual criteria in most instances were apparently assessed by a single person.
- 4.30 The LEI Report notes the following regarding the results of the audit:
- “After carefully reviewing the results of the LEI evaluation against the OPA’s evaluation the two parties came to the conclusion that there were no discrepancies.*
- While there were some initial differences between the LEI and OPA scoring, LEI and the OPA made some adjustments given a more detailed understanding of specific nuances in the criteria. The initial differences were primarily the result of a consistent difference of interpretation of the submitted evidence by a single applicant with multiple applications. In general, LEI’s initial evaluation was more generous than OPA’s.*
- Given that no differences persisted, the audit can be interpreted to reveal that the OPA performed a fair and consistent evaluation of the criteria requirements”¹¹.*
- 4.31 LEI effectively attempted to recreate and re-evaluate applications through their sample audit, using the same methodology that LEI had advised and had been involved in. The re-evaluation of applications is not a process that is normally undertaken by a fairness monitor. Inherently, the sample audit would have a bias to attain the same results as the OPA evaluation. Therefore, the work of LEI on the sample audit was not independent and the results not valid in terms of determining fairness in the evaluation process.
- 4.32 We question how LEI can conclude that there were no discrepancies when in fact some differences were identified even though the sample audit process was more thorough than the process used by the OPA. The LEI Report is silent on the percentage of applications reviewed as part of the audit which resulted in a difference between the LEI and OPA scoring.

¹⁰ R-82, LEI Report, section 3.2, page 15.

¹¹ R-82, LEI Report, section 3.3.2, page 15.

- 4.33 The LEI Report states that “*LEI and the OPA made some adjustments*”. If the OPA adjusted scores as a result of the LEI audit, it would be a cause for serious concern and a strong indicator that there were issues with the OPA process, and its subsequent evaluation and scoring.
- 4.34 The LEI Report indicates that “*the experience criterion was the most common source of difference*”¹². LEI noted that its initial evaluation was, in general, more generous than OPA’s. This might be an indicator that there were issues with the evaluation for the experience criterion (i.e. two LEI staff having reached the more generous evaluation on consensus basis). Regardless of the outcome, we are concerned that the process used to verify the results was not the same process used by the OPA.
- 4.35 The LEI Report is silent on what changes were made to the scoring, and to which population of applications. It does not mention whether changes to the scoring were made only for discrepancies identified as a result of the LEI sample audit, or to the entire population of applications? We have serious concerns with any changes in scoring that are not made by evaluators during the evaluation process.
- 4.36 Given the above-noted comments regarding the LEI sample audit, we question how LEI can conclude that there were no discrepancies between the OPA evaluation and the results of the LEI sample audit.
- 4.37 Notwithstanding that LEI indicated that OPA performed a “*fair and consistent evaluation of the criteria requirements*”, the completion of the sample audit by LEI using the evaluation checklist does not provide assurance that the evaluation process was actually conducted in a manner that was fair to the applicants. For example, as discussed at paragraph 4.11, certain of the questions within the evaluation checklist do not appear to be explicit to the FIT rules, and therefore applying these questions for evaluation purposes could be unfair to the applicants.

¹² R-82, LEI Report, footnote 22, page15.

5 Conclusions on the LEI Report

- 5.1 Based on our review of the LEI Report, we have identified a number of issues which cause us to question whether the OPA evaluation was fair and consistent:
- The evaluation spreadsheet and related evaluation checklist questions, used by the OPA evaluators appears to include interpretations (or additional requirements) which do not appear to have been explicitly part of the FIT Rules and may have changed or evolved through the evaluation period.
 - There is a possibility that members of the Launch Period Criteria Team were also involved directly or indirectly with applicants. This would create a conflict of interest situation in relation to the evaluation of the applications by these OPA staff.
 - Since the pre-screen was conducted while OPA was still receiving completed applications from other OPA departments, it created a situation whereby later applicants could have received information related to the pre-screen completed to that point, or received different information.
 - The applicants who identified themselves as having misinterpreted the rules received a second communication. The result is that not all applicants received the same information, creating a potential fairness-related issue.
 - As LEI appears to have only monitored the first day of evaluations, we question how LEI can provide assurance as to the fairness of the evaluation process undertaken after the first day of the evaluation process.
 - The completion of the sample audit by LEI resulted in the identification of discrepancies in scoring between LEI and the OPA, and apparent adjustments to scores by the OPA. Also, the completion of the sample audit by LEI using the evaluation checklist does not provide assurance that the evaluation process was actually conducted in a manner that was fair to the applicants.
- 5.2 The role of LEI in the FIT Launch Period Criteria Evaluation, while on the one hand was broader than that of a fairness monitor, while on the other lacking some critical fairness monitor functions. Given LEI's involvement in multiple aspects of the process, we do not believe that LEI's opinion should be viewed as that of an independent fairness monitor. Examples of roles that are in conflict to that of a fairness monitor include the following:
- LEI provided guidance and input in the process set-up¹³. What impact did this guidance and input have on the evaluation process? As part of the monitoring of the evaluation process, LEI was effectively reviewing and monitoring the process for which they had guided the design, including suggesting changes to the evaluation framework and spreadsheet. As such, we question how LEI was an independent monitor of the evaluation process.

¹³ R-82, LEI Report, section 3.1, page 13.

- LEI provided direction on an unknown number of issues during the evaluation process, including guidance on interpretation of the FIT Rules¹⁴. What impact did this direction have on the evaluation process? As part of the monitoring of the evaluation process, LEI was effectively reviewing and monitoring a process in which they provided guidance on interpretation of the FIT Rules. As such, we question how LEI was an independent monitor of the evaluation process.
- LEI did not indicate whether they undertook fundamental fairness monitor functions, such as reviewing evaluation framework, reviewing conflict of interest declarations and reviewing confidentiality agreements. To the extent that they have not undertaken these functions, LEI should not be considered to have undertaken appropriate fairness monitor functions.

5.3 As part of our review, we would have expected to see disclosure of documents prepared by, used by or relied upon, by LEI in the preparation of their report and underlying work. We understand from Counsel that no documents prepared by, used by or relied upon by LEI with respect to the evaluation of launch period applications was produced.

¹⁴ R-82, LEI Report, section 3.2, page 13.

6 Comments on the OPA Evaluation Process

Background

- 6.1 We understand that FIT Program applications were evaluated based on whether they met the requirements of the program. Applications were ranked based on the number of Commercial Operation Date Acceleration Days (“COD AD”) as defined below. Applications received within 60 days of the FIT Program Launch were ranked ahead of applications received after this period.
- 6.2 We understand that COD AD was the number of days an applicant was willing to reduce the time to meet commercial operation relative to the standard FIT contract. An applicant could claim up to 365 COD AD as part of their application. Additional COD AD credits for ranking purposes were available if the applicant met any of four criteria set out in the FIT Rules. Each qualifying criteria would increase the COD AD by 90 (for a maximum of 360 additional COD AD).
- 6.3 The applications submitted by TTD and Arran claimed additional COD AD credits in relation to three of the four available criteria. We provide below our comments related two of these criteria:
- the prior experience criteria; and
 - the financial capacity criteria.

Prior experience criterion

Definition

- 6.4 Section 13.4(a)(iii) of the FIT Rules indicates that a point (equivalent to an additional 90 COD AD) was to be awarded if the application satisfies the following criteria:
- “The Applicant Control Group has, or any three full-time employees of the Applicant Control Group each have, successful experience with planning and developing one or more Similar Facilities. The Similar Facility(ies) used to support this requirement must have been developed under circumstances where the Applicant Control Group had, or the three full-time employees each had, as applicable, primary responsibility for such Similar Facility(ies), either for planning and development or as design/builder”.*
- 6.5 Similar Facility was defined as:
- “an electricity generation facility, other than the Project, that is located anywhere in the world, which (i) uses the same Renewable Fuel as the*

an applicant claimed and submitted evidence that a member of the Applicant Control Group, or any three full-time employees working for the Applicant Control Group, had experience developing a similar project anywhere else in the world.

47. Neither the application for the TTD nor the Arran wind project contained a statement that either of these two tests was satisfied. In essence, neither application stated on what grounds the point was being sought. The TTD and Arran application were not the only to fail for this reason – 68 other applicants bid for this point but failed to include the required statements that showed on what grounds they were claiming the point.”¹⁶

- 6.11 Richard Duffy emphasizes that a “statement” was required by the applicants for this criterion to be considered. Based on our review of the FIT Rules, we did not identify a specific provision which required such a “statement” to be made by the applicants. It appears that the requirement for a “statement” is an additional and/or hidden evaluation criterion.
- 6.12 We note that the OPA Evaluation Criteria – Checklist document indicates [REDACTED] of which Richard Duffy indicated that 68 other applicants (together with Mesa, representing 26% of the applicants who “submitted” for this criterion) failed to obtain the additional COD AD as a result of not having provided a “statement”. This high rate of failure directly attributed to the lack of “statements” submitted by the applicants is an indicator that the requirement for such a “statement” was an additional and/or hidden evaluation criterion.
- 6.13 It appears that the OPA evaluation of the prior experience criterion in the TTD and Arran applications was concluded prematurely as it was stopped after OPA determined that the applicants did not include a “statement” regarding the Applicant Control Group or employees of the Applicant Control Group, based on what appears to be an additional and/or hidden evaluation criterion.

Financial capacity criterion

Definition

- 6.14 Section 13.4(a)(iv) of the FIT Rules stipulates that a point (equivalent to an additional 90 COD AD) was to be awarded if the application satisfies the following criteria:

*“That any one Person that accounts for 15% or more of the direct or indirect Economic Interest in the Applicant, or if applicable, any one group of Persons that together account for 15% or more of the Economic Interest in the Applicant (the “**Designated Equity Provider(s)**”), has an individual Tangible Net Worth (or a collective Tangible Net Worth, in the case of a group of Designated Equity Providers), of \$500 or more per kW of proposed Contract Capacity at the end of the most recent fiscal year.*

*(A) **Financial Documentation.** The Applicant must attach an audited balance sheet for the Designated Equity Provider(s), in conformity with GAAP (or IFRS if the Designated Equity Provider has adopted such standard), with respect to the most recent fiscal year, provided*

¹⁶ Witness Statement of Richard Duffy, February 28, 2014, paragraphs 46 and 47.

that where the most recent fiscal year has ended less than 90 days prior to the Program Launch, the Applicant may submit such financial statements in respect of the previous fiscal year. Notwithstanding the foregoing, a Designated Equity Provider who is an individual shall be permitted to provide an unaudited balance sheet or other financial documentation satisfactory to the OPA, acting reasonably, demonstrating Tangible Net Worth, instead of an audited balance sheet, together with a statutory declaration of such person stating that such unaudited balance sheet or other financial documentation presents fairly, in all material respects, the Tangible Net Worth of the Designated Equity Provider. All Designated Equity Provider(s) other than individuals, that do not provide audited balance sheets, do not satisfy the requirements of this Section 13.4(a)(iv)(A).

(B) Calculation. *The Applicant must attach a summary outlining and describing the calculation used to determine the Tangible Net Worth of Designated Equity Provider(s) pursuant to Section 13.4(a)(iv)".*

- 6.15 The FIT Rules included the following definition applicable to the financial capacity criteria:
- 6.16 **Designated Equity Provider** has the meaning given to it in Section 13.4.(a)(iv)¹⁷.
- 6.17 **GAAP** means Canadian or U.S. generally accepted accounting principles approved or recommended from time to time by the Canadian Institute of Chartered Accountants or the Financial Accounting Standards Board, as applicable, or any successor institutes, applied on a consistent basis¹⁸.
- 6.18 **IFRS** means the International Financial Reporting Standards, being the accounting standards and interpretations adopted or recommended from time to time by the International Accounting Standards Board (IASB) or any successor organization, applied on a consistent basis¹⁹.
- 6.19 **Tangible Net Worth** means in respect of a Designated Equity Provider, at any time and without duplication, an amount determined in accordance with GAAP (or IFRS, if the Designated Equity Provider has adopted such standard), and calculated as (a) the aggregate book value of all assets, minus (b) the aggregate book value of all liabilities, minus (c) the sum of any amounts shown on account of patents, patent applications, service marks, industrial designs, copyrights, trade marks and trade names, and licenses, prepaid assets, goodwill and all other intangibles²⁰.

OPA Evaluation

- 6.20 The OPA evaluation indicates that [REDACTED]
- 6.21 The OPA evaluation was based on the following questions or factors which were assessed by the evaluators (OPA’s assessment of Mesa’s applications is noted in bold):

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

¹⁷ C-0258, Feed-in Tariff Program, FIT Rules, Version 1.1, September 30, 2009, section 13.1(e).
¹⁸ C-0258, Feed-in Tariff Program, FIT Rules, Version 1.1, September 30, 2009, section 13.1(f).
¹⁹ C-0258, Feed-in Tariff Program, FIT Rules, Version 1.1, September 30, 2009, section 13.1(g).
²⁰ C-0258, Feed-in Tariff Program, FIT Rules, Version 1.1, September 30, 2009, section 13.1(m).

*statements for the most recent fiscal year, 2009. As the FIT Rules made clear, unless Financial Capacity was being established through a natural person, the failure to provide audited balance sheets would be fatal to the bid for this criteria point. As Mesa's evidence was unaudited and for the wrong fiscal year, the review did not need to continue further*²¹.

- 6.24 There is a discrepancy between the statement from Richard Duffy and the OPA Evaluation Criteria – Checklist document. While Richard Duffy indicates that the applications from TTD and Arran were not awarded the financial capacity criteria point as a result of the reliance on unaudited financial statements, the OPA Evaluation Criteria – Checklist document indicates that [REDACTED]
- 6.25 If the statement from Richard Duffy is accurate, then we question the validity of the OPA Evaluation Criteria – Checklist document as it appears that for the TTD and Arran applications it would not be representative of the actual foundation for the award of evaluation criteria. We understand that this document is the only source of information regarding the evaluation of specific applications that has been provided by the Government of Canada.
- 6.26 If the information from the OPA Evaluation Criteria – Checklist document is accurate, then it would appear that the OPA evaluation of the financial capacity criterion in the TTD and Arran applications was concluded prematurely [REDACTED]
- [REDACTED] We note that both of the TTD and Arran applications included the same document which outlined and described a calculation of tangible net worth. As such, it would appear that the OPA did not evaluate these applications according to the FIT Rules.

²¹ Witness Statement of Richard Duffy, February 28, 2014, paragraph 49.

7 Conclusions on the FIT Evaluation Program

- 7.1 Based on our review of documents related to the OPA evaluation, we identified instances of apparent premature conclusion of the evaluation in relation to the prior experience criterion and the financial capacity criterion.
- 7.2 In the case of the prior experience criterion, the apparent premature conclusion of the evaluation was as a result of what appears to be an additional and/or hidden evaluation criterion.
- 7.3 A conclusion on the evaluation of the TTD and Arran applications, more specifically on the financial capacity criterion, appears to have been premature and not consistent with the information contained in the applications.
- 7.4 In addition, we noted a discrepancy in the rationale for not allowing the claimed financial capacity criterion between the statement of Richard Duffy and the OPA Evaluation Criteria – Checklist document. If the statement of Richard Duffy is accurate, then we question the validity of the OPA Evaluation Criteria – Checklist document, which we understand is the only document provided by the OPA to support and validate the results of its evaluation of the FIT program launch applications.

Appendix A – Scope of review

We have reviewed and/or relied upon the following information *inter alia*, without audit or verification by us, in the preparation of this Report:

- B1. Mesa Power Group, LLC v. Government of Canada, Counter-Memorial and Reply on Jurisdiction, February 28, 2014.
- B2. Mesa Power Group, LLC v. Government of Canada, Witness Statement of Richard Duffy, February 28, 2014.
- B3. Mesa Power Group, LLC v. Government of Canada, Witness Statement of Shawn Cronkwright, February 28, 2014.
- B4. Ontario Power Authority, Feed-in Tariff Program, FIT Rules, Version 1.1, September 30, 2009 (C-0258).
- B5. Ontario Power Authority, Feed-in Tariff Contract, Version 1.1 (C-0109).
- B6. Ontario Power Authority spreadsheet (Microsoft Excel) – Evaluation Criteria Checklist (R-79 – Confidential).
- B7. Feed-in Tariff Launch Period Criteria Evaluation Independent Process Review, London Economics International LLC, dated March 31, 2010 (R-82).
- B8. FIT Program application from TTD Wind Project ULC, and attached documents (C-0364 – Confidential).
- B9. FIT Program application from Arran Wind Project ULC, and attached documents (C-0129 – Confidential).

Appendix B – Curriculum Vitae of Gary Timm

Gary Timm, CPA, CA·IFA, CFF, CFE

Profile

Gary Timm is a Partner in the Deloitte LLP Financial Advisory group in Ottawa. Since 1987, Gary has worked exclusively in forensic and investigative accounting, economic-loss analysis/calculations, due diligence assessments, litigation consulting, corporate investigations across a number of industries including public sector, pharmaceutical, financial services, high tech and manufacturing. In 2000, he was in the inaugural group of professionals to obtain the CA·IFA designation, recognized by the Canadian Institute of Chartered Accountants as a Specialist in Investigative and Forensic Accounting.

Before joining Deloitte's Ottawa office in 2008, he was the Office Managing Director of the Ottawa office of Navigant Consulting's Litigation and Investigative practice. Prior to Navigant, Gary was a Principal in Kroll Lindquist Avey from 1992, and prior to that a Senior Manager at KPMG in its Forensic & Investigative Accounting Practice.

Gary has extensive experience conducting various and diverse investigations on behalf of public and private corporations, their board of directors, government departments and agencies, and enforcement agencies for allegations of fraud, anti-money laundering, corruption, accounting irregularities, homicide for profit, and other unlawful conduct or unusual circumstances.

He also has considerable experience related to the analysis and quantification of economic damages.

He has worked for clients throughout North America and internationally.

Gary has been qualified as an expert, and provided testimony as such, in a number of litigation, forensic and investigative matters.

Relevant Experience

1. Deloitte was retained by Public Works and Government Services Canada ("PWGSC") to provide Fairness Monitor services for the procurement of a contract for the construction of a new government facility. The objective of this project was to construct a new government facility for the consolidation of Canada Revenue Agency premises in the Quebec City region. Gary Timm was the engagement Partner responsible for this engagement. [March 2010 to May 2013]
2. Deloitte was retained by Public Works and Government Services Canada ("PWGSC") to provide Fairness Monitor services for the procurement of standing offers for language training (Process A). The objective of this project was to qualify one or more suppliers for the provision of language training in the province of Quebec. Gary Timm was the engagement Partner responsible for this engagement. [March 2010 to October 2010]
3. Deloitte was retained by Public Works and Government Services Canada ("PWGSC") to provide Fairness Monitor services for the procurement of standing offers for language training (Process B – The result of Process A was that none of the bidders qualified for a standing offer). The objective of this project was to qualify one or more suppliers for the provision of language training in the province of Quebec. Gary Timm was the engagement Partner responsible for this engagement. [October 2010 to March 2011]
4. Deloitte was retained by the Office of the Public Sector Integrity Commissioner of Canada ("OPSIC") to perform a review of closed disclosure of wrongdoing and reprisal complaints files in order to determine whether they were dealt with in a manner consistent with the requirements of the Public Servants Disclosure Protection Act and with applicable legal,

investigative and administrative decision-making standards. The purpose of the review is to identify any possible issues or errors in process or fact in the files following allegation that the former Commissioner was not performing adequate work and inappropriately closed files. A significant portion of the files reviewed related to government contracting issues for goods, services and construction within the context of the government Contracting Policy. Gary Timm was the engagement Partner responsible for this engagement and reporting to the client.

5. Gary Timm was the engagement Partner in a matter on behalf of Public Works and Government Services Canada to undertake the review of a Department of National Defence procurement evaluation process involving allegations by a bidder that the evaluation process was flawed. Gary was involved in the review of the process, documentation and interviews, and reporting on the findings of the engagement.

Employment History

03/08 – date: Partner, Deloitte & Touche LLP

02/92 – 03/08: Managing Director, Navigant Consulting (formerly Kroll Lindquist Avey)

08/82 – 02/92: Senior Manager, KMPG Peat Marwick Thorne, Chartered Accountant

Work Experience

- government related investigations involving:
 - fairness monitoring related to procurement;
 - allegations regarding the procurement and contracting area;
 - investigations regarding employee wrong doing;
 - investigations regarding inappropriate activity (fraud and other matters) related to third parties who received government funding; and
 - quantification of damages regarding contract disputes
- investigative accounting analyses and advice in connection with criminal investigations involving:
 - fraud investigations
 - employee fraud & theft investigations,
 - management fraud & theft investigations, and
 - supplier and investor fraud & theft investigations.
 - proceeds of crime investigations and analysis,
 - money laundering investigations and analysis,
 - homicide for profit investigations and analysis,
 - identification of bribery, kickback schemes investigations and analysis,
 - identification of secret commissions, and investigations of bid rigging.

Amounts subject to allegations of wrongdoing have ranged from thousands to millions of dollars. These investigations have included: multi-national corporations, owner managed businesses, individuals, and municipal, provincial and federal governments and agencies.

- litigation accounting including analysis and quantification of damages for matters such as:
 - loss of income – personal and corporate,
 - intellectual property matters - patent infringement and trademarks,

- breach of contract,
- breach of fiduciary duty,
- shareholder/partnership disputes,
- personal injury,
- wrongful/rightful (constructive) dismissals,
- professional negligence,
- matrimonial disputes, and
- other commercial disputes.

Damages analyzed and quantified have involved amounts from thousands to hundreds of millions of dollars. These investigations have included: multi-national corporations, owner managed businesses, individuals, and municipal, provincial and federal governments and agencies. Matters have involved various industries in the manufacturing and services sector.

- various insurance investigations and damages quantifications including:
 - business interruption assessments,
 - property loss,
 - fidelity bond claims,
 - arson for profit, and
 - personal injury.

Education

- Bachelor of Commerce, Honours, 1982
- Chartered Accountant (CA), 1985
- Chartered Accountant-designated specialist in Investigative and Forensic Accounting (CA-IFA), 2000
- Certified in Financial Forensics (CFF), 2014
- Certified Fraud Examiner (CFE), 1992

Professional Affiliations / Certifications

- Institute of Chartered Accountants of Canada (CICA)
- Institute of Chartered Accountants of Ontario (ICAO)
- Alliance for Excellence in Investigative and Forensic Accounting
- Association of Certified Fraud Examiners

Relevant Expert Testimony

Gary has testified as an expert witness on numerous occasions in The Federal Court of Canada, The Ontario Court of Justice (General and Superior); The New Brunswick Superior Court of Queen's Bench, The Quebec Superior Court of Justice and was recognized in 2010 by Lexpert as a Cross-border Corporate expert witness.

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