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

Rejoinder Witness Statement of Susan Lo

July 2, 2014

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

1. My name is Susan Lo. I am submitting this second witness statement in order to supplement the information that I provided in my initial witness statement in this arbitration, dated February 28, 2014, and to respond to other matters raised by the Claimant and its witnesses since that date.

2. As described in my first witness statement, I became the Assistant Deputy Minister at the Ministry of Energy, responsible for the Renewables and Energy Efficiency Division, in June 2009. In that position, I provided strategic oversight of the *Green Energy and Green Economy Act, 2009* ("GEGEA"), the FIT Program, and the implementation of the *Green Energy Investment Agreement* (the "GEIA") from May 2010, including the negotiation of certain amendments to the GEIA in May 2011. Prior to my involvement with the GEIA, Rick Jennings was the Assistant Deputy Minister at the Ministry of Energy, responsible for Energy Supply, Transmission and Distribution Policy when the GEIA was negotiated.

II. THE AMENDMENTS TO THE GREEN ENERGY INVESTMENT AGREEMENT

3. When I assumed oversight of the implementation of the GEIA in May 2010, the original agreement had already been negotiated and signed. I understand that Rick Jennings has explained the details of the original negotiation of the GEIA, as well as the agreement that Ontario was able to negotiate. I will not repeat his testimony but I have reviewed it and it is consistent with what I recall and with what I understood to be the case when I took responsibility for the file.

4. As a negotiated agreement, there were things in the GEIA that were "gets" for Ontario (the commitments to develop generation capacity and attract manufacturing to Ontario) and there were things that were "gives" (the priority transmission guarantee and the Economic Development Adder ("EDA")). For example, in the original GEIA, the Korean Consortium sought and was able to obtain an EDA – which amounted to an extra payment per kilowatt hour if the Korean Consortium was able to deliver on its commitments to attract or establish manufacturing in Ontario.

5. In the original GEIA, eligibility for the EDA depended on the Korean Consortium providing evidence that four manufacturing plants had been established and were operational by certain deadlines.[1] By the spring and summer of 2010, the Korean Consortium was experiencing difficulties meeting the deadlines in the GEIA. As a result, an opportunity arose to renegotiate the deadlines and reduce the terms of the EDA prior to Ontario having to pay out anything under it. We took that opportunity.[2]

6. In the *Green Energy Investment Agreement Amending Agreement* (the "Amended GEIA"), which was signed on July 29, 2011,[3] Ontario obtained a reduction in the EDA amount, a reduction in the number of project phases to which it could apply, and a revision to the qualification methodology. For the province, the manufacturing commitment had always been about jobs in Ontario. As a result, instead of tying the

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[1] **C-0322**, Green Energy Investment Agreement (Jan. 21, 2010), Articles 8.1, 8.4 and 9.3.

[2] To date, there has been no payment of the EDA. Of note, on June 20, 2013, the GEIA was further amended to reduce the size and scope of the GEIA. In doing so, the Amended and Restated Green Energy Investment Agreement (the "Amended and Restated GEIA") limited the Korean Consortium's eligibility for the EDA to the first three phases of the GEIA. **R-133**, Amended and Restated Green Energy Investment Agreement (Jun. 20, 2013).

[3] **C-0282,** Green Energy Investment Agreement – Amending Agreement, By and Among Her Majesty The Queen In Right Of Ontario as represented by the Minister of Energy And Korea Electric Power Corporation And Samsung C&T Corporation (Jul. 29, 2011).

EDA to the mere existence of manufacturing plants, which may or may not have been employing staff, we tied the qualification for the EDA to the number of jobs at the manufacturing plants that had been attracted to Ontario by the Korean Consortium. We did not require the manufacturing plants to be owned by the Korean Consortium. However, in the Amended GEIA we did require that a minimum average of 765 jobs be created and maintained at these plants in each job counting reporting period to supply the Korean Consortium with the equipment it needed for its GEIA projects (which was the metric we used for determining if the Korean Consortium had "attracted" the plants to Ontario) and to fill orders for renewable energy components from entities other than the Korean Consortium.[4]

7. Further amendments made to the GEIA in 2013 state that the solar manufacturing plants and a research and development centre that produces solar components will make the Korean Consortium eligible for EDA payments for Phase 3 solar generation, provided that these plants support a minimum average of 265 jobs, and 300 jobs at peak capacity, throughout the year ending 2016.[5]

8. From my experience in implementing the GEIA, as amended in May 2011, I can confirm that Ontario believes that the commitments that the Korean Consortium made are real and binding. Further, the Korean Consortium has always acted like it also believes that it has real and binding commitments. In particular, the Korean Consortium has entered into manufacturing partnership agreements with four manufacturing partners to

[4] **C-0282**, Green Energy Investment Agreement – Amending Agreement, By and Among Her Majesty The Queen In Right Of Ontario as represented by the Minister of Energy And Korea Electric Power Corporation And Samsung C&T Corporation (Jul. 29, 2011), Articles 10-15; and **C-0322**, Green Energy Investment Agreement (Jan. 21, 2010), Article 8.8.

[5] **R-133**, Amended and Restated Green Energy Investment Agreement (Jun. 20, 2013), Article 9.3.5.

establish manufacturing plants in Ontario: SMA (solar inverters), Canadian Solar (solar panels), Siemens (wind turbine blades) and CS Wind (turbine towers).[6] Currently, all of these plants are manufacturing renewable energy components in Ontario, not only in support of the GEIA projects but also for projects of other FIT proponents and renewable energy developers in Ontario.[7]

9. As a result of these partnerships, the Korean Consortium has actively, and successfully, attracted green energy manufacturing jobs to Ontario in keeping with its commitment to the province to demonstrate a minimum average of 765 jobs for the years ending 2013, 2014 and 2015. In particular, I understand from staff in the Partnerships and Strategic Initiatives Office of the Ministry of Energy that the Korean Consortium has submitted evidence to Ontario for the year 2013 stating that an average total of 779 jobs were maintained in the four wind and solar manufacturing facilities.[8] Furthermore, the Korean Consortium has publicly stated that it will support its manufacturing partners' efforts to develop export markets beyond the GEIA projects.[9]

10. Ultimately, I agree that the FIT Program has also helped to stimulate manufacturing capacity in the province, but the Ontario Government believes that the

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[6] Expert Report of Seabron C. Adamson, 27 April 2014, ¶ 40 ("Adamson Report"); **C-0593**, Samsung Website, "Samsung Renewable Energy signs manufacturing partnership agreement with Canadian Solar Inc." (Jun. 26, 2013).

[7] See references to Canadian Solar in ¶ 41 of the Adamson Report; **R-180**, CS Wind Canada, Manufacturer's Certificate of Origin (Jan. 11, 2011).

[8] **R-192**, Letter from Ki-Jung Kim, Executive Vice President of Samsung C&T Corporation to Hon. Bob Chiarelli (Feb. 28, 2014).

[9] **R-190**, Samsung Renewable Energy, Samsung C&T Statement on the Amended Green Energy Investment Agreement (Jun. 20, 2013). Available at http://www.samsungrenewableenergy.ca/node/57; and **R-191**, Samsung Renewable Energy, Samsung Renewable Energy signs manufacturing partnership agreement with Canadian Solar Inc. (Jun. 26, 2013). Available at: http://www.samsungrenewableenergy.ca/node/61.

GEIA has been an important factor in establishing a foundation for the province's renewable energy sector in a timely fashion. Without the GEIA, it is unclear in my mind how successful our efforts to develop Ontario's renewable energy manufacturing sector would have been.

III. THE DEVELOPMENT OF THE BRUCE TO MILTON ALLOCATION PROCESS

11. My previous witness statement addressed the issues surrounding the allocation of transmission capacity on the Bruce to Milton transmission line in the Minister of Energy's June 3, 2011 direction to the OPA (the "June 3, 2011 Direction").[10] I do not intend to repeat any of these observations here – I have already offered a full explanation of why the Government made the decisions it did in this respect.

12. However, I do wish to reiterate, in light of some allegations that the Claimant has now made, that none of these policy decisions were related to NextEra Energy, LLC ("NextEra") or any of its projects.

13. I understand that the Claimant has alleged that we chose the policy we did in direct response to requests from NextEra in May 2011. This is completely untrue. In fact, the planning and development of the Bruce to Milton allocation process was well underway in March 2011, months prior to the May 11, 2011 meeting with NextEra.[11]

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[10] RWS-Lo, ¶¶ 41-45.

[11] **R-183**, Ontario Ministry of Energy Presentation, "DRAFT KC and Future FIT Accommodation on Near-Term Transmission Projects (Mar. 21, 2011); **C-0067**, Ontario Ministry of Energy Presentation, "DRAFT Bruce to Milton Next Steps" (May 5, 2011); **C-0269**, Ontario Ministry of Energy Presentation, "Bruce to Milton Transmission Line FIT Contract Awards" (May 11, 2011). *See also*, **R-182**, DRAFT Ontario Power Authority Presentation, "Economic Connection Test (ECT) Moving Forward" (Mar. 1, 2011).

14. In the early stages, various options for awarding the new Bruce to Milton capacity were considered, including allocating transmission capacity through a special transmission and distribution availability test and running a process more like a regionalized economic connection test (which included connection point changes and generator paid upgrades).[12] In considering our options, we weighed all of the policy implications.

15. For example, I understand that the Claimant has referred to documents showing that one of the things that we requested the OPA to do in this context was to run a rough simulation of what would happen if a special TAT approach was followed, which did not involve connection point changes or generator paid upgrades.[13] I recall that a particular concern of ours was to understand how many megawatts ("MWs") could theoretically be accommodated by the new Bruce to Milton transmission line. We wanted to clearly understand this because we were contemplating whether or not to introduce a cap on the number of MWs that would be awarded, recognizing that all the capacity awarded for the Bruce to Milton transmission line would be at attractive FIT prices and we were getting close to the renewable energy target in Ontario's *Long-Term Energy Plan 2010* ("2010 LTEP"). Consequently, it was very important to us to try to understand, even roughly, the overall amount of generation capacity that would be procured if a particular approach was followed. However, at no time prior to the June 3, 2011 Direction were we concerned with how particular proponents might be affected.

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[12] *Ibid.*

[13] **C-0448**, Bruce Area Scenario Analysis, Table of Results (Apr. 13, 2011).

16. Further, as I explained in my first witness statement, we were also quite concerned with trying to respect developer expectations, especially in how the process would be carried out. The marketplace expected that there would be the option of changing connection points as part of the Bruce to Milton allocation.[14] We also wanted the best and most advanced projects to proceed. Allowing for connection point changes and generator paid upgrades would help facilitate that outcome.

17. In fact, I can say without hesitation that the fate of NextEra's projects never factored into our analysis of which option was best. In this regard, I understand that the Claimant has referenced discussions that took place at a May 12, 2011 meeting with the Premier's Office and the Minister's Office.[15] What I can confirm is that all of the meetings I attended with the Premier's and Minister's Offices regarding the Bruce to Milton transmission corridor were at a much higher policy level rather than individual projects or proponents.[16] In general, the discussions concerned the need to move forward with contract awards as quickly as possible and to balance developers' expectations under the FIT Program, with alignment to the policy goals of the 2010 LTEP. There was never discussion about how NextEra may or may not be impacted by a specific course of action the ministry might take or to alter our policies to benefit a specific proponent.

18. In this regard, I also understand that the Claimant has insinuated that my comment in a May 12, 2011 email to Andrew Mitchell about [redacted]

[14] **R-113**, Letter from Robert Hornung, President of CanWEA to Brad Duguid, Minister of Energy (May 27, 2011).

[15] **C-0090**, Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs) (May 12, 2011).

[16] **C-0473**, Email from Pearl Ing (Ministry of Energy) to Sue Lo and Sunita Chander (Ministry of Energy) (May 12, 2011).

[redacted] I raised this point with Mr. Mitchell because I was aware of an expectation amongst developers that the outcome of any allocation process would allow for the highest ranked FIT projects to receive contracts.

19. Ultimately, the desire to respect developers' expectations and the need to manage the overall amount of renewable generation capacity that would be procured were the primary reasons that we ended up developing the approach we did for the June 3, 2011 Direction, as opposed to other options, such as the special TAT. None of these policy decisions related specifically to NextEra or its projects.

Dated: June 27/14

Susan Lo

[17] **C-0629**, Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy) (May 12, 2011); Claimant's Reply Memorial, ¶ 788.

[18] **C-0629**, Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy) (May 12, 2011).