

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 2010 UNCITRAL ARBITRATION RULES**

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

MEMORIAL OF THE CLAIMANT

WINDSTREAM ENERGY LLC

August 19, 2014



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PART ONE – INTRODUCTION

A. Overview

1. In an effort to phase out dirty coal-fired power plants and establish a robust renewable power industry supporting “green-collar” jobs, in the mid-to-late 2000s the province of Ontario, Canada, turned to the private sector to build thousands of megawatts of power supplied by renewable sources. The sources of renewable energy that Ontario promoted included offshore wind electricity generation. Over a period of more than two-and-a-half years, Ontario actively promoted itself to investors as a safe jurisdiction in which to invest in offshore wind renewable energy projects – a jurisdiction that would provide “certainty” to investors in offshore wind projects. Ontario made multiple representations and commitments to the Claimant, Windstream Energy LLC (“**Windstream**”), that it supported offshore wind electricity generation generally and Windstream’s offshore wind project, the Wolfe Island Shoals Project (the “**Project**”), specifically. Relying on these multiple representations and commitments, Windstream invested millions of dollars in developing the Project.

2. In February 2011, Ontario reversed its support for offshore wind by imposing a “moratorium” on offshore wind development, citing “scientific uncertainty” as the moratorium’s rationale. The moratorium remains in effect as of the date of this memorial. The moratorium and Ontario’s related actions have had devastating and drastic effects on Windstream’s investments in Ontario, which are now effectively worthless and have no prospect of recovering in value even if the moratorium is lifted. Ontario’s actions breach Canada’s obligations under Articles 1110, 1105, 1102 and 1103 of NAFTA, and give rise to an obligation to compensate Windstream.

3. *Windstream’s investments in Canada.* In August 2010, Windstream, through its Canadian investment Windstream Wolfe Island Shoals Inc. (“**WWIS**”), entered into a power purchase agreement under the Ontario Power Authority’s (“**OPA**”) feed-in-tariff program (the “**FIT Contract**”). The FIT Contract requires the OPA to purchase the electricity generated by the Project at a fixed contract price of \$190¹ per megawatt hour, indexed annually, over a 20-year term. Because it provided a guaranteed revenue stream over a 20-year period with a credit-

¹ All currency is in Canadian dollars unless otherwise specified.

worthy counterparty, the FIT Contract was an extremely valuable asset. It was especially so because the OPA grants very few FIT contracts. Windstream is the only proponent to have been granted a FIT contract to develop an offshore wind project in Ontario.

4. The Project is an offshore wind generation facility that Windstream proposed to build in the Wolfe Island Shoals area in eastern Lake Ontario, near Kingston, Ontario. At 300 megawatts, it was the largest FIT contract awarded at the time, representing 20% of the energy generation capacity of the windpower projects selected by the OPA to receive FIT contracts. Windstream is a Delaware company dedicated to the development of renewable energy projects. Its investors are a New York City-based investment group with extensive experience developing and operating energy projects in both onshore and offshore environments.

5. *Windstream relied on Ontario's commitments to the Project and to offshore wind.* Windstream invested in Ontario and, through WWIS, entered into the FIT Contract in reliance on a number of representations and commitments made by the Ontario Government that it would support investment in renewable energy generally, and offshore wind and the Project in particular.

6. The circumstances that led Windstream to invest in Ontario and enter into the FIT Contract include:

- a) throughout 2007 to 2010, the Ontario Government, in particular its Ministers of Energy and Natural Resources, actively and consistently promoted Ontario to renewable energy developers and investors – including offshore wind developers and investors – as North America's leader in green energy development, as a jurisdiction in which investors could expect certainty, and as providing in particular standardized, long-term FIT contracts paying attractive prices for renewable energy, a streamlined regulatory process with a service guarantee, and access to the electrical grid;
- b) Ontario's Premier declared in 2008 that offshore wind could play an important role in the development of renewable energy resources in Ontario, and that the

government had received advice that “you don’t just have to stay on land, and you can do it in a way that does not compromise ecosystems”;

- c) the Ministry of Natural Resources had carried out research respecting offshore wind energy development during a moratorium between 2006 and 2008 and had lifted the moratorium, stating that on the basis of this research it was “clear that developing offshore wind potential would be practical and environmentally sound”;
- d) the Minister of Natural Resources had told offshore wind energy developers that Ontario was “open for business” for offshore wind and that offshore wind energy developers should “join us” in the development of offshore wind projects;
- e) the Minister of Natural Resources had written to WWIS expressly stating that its Project had the “highest priority” for receiving the approvals it needed from the Ministry to develop the Project on Crown land and would receive “priority attention” from the government;
- f) Ontario enacted the *Green Energy and Green Economy Act* in 2009 (“***Green Energy Act***”), which laid the groundwork for Ontario’s feed-in-tariff program for renewable energy. When unveiling the *Green Energy Act* to the public, Ontario’s Energy and Infrastructure Minister, George Smitherman, said it was intended to make the province the “destination of choice” for green power developers and incentive proponents to develop projects by offering an attractive price for renewable energy that would be guaranteed for decades, and “certainty” and a “service guarantee” with respect to regulatory approvals;
- g) the regulatory process in place for renewable energy in 2010 applied both to onshore and offshore wind projects, with the remaining issue of confirming the

setback distance from shore applicable to offshore wind turbines set to be finalized as of January 2011;²

- h) the Ministry of Natural Resources had provided comfort that it would work with Windstream so it could site the Project to comply with the five-kilometre setback proposed at the time by the Ministry of the Environment, that it appreciated Windstream's "need for certainty" and would "move as quickly as possible" so Windstream would obtain MNR approvals "in a timely manner"; and
- i) Windstream was advised by government officials that the Ontario Government, including the Premier's Office, supported the Project.

7. In accordance with its obligations under the FIT Contract, Windstream posted \$6 million as security with the OPA and carried out the substantial development work required for the Project to proceed, including obtaining approval for the Project to be connected to Ontario's electrical transmission grid, arranging for the completion of studies by specialist consultants to carry out wind resource and energy yield testing, electrical design, lake bottom investigation and financial feasibility analyses, and conducting a process to retain the consultants required to carry out permitting work, turbine foundation and substructure design analysis and geotechnical work.

8. *Ontario's about-face on offshore wind.* In February 2011, with no notice to or consultation with Windstream or the renewable energy industry, the Ontario Government announced that it was placing a new moratorium on the further development of offshore wind projects. It purported to justify the moratorium on the ground that further scientific research was needed before offshore wind development could proceed in an environmentally sound manner.

² As explained in more detail below, the "setback" in this case is the minimum distance between an offshore wind turbine and the shoreline. Over the course of the project, the setback distance fluctuated from between 550 metres (the same as for on-shore turbines, where the distance is between the turbine and the nearest "receptor") and the Ministry of the Environment's proposed five kilometres, though the issue was never settled.

9. Ontario's "scientific uncertainty" pretext for the moratorium is inconsistent with the facts that:

- a) Ontario had already had a moratorium on offshore wind development, which it had lifted in 2008 after confirming offshore wind development was practical and environmentally sound;
- b) the decision to impose the moratorium and to premise it on scientific uncertainty was made at the level of the Premier's Office, and the Ministry of the Environment, the very Ministry charged with protecting the environment, was "out of the loop" regarding the decision until after the decision was made;
- c) the "scientific uncertainty" rationale for the moratorium was only adopted after several other justifications for constraining offshore wind, which were unrelated to scientific uncertainty, were considered and rejected by the Premier's Office and the relevant Ministers' Offices, again with minimal input from ministry staff;
- d) as of the fall of 2010, the relevant ministries were working "feverishly" to develop guidance documents for offshore wind which they planned to have in force by January 2011; and
- e) Ontario has carried out virtually no additional scientific studies respecting offshore wind development since the moratorium was announced.

10. The evidence shows that the moratorium was in fact motivated by concerns about the costs of offshore wind power, which is more expensive than onshore wind power or natural gas generation, and by electoral politics. The Minister of Energy stated candidly just days after the moratorium was put in place that if Ontario was achieving its renewable energy objectives through less expensive onshore projects, "why would we then want to expand into offshore which is going to be more costly?" Windstream's experts have calculated that Ontario has gained an economic benefit of between \$1.3 and \$2.1 billion by effectively cancelling Windstream's Project.

11. The evidence also shows that public opposition to wind turbine projects, particularly in key electoral ridings for the governing Liberal Party, was a crucial factor in causing Ontario to abandon its commitment to offshore wind energy development in the lead-up to its re-election campaign.

12. ***Ontario's promise to keep Windstream whole.*** Following the announcement of the moratorium, Ontario made a series of promises to Windstream. Specifically, Ontario promised:

- a) that the Project was frozen rather than cancelled;
- b) that Windstream would be kept whole through the province negotiating an acceptable solution to ensure that Windstream was “happy” with the process;
- c) that the government would allow the Project to continue; and
- d) that the OPA would enter into discussions with Windstream that would include, among other things, constraining the OPA’s right to terminate the FIT Contract if the Project was delayed by more than two years.

13. This last issue was particularly important to Windstream, because, although its FIT Contract was under *force majeure*, the contract’s terms allowed the OPA to terminate the FIT Contract if the Project was delayed by more than two years. This meant that WWIS stood to lose its contract altogether if it was prevented by the moratorium from bringing the Project into commercial operation by May 4, 2017, two years after the FIT Contract’s May 4, 2015 milestone date of commercial operation.

14. ***Windstream's Project is now substantially worthless.*** Ontario did not keep its promise. Instead, it has allowed the moratorium to cause delays so drastic that the Project cannot be developed in time to meet the May 4, 2017 deadline. It is no longer financeable. As a result, the Project has effectively been cancelled and is now substantially worthless, as are Windstream’s investments in WWIS and the FIT Contract.

15. Ontario failed to keep its promise to immunize Windstream from the effects of the moratorium with full knowledge that, if it did not remove the deadlines in the FIT Contract, moratorium-related delays would crystallize into an effective cancellation of the Project. Due to

the moratorium's length and its inconsistency with Ontario's prior representations regarding its commitment to offshore wind, the moratorium and Ontario's related conduct has also caused the market to lose confidence in the Ontario Government. Even if the OPA now relieved Windstream from its deadlines under the FIT Contract, Windstream's investments would not recover in value.

16. Despite this, the OPA has refused to return WWIS' \$6 million letter of credit, and continues to expressly reserve its right to exercise all of its rights and remedies under the FIT Contract, including its right to formally terminate the FIT Contract if WWIS fails to achieve a deadline that has now become impossible to achieve because of delays caused by Ontario.

17. Ontario also refused to seriously consider various proposals Windstream made following the moratorium to allow it to develop the Project as a pilot project or to develop an alternative project, which would have allowed Windstream to preserve at least some of the value of its investments in Canada.

18. ***Ontario kept TransCanada whole in strikingly similar circumstances.*** Ontario's failure to fulfill its promise to keep Windstream whole stands in stark contrast to Ontario's treatment of TransCanada Energy Ltd., a Canadian company. Windstream and TransCanada were in almost identical situations. TransCanada's project – a gas generation plant – was cancelled by Ontario, its contract with the OPA had the same *force majeure* provisions as the FIT Contract, and Ontario made a promise to TransCanada that it would be kept whole.

19. The difference in TransCanada's case was that Ontario fulfilled that promise, compensating TransCanada for its sunk costs and giving it an alternative project with a new power purchase agreement, on favourable terms, connected to the electrical grid at the same point where Windstream's Project was to be connected. Ontario's Auditor General estimated that the cost of Ontario compensating TransCanada was approximately \$675 million. Windstream, in contrast, received no compensation and no new project. Ontario, by contrast, obtained a significant economic benefit in large part by substituting the power the OPA would have purchased from Windstream with lower-cost, gas generated power from the new TransCanada plant.

20. ***Ontario treats other energy investors more favourably than Windstream.*** Ontario's preferential treatment of other energy investors over Windstream did not stop with TransCanada. One of the alternative projects that Windstream had proposed to Ontario was a solar project, which Ontario refused to entertain as a possibility. Only two months after Ontario rejected Windstream's proposal, it awarded a nearly identical solar project – located on the same site and connected to the same transmission line as Windstream had proposed – to the South Korean conglomerate Samsung.

21. Furthermore, despite its promises to ensure that Windstream would be granted access to Crown land for the Project “in a timely manner” and that it would be given the “highest priority”, Windstream's application for Crown land for the Project site it made over six years ago has still not been processed. In the meantime, Ontario has granted access to Crown land to at least 19 other wind energy developers. It has also allowed the other developers who were awarded FIT contracts at the same time as Windstream to proceed through the regulatory process unimpeded.

22. ***Ontario's conduct breaches Canada's NAFTA obligations.*** Ontario's conduct, which is attributable to Canada, is in breach of four of Canada's obligations to Windstream under Chapter 11 of the North American Free Trade Agreement (“NAFTA”). First, contrary to Article 1110 of NAFTA, Ontario has unlawfully expropriated Windstream's investments in WWIS, the FIT Contract and the Project by imposing the moratorium and by failing to fulfill its promises to immunize Windstream from the moratorium's effects. These measures have rendered Windstream's investments substantially worthless, while resulting in a substantial economic benefit to Ontario. Neither Ontario nor Canada has paid Windstream any compensation to remedy the effects of Ontario's conduct. Ontario's measures have substantially deprived Windstream of its investments and, therefore, amount to an unlawful expropriation of those investments, in breach of Article 1110 of NAFTA.

23. Second, the moratorium and Ontario's failure to fulfill its promises to keep Windstream whole breached Canada's obligations under Article 1105(1) of NAFTA to accord to Windstream's investments fair and equitable treatment in accordance with international law. The moratorium was a breach of commitments and representations Ontario made that if Windstream

applied for and obtained a FIT contract, the Project would be permitted to proceed through the regulatory approvals process. These commitments and representations were intended to, and did, encourage Windstream to invest in the Project and enter into the FIT Contract, putting capital at risk. The moratorium was a repudiation of these commitments, and indeed of Ontario's entire regulatory framework for renewable energy projects as it applied to offshore wind, contrary to Ontario's commitment that it was "open for business" for offshore wind. Its effects were to render Windstream's investments effectively worthless. This alone would be sufficient to render Ontario's conduct a breach of Canada's obligation under Article 1105(1) of NAFTA to accord fair and equitable treatment to Windstream's investments.

24. Ontario's conduct is rendered even more egregious in light of Ontario's ulterior, political motives for imposing the moratorium and its failure to fulfill its promises to ensure that Windstream would not suffer as a result of Ontario's about-face on offshore wind. It is all the more shocking when compared to Ontario's treatment of TransCanada and Samsung summarized above and discussed in detail below.

25. Third, in addition to breaching Article 1105(1), Ontario's preferential treatment of TransCanada breaches Canada's obligation under Article 1102 to accord treatment to Windstream that is no less favourable than that which it accords to its own investors (including TransCanada, a Canadian company) in like circumstances. TransCanada and Windstream were in like circumstances – indeed strikingly so – with respect to the cancellation of their respective projects. Both were cancelled for political reasons. Both companies had power purchase agreements that were under *force majeure* because of delays beyond their control. Both agreements contained an identical limitation on *force majeure* that allowed the OPA to terminate the agreement if the project was delayed by two years. Through no fault of their own, both companies' projects faced this termination risk.

26. Yet Ontario chose two drastically different solutions to identical problems. It kept TransCanada whole and gave it a new contract, a new project and reimbursed its costs, at a cost to Ontario of approximately \$675 million. In contrast, Windstream received no new contract, no new project and no compensation at all, at a substantial economic benefit to Ontario.

27. Fourth, Ontario's preferential treatment of Samsung breaches Canada's obligation, under Article 1103 of NAFTA, to accord to Windstream treatment no less favourable than it awards to investors of third parties (like Samsung, a South Korean company). Samsung and Windstream were in like circumstances with respect to the award of a solar project. Ontario treated Samsung more favourably than it did Windstream by awarding to Samsung a project substantially identical to one Windstream conceived of and proposed, in circumstances where Ontario had promised to ensure that Windstream would not be penalized by the moratorium.

28. *Canada is liable to compensate Windstream.* Windstream is entitled to damages arising from these breaches of NAFTA based on the fair market value of the Project as of the date of the breaches or the date of the award, whichever is higher, assuming the breaches had never occurred.

29. Most of the Project's value was generated by the FIT Contract, which guaranteed Windstream a revenue stream once the Project became operational. Indeed, one of the stated goals of Ontario's new renewable energy legislation was to provide investors with revenue certainty, and the FIT Contract accomplished that objective.

30. Windstream has submitted extensive evidence with this memorial that establishes that the Project would have become operational had Ontario not impeded Windstream's efforts to develop it, and that therefore Windstream would have earned the revenues guaranteed to it under the FIT Contract. Windstream's evidence establishes that:

- a) its investors had the track record to attract the equity and debt financing necessary to bring the Project to commercial operation;
- b) the Project was technically feasible;
- c) the Project did not face significant regulatory risk;
- d) there was no material impediment to the Project receiving all required permits and approvals;
- e) absent the moratorium, the Project would have been built and operational within the time frames provided for in the FIT Contract; and

f) the Project's future cash flows can be calculated with a high degree of certainty.

31. Thus, the fair market value of Windstream's investments is most appropriately determined using a Discounted Cash Flow methodology. In the opinion of Deloitte LLP, Windstream's quantum experts, Windstream's losses arising from Canada's NAFTA breaches are between \$357.5 and \$486.6 million as of the date of this memorial. This amount will be updated in due course to the date of the Tribunal's award.³

32. Windstream is entitled to damages in this range (as updated), plus interest and its costs of the arbitration.

B. Materials Submitted by Windstream

33. In support of this memorial, Windstream has submitted witness statements from:

- a) **Mr. Ian Baines**: the President of WWIS. Mr. Baines provides evidence about the life of the Project, representations and commitments Ontario made to Windstream to encourage it to sign the FIT Contract, the decision to enter into the FIT Contract, and Windstream's interactions with Ontario since the moratorium.⁴
- b) **Mr. David Mars**: the co-founder and President of Windstream. Mr. Mars provides evidence about the investors in Windstream, Windstream's decision to invest in Ontario, Windstream's commitment to the Project, Windstream's reliance on Ontario's representations and commitments, and the effects of the moratorium on Windstream and the Project.⁵
- c) **Mr. William Ziegler**: the majority investor in Windstream, and Chairman of its Board of Directors. In addition to the topics addressed in Mr. Mars' statement,

³ These losses are based on a design of the Project that met Ontario's proposal that turbines be located at least five kilometres from shore. However, as the documents produced in this arbitration reveal, that setback requirement was never adopted and was not based on a scientific rationale. Assuming that the requirement had never been adopted, or that a less stringent one had been adopted, Windstream's damages would be greater than the above amount: CER-Deloitte (Taylor, Low), pp. 3-4.

⁴ CWS-Baines.

⁵ CWS-Mars.

Mr. Ziegler provides evidence about his substantial experience bringing large-scale energy projects from development to operation.⁶

- d) **Mr. Uwe Roeper:** the President of Ortech Consulting Inc., a professional engineer who acted as project manager for the Project. Mr. Roeper provides evidence about the regulatory environment in place for offshore wind in 2009 and 2010 and the work carried out by Ortech on behalf of Windstream to develop the Project.⁷
- e) **Mr. Chris Benedetti:** a principal at Sussex Strategy Group, a leading Canadian public affairs consulting firm, who acted as government relations consultant for Windstream. Mr. Benedetti provides evidence about his interactions with the Ontario Government on behalf of Windstream both before and after the moratorium was imposed.⁸
- f) **Mr. Adam Chamberlain:** a partner with the law firm of Borden Ladner Gervais LLP, who specializes in environmental and energy law. Mr. Chamberlain provides evidence about his interactions with the Ontario Government on behalf of Windstream in his capacity as counsel for Windstream.⁹

34. Windstream has also submitted expert reports from:

- a) **Sarah Powell:** Ms. Powell is a partner with the law firm of Davies Ward Phillips & Vineberg LLP, who specializes in environmental and energy law and is certified by the Law Society of Upper Canada as a Certified Specialist in Environmental Law. Ms. Powell's report assesses the regulatory environment for offshore wind in place at the time Windstream decided to invest in the Project and, through WWIS, enter into the FIT Contract, as well as the status of the FIT

⁶ CWS-Ziegler.

⁷ CWS-Roeper.

⁸ CWS-Benedetti.

⁹ CWS-Chamberlain.

Contract and other Project assets as intangible personal property under Ontario law.¹⁰

- b) ***Richard Taylor and Robert Low of Deloitte LLP***: Messrs. Taylor and Low are Certified Public Accountants, Chartered Accountants and Certified Business Valuators. Mr. Taylor is a partner and Mr. Low is an Executive Advisor in Deloitte's Financial Advisory group. Their report quantifies Windstream's losses resulting from Canada's breaches of NAFTA.¹¹
- c) ***Remo Bucci of Deloitte LLP***: Mr. Bucci is a licensed Professional Engineer who has been involved in infrastructure projects related to power and utilities. His report addresses the financeability of the Project, both today and but for the moratorium.¹²
- d) ***4C Offshore***: 4C Offshore is a leading provider of market consulting services to the offshore wind industry. Its report provides an assessment of the Project's cost and information about four freshwater offshore wind farm projects in Europe.¹³
- e) ***Power Advisory LLC***: Power Advisory is a consulting firm with focus on the electricity sector, with extensive experience in Ontario's renewable generation market. Its report quantifies the economic benefit to Ontario from cancelling the Project.¹⁴
- f) ***SgurrEnergy***: SgurrEnergy is a leading independent multi-disciplinary renewable energy consultancy, which has provided technical support, resource assessment, and project management to more than 110 gigawatts of offshore and onshore wind projects. Its report opines on the technical feasibility of constructing and operating

¹⁰ CER-Powell.

¹¹ CER-Deloitte (Taylor and Low).

¹² CER-Deloitte (Bucci).

¹³ CER-4C Offshore.

¹⁴ CER-PowerAdvisory.

the Project. As part of this work, SgurrEnergy considered reports by OCC|COWI and Weeks Marine. COWI developed the offshore construction plan, foundation conceptual design and installation strategy. Weeks Marine, an internationally recognized offshore contractor, supported the offshore construction plan.¹⁵

- g) ***W.F. Baird & Associates Coastal Engineers***: Baird is an engineering consulting firm specializing in coastal projects and with expertise in in-water projects in Lake Ontario. Its report reviews the technical and permitting feasibility of the Project in connection with the aquatic environment aspects of the Project.¹⁶
- h) ***Dr. Paul Kerlinger***: Dr. Kerlinger holds a Ph.D. in biology with specialization in bird behaviour, ecology, and research design from the University at Albany in New York State. He has studied the impacts of wind turbines and communication towers on birds since 1994. His report considers whether there are any impediments to the Project obtaining a Renewable Energy Approval on the basis of available information related to birds, and what mitigation measures would be expected for the project.¹⁷
- i) ***Dr. Scott Reynolds***: Dr. Reynolds holds a Ph.D. in Physiological Ecology from Boston University, and has been conducting research on bats since 1993 and working with the impact of wind turbines on bats since 2003. His report summarizes known bat species in Ontario and predicts the likely scope and scale of the Project's impact on bats.¹⁸
- j) ***Brian Howe of HGC Engineering***: HGC Engineering is one of North America's largest engineering consulting firms. It specializes exclusively in noise, vibration, and acoustics. Mr. Howe sits on the Council of Canadian Academies' Wind

¹⁵ CER-SgurrEnergy.

¹⁶ CER-Baird.

¹⁷ CER-Kerlinger.

¹⁸ CER-Reynolds.

Turbine Noise and Human Health Panel and prepared a literature review for Ontario's Ministry of the Environment related to low-frequency noise associated with wind turbines. Mr. Howe evaluated the anticipated acoustic impact of the Project.¹⁹

- k) ***Ortech Consulting Inc.***: Ortech is a leading provider of engineering services in the power and environmental sector, and was one of Windstream's consultants on the Project. Ortech prepared two reports for this arbitration that continued environmental assessment work Ortech had started before this arbitration. The first considers whether there would be material impediments to the Project obtaining a Renewable Energy Approval, and relies on the Baird, Kerlinger, Reynolds and HGC reports as well as Ortech's analysis. The second provides an assessment of whether the Project could complete the Natural Heritage component of the Renewable Energy Approval process.²⁰
- l) ***Jim MacDougall of Compass Renewable Energy Consulting***: Mr. MacDougall is a former manager of the OPA with experience in the design and implementation of the FIT Program. Mr. MacDougall's report explains the considerations and assumptions that were used in determining the FIT Program design and pricing.²¹
- m) ***Professor Rudolph Dolzer***: Professor Dolzer is a Professor of Law at the University of Bonn in Germany. His expertise includes international investment law and commercial international arbitration, with a particular focus in energy matters. His opinion considers the scope of the fair and equitable treatment provision in Article 1105 of NAFTA.

¹⁹ CER-HGC.

²⁰ CER-ORTECH.

²¹ CER-Compass.

PART TWO – THE FACTS

I. BACKGROUND

A. Offshore Wind Electricity Generation

35. Offshore wind energy is a fast-growing source of renewable electricity generation. In an offshore wind electricity generation project, wind turbines are installed in a body of water rather than on land. Offshore wind offers several advantages over onshore, most notably higher wind speeds, more constant wind, efficient access to major transmission connections and the fact that offshore projects are constructed much further away from residential areas than most onshore projects.

36. Most of the world's major offshore wind projects are located in Europe, principally off the coasts of Great Britain. As of the end of July 2014, there was a combined 7,110 megawatts of offshore wind generating capacity in operation, a further 2,190 megawatts installed but not yet operational, and an additional 4,000 megawatts of generating capacity under development. The two largest projects – the London Array and the Greater Gabbard offshore wind energy projects – have a capacity of 630 megawatts and 504 megawatts, respectively. They are located off the coast of Great Britain, in the North Sea. The first offshore wind project, the Vindeby Wind Farm, was constructed in the North Sea off the coast of Denmark in 1991.²²

37. To date, most of the world's offshore wind facilities are located in saltwater environments. However, planned and existing offshore wind development in two freshwater lakes – Lake Vänern in Sweden and the Usselmeer in the Netherlands – and in the Baltic Sea, parts of which have low levels of salinity, demonstrate the feasibility of offshore wind energy development in freshwater and low-salinity environments and provide useful lessons for offshore development in the Great Lakes.²³ Developers at these projects have found that offshore development in freshwater has numerous important advantages over development in saltwater, including lower installation and maintenance costs as a result of lower wave heights, and lower

²² **C-0664**, Report (EWEA), The European offshore wind industry - key trend and statistics 1st half of 2013 (July 2013); **C-0709**, 4C Offshore (August, 2014), European Market Overview Report and Global Offshore Wind Farms Database.

²³ CER-4C Offshore, p. 6.

equipment costs as a result of reduced salinity levels in the water.²⁴ Offshore developers in Europe, as in Ontario, are subject to rigorous environmental review processes at the pre- and post-construction as well as operational phases.²⁵

38. The following photograph depicts offshore wind turbines at the Lake Vänern Offshore Wind Farm in Sweden.²⁶



39. Maps showing the locations of the numerous operational and planned offshore wind farms in Europe are included in Windstream's book of exhibits.²⁷

B. The Wolfe Island Shoals Project

40. The Windstream Wolfe Island Shoals Project (previously defined as the “**Project**”) was an offshore wind energy generation project that Windstream proposed to build in the Wolfe Island Shoals area in Lake Ontario, off Wolfe Island, near Kingston, Ontario, Canada.²⁸

²⁴ CER-4C Offshore, p. 3.

²⁵ CER-4C Offshore, pp. 21-23.

²⁶ CER-SgurrEnergy, p. 20.

²⁷ **C-0710**, Map (4C Offshore), Offshore Wind Farms in the North Sea, Baltic Sea, and UK Waters: Commissioned, Under Construction and in Planning (August 2014); **C-0709**, 4C Offshore European Market Overview Report and Global Offshore Wind Farms Database (August 2014), pp. 54-60.

²⁸ **C-0551**, Report (Ortech), Draft Project Description for Wolfe Island Shoals Offshore Wind Farm (September 26, 2011); **C-0354** Presentation, Windstream Wolfe Island Shoals Wind Farm (September 2010).

41. The following photographs depict a computer-generated rendition of the Project, both (a) from an aerial view and (b) as it would have appeared from the shore.²⁹



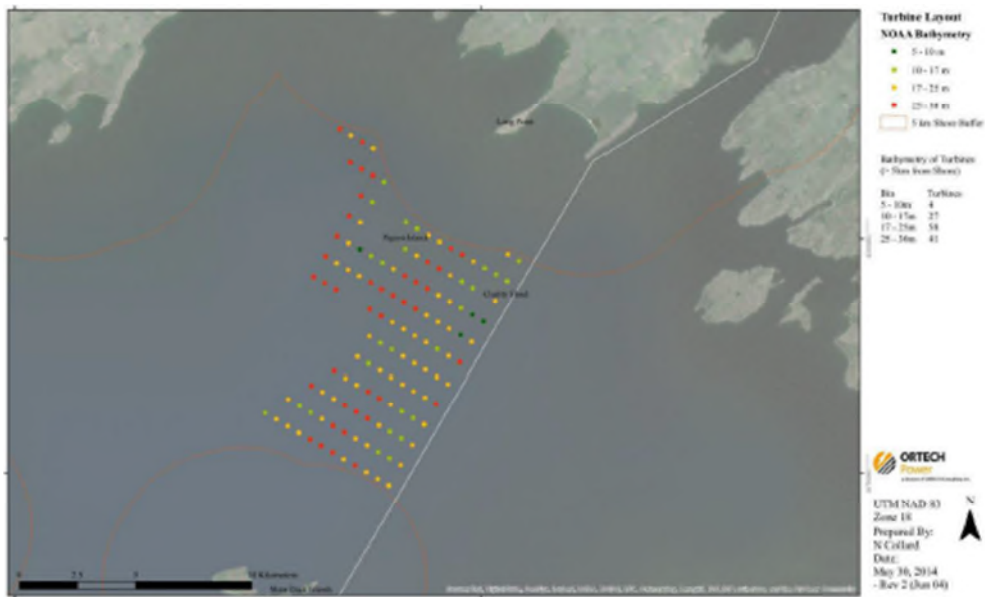
42. As shown on the following map, the Project was located in Eastern Lake Ontario, near Kingston, Ontario:³⁰

²⁹ C-0699, Wolfe Island Photomontage (July 2014); C-0698, Wolfe Island Photomontage (July 2014).

³⁰ C-0744, Map (Ortech) Lake Ontario (July 21, 2014).



43. The Project had a 300-megawatt capacity, and would have included 130 wind turbines. Based on the Ontario government’s proposal that offshore wind turbines be located five kilometres from shore (described in paragraph 200), Windstream and its consultants designed the following layout for the Project:³¹



44. The Project would have been connected to Ontario’s electricity grid at the Lennox Transmission Station, a major node on the provincial grid through a 28-kilometre submarine

³¹ CER-SgurrEnergy, p. 32.

cable. WWIS has received conditional approval to connect the Project to Ontario's power grid, subject to the completion of certain standard conditions.³²

45. In 2010, WWIS entered into a power purchase agreement under the OPA's feed-in-tariff program (the "**FIT Contract**"). Under the FIT Contract, the OPA is required to purchase the electricity generated by the Project at a fixed contract price of \$190 per megawatt hour, indexed to inflation annually, over a 20-year term.³³

46. If built, the Project would have resulted in a \$850 million investment in Ontario that was projected to add 1,900 full-time jobs in Ontario during the construction period, and a further 175 jobs while the Project was in operation.³⁴ It would have generated over 23 million megawatt hours of electricity from renewable sources for Ontario over a 20-year period.³⁵

II. WINDSTREAM AND ITS ENTERPRISE WWIS

A. Windstream

47. Windstream Energy LLC, defined above as Windstream, is a limited liability company dedicated to the development of renewable energy. It is organized under the laws of Delaware, United States of America.³⁶ Windstream was incorporated on October 15, 2007 as Ontario Clean Power LLC by a New York City-based investment group with extensive experience developing

³² **C-0383**, Report (Hydro One), Customer Impact Assessment, Wolfe Island Shoals GS 300 MW Wind Turbine Generator Generation Connection (November 8, 2010); **C-0381**, System Impact Assessment Report (IESO), Wolfe Island Shoals Wind Generation Station, Connection Assessment & Approval Process (Final Report) (November 8, 2010).

³³ **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

³⁴ **C-0413**, Letter from Baines, Ian (WEI) to The Honourable Dalton McGuinty, Premier (December 15, 2010); **C-0412**, Presentation, Wolfe Island Shoals Project, Windstream Energy, Employment and Income Impacts in Ontario (December 14, 2010), pp. 6-7; **C-0560**, Draft Report (Ortech), Wolfe Island Shoals Offshore Wind Project Specific Benefits (November 17, 2011), p. 4; **C-0415**, Report (Aecom Canada Ltd.), Windstream Energy - Potential Employment and Income Impacts in Ontario from the Wolfe Island Shoals Project (December 17, 2010).

³⁵ **C-0670**, Report, (GL Garrad Hassan), Wolfe Island Shoals Wind Farm Preliminary Energy Assessment (September 30, 2013), p. 15; CER-SgurrEnergy, p. 61.

³⁶ **C-0682**, Delaware Corporate Search, Windstream Energy LLC (March 26, 2014).

and operating energy projects in both onshore and offshore environments.³⁷ Windstream's initial objective was to acquire a number of existing Ontario wind energy project assets and focus on smaller standard offer contracts that existed in Ontario, before developing larger (100 MW and up) opportunities for future requests for proposal.³⁸

48. Windstream is managed by White Owl Capital Partners (“**White Owl**”), an early stage investment firm based in New York City. David Mars and William Ziegler are the principals of White Owl. Under a Limited Liability Company Agreement entered into in November 2007, White Owl has the exclusive right to manage Windstream's business.³⁹

B. Windstream Wolfe Island Shoals Inc.

49. Windstream Wolfe Island Shoals Inc., defined above as WWIS, is a subsidiary of Windstream. WWIS is a corporation incorporated under the laws of Ontario.⁴⁰ It was incorporated under the name Ontario Clean Power Foymount Inc. on October 18, 2007 as a special purpose company to develop and operate the Project.⁴¹ WWIS is the vehicle through which Windstream owns the Project. Windstream directly owns 85% of the shares of WWIS.⁴² Windstream indirectly owns the remaining 15% of the shares of WWIS through OCP Option

³⁷ **C-0030**, Delaware Certificate of Formation of Ontario Clean Power LLC (October 15, 2007); **C-0032**, Certificate of Incorporation, Ontario Clean Power Foymount Inc. (October 18, 2007); **C-0031**, Articles of Amendment, Ontario Clean Power Foymount Inc. (October 18, 2007); **C-0098**, Delaware Certificate of Amendment of Certificate of Formation of Ontario Clean Power LLC (November 20, 2008).

³⁸ CWS-Baines ¶ 29.

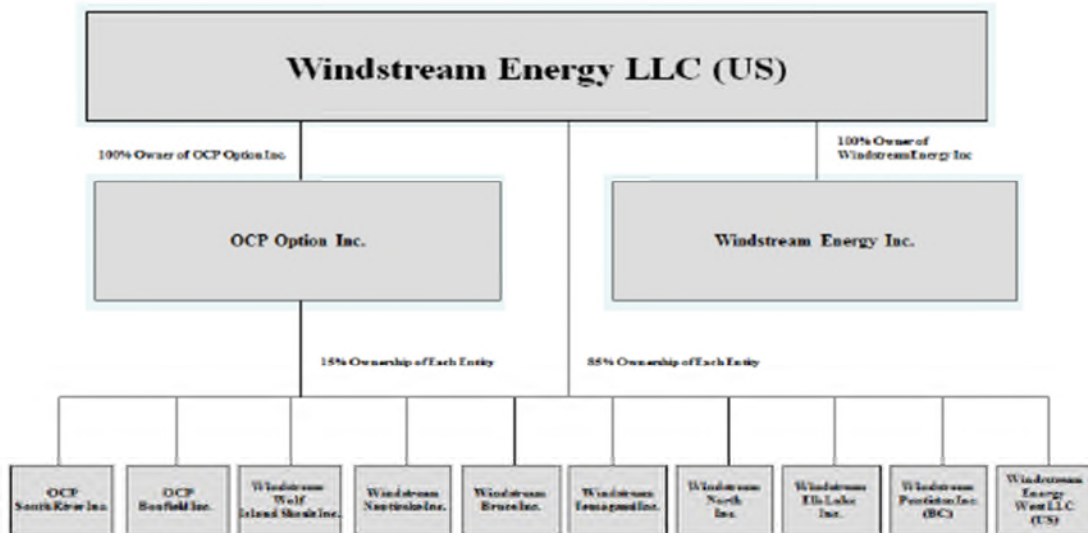
³⁹ CWS-Mars ¶ 10; **C-0040**, Limited Liability Company Agreement of Ontario Clean Power LLC, (November 2, 2007); **C-0179**, Second Amended Restated Limited Liability Company Agreement of Windstream Energy LLC (January 14, 2010).

⁴⁰ CWS-Mars ¶ 34; **C-0035**, Initial Return/Notice of Change, Ontario Ministry of Consumer and Business Services Receipt Only, Windstream Wolfe Island Shoals Inc. (WWIS) (October 18, 2007).

⁴¹ CWS-Mars ¶ 34; CWS-Baines ¶¶ 29-30; **C-0037**, Windstream Wolfe Island Shoals Inc. (WWIS) Corporation Summary (October 18, 2007); **C-0150**, Certificate of Status, Windstream Wolfe Island Shoals Inc. (WWIS) (November 19, 2009).

⁴² CWS-Mars ¶ 34; **C-0176**, Shareholders' Register, Windstream Wolfe Island Shoals Inc. (January 1, 2010).

Inc., which is a wholly owned subsidiary of Windstream.⁴³ Below is an organizational chart of the Windstream family of companies:



50. WWIS is the counterparty to the FIT Contract, and is the holder of all rights under that contract.⁴⁴

C. Windstream’s Other Investments in Ontario

51. Windstream Energy Inc. is a second wholly-owned subsidiary of Windstream. Windstream Energy Inc., formerly known as Ontario Clean Power Ltd., is incorporated under the laws of Ontario.⁴⁵ It provides contract staff, engineering support, legal and accounting services to WWIS and Windstream’s other subsidiaries.⁴⁶

⁴³ CWS-Mars ¶ 34; **C-0175**, Shareholders' Register, OCP Option Inc. (January 1, 2010); **C-0176**, Shareholders' Register, Windstream Wolfe Island Shoals Inc. (January 1, 2010).

⁴⁴ **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

⁴⁵ CWS-Mars ¶ 35; **C-0033**, Certificate of Incorporation, Ontario Clean Power Ltd. (OCP) (October 18, 2007); **C-0034**, Initial Return/Notice of Change, Ontario Clean Power Ltd. (OCP) (October 18, 2007).

⁴⁶ CWS-Mars ¶ 35; CWS-Baines ¶ 30; Windstream Inc. provides these services pursuant to a Management Services Agreement entered into on October 17, 2007; **C-0036**, Management Services Agreement between Ontario Clean Power Foymount Inc. and Ontario Clean Power Ltd. (October 18, 2007).

52. In addition to the Project, Windstream has conducted development work on ten onshore wind energy projects in Ontario. Windstream established and invested in special purpose companies to develop each of these projects.⁴⁷ Windstream applied through its special purpose companies for FIT contracts for each of these projects but was not granted any FIT contracts for them.⁴⁸

D. Windstream's Investments in Wyoming and British Columbia

53. In addition to its activities in Ontario, Windstream is currently engaging in development work in Wyoming and British Columbia for renewable energy projects.⁴⁹ In Wyoming, Windstream is conducting development activities and holds options to lease for wind energy projects on sites totaling 128,000 acres.⁵⁰ Windstream has undertaken wind, terrain and environmental studies in relation to those sites.⁵¹ In British Columbia, Windstream has explored wind energy development on approximately 150,000 acres of land.⁵²

E. Investors in Windstream Have Substantial Experience Developing and Financing Offshore and Onshore Energy Projects

54. The principal investors in Windstream – William Ziegler, Steven Webster and Kenneth H. Hannan, Jr. – are a group of American high net-worth individuals who have been investing together for over 25 years. They have extensive experience in the oil & gas, offshore drilling, shipping, real estate, banking and private equity industries. Together, the investors in Windstream have founded and later sold firms with an aggregate value of more than \$16 billion, and currently have together over [REDACTED] invested in controlling stakes in a range of energy and technology companies.⁵³

⁴⁷ CWS-Baines ¶ 30.

⁴⁸ CWS-Baines ¶ 72.

⁴⁹ CWS-Mars ¶ 46.

⁵⁰ CWS-Mars ¶ 61.

⁵¹ **C-0731**, Presentation (WEI), Investor Presentation (October 2009).

⁵² CWS-Mars ¶ 61.

⁵³ CWS-Mars ¶ 15.

55. Mr. Ziegler is the [REDACTED] majority owner of Windstream, and the Chairman of its Board of Directors. Mr. Ziegler has been investing in the energy sector for over 30 years.⁵⁴ In addition to Windstream, Mr. Ziegler currently is a major investor in and serves as Chairman of the Board of Directors of several other companies, including a company that operates natural gas pipelines in Northern Ohio, an oil and gas exploration and extraction company that operates in New York State, and a natural gas gathering and transportation services company that operates in the Appalachian Basin.⁵⁵

56. In 1988, Mr. Ziegler and Mr. Webster founded Falcon Drilling Company, Inc., later renamed R&B Falcon Corporation (“**R&B Falcon**”). By 2000, R&B Falcon had become one of the largest offshore drilling contractors in the world.⁵⁶ Mr. Ziegler has also been a lead investor in, among other companies: an oil and gas drilling company sold for approximately US\$1.7 billion, a publicly traded oil & gas well technology company with a current market capitalization of US\$1.5 billion, a company that is the largest drill rig operator in the Appalachian Basin, recently sold for US\$242 million, [REDACTED] [REDACTED].⁵⁷

57. Mr. Hannan, [REDACTED] [REDACTED], has been President of Colonial Navigation for 37 years.⁵⁸ Colonial Navigation is an established shipping company that currently controls a diversified fleet of twelve tankers and ten supramax vessels. [REDACTED]. Colonial has a global presence and since inception has purchased, built, operated and sold in excess of 100 vessels. The cost of these vessels ranges from US\$30 million to US\$65 million per vessel. In addition, Mr. Hannan is a longtime energy investor and is a limited partner in a number

⁵⁴ CWS-Mars ¶ 14; **C-0689**, Windstream Energy LLC Investor Schedule A (April 7, 2014).

⁵⁵ CSW-Ziegler ¶¶ 1, 7.

⁵⁶ CSW-Ziegler ¶ 9.

⁵⁷ CWS-Ziegler ¶ 10; CWS-Mars ¶ 13.

⁵⁸ CWS-Mars ¶ 16; **C-0689**, Windstream Energy LLC Investor Schedule A (April 7, 2014).

of private equity funds. He previously was an investor with Mr. Ziegler and Mr. Webster in R&B Falcon, for which he served as director from 1991 to 1997.⁵⁹

58. Mr. Webster, who owns ████████ of Windstream, since 2005 has been the Co-Managing Partner and Co-CEO of a private equity firm with over US\$5 billion under management. This firm focuses on the energy, media and healthcare industries. From 2000 to 2005, Mr. Webster was Chairman of Global Energy Partners, an affiliate of Credit Suisse First Boston's Alternative Capital Division. From 1988 to 1997, he was Chairman and CEO of Falcon Drilling Inc. and President and CEO of its successor R&B Falcon until 1999. He served as Vice Chairman of R&B Falcon until 2001, when the company was acquired by Transocean Inc. for US\$8.8 billion. Mr. Webster co-founded, and currently serves as Chairman of the Board of Directors of a leading independent oil and gas exploration and production company with operations in the U.S. onshore shale gas basins and offshore basins in the North Sea. He is also Chairman of a well site services company and a director of a number of energy companies, including an international provider of offshore contract drilling, liftboat and inland barge services. He has previously served on the board of directors of a number of energy companies. He also served as a director of an offshore energy support and marine transportation company. Throughout his business career, Mr. Webster has been active in venture capital and investment activities in various industries, including energy. He co-founded or has been the lead investor in a number of companies in the energy sector, which have been sold for or have an market capitalization of an aggregate of over US\$14 billion, including a leading global provider of offshore contract drilling and liftboat services, with operations in most of the major shallow water hydrocarbon producing provinces in the world operating a fleet of 38 jackup rigs and 24 liftboats, an exploration, development and production company operating in the Gulf of Mexico and a privately held company engaged in the acquisition, exploration and development of natural gas and oil reserves in Texas.⁶⁰

59. Mr. Ziegler and Mr. Mars brought the group of investors together in mid-2009 and 2010 because, in light of the Ontario Government's very public commitment to renewable energy

⁵⁹ CWS-Mars ¶ 16.

⁶⁰ CWS-Mars ¶¶ 17-18.

development including offshore wind, he believed that there were substantial opportunities in Ontario for wind energy development.⁶¹

F. WWIS' President Has Substantial Experience Developing Wind Energy Projects

60. The activities of Windstream and its subsidiaries in Ontario are led by Ian Baines, an Ontario-based engineer with extensive experience developing wind energy projects.⁶² In 1990, Mr. Baines founded Controltech Engineering Inc. (“**Controltech**”), an engineering company focused on designing, developing and building renewable energy projects in Ontario, and subsequently established a subsidiary called Windtechnik Inc. (“**Windtechnik**”) to focus on wind development. In 1993, when the Ontario Government’s electricity agency issued a request for proposal to construct wind farms in the province, Windtechnik submitted a successful application to develop a wind energy generation project on Wolfe Island. However, the province’s renewable energy program was cancelled before the project could move ahead.⁶³

61. In 2000, Mr. Baines together with other investors formed a company called Canadian Renewable Energy Corporation (“**CREC**”). CREC was involved in the developmental stages of a number of renewable energy projects, including the Wolfe Island wind project and the Melancthon wind project, both of which were subsequently completed by other companies into two of Ontario’s largest onshore wind projects.⁶⁴ Through Controltech, Mr. Baines was retained to obtain the necessary approvals and perform other work on the onshore Wolfe Island Wind Project. The Wolfe Island Wind Project began commercial operation in 2009, with a nameplate capacity of 197.8 megawatts, and is currently the second largest wind energy project in Canada, measured by megawatts. The power produced by the Wolfe Island Wind Project is sold under a 20-year Renewable Energy Supply Contract with the OPA.⁶⁵

⁶¹ CWS-Mars ¶ 15.

⁶² CWS-Baines ¶¶ 1, 3-6.

⁶³ CWS-Baines ¶ 19.

⁶⁴ CWS-Roeper ¶ 3.

⁶⁵ CWS-Baines ¶ 23.

III. THE PROVINCE OF ONTARIO AND ITS RELEVANT MINISTRIES AND AGENCIES

A. The Province of Ontario

62. The Province of Ontario is one of Canada's ten provinces, and its most populous. Its population accounts for nearly 40% of the population of Canada. Three of North America's Great Lakes – Lake Ontario, Lake Erie and Lake Huron – and the St. Lawrence Seaway form the southern and western borders of the area of Ontario known informally as Southern Ontario, which is home to 94% of the province's population.

63. Several of Ontario's major cities are located along the northern shore of Lake Ontario. These include the Greater Toronto and Hamilton area in the west and Kingston in the east.

B. Premier of Ontario, Executive Council and Premier's Office

64. The Premier of Ontario is the Province of Ontario's head of government.⁶⁶ The Premier presides over the Executive Council of Ontario, informally known as the Cabinet of Ontario. The Executive Council is comprised of all the cabinet ministers who are the heads of a ministry. The Premier is also an elected member of the Legislature of Ontario.

65. The current Premier of Ontario is Kathleen Wynne, who assumed office on February 11, 2013 following the resignation of former Premier Dalton McGuinty. Premier McGuinty was in office from October 23, 2003 to February 11, 2013. He and Premier Wynne are both members of the Ontario Liberal Party.

66. The Premier's Office consists of appointed advisors who serve at the pleasure of the Premier. The Premier's advisors are not members of the civil service, and are frequently referred to as "political staff." They answer to the Premier's Chief of Staff, and advise the Premier on a range of matters including energy policy and stakeholder relations.

⁶⁶ The Premier is the *de facto* head of the Government of Ontario. Under the *Constitution Act, 1867*, the Lieutenant Governor in Council is the head of the Government of Ontario; however, in practice, the Lieutenant Governor in Council is apolitical and does not participate in the day-to-day governance of the province.

C. Ministry of Energy and Infrastructure

67. The Ministry of Energy and Infrastructure⁶⁷ (“MEI”) is the portfolio of the Executive Council responsible for developing Ontario’s electricity generation, transmission and other energy-related facilities. It is an organ of the Ontario Government. The MEI is constituted by the *Ministry of Energy and Infrastructure Act*, which grants the Minister of Energy extensive authority to, among other things, review energy and infrastructure matters on a continuing basis with regard to both short-term and long-term goals in relation to the energy and infrastructure needs of the Province of Ontario.

68. The MEI is directed by the Minister of Energy, who is an elected member of the Legislature of Ontario and is appointed by the Lieutenant Governor of Ontario, acting on advice from the Premier of Ontario. As a formal matter, the Minister of Energy (and other Ministers) serves at the pleasure of the Lieutenant Governor. Practically speaking, the Minister serves at the pleasure of the Premier. The Minister is accountable to the Legislature of Ontario. The Deputy Minister of Energy is generally appointed from the civil service. The Deputy Minister directs all the activities of the Ministry. He or she reports both to the Minister and to the Secretary of the Cabinet, who is the head of the civil service.

69. The MEI was given special responsibility through the *Green Energy Act* and its amendments to the *Electricity Act* to expand Ontario’s reliance on renewable energy. In particular, the *Green Energy Act* amended the *Electricity Act* to empower the Minister of Energy to direct the Ontario Power Authority (previously defined as the OPA) to, among other things, procure electricity supply from renewable sources and develop a feed-in-tariff program for electricity produced by renewable sources.

70. The MEI is responsible for a number of entities that regulate and operate Ontario’s energy sector, including the OPA, Ontario Power Generation, the Independent Electricity System Operator, Hydro One and the Ontario Energy Board.

⁶⁷ Between 2007 and 2010, the Ministry was known as the Ministry of Energy and Infrastructure. It is now known as the Ministry of Energy.

D. Ontario Power Authority

71. The OPA is a corporation without share capital established in 2004 through amendments to the *Electricity Act* enacted by the *Electricity Restructuring Act, 2004*. Further amendments to the *Electricity Act* made pursuant to the *Green Energy Act* empowered the OPA to create a feed-in-tariff program if directed to do so by the Minister of Energy, as described below in paragraph 108).

72. The OPA is controlled by its Board of Directors and by a Chief Executive Officer who is appointed by the Board of Directors. Members of the Board of Directors are appointed by the Minister of Energy and serve at the Minister's pleasure. Although the OPA has a Board of Directors appointed by the Minister of Energy, the Minister exercises formal control over the OPA by way of mandatory directives issued under the *Electricity Act*. The Minister also exercises less formal control over the OPA, as discussed in section XXIV.B.2 below.

73. The OPA is also responsible for forecasting electricity demand, planning for electricity generation and engaging in activities to ensure an adequate supply of electricity in Ontario. This includes procuring electricity, including entering into long-term power purchase agreements with private sector developers.

E. Ministry of Natural Resources

74. The Ministry of Natural Resources ("MNR") is an organ of the Ontario Government. It is the portfolio of the Ontario Cabinet responsible for developing resource management policies, managing Ontario parks, forest fire, flood and drought protection and generating geographic information about the province. MNR is responsible for the *Public Lands Act*, and managing, selling and disposing of Crown lands in Ontario.

75. MNR is directed by the Minister of Natural Resources, who is an elected member of the Legislature of Ontario and is appointed by the Lieutenant Governor of Ontario, acting on advice from the Premier of Ontario. The MNR serves at the pleasure of the Lieutenant Governor (and in practice to the Premier), and the Minister is accountable to the Legislature of Ontario.

F. Ministry of the Environment

76. The Ministry of the Environment (“MOE”) is another organ of the Government of Ontario. MOE is the portfolio of the Ontario Cabinet responsible for managing and protecting the natural environment in Ontario, including developing environmental standards and regulations, managing the environmental approvals process, and enforcing compliance with environmental laws. MOE is responsible for administering the *Environmental Assessment Act*, the *Environmental Bill of Rights*, the *Environmental Protection Act, 2008*, and the *Ontario Water Resources Act* (among others). MOE is constituted by the *Ministry of the Environment Act*.

77. MOE is directed by the Minister of the Environment, who is an elected member of the Legislature of Ontario and is appointed by the Lieutenant Governor of Ontario, acting on advice from the Premier of Ontario. The Minister of the Environment serves at the pleasure of the Lieutenant Governor (and in practice to the Premier), and the Minister is accountable to the Legislature of Ontario.

78. MOE is empowered under the *Environmental Protection Act* to “issue, amend or revoke policies in respect of renewable energy approvals” in Ontario.

IV. 2003-2006: ONTARIO ADOPTS POLICIES TO PROMOTE RENEWABLE ENERGY DEVELOPMENT IN THE PROVINCE

79. Heading into the 21st century, Ontario’s electricity supply mix consisted primarily of hydroelectricity, nuclear energy, gas, oil and coal. Aside from hydroelectricity, which by 2003 provided 23% of Ontario’s supply mix, renewable sources of electricity made up a negligible proportion of the province’s supply mix.⁶⁸ Ontario also relied heavily on coal. As late as 2003, Ontario’s four coal-fired power plants made up 25% of Ontario’s supply-mix.⁶⁹

80. Beginning in 2003, Ontario began to adopt policies to promote renewable energy development. Among other initiatives, in March, 2003, the MNR released on Ontario’s Environmental Registry for public comment a draft policy for the disposition of Crown land

⁶⁸ C-0006, Specifications (OEB), Ontario’s System-Wide Electricity Supply Mix: 2003 Data (October 26, 2005).

⁶⁹ C-0133, Article (MEI), Ontario’s Coal Phase Out Plan (September 3, 2009).

(including the beds of the Great Lakes) for wind energy development.⁷⁰ The guiding principle of this policy was to provide a standardized approach to the allocation process, information requirements, granting of tenure and the charging of rent fees for wind power development. This policy recognized that developers need a “fair, consistent, orderly and timely process for requesting tenure to Crown land.”⁷¹

81. In March 2004, the draft policy was finalized and MNR subsequently issued it as Policy Number 4.10.04, *Windpower Development on Crown Land* (“**Wind Policy 4.10.04**”).⁷² The purposes of this policy were to:

- a) provide Crown land for wind power testing and development;
- b) support wind power in far north remote communities;
- c) achieve a sustainable source of revenue; and
- d) provide a consistent approach to the authorization of activities on Crown land.

The policy emphasized that “Ontario supports clean, renewable power generation”, and that “Crown land should be made available to test and potentially develop new wind power projects.”⁷³ (The policy is further described in Section VII.B below.) With respect to offshore wind projects on Crown land, the MNR between 2004 and 2006, conducted research regarding the potential effects of offshore wind energy projects on fish and fish habitat and the effects of underwater noise and electromagnetic fields.⁷⁴ MNR also released in 2005 an Ontario Wind

⁷⁰ CER-Powell ¶ 58.

⁷¹ CER-Powell ¶ 58, note 43.

⁷² **C-0004**, Policy No. PL 4.10.04 (MNR), *Wind Power Development on Crown Land* (January 27, 2004), p. 3.

⁷³ **C-0004**, Policy No. PL 4.10.04 (MNR), *Wind Power Development on Crown Land* (January 27, 2004).

⁷⁴ CER-Powell ¶ 63.

Resource Atlas, which indicated that the best potential for wind power development was located near onshore and near offshore of the Great Lakes.⁷⁵

82. On June 13, 2006, the Minister of Energy issued a directive to the OPA to develop an *Integrated Power System Plan*, which called for an increase in 2,700 megawatts of installed renewable capacity in Ontario from the 2003 base year by 2010 and a further increase of 15,700 megawatts by 2025.⁷⁶ In a press release accompanying the directive, the government emphasized that Ontario would achieve a “healthy balance [in its electricity supply mix] by moving away from coal in favour of new nuclear power and renewable energy” and that the Ontario Government expected to add 1,000 megawatts of renewable energy to Ontario’s supply mix within 10 years.⁷⁷

83. On August 27, 2007, the Minister directed the OPA to procure up to 2,000 megawatts of renewable energy by 2011 to come into service by 2015. The directive also confirmed Ontario’s stated goal of increasing the province’s installed renewable energy capacity to 15,700 megawatts by 2025.⁷⁸

84. On August 29, 2007, the OPA filed its proposed 20-year *Integrated Power System Plan* with the Ontario Energy Board.⁷⁹ The plan included upgrades to Ontario’s transmission system to accommodate increased renewable energy generating capacity, and doubling Ontario’s installed renewable energy capacity to 15,700 megawatts by 2025.⁸⁰

⁷⁵ **C-0460**, Issues Management Plan (MNR), Offshore Wind Power - Temporary Deferral (January 17, 2011), p. 3.

⁷⁶ **C-0009**, Letter from Duncan, Dwight (MEI) to Carr, Jan (OPA) (June 13, 2006).

⁷⁷ **C-0008**, Press Release (MNR), McGuinty Government Delivers a Balanced Plan for Ontario’s Electricity Future (June 13, 2006).

⁷⁸ **C-0020**, Letter from Duncan, Dwight (MEI) to Carr, Jan (OPA) (August 27, 2007).

⁷⁹ **C-0038**, Report (OPA), The Integrated Power System Plan for the Period 2008-2027 (October 19, 2007), p. 8.

⁸⁰ **C-0038**, Report (OPA), The Integrated Power System Plan for the Period 2008-2027 (October 19, 2007), p. 8; **C-0086**, Table of Contents (OPA), The Integrated Power System Plan Before the Ontario Energy Board (September 15, 2008).

V. 2006-2008: ONTARIO IMPOSES, AND THEN LIFTS, A DEFERRAL ON APPROVAL OF CROWN LAND APPLICATIONS FOR OFFSHORE WIND PROJECTS

85. In the latter half of 2006 and into 2007, MNR began taking steps to implement the policy directives discussed above that were aimed at increasing reliance on renewable energy in the province, including establishing guidance in relation to offshore wind projects. For instance, in October 2006, MNR promulgated its *Guideline to Assist MNR Staff in the Review of Wind Power Proposals In or Near Water: Potential Impact to Fisheries*.⁸¹ This Guideline included guidance for MNR staff in assessing the possible impact of wind turbines installed in lakes on fish populations and recreational and commercial fishing.

86. In November 2006, MNR announced that it was deferring the approval of applications for access to Crown land to develop offshore wind energy to allow further scientific study.⁸² An Issues Management Plan prepared by MNR at the time indicates that the deferral was imposed to allow MNR to carry out further study so as to “provide additional information regarding implications and impacts of offshore development given the identified concerns of stakeholders.”⁸³ The Plan stated that:

Wind energy development is the fastest growing source of new electricity in the world. Because wind power is recent to many North American jurisdictions, including Ontario, there is relatively little experience with understanding the positive and negative social and economic effects associated with projects.

In response to concerns regarding wind power development on the Great Lakes, the Ministry of Natural Resources is deferring any decision about offshore wind energy projects, and no new applications for offshore wind power will be accepted, pending the outcomes of an important research project.

⁸¹ **C-0011**, Guideline (MNR) To Assist MNR Staff in the Review of Wind Power Proposals in or Near Water: Potential Impacts to Fisheries (October 2006).

⁸² **C-0460**, Issues Management Plan (MNR), Offshore Wind Power - Temporary Deferral (January 17, 2011); CER-Powell ¶ 64; **C-0013**, Letter from Boysen, Eric (MNR) to Proponent Address (November 21, 2006).

⁸³ **C-0460**, Issues Management Plan (MNR), Offshore Wind Power - Temporary Deferral (January 17, 2011), p. 4; see also **C-0049**, Draft Key Messages (MNR) (December 6, 2006).

VI. 2008-2010: ONTARIO ACTIVELY ENCOURAGES INVESTMENT IN OFFSHORE WIND ENERGY

A. Ontario Promotes Itself as “Open for Business” for Offshore Wind Energy Development

87. On January 17, 2008, the Minister of Natural Resources Donna Cansfield announced that Ontario was lifting the deferral on offshore wind energy development.⁸⁴ She stated that Ontario was “committed to developing clean, renewable sources of energy” and that the Province was “preparing to accept new applications for both onshore and offshore wind developments.”⁸⁵ According to Minister Cansfield, Ontario had set a goal of doubling its renewable energy capacity to 15,700 megawatts by 2025.⁸⁶ In furtherance of this new policy direction, Wind Policy 4.10.01 was updated and reissued to include offshore wind with accompanying guidelines on January 28, 2008.⁸⁷

88. The Minister’s announcement had been previewed the previous day by Ontario Premier Dalton McGuinty, who told media outlets that offshore wind could play an important role in the development of renewable energy resources in Ontario. He said that the government had “received advice that you can, in fact, do more to harness wind power – that you can harness that wind power offshore.” He went on to dispel any notion that offshore wind was environmentally harmful, noting that “You don’t just have to stay on land, and you can do it in a way that does not compromise ecosystems.”⁸⁸

⁸⁴ **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008); **C-0055**, Article, Hamilton, Tyler (Toronto Star), “Ontario is preparing to lift controversial moratorium...” (January 15, 2008).

⁸⁵ **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

⁸⁶ **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

⁸⁷ CER-Powell ¶ 68; **C-0059**, Policy No. PL 4.10.04 (MNR), Windpower Site Release and Development Review - Crown Land (January 28, 2008).

⁸⁸ **C-0056**, Article, Hamilton, Tyler (Toronto Star) Premier Reveals Support for Offshore Energy Plan (January 16, 2008).

89. During her press conference, Minister Cansfield indicated that “the province has taken steps to ensure decisions on applications for onshore and offshore wind power development are based on the best available information.”⁸⁹ These steps included:

- a) partnering with the U.S. National Renewable Energy Laboratory to evaluate offshore wind potential in the Great Lakes;
- b) analyzing Lakes Erie, Huron and Ontario, including depth, wind speed and other social and ecological values;
- c) developing wind power guidance documents for birds and bats; and
- d) establishing a partnership with Bird Studies Canada, the Canadian Wind Energy Association and Environment Canada’s Canadian Wildlife Service to set up a common database for monitoring wind power’s impact on birds and bats.⁹⁰

90. The Ontario Government’s official view at that time was that “there has been considerable activity on the policy and resource analysis front in the last year” and that “based on this work, [the government had] determined that the existing policy and Environmental Assessment processes are sufficient to address site-specific issues and concerns related to offshore wind.”⁹¹ This view was restated in internal communications, which indicate that MNR was confident that Ontario has “taken steps to address [...] concerns” about offshore wind⁹² and that “existing policy and Environmental Assessment processes are sufficient to address site-specific issues and concerns related to offshore wind.”⁹³

91. Satisfied that offshore wind development could go ahead, Minister Cansfield promoted Ontario as a place in which foreign investors could invest in offshore wind development. In June

⁸⁹ C-0058, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

⁹⁰ C-0058, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

⁹¹ C-0052, House Note (MNR), Issue: Lifting of the Off-Shore Wind Power Deferral (January 3, 2008).

⁹² C-0057, House Note (MNR), Issue: Lifting of the Off-Shore Wind Power Deferral (January 17, 2008); see also CER-Powell ¶ 67, which confirms this point.

⁹³ C-0054, Key Messages (MNR) (January 15, 2008).

2008, Minister Cansfield told the Toronto Star newspaper that Ontario was “open for business” when it comes to offshore wind.⁹⁴

92. During this period, Ontario began to take further steps to assess the potential for offshore wind in Ontario. In April 2008, the OPA issued a technical analysis on the future of offshore wind in Ontario that it had mandated wind energy consultant Helimax Inc. (“**Helimax**”) to conduct.⁹⁵ When the OPA first commissioned Helimax in the fall of 2005, it had mandated it to evaluate the potential for wind power development in the province of Ontario.⁹⁶ The OPA then extended Helimax’s mandate to identify the best locations in Ontario for future wind power projects. However, because the MNR had imposed a deferral on offshore wind development at the time, this new mandate did not extend to the study of the best locations for offshore wind projects. In March 2008, when the MNR lifted the deferral, Helimax’s mandate was extended to include the best locations for offshore wind developments in Ontario, with a particular focus on the Great Lakes.⁹⁷

93. Helimax aimed to achieve the following objectives:

- a) project or anticipate the locations of future large-scale offshore wind development within those parts of the Great Lakes within Ontario’s jurisdiction (Lake Ontario, Lake Erie, Lake Huron including Georgian Bay and Lake Superior);
- b) rank the sites based on their viability assuming equal electrical grid integration conditions at all sites;
- c) calculate the installable capacity (in megawatts) that each site could potentially accommodate and calculate an approximate energy yield (in gigawatt hours) that each of the projected wind farms could generate;

⁹⁴ **C-0081**, Email from Cooper, John (MNR) to Morencie, Mike (MNR) et al attaching Toronto Star article (June 30, 2008).

⁹⁵ **C-0072**, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008).

⁹⁶ **C-0072**, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), p. 1.

⁹⁷ **C-0072**, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), p. 1.

- d) provide preliminary estimates for construction, operation and maintenance costs of developing a generic offshore wind farm in Ontario's Great Lakes; and
- e) provide a generic schedule for the development of an offshore wind power project from initial project conception to project commissioning.⁹⁸

94. Helimax identified and performed a technical assessment and ranking of 64 offshore sites in the Ontario Great Lakes offshore region that were considered to have favourable potential for wind project development.⁹⁹ Each of the sites has a sufficiently large water sheet to accommodate at least 100 megawatts of installed capacity.¹⁰⁰ While the majority of the most favourable sites identified were located in Lake Huron (27) and Lake Erie (25), it also identified nine sites in Lake Ontario.¹⁰¹ One of the nine locations identified as being most favourable for offshore wind development included the site for the Project.¹⁰²

95. With the appointment of George Smitherman as Minister of Energy and Infrastructure in June 2008, the Province's push to develop renewable energy intensified.¹⁰³ That same newspaper article that quoted Minister Cansfield as stating that Ontario was "open for business" when it comes to offshore wind stated that Minister Smitherman "wanted so much to express his support for wind-industry growth in Ontario that just days after his appointment he made an unscheduled speech" at the seventh annual World Wind Energy Conference, held in Kingston, Ontario.¹⁰⁴

⁹⁸ C-0072, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), p. 1.

⁹⁹ C-0072, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), p. iii..

¹⁰⁰ C-0072, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), p. 27.

¹⁰¹ C-0072, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), p. iii.

¹⁰² C-0072, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), pp. 29-30.

¹⁰³ CWS-Benedetti ¶ 7.

¹⁰⁴ C-0081, Email from Cooper, John (MNR) to Morencie, Mike (MNR) et al attaching Toronto Star article (June 30, 2008).

During his speech, Minister Smitherman emphasized his government's commitment to eliminating coal and "replacing it with green sources of energy."¹⁰⁵

96. On June 16, 2008, a MNR representative at the Great Lakes Wind Collaborative – Offshore Wind Workgroup confirmed that Ontario had lifted the deferral on offshore development, and that it had an assessment process that could be initiated in order to obtain necessary testing permits.¹⁰⁶

97. In September 2008, MEI announced that it was directing the OPA to review a portion of its proposed Integrated Power System Plan for Ontario to focus more on renewable energy and conservation "to ensure Ontario is maximizing its potential to provide clean, green, renewable power to homes and business across the province – and a new generation of 'green-collar' careers and industry."¹⁰⁷ The steps the Minister directed the OPA to take, among other things, included increasing the amount and diversity of renewable energy sources in the supply mix, and improving transmission capacity in parts of the province that were limited to the development of new renewable energy supply.¹⁰⁸

98. At the annual Ontario Waterpower Conference in October 2008, Minister Cansfield gave a speech in which she confirmed that timely approval of applications to use Crown land for offshore wind energy development could be expected by those submitting applications.¹⁰⁹ The Minister stated that it was "an exciting time to be in the renewable energy business in Ontario" and that "finding clean, affordable and sustainable sources of electricity is a top priority for this government."¹¹⁰ In October 2008, Mr. Baines met with the Assistant Deputy Ministers of

¹⁰⁵ C-0079, Article (The Kingston-Whig Standard) Climate Experts turn up the heat (June 25, 2008).

¹⁰⁶ C-0078, Call Summary, Great Lakes Wind Collaborative - Offshore Wind Workgroup (June 16, 2008).

¹⁰⁷ C-0088, News Release (MEI), Energy Plan to Strengthen Green Ontario, McGuinty Government Emphasizes Reliance on Renewables, Conservation; Core Elements of Nuclear Rebuild and Coal Elimination Unchanged (September 18, 2008).

¹⁰⁸ CWS-Benedetti ¶ 7; C-0087, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 17, 2008).

¹⁰⁹ CWS-Baines ¶ 96.

¹¹⁰ CWS-Baines ¶ 42, C-0092, Remarks for Donna Cansfield, Natural Resources Minister at the 8th Annual Waterpower Association Conference (October 29, 2008).

Energy, Finance and Natural Resources. During that meeting, the Assistant Deputy Ministers indicated that they were determined to direct the OPA to take steps to facilitate renewable energy development in the Province.¹¹¹

99. In a press release dated October 30, 2008 and entitled “Ontario Leads Canada in Wind Power Development”, MEI described all the large wind projects that were proceeding or in progress and reiterated Ontario’s commitment to eliminate coal-fired electricity to reduce greenhouse gas emissions. The press release described how successful wind project bidders “receive long-term contracts, encouraging major investments in Ontario’s green energy future.”¹¹² In January 2009, MEI announced that the OPA had awarded long-term contracts for six new wind projects, highlighted the economic benefits of wind power, stated that Ontario had doubled its supply of wind power in the past year alone, and explained that these projects would help the province achieve its commitments to eliminate coal-fired generation and reduce its output of greenhouse gases.¹¹³

B. Ontario Enacts the *Green Energy and Green Economy Act, 2009*, to Encourage Renewable Energy Investment, Including Investment in Offshore Projects

100. On February 20, 2009, the Ontario Government announced its proposal to enact the *Green Energy Act*.¹¹⁴ It described the Act as “sweeping new legislation to attract new investment, create new green economy jobs and better protect the climate.”¹¹⁵

101. In introducing the proposed legislation in the Ontario Legislature, Minister Smitherman stressed the benefits of the *Green Energy Act*. He emphasized in particular that it would create an attractive investment climate and provide certainty for investors – including offshore wind

¹¹¹ CWS-Baines ¶ 40; C-0093, Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) (October 30, 2008).

¹¹² C-0094, News Release (MEI), Ontario Becomes Wind Power Leader in Canada: McGuinty Government Celebrates Canada’s Largest Wind Farm (October 30, 2008).

¹¹³ C-0107, News Release (MEI), New Green Energy Projects Generate More Green Jobs (January 23, 2009).

¹¹⁴ C-0110, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

¹¹⁵ C-0115, News Release, Smitherman, George (MEI), Ontario’s Bold New Plan for a Green Economy (February 23, 2009).

projects – making Ontario the “destination of choice for green power developers” by offering an attractive, long-term price for renewable energy, facilitating connection to the electrical transmission grid, and creating a streamlined approvals process. Minister Smitherman stated:

If passed, the act would turbocharge the creation of renewable energy in this province and set the standard for green energy policy across this continent. It would make this province the destination of choice for green power developers and incent proponents, large and small, to develop projects by offering an attractive price for renewable energy and the certainty that creates an attractive investment climate: certainty that power would be purchased at a fair price; certainty that wherever feasible, the power would be connected to the grid; certainty that government would issue permits in a timely way.

If passed, the act would ensure that new green power doesn't get tripped up in all kinds of red tape, but instead that new renewable generation would be built and flowing into the system faster, complete with service-time guarantees on our processes...

Our proposed legislation would create a best-in-class renewable energy feed-in tariff, a feed-in tariff that would offer an attractive price for renewable power, including wind, both onshore and offshore, solar, hydro, biomass, biogas and landfill gas, and would not limit the size of projects; a feed-in tariff that would guarantee that price for the life of the contract. With this bold move, Ontario would join the ranks of global green power leaders like Denmark, Germany and Spain.

Our green energy experiences over these past several years have told us volumes about where our best renewable opportunities lie. Working proactively with our energy agencies, we would initiate investments in the development of new transmission capacity, and the act would replace the snail's pace with a sense of urgency. ...

The proposed legislation would coordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process within a service guarantee. And so long as all necessary documentation is successfully completed, permits would be issued within a six-month service window.¹¹⁶

102. In order to encourage the development of renewable energy projects in the Province, the *Green Energy Act* sought to provide a “standard, streamlined, open and fair” project procurement

¹¹⁶ C-0114, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009); C-0116, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009).

process.¹¹⁷ The *Green Energy Act* pursued these objectives by amending a large number of relevant provincial statutes, regulations, policies and procedures, and through the creation of three key mechanisms:

- a) the Feed-in-Tariff Program (“the **FIT Program**”), which was intended to provide standard program rules, contracts and pricing for specified renewable energy sources in order to increase investor confidence in renewable energy projects;
- b) a “right to connect” to the electricity grid for renewable projects; and
- c) a streamlined approvals process for renewable energy projects, which combined the previous amalgam of municipal and provincial permits into a single new “renewable energy approval” (the “**REA**”).¹¹⁸

103. Ontario Government officials stated repeatedly that a primary purpose of the *Green Energy Act* was to create certainty for investors to invest in renewable power in Ontario and thereby create jobs – more than 50,000 new jobs between 2009 and 2012.¹¹⁹ Speaking on February 20, 2009 to the Toronto Board of Trade, Minister Smitherman repeated to his business audience what he had told the Legislature – that the Act was intended to make the province the destination of choice for green power developers and incent proponents to develop projects by offering an attractive price for renewable energy and the certainty that creates an attractive investment climate.¹²⁰ He explained that the *Green Energy Act* would create a feed-in tariff that “in layman’s terms” meant that Ontario would “offer an attractive price for renewable power,

¹¹⁷ CER-Powell ¶ 14; **C-0131**, Regulation Proposal Notice (MOE), Proposed Ministry of the Environment Regulations to Implement the *Green Energy and Green Economy Act, 2009* (August 27, 2009).

¹¹⁸ CWS-Baines ¶ 44; CER-Powell ¶¶ 25-26; **C-0113**, Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) (February 23, 2009).

¹¹⁹ **C-0137**, Article (MOE), Ontario Makes it Easier, Faster to Grow Green Energy (September 24, 2009); **C-0138**, Article (MOE), *Green Energy Act* Will Attract Investment, Create Jobs (September 24, 2009); **C-0107**, News Release (MEI), New Green Energy Projects Generate More Green Jobs (January 23, 2009); **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009); **C-0609**, Article, Ontario’s Feed-in Tariff Program - Two Year Review Report (April 13, 2012).

¹²⁰ **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

including wind - onshore and offshore ... and we'll guarantee that price for decades."¹²¹ He also assured the audience that there had been "careful consideration of all the meaningful, peer-reviewed studies currently available" respecting the health and safety of wind farms.¹²²

104. Following his speech at the Board of Trade, Minister Smitherman gave an interview to the Toronto Star newspaper that was published the next day. He was quoted in that article as stating that "There are wonderful opportunities for offshore wind ... there are lots and lots of exciting proposals. We're making sure we'll move those proposals along."¹²³ At no point did Minister Smitherman indicate that applications for offshore wind energy projects would be treated any differently than applications for onshore wind energy projects.

105. The *Green Energy Act* was assented to in May 2009.¹²⁴

C. Ontario Implements the *Green Energy Act* by Establishing the FIT Program, REA Regulations and New MNR Policies

106. Through the Spring and Summer of 2009, the Ontario Government conducted policy and consultative work to implement the *Green Energy Act*, developing the FIT Program, the streamlined approvals process promised by Minister Smitherman, and the policy changes required for MNR to comply with these new processes.

107. This work culminated on September 24, 2009, with the Ontario Government making simultaneous announcements – as described in detail below – respecting:

- a) the establishment of the FIT Program – to be managed by the OPA;
- b) the establishment of the new streamlined approvals process – the Renewable Energy Regulations – to be overseen by the MOE; and
- c) the steps MNR would take to align its policies with these new provisions.

¹²¹ C-0110, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

¹²² C-0110, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

¹²³ C-0141, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009).

¹²⁴ C-0123, The *Green Energy Act* and *Green Economy Act* (2009).

1. Ontario Establishes the Feed-in-Tariff (FIT) Program

108. On September 24, 2009, the Minister of Energy exercised his power pursuant to section 25.35 of Ontario's *Electricity Act* by issuing a directive directing the OPA to develop the FIT Program.¹²⁵ The FIT Program – described as “North America’s first comprehensive feed-in tariff program”¹²⁶ – was designed to:

- a) provide a standardized contract for all proponents;
- b) set a standardized price for all projects within a certain class (waterpower, onshore wind, offshore wind, solar and bioenergy); and
- c) establish a standardized and preset maximum timeline to bid, be evaluated, obtain a contract, obtain necessary approvals and construct.¹²⁷

109. The FIT Program was designed, among other things, to respond to concerns that the renewable energy industry had expressed regarding Ontario’s previous renewable energy procurement programs, which had not provided sufficient certainty for investors with respect to rules, timelines and approvals.¹²⁸ Responding to these concerns, the FIT Program provided standardized prices, contracts and processes to provide certainty to investors, including the certainty required to enable project proponents that had been awarded a FIT contract to obtain long-term limited recourse debt finance to fund their project.¹²⁹ In his announcement respecting the consultation process that led to the September 24, 2009 announcement, the OPA’s Chief Executive stated that Ontario was becoming “Canada’s leading province for wind power.”¹³⁰

¹²⁵ C-0141, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009).

¹²⁶ C-0208, Report (OPA), Ontario's Feed-In Tariff Program - Backgrounder (April 8, 2010).

¹²⁷ C-0130, Presentation (Ortech), FIT Program, What Has Changed? Everything! (August 2009); C-0119, News Release (OPA), Ontario Unveils North America's first Feed-In Tariff (March 12, 2009).

¹²⁸ CWS-Baines ¶ 52.

¹²⁹ CER-Powell ¶ 19.

¹³⁰ C-0119, News Release (OPA), Ontario Unveils North America's first Feed-In Tariff (March 12, 2009).

110. As Canada has stated in its memorial in another NAFTA arbitration, the FIT Program was established on the basis that a standardized and fair process, with financial incentives, was required to facilitate the increased development of renewable energy. As the memorial states,

The fundamental objective of establishing the FIT Program in Ontario was to facilitate the increased development of renewable generating facilities of varying sizes, technologies and configurations via a standardized, open and fair process. Although the procurement of renewable energy through the FIT Program had cost-effectiveness implications (related to electricity pricing) because of the financial incentives necessary to make it successful, Ontario believed that the long-term benefits outweighed these costs.¹³¹

111. In its Long-Term Energy Plan for 2010, Ontario presented itself as being at the forefront of renewable energy and wind energy developments, and committed to expanding the role of wind and renewable electricity generation in Ontario. The Long Term Energy Plan emphasized the importance of renewable energy in Ontario:

Ontario has become a North American leader in producing energy from sources that are continually renewed by nature such as wind, sun and bioenergy.¹³² Ontario is Canada's solar and wind power leader, and home to the four largest operating wind and solar farms in the country.¹³³ ...

Ontario is creating a new sector for investment and is becoming a global destination of choice for clean energy developers and suppliers. Ontario's *Green Energy and Green Economy Act, 2009* has laid the foundation for economic opportunities throughout the province. ... Ontario has already attracted more than \$16 billion of private sector investment and over 20 companies have announced plans to set up or expand operations in Ontario.¹³⁴ ...

By 2030, Ontario will have completely eliminated coal as a generation source and will have also increased wind, solar and bioenergy from less than 1% of generation capacity in 2003 to almost 13%.¹³⁵ ...

¹³¹ C-0678, Government of Canada Counter-Memorial and Reply on Jurisdiction, Mesa Power Group v. Government of Canada (February 28, 2014), ¶ 54 (internal citations omitted).

¹³² C-0387, Report, Ontario's Long-Term Energy Plan (November 22, 2010), p. 28.

¹³³ C-0387, Report, Ontario's Long-Term Energy Plan (November 22, 2010), pp. 6, 28.

¹³⁴ C-0387, Report, Ontario's Long-Term Energy Plan (November 22, 2010), p. 52.

¹³⁵ C-0387, Report, Ontario's Long-Term Energy Plan (November 22, 2010), p. 18.

In the future, Ontario will continue to be a leader in renewable energy development and generation.¹³⁶ It will continue to develop its renewable energy potential over the next decade.¹³⁷

112. The Conference Board of Canada specifically acknowledged the benefits of offshore wind energy development in Ontario. A report prepared by the Conference Board in 2010 estimated that building and operating offshore wind energy projects in Ontario could create between 55,000 and 62,000 person-years of employment, and lift the province's Gross Domestic Product by \$5.6 billion between 2013 and 2026.¹³⁸

113. The OPA held a number of "stakeholder engagement" sessions as part of introducing the FIT program. The fourth of these sessions took place on April 7, 2009, and included extensive discussion of FIT pricing, including for offshore wind.¹³⁹ The prices for offshore wind facilities, like all renewable energy projects, were standardized, developed using a Discounted Cash Flow model and designed to cover the cost of the initial capital investment, on-going maintenance and operating expenses, and to ensure a reasonable rate of return over the 20-year term.¹⁴⁰

114. Under the FIT Program, the OPA established the price to be paid for offshore wind power at \$190 per megawatt hour, with full escalation for inflation until the project's commercial operation date, and escalation for inflation up to a maximum of 20% in total thereafter.¹⁴¹ The rate was based on certain assumptions about the average capacity factor of offshore wind projects, as well as typical capital and operating and maintenance costs.¹⁴²

¹³⁶ C-0387, Report, Ontario's Long-Term Energy Plan (November 22, 2010), p. 30.

¹³⁷ C-0387, Report, Ontario's Long-Term Energy Plan (November 22, 2010), p. 31.

¹³⁸ C-0397, Article, Conference Board of Canada, Employment and Economic Impacts of Ontario's Future Offshore Wind Power Industry (December 2010).

¹³⁹ C-0121, Presentation (OPA), Proposed Feed-In Tariff Schedule, Stakeholder Engagement - Session 4 (April 7, 2009), pp. 4, 8, 21-35, 40.

¹⁴⁰ CER-Compass, p. 7.

¹⁴¹ C-0121, Presentation (OPA), Proposed Feed-In Tariff Schedule, Stakeholder Engagement - Session 4 (April 7, 2009), pp. 32, 47.

¹⁴² CER-Compass, p. 7.

115. The price to be paid for offshore wind power was higher than the price of \$135 per megawatt hour to be paid for onshore wind power, since the investment costs for offshore projects can be twice as high as those for onshore development.¹⁴³ The pricing made it economically attractive and feasible for investors to develop, obtain financing and build offshore wind projects.¹⁴⁴ As the OPA has stated, FIT contract prices were “designed to ensure a reasonable rate of return for investors while providing good value for clean, renewable energy for Ontario ratepayers.”¹⁴⁵

2. Ontario Establishes the Streamlined Renewable Energy Approvals (REA) Process

116. On September 24, 2009, the Ontario Government promulgated the REA Regulation, made under Ontario’s *Environmental Protection Act*.¹⁴⁶ The REA Regulation replaced the previous “patchwork” of provincial and municipal approval provisions with one set of environmental approval requirements for wind, solar, thermal and anaerobic digestion energy facilities.¹⁴⁷ This streamlined process allowed developers to submit a single application to satisfy all provincial and municipal regulatory requirements for the development of renewable energy projects, instead of the various different procedures and applications under the pre-REA regime.

117. In a press release entitled “Ontario Makes it Easier, Faster to Grow Green Energy”, MEI explained that the new REA Regulation “integrates environmental approvals, providing clear provincial rules and requirements, transparent decision-making and certainty for stakeholders and proponents” and “is coordinated with other provincial approvals to ensure a streamlined approach, providing a six-month service guarantee per project.” The release also stated that the

¹⁴³ C-0121, Presentation (OPA), Proposed Feed-In Tariff Schedule, Stakeholder Engagement - Session 4 (April 7, 2009, p. 47; CER-Compass, p. 8.

¹⁴⁴ CWS-Baines ¶ 54.

¹⁴⁵ C-0387, Report, Ontario's Long-Term Energy Plan (November 22, 2010).

¹⁴⁶ C-0103, *Environmental Protection Act*, Ontario Regulation 359/09.

¹⁴⁷ CER-Powell ¶¶ 25-26; CWS-Roeper ¶ 15; C-0131, Regulation Proposal Notice (MOE), Proposed Ministry of the Environment Regulations to Implement the *Green Energy and Green Economy Act, 2009* (August 27, 2009).

government would be creating a Renewable Energy Facilitation Office to be a “one-window access point for information on renewable energy project requirements.”¹⁴⁸

118. The REA Regulation set out specific requirements for all types of wind facilities, including offshore wind facilities, which it defined as “Class 5” wind facilities.¹⁴⁹ Subsequent documents issued by the relevant ministries to clarify the REA process and to provide guidance to project proponents in the REA process referred expressly to offshore wind energy projects. For example, in March 2010, MOE issued a series of “technical bulletins”, all of which contained express requirements for offshore wind energy development.¹⁵⁰ Similarly, in March 2010, MNR published an updated draft of *Bats and Bat Habitats: Guidelines for Wind Power Projects* (the “**Bat Guidelines**”).¹⁵¹ The Bat Guidelines were designed in part to provide guidance on identifying and addressing the potential negative effects on bats and bat habitats during the planning and operation of offshore wind energy projects.¹⁵² The MOE’s *Checklist for Requirements under the REA Regulation* and the *Application for Approval of a Renewable Energy Project* were also issued during this period, both providing guidance with respect to offshore wind projects.¹⁵³ In addition, although the REA Regulation’s 550-metre minimum noise setback requirement applied only to onshore wind projects, the MOE had stated when it initially

¹⁴⁸ C-0137, Article (MEI), Ontario Makes it Easier, Faster to Grow Green Energy (September 24, 2009).

¹⁴⁹ C-0103, *Environmental Protection Act*, Ontario Regulation 359/09, s. 6, p. 14.

¹⁵⁰ CER-Powell ¶ 34; C-0188, Policy Proposal Notice (MOE), Renewable Energy Approval Technical Guidance Bulletins (EBR Registry Number: 010-9235) (March 1, 2010); C-0189, Report (MOE), Renewal Energy Approvals, Technical Bulletin One, Guidance for preparing the Project Description Report (March 1, 2010); C-0190, Report (MOE), Renewal Energy Approvals, Technical Bulletin Two, Guidance for preparing the Design and Operations Report (March 1, 2010), p. 39; C-0191, Report (MOE), Renewal Energy Approvals, Technical Bulletin Three, Guidance for preparing the Construction Plan Report (March 1, 2010); C-0192, Report (MOE), Renewal Energy Approvals, Technical Bulletin Four, Guidance for preparing the Decommissioning Plan Report (March 1, 2010); C-0193, Report (MOE), Renewal Energy Approvals, Technical Bulletin Five, Guidance for preparing the Consultation Report (March 1, 2010); C-0194, Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines (March 1, 2010).

¹⁵¹ C-0187, Draft Report (MNR), Bats and Bat Habitats Guidelines for Wind Power Projects (March 2010).

¹⁵² CER-Powell ¶ 35; C-0187, Draft Report (MNR), Bats and Bat Habitats Guidelines for Wind Power Projects (March 2010), p. 4.

¹⁵³ CER-Powell ¶ 36; C-0166, Application for Approval of a Renewable Energy Project (MOE) (December 2009); C-0322, Checklist for Requirements under O. Reg 359/09 (MOE), Supplement to Application for Approval of a Renewable Energy Project (July 26, 2010).

posted the 550-metre setback for public comment in June 2009 that the MOE and the MNR were working together to develop “future setbacks related to offshore wind energy facilities.”¹⁵⁴ The REA Regulation has been amended six times since its promulgation,¹⁵⁵ and at no point has regulatory guidance for offshore wind energy projects been removed.

3. MNR Announces Steps To Align Its Policies With These Provisions

119. The MNR also made announcements on September 24, 2009 respecting the steps it would take to align its policies with the new FIT Program and REA Regulation provisions.

120. First, the MNR issued its Approval and Permitting Requirements Document for Renewable Energy Projects (the “APRD”), which described the requirements and approval process for those aspects of renewable energy projects that fall under the responsibility of MNR.¹⁵⁶

121. Like the REA Regulation, the APRD dealt expressly with offshore wind facilities, and specified the requirements needed to complete the *Offshore Wind Facility Report* required under the REA Regulation. These were:

- a) a site plan that included the location of shipping channels, commercial fisheries zones, submarine cables, existing dispositions of the lake bed and the location of offshore oil and gas licenses, leases, well and works;
- b) a records review that included fish and fish habitats, fish populations and fisheries, rare vegetation communities, species and habitat protected under the *Endangered Species Act* and wildlife species and their habitats and hazard lanes; and

¹⁵⁴ C-0126, Report (MOE). Proposed Content for the Renewable Energy Approval Regulation under the *Environmental Protection Act* (June 9, 2009), at p. 14; CER-Powell ¶ 33.

¹⁵⁵ CER-Powell ¶ 48, note 36.

¹⁵⁶ C-0136, Report (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 24, 2009).

- c) a coastal engineering study that addressed the effect of the proposed project on natural erosion and accretion.¹⁵⁷

122. Second, MNR published on the same day a notice that it was undertaking a two-step phased review of its Crown land site release policies and procedures to ensure they “align with the direction provided for in the *Green Energy Act* and with the new approval process for renewable energy projects.”¹⁵⁸ The notice stated that Phase 1 of the review “will focus primarily on procedural elements including ensuring clarity between site release and other provincial approval processes” and Phase 2 “will focus on the long-term application of site release, and the policy direction for renewable energy developments on Crown land in the context of the government’s Green Energy initiative.”¹⁵⁹ The notice emphasized that “[o]ne area of focus of the review will include managing projects through the transition period and smoothly integrating them into the Feed in Tariff (FIT) progress.” It stated that MNR “recognize[d] that proponents engaged in the current process may benefit from further streamlining and efficiencies that may be identified and implemented through the review.”¹⁶⁰

123. The proposed Phase 1 revisions were published for consultation on December 22, 2009.¹⁶¹ In the document accompanying those proposed revisions, the MNR:

- a) reiterated the three main objectives of the *Green Energy Act* – certainty and clarity in the approvals process, a FIT guaranteeing specific rates, and a right to connect to the electricity grid for projects that met the requirements;

¹⁵⁷ CER-Powell ¶ 73.

¹⁵⁸ **C-0140**, Notice (MOE), Review of the waterpower and windpower site release policies and procedures (September 24, 2009).

¹⁵⁹ **C-0140**, Notice (MOE), Review of the waterpower and windpower site release policies and procedures (September 24, 2009).

¹⁶⁰ **C-0140**, Notice (MOE), Review of the waterpower and windpower site release policies and procedures (September 24, 2009).

¹⁶¹ CER-Powell ¶ 79; **C-0169**, Report (MNR), Wind and Waterpower Site Release Review: Summary of Phase One Proposed Revisions (December 22, 2009).

- b) explained that the elimination of coal-fired generation from the supply mix “will be the largest climate change initiative in Canada”;
- c) confirmed that the site release process was intended to support an orderly approach to making Crown land available for renewable energy development; and
- d) reiterated the importance of ensuring that the site release policies and procedures “align with the Government’s overall Green Energy initiative.”

124. The document put forward a number of proposed revisions intended to provide more procedural clarity about the site release process, to align the process and content of the site release with the Ontario’s new green energy programs, and to eliminate duplication.¹⁶² A December 10, 2009 MNR presentation for the Minister of Natural Resources confirmed that the Phase 1 revisions were intended to provide direction to parties that had already applied for Crown land site releases whereas Phase 2 was intended to establish direction for future applicants.¹⁶³ The presentation provided a timeline indicating that the Phase 1 revisions were intended to be finalized by February 2010 and the Phase 2 proposals would be posted for consultation in March 2010.

125. The importance to MNR of taking steps to align its policies and procedures with the goals of the *Green Energy Act* was highlighted by Minister Cansfield in an October 21, 2009 speech she made to the Offshore Wind Energy in Coastal North America and the Great Lakes Conference. In her speech, Minister Cansfield emphasized that the Ontario Government had made it a priority to “unlock” the province’s “huge untapped waterpower, windpower and bioenergy potential.” She stated that much of the renewable energy development being facilitated through the *Green Energy Act* would occur on Crown land – which she noted included the beds of the Great Lakes on the Canadian side of the border – and that MNR, which managed Crown land in Ontario, would have a “big role to play in making [renewable energy

¹⁶² **C-0169**, Report (MNR), Wind and Waterpower Site Release Review: Summary of Phase One Proposed Revisions (December 22, 2009).

¹⁶³ **C-0167**, Presentation (MNR), Site Release Review: Phase One Overview, Minister's Office Briefing (December 10, 2009), pp. 5-6; **C-0184**, Email from Wallace, Marcia (ENE) to Dumais, Doris (ENE) (February 9, 2010); CER-Powell, ¶ 79.

development] happen.” She emphasized that the Ontario Government had an “unwavering commitment to a green future”, that “the time is right to be in the renewable energy business in Ontario”, that Ontario was “on the way to becoming a North American leader in the emerging green economy” and invited the offshore energy developers present at the conference to “join us on this exciting journey.”¹⁶⁴

126. Like Minister Smitherman, Minister Cansfield emphasized in her speech that the *Green Energy Act* was expected to create more than 50,000 direct jobs by supporting “a more stable investment environment in Ontario for the renewable energy industry” because “[w]hen companies know exactly what the rules are it instills greater confidence to invest in Ontario, hire workers and produce and sell renewable energy.” She stated that MNR had “amended five statutes to remove barriers and to streamline processes for ministry permits and approvals needed for the construction and operation of renewable energy projects.”¹⁶⁵

127. With respect to the development of offshore wind projects, Minister Cansfield stated that there was “tremendous offshore windpower potential in the Great Lakes.” She stated:

In 2006, my ministry placed a deferral on proposals for Great Lakes offshore development. We needed to get a better understanding of how offshore wind turbines might affect the surrounding environment. We also needed to assess the potential benefits and impacts of this technology. Our research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place. As a result, the deferral was lifted in January [2008] and the province began accepting applications for project proposals.¹⁶⁶

128. With respect to the Crown land site release review, Minister Cansfield confirmed that the review was expected to be completed by the end of 2010, and that the review was being done in

¹⁶⁴ C-0147, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

¹⁶⁵ C-0147, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

¹⁶⁶ C-0147, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

two phases to allow applications already in the current system “to continue under a new streamlined site review process.”¹⁶⁷

129. Minister Cansfield’s message that developing offshore wind energy would be practical and environmentally sound was consistent with internal views expressed by MNR staff. For example, a March 2010 email sent by the Director of the Biodiversity Branch of the Renewable Energy Program at MNR to an official at MEI stated:

We did a policy review years back and determined that there was little to distinguish an offshore farm from an onshore farm from a planning / EA / mitigation point of view.

Given that we have a stack of applications for offshore, MNR sees our short term priorities to be the processing of any application that comes out of the FIT process with a contract. All others will be reviewed in due course,

... At this point, we’re not committed to a broader review of offshore. Rather, we feel that we can deal with most offshore issues on a site specific, application-based approach and that has been the message that we have been delivering for some time now. Our current guidance for birds and bats will have a specific offshore piece, but clearly, we’re not preparing separate guidelines.¹⁶⁸

VII. REGULATORY APPROVALS PROCESS IN PLACE FOR OFFSHORE WIND PROJECTS IN ONTARIO IN 2009

130. As a result of the enactment and implementation of the *Green Energy Act* described above, there were four key steps in the development of renewable energy projects that an offshore wind project proponent like WWIS, developing its project in late 2009, was required to satisfy:

- a) obtain a FIT contract;
- b) obtain access to Crown land;
- c) obtain a REA; and

¹⁶⁷ C-0147, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

¹⁶⁸ C-0198, Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) (March 23, 2010).

- d) obtain a grid-connection approval from the IESO, the entity that monitors the operation of Ontario’s power system and ensures its reliability.

A. Process to Obtain a FIT Contract

131. Project proponents needed to first apply to the OPA for a FIT contract,¹⁶⁹ viewed by developers as the key “hard gate” in the development of a renewable energy project.¹⁷⁰ The goal of the FIT Program was to ensure that proponents could use their FIT contracts to secure long-term limited recourse debt financing to fund the planning and construction of their projects.¹⁷¹ The FIT application process was identical for onshore and offshore wind projects, and the initial FIT application period (during which Windstream applied) was opened by the OPA from October 1, 2009 to November 30, 2009.¹⁷²

B. Process to Obtain Access to Crown Land

132. Project proponents building on Crown land had to apply for the “release” of the applicable sections of Crown land for wind testing and project construction and operation. In Ontario, all lakebeds (with the exception of a single private fishing lake) are Crown land.¹⁷³ The process of applying for permission to test or build on Crown land is known as the Site Release process. A proponent that obtains Site Release is referred to as an Applicant of Record.¹⁷⁴

133. As described in paragraph 81 above, in 2004 the MNR had issued Wind Policy 4.10.04, *Windpower Development on Crown Land*, which established for the first time a set of standardized rules for wind developers to apply for the use of Crown land. The Policy was updated in January 2008, when MNR lifted the deferral on offshore wind development.

¹⁶⁹ **C-0128**, Feed-In Tariff Application Process: Based on Rules Published July 10, 2009; **C-0734**, Ontario's Feed-In Tariff Program “Launch Application” (December 2009).

¹⁷⁰ CER-Powell, ¶¶ 3, 106.

¹⁷¹ CER-Powell, ¶ 19.

¹⁷² CWS-Baines ¶ 56; CWS-Benedetti ¶ 9; **C-0146**, OPA Feed-In Tariff Program, FIT Rules Version 1.1 (September 30, 2009).

¹⁷³ CER-Powell, ¶ 32.

¹⁷⁴ CER-Powell, ¶ 33.

134. Wind Policy 4.10.04 provided a two-stage disposition and review process to permit the use of Crown land for wind power development:

- a) Stage 1 – Windpower Testing Application and Review stage, which governed the process for applying to carry out windpower testing on Crown land. If approval was granted under this stage, an applicant would be granted a land use permit for the footprint of the testing facilities and recognition that the applicant was the windpower applicant for the grid cells associated with the project; and
- b) Stage 2 – a Windpower Development Review, which governed the process for applying to develop a wind farm in whole or in part on Crown land. If approval was granted under this stage, the applicant would be issued Applicant of Record status and could begin construction.¹⁷⁵

135. Wind Policy 4.10.04 required applicants to include a map and lists indicating the grid cells the applicant was applying to use (the Ministry had divided Ontario Crown land into a series of grid cells for the purposes of these applications). The Policy set out specified timelines for each step in the process – 30 days for the Ministry to carry out an initial review of the application and to process the application fee, another 30 days for the Ministry to prepare a site description package with maps showing information relevant to the approval, and further timelines to govern subsequent parts of the process.¹⁷⁶

136. A proponent was required to comply with the requirements of the APRD in completing the Site Release process.¹⁷⁷ After successfully completing Stages One and Two, the applicant was required to submit a windpower site strategy, which was reviewed by MNR. Upon successful completion of this step, Applicant of Record status was issued, and the applicant

¹⁷⁵ CER-Powell, ¶¶ 60, 62; **C-0059**, Policy No. PL 4.10.04 (MNR), Windpower Site Release and Development Review - Crown Land (January 28, 2008), p. 1.

¹⁷⁶ **C-0059**, Policy No. PL 4.10.04 (MNR), Windpower Site Release and Development Review - Crown Land (January 28, 2008), pp. 4-5.

¹⁷⁷ **C-0136**, Report (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 24, 2009), p. 4.

received the necessary permits and tenure, usually a 25-year lease, for the development of a wind farm on Crown land.¹⁷⁸

C. Process for Renewable Energy Approval

137. As part of the REA process, proponents of offshore wind facilities (classified as Class 5 facilities under the REA Regulation) were required to complete the same studies as proponents of onshore renewable energy projects: a Natural Heritage Assessment (for offshore proponents, the emphasis is on fish populations and fisheries and fish habitats), a Water Assessment, a Cultural Heritage Resources Assessment, a Project Description Report, a Construction Plan Report, a Design Operations Report, a Decommissioning Plan Report, a Consultation Report, and a Wind Turbine Specifications Report.

138. In addition to these studies, proponents of offshore wind energy projects were also required to complete an *Offshore Wind Facility Report*, which evaluated the potential for negative environmental effects arising from the project and proposed mitigation measures.¹⁷⁹ Guidance for completing these documents could be found in the MNR's APRD.¹⁸⁰

139. After receiving a completed application, the Director of the MOE issued the REA provided that the application met all the requirements of the REA Regulation. The Director was permitted to refuse to issue a REA only if he or she determined that it was in the public interest to do so.¹⁸¹ Ontario's *Environmental Protection Act* provides some guidance as to when a project would be found not to be in the public interest. In particular, pursuant to s. 145.2.1(2)(a), if the project will cause serious harm to human health, or pursuant to s. 145.2.1(2)(b), if it will cause serious and irreversible harm to the natural environment.¹⁸²

¹⁷⁸ CER-Powell ¶ 62; **C-0059**, Policy No. PL 4.10.04 (MNR), Windpower Site Release and Development Review – Crown Land (January 28, 2008).

¹⁷⁹ CER-Powell ¶ 97; **C-0103**, *Environmental Protection Act*, Ontario Regulation 359/09, p. 79.

¹⁸⁰ **C-0136**, Report (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 24, 2009), p. 32.

¹⁸¹ **C-0105**, *Environmental Protection Act*, R.S.O. 1990, Chapter E.19, s. 47.5.

¹⁸² **C-0105**, *Environmental Protection Act*, R.S.O. 1990, Chapter E.19, s. 47.5.

140. Of the 12 FIT contracts issued during the first round of offers for onshore projects larger than 50 megawatts, 10 have received a REA and two are currently proceeding through the approvals process.¹⁸³ A REA has never been denied for a wind energy project larger than 50 megawatts.¹⁸⁴

D. Process for Grid Connection

141. Renewable energy proponents of projects larger than ten megawatts were also required to obtain a connection assessment, which included an IESO *System Impact Assessment* (“**SIA**”) and a *Customer Impact Assessment* (“**CIA**”) from the relevant transmitter.¹⁸⁵

142. The purpose of the SIA was to determine the impact of a project on the reliability of Ontario’s integrated power system and to identify any enhancements to the transmission system that may be required by the IESO in order to mitigate adverse reliability impacts. After the IESO received a proponent’s application, the proponent and IESO negotiated a Scope of Work and executed an SIA Agreement. The IESO then studied the application and issued its final report granting a notification of either Conditional Approval or Disapproval.¹⁸⁶

143. After completing the SIA, proponents were required to apply for a CIA from the relevant transmitter (the owner of the power lines, in this case Hydro One Networks Inc.). The purpose of a CIA is to determine the impact of the connection of a new project to that transmission system on existing customers. A CIA is mandatory in all cases where the connection is one for which the IESO requires an SIA or where the transmitter determines that the connection may have an impact on existing customers.¹⁸⁷

¹⁸³ CER-Powell, ¶ 24.

¹⁸⁴ CER-Powell, ¶ 24; Only one REA has ever been denied for a wind energy project, a 0.5 megawatt project: **C-0708**, Renewable Energy Projects Listing (MOE) (August 2014).

¹⁸⁵ **C-0648**, External Guidelines for Connection to the IESO Controlled Grid (April 18, 2013); **C-0241**, Email from Baines, Nancy (WEI) to Baines, Ian (WEI) et al. (April 30, 2010).

¹⁸⁶ **C-0676**, Flowchart (IESO), Connection Assessment Process, Renewable Energy Generation Facilities (November 14, 2013).

¹⁸⁷ **C-0676**, Flowchart (IESO), Connection Assessment Process, Renewable Energy Generation Facilities (November 14, 2013).

E. Federal Permits

144. In the case of offshore projects, proponents also had to obtain required permits from the federal government. In the case of the Project, approvals would be required from Transport Canada under the *Navigation Protection Act*,¹⁸⁸ and from the Department of Fisheries and Oceans under the *Fisheries Act*.¹⁸⁹ Industry Canada may also be involved in assessing whether telecommunications infrastructure would be impacted by a wind energy facility's radiocommunications.¹⁹⁰ While in some cases approvals under the federal *Species At Risk Act* would also be required, in this case it is not likely that the project would have required them.¹⁹¹

VIII. 2007-2010: WINDSTREAM INVESTIGATES POSSIBILITY OF WIND ENERGY DEVELOPMENT IN ONTARIO AND SUBSEQUENTLY INVESTS IN THE PROJECT BASED ON ONTARIO'S COMMITMENTS TO OFFSHORE WIND AND TO THE PROJECT

A. Windstream Begins to Investigate Opportunities for Wind Energy Development in Wolfe Island Shoals Area

145. Beginning in 2007, Mr. Mars and Mr. Ziegler became interested in investing in alternate energy-sector opportunities that could counterbalance their oil and gas portfolio. They considered various opportunities, including wind, solar and other renewable energy technologies like biofuels and geothermal power projects.¹⁹²

146. After a thorough review of many potential opportunities, they decided to focus their efforts on wind energy development, because of the economics, proven technology (wind turbines developed by Siemens, Vestas and General Electric) and of the many similarities that existed between exploration/development of oil and gas projects and wind energy projects. In both types of projects, the developer first identifies a site with a potentially attractive resource, and then secures the rights to the land. The developer then undertakes engineering studies to

¹⁸⁸ CER-Baird, p. 145.

¹⁸⁹ *Ibid.*, p. 129.

¹⁹⁰ CER-Ortech (REA Summary), p. 18.

¹⁹¹ CER-Baird, p. 129.

¹⁹² CWS-Mars ¶ 23.

prove the resource, to establish project economics and to determine the availability of delivery capacity. If the project economics are attractive, the developer may sell the project to an investor interested in building and operating it, or build and operate it itself or in partnership with other parties. These similarities with oil and gas made wind energy an attractive option for the Windstream investor group. Additionally, Mr. Ziegler had a successful track record of building energy platform companies by starting with a small acquisition and then growing the business into a very sizable energy company. Windstream's investors felt that they could do the same in the wind energy arena.¹⁹³

147. Mr. Baines, Mr. Ziegler and Mr. Mars had extensive discussions in the summer of 2007 about potential opportunities for developing and investing in wind energy projects in Ontario. The Ontario Government's desire to procure additional wind power was progressing at a rapid pace, and was buttressing their view that the investment environment was very favourable for wind energy development in Ontario. At the time, the Ontario Government was actively encouraging wind energy development, under repeated calls to phase out coal-fired electricity generation in the province. In August 2007, the MEI had directed the OPA to procure up to 2,000 megawatts of renewable energy supply by 2011, and reaffirmed its goal of doubling Ontario's renewable energy capacity to 15,700 megawatts by 2025.¹⁹⁴

148. The physical and geographical attributes of Ontario were also attractive to Mr. Ziegler and Mr. Mars. The province itself was a significant power consumer. Unlike many other jurisdictions where power was produced very far from the load center, the potential wind power sites were actually within close proximity to where the power was needed (even northern projects). The province also had a substantial manufacturing and mining base that needed power. The energy grid was stable and there were a number of proposed upgrades to the transmission system that would further accommodate the development of wind power. The wind conditions were very favorable to development of wind energy projects. There was also ample farm land and government land available that was not very suitable for farming, and was very attractive for wind energy development. Lastly, the government appeared stable and earnest in its desire to be

¹⁹³ CWS-Mars ¶ 24.

¹⁹⁴ CWS-Mars ¶ 27; **C-0009**, Letter from Dwight Duncan (MEI) to Jan Carr (OPA) (June 13, 2006).

a leader in renewable energy development in North America. All of the above factors came together to encourage Mr. Ziegler and Mr. Mars to consider seriously Ontario as a centre for their wind energy operations and investments.¹⁹⁵

149. Windstream was founded in October 2007 in light of Ontario's attractiveness as a destination for wind energy investment, and its investors' recognition that the Ontario Government was preparing to make a significant investment in renewable energy.¹⁹⁶ Shortly thereafter, the OPA issued the Renewable Energy Supply (Phase III) Request for Expressions of Interest, further reinforcing Windstream's view that Ontario was serious in its intent to increase its supply of renewable electricity.¹⁹⁷

150. When Windstream's investors first began investing in Ontario, they identified sites that would potentially be attractive options for development of a wind energy project. They were looking for projects with high wind speeds, strong/available grid access and ability to obtain a significant land position. The potential for development of both onshore and offshore wind projects appeared to be very good. They identified a number of sites that included the waters off Wolfe Island in Lake Ontario.¹⁹⁸

151. The Wolfe Island Shoals Project (previously defined as the "**Project**") was particularly attractive to Mr. Ziegler and Mr. Mars, because in addition to their belief that the above attributes were satisfied, Mr. Baines had an extensive knowledge of the site and community stakeholders due to his role in the development of the 198 megawatt onshore Wolfe Island Project. In addition, the presence of multiple universities and a local wind turbine technician training program meant that there would be a good base of labour and technology expertise for the Project.¹⁹⁹

¹⁹⁵ CWS-Mars ¶ 29.

¹⁹⁶ CWS-Mars ¶¶ 27-34.

¹⁹⁷ **C-0042**, Request (OPA), Renewable Energy Supply (Phase III), Request for Expressions of Interest (November 20, 2007); CWS-Mars.

¹⁹⁸ CWS-Mars ¶38.

¹⁹⁹ CWS-Mars ¶ 39.

152. Windstream identified the Wolfe Island Wind Shoals area as an attractive site for offshore wind energy development. Mr. Baines had been investigating the potential for offshore wind energy in this area since early 2007, when an examination of publicly-available hydro-geological charts showed that there was an extensive shallow area offshore to the southwest of Wolfe Island – the area known as the Wolfe Island Shoals. He also evaluated likely offshore wind speeds using the data available from the onshore Wolfe Island Wind Project, Environment Canada, and an offshore buoy located in adjacent waters.²⁰⁰ The area was of interest to Windstream because of its high winds and likely nearby connection to Ontario’s power grid.²⁰¹

153. Windstream determined that there were significant wind resources in the area, but that to justify the additional costs of building offshore, a project of at least 300 megawatts was optimal.²⁰² This project would have to be connected to Ontario’s power grid via an underwater cable.²⁰³ Windstream worked with the IESO and determined that it would be possible to connect a 300 megawatt offshore wind energy project to Ontario’s power grid onshore at a nearby thermal generating station in Lennox, Ontario.²⁰⁴

154. However, despite recognizing the significant potential for offshore wind energy in the Wolfe Island Wind Shoals area before 2008, there was no possibility of raising funds to finance a project in this area until after the 2006 deferral on offshore wind was lifted in 2008.²⁰⁵

B. Windstream Begins Investing in the Project and Applies for Applicant of Record Status, In Reliance on Ontario’s Stated Commitment to Renewable Energy and Offshore Wind

155. As described in Section VI.A above, in 2008 and 2009, after the 2006 deferral on offshore wind development was lifted, the Ontario Government communicated clearly to the

²⁰⁰ CWS-Mars ¶ 40.

²⁰¹ CWS-Baines ¶ 27.

²⁰² CWS-Baines ¶ 27.

²⁰³ CWS-Baines ¶ 27.

²⁰⁴ CWS-Baines ¶ 27.

²⁰⁵ CWS-Baines ¶ 28; CWS-Mars ¶¶ 40-41.

business community that the province was “open for business” for offshore wind development, and that the *Green Energy Act* would provide developers with an expeditious permitting process and a long-term price guarantee for the energy produced by renewable energy projects.

156. Relying on Ontario’s commitment to supporting offshore wind development, on February 8, 2008, WWIS²⁰⁶ applied to the MNR for Applicant of Record status with respect to portions of the lake bottom required to construct a 300 megawatt offshore wind project in the Wolfe Island Shoals area.²⁰⁷ Windstream also applied for Applicant of Record status through its special purpose companies established to develop 10 onshore wind energy projects.²⁰⁸

157. After its applications for Applicant of Record status were submitted, Windstream took preliminary steps to ensure that it could move ahead with its projects as quickly as possible once access to Crown land was granted. These measures included submitting 600 megawatts of System Impact Assessment Applications to the IESO, carrying out wind modeling, concluding a [REDACTED] with [REDACTED] ([REDACTED] [REDACTED]), and initiating discussions with wind turbine manufacturers with a [REDACTED].

²⁰⁶ Which at the time was operating under its predecessor name Ontario Clean Power Foymount Inc.

²⁰⁷ CWS-Baines ¶ 38; CWS-Mars ¶¶ 42-43; **Number of acres applied for by Windstream for each project: C-0129**, Chart (WEI), Land Status (July 21, 2009); **Application forms: C-0068**, Windpower Application for Crown Land, OCP Foymount Inc. (February 19, 2008); **C-0069**, Windpower Application for Crown Land, OCP Foymount Inc. (February 19, 2008); **C-0067**, Windpower Application for Crown Land, OCP South River Inc. (February 19, 2008); **Confirmation of receipt from Ontario: C-0074**, Letter from Keyes, Jennifer (MNR) to Baines, Ian (OCP) (May 12, 2008); **C-0082**, Letter from Keyes, Jennifer (MNR) to Baines, Ian (OCP) (July 2, 2008); **C-0202**, Letter from Hayward, Neil (MNR) to Baines, Ian (WWIS) (April 7, 2010); **Application Status Fact Sheets for Windstream’s application for Crown land: C-0151**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-214 (November 20, 2009); **C-0152**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-215 (November 20, 2009); **C-0153**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-292 (November 20, 2009); **C-0154**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-293 (November 20, 2009); **C-0155**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-294 (November 20, 2009); **C-0156**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-295 (November 20, 2009); **C-0157**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-296 (November 20, 2009).

²⁰⁸ CWS-Baines ¶¶ 30, 72.

significant presence in Ontario, in order to allow Windstream to meet its Ontario content obligations under the FIT Contract.²⁰⁹

158. Because of the Ontario Government's announced commitment to offshore wind development, in December 2008, Mr. Ziegler and Mr. Mars sought to begin discussions with their longtime investing partners about joining Mr. Ziegler as investors in Windstream. By that time, Mr. Ziegler had already invested █████ million in the company, but additional investment would be necessary in order to fund the work that would be needed to establish the feasibility of the Project, including engineering, environmental, wind assessment and interconnection studies. Additionally, their expertise in the shipping arena and offshore oil & gas exploration services would be helpful as Windstream moved forward with the Project.²¹⁰

C. WWIS Applies for a FIT Contract, Relying on MNR and OPA's Assurances and Representations Concerning WWIS' Application for Crown Land

159. On September 24, 2009, the day the FIT Program was launched, the MNR wrote to Windstream acknowledging its Crown land applications and stating that in order for WWIS to maintain the priority position of its Applicant of Record application, WWIS was required to submit a FIT application within the initial FIT application period (before November 29, 2009).²¹¹

160. MNR's representations were confirmed by the OPA's statements, in the FIT Rules published at that time, that an applicant for a FIT contract would be deemed to have access rights to the project site required for a FIT contract so long as the applicant had submitted a request for Applicant of Record status to the MNR.²¹²

161. In deciding to apply for a FIT contract, Windstream relied on the repeated assurances and commitments Ontario made at the time it introduced the *Green Energy Act*, set out at Section VI.B above, that it was committed to providing investors with certainty. Particularly comforting

²⁰⁹ CWS-Mars ¶ 44; **C-0101**, Heads of Agreement (Draft) between Windstream Energy Inc. and █████ (December 17, 2008).

²¹⁰ CWS-Mars ¶ 50.

²¹¹ **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009).

²¹² **C-0146**, OPA Feed-In Tariff Program, FIT Rules Version 1.1 (September 30, 2009), s. 3.1(e).

to Windstream was Minister Smitherman's February 2009 speech, in which the Minister stated that the Act would make Ontario the "destination of choice" for green power developers, would "incent proponents large and small to develop projects by offering an attractive price for renewable energy" and would provide "the certainty that creates an attractive investment climate." Minister Smitherman emphasized that the certainty created by the FIT program included certainty that Ontario would purchase power at a fair price and certainty that Ontario would "issue permits in a timely way", with a "service guarantee."²¹³ Minister Smitherman was also quoted as saying that there were "wonderful opportunities for offshore wind", "lots of exciting proposals," and that Ontario was "making sure [it would] move those proposals along."²¹⁴ To Windstream, the message was clear that Ontario wanted developers to invest money, add jobs and build offshore wind energy projects.²¹⁵

162. Ontario's support for offshore wind, exemplified by the adoption of the *Green Energy Act* and the government's multiple statements supporting renewable energy investment generally and offshore wind investment in particular, prompted Windstream to seek and obtain additional investment capital in February 2009.²¹⁶

163. Although Windstream had determined that the WWIS Project was feasible, it was concerned about applying for a FIT contract in light of the slow progress of its application for Applicant of Record status, which had been outstanding for 16 months at that time.²¹⁷ However, there was still one big stumbling block around land control. Minister Cansfield addressed that concern in a letter to Windstream in September 2009, which stated that "in order to maintain priority position within MNR's site release process, you must submit an application to the FIT

²¹³ C-0116, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009).

²¹⁴ C-0116, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009).

²¹⁵ CWS-Mars ¶ 54.

²¹⁶ CWS-Mars ¶ 55.

²¹⁷ CWS-Baines ¶ 55; CWS-Mars ¶ 57.

program within the FIT launch application process.”²¹⁸ This was confirmed by a November 24, 2009 letter indicating that:

Existing Crown land applicants who apply to FIT during the launch period, and who are awarded contracts by the OPA, will be given the highest priority to the Crown land sites applied for. This means that these applications will take precedence over all others for this site, and will receive priority attention from MNR.²¹⁹

164. From those statements, Windstream understood that if it applied for and was awarded a FIT contract, it would be awarded land tenure and would receive priority attention from MNR.²²⁰

165. On November 27, 2009, on the basis of the representation contained in these letters and in reliance on Ontario’s commitment to offshore and onshore wind set out in paragraphs 87 to 104 above, Windstream, through WWIS and other subsidiaries, applied for a FIT contract for the Project and for 10 onshore projects whose potential it had identified.²²¹

166. Windstream posted with WWIS’s application a \$3 million letter of credit, as required by the FIT Program rules.²²² It also posted an additional \$7.45 million in letters of credit in connection with 10 applications by Windstream’s other subsidiaries for Windstream’s proposed onshore wind projects.²²³ In addition, as explained below, WWIS deposited \$6 million upon

²¹⁸ CWS-Baines ¶ 56; CWS-Mars ¶ 57; **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009).

²¹⁹ **C-0158**, Letter from Lawrence, Rosalyn (MNR) to Homung, Robert (Canadian Wind Energy Association) (November 24, 2009).

²²⁰ CWS-Mars ¶ 57.

²²¹ CWS-Mars ¶ 58; CWS-Baines ¶ 70.

²²² CWS-Baines ¶ 70; **C-0162**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Windstream Wolfe Island Shoals Inc. (WWIS) (November 27, 2009); **C-0178**, FIT Security Provision Agreement (January 14, 2010).

²²³ CWS-Baines ¶ 70; **C-0165**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Ontario Clean Power South River Inc. (November 27, 2009); **C-0164**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Windstream Temagami Inc. (November 27, 2009); **C-0163**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Windstream North Inc. (November 27, 2009); **C-0163**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Windstream North Inc. (November 27, 2009); **C-0161**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Windstream Blake Lake Inc. (November 27, 2009); **C-0733**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and

execution of the FIT contract for the Project (at which point the \$3 million letter of credit from November 27, 2009 was refunded),²²⁴ making a total of \$13.45 million deposited by Windstream's subsidiaries.

D. Windstream Secures Additional Investment for the Project

167. With this new clarity and with the announcement that the opening of the FIT Launch Period was October 1, 2009 with a deadline of November 30, 2009, Windstream's discussions with potential partners began to accelerate. By the end of October, Windstream had met with a number of highly qualified investors [REDACTED]

[REDACTED]. In a presentation to those potential investors, Windstream again emphasized the incentives established by the Ontario Government under the FIT Program established under the *Green Energy Act*. In particular, Windstream explained that the rates offered for a 20-year FIT contract were \$135/MWh (for onshore) to \$190/MWh (for offshore), which was significantly higher than the then-current rates that similar Canadian and U.S. projects had received. Windstream also explained that the government had expressed a "clear desire to add off-shore wind development." This made the Project especially attractive as an investment opportunity.²²⁵

168. Unfortunately the limited window of time that Windstream had from October 1, 2009 to November 30, 2009, meant that a transaction with the right partner could not be achieved on time. In November, Windstream decided to move forward internally with putting up the \$10.45 million letter of credit needed to secure the 1,045 megawatts of FIT applications. In addition, Windstream brought in Mr. Webster as an additional investor, and also secured additional investment from [REDACTED].²²⁶

Windstream Bruce Inc. (November 27, 2009); **C-0160**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Ontario Clean Power Bonfield Inc. (November 27, 2009).

²²⁴ **C-0692**, Standby Letter of Credit (RBS) and Ontario Power Authority (OPA) (April 14, 2014); **C-0149**, Flowchart (OPA), Ontario Feed In Tariff Letters of Credit Decision Tree (November 2, 2009).

²²⁵ CWS-Mars ¶ 58; **C-0731**, Presentation (WEI), Investor Presentation (October 2009).

²²⁶ CWS-Mars ¶ 59.

169. Windstream’s investors felt very assured that this was money worth investing. All of the announcements, public proclamations and speed with which the *Green Energy Act* was approved and being implemented clearly indicated that the Ontario Government and all of the agencies it controlled were wholly supportive of the FIT program, and both onshore and offshore wind. Premier McGuinty summed it up by saying “Ontario has taken the lead in Canada and set the ground rules for doing green business. Now investors, renewable energy companies and skilled workers can really move our green economy forward.”²²⁷

E. WWIS Invests in Resource Evaluation, Engineering and Technical Reviews

170. These additional investments gave Windstream the capital it needed to proceed with further work on the Project and its other projects. This included preparing FIT contract applications for the Project and for seven other on-shore projects totaling 1,045 megawatts. In addition it allowed for further geographic diversification with the acquisition of 128,000 acres of land in Wyoming across three sites and 150,000 acres of land across two sites in British Columbia.²²⁸

171. Windstream retained Ortech Consulting Inc. (“**Ortech**”), an environmental engineering firm specialized in renewable energy projects, to act as project manager and conduct development work. Early work conducted by Ortech in 2009 included advising Windstream about the FIT application process.²²⁹ To that end, Ortech assessed the feasibility of the Project by determining whether the Project could be connected to Ontario’s electricity grid, considered permitting issues and risks, and assessed project costs, including capital and construction costs.²³⁰

172. During this period and subsequently, Ortech conducted preliminary feasibility assessments of the Project by consulting and analyzing publically available information,

²²⁷ CWS-Mars ¶ 60; **C-0143**, Article, Green Energy Rules Make Ontario a North American Leader (September 24, 2009).

²²⁸ CWS-Mars ¶ 61.

²²⁹ **C-0135**, Plan (Ortech), Feed-In Tariff Application Preparation and Submission (September 16, 2009).

²³⁰ CWS-Roeper ¶ 19.

including information from Helimax Energy Inc.'s reports prepared for the OPA evaluating potential wind development sites in Ontario (both onshore and offshore), information from a subsequent May 2009 study prepared specifically by Helimax for Windstream respecting wind resources and energy yield for the Project area,²³¹ and a study mapping wind speeds in the Great Lakes by AWS Truewind.²³² In addition, during this period and subsequently Ortech retained (on behalf of Windstream) a number of well-respected specialist firms and consultants to evaluate specific aspects of the Project. These consultants produced reports related to wind resources, physical works, electrical design, construction planning and logistics, and analyses of the wind resource at Wolfe Island Shoals. This work, as well as other work prepared to advance the Project, is discussed below in Section XIV.

IX. 2010: ONTARIO ENCOURAGES WWIS TO ENTER INTO THE FIT CONTRACT BY CONFIRMING ITS SUPPORT FOR THE PROJECT AND COMMITTING TO GRANTING WWIS ACCESS TO CROWN LAND IN A TIMELY MANNER

A. OPA Selects the Project to Become the Largest Wind Project Developed Under the First Round of FIT Contract Awards

173. On April 8, 2010, the OPA advised WWIS that it would be offered a FIT contract for the Project.²³³ The same day, Minister of Energy and Infrastructure Brad Duguid announced that the OPA had offered FIT contracts for almost 2,500 megawatts of renewable energy generation, split among 184 large-scale projects. The Ministry of Energy's press release respecting the announcement stated:

These projects are the latest accomplishments of the *Green Energy Act* which is making Ontario a place of destination for green energy development, manufacturing, and expertise," said Minister Duguid. "The investments generated

²³¹ C-0139, Report (Helimax Energy Inc.), Meteorological and Energy Yield Report, Wolfe Island, Ontario (September 24, 2009); CWS-Roeper ¶ 26.

²³² C-0072, Report (NYSERDA), New York's Offshore Wind Energy Development Potential in the Great Lakes: Feasibility Study (April 2010).

²³³ C-0205, Article, Ontario Becoming North American Green Energy Leader (April 8, 2010); C-0207, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (April 8, 2010); CWS-Roeper ¶ 22.

by FIT will not only create green jobs, but will also build a coal-free legacy for future generations.”²³⁴

174. A formal Offer Notice with respect to the Project was delivered on May 4, 2010.²³⁵

175. The Project, at 300 megawatts, was the largest FIT contract among the 184 FIT contracts awarded during this first round of FIT contracts.²³⁶ The Project comprised 20% of the total generation capacity for wind energy projects. It was also the only offshore wind project to be awarded a FIT contract.²³⁷

176. The FIT contract process was rigorous, and designed to identify the projects that could start work before others. As Canada explained in its memorial in another NAFTA arbitration, in selecting projects that would be awarded a FIT contract, the OPA took into account whether or not the project was likely to be developed in the near term, and would therefore most likely lead to near term job creation. As the memorial states:

the OPA was also guided by the desire of the government to procure, first and foremost, “shovel-ready” projects. The projects that were the most development-ready were the ones that would most likely lead to job creation, in both construction and manufacturing sectors, in the near term. Simply awarding contracts to those projects that submitted their applications faster than others would not achieve this objective.²³⁸

177. In order to determine whether projects were in fact “shovel ready”, the OPA looked at a number of criteria, including whether the proponent had prior experience (like Windstream), and whether the proponent had the requisite financial support for the project (also like

²³⁴ **C-0206**, News Release (OPA), Ontario Announces 184 Large Scale Renewable Energy Projects (April 8, 2010).

²³⁵ **C-0246**, Letter from Butler, Joanne (OPA) to Baines, Nancy (WWIS) (May 4, 2010).

²³⁶ **C-0207**, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (April 8, 2010).

²³⁷ CWS-Roeper ¶ 22. Applicants whose bids were unsuccessful were placed in a queue and advised that they would be eligible for FIT contracts if and when transmission for their projects became available. Ten of Windstream’s proposed projects were placed in the queue. In 2011, the OPA offered an additional 40 FIT contracts, but they did not include any of Windstream’s other projects.

²³⁸ **C-0678**, Government of Canada Counter-Memorial and Reply on Jurisdiction, Mesa Power Group v. Government of Canada (February 28, 2014), 2014 ¶ 69.

Windstream).²³⁹ The OPA believed that prior experience “would show that the people running the project understood and were ready for the typical difficulties that would be encountered in getting the project into operation.”²⁴⁰

B. Key Terms of the FIT Contract

178. The FIT Contract required the OPA to purchase all electricity generated by the Project at a rate of \$190 per megawatt-hour, with full escalation for inflation until the project’s commercial operation date, and escalation for inflation up to a maximum of 20% in total thereafter, for 20 years starting from the date of the Project’s commercial operation.²⁴¹

179. The FIT Contract required that WWIS bring the Project into commercial operation by its Milestone Date for Commercial Operation, which was specified to be May 4, 2014. Section 2.5 of the FIT Contract provided:

2.5 Milestone Date for Commercial Operation

[WWIS] acknowledges that time is of the essence to the OPA with respect to attaining Commercial Operation of the Contract Facility by the Milestone Date for Commercial Operation set out in Exhibit A [May 4, 2014]. The Parties agree that Commercial Operation shall be achieved in a timely manner and by the Milestone Date for Commercial Operation. [WWIS] acknowledges that even if the Contract Facility has not achieved Commercial Operation by the Milestone Date for Commercial Operation, the Term shall nevertheless expire on the day before the twentieth or fortieth anniversary (as applicable) of the Milestone Date for Commercial Operation, pursuant to Section 8.1.²⁴²

²³⁹ **C-0678**, Government of Canada Counter-Memorial and Reply on Jurisdiction, Mesa Power Group v. Government of Canada (February 28, 2014), 2014 ¶ 72.

²⁴⁰ **C-0678**, Government of Canada Counter-Memorial and Reply on Jurisdiction, Mesa Power Group v. Government of Canada (February 28, 2014), 2014 ¶ 83.

²⁴¹ **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

²⁴² **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), p. 9.

While the FIT Contract required that the Project be brought to commercial operation by May 4, 2014, it also contemplated that the Project could be brought into commercial operation within 18 months after that date, although that would reduce the term of the Contract.²⁴³

180. Commercial Operation under the FIT Contract occurs when the following principal conditions are met:

- a) the Contract Facility has been completed in all material respects;
- b) the Connection Point of the Contract Facility is that set out in the FIT Contract Cover page [in this case the Lennox Connection Point]; and
- c) the Contract Facility has been constructed, connected, commissioned and synchronized to the IESO-Controlled Grid such that 90% of the contract capacity is available to deliver electricity to the grid.²⁴⁴

181. Construction of the Project could not begin until the OPA issued a Notice to Proceed under Section 2.4 of the FIT Contract.²⁴⁵ The preconditions for issuance of a Notice to Proceed were:

- a) that WWIS had received a REA and any other equivalent environmental and site plan approvals necessary for construction to commence;²⁴⁶
- b) that WWIS submit a financing plan including signed commitment letters from sources of financing representing at least 50% of the expected development costs, stating their agreement in principle to provide the necessary financing; and

²⁴³ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), section 9.1(j), p. 28.

²⁴⁴ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.6(a)(iv), pp. 9-10.

²⁴⁵ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(b)(i)-(iv), p. 8.

²⁴⁶ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(b), p. 8.

- c) that WWIS submit a domestic content plan that explained that the Project would meet a 50% Ontario content requirement.²⁴⁷

182. In addition to the \$3 million it posted as security when it applied for the FIT Contract (referred to in the FIT Contract as the “**Initial Security**”), WWIS would be required to post an additional \$3 million as security upon signing the FIT Contract (the “**Incremental NTP Security**”). The total would be refunded after the Project achieved its Commercial Operation Date.²⁴⁸

183. If it executed the FIT Contract, WWIS would be bound to achieve the Milestone Commercial Operation Date of May 4, 2014. If it failed to do so, as of 18 months after the Milestone Date of Commercial Operation (*i.e.* November 4, 2015), the OPA would be entitled to terminate the FIT Contract, retain the \$3 million Incremental NTP Security, and sue Windstream for damages.²⁴⁹

184. Prior to the issuance of a Notice to Proceed, WWIS could only terminate the FIT Contract by forfeiting the \$6 million in security it had provided.²⁵⁰ Although the FIT Contract also allowed the OPA to terminate the FIT Contract prior to the issuance of a Notice to Proceed upon refunding the security and compensating WWIS for a portion of its pre-construction development costs, that right was subsequently waived by the OPA.²⁵¹

²⁴⁷ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(b), p. 8.

²⁴⁸ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 5.1, p. 19.

²⁴⁹ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 9.2(d)(ii), p. 29.

²⁵⁰ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(a)(ii), p. 8.

²⁵¹ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(a), pp. 7-8; **C-0549**, Waiver Agreement OPA and WWIS re Pre-NTP Termination Right (August 29, 2011); **C-0575**, Email from Baines, Ian (WEI) to Vellone, John (BLG) et al (December 19, 2011).

C. Immediately After Being Offered a FIT Contract, Windstream Is Approached by a Number of Major Investors Seeking to Collaborate on the Project

185. As soon as the contract was offered to WWIS, it was approached by a number of major industry players [REDACTED] who were interested either in acquiring the project or in developing it in partnership with Windstream. Bankers, lawyers and consultants were offering to make introductions or had clients that were interested in speaking with Windstream.²⁵²

186. Windstream had already begun the initial phases of a partnering process with KeyBanc as its investment bank, but began initial steps to bring in either a [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].²⁵⁴

D. WWIS Does Not Immediately Sign the FIT Contract, Seeking Comfort from Ontario Regarding Approvals and Timelines

187. Windstream had three major concerns at the time WWIS was awarded the FIT Contract that prevented it from immediately causing WWIS to execute the contract.

188. First, MNR had not yet processed WWIS' application for Applicant of Record status. While Windstream was aware that MNR was still implementing Phase 1 of its review of the Site Release process and had publicly committed to using that review to align the Site Release

²⁵² CWS-Mars ¶ 63; C-0212, Email from [REDACTED] to Brown, Daniel (Keybank) (April 9, 2010); C-0225, Email from Bell, Mark (WEI) to Brown, Daniel (Keybank) (April 20, 2010); C-0224, Email from Baines, Ian (WEI) to Brown, Daniel (Keybank) (April 20, 2010); C-0230, Email from Brown, Daniel (Keybank) to Bell, Mark (WEI) (April 21, 2010); C-0226, Email from Baines, Ian (WEI) to Brown, Daniel (Keybank) (April 20, 2010); C-0249, Email from Mars, David (White Owl Capital) to [REDACTED] (May 4, 2010); C-0229, Email from Bell, Mark (WEI) to Brown, Daniel (Keybank) (April 21, 2010); C-0210, Email from Brown, Daniel (Keybank) to Mars, David (White Owl Capital) et al (April 8, 2010); C-0216, Email from Mars, David (White Owl Capital) to Baines, Ian (WEI) (April 15, 2010); C-0233, Email from Baines, Ian (WEI) to [REDACTED] (April 22, 2010).

²⁵³ CWS-Mars ¶ 64.

²⁵⁴ CWS-Mars ¶ 65.

process with the FIT process, Windstream was looking for some comfort from MNR that it would be able to gain access to the Crown land for which it had applied to begin the testing work required to develop the project.²⁵⁵

189. Second, the MOE and MNR had not yet finalized for offshore wind energy projects the so-called “setback” – the minimum distance between a residence (known as a “receptor”) onshore and a wind turbine. As described above,²⁵⁶ when the MOE had initially posted the REA Regulation for public comment on June 9, 2009, it had sought comment on, among other things, the requisite setbacks for wind turbines.²⁵⁷ With respect to onshore turbines, the MOE had proposed a mandatory minimum 550-metre setback from a residence to a turbine, based on its determination that a 40 dBA level for noise was scientifically sound, and this was adopted as the standard when the REA Regulation was promulgated in September 2009.²⁵⁸ With respect to offshore turbines, the MOE had stated in the June 9, 2009 posting that it would work with the MNR in developing setbacks²⁵⁹ and that, in the meantime, offshore wind developers should submit noise studies that would take into account the “unique” project-specific noise conditions regarding offshore wind facilities.²⁶⁰ In addition, on March 1, 2010, the MOE had released draft *Technical Bulletin Six: Required Setbacks for Wind Turbines*, indicating that, while the REA Regulation does not specify minimum setback distances, turbine siting will be an “important” factor assessed in the requisite *Offshore Wind Facility Report*.²⁶¹ However, the MOE

²⁵⁵ CWS-Baines ¶ 75.

²⁵⁶ See ¶ 118.

²⁵⁷ **C-0131**, Regulation Proposal Notice (MOE), Proposed Ministry of the Environment Regulations to Implement the *Green Energy and Green Economy Act, 2009* (August 27, 2009).

²⁵⁸ **C-0103**, *Environmental Protection Act*, Ontario Regulation 359/09, s. 54, pp. 57-58; **C-0126**, Report (MOE). Proposed Content for the Renewable Energy Approval Regulation under the *Environmental Protection Act* (June 9, 2009), p. 13.

²⁵⁹ **C-0126**, Report (MOE). Proposed Content for the Renewable Energy Approval Regulation under the *Environmental Protection Act* (June 9, 2009), p. 15.

²⁶⁰ **C-0126**, Report (MOE). Proposed Content for the Renewable Energy Approval Regulation under the *Environmental Protection Act* (June 9, 2009), p. 15.

²⁶¹ **C-0194**, Report (MOE), Renewable Energy Approvals, *Technical Bulletin Six, Required Setbacks for Wind Turbines* (March 1, 2010): The draft Technical Bulletin Six states: “This report requires applicants to provide a comprehensive assessment of the existing environment where the project will be located, identify any negative environmental effects caused by the project, and describe measures to mitigate identified impacts.

had indicated it was developing setback guidelines, and it was unclear to Windstream how that might affect Windstream's ability to build in some of the grid cells included in its application for Applicant of Record status.

190. Third,²⁶² the FIT Contract provided for a Milestone Commercial Operation Date for the Project of May 4, 2014, four years from the date of the contract's May 4, 2010 award date.²⁶³ Because of MNR's delays in processing Windstream's application for Applicant of Record status and MOE's delays in developing offshore setbacks, Windstream was concerned that it might not be able to reach the Milestone Commercial Operation Date within the prescribed four-year period.

191. Windstream raised its three concerns with the OPA and with the relevant ministries during a series of meetings and exchanges of correspondence from May to August of 2010.²⁶⁴ During this period, as discussed below, representatives of the OPA, MNR, MEI and MOE provided Windstream with specific comfort and commitments with respect to each of its three concerns, with a view to encouraging WWIS to execute the FIT Contract. If not for the comfort received from the Ontario Government with respect to these outstanding issues, Windstream would not have caused WWIS to sign the FIT Contract.²⁶⁵

192. During all of Windstream's discussions and interactions with government officials, it was repeatedly stated by officials from all ministries that the Project had the full support of the Ontario Government, that the government officials understood Windstream's need for certainty,

Wind turbine location will influence the assessment of environmental effects including noise and increasing setback distances from noise receptors can be used as a mitigation approach. Applicants are strongly encouraged to meet with the [MOE] prior to preparing this report." The Technical Bulletins were ultimately consolidated by the MOE into its *Technical Guide to Renewable Energy Approvals (2013)* (the "**REA Guide**"). The 2011 and 2012 draft versions of the REA Guide included the following explanation about offshore wind (s. 1.2): "In light of the comments received through public consultation and in particular the identified need for further study, Ontario has decided not to proceed with proposed offshore wind projects while further scientific research is conducted on the specific issues that come with developing wind projects in a lake environment..." This section was deleted from the final version of the REA Guide (but the section is still inadvertently referenced in the REA Guide's appendices).

²⁶² Described above in ¶ 179.

²⁶³ **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

²⁶⁴ **C-0508**, Windstream Summary of Discussions with OPO, MEI, MOE, MNR (February 21, 2011).

²⁶⁵ CWS-Mars ¶ 67.

and that the government would work with Windstream to resolve any permitting issues as expeditiously as possible.

193. In addition, the OPA facilitated Windstream's need to take the time required to obtain comfort with respect to its concerns by repeatedly agreeing to extend the deadline for executing the FIT Contract, from the original date of May 4, 2010 to August 12, 2010.²⁶⁶

E. Windstream Holds Meetings with Government Officials to Obtain Comfort Respecting Its Concerns

194. Windstream convened a meeting on April 19, 2010 with representatives of MNR, MEI, MOE and the Ministry of Culture.²⁶⁷ This meeting was intended as a “kick off” meeting to discuss the Project and determine what information the government would need from Windstream to begin the permitting and development process for the Project.²⁶⁸ At this meeting, Windstream received no indication whatsoever from any Ontario Government officials that the Project would be treated any differently by the government from any other project for which a FIT contract had been awarded. On the contrary, the officials advised Windstream that the Ontario Government supported the Project and that, among other things, the Project had the highest priority for receiving Applicant of Record status.²⁶⁹ This was reassuring to Windstream, as it confirmed that WWIS would be able to commence the development of the Project in a timely fashion.²⁷⁰

²⁶⁶ CWS-Chamberlain ¶¶ 22-23; **C-0305**, Email from Bizarro, Sheri (OPA) to Baines, Nancy (WEI) (June 29, 2010); **C-0313**, Email from Butler, JoAnne (OPA) to Chamberlain, Adam (BLG) (July 8, 2010); **C-0265**, Email from Chamberlain, Adam (BLG) to Baines, Nancy (WEI) et al (May 17, 2010); **C-0283**, Email from Baines, Nancy (WEI) to Baines, Ian (WEI) et al (June 15, 2010).

²⁶⁷ CWS-Baines ¶ 76; **C-0221**, Handwritten Notes of Roeper, Uwe (Ortech) (April 19, 2010), p. 1.

²⁶⁸ CWS-Roeper ¶ 24.

²⁶⁹ **C-0214**, Email from Baines, Ian (WEI) to Roeper, Uwe (Ortech) (April 14, 2010); CWS-Baines. Prior to the April 19, 2010 meeting, an MNR official sent an email to Mr. Baines which noted Mr. Baines' “substantial development experience” (April 13, 2010); CWS-Baines ¶ 76.

²⁷⁰ CWS-Baines ¶ 76.

195. The next meeting, on May 13, 2010, was held with the OPA's Director of Contract Management, and two of his colleagues.²⁷¹ At that meeting, Windstream discussed various portions of the FIT Contract and asked whether the OPA would be prepared to modify any of them. The OPA representatives advised Windstream that they were not in a position to provide regulatory certainty and to contact the Renewable Energy Facilitation Office to obtain any additional information it needed on the relationship between the FIT Contract process and other parts of the renewable energy regulatory process.²⁷²

196. That same day, Windstream wrote to the Renewable Energy Facilitation Office to note its concern with the expectation in the FIT Contract that the Project would be operational within four years, in the face of uncertainties respecting setbacks, the site release process, and the detailed requirements of the renewable energy approval process.²⁷³ Windstream stated that since Ontario had granted WWIS a FIT contract with a four-year window to develop the Project, it was assuming that the relevant ministries were committed to resolving these uncertainties so that WWIS' ability to meet its obligations under the FIT Contract would not be compromised. Windstream asked the Renewable Energy Facilitation Office to contact it if WWIS could not expect that support from the Office. Since it did not do so, Windstream assumed, reasonably, that WWIS would receive the support requested.²⁷⁴

197. On May 21, 2010, Uwe Roeper from Ortech met with Pearl Ing of MEI to discuss the Project. Ms. Ing informed Mr. Roeper that MEI and MOE were working "feverishly" on finalizing offshore REA guidelines and that the guidelines would be available soon. No precise date was provided, but Ms. Ing stated that she expected it to be very soon.²⁷⁵

²⁷¹ CWS-Chamberlain ¶ 6; **C-0260**, Email from Killeavy, Michael (OPA) to Baines, Ian (WEI) (May 14, 2010); CWS-Baines ¶ 77; **C-0221**, Handwritten Notes of Roeper, Uwe (Ortech) (April 19, 2010), p. 4; **C-0262**, Letter from Baines, Ian (WEI) to Killeavy, Michael (OPA) (May 16, 2010).

²⁷² CWS-Chamberlain ¶ 8; CWS-Baines ¶ 77.

²⁷³ **C-0258**, Letter from Baines, Ian (WEI) to Zaveri, Mirrun (MEI) (May 13, 2010).

²⁷⁴ CWS-Baines ¶ 78.

²⁷⁵ **C-0270**, Email from Roeper, Uwe (Ortech) to Ing, Pearl (MEI) (May 25, 2010); CWS-Roeper ¶ 29.

198. The next meeting, on June 15, 2010, was again with staff from MEI, MNR and MOE, as well as the Renewable Energy Facilitation Office.²⁷⁶ This meeting was set up at Windstream's request to seek direction on the setback and site release issues it had identified in earlier meetings.²⁷⁷ Windstream raised the possibility at the meeting of "swapping" the land that Windstream had applied for with other land further offshore in order to comply with a five-kilometre setback from shore, which at the time was rumoured to be under consideration by the MOE.²⁷⁸ There was no indication from any of the officials present that these were anything but standard regulatory issues that would need to be addressed.²⁷⁹ As reflected in the minutes of that meeting, which were circulated after the meeting to all participants, staff from the ministries made a number of commitments with respect to working with Windstream to expedite the approval process for the project. Specifically:

- a) MNR staff committed to consider Windstream's proposal for a possible "land swap";
- b) MOE staff indicated that guidelines for setbacks were being developed, and they inquired about Windstream's "drop dead deadline for the project";
- c) MEI staff committed to speak to the OPA about FIT Contract provisions dealing with Ontario content requirements and the need for flexibility on this issue for offshore projects;
- d) MNR staff offered to provide input on the field studies required for the project; and

²⁷⁶ CWS-Baines ¶ 79; **C-0281**, Email from Duffey, Barry (ENE) to Ing, Pearl (MEI) et al (June 15, 2010); **C-0282**, Email from Perry, Kevin (ENE) to Ing, Pearl (MEI) (June 15, 2010).

²⁷⁷ CWS-Baines ¶ 79; **C-0280**, Letter from Baines, Ian (WEI) to Lo, Sue (MEI) (June 2, 2010).

²⁷⁸ **C-0293**, Briefing Document: Wolfe Island Shaols (Off-Shore Wind Project) Impact of a 5km Set-Back (June 23, 2010); CWS-Baines ¶ 79.

²⁷⁹ CWS-Chamberlain ¶ 16; CWS-Baines ¶ 79; An email sent on June 1, 2010 by the Director of MNR's Renewable Energy Program states that, because of MOE's delay in posting a proposal on offshore setbacks, "[a]ll ministries continue to "drag the puck" with applicants, including Windstream." However, that message was never communicated to Windstream (**C-0279**, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) et al. (June 1, 2010). To "drag the puck" is a hockey expression for controlling the puck but failing to do anything with it other than delay.)

- e) MNR staff committed to inquiring about the status of the Site Description Package for Windstream’s Applicant of Record application.²⁸⁰

199. On June 23, 2010, counsel for Windstream spoke with the Director of MNR’s Renewable Energy Program. The Director indicated that the Project was “special”, and that he was “advancing” Windstream’s proposal to swap grid cells selected for the Project.²⁸¹ This statement is supported by internal correspondence among MNR staff, which suggests that priority would be given for projects with a FIT contract and that the fact that Windstream had filed a substantial deposit with the OPA was helpful in supporting Windstream’s desire to move its project forward.²⁸²

200. On June 25, 2010, the MOE posted for public consultation its proposed rules for the development of offshore projects, including the proposal that there be a five-kilometre exclusion zone from the shore line to any offshore wind projects.²⁸³ The proposed rules confirmed that offshore project proponents would be required to complete a *Natural Heritage Assessment* (“**NHA**”) and an *Offshore Wind Facility Report* in addition to the core technical reports required to apply for a REA.²⁸⁴ The posting also indicated that future guidance documents would be forthcoming, including *Offshore Wind Noise Guidelines*, *Coastal Engineering Study Guidance*, and Phase 2 of the *Crown Land Renewable Energy Policy* review described above.²⁸⁵

²⁸⁰ **C-0285**, Memorandum from Adam Chamberlain (BLG) to WEI (June 17, 2010); CWS-Chamberlain ¶ 15.

²⁸¹ CWS-Roeper ¶ 30; **C-0291**, Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) (June 23, 2010).

²⁸² **C-0301**, Email from Richard, Linley (MNR) to Boysen, Eric (MNR) (June 25, 2010).

²⁸³ CWS-Roeper ¶ 31; **C-0296**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Off-Shore Wind Facilities - An Overview of the Proposed Approach (June 25, 2010) As discussed in more detail below in Section XVI.B.1, the setback distance of five kilometers (like the 2011 moratorium), was motivated by political, and not scientific, considerations.

²⁸⁴ Described above in ¶ 137. CER-Powell ¶ 38; **C-0298**, Report - Discussion Paper - Off-shore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010).

²⁸⁵ **C-0298**, Report - Discussion Paper - Off-shore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010).

201. Although skeptical about the scientific basis of the setback proposal, WWIS determined that the Project could be reconfigured to meet the requirement.²⁸⁶ WWIS wrote to government officials to inform them that a five-kilometre setback would be workable for the Project.²⁸⁷ WWIS also proposed a “land swap”, whereby WWIS would release its application for parts of the lakebed near Wolfe Island that were within five kilometres of Wolfe Island in exchange for other lakebed lands further offshore. MNR staff responded positively to this proposal.²⁸⁸

202. On July 5, 2010, Windstream attended a meeting with senior staff from MNR and MEI, including MNR’s Chief of Staff, MEI’s Director of Policy and a Special Assistant in the MNR.²⁸⁹ At this meeting, Windstream explained its three main concerns with signing the FIT Contract, which had evolved somewhat in light of the five-kilometre setback announcement. First, in light of the setback announcement, Windstream wanted to ensure that its proposed land swap was feasible, such that the land for which it had applied for Applicant of Record status which was within five-kilometres of the shoreline could be swapped for land further offshore. Second, Windstream sought clarity on the timing of its receiving Applicant of Record status. Third, in light of ongoing delays, Windstream required an extension from four to five years of the commercial operation date specified in the FIT Contract.²⁹⁰ At this meeting, Paul Ungerman, MEI’s Director of Policy, stated that he recognized that the confirmation of the setback

²⁸⁶ **C-0326**, Email from Nowlan, James (MNR) to Boysen, Eric (MNR) (August 3, 2010); **C-0294**, Briefing Document (WEI), Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5km Set-Back (June 24, 2010); **C-0292**, Email from Baines, Ian (WEI) to Baines, Nancy (WEI) (June 23, 2010); **C-0307**, Presentation, Wolfe Island Shoals (WIS) Wind Farm, Impact of Proposed 5 km Setback (July 2010); **C-0297**, Presentation, (WWIS), Wolfe Island Shoals Off-Shore Wind Project, Working with a 5km Set-Back (June 25, 2010); **C-0310**, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010); CWS-Baines ¶ 84; **C-0568**, Map (Ortech), 5km Setback Turbines (December 1, 2011).

²⁸⁷ **C-0302**, Email from Baines, Ian (WEI) to Cain, Ken (MNR) (June 26, 2010).

²⁸⁸ CWS-Roeper ¶ 36; **C-0330**, Email from Baines, Ian (WEI) to Boysen, Eric (MNR) (August 5, 2010); **C-0331**, Spreadsheet (WEI), 5km Setback Required (July 22, 2010); **C-0332**, Map (Ortech), Wolfe Island Shoals Wind Farm (July 21, 2010).

²⁸⁹ CWS-Baines ¶ 86; CWS-Roeper ¶ 35; CWS-Benedetti, ¶ 18; **C-0308** Memorandum from Ortech Power to WEI (July 6, 2010).

²⁹⁰ CWS-Baines ¶ 86; CWS-Roeper ¶ 35; CWS-Benedetti, ¶ 19.

requirement would have an effect on the Project, and committed to following up on the issues Windstream had identified with the Project within two or three days.²⁹¹

203. None of the officials present at the meeting indicated that there would be any difficulties with the Project aside from standard regulatory issues that needed to be addressed. These officials told Windstream that the government was committed to supporting renewable energy projects, which was consistent with the policies being implemented through the REA.²⁹²

204. On June 23, 2010, Adam Chamberlain, counsel to Windstream, spoke with Ken Cain, Manager of the Policy and Program Section of MNR's Great Lakes Branch, about the land swap. Mr. Cain told Mr. Chamberlain that his staff was working hard to support Windstream's efforts to achieve the required regulatory milestones. Mr. Cain's numerous statements in this period reinforced that the Project was a high priority for MNR staff.²⁹³

205. On July 7, 2010, Windstream had a further meeting with Mr. Ungerman, this time including Windstream co-founders and officers David Mars and William Ziegler.²⁹⁴ At this meeting, Mr. Ungerman stated that the Ontario Government, including the Premier's Office, supported the FIT contract process and that the Project in particular had the support of the Ontario Government.²⁹⁵ He advised Windstream that the Ontario Government was concerned about a campaign that the Canadian Wind Energy Association, the wind industry association, was apparently mounting against the proposed five-kilometre setback for offshore wind turbines, and asked that Windstream not support it (which Windstream agreed to do).²⁹⁶ Mr. Ungerman agreed to have MEI representatives speak to OPA representatives about extending the

²⁹¹ C-0308, Memorandum from ORTECH Power to WEI (July 6, 2010); CWS-Benedetti, ¶¶ 18-21; C-0309, Email from Benedetti, Chris (Sussex Strategy) to Baines, Ian (WEI) et al. (July 6, 2010); CWS-Baines ¶ 86.

²⁹² CWS-Chamberlain ¶ 16.

²⁹³ CWS-Chamberlain ¶ 19.

²⁹⁴ CWS-Baines ¶ 87; CWS-Mars ¶ 69; CWS-Benedetti, ¶¶ 23-24.

²⁹⁵ CWS-Mars ¶ 69; CWS-Baines ¶ 87; CWS-Benedetti, ¶ 24.

²⁹⁶ C-0312, Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) (July 7, 2010).

commercial operation date under the FIT Contract, and to support Windstream in its discussions with the MNR on the process and methodology for the “land swap.”²⁹⁷

206. Windstream sent an email message to Mr. Ungerman following the meeting to thank him for the positive and clear message to Windstream’s board. Windstream confirmed that it wanted the FIT Program to succeed as much as the MEI and that Windstream could support the five-kilometre setback if the MNR supported the Project.²⁹⁸

207. In mid-July, Mr. Ungerman advised Windstream that the OPA would be adjusting the Commercial Operation Date in the FIT Contract to May 4, 2015 from May 4, 2014, as Windstream had requested.²⁹⁹ Windstream viewed this as a very positive indication that the Ontario Government understood its concerns and was committed to supporting the Project.³⁰⁰

208. The positive news continued into August. On August 5, 2010, Windstream had sent to the MNR a proposed layout and description of the grid cells required for the Project to be built outside the five-kilometre exclusion zone.³⁰¹ This capped an effort that had been proceeding since mid-July to get comfort from MNR regarding the “grid cell swap.”³⁰² On August 9, 2010, the MNR sent Windstream a letter confirming its willingness to discuss a reconfiguration of the Project site once the five-kilometre setback policy proposal was concluded.³⁰³ The letter outlined the steps that would follow the reconfiguration:

Once the re-configuration of applications has been finalized the amended applications can begin to move through the normal Crown land application

²⁹⁷ Described in ¶ 201 above.

²⁹⁸ CWS-Baines ¶ 88; **C-0314**, Email from Ungerman, Paul (MEI) to Baines, Ian (WEI) (July 8, 2010).

²⁹⁹ CWS-Baines ¶ 89; **C-0317**, Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) et al. (July 16, 2010); CWS-Benedetti ¶ 27.

³⁰⁰ CWS-Baines ¶ 89; CWS-Benedetti, ¶ 27.

³⁰¹ CWS-Roeper ¶ 36; CWS-Baines ¶ 90; **C-0330**, Email from Baines, Ian (WEI) to Boysen, Eric (MNR) (August 5, 2010); **C-0331**, Spreadsheet (WEI), 5km Setback Required (July 22, 2010); **C-0332**, Map (Ortech), Wolfe Island Shoals Wind Farm (July 21, 2010).

³⁰² CWS-Benedetti, ¶¶ 28-29.

³⁰³ CWS-Chamberlain, p. 25; CWS-Roeper ¶ 36.

process, including holding a site information meeting with MNR to discuss known or potential constraints in the project area, public and aboriginal notification, and confirmation of requirements for offshore windpower in the renewable energy approval process.³⁰⁴

I appreciate your need for certainty on this file, and we will move as quickly as possible through the remainder of the application review process in order that you may obtain Applicant of Record status in a timely manner.³⁰⁵

209. This was a very significant letter. According to Mr. Roeper of Ortech, who has worked in the Ontario power and environmental sectors for more than 25 years, it is “very rare” to obtain these kinds of comfort letters from the MNR or MOE, and the fact that MNR provided one suggested MNR was making a concerted effort to facilitate the signing of the FIT Contract and to advance the regulatory process.³⁰⁶

210. Three days later, on August 12, 2010, the OPA confirmed that it would be revising the FIT Contract with a term changing the Commercial Operation Date from four years following the contract date to five years, and that it would issue a revised contract with those terms within days.³⁰⁷ As promised, the OPA provided Windstream with a revised contract on August 18, 2010.³⁰⁸

F. Ministries Expected to Complete Review of Site Release Process and Confirm Five-Kilometre Setback by January 1, 2011

211. Consistent with the representations made to Windstream, internal correspondence and other documents from the MNR, MEI and MOE created between May and August 2010 indicate that all ministries were planning at that time to implement the MOE’s setback policy and revised REA Regulation for offshore and the MNR’s new site release policy by January 1, 2011:

³⁰⁴ C-0334, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

³⁰⁵ C-0334, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

³⁰⁶ CWS-Roeper ¶ 38.

³⁰⁷ CWS-Chamberlain ¶ 27; CWS-Benedetti ¶ 35; CWS-Baines ¶ 91; C-0343, Email from Cecchini, Perry (OPA) to Chamberlain, Adam (BLG) et al. (August 12, 2010).

³⁰⁸ CWS-Baines ¶ 91; C-0349, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (August 18, 2010); C-0243, Schedule 2 (OPA), FIT Contract, Special Terms and Conditions Wind (Off-Shore) Facilities (May 4, 2010).

- a) A graphical timeline attached to an email sent on May 23, 2010 by an MOE employee indicated that offshore wind requirements would be developed between June and August 2010, and that Phase 2 of MNR's Site Release review as well as all necessary amendments to the REA Regulation would be completed and posted for public comment by September, 2010. Following a period of public comment, these regulatory measures would come into effect January 1, 2011.³⁰⁹
- b) A more detailed graphical timeline created on June 1, 2010 (updated July 5, 2010) provided a detailed list of relevant deliverables, including guidance documents, within the timelines set out in the document described above.³¹⁰
- c) An Offshore Wind Project Requirements Work Plan, also dated June 1, 2010, also provided a detailed list of deliverables and provided for the completion of all work and the amendment of the REA Regulation by January 1, 2011.³¹¹
- d) A timeline produced on June 11, 2010 showed that MNR and MOE would undertake necessary work with stakeholders between June and September 2010, the resulting regulations would be posted for comment between September and November 2010, between November and December 2010 the government would make decisions about areas where offshore development should be constrained, and by January 1, 2011, a revised REA Regulation as well as a revised Site Release policy and APRD would be in effect.
- e) On August 5, 2010, the MEI briefed the Premier's Office that regulatory "amendments [for offshore wind] are anticipated to be completed by year's end and will come into force in January, 2011."³¹²

³⁰⁹ **C-0268**, Email from Evans, Paul (ENE) to Lo, Sue (MEI) et al (May 21, 2010); **C-0269**, Off-shore Wind Delivery Timeline (MOE) (May 21, 2010).

³¹⁰ **C-0316**, Proposed Off-shore Wind Delivery Timeline (MOE) (July 16, 2010).

³¹¹ **C-0278**, Flowchart, Off-Shore Wind Project Requirements Work Plan (June 1, 2010).

³¹² **C-0327**, Presentation (MEI), Offshore Wind, Premier's Office Information (August 5, 2010).

- f) A document with identical timelines to those in the above document was attached to an email sent by an MNR staffer on August 23, 2010.³¹³
- g) On November 8, 2010, a chart was circulated in an email sent by an MOE employee which listed January 2011 as the delivery date of the rules for offshore wind and the amendments for the REA Regulation.³¹⁴
- h) Consistent with the timelines, in January 2011, officials from the relevant Ministries indicated to Windstream's government relations consultant that the relevant regulations were only a week or two away.³¹⁵

212. The MNR had also completed Phase 1³¹⁶ and begun consultation on Phase 2 of its review of Crown land site release policies and procedures, described at paragraphs 122 and 123 above. On August 18, 2010, MNR announced that the government was “undertaking additional regulatory and policy work to provide further clarity and certainty to renewable energy proponents and the public on where renewable energy projects can be located and what technical requirements need to be fulfilled to ensure the protection of the environment and ecological sustainability”, and invited public comment on these issues.³¹⁷ As noted above, the Ministries’ internal timelines at the time all anticipated that the MNR’s policy review, including consultation, would be completed during fall 2010, in conjunction with the MOE development and consultation respecting the offshore wind setback and other rules, in time for these provisions to come into effect in January 2011.

³¹³ **C-0352**, Flowchart (MNR), Offshore Timeline Overview (August 23, 2010); **C-0351**, Email from Nowlan, James (MNR) to Cain, Ken (MNR) (August 23, 2010); **C-0352**, Flowchart (MNR), Offshore Timeline Overview (August 23, 2010).

³¹⁴ **C-0380**, Chart (ENE), GE Program Development and Delivery Plan (Draft) (November 8, 2010); **C-0379**, Email from Duffey, Barry (ENE) to Wallace, Marcia (ENE) (November 8, 2010).

³¹⁵ **C-0468**, Email from Baines, Nancy (WEI) to Mars, David (White Owl Capital) (January 29, 2011).

³¹⁶ **C-0311**, Policy Proposal Notice (MNR), Review of the waterpower and windpower site release policies and procedures (EBR Registry Number 010-7895) (July 6, 2010).

³¹⁷ **C-0346**, Policy Proposal Notice (MNR), Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (EBR Registry No. 011-0907) (August 18, 2010).

213. In addition, the Ontario Government continued to promote Ontario as a jurisdiction in which offshore windpower development was being welcomed. On September 9, 2010, representatives of MNR attended the annual meeting of the Great Lakes Wind Collaborative in Cleveland, Ohio. At that meeting, Mr. Cain of the MNR delivered a slide presentation on behalf of MNR entitled “Offshore Windpower Development in Ontario: Provincial Update & Ontario’s First Power Purchase Agreement.”³¹⁸ The presentation explained, among other things, that:

- a) the Ministry had introduced a Windpower Crown Land Site Release Policy in 2004, which included provisions for making the beds of the Great Lakes available for offshore development;
- b) in 2008, the OPA completed a study of windpower potential in the Ontario portion of the Great Lakes and identified 64 sites with over 35,000 megawatts of generating potential; and
- c) in May 2009, Ontario’s *Green Energy Act* was enacted to make Ontario a renewable energy leader, address climate change, encourage investment and create green jobs by creating a “new Streamlined Approvals process” for renewable energy projects.³¹⁹

214. At no point did any of the above documents cite any scientific uncertainty that would prevent the development of appropriate regulations for offshore wind projects.

G. Ministries Were Carrying Out Appropriate Research to Support the Development of Guidelines for Offshore Wind Development

215. As of this time period, the MNR and MOE were carrying out research that was appropriate to support the development of guidelines for offshore wind development, in accordance with timelines described above.

³¹⁸ C-0363, Presentation (MNR), Offshore Windpower Development in Ontario: Provincial Update & Ontario's First Power Purchase Agreement (September 17, 2010).

³¹⁹ C-0363, Presentation (MNR), Offshore Windpower Development in Ontario: Provincial Update & Ontario's First Power Purchase Agreement (September 17, 2010), pp. 3-4.

216. The studies that the MNR had commissioned and was carrying out included the following:

- a) *Impact on Coastal Processes*: Analysis of the current knowledge on the potential effect of offshore wind development on fish and coastal engineering issues.³²⁰
- b) *Radar Migration Study*: Weather radar study of the spatial distribution of nocturnal migratory birds and bats to determine whether migratory corridors are used to cross both Lake Ontario and Lake Erie.³²¹
- c) *Bat Migratory Habitat Analysis*: Analysis of acoustic parameters for migrating bats to identify migratory corridors in the Georgian Bay, Lake Huron and Lake Erie areas.³²²
- d) *Fish Habitat*: Review of the potential effects and mitigation strategies for fish and fish habitat in relation to offshore wind power development.³²³
- e) *Renewable Energy Atlas*: Wind resource characterization and development of the Renewable Energy Atlas that provides a publicly accessible GIS-based mapping tool identifying wind resources, in collaboration with the U.S. National Renewable Energy Laboratory.³²⁴

217. Although these studies were not completed before the moratorium was put in place, those that have since been completed, including the study on the impact of offshore wind turbines on

³²⁰ **C-0559**, Presentation (MOE), Status of Wind Energy Science (October 19, 2011); **C-0353**, Email from McGillis, Andrew (Baird) to Edwards, Kevin (MNR) (August 26, 2010); **C-0339**, Report (Baird), Coastal Engineering Study Guidance for Offshore Wind Development on the Great Lakes (August 10, 2010); **C-0359**, Email from Hayward, Neil (MNR) to Morencie, Mike (MNR) (September 13, 2010); **C-0361**, Email from Edwards, Kevin (MNR) to McLeish, David (MNR) (September 15, 2010).

³²¹ **C-0559**, Presentation (MOE), Status of Wind Energy Science (October 19, 2011).

³²² **C-0559**, Presentation (MOE), Status of Wind Energy Science (October 19, 2011).

³²³ **C-0577**, Assistant Deputy Minister's Information Briefing Note (MNR) (December 20, 2011); **C-0323**, Email from Dunlop, Erin (MNR) to Edwards, Kevin (MNR) et al. (July 29, 2010).

³²⁴ **C-0555**, Presentation (MOE), Renewable Energy Approval (REA) Off-shore Wind (October 14, 2011).

coastal processes (by Baird & Associates Coastal Engineers, who are also Windstream's experts in this arbitration),³²⁵ and the studies on the potential effects of offshore wind turbines on fish habitat (by Sarah Nienhuis and Erin Dunlop)³²⁶ were largely positive, as described in the report by Baird & Associates discussed at paragraphs 454 to 459 below). The *Bat Migratory Habitat Analysis* was finalized in March 2012,³²⁷ though, unlike the fish impact and coastal processes studies, there is no indication that it has been published. The Renewable Energy Atlas was put up on web but appears to no longer be accessible.³²⁸ MOE had also commissioned a study on water quality modeling that assessed the impact of offshore construction on water quality. This report was completed in 2012,³²⁹ and concluded that any impacts from construction of an offshore wind turbine would be quite small.³³⁰

H. Windstream Confirms that the Project is Feasible and Financeable

218. While engaging in the meetings with Ontario Government officials described above, Windstream and its consultant Ortech had also carried out the requisite assessments and analyses to confirm that the Project was feasible and financeable. This work included:

- a) a project management plan outlining scheduling requirements, project challenges, organizational structure and budget;³³¹
- b) a conceptual engineering layout for the project;³³²

³²⁵ **C-0572**, Report (Baird), Offshore Wind Power Coastal Engineering Report, Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ministry of Natural Resources (May 2011).

³²⁶ **C-0543**, Report (MNR), Nienhuis, Sarah and Dunlop, Erin S., "The Potential Effects of Offshore Wind Power Projects on Fish and Fish Habitat in the Great Lakes", Aquatic Research Series 2011-01 (July 6, 2011); **C-0541**, Report (MNR), Nienhuis, Sarah and Dunlop, Erin S. "Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat" Aquatic Research Series 2011-02 (July 2011).

³²⁷ **C-0622**, Next Steps: Offshore Windpower Development - Proposed Research Plan (July 17, 2012).

³²⁸ www.ontariowindatlas.ca.

³²⁹ **C-0637**, Report (MOE), Application of the MIKE3 model to examine water quality impacts within Lake Ontario nearshore in 2008 (December 28, 2012).

³³⁰ **C-0637**, Report (MOE), Application of the MIKE3 model to examine water quality impacts within Lake Ontario nearshore in 2008 (December 28, 2012), p. iv.

³³¹ **C-0218**, Letter from Roeper, Uwe (Ortech) to Baines, Ian (WEI) (April 18, 2010); CWS-Roeper ¶ 22.

- c) an assessment, with the assistance of the UK engineering firm Mott MacDonald, of capital and operating costs, turbine options, optimal designs, options for the cable required to connect the project to the electrical grid, and options for anchoring the turbine foundations to the lake bed;³³³ and
- d) a project feasibility analysis.³³⁴

219. Ortech prepared the project feasibility analysis based on the Mott MacDonald engineering cost estimates from Mott Macdonald using industry-typical values for offshore wind projects, bearing in mind that there were certain differences in the conditions between offshore projects in Europe compared to Lake Ontario.³³⁵ The available wind resources were calculated based on the September 2009 wind and energy yield study carried out by Helimax for Windstream, referred to at paragraph 172 above, adjusted for the turbine type typically used in Ontario.³³⁶ Ortech projected the revenue based on the prices being offered by the OPA in the FIT Contract, which Ortech described as being “a very favourable contract with a limited number of operational risks.”³³⁷ Ortech also found other aspects of the project to be favourable, including low wave heights, accessibility of the site for construction and maintenance, and a strong electrical grid.³³⁸

³³² **C-0139**, Report (Helimax Energy Inc.), Meteorological and Energy Yield Report, Wolfe Island, Ontario (September 24, 2009), p. 22; CWS-Roeper ¶ 25.

³³³ **C-0237**, Email from Baines, Nancy (WEI) to Baines, Ian (WEI) et al. (April 28, 2010); **C-0244**, Mott MacDonald, Instruction and Notes on Use of Preliminary Cost Plan (PCP), (May 4, 2010); CWS-Roeper ¶ 25.

³³⁴ **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010); CWS-Roeper ¶ 25.

³³⁵ **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010), p. 8.

³³⁶ **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010), p. 8.

³³⁷ **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010), p. 9; CWS-Roeper ¶ 26.

³³⁸ **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010), p. 8; CWS-Roeper ¶ 26.

220. Ortech’s first project feasibility analysis, dated May 12, 2010, indicated that the project would take 21 months to engineer and permit and 24 months to construct, with construction financing occurring in 2012.³³⁹ Ortech concluded that the Project would provide an extremely attractive rate of return for investors. For projects at WWIS’s stage (FIT contract in hand, a viable grid connection, and certain remaining permit and construction risks), an internal rate of return (“IRR”) on equity before tax (levered) of over █████ would be deemed attractive to the investment community.³⁴⁰ Ortech’s feasibility analysis concluded that the Project would significantly exceed the █████ threshold and provide a █████ IRR on equity before tax (levered).³⁴¹ As a result, the Project would be “readily financeable.”³⁴²

221. On July 6, 2010, at Windstream’s request, Ortech prepared an addendum letter that updated the project feasibility analysis that had previously been prepared, assuming that the project would be reconfigured to accommodate the proposed five-kilometre setback.³⁴³ Ortech used the same assumptions as in the original feasibility analysis, but adjusted costs to account for fewer turbines (but more megawatts per turbine) and more expensive turbine foundation costs, reflecting the larger size of the turbines and the fact that some would have to be at deeper water depths than originally planned.³⁴⁴ As a result of these revisions, Ortech adjusted the projected return of █████ IRR on equity before tax (levered) to █████ IRR on Equity before Tax (levered), which – because it continued to exceed █████, was viewed by Ortech as attractive financially and therefore feasible.³⁴⁵

³³⁹ C-0257, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010), p. 8; CWS-Roeper ¶ 26.

³⁴⁰ CWS-Roeper ¶ 28.

³⁴¹ C-0257, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010), p. 9.

³⁴² CWS-Roeper ¶ 28.

³⁴³ C-0310, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010); CWS-Roeper ¶ 33.

³⁴⁴ C-0310, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010); CWS-Roeper ¶ 33.

³⁴⁵ C-0310, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010); CWS-Roeper ¶ 34.

222. Windstream's investors had a high degree of confidence that, with the FIT Contract in hand, the group's management and financial resources could obtain equity partners as well as debt financing and bring the Project to a successful conclusion.³⁴⁶

I. On the Basis of Ontario's Representations, Windstream Executes the FIT Contract

223. Having carried out these analyses to assess the feasibility and financeability of the Project and received the comfort described in Section IX.E above from the Ontario Government, Windstream proceeded to execute the FIT Contract on August 20, 2010 and to substitute the initial \$3 million letter of credit deposited when WWIS applied for the FIT Contract with a \$6 million letter of credit, also secured by funds advanced by Windstream's investors.³⁴⁷

224. To Windstream, the assurances and commitments it was receiving from the government confirmed that it would be permitted to move the Project through the development phase and to achieve commercial operation by its commercial operation date deadline, and that the Project had the full support of the Ontario Government. In reliance on these assurances and commitments, Mr. Ziegler and Mr. Mars authorized WWIS to enter into the FIT Contract.³⁴⁸

225. The FIT Contract was the key asset associated with the Project, and securing it was a critical milestone in the Project's development. The FIT Contract provided the revenue certainty that Windstream would need in order to secure the equity and debt financing needed to bring the Project into commercial operation. Without a FIT contract, it would have been impossible to proceed with the Project. In other words, the FIT Contract was the main value driver for the Project, without which the Project could not have proceeded.³⁴⁹

226. Upon signing the FIT Contract, WWIS was required to post a \$6 million letter of credit to secure the performance of its obligations under the FIT Contract, which amount would be

³⁴⁶ CWS-Ziegler ¶ 13; CWS-Mars ¶ 79.

³⁴⁷ CWS-Mars ¶ 73; C-0247, Resolution of the Directors (WWIS), Authorization of Feed-in Tariff Contract (May 4, 2010).

³⁴⁸ CWS-Mars ¶ 71.

³⁴⁹ CWS-Mars ¶ 72.

forfeited in the event that WWIS failed to meet its commercial operation date under the FIT Contract. [REDACTED]

[REDACTED] The letter of credit is secured by cash in the amount of US\$6.6 million held in a bank account and not available for use by the investors.³⁵⁰ Although Windstream requested in December 2013 that the letter of credit be refunded or returned, the OPA has refused to return it.³⁵¹

J. Windstream’s Decision to Execute the FIT Contract Was Commercially Reasonable

227. Sarah Powell, a senior Ontario lawyer who is a leading expert on the regulatory aspects of renewable energy projects, concludes in a report prepared on behalf of Windstream (described further in Section XX.A) that it was commercially reasonable for Windstream to execute the FIT Contract despite the fact that certain regulations for offshore wind energy were not yet in place. Ms. Powell reaches this conclusion for four reasons:

- a) The FIT Contract was a prerequisite to any offshore development, and was generally viewed by members of the industry as the key “hard gate” (i.e. required before any other material milestone in the project development process would have been pursued).
- b) Members of the industry generally understood that MNR would support Ontario’s commitment to renewable energy by aligning the Crown land access process with the OPA’s renewable energy procurement process, and it therefore would have been commercially reasonable for a contractor who had been awarded a FIT contract to assume it would receive Crown land tenure in a timely manner.
- c) It would have been commercially reasonable for a developer to assume that permitting of an offshore wind project could have been completed in approximately three years.

³⁵⁰ CWS-Mars ¶ 73.

³⁵¹ C-0680, Letter from Killeavy, Michael (OPA) to Chamberlain, Adam (BLG) (January 10, 2014).

- d) A developer could not have reasonably anticipated that Ontario would later reverse its stated support for offshore wind projects.³⁵²

K. Windstream Completes Development Work and Takes Steps to Find an Equity Partner for the Project

228. After the FIT Contract was signed on August 20, 2010, Windstream began immediately to move the Project forward, as described in Section XIV below. In order to fund this work, WWIS used the capital that Windstream had already invested and additional capital contributions that Windstream sought from its investors on the understanding that the Ontario Government would fulfill its commitment to support the Project.³⁵³

229. In securing additional capital from its investors, Windstream explained that it was doing as much development work as possible pending the finalization of the setback rules for offshore wind projects, which would drive the ultimate project layout and design. Windstream reported to its investors that it anticipated that the setback would be released in early January 2011, such that further development work could move forward during the first quarter of 2011.³⁵⁴

230. Meanwhile, from April 2010 to February 2011, in conjunction with its investment bankers KeyBanc, Windstream met with numerous different parties in relation to the Project. The delay in entering into a transaction revolved almost solely around finalization of the set-back rules (described in Section XI.A below). Windstream had already closed a joint development transaction with General Electric for its onshore portfolio in Ontario and British Columbia, and was planning to enter into a similar transaction with a partner for the Project.³⁵⁵

³⁵² CER-Powell ¶ 3.

³⁵³ CWS-Mars ¶ 75.

³⁵⁴ CWS-Mars ¶ 76.

³⁵⁵ CWS-Mars ¶ 77.

X. 2010: WINDSTREAM APPLIES FOR AND RECEIVES CONDITIONAL GRID CONNECTION APPROVAL FROM IESO AND HYDRO ONE

231. On November 8, 2010, WWIS received a *Notification of Conditional Approval for Connection* from the IESO.³⁵⁶ The IESO determined that the connection of WWIS to the IESO-controlled grid at the Lennox connection point would not adversely affect the grid. The Notification was subject to certain standard conditions that Windstream could easily satisfy. That same day, Hydro One issued its *Customer Impact Assessment* for WWIS, which provided that WWIS was not expected to adversely impact transmission customers in the area of Lennox County (WWIS's connection point).³⁵⁷ As described in Section VII.D, this was a key regulatory approval which provided that Windstream would be able to connect WWIS to the IESO-controlled grid. The decision to use the connection point at the Lennox connection point was the result of significant long-term planning by Windstream supported by Genivar, an engineering firm retained by Windstream to study the feasibility of connecting the Project to the IESO-controlled grid.³⁵⁸

XI. 2010: ONTARIO FAILS TO PROMPTLY GRANT WWIS ACCESS TO CROWN LAND AND FINALIZE THE FIVE-KILOMETRE SETBACK, BUT ENCOURAGES WINDSTREAM TO CONTINUE INVESTING IN THE PROJECT

A. Ontario Fails to Process WWIS' Application for Crown Land and to Confirm the Applicable Setback

232. Beginning in September 2010, one month after WWIS had executed its FIT Contract and been assured that its application for Applicant of Record status would be cleared through the application process as quickly as possible, Windstream and its representatives began to meet

³⁵⁶ **C-0381**, System Impact Assessment Report (IESO), Wolfe Island Shoals Wind Generation Station, Connection Assessment & Approval Process (Final Report) (November 8, 2010); **C-0382**, Letter from Constantinescu, Barbara (IESO) to Baines, Ian (WEI) (November 8, 2010).

³⁵⁷ **C-0383**, Report (Hydro One), Customer Impact Assessment, Wolfe Island Shoals GS 300 MW Wind Turbine Generator Generation Connection (November 8, 2010), pp. 8, 10.

³⁵⁸ **C-0274**, Report (Genivar), Wolfe Island Shoals Wind Farm 300 MW Project, Preliminary Project and Operating Philosophy (May 27, 2010). In 2008, Windstream also retained Genivar to study the connection of a planned 264 megawatt offshore wind project to the same connection point: **C-0732**, Report (Genivar), Ontario Clean Power Foymount Inc., Wolfe Island Shoals – Part A and Part B Wind Farm Projects, System and Protective Relays Overview (October 29, 2008).

with representatives of the relevant ministries to discuss gaining access to Crown land in order to begin the wind testing permitting under Phase 1 of the Site Release process.³⁵⁹ Wind testing was an important step before Windstream's application for Applicant of Record status could proceed to Phase 2 of the Site Release process, where the testing and assessment requirements to obtain a REA could begin. However, contrary to its commitment to Windstream, MNR failed to expedite its application for Applicant of Record status, and permission to access Crown land was not forthcoming.

233. On September 9, 2010, Ortech representatives on behalf of Windstream met with MNR officials to discuss the technical studies that Ortech needed to carry out while MNR and MOE were considering the issues raised in their June and August policy proposals (discussed above in paragraphs 200 to 208).³⁶⁰ MNR officials stated that the field studies (for example, test drilling, geophysical surveys and sampling) could proceed, provided that any necessary work permits were applied for and approved, and that the Ministry officials would assist in facilitating obtaining the work permits.³⁶¹

234. However, MNR officials stated that Ortech could not set up an offshore wind measurement mast because this required a temporary land use permit, which could not be granted until WWIS was given Applicant of Record status under the site release process.³⁶² The Ministry stated that this process was on hold until MOE's setback proposal was finalized, the Ministry's own policy process was completed, and a new site release process for offshore wind

³⁵⁹ CWS-Roeper ¶ 39.

³⁶⁰ CWS-Baines ¶ 95; **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010); CWS-Roeper ¶ 42.

³⁶¹ CWS-Roeper ¶ 43; **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010).

³⁶² **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010); CWS-Roeper ¶ 43.

was approved by the Minister.³⁶³ MNR later denied a request by Windstream to set up a wind testing site on a barge to be moored temporarily in the Project area.³⁶⁴

235. MNR also explained that the grid cell exchange that had been discussed could not yet be carried out because the site release process was still on hold.³⁶⁵ However, the Ministry encouraged Windstream to provide it with a letter outlining the cells required for the WWIS intended to apply.³⁶⁶ MNR explained that it was preparing a document that would outline the studies and information required to meet any coastal engineering requirements under the MNR's APRD.³⁶⁷

236. On September 30, 2010, Mr. Baines wrote to Mr. Boysen and again requested that WWIS be allowed to erect a temporary wind monitoring mast to carry out wind speed testing. Mr. Baines' letter indicated that this testing was a necessary part of the field studies that had to be carried out.³⁶⁸

237. On October 4, 2010, Mr. Baines sent a further letter to the MNR detailing Windstream's submissions on MNR's proposed site release process for offshore wind facilities.³⁶⁹ In his letter, Mr. Baines indicated that the decision to put the site release process on hold pending the determination of appropriate setbacks was directly contrary to representations made by MNR officials in 2010 where they indicated that WWIS's application for Applicant of Record status would be given priority, and that the site release process would be completed in sufficient time for WWIS to comply with REA and other regulatory requirements.

³⁶³ C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010); CWS-Roeper ¶ 43.

³⁶⁴ C-0596, Letter from Baines, Ian (WEI) to Bellamy Karen (MNR) (February 14, 2012).

³⁶⁵ CWS-Baines ¶ 96; CWS-Roeper ¶ 43.

³⁶⁶ C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010).

³⁶⁷ C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010).

³⁶⁸ C-0366, Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) (September 30, 2010).

³⁶⁹ C-0369, Letter from Baines, Ian (WWIS) (October 4, 2010).

238. On October 7, 2010, Mr. Baines again wrote to Mr. Boysen to formally apply for the “swap” of Crown land grid cells previously discussed. Mr. Baines also reiterated the need for Windstream to obtain Applicant of Record status as soon as possible.³⁷⁰

239. On October 29, 2010, Windstream representatives and Mr. Roeper again met with officials from MNR, MEI and MOE.³⁷¹ Mr. Roeper and the Windstream representatives made a presentation respecting the Project, and asked the Ministries to expedite the confirmation of the setback exclusion zone and allow wind-testing and reconfiguration to proceed. None of the officials would confirm whether an offshore setback would be adopted or the likely distance of any setback.³⁷² However, there was never any suggestion during any of these meetings that the Project would not be allowed to proceed.³⁷³

240. Mr. Roeper followed up repeatedly with Mr. Cain and other Ministry officials in November 2010 about the status of WWIS’s application for Applicant of Record status, whether WWIS could begin the testing and studies described in the September 9, 2010 meeting and the potential swap of grid cells.³⁷⁴ Mr. Cain finally responded on November 22, 2010, indicating, among other things, that:

The government’s offshore windpower policy review is still outstanding. Accordingly, we are still much in the same situation as we were when you met last with MNR, ME and MOE on October 29th.

We are not yet able to consider advancing the Wolfe Shoals project through the Applicant of Record process, nor implement the potential exchange of grid cells.³⁷⁵

³⁷⁰ C-0371, Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) (October 7, 2010).

³⁷¹ CWS-Roeper ¶ 47; CWS-Baines ¶ 101; CWS-Benedetti ¶ 45.

³⁷² C-0377, Email from Lucas, Brenda (ENE) to Benedetti, Chris (Sussex Strategy) et al (November 3, 2010); CWS-Baines ¶ 101; CWS-Roeper ¶ 47.

³⁷³ CWS-Chamberlain ¶ 34.

³⁷⁴ CWS-Roeper ¶ 48.

³⁷⁵ CWS-Roeper ¶ 48; C-0388, Email from Cain, KEN (MNR) to Roeper, Uwe (Ortech) (November 22, 2010); CWS-Benedetti ¶ 46.

241. On November 26, 2010, Mr. Benedetti spoke with Mr. Cain at MNR and Brenda Lucas at MOE to obtain another update. Ms. Lucas indicated that MOE was attempting to align its proposed regulations with those of MNR, but could not estimate when more information would be available.³⁷⁶ Mr. Cain indicated that offshore projects had been “deferred” until there was additional clarity on setback requirements.³⁷⁷

B. WWIS Has No Other Option But to Declare Force Majeure Under the FIT Contract

242. By December 2010, MNR still had not processed WWIS’ application for Applicant of Record status nor had MOE finalized the setback requirement that would apply to offshore wind projects. As a result, it was apparent that Windstream would not receive Applicant of Record status in 2010. The key items delayed as a result of MNR and MOE’s inaction were the ability of Windstream to access the Project site to begin wind testing, and the initiation of discussions concerning the reconfiguration of grid cells that was required to define the project area and to plan field studies to apply for renewable energy approval.³⁷⁸ As described above in Section XI.A, repeated requests by Windstream to gain access to the Project site in order to begin wind testing and also to initiate discussions about reconfiguring its Crown land application were refused.

243. In the absence of progress on both of these fronts, it was impossible for the Project to advance towards its Milestone Date for Commercial Operation (“**MCOD**”) of May 4, 2015.³⁷⁹ Even with the one-year extension for WWIS’s commercial operation date, WWIS was left with only four-and-a-half years to complete the remaining permitting requirements and construct the project so that it would be operational by May 4, 2015.³⁸⁰

³⁷⁶ CWS-Benedetti ¶ 47; **C-0393**, Email from Baines, Ian (WEI) to Benedetti, Chris (Sussex Strategy) et al (November 27, 2010).

³⁷⁷ CWS-Benedetti ¶ 47; C-0148, Article, Hamilton, Tyler (Toronto Star) Province freezes Great Lakes energy proposals (October 23, 2009).

³⁷⁸ **C-0406**, Exhibit “A” Force Majeure Notice (December 10, 2010), p. 3.

³⁷⁹ **C-0406**, Exhibit “A” Force Majeure Notice (December 10, 2010), p. 3.

³⁸⁰ CWS-Baines ¶ 104.

244. WWIS therefore had no other option but to declare *force majeure* under the FIT Contract. It delivered a *force majeure* notice to the OPA on December 10, 2010, effective on November 22, 2010.³⁸¹ In its *force majeure* notice, WWIS indicated that it was unable to advance further towards the milestone dates in the FIT Contract without being able to carry out wind testing, further defining of the project area, and related studies, all of which required that Applicant of Record status be granted.³⁸²

245. The OPA accepted the *force majeure* notice on September 9, 2011, effective November 22, 2010.³⁸³

246. Section 10.1(f) of the FIT Contract provides that the MCOB shall be extended by a reasonable period of delay directly resulting from the *force majeure* event.³⁸⁴ However, the *force majeure* provision is subject to an important exception. Despite any persisting event of *force majeure*, either party may unilaterally terminate the FIT Contract if the Project does not achieve COD by May 4, 2017, the date that is two years after the original COD. Section 10.1(g) of the FIT Contract provides:

10.1(g). If, by reason of one or more events of Force Majeure, the Commercial Operation Date is delayed by such event(s) of Force Majeure for an aggregate of more than 24 months after the original Milestone Date for Commercial Operation (prior to any extension pursuant to Section 10.1(f)), then notwithstanding anything in this Agreement to the contrary, either Party may terminate this Agreement upon notice to the other Party and without any costs or payments of any kind to either Party, and all Completion and Performance Security shall be returned or refunded (as applicable) to the Supplier forthwith.³⁸⁵

³⁸¹ **C-0408**, Form of Notice of Force Majeure, OPA and WWIS (December 10, 2010) FIT Contract, OPA and WWIS (December 10, 2010), Exhibit "A", ¶ 3; CWS-Chamberlain ¶ 34; CWS-Baines ¶ 105; **C-0550**, Letter from Killeavy, Michael (OPA) to Baines, Nancy (WWIS) (September 9, 2011).

³⁸² **C-0408**, Form of Notice of Force Majeure, OPA and WWIS (December 10, 2010) FIT Contract, OPA and WWIS (December 10, 2010), Exhibit "A", ¶ 3.

³⁸³ **C-0550**, Letter from Killeavy, Michael (OPA) to Baines, Nancy (WWIS) (September 9, 2011).

³⁸⁴ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), ¶ 32.

³⁸⁵ **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), ¶ 32.

247. The OPA has exercised its power under section 10.1(f) to terminate FIT contracts where MCOD has been delayed for more than 24 months as a result of a *force majeure* event(s).³⁸⁶ For example, in July 2014, the OPA announced that it was terminating Horizon Wind's FIT contract for its Big Thunder Beta wind energy project in Thunder Bay, Ontario, because *force majeure* events delayed milestone MCOD by more than 24 months.³⁸⁷ Like the Project, Big Thunder lacked regulatory approvals from MOE. A statement from an OPA spokesperson confirms that the decision to cancel the contract resulted from delays caused by the *force majeure* event(s):

The Big Thunder Wind Park project was significantly delayed due to force majeure events. Under a FIT Contract, either party to the contract has the right to terminate the contract if force majeure events delay a project past 24 months. The OPA terminated the Big Thunder Wind Park project for this reason.³⁸⁸

248. Thus, WWIS' rights were not frozen in time as in typical cases of *force majeure*. Rather, despite the OPA's acceptance of Ontario's delays as causing an event of *force majeure* under the FIT Contract, WWIS' rights to the benefits of the FIT Contract continued to depend on the MNR and the MOE engaging in the approval process in an expeditious manner.

249. Because time remained of the essence, WWIS wrote a letter to Premier McGuinty, then Premier of Ontario, explaining the difficulties facing WWIS in the FIT contract process and requesting an immediate decision on the setback regulations and the immediate release of the Ministry's site release policy.³⁸⁹ The Premier responded by referring the request to John Wilkinson, the Minister of the Environment.³⁹⁰ No response was received from either Mr. Wilkinson or anyone else at MOE.

³⁸⁶ C-0703, OPA Webpage, Terminated FIT Contracts (July 24, 2014); C-0704, Chart (OPA), Terminated Feed-In Tariff Contracts (July 24, 2014).

³⁸⁷ C-0705, Article (CBC News), Ontario Power Authority cancels contract with Horizon Wind (July 25, 2014).

³⁸⁸ C-0706, Article (tbnewswatch.com), Contract scrapped (July 25, 2014).

³⁸⁹ CWS-Baines, ¶ 106; C-0413, Letter from Baines, Ian (WEI) to The Honourable Dalton McGuinty, Premier (December 15, 2010).

³⁹⁰ CWS-Baines, ¶ 106; C-0422, Letter from McGuinty, Dalton, Premier to Baines, Ian (WEI) (January 4, 2011).

C. Ministry of Energy Leads Windstream to Believe Project can Proceed Even if Other Offshore Projects Cannot

250. In 2010, opposition to wind energy development in Ontario was becoming increasingly vocal and well-organized, and began to target the electoral ridings of members of the Ontario Legislature in anticipation of the upcoming 2011 election.³⁹¹ That election was the first to take place under Ontario’s new “fixed-date election law.” Before this law was passed, a Premier with a majority in the Legislature could choose to call an election at any time before a constitutionally-imposed term limit of five years. The fixed-election law meant that, for the first time, all the parties in the Legislature knew with certainty that the next election would be held in October 2011.³⁹²

251. The fixed election date meant that by the fall of 2010, both the governing Liberal party and the opposition parties had begun strategic planning and established campaign teams. Candidate nominations were beginning to take place in local constituencies around the province. The parties were, therefore, all sensitive to the issues of concern in important ridings, and how those issues might impact voters and voting intentions.³⁹³

252. Anti-wind opponents mounted especially strong campaigns against a proposed offshore project in Lake Ontario located near Energy Minister Brad Duguid’s electoral riding in the Toronto area and against another proposed offshore project in Lake Erie located near the swing ridings of Essex and Windsor West.³⁹⁴ The governing Liberal party was sensitive to the offshore windpower issue and its perceived impact on the upcoming election.³⁹⁵ John Laforet, President of Wind Concerns Ontario (one of many anti-wind groups in Ontario), stated at the time that Liberal MPPs would face difficulties in the upcoming election for their support of the *Green*

³⁹¹ CWS-Baines, ¶ 107.

³⁹² CWS-Benedetti, ¶ 37.

³⁹³ CWS-Benedetti, ¶ 38.

³⁹⁴ **C-0217**, Article (The Globe & Mail), Scarborough Bluffs residents determined to fight wind turbine project (April 16, 2010); CWS-Baines ¶ 107.

³⁹⁵ CWS-Benedetti, ¶ 39.

Energy Act: “I think what we’re going to see is a lot of Liberal MPPs will be losing their seats because communities can’t afford another four years of this government refusing to listen.”³⁹⁶

253. Windstream, concerned about the possible impact anti-wind opposition might have on its project, proposed to MOE officials that the Project proceed as a “pilot project” in order to generate scientific data to assist the Ontario Government in determining how to proceed with future offshore wind projects.³⁹⁷

254. On December 15, 2010, Mr. Baines attended a private dinner with the Minister of Energy, his Chief of Staff Craig McLennan and policy advisor Andrew Mitchell to discuss the pilot project proposal.³⁹⁸ On December 21, 2010, Mr. Benedetti spoke with Mr. Mitchell, who told him the Ministry was receptive to the pilot project proposal, but it was unclear what the government’s timelines would be for moving the project forward.³⁹⁹

255. On January 19, 2011, Mr. Baines again met with Mr. MacLennan and Mr. Mitchell.⁴⁰⁰ They confirmed that the pilot project concept was being favorably received and they told Mr. Baines to “leave it with us” and “have faith.”⁴⁰¹ Taken together, Windstream understood these representations and representations made at previous meetings and conversations with government officials to indicate that WWIS would shortly be receiving confirmation that the pilot project proposal was acceptable to the Ontario Government.⁴⁰²

³⁹⁶ C-0539, Article, McGuinty vulnerable on wind power: opponent (June 12, 2011).

³⁹⁷ CWS-Baines ¶ 108.

³⁹⁸ CWS-Baines ¶ 109; C-0414, Email from Baines (WEI) to Benedetti, Chris (Sussex Strategy) et al (December 15, 2010).

³⁹⁹ CWS-Benedetti ¶ 51; CWS-Baines ¶ 109.

⁴⁰⁰ CWS-Baines ¶ 110; C-0461, Calendar Entry of Benedetti, Chris (Sussex Strategy) - Windstream meeting with Craig MacLennan and Andrew Mitchell (MEI) (January 19, 2011); C-0440, Accepted Calendar Reply from Baines, Ian (WEI) to Benedetti, Chris (Sussex Strategy) (January 8, 2011).

⁴⁰¹ CWS-Baines ¶ 110.

⁴⁰² CWS-Baines, ¶ 110.

256. On January 28, 2011, Mr. Benedetti was told that the government was considering one or two projects as pilots, and that Windstream was certain to be one of those projects.⁴⁰³ On February 7, 2011, Mr. Benedetti was provided with a summary of a meeting between the Canadian Wind Energy Association and Mr. Mitchell of MEI. The Association was told that an offshore pilot project announcement was expected soon and that another offshore wind project – the Trillium project – would likely not be part of the pilot. Mr. Benedetti reasonably viewed this as confirmation that Windstream’s Project would be part of the pilot.⁴⁰⁴

XII. 2011: ONTARIO IMPOSES A MORATORIUM ON OFFSHORE WIND DEVELOPMENT, BUT COMMITS TO ENSURING THAT THE PROJECT IS NOT PENALIZED AS A RESULT

A. Ontario Unexpectedly Imposes a Moratorium on Offshore Wind Development in February 2011, But Commits to Ensuring WWIS is not Penalized

257. On February 11, 2011, the Ontario Government abruptly reversed its policy commitment to offshore wind by imposing a moratorium on offshore wind development.⁴⁰⁵

258. Officials from the MEI, MOE and MNR informed Windstream of the Ontario Government’s decision to issue the moratorium during a conference call held on February 11, 2011, just before issuing a press release announcing the decision.⁴⁰⁶

259. In explaining the moratorium, Mr. Mitchell of MEI acknowledged that the Project was unique in that it had a FIT contract, and, because of that, the MEI had asked the OPA to negotiate with Windstream new arrangements respecting *force majeure* and security deposits. He

⁴⁰³ C-0468, Email from Baines, Nancy (WEI) to Mars, David (White Owl Capital) (January 29, 2011); CWS-Benedetti, ¶ 53.

⁴⁰⁴ C-0471, Email from Mars, David (White Owl Capital) to Benedetti, Chris (Sussex Strategy) (February 7, 2011), ¶¶ 2, 3; CWS-Benedetti, ¶ 54.

⁴⁰⁵ C-0485, News Release (MOE), Ontario Rules Out Offshore Wind Projects (February 11, 2011).

⁴⁰⁶ C-0484, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011; C-0483, Audio Recording of Telephone Conference Call held February 11, 2011; CWS-Baines ¶ 113; CWS-Benedetti, ¶ 58.

stated that the Ministry would attempt to create a solution that would be acceptable to Windstream.⁴⁰⁷

260. Brenda Lucas of MOE advised that MOE was not ready to move forward with the REA Regulation for offshore wind because it had received many submissions in response to its EBR posting on the proposed five-kilometre setback requirement, and did not have enough information or science to build an offshore REA Regulation. She stated that the Ministry would do more science work, including working with the other Great Lakes jurisdictions, and that Windstream should not expect a REA Regulation from the MOE any time soon.⁴⁰⁸

261. Richard Linley of MNR stated that it would be cancelling Applicant of Record applications for offshore wind projects, except for the Windstream application, since Windstream had a FIT contract. He stated that when there was greater scientific certainty, consideration of offshore wind development would resume, and that the discussions that Windstream had commenced with the Ministry would be put on hold. As a result, Windstream could not obtain Applicant of Record status, and WWIS' existing Crown land application would be frozen.⁴⁰⁹

262. When Windstream asked for clarification as to whether the Project was effectively over, Mr. Mitchell declined to provide an answer, and suggested that further discussion of these issues continue at a meeting between Windstream, the MEI and the OPA.⁴¹⁰ He confirmed that the purpose of these negotiations would be to ensure that the status of Windstream's project as effectively frozen would be confirmed with the OPA and in FIT contract-related documents so

⁴⁰⁷ **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

⁴⁰⁸ **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

⁴⁰⁹ **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

⁴¹⁰ CWS-Benedetti, ¶ 59.

that no penalties would be incurred by WWIS. Ms. Lucas did not give a specific time frame for the further scientific studies, but said it would be a matter of years, not months.⁴¹¹

263. Perry Cecchini of the OPA provided his own recollection of the call in a February 16, 2011 email to Mr. Killeavey, the OPA's Director of Contract Management, among other people.⁴¹² He stated that Mr. Mitchell had informed Windstream that the Ontario Government wished that the OPA and Windstream would create a solution acceptable to the company, and that these negotiations could be directed at issues of *force majeure* and constraining the OPA's termination rights for projects that are in *force majeure* for more than two years, as well as reducing security. Mr. Cecchini also confirmed that Mr. Baines had asked if Windstream's contract was being cancelled, and Mr. Cecchini responded to Mr. Baines that he was "not hearing that."⁴¹³

264. Windstream was taken aback by this announcement, since it had been led to believe that the Project would be allowed to proceed as a pilot project. The decision did not accord with any of the messages that Windstream, its lawyers or its consultants had been receiving from government officials.⁴¹⁴

265. Immediately following this call, Windstream held a separate teleconference with the Ministry of Energy's Chief of Staff Craig MacLennan. Mr. MacLennan advised that he wanted to ensure that Windstream was "happy" with the process, and confirmed that the Project could continue.⁴¹⁵ He reassured Windstream by pointing out that it would have been easy for the Ontario Government to cancel all offshore projects entirely, but that the government had instead allowed the Project to continue.⁴¹⁶ He assured Windstream that the OPA "would be open for

⁴¹¹ C-0484, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011; C-0483, Audio Recording of Telephone Conference Call held February 11, 2011.

⁴¹² C-0503, Email from Cecchini, Perry (OPA) to Killeavy, Michael (OPA) et al. (February 16, 2011).

⁴¹³ C-0503, Email from Cecchini, Perry (OPA) to Killeavy, Michael (OPA) et al (February 16, 2011).

⁴¹⁴ CWS-Mars ¶¶ 80-83; CWS-Baines ¶ 117; CWS-Chamberlain ¶ 36.

⁴¹⁵ CWS-Baines ¶ 118.

⁴¹⁶ CWS-Baines ¶ 118.

business”, and that MEI would “meet with the OPA to resolve the issues. This would include Windstream maintaining its applications for land and its FIT Contract.”⁴¹⁷

266. These assurances given to Windstream were consistent with public statements made by Energy Minister Brad Duguid, who was quoted in the Toronto Star newspaper as saying that Windstream’s contract would be extended so that it would not be adversely affected by the moratorium:

And only one offshore contract in Kingston with Windstream has been accepted out of the almost 1,300 approved contracts, Duguid said.

“That one project contract won’t be cancelled, it’ll be extended until the science is done,” Duguid said.⁴¹⁸

267. While the conference call was in progress, the MOE issued a news release entitled “Ontario Rules Out Offshore Wind Projects.” The news release stated:

Ontario is not proceeding with proposed offshore wind projects while further scientific research is conducted.

No Renewable Energy Approvals for offshore have been issued and no offshore projects will proceed at this time. Applications for offshore wind projects in the Feed-in-Tariff program will no longer be accepted and the current applications will be suspended.⁴¹⁹

268. The OPA reiterated this message in its own issues note, entitled “Offshore Windpower Not Proceeding”, making clear, among other things, that this decision had a “direct impact” on the FIT Program, that the OPA would adhere to the Ontario Government policy direction that offshore windpower development would not proceed, and that the OPA would meet with Windstream “to discuss contractual implications of this announcement.” The OPA stated:

On February 11th, Ontario is announcing the Province will not proceed on offshore wind development until further science, regulatory work and coordination with U.S. partners is complete. The decision follows a period of

⁴¹⁷ C-0507, Email from Baines, Ian (WEI) to Vellone, John et al (February 19, 2011); CWS-Baines ¶ 118.

⁴¹⁸ C-0498, Article (Toronto Star), Ontario scraps offshore wind power plans (February 12, 2011); C-0487, Email from McGhee, Karen to Baines, Ian (WEI) (February 11, 2011).

⁴¹⁹ C-0485, News Release (MOE), Ontario Rules Out Offshore Wind Projects (February 11, 2011).

public consultation that began on June 25, 2010 and which received 1,400 comment submissions. It has a direct impact on the OPA's FIT Program.

Offshore windpower development in freshwater lakes is relatively new and presents technical challenges not found in saltwater environments, such as managing potential effects on drinking water and of ice build-up on support structures. Ontario will monitor projects in Sweden and Ohio. Province will undertake collaborative research with neighbouring U.S. states to ensure future projects are designed and implemented to protect human health and the environment.

There will be an opportunity to review and comment on proposed technical and environmental requirements as they are developed through the Environmental Registry. Offshore wind-specific requirements will be included in the regulation, policy and guidelines. [...]

This is a policy decision of the government of Ontario. The Feed-in-Tariff program managed by the OPA will adhere to its direction. Offshore windpower will not proceed until further science, regulatory work and co-ordination with U.S. partners is complete. [...]

Ontario will rule out offshore until further scientific research is completed to ensure offshore development in Ontario protects human health and the environment. [...]

Development of Windstream's Wolfe Island Shoals Project is contingent on completion of necessary research and regulations. The OPA will meet with Windstream to discuss contractual implications of this announcement for the Wolfe Island Shoals Project.⁴²⁰

269. The same day, the MOE and MNR posted Policy Decisions on the EBR Registry. Both Policy Decisions stated:

In light of the comments received in response to [MOE and MNR's] postings and in particular the identified need for further study, Ontario is not proceeding with any development of offshore wind projects until the necessary scientific research is completed and an adequately informed policy framework can be developed. An offshore wind project is defined as any project classified under the Renewable Energy Approval regulation (O. Reg. 359/09) as a Class 5 wind facility.

⁴²⁰ C-0481, Announcement (OPA), Offshore Windpower Not Proceeding (February 11, 2011).

Offshore wind power development in ocean environments is relatively well-understood technology and has been successfully deployed in several locations in Europe. By contrast, offshore wind power development in freshwater lakes is relatively new and presents technical challenges that do not exist in a saltwater environment, such as the need to manage potential impacts to drinking water and the effects of ice buildup on support structures. A recently constructed offshore wind pilot project is currently operating in Lake Vanern, a freshwater lake in Sweden. A second pilot project has been proposed in the State of Ohio in Lake Erie near Cleveland. Ontario will monitor these projects and the resulting knowledge gained from their construction and operation. Ontario will work with our US neighbours to undertake collaborative research and study that will ensure that any future projects are designed and implemented in a manner that is protective of human health, cultural heritage and the environment.

A bi-national collaborative approach to conducting research would leverage resources and expertise from within the entire Great Lakes region to focus on the scientific and technical challenges of developing offshore wind power in a freshwater environment. These challenges include a better understanding of how noise behaves over water and ice, foundation designs, water quality impacts, and impacts to shoreline ecosystems and wildlife.

The Government of Ontario will be implementing this direction through a coordinated multi-agency approach. During this time, applications for offshore wind projects in the Feed-in-Tariff program will no longer be accepted and the current applications will be cancelled; the MNR will be cancelling all existing Crown land applications for offshore wind development that do not have a Feed-in-Tariff contract, including those with Applicant of Record status. MNR will not be accepting any new Crown land applications for offshore wind development. When there is greater scientific certainty, consideration of offshore wind development will continue.⁴²¹

270. The stated reasons for the moratorium were strikingly similar to those used to justify the MNR's 2006 moratorium on offshore wind, described at paragraph 86 above, which had been lifted in 2008. As described at paragraph 127 above, in 2009 Minister Cansfield stated to an offshore wind development conference that the deferral had been imposed because MNR needed

⁴²¹ **C-0494**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Offshore Wind Facilities - An Overview of the Proposed Approach (February 11, 2011); **C-0482**, Decision on Policy (MNR), Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (February 11, 2011).

to get a better understanding as to how wind turbines might affect the surrounding environment and that it had been lifted because MNR's research "made it clear" that developing offshore windpower would be "practical and environmentally sound."

271. Senior MNR staff appear to have recognized that the new moratorium was inconsistent with the lifting in 2008 of the earlier moratorium on offshore wind. Indeed, immediately after the moratorium was announced, the Assistant Deputy Minister of MNR sent an email to her staff entitled "URGENT", which stated "When you google offshore, Cansfields 2008 NR lifting moratorium on offshore pops up. CAN WE BURY THIS PLEASE."⁴²²

272. If applied to the Project, the moratorium was also squarely inconsistent with various expressions of support made by the Government of Ontario to Windstream, including, among many others:

- a) MNR's commitment to discuss the re-configuration of WWIS' grid cells and process WWIS' Applicant of Record application "in a timely manner" (see paragraph 208);
- b) the commitment from Ms. Ing that MEI and MOE were working "feverishly" on defining offshore REA guidelines (see paragraph 197);
- c) the commitment by MNR and the OPA that projects with a FIT contract, including WWIS, had the highest priority for receiving Applicant of Record status (see paragraphs 160 and 163);
- d) the commitments by MEI, MNR and MOE on multiple occasions that WWIS had the government's support (see, for example, paragraphs 194, 204 and 205);
- e) the OPA's decision to grant Windstream additional time to execute the FIT Contract and to delay Windstream's MCOB in order to enable it to obtain further comfort from relevant Ministries concerning regulatory approvals (see paragraphs 191 to 210); and

⁴²² C-0479, Email from Lawrence, Rosalyn (MNR) to Linley, Richard (MNR) (February, 11, 2011).

- f) Mr. McLennan and Mr. Mitchell’s assurances to Mr. Baines to “have faith” and “leave it with us” (see paragraph 255).

B. Windstream Could Not Have Foreseen that a Moratorium Would be Imposed by the Ontario Government

273. Windstream was completely surprised by the Ontario Government’s decision to impose a moratorium on offshore wind development, a development that it could not have reasonably foreseen.⁴²³

274. First, it was inconsistent with the fact that Ontario had already had in place a moratorium on offshore wind development, had lifted it in 2008 after confirming offshore wind development was practical and environmentally sound, and had expressly stated that Ontario was “open for business” for offshore wind and that offshore wind developers should “join us” in the development of offshore wind.⁴²⁴

275. Second, it was inconsistent with the fact that, throughout 2007 to 2010, Ontario had actively and consistently promoted itself to renewable energy developers and investors – including offshore developers and investors – as North America’s leader in green energy development, as a jurisdiction in which investors could expect certainty, and as providing in particular standardized, long-term FIT Contracts paying attractive prices for renewable energy, a streamlined regulatory process, and access to the electrical grid.

276. Third, it was inconsistent with the specific comfort and encouragement WWIS had received from the Ontario Government officials, some examples of which are described in paragraph 272 above.

277. Fourth, it was inconsistent with the fact that there was an existing regulatory framework respecting the development of renewable wind energy in Ontario that did not distinguish between onshore and offshore wind energy, and specific regulatory provisions that had either

⁴²³ CWS-Baines ¶ 112; CWS-Mars ¶¶ 80-84.

⁴²⁴ See Minister of Natural Resources Cansfield’s statements excerpted at ¶¶ 91 and 125 above.

already been developed or were being finalized to deal specifically with offshore wind energy projects. As MNR officials stated in a confidential MNR slidedeck from August 2010:

- Currently the Ministries of the Environment; Natural Resources; Tourism and Culture; and Energy and Infrastructure are working together to develop policies and procedures for offshore wind projects to provide greater certainty and clarity to the rules that exist today. Included in that work is the development of science-based noise setbacks.
- Offshore specific procedures and requirements will be implemented through an amendment to Regulation 359/09.⁴²⁵

278. Regulatory mechanisms in place at the time the 2011 moratorium was introduced, and which dealt specifically with offshore wind energy projects included:

- a) The process for applying to use lakebeds for windpower development under MNR's Site Release policy in place at the time Windstream applied for Applicant of Record status, Wind Policy 4.1.04 (described above at paragraphs 132 to 136), was the same as the process for applying for onshore Crown land.⁴²⁶
- b) Under the REA Regulation, the proponent of an offshore wind energy facility, which is defined as a Class 5 wind facility, must prepare the same reports prescribed in Part IV of that Regulation as the proponent of an onshore wind energy project. Proponents of offshore facilities are only required to take one additional step, which is to submit an *Offshore Wind Facility Report*.⁴²⁷
- c) MNR's *Approval and Permitting Requirements Document for Renewable Energy Projects* provided (and continues to provide) direction about how to complete the *Offshore Wind Facility Report*.⁴²⁸

⁴²⁵ C-0219, Presentation (MNR), Offshore Wind Power Development (April 19, 2010), ¶ 5.

⁴²⁶ C-0059, Policy No. PL 4.10.04 (MNR), Windpower Site Release and Development Review - Crown Land (January 28, 2008).

⁴²⁷ CER-Powell ¶¶ 31-32; C-0103, *Environmental Protection Act*, Ontario Regulation 359/09, ¶ 79.

⁴²⁸ C-0136, Report (MNR), *Approval and Permitting Requirements Document for Renewable Energy Projects* (September 24, 2009), ¶ 32. The most recent version of the APRD available on MNR's website still contains

- d) Technical bulletins promulgated by MOE in March 2010 to assist developers in preparing reports to satisfy the requirements of the REA Regulation all included express direction for offshore wind projects. For instance, *Technical Bulletin Six: Required Setbacks for Wind Turbines* indicated that siting and setback distances for offshore facilities was “an “important” factor assessed in the requisite *Offshore Wind Facility Report*.”⁴²⁹
- e) Bats and Bat Habitats: *Guidelines for Wind Power Projects* was updated by MNR in March 2010 with mitigation measures for offshore turbines and recommended turbine speeds during the fall bat migration season.⁴³⁰
- f) In March 2010 (last updated in June 2010), MOE issued a *Checklist for Requirements Under the REA Regulation and the Application for Approval of a Renewable Energy Project*. Both provide detailed requirements for offshore wind energy projects.⁴³¹
- g) Although not released publicly, the MOE had prepared a document entitled *Draft Complete Submission Requirements Checklist for Offshore Wind Projects under O. Reg. 359/09*, which as its title suggests set out a checklist specifically for offshore wind proponents for obtaining renewable energy approvals.⁴³²

instructions for completing the Offshore Facility Report: **C-0132**, Presentation (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 2009), ¶ 32.

⁴²⁹ CER-Powell ¶ 34; **C-0194**, Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines (March 1, 2010).

⁴³⁰ CER-Powell ¶ 35; **C-0187**, Draft Report (MNR), Bats and Bat Habitats Guidelines for Wind Power Projects (March 2010), ¶ 11.

⁴³¹ CER-Powell; **C-0166**, Application for Approval of a Renewable Energy Project (MOE) (December 2009); **C-0322**, Checklist for Requirements under O. Reg 359/09 (MOE), Supplement to Application for Approval of a Renewable Energy Project (July 26, 2010).

⁴³² **C-0448**, MOE - Complete Submission Requirements Checklist for Off-shore Wind Projects under O. Reg. 359/09 (January 11, 2011). There may have been some internal sensitivity concerning this document, since the email to which it was attached instructed the recipient to “[p]lease delete from your inbox and deleted items box after you save somewhere.” **C-0741**, Email from Schroter (ENE) to Postacioglu, Dilek (ENE) (January 11, 2011).

- h) The Natural Heritage Assessment Guide for Renewable Energy Projects released by MNR on December 10, 2010 required offshore proponents to conduct a site investigation with specific emphasis on fish and fish habitats.⁴³³
- i) The Phase 1 revisions to MNR’s Site Release Policy (described in paragraph 122 to 124) released on July 5, 2010 indicated that policies and procedures for offshore development would be addressed in future Environmental Registry postings.⁴³⁴ (As described in paragraph 211 above, the government’s internal timelines anticipated that these policies and procedures would be in place by January 2011, together with required REA amendments).
- j) Even in the absence of specific setbacks applicable to all offshore projects, the REA Regulation and the APRD provided reasonable regulatory certainty to wind energy developers, and “[a] developer would have reasonably expected that the applicable setbacks would be determined based on a project-specific assessment.”⁴³⁵
- k) Finally, the REA process required a proponent to satisfy the MOE that its project would not adversely affect areas such as lakebed impacts and the effects on drinking water. These were mandatory considerations under the REA Regulation.⁴³⁶ As a result, proponents, who bore the onus of satisfying MOE that their projects would not have adverse effects, could not possibly foresee the possibility of these adverse effects being used by MOE as a pre-text to impose the moratorium.⁴³⁷

⁴³³ CER-Powell ¶ 39; **C-0400**, Natural Heritage Assessment Guide (MNR) for Renewable Energy Projects (December 7, 2010), ¶ 7.

⁴³⁴ CER-Powell ¶ 80; **C-0311**, Policy Proposal Notice (MNR), Review of the waterpower and windpower site release policies and procedures (EBR Registry Number 010-7895) (July 6, 2010).

⁴³⁵ CER-Powell ¶ 97.

⁴³⁶ CER-Powell ¶ 98.

⁴³⁷ CER-Powell ¶ 99.

XIII. 2011-2012: ONTARIO FAILS TO TAKE MEASURES TO ENSURE THAT THE PROJECT WAS NOT ADVERSELY AFFECTED BY THE MORATORIUM

A. OPA Refuses to Waive the Force Majeure Conditions and Retains Windstream's Security

279. As discussed above in Section XI.B, at the time the moratorium was announced, the FIT Contract was under *force majeure* given the delays in the MNR processing Windstream's site release application. However, the *force majeure* was subject to an important limitation: the OPA could terminate the contract if WWIS failed to bring the Project into commercial operation by May 4, 2017, the date that was two years after the Project's commercial operation date.⁴³⁸ In other words, regardless of any *force majeure* caused by the moratorium or other government actions preventing it from moving forward with the Project, WWIS would lose its rights under the FIT Contract and would therefore not be allowed to build and operate the Project if it could not bring it into commercial operation by May 4, 2017.

280. This provision was highly problematic to Windstream in light of the moratorium. The limitation on *force majeure* meant that, while the government took time to conduct the scientific studies that were the stated rationale for the moratorium, WWIS' ultimate deadline to bring the Project into commercial operation by May 4, 2017 continued to apply.⁴³⁹ In addition, to maintain its rights under the FIT Contract during this period, Windstream would have to maintain the \$6 million security it had posted when it signed the FIT Contract in August 2010.

281. As described at paragraph 268 above, the OPA in its press release announcing the moratorium had stated that it would meet with Windstream to discuss the "contractual implications of this announcement." In addition, as the OPA acknowledged in its internal correspondence described at paragraph 263 above, Mr. Mitchell of the MEI had advised Windstream that the government wished that the OPA and Windstream would create a solution acceptable to the company, and that these negotiations could be directed at issues of *force*

⁴³⁸ C-0245, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 10.1(g), ¶ 32.

⁴³⁹ CWS-Baines ¶ 122.

majeure and constraining the OPA’s termination rights for projects that are in *force majeure* for more than two years, as well as reducing security.

282. From February to June 2011, Windstream and the OPA engaged in without prejudice settlement discussions to attempt to arrive at a resolution of these issues.⁴⁴⁰ These meetings included a high-level meeting between Colin Andersen, OPA’s Chief Executive Officer, and Mr. Ziegler.⁴⁴¹

283. However, Windstream and the OPA were unable to resolve these issues.⁴⁴² As a result, the FIT Contract remains subject to the limitation applicable to *force majeure* described above and, critically, continues to require that the Project be brought into commercial operation by May 4, 2017 at the latest.

B. Ontario Fails to Allow WWIS to Preserve Its Rights Under the FIT Contract By Developing an Alternative Project, Despite Recognizing that it Should Keep Windstream Whole

284. Given the moratorium, and in light of Mr. Mitchell’s statements that the government wished an acceptable solution for Windstream and Mr. MacLennan’s statements that MEI wanted to ensure Windstream was “happy” with the process, Windstream proposed to replace the Project with one of a number of alternative projects that would allow WWIS to preserve its rights under the FIT Contract while at the same time respecting the moratorium on offshore wind development.⁴⁴³

285. Windstream’s first proposal was to replace the Project with a 300 megawatt solar energy project in Lennox County, near Kingston, Ontario.⁴⁴⁴ Windstream proposed to connect the solar

⁴⁴⁰ CWS-Baines ¶ 123.

⁴⁴¹ CWS-Baines ¶ 123; CWS-Mars ¶ 91.

⁴⁴² CWS-Baines ¶ 123.

⁴⁴³ **C-0515**, Email from Baines, Ian (WEI) to Chamberlain, Adam (BLG) (March 30, 2011); CWS-Baines ¶ 124.

⁴⁴⁴ **C-0644**, Presentation (Windstream), Windstream-Samsung Solar Comparisons (February 21, 2013); CWS-Baines ¶ 125; **C-0525**, Report, Genivar 300 MW Solar Projects Connection to 230 kV Circuits Lennox-Hinchinbrook (April 11, 2011); **C-0522**, Announcement (WEI), Windstream Intention to Develop Lennox Area Ground-Mount Solar PV (April 11, 2011).

project using the same connection capacity allocated to WWIS for the Project on Ontario's transmission grid.⁴⁴⁵ Windstream also indicated that it was willing to reduce the capacity of this proposed solar project to 100 megawatts, and to hold in reserve the remaining 200 megawatts of connection capacity to which it was entitled to develop an offshore project when the moratorium was lifted.⁴⁴⁶

286. On April 11, 2011, Windstream met with an official from the Premier's Office to discuss switching from an offshore wind project to a 100 megawatt solar project, and left open the possibility that the Project could proceed when the moratorium on offshore wind energy development was lifted.⁴⁴⁷ The official was receptive to Windstream's proposal, indicating that the government did not want to "throw away" the Project since the government did not want to be seen as going back on its commitment to offshore wind. He indicated that he would discuss this proposal with the MEI.⁴⁴⁸

287. On April 14, 2011, Windstream gave a presentation to the OPA about its proposed solar project, which included a detailed outline of the proposed solar project showing connection points for transmission lines and their compatibility with solar energy, an interconnection diagram, details about existing connection capacity at the connection points, information about the development areas and their suitability for a solar energy project and next steps.⁴⁴⁹ Windstream also produced maps of potential development areas for the solar project, and lists of potential properties that it could lease to install solar panels.⁴⁵⁰

⁴⁴⁵ **C-0644**, Presentation (Windstream), Windstream-Samsung Solar Comparisons (February 21, 2013); CWS-Baines ¶ 125; **C-0525**, Report, Genivar 300 MW Solar Projects Connection to 230 kV Circuits Lennox-Hinchinbrook (April 11, 2011); **C-0522**, Announcement (WEI), Windstream Intention to Develop Lennox Area Ground-Mount Solar PV (April 11, 2011).

⁴⁴⁶ **C-0538**, Email from Lo, Sue (MEI) to Ing, Pearl (MEI) et al (June 8, 2011).

⁴⁴⁷ CWS-Baines, ¶ 126; CWS-Benedetti, ¶ 64.

⁴⁴⁸ CWS-Baines, ¶ 126.

⁴⁴⁹ **C-0526**, Presentation, Discussion with OPA, Windstream Energy (April 14, 2011); **C-0527**, Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) (April 15, 2011); CWS-Baines ¶ 127.

⁴⁵⁰ **C-0520**, Spreadsheet, Land Inventory - Godfrey (April 7, 2011); **C-0531**, Map (Ortech). Windstream-Potential Development Areas (May 6, 2011); **C-0518**, Map (Ortech), Windstream Solar - Potential Solar Sites (April 6, 2011); **C-0524**, Map (Ortech), Usable Areas (April 11, 2011).

288. Internal communications show that staff at MEI never seriously considered the proposal,⁴⁵¹ and it appears that the decision to reject Windstream's solar proposal was based on the Minister's Office direction."⁴⁵²

289. On May 30, 2011, Windstream representatives met with representatives of the OPA. During the meeting, OPA representatives indicated that Windstream's proposal for a solar project would not be allowed to proceed. As discussed in paragraphs 426 and 631 below, it later became apparent to Windstream that this very project had been promised to Samsung as part of a renewable energy development agreement concluded between it and the Ontario Government.

290. During its discussions with the OPA, Windstream also proposed to replace WWIS with a combination of onshore wind energy facilities with a combined capacity of 300 megawatts.⁴⁵³ At the time, the OPA continued to hold \$7.45 million in letters of credit from Windstream for onshore wind projects. However, building these facilities would have required using one or several alternate connection points than that provided under the FIT Contract to the IESO-controlled grid, and the OPA was unwilling to permit Windstream to use alternate connection points.⁴⁵⁴ Moreover, Windstream was unable to build a 300 megawatts onshore project using its existing connection to the IESO-controlled grid since the onshore wind resources in that area were insufficient to allow a project to be viably developed.⁴⁵⁵

C. Ontario Continues to Deny Windstream's Proposal that the Project be Allowed to Proceed as a Pilot

291. In October 2011, following the provincial election, which returned the Liberals to power as a minority government, Windstream renewed its efforts to have the WWIS Project proceed as a pilot project.

⁴⁵¹ C-0528, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (April 18, 2011); C-0556, Email from Heneberry, Jennifer (MEI) to Slawner, Karen (MEI) et al. (October 17, 2011).

⁴⁵² C-0537, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (June 7, 2011).

⁴⁵³ CWS-Baines ¶ 129.

⁴⁵⁴ CWS-Baines ¶ 129.

⁴⁵⁵ CWS-Mars ¶ 94.

292. On November 18, 2011, Windstream met with the Minister of Agriculture to discuss proceeding with the Project as a pilot project.⁴⁵⁶ The Minister's riding includes the areas where much of the design and construction of the offshore project would have been completed.

293. On December 7, 2011, Windstream met with the Chief of Staff of the MOE and other MOE personnel.⁴⁵⁷ Windstream presented its proposal and was advised that MNR, MOE and MEI needed to discuss the proposal and come to resolution internally. Windstream held a subsequent meeting with MOE staff on March 2, 2012.⁴⁵⁸

294. Windstream also met with MNR officials on December 7, 2011 to discuss the pilot project,⁴⁵⁹ and with the MNR on February 29, 2012.⁴⁶⁰

295. On December 5, 2011, Ortech, on behalf of Windstream, sent a letter to MEI to once again propose moving forward with Windstream as a pilot.⁴⁶¹ No response was received.

296. On February 10, 2012, Ortech on behalf of Windstream followed up with MNR officials concerning Windstream's earlier request to reconfigure Windstream's Crown land application.⁴⁶² On February 14, 2012, Windstream followed up with MNR asking again for approval to proceed with the permitting process to install a testing facility at the Project site.⁴⁶³

⁴⁵⁶ **C-0561**, Presentation (WEI), Lake Ontario Offshore Network, Meeting with Ontario Minister of Agriculture Ted McMeekin MPP, Ancaster-Dundas-Flamborough-Westdale (November 18, 2011), ¶ 13; CWS-Baines ¶ 136; **C-0563**, Email from Baines, Ian (WEI) to Minister McMeekin (November 23, 2011).

⁴⁵⁷ **C-0574**, Email from Baines, Nancy (WEI) to Baines, Ian (WEI) et al (December 8, 2011).

⁴⁵⁸ CWS-Baines ¶ 139.

⁴⁵⁹ **C-0573**, Email from Baines, Nancy (WEI) to Baines, Ian (WEI) et al. (December 8, 2011).

⁴⁶⁰ **C-0601**, Calendar Entry of Baines, Ian (WEI), Meeting with Minister of Natural Resources - Michael Gravelle (February 29, 2012); **C-0600**, Presentation (WEI), Lake Ontario Offshore Network, Lake Ontario Offshore Wind Discussion, Meeting with Minister Michael Gravelle (MNR) (February 29, 2012).

⁴⁶¹ **C-0569**, Email from Roeper, Uwe (Ortech) to Lo, Sue (MEI) (December 5, 2011).

⁴⁶² **C-0594**, Email from Van Bakel, Hank (Ortech) to Boysen, Eric (MNR) (February 10, 2012).

⁴⁶³ **C-0596**, Letter from Baines, Ian (WEI) to Bellamy Karen (MNR) (February 14, 2012).

297. On March 2, 2012, Windstream met with John Brodhead, who was in charge of the energy file in the Premier's Office. Windstream gave a presentation which provided an overview of the Project, the outcome of the regulatory process to date, the Project's benefits for Ontario, and the possibility of advancing the Project as a pilot research project.⁴⁶⁴ At the meeting, Mr. Brodhead indicated that he would get back to Windstream within one to two weeks.⁴⁶⁵

298. Mr. Brodhead followed up with Windstream on March 21, 2012 indicating that he "had a number of conversations with people." However, the "challenge I have is that I cannot get the attention of decision-makers until after our budget on Tuesday." Mr. Brodhead further indicated that he would "get [Windstream] some clarity following the budget."⁴⁶⁶ Windstream followed up with Mr. Brodhead on April 10, 2012 seeking information about a timeline for the resolution of concerns that Windstream had raised in their March 2, 2012 meeting. Mr. Brodhead responded simply "[a]fter the budget vote."⁴⁶⁷ Mr. Brodhead did not follow up.

299. On May 4, 2012, Windstream, having heard nothing further, sent a final letter to Mr. Brodhead, making a last resort effort to get the Premier's Office and government to respond to Windstream's concerns.⁴⁶⁸ Windstream asked Mr. Brodhead why after two years it was still unable to determine when and if the Project would ever be allowed to proceed. Windstream reminded Mr. Brodhead that nothing in the FIT Contract or in the regulations that were in place at the time indicated that offshore wind required additional scientific study, or that regulations governing all other wind projects would not apply to Windstream's project. Fifty months after applying for Applicant of Record status, 29 months after receiving letters of credit and two years after receiving a FIT contract, Windstream was no closer to being able to proceed with the Project. Windstream stated that it had lost faith in the government's willingness to work with Windstream to find a solution.

⁴⁶⁴ C-0603, Presentation (WEI), Lake Ontario Offshore Wind Discussion, Meeting with John Brodhead (OPO) (March 2, 2012), ¶¶ 8, 15.

⁴⁶⁵ CWS-Baines ¶ 139.

⁴⁶⁶ C-0606, Email from Bliss, Baker (Bentham Associates) to Baines, Ian (WEI) et al (March 21, 2012).

⁴⁶⁷ C-0608, Email from Baines, Nancy (WEI) to Mars, David (White Owl Capital) (April 10, 2012).

⁴⁶⁸ C-0613, Email from Baines, Ian (WEI) to Brodhead, John (OPO) (May 4, 2012); CWS-Baines ¶ 140.

300. Windstream never received a response to this email nor any further correspondence from the Premier's Office.⁴⁶⁹

301. Despite Mr. Brodhead's assurances that he was having "a number of conversations with people", it appears that Windstream's renewed proposal after October 2011 to build WWIS as a pilot project was never seriously considered by MNR. In an internal March 13, 2012 email to several directors at MNR, the Director of MNR's Renewable Energy Program indicated that "[w]e continue to hold off finalizing the memo to Windstream to refuse MNR permission for testing permits and "trading" their lakebed grid cells [...] it would appear that we can continue to point to the science engagement as a basis for refusal, given the consistent messaging that nothing will proceed while the province considers the science."⁴⁷⁰

XIV. 2009 TO SPRING 2012: DESPITE NOT BEING GRANTED ACCESS TO PROJECT SITE, WINDSTREAM PERFORMS SUBSTANTIAL WORK TO ADVANCE THE PROJECT

302. As described in paragraph 234 above, because of Ontario's delay in its site release process, Windstream was never granted the right by MNR to carry out comprehensive wind resource/energy yield testing, geotechnical work or lake bottom investigation at the Project site.⁴⁷¹

303. Nevertheless, Windstream performed substantial work to advance the Project.

304. Much of this work was carried out directly by Windstream or Ortech. As described above, throughout the relevant period, Windstream and Ortech made various investigations, prepared applications (including Crown land site release applications, the FIT application, and applications seeking to carry out testing on Crown land, among others), made proposals (including the pilot project proposal, which involved discussions with a network of

⁴⁶⁹ CWS-Baines ¶ 141.

⁴⁷⁰ C-0605, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) et al. (March 13, 2012).

⁴⁷¹ CWS-Roeper ¶ 57.

stakeholders), prepared other documentation, and engaged in multiple meetings with Ontario government officials.⁴⁷²

305. In addition, Windstream, either directly or through Ortech, engaged specialist firms and consultants to carry out work in the following areas.

306. *Wind resource/energy yield testing.* Because MNR did not provide Windstream with approval to erect a wind-measuring tower at the Project site, Windstream arranged for alternative ways to obtain that data:

- a) First, Windstream hired Helimax, the engineering firm that had been retained by Ontario to conduct its province-wide wind resource assessments, to provide an report, dated May 2009, on the anticipated wind resources/energy yield based on wind measurement data at meteorological towers on Wolfe Island.⁴⁷³
- b) Second, Ortech engaged the engineering firm Zephyr North to provide a preliminary estimate, dated May 2010, of wind speeds at four sites in the Project based on atmospheric modeling.⁴⁷⁴
- c) Third, Windstream engaged Ortech to produce a wind resource/energy yield report in July 2010,⁴⁷⁵ updated with additional data in March 2011,⁴⁷⁶ using wind measurement data collected from meteorological towers on Wolfe Island, supplemented by data from [REDACTED]

[REDACTED]⁴⁷⁷

⁴⁷² See the detailed description of Ortech's work described in the CWS-Roeper ¶ 58.

⁴⁷³ CWS-Roeper ¶ 61; **C-0139**, Report (Helimax Energy Inc.), Meteorological and Energy Yield Report, Wolfe Island, Ontario (September 24, 2009).

⁴⁷⁴ CWS-Roeper ¶ 62; **C-0259**, Report (Zephyr North Ltd.), Offshore Wind Speeds from Boundary Layer Modelling (May 13, 2010).

⁴⁷⁵ **C-0324**, Report (Ortech), Wolfe Island Shoals Offshore Wind Report (July 30, 2010).

⁴⁷⁶ **C-0511**, Report (Ortech), Updated Wolfe Island Shoals Offshore Wind Report (March 7, 2011).

⁴⁷⁷ CWS-Roeper ¶ 63.

- d) Fourth, in December 2011, Windstream, with permission from a private landowner, erected a meteorological tower and sodar equipment on Long Point, Wolfe Island. This spit of land extends two kilometres offshore from Wolfe Island and is surrounded on three sides by the waters in the Project area. The erection of the meteorological tower allowed Windstream and Ortech to collect the most accurate wind measurement data possible short of being able to erect a tower in the lake at the Project site.⁴⁷⁸

307. *Electrical design.* Ortech also arranged for the preparation of studies and designs relating to the Project's electrical system and, in particular, its connection to the electrical grid. This work included the following:

- a) In April 2010, Genivar provided a preliminary drawing indicating how the Project would connect to the Lennox transmission station.⁴⁷⁹
- b) In May 2010, Genivar prepared a "preliminary protection and operating philosophy" for the project, which also contained a high level outline of the electrical design and a map showing the proposed interconnection.⁴⁸⁰
- c) In November 2010, on the basis of application documentation submitted to it by Ortech, the Independent Electricity System Operator (the Ontario Government entity responsible for managing Ontario's electricity grid) provided a final report determining that the WWIS Project's interconnection at Lennox was acceptable and would not negatively impact the electrical transmission system.⁴⁸¹

⁴⁷⁸ CWS-Roeper ¶ 64; **C-0627**, Report (Ortech), Updated Wolfe Island Shoals Offshore Wind Report (October 24, 2012), ¶ 9; **C-0587**, Meteorological Mast Commissioning Report (GL Garrad Hassan), Long Point, Wolfe Island Shoals Project, Ontario (January 25, 2012).

⁴⁷⁹ CWS-Roeper ¶ 66; **C-0236**, Drawing No. 10-154-01, Genivar re Wolfe Island Shoals Wind Farm 300MW (April 28, 2010).

⁴⁸⁰ CWS-Roeper ¶ 67; **C-0274**, Report (Genivar), Wolfe Island Shoals Wind Farm 300 MW Project, Preliminary Project and Operating Philosophy (May 27, 2010); **C-0275**, Geographic Map, Genivar, Wolfe Island Shoals Proposed Interconnection (May 27, 2010).

⁴⁸¹ CWS-Roeper ¶ 68; **C-0381**, System Impact Assessment Report (IESO), Wolfe Island Shoals Wind Generation Station, Connection Assessment & Approval Process (Final Report) (November 8, 2010).

- d) In November 2010, also on the basis of application documentation submitted to it by Ortech, Hydro One (the Ontario Government entity responsible for managing Ontario's transmission system) similarly concluded that the Project would not adversely impact any transmission customers.⁴⁸²

308. **Lake bottom investigation (bathymetry and geophysical).** Ortech had the benefit of certain studies that had been prepared in 2007 for the on-shore Wolfe Island wind project, including surveys of the cable and submarine transmission line routing from that project.⁴⁸³ Following Windstream's receipt of the FIT Contract offer in April 2010, Ortech arranged for additional studies to assess lake bottom conditions for the Project, including the following:

- a) a study by Canadian Seabed Research Ltd. of the regional bathymetry and geophysical conditions of the turbine area (essentially a study of the topography and physical nature of the lake bottom);⁴⁸⁴ and
- b) a detailed bathymetry study, co-sponsored by Windstream and conducted by the Canadian Hydrographic Services, of areas of Lake Ontario that overlap with parts of the proposed export cable routes for the Project.⁴⁸⁵

309. **Financial.** As described at paragraphs 219 to 221 above, prior to executing the FIT Contract, Windstream obtained financial assessments to assist it in assessing the feasibility of the Project. These included:

- a) a May 2010 cost assessment prepared by UK engineering firm Mott MacDonald using industry-typical values for offshore wind projects, bearing in mind that

⁴⁸² CWS-Roeper ¶ 69; **C-0383**, Report (Hydro One), Customer Impact Assessment, Wolfe Island Shoals GS 300 MW Wind Turbine Generator Generation Connection (November 8, 2010).

⁴⁸³ CWS-Roeper ¶ 70; **C-0015**, Survey, Canadian Seabed Research Ltd., 2007 Wolfe Island Cable Route Survey (July 2007); **C-0039**, Report, Santec Consulting Ltd., Appendix C10 Submarine Transmission Line Crossing Report (November 2007).

⁴⁸⁴ CWS-Roeper ¶ 70; **C-0514**, Report, Canadian Seabed Research Ltd., 2010 Preliminary Site Investigation, Lake Ontario Wind Farm and Cable Route Survey (March 28, 2011).

⁴⁸⁵ CWS-Roeper ¶ 70; **C-0173**, Report (Canada Hydrographic Service) Final Field Report, Charity Shoal and Upper Gap of Adolphus Reach Survey (Fall 2010).

there were certain differences in the conditions between offshore projects in Europe compared to Lake Ontario;⁴⁸⁶

- b) a May 2010 project feasibility analysis prepared by Ortech in May 2010 based on the Mott MacDonald cost estimates, the wind resource and energy yield information from the September 2009 Helimax report, and containing revenue projections;⁴⁸⁷ and
- c) a July 2010 addendum letter prepared by Ortech updating the project feasibility analysis, assuming the Project would be reconfigured to accommodate the proposed MOE's five-kilometre setback.⁴⁸⁸

310. **RFP Processes.** In addition to arranging for the studies described above to be prepared by specialized consultants, Windstream and Ortech organized RFP processes to ensure the appropriate consultants would be engaged to carry out the tasks required to develop the Project.⁴⁸⁹

311. In early October 2010, Ortech issued a Request for Proposal to solicit proposals to retain service providers to prepare the environmental permitting and fieldwork required to complete the REA and MNR processes, as well as related provincial and federal approval requirements.⁴⁹⁰ The purpose of the RFP was to create a permitting team, headed by Ortech, that would manage the permitting aspects of developing the project. The RFP divided the work into six categories:

- a) permitting work;
- b) ecological field work;

⁴⁸⁶ CWS-Roeper ¶ 71; **C-0244**, Mott MacDonald, Instruction and Notes on Use of Preliminary Cost Plan (PCP), (May 4, 2010).

⁴⁸⁷ CWS-Roeper ¶ 72; **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010).

⁴⁸⁸ CWS-Roeper ¶ 71; **C-0310**, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010); CWS-Roeper ¶ 71.

⁴⁸⁹ CWS-Roeper ¶ 72.

⁴⁹⁰ CWS-Roeper ¶ 73; **C-0374**, Request for Proposal (ORTECH), Wolfe Island Shoals Offshore Windfarm Permitting Field Investigation Services (October 8, 2010).

- c) technical field work;
- d) cultural heritage study and archaeology study;
- e) Aboriginal consultation; and
- f) inter-jurisdictional advisor.⁴⁹¹

312. Following the completion of the RFP process, which resulted in 14 proposals, Ortech recommended to Windstream that it retain Stantec Consulting Inc. for the permitting work, Natural Resource Solutions Inc. (“**NRSI**”) for the ecological field studies, Stantec Consulting Inc. for the technical field studies, Scarlett Janusas Archaeology and Heritage Consulting Education for the archeology and cultural heritage work, McLeod Wood for aboriginal consultation, and Stantec Consulting as inter-jurisdictional advisor.⁴⁹² On January 27 and 31, 2011, Ortech met with Stantec Consulting and NRSI to advise them they had been retained to carry out, respectively, the permitting and ecological field studies, and that they should prepare a work plan so that late winter bird work could begin in March 2011.⁴⁹³

313. In November 2010, Ortech issued a Request for Conceptual Foundation and Substructure Design Analysis Services, soliciting proposals to carry out a conceptual level design study of the turbine foundation and substructure.⁴⁹⁴ Both COWI and Mott MacDonald submitted proposals in response to this RFP.⁴⁹⁵ Windstream and Ortech also solicited and received proposals respecting wind resource and energy yield work⁴⁹⁶ and the determination of port capabilities for offshore

⁴⁹¹ CWS-Roeper ¶ 73.

⁴⁹² **C-0473**, Letter from Deveaux, Leah (Ortech) to Baines, Ian (WEI) (February 8, 2011).

⁴⁹³ CWS-Roeper ¶ 74; **C-0466**, Meeting Agenda, Deveaux, Leah (ORTECH) to Rowland, Rob (Stantec) (January 27, 2011).

⁴⁹⁴ **C-0389**, Request Letter (ORTECH), Request for Conceptual Foundation and Substructure Design Analysis Services (November 22, 2010).

⁴⁹⁵ **C-0394**, Proposal (COWI), Windstream Wolfe Island Shoals Inc., Foundation and Substructure Concept Design, Technical and Financial Proposal (December 2010); **C-0395**, Proposal, Mott MacDonald, Windstream Wolfe Island Offshore Wind Farm Foundation Study (December 2010).

⁴⁹⁶ **C-0409**, Report (GL Garrard Hassan) Technical Proposal for Wind Resource Assessment Update for Wolfe Island Project (December 10, 2010).

wind turbine construction, among other matters.⁴⁹⁷ In addition, Windstream and Ortech, through a 2010 RFP process, retained McKeil Marine and their sub-contractor Canadian Soil Drilling to carry out the geotechnical drilling that would have been required had the Project been allowed to proceed.⁴⁹⁸

314. **Equipment.** In November 2011, Windstream signed a Turbine Supply Agreement with turbine supplier Siemens to supply 130 turbines for the Project for slightly more than [REDACTED] million.⁴⁹⁹

315. **Project schedules and task lists.** From the date Windstream was offered the FIT Contract up to the February 2011 moratorium, Windstream and Ortech carried out their work on the basis of comprehensive project work plans and schedules to ensure the Project was moving forward as quickly as possible. As described at paragraph 218 above, in April 2010, Ortech prepared for Windstream a project management plan outlining scheduling requirements, project challenges, organizational structure and budget. Beginning in early April 2010 and continuing to early February 2011, Windstream and Ortech held weekly teleconference calls at which they discussed and updated a detailed list of tasks to be accomplished under the following categories: Engineer/Procure/Construct (EPC); Civil/Foundation; Electrical; Wind Resource; Environmental Permitting (REA/EA); Other Legal/Land; and Other.⁵⁰⁰

⁴⁹⁷ C-0360, COWI, Wolfe Island Shoals Offshore Wind Farm: Port Evaluation for Offshore Wind Farms, September 13, 2010; C-0416, Presentation (Ortech), Installation Study (December 20, 2010).

⁴⁹⁸ CWS-Roeper ¶ 75; C-0619, Report, (ORTECH), Wolfe Island Shoals Wind Farm MNR Well License Application (June 12, 2012).

⁴⁹⁹ CWS-Roeper ¶ 76; C-0576, Siemens Turbine Supply Agreement, Wolfe Island Shoals Offshore Wind Farm (December 19, 2011); C-0562, (Resolution to enter into TSA) Resolution of the Directors (WWIS), Authorization of Turbine Supply Contract (November 22, 2011); Schedule A2: C-0566, Siemens Wolfe Island Shoals Turbine Supply Agreement Contract Schedules, Schedule A Contract Price and Payments (November 28, 2011).

⁵⁰⁰ CWS-Roeper ¶ 77; C-0252, WIS Short-Term Task List (excel spreadsheet) May 2010 to February 2011 (May 5, 2010).

XV. MAY 2012: WINDSTREAM'S INVESTMENTS BECOME SUBSTANTIALLY WORTHLESS

316. By May 4, 2012, when Windstream wrote its final letter to the Premier's Office, described at paragraph 299 above, it had become clear to Windstream that the value of its FIT Contract, and by extension the value of its investments in WWIS and the Project, would soon be lost as a result of the moratorium and the government's refusal to ensure that Windstream was not penalized as a result of the moratorium.⁵⁰¹

317. As described in Section XI.B above, while the FIT Contract remained under *force majeure*, it was subject to unilateral termination by the OPA at any time if the Project did not achieve commercial operation by May 4, 2017.⁵⁰² As described at paragraphs 247 to 249 above, this is a power that the OPA can and has exercised to terminate projects that are delayed by more than 24 months in meeting their MCOB.

318. In light of the period that would be required to re-start the Project, confirm regulatory requirements, obtain the required approvals, complete development work and build the Project, as of May 4, 2012 it was no longer feasible to expect that the Project could achieve that commercial operation date, even if the moratorium were lifted and the Project were allowed to proceed.⁵⁰³

319. Further, because of the OPA's unilateral termination right that applied despite the *force majeure*, the Project could not attract the necessary financing to allow this work to be completed. The FIT Contract was the key asset that would have allowed Windstream to secure the equity and debt financing required to develop and construct the Project and achieve commercial operation.⁵⁰⁴

⁵⁰¹ C-0711, Spreadsheet (WWIS) Overall Project Development Schedule Highlights (Detailed - COD May 2017) (August 1, 2014).

⁵⁰² C-0245, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 10.1(g), ¶ 32.

⁵⁰³ C-0711, Spreadsheet (WWIS) Overall Project Development Schedule Highlights (Detailed - COD May 2017) (August 1, 2014); CWS-Baines ¶ 142; CWS-Roeper ¶ 87.

⁵⁰⁴ CWS-Mars ¶ 99.

320. While the OPA has not taken any steps to terminate the FIT Contract, Mr. Bucci of Deloitte concludes that the fact that it would be permitted to do so even if Windstream built the Project and brought it into operation on a date after May 2017 has rendered the Project impossible to finance.⁵⁰⁵ As set out in Ms. Powell's report, the FIT Contract is an integral part of the project lender's collateral.⁵⁰⁶ In her experience, it would be extremely unlikely that any project lender would be willing to provide financing for a renewable energy project if such *force majeure* termination right is exercisable prior to a project's expected commercial operation date. Thus, project lenders would require the OPA to waive such right to terminate the FIT Contract as a condition precedent to any financing.⁵⁰⁷

321. In Deloitte's opinion, the fact that the Project can no longer be financed because of the combined operation of the limitation on *force majeure* and the time required to bring the Project into operation has rendered the FIT Contract, the Project and WWIS itself substantially worthless. Deloitte notes that nominal value may be attributed to the past costs incurred related to certain assets of the Project, including the meteorological tower and the studies performed to date. However, in Deloitte's opinion, given that a potential purchaser of the Project's assets would not be able to earn future profits from those assets given the current circumstances surrounding the Project, a potential purchaser would not likely ascribe any value to these assets. As a result, in Deloitte's opinion, the WWIS, the Project and the FIT Contract currently have only nominal value, and have had only nominal value since May 4, 2012.⁵⁰⁸

322. In addition, the OPA has as recently as January 2014 refused to return WWIS' \$6 million letter of credit and to waive any of its termination rights under the FIT Contract. In a letter dated January 10, 2014, the OPA stated:

The OPA [...] will not agree to refund or return the Completion and Performance Security.

⁵⁰⁵ CER-Deloitte (Bucci), Section 1.9.

⁵⁰⁶ CER-Powell ¶ 116.

⁵⁰⁷ CER-Powell ¶ 115.

⁵⁰⁸ CER-Deloitte (Taylor, Low), Section 5.

The OPA reserves all rights and remedies under the FIT Contract and at law and equity, including the right to exercise any rights and remedies at any time and from time to time.⁵⁰⁹

323. Further, even if the OPA were to waive its ability to terminate, the government's actions have created a level of uncertainty around offshore wind and mistrust in the investor community that will take decades to repair.⁵¹⁰

324. Mr. Ziegler confirms that, by the middle of May 2012, it became clear to him that there was no way the Project could be financed. These included:

- (a) **“Contract Termination Risk:** The OPA now had the ability to use a back door termination clause that was caused entirely by arbitrary government policy and not by a legitimate force majeure event.
- (b) **Lack of Investor Confidence:** The political chicanery that had occurred created a massive amount of mistrust in the investor community. Once that happens it takes an incredibly long time to gain that trust back.
- (c) **Counter Party Risk:** There was now a high level of counter party risk to the contract. Previously, that lack of risk was one of the large value drivers for the FIT program.
- (d) **Policy Uncertainty:** Clearly this government felt that they could change policies without justification or regard to the rights of contract holders.
- (e) **Supply Chain Destruction:** All advances in developing the supply chain necessary to support an offshore wind industry had been destroyed and many of the potential suppliers for the project subsequently focused their resources on other jurisdictions.
- (f) **Negative Public Perception:** The commentary that was offered by Premier McGuinty, Minister Duguid and others was extremely damaging to building an offshore wind industry and our Project.”⁵¹¹

⁵⁰⁹ C-0680, Letter from Killeavy, Michael (OPA) to Chamberlain, Adam (BLG) (January 10, 2014).

⁵¹⁰ CWS-Mars ¶ 101.

325. Thus, because of Ontario's about-face on offshore wind, Mr. Ziegler and his investor group would no longer finance the Project. Additionally, according to Mr. Ziegler, none of the strategic partners, banks, pension funds, and utilities that Windstream was negotiating with would entertain an investment in the Project or offshore wind in Ontario. In his view, the government of Ontario has irreparably harmed the offshore wind industry and Windstream's Project, and has rendered a FIT Contract with a \$5 billion revenue stream worthless.⁵¹²

XVI. MORATORIUM WAS MOTIVATED BY CONCERNS ABOUT THE COST OF OFFSHORE POWER AND PUBLIC OPPOSITION TO WIND TURBINE PROJECTS, NOT SCIENTIFIC CONCERNS

326. When it announced the moratorium in February 2011, the Ontario Government's official position that it was being imposed because further scientific research was required. As already noted at paragraph 274 above, this was inconsistent with the fact that Ontario had a moratorium on offshore wind development in 2006 and lifted it in 2008 after confirming offshore wind development was practical and environmentally sound. In addition, the evidence shows that the real concerns that motivated the Ontario Government to impose the moratorium were rising costs of renewable energy electricity – including the fact that offshore wind power was more costly than onshore wind – and public opposition to wind turbine projects, particularly in the face of a pending October 2011 election.

327. As the evidence, described below, shows, the statement that further scientific research was required respecting offshore wind was a rationale of expediency, hastily developed only after other potential rationales for regulating offshore wind in a manner that would manage public opposition for the coming election were explored and abandoned as untenable. As the evidence also shows, the process that led to the scientific research rationale being adopted was driven not by the ministries' technical and policy experts – who in 2009 and 2010 were developing policies that would allow for the development of offshore wind projects within the framework of the *Green Energy Act* – but by the Premier's Office, the ministers and their political staff.

⁵¹¹ CWS-Ziegler ¶ 18.

⁵¹² CWS-Ziegler ¶ 19.

328. The result, as described below, was that – with the October 2011 election firmly in the minds of government ministers – the process that led to the moratorium became a result-oriented, top-down approach to policy-making, characterized by expediency and arbitrariness. As an Assistant Deputy Minister at MNR wrote (around the time MNR was revising its Site Release policy) the manner in which the Minister’s Office was going about its work was “panicky, repetitive, unfocused, unconnected, stressed, stressful and many others in my experience to date.”⁵¹³ Another MNR official described the circumstance of MNR granting and then cancelling Crown land applications for offshore wind developers as like “an Etch-a-Sketch approach to policy.”⁵¹⁴

A. Moratorium Was Motivated by Costs Concerns

329. By 2011, the impetus for the Ontario Government to procure electricity from large-scale renewable energy projects in Ontario had declined because of significant changes in the electricity market.⁵¹⁵ At the time, the FIT Program was developed in 2009, natural gas prices were higher than in 2011 and were expected to increase. As a result, renewable sources of electricity such as wind were particularly attractive to policymakers in the Province.⁵¹⁶ However, by 2011, the average cost of natural gas had dropped by 58%.⁵¹⁷ In addition, given the importance of natural gas in setting wholesale electricity prices, there was a corresponding decrease in the wholesale market price paid for electricity by the Ontario Government, which triggered certain compensatory payments the government was required to make to generators,⁵¹⁸

⁵¹³ C-0276, Email from Lawrence, Rosalyn (MNR) to Cain, Ken (MNR) (May 27, 2010).

⁵¹⁴ C-0390, Email from Boysen, Eric (MNR) to Carey, Paul (MNR) et al. (November 24, 2010). An Etch-a-Sketch is a mechanical toy. By turning knobs on the device, children are able to manipulate a stylus to draw images by displacing aluminum powder on the back of the device’s screen. Any images can be erased (or “expunged”) by shaking the device.

⁵¹⁵ CER-Power Advisory, pp. iii, 4-5.

⁵¹⁶ CER-Power Advisory, p. 3.

⁵¹⁷ CER-Power Advisory, p. 3.

⁵¹⁸ This compensatory payment is the Global Adjustment, a levy paid by all electricity rate-payers which is designed to compensate generators for differences between their contract price for the sale of electricity and the actual amounts received from selling the electricity they produce on the wholesale market. Using the Project as an example, the FIT Contract provides a contract price of \$190 per megawatt hour. In the event that

resulting in overall higher electricity prices for ratepayers.⁵¹⁹ In addition to concerns about increasing electricity costs in the province, a combination of factors resulted in a decrease in demand for electricity between 2009 and 2011, including the financial crisis (and the resulting slump in Ontario’s manufacturing sector), refurbishments to Ontario’s nuclear power plants, and increases in solar generation.⁵²⁰

330. The impetus for the Ontario Government not to proceed with offshore wind because of costs concerns was particularly strong. As described at paragraphs 114 and 115 above, the price for offshore wind power, including for the WWIS Project, was \$190 per megawatt hour, with full escalation for inflation until the Project’s commercial operation date and escalation for inflation up to a maximum of 20% in total thereafter. That price was higher than the price of \$135 per megawatt hour, plus escalation, to be paid for on shore wind power. In addition, the WWIS Project – at 300 megawatts – was the largest of any of the projects granted a FIT contract in 2009.

331. Despite the asserted rationale of scientific uncertainty, there is strong evidence that the Ontario Government was motivated by these costs concerns to stop offshore development, including the WWIS Project. Perhaps the best contemporaneous evidence of this is the statement made by Minister Duguid, only days after the moratorium was imposed, that “[i]f we’re reaching our clean energy objectives with onshore projects in solar, wind, bioenergy, why would we then want to expand into offshore which is going to be more costly?”⁵²¹

332. In addition, a number of internal documents suggest that the government was concerned with the cost of offshore wind:

- a) In an email sent on April 17, 2010, an MEI official states that “we must make decisions around offshore versus other forms of generation –Nuclear etc. Wind in

WWIS received only \$160 per megawatt hour (for example), under the Global Adjustment the Ontario Government would collect the \$30 per megawatt hour difference from rate-payers and pay it to WWIS to compensate it for the lower revenues resulting from the lower wholesale price.

⁵¹⁹ CER-Power Advisory, p. 4.

⁵²⁰ CER-Power Advisory, p. 5.

⁵²¹ **C-0504**, Article (Spears, John), Ontario Denies Losing Its Taste for Renewable Energy (February 17, 2011).

such a massive quantity will be a concern with respect to power quality/dispatchability [...] Cost implications of bringing in 7000 MW at 19 cents/kWh and concerns of energy oversupply.”⁵²²

- b) A presentation prepared for a briefing at the Premier’s Office on April 30, 2010 indicated that “[i]f all offshore FIT projects were to proceed at 19 cents/kWh, electricity bills would increase by 26% or \$368 per year.”⁵²³
- c) A similar presentation created to brief the Minister of Energy and Infrastructure indicated that a major concern about offshore was the “costs to rate base.”⁵²⁴
- d) These sentiments were also reflected in handwritten notes taken by Eric Boysen from MNR, who wrote “do we need the power at this price?.”⁵²⁵
- e) At least one internal email from MNR (discussed in further detail below in paragraph 349) highlights that one of the benefits of a five-kilometre setback for offshore wind facilities is that it will reduce “the number of viable offshore projects which is a cost containment measure.”⁵²⁶

333. Internal documents also highlight that electricity needs in Ontario had changed by November 2010, and as a result the electricity produced at offshore wind facilities was no longer needed. On November 23, 2010, MEI released Ontario’s Long-Term Energy Plan (“**LTEP**”).⁵²⁷ The LTEP stated that “[o]ff-shore wind energy is not a near-term driver for renewable energy supply in Ontario.”⁵²⁸ Further, by November 9, 2010, MEI’s “Power Supply Directive

⁵²² **C-0220**, Email from Ing, Pearl (MEI) to Slawner, Karen (MEI) et al (April 19, 2010).

⁵²³ **C-0240**, Presentation (MEI), Offshore Wind and the *Green Energy Act*, PO Briefing (April 30, 2010), p. 3.

⁵²⁴ **C-0264**, Presentation (MEI), Offshore Wind, Minister's Briefing (May 17, 2010), p. 3.

⁵²⁵ **C-0171**, Handwritten Notes of Eric Boysen (MNR) (2010).

⁵²⁶ **C-0171**, Handwritten Notes of Eric Boysen (MNR) (2010).

⁵²⁷ **C-0399**, Chronology (MOE), Attachment to Information Note, Offshore Wind Power - Status (December 6, 2010).

⁵²⁸ **C-0399**, Chronology (MOE), Attachment to Information Note, Offshore Wind Power - Status (December 6, 2010).

indicate[d] that there is no immediate demand for offshore wind power. Offshore wind energy is not critical to renewable energy supply in Ontario.”⁵²⁹ Handwritten notes from a November 1, 2010 government document titled “Debrief offshore” further indicate that “they don’t need offshore power.”⁵³⁰

334. This evidence shows that – despite the fact that the OPA had executed a long-term FIT contract with WWIS – the Ontario Government was motivated to prevent the Project from proceeding so that the OPA would not be required to procure power from WWIS at the higher offshore energy prices. As described at paragraph 476 below, Windstream’s expert estimates that Ontario has realized an economic benefit of approximately \$1.3 to \$2.1 billion dollars.

B. Moratorium was Motivated by Public Opposition and Political Expediency

335. As discussed above starting in paragraphs 250 to 252 above, in 2010 and 2011, groups opposing wind energy were becoming increasingly active in Ontario. Premier McGuinty was frequently greeted by anti-wind protestors while on the campaign trail, and anti-wind groups had organized mail-in campaigns to facilitate complaints to elected officials about wind power⁵³¹ and begun to target the electoral ridings of various liberal MPP’s.⁵³² Broadly speaking, these groups opposed the installation of what they called “industrial wind turbines” in rural Ontario.⁵³³ Among their many concerns, these groups argued that the low frequency sound produced by wind turbines adversely affected human health, that wind turbines were a blight on the rural landscape,

⁵²⁹ **C-0384**, Presentation (MOE) Offshore Wind Development Path Forward, Director's Briefing (November 9, 2010), ¶ 2.

⁵³⁰ **C-0376**, Handwritten Notes of Dilek Postacioglu (ENE) (November 1, 2010), p. 1.

⁵³¹ **C-0498**, Article (Toronto Star), Ontario scraps offshore wind power plans (February 12, 2011).

⁵³² CWS-Baines ¶ 107; **C-0539**, Article, McGuinty vulnerable on wind power: opponent (June 12, 2011).

⁵³³ **C-0700**, Web Page, WCO, Wind Concerns Ontario (July 2014); **C-0610**, Web Page, Bruce Peninsula Wind Turbine Action Group (April 23, 2012); **C-0051**, Web Page, Chatham-Kent Wind Action Group (CKWAG) (2008); **C-0701**, Web Page, CCSAGE Naturally Green, County Coalition for Safe and Appropriate Green Energy (July 2014).

and that the REA process was inherently undemocratic because it removed the ability of municipalities to block the development of wind energy projects within their borders.⁵³⁴

336. As described at paragraph 252, anti-wind opponents had mounted especially strong campaigns against offshore projects, including a proposed offshore project in Lake Ontario located near Energy Minister Duguid's electoral riding and against another proposed offshore project in Lake Erie located near the swing ridings of Essex and Windsor West.⁵³⁵ The governing Liberal party was sensitive to the offshore windpower issue and its perceived impact on the upcoming election.⁵³⁶

337. These political concerns arising from public opposition to wind turbines appear to have been particularly influential during two parts of the offshore wind policy-making processes during 2010 and 2011:

- a) the period from April to July 2010 when the five-kilometre setback proposal was being discussed and was ultimately proposed by the MOE; and
- b) the period from November 2010 to February 2011, which led to the moratorium being imposed.

338. During both these periods, as described below, the technical and scientific considerations that would normally have played a significant, if not the most significant, role in determining these policies were overridden by concerns of political expediency.

⁵³⁴ **C-0700**, Web Page, WCO, Wind Concerns Ontario (July 2014); **C-0610**, Web Page, Bruce Peninsula Wind Turbine Action Group (April 23, 2012); **C-0051**, Web Page, Chatham-Kent Wind Action Group (CKWAG) (2008); **C-0701**, Web Page, CCSAGE Naturally Green, County Coalition for Safe and Appropriate Green Energy (July 2014).

⁵³⁵ **C-0217**, Article (The Globe & Mail), Scarborough Bluffs residents determined to fight wind turbine project (April 16, 2010); CWS-Baines ¶ 107.

⁵³⁶ CWS-Benedetti, ¶ 39.

1. April to July 2010: Proposed Five-kilometre Setback Motivated By Political Concerns, Not Scientific Considerations

339. As described at paragraph 200, on June 25, 2010, MOE posted for public comment a proposed five-kilometre setback for offshore wind turbines. Prior to that posting, there was a significant amount of inter-Ministerial correspondence discussing the setback proposal. The record of this correspondence shows that (a) there was no scientific rationale for the five-kilometre setback, in contrast to the scientific rationale for the on-shore 550-metre setback and (b) that officials were aware that the setback proposal, if accepted, would effectively prevent all the offshore wind projects proposed at that time from being developed unless, like Windstream, an arrangement was made to reconfigure grid cells.

340. The MOE, which was responsible for determining what setback should be proposed, did not provide a scientific rationale for a five-kilometre setback.⁵³⁷ In fact, MOE employees were careful not to “rationalize” the proposed setback on the basis of scientific reasons or to suggest that it was “a science-based number”,⁵³⁸ and they were “looking for ecological reasons from MNR to rationalize the number.”⁵³⁹ It is clear from the minutes of MOE meetings discussing the setback issue that the concerns were focused on issues of “viewscape”, as opposed to noise or scientific rationales.⁵⁴⁰

341. MNR also lacked any kind of scientific rationale to support the imposition of a five-kilometre setback; the five kilometres was instead “a number” pulled out of the air.”⁵⁴¹ As Eric Boysen, the Director of MNR’s Renewable Energy Program, stated,

⁵³⁷ **C-0219**, Presentation (MNR), Offshore Wind Power Development (April 19, 2010), p. 5; **C-0253**, Handwritten Notes of Ken Cain (MNR) (May 6, 2010), p. 2.

⁵³⁸ **C-0172**, Handwritten notes of Ken Cain (MNR) (2010), p. 1; **C-0256**, Email from Hamilton, Rachel (ENE) to Duffey, Barry (ENE) May 11, 2010); **C-0271**, Email from Leus, Adam (ENE) to Duffey, Barry (ENE) et al. (May 26, 2010); **C-0222**, Email from Postacioglu, Dilek (ENE) to Leus, Adam (ENE) (April 20, 2010).

⁵³⁹ **C-0234**, Email from Cain, Ken (MNR) to Hayward, Neil (MNR) (April 23, 2010).

⁵⁴⁰ **C-0227**, Handwritten Notes of Dilek Postacioglu (ENE) (April 21, 2010), p. 1.

⁵⁴¹ **C-0228**, Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) (April 21, 2010); **C-0231**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (April 22, 2010); **C-0232**, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) (April 22, 2010).

The real challenge now begins. Although we have messaged to MOE that there is nothing in our data to support an exclusion zone, they continue to want to base this on ecological reasons.

This will pose a number of challenges, most of which is a very inconsistent approach to probably more ecologically sensitive areas on dry lands. [...] ⁵⁴²

342. Mr. Boysen stated in another email that MNR was told “that we are to work backwards from the number to provide a rationale for it. But this can’t be about aesthetics, or there will be a similar cry for exclusion zones on land.” ⁵⁴³ According to Mr. Boyen, the aesthetic impetus for offshore setbacks came from Minister Duguid and Minister of the Environment, John Gerretsen:

[...] Ministers D and G wanted at least a setback for view aesthetics (I did comment to Gail that if that were the case, MNR would not have a particular interest and that it would be a political determination of balancing available offshore power against aesthetic considerations.) ⁵⁴⁴

343. MEI had a similar view. According to Sue Lo, Head of the Renewable Energy Program at MEI, the decision to propose the five-kilometre setback was a political decision – “an aesthetic setback.” ⁵⁴⁵

344. MNR officials were also concerned that the five-kilometre setback, if accepted, would effectively prevent all the offshore wind projects from being developed (unless, like Windstream, an arrangement was made to reconfigure grid cells). In an email sent on May 18, 2010, Mr. Cain, the Director of MNR’s Renewable Energy Program wrote:

[...] That being said, we need to develop standalone MNR material – most specifically, direction and answers regarding how the setback will be implemented for current Crown lake bed applicants and what will be the impact on them. Attached find a confidential sample map, that demonstrates that all/most applications will not proceed with the 5 km proposed setback – this is very significant, in light of the province’s past commitments to promoting offshore wind. While MOE and perhaps MEI have tried to point to ecological values as a

⁵⁴² **C-0238**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) et al. (April 28, 2010).

⁵⁴³ **C-0231**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (April 22, 2010); **C-0223**, Email from Boysen, Eric (MNR) and Lawrence, Rosalyn (MNR) (April 20, 2010).

⁵⁴⁴ **C-0223**, Email from Boysen, Eric (MNR) and Lawrence, Rosalyn (MNR) (April 20, 2010).

⁵⁴⁵ **C-0386**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (November 22, 2010).

rational [sic] for a zonal setback approach, MNR has not supported such thinking – we see these values as more site specific than zonal. That being said, this is the approach that government is taking and MNR will have to be reserved in how it messages its story lines and be seen to be supporting the broader government agenda.⁵⁴⁶

345. A chart was circulated within the relevant ministries one month before the five-kilometre setback was posted for comment which lists for each proposed offshore wind energy project the number of grid cells applied for by proponents that would fall within the five-kilometre exclusion zone.⁵⁴⁷ This chart shows that the government was keenly aware of how the proposed setback would affect planned offshore projects in the Great Lakes. The chart showed that 78.15% of the grid cells applied for by Windstream fell within the five-kilometre exclusion zone. Offshore projects in Lake Ontario proposed by Gilead Power Corporation (three projects), Toronto Hydro Energy Services, William James Fisher (three projects) would lose 97.73%, 100%, 88.24%, 100%, 42.35%, 31.82% and 100%, respectively, of the grid cells applied for. Three of the five offshore projects proposed in Lake Huron would lose over 75% of the grid cells applied for,⁵⁴⁸ all three projects proposed for Lake Superior would lose 100% of the grid cells applied for, and half of the 14 projects proposed for Lake Erie would lose over 54% of the grid cells applied for.⁵⁴⁹

346. As one MNR official wrote to another, “[c]learly this is being driven politically and we shouldn’t pretend we can stop it.”⁵⁵⁰

⁵⁴⁶ **C-0266**, Email from Cain, Ken (MNR) to Harvey, Deborah (MNR) (May 18, 2010); see also **C-0304**, Email from Boysen, Eric (MNR) to Duffey, Barry (ENE) et al (June 28, 2010).

⁵⁴⁷ **C-0261**, Email from Cain, Ken (MNR) to Nowlan, James (MNR) et al. (May 14, 2010); **C-0263**, Email from Linley, Richard (MNR) to Mullin, Sean (OPO) et al (May 17, 2010); **C-0295**, Map (MNR), Offshore Windpower Values Analysis, Lake Ontario (June 25, 2010).

⁵⁴⁸ 76.14%, 98.48% and 100%.

⁵⁴⁹ 54.55%, 72.73%, 81.82%, 100%, 100%, 90.91% and 75%.

⁵⁵⁰ **C-0273**, Email from Harvey, Deborah (MNR) to Boysen, Eric (MNR) (May 26, 2010). This email was sent in the context of discussions about implementing setbacks for offshore wind turbines, which was originally scheduled for late May, 2010: **C-0272**, Email from West, Karen (MNR) to Dottin, Bev (MNR) (May 26, 2010).

347. Internal government documentation confirms that the Premier’s Office and the Ontario Government were concerned about public opposition to offshore windpower. Handwritten notes taken during a meeting held on January 6, 2011 indicate that Sean Mullin, the person responsible for the energy portfolio at the Premier’s Office, told those present that “they are concerned about other lakes + huge public opposition + onshore anti-wind sentiment.”⁵⁵¹ An email sent by another person present at the meeting indicated that representatives from the Premier’s Office said that they were “concern[ed] about public opposition in other lakes coupled with onshore anti-wind sentiment.”⁵⁵²

348. A summary of the government’s draft communication strategy for the roll-out of its decision concerning offshore wind dated January 10, 2011 also highlights the Ontario Government’s concerns about public opposition to offshore wind energy development:

There is organized opposition to renewable energy projects – particularly wind power – in several parts of the province.

Electricity costs for consumers have been rising. Offshore wind is likely to be seen to contribute to the impact of renewables on prices. [...]

Windstream has executed a FIT Contract with the OPA. Several other offshore FIT applications have been made the OPA, [sic] however these lie inside the 5km setback. Toronto Hydro has, sparking considerable opposition, been taking initial steps towards a project off the Toronto shoreline of Lake Ontario in the Scarborough area. They have not yet applied to the FIT program. [...]⁵⁵³

349. In a series of emails on January 6 and 7, 2010, staff from MEI, MOE and MNR discussed ways of avoiding public opposition by limiting offshore development to certain areas. They had in mind leaving “[a]ll of Lake Ontario” open to offshore wind energy development (including the project area for WWIS), as well as a portion of Lake Erie and Georgian Bay. However, MEI staff worried that there “[c]ould be significant public opposition if we keep Georgian Bay open”, but since the site release process for offshore wind development was “closed” and “MNR needs to

⁵⁵¹ C-0442, Handwritten Notes of Jennifer Heneberry (MEI) (January 10, 2011), p. 1.

⁵⁵² C-0433, Email from Zaveri, Mirrun (MEI) to Powers, Kevin (MEI) (January 6, 2011).

⁵⁵³ C-0446, Communications Strategy Summary: Offshore Wind (January 10, 2011).

develop policies and procedures before opening [...] this could be the lever to ensure Georgian Bay does not see offshore wind in the near future.”⁵⁵⁴

2. November-February 2011: Ontario Discusses Various Approaches to Constrain Offshore Wind Development, Before Adopting the Scientific Uncertainty Rationale and Moratorium

350. By fall 2010, when the Legislature returned for its fall sitting and with the October 2011 election date looming, the political direction to back away from the Ontario Government’s previous commitments to offshore wind development intensified. This shift in political direction is reflected in the contemporaneous correspondence of Ministry officials. According to emails among MEI staff in November and December 2010, Ontario was “[l]ooking at ways to move away from offshore development without sending a chill through the energy development and manufacturing markets”,⁵⁵⁵ and [REDACTED]

[REDACTED]⁵⁵⁶ According to Mr. Cain at MNR, “offshore wind [was] losing political favour.”⁵⁵⁷

351. Officials discussed several approaches to accomplish this objective. [REDACTED]

[REDACTED] This position was articulated in several documents from November and December 2010.⁵⁵⁹

⁵⁵⁴ **C-0438**, Email from Mahmood, Mansoor (ENE) to Zaveri, Mirrun (MEI) (January 7, 2011); **C-0439**, Map of the Great Lakes, Regional Summary by Capacity (MW) (January 7, 2011).

⁵⁵⁵ **C-0403**, Email from Zaveri, Mirrun (MEI) to Slawner, Karen (MEI) et al. (December 8, 2010).

⁵⁵⁶ **C-0402**, Email from Tasca, Leo (MEI) to Slawner, Karen (MEI) et al. (December 8, 2010).

⁵⁵⁷ **C-0172** Handwritten notes of Ken Cain (MNR) (2010), p. 2.

⁵⁵⁸ **C-0385**, Presentation (MNR), Crown Land - Renewable Energy Policy Review, Minister's Briefing (November 12, 2010), ¶ 11; **C-0411**, Presentation (MNR), Crown Land - Renewable Energy Policy Review, Minister's Briefing (December 13, 2010), ¶ 11.

⁵⁵⁹ **C-0738**, Information Note (MOE), Offshore Wind Power – Status (December 7, 2010); **C-0740**, Annotated Agenda, Energy Issues Meeting (December 16, 2010); **C-0739**, Presentation (MOE), Offshore Windpower (December 2010); **C-0735**, Presentation (MOE), Offshore Wind Development Path Forward (November 2010); **C-0737**, Presentation (MOE), Offshore Wind Development (November 24, 2010); **C-0736**, Email from Leus, Adam (ENE) to Postacioglu, Dilek (ENE) (November 17, 2010).

352. During December 2010 and early January 2011, officials from the relevant ministries focused on an approach of trying define “go” and “no-go” zones that would allow certain offshore projects to proceed (including the WWIS project) but ideally prevent more controversial projects from going forward. This approach appears to have been under discussion as early as July 2010, although at that time officials had not established a rationale to exclude specific zones from offshore development.⁵⁶⁰ Officials subsequently settled on a rationale of restricting offshore wind development to designated areas on the basis of transmission constraints. In other words, the plan was to restrict offshore development in the Great Lakes not on the basis of scientific uncertainty about the potential effects of offshore wind development in the Great Lakes, but rather constraints in Ontario’s electricity transmission system. The geographic restriction on development would be combined with a five-kilometre “natural buffer” between the lakeshore and any offshore wind energy project.⁵⁶¹

353. Sometime in December 2010 “before the holidays”, a “multi-ministry MO/Premier’s Office meeting was held [...] where options were discussed around how to move forward with offshore wind.”⁵⁶² Apparently, this meeting was held without the knowledge or participation of managerial-level staff at MOE, the ministry responsible for the renewable energy regulation.⁵⁶³ A decision must have been made at this meeting to move forward on restricting offshore wind energy development, since steps were taken in that direction immediately after the holidays. In a presentation dated January 4, 2011 and entitled “Offshore Wind: Options for Moving Forward”,

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁶⁰ C-0315, Email from Cain, Ken (MNR) to Nowlan, James (MNR) et al (July 9, 2010); C-0306, Email from Boysen, Eric (MNR) to Au, Dave (MNR) et al. (June 29, 2010).

⁵⁶¹ C-0434, Email from Zaveri, Mirrun (MEI) to Wallace, Marcia (ENE) et al. (January 6, 2011).

⁵⁶² C-0424, Email from Lawrence, Rosalyn (MNR) to Boysen, Eric (MNR) et al. (January 5, 2011).

⁵⁶³ C-0424, Email from Lawrence, Rosalyn (MNR) to Boysen, Eric (MNR) et al. (January 5, 2011).

[REDACTED]

In addition, a discussion paper dated January 4, 2011 by the Manager of Transmission Policy at MEI titled *Can Transmission Capability Limits Aid in Buffering Offshore Applications?*

[REDACTED]

354. The transmission constraints rationale appears to have been initially selected in early January 2011 as the mechanism to reduce offshore development. MEI's policy proposal discussed at the time called for the designation of "go" zones where there was available transmission capacity and where offshore development would be permissible, and "no-go" zones, where there was insufficient transmission capacity and where development would not be allowed. Officials from the relevant ministries understood that the "go-zones" would be defined narrowly to limit development.⁵⁶⁶ Five of the eight zones planned for the Great Lakes fell into the "no go" category. The WWIS Project fell into one of the three "go" zones, though other "Lake Ontario and Lake Erie project proposals would be accepted only from FIT applicants that have already started the site release process."⁵⁶⁷

355. This approach to offshore policy was endorsed by the Premier's Office,⁵⁶⁸ and significant work was done to develop it.⁵⁶⁹ Further, until a moratorium was ultimately chosen as the

⁵⁶⁴ C-0420, Presentation (MEI), Offshore Wind Options for Moving Forward (January 4, 2011), p. 7.

⁵⁶⁵ C-0421, Report (MEI), *Can Transmission Capability Limits Aid in Buffering Offshore Applications?* (January 4, 2011).

⁵⁶⁶ C-0463, Handwritten Notes of Ken Cain (MNR) (January 20, 2011), p. 2; C-0436, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) et al (January 7, 2011).

⁵⁶⁷ C-0447, Report (MEI), Off-shore Wind (January 10, 2011).

⁵⁶⁸ C-0449, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (January 11, 2011); C-0445, Communications Strategy Summary: Offshore Wind (January 10, 2011); C-0443, Email from MacNeil, Greg (MNR) to Whytock, John (MNR) (January 10, 2011); C-0435, Email from Collins, Jason (MEI) to Powers, Kevin

Province's policy direction, [REDACTED]

356. [REDACTED]

[REDACTED].⁵⁷¹ MNR in particular was not impressed with the plan – the Assistant Deputy Minister of the MNR suggested to another MNR employee that the plan would make his head “explode in anger.”⁵⁷² MOE, which apparently had little or no representation at the December 2010 meeting described above in paragraph 353 where direction forward on onshore was discussed, “was totally out of the loop on this.”⁵⁷³

357. Beginning in January 12, 2011 the Ontario Government appears to have begun to abandon the “go” and “no-go” zone policy. In an email exchange between MNR staff on January 13, 2011, the sender wrote: “[y]esterday I heard that there were [Minister’s Office]-to-

(MEI) (January 6, 2011); C-0450, Email from Collins, Jason R. (MEI) to Ing, Pearl (MEI) (January 11, 2011); C-0429, Email from Zaveri, Mirrun (MEI) to Boysen, Eric (MNR) (January 6, 2011) – [REDACTED]

[REDACTED] C-0430, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 6, 2011); C-0453, Email from Sermat-Harding, Kaili (MEI) to Kozman, Bryan (CAB) (January 12, 2011).

⁵⁶⁹ C-0181, News Release (MNR), Discussion Draft, Ontario Sets Clear Course for Offshore Wind Power (January 15, 2010); C-0447, Report (MEI), Off-shore Wind (January 10, 2011); C-0431, Email from Boysen, Eric (MNR) to Zaveri, Mirrun (MEI) (January 6, 2011); C-0452, Draft Complete Submission Requirements Checklist for Off-shore Wind Projects under O.Reg. 359/09 (January 12, 2011).

⁵⁷⁰ C-0426, Presentation (MOE), Offshore Wind - Options for Moving Forward (January 5, 2011); C-0435, Email from Collins, Jason (MEI) to Powers, Kevin (MEI) (January 6, 2011); C-0430, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 6, 2011), ¶¶ 6, 8.

⁵⁷¹ C-0421, Report (MEI), Can Transmission Capability Limits Aid in Buffering Offshore Applications? (January 4, 2011); C-0425, Email from Norman, Jonathan (MEI) to Lo, Sue (MEI) (January 5, 2011); C-0433, Email from Zaveri, Mirrun (MEI) to Powers, Kevin (MEI) (January 6, 2011); C-0437, Email from Bishop, Cieran (MEI) to Viswanathan, Samira (MEI) (January 7, 2011); C-0444, Email from Heneberry, Jennifer (MEI) to Viswanathan, Samira (MEI) et al (January 10, 2011); C-0441, Handwritten Notes of Jennifer Heneberry (ME!) (January 10, 2011), ¶¶ 1, 5.

⁵⁷² C-0432, Email from Lawrence, Rosalyn (MNR) to Boysen, Eric (MNR) et al. (January 6, 2011).

⁵⁷³ C-0423, Email from Wallace, Marcia (ENE) to Boysen, Eric (MNR) (January 5, 2011).

[Minister's Office] discussions about communications where MEI said to expect a "shift." Lord knows what that will mean."⁵⁷⁴

358. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

359. [REDACTED]

[REDACTED] and this shift was confirmed on January 14, 2011 when direction was given by the Premier's Office that a moratorium was now Ontario's preferred policy for offshore wind.⁵⁷⁷ MOE, which had previously been "out of the loop" on discussions about offshore wind energy, became the lead agency on this issue. An email sent on January 19, 2011 indicates that MEI was told that "Environment was steering the ship."⁵⁷⁸

⁵⁷⁴ C-0455, Email from Cain, Ken (MNR) to Whytock, John (MNR) (January 13, 2011).

⁵⁷⁵ C-0458, Email from Ing, Pearl (MEI) to Wallace, Marcia (ENE) et al. (January 13, 2011); C-0456, Email from Whytock, John (MNR) to Hanson, Barbara (MNR) (January 13, 2011).

⁵⁷⁶ C-0456, Email from Whytock, John (MNR) to Hanson, Barbara (MNR) (January 13, 2011); C-0457, Email from Viswanathan, Samira (MEI) to Gibson, Amy (MEI) (January 13, 2011).

⁵⁷⁷ C-0180, Email from Evans, Paul (ENE) to Lo, Sue (MEI) et al (January 14, 2010).

⁵⁷⁸ C-0462, Email from Power, Karen (MEI) to Whytock, John (MNR) et al (January 19, 2011).

360. It was only at this point – in mid-January 2011 – that the government settled on scientific uncertainty as the basis for imposing the moratorium, and staff at the relevant ministries began working to develop this rationale.⁵⁷⁹ All other rationales for limiting or prohibiting offshore wind development were abandoned. For instance, in response to a document containing “Key Messages and Questions and Answers” about offshore wind which suggested that MOE could “review applications on a case by case basis considering relevant site-specific characteristics of a project and the extent to which design and control measures would be needed to ensure adequate protection of the natural environment”, MOE’s Director, Modernization and Approvals wrote “I’d like to talk about this Mark. I’m fine with the tone of the answers, but I’m not sure if all the answers are consistent with the rationale and policy discussion ADMs had yesterday and are continuing today....”⁵⁸⁰

361. The Ontario Government settled on scientific uncertainty despite the repeated assertions, detailed in paragraph 90, from staff at MNR that they were confident that existing regulatory mechanisms were sufficient to deal with site-specific problems as they arose and despite the fact that MEI, MOE and MNR had all planned to have the requisite rules for offshore wind energy projects in place by January 1, 2011 (see Section IX.F above). It had not been suggested at the time that there was any uncertainty that would prevent that work from going forward.

C. “Uncertainty” Rationale Not Supported by Ontario’s Extensive Experience with Construction Projects in Fresh Water

362. Ontario’s significant experience with construction projects in fresh water lakes and rivers throughout the province also demonstrates that there was not, in fact, any significant scientific or regulatory uncertainty concerning permitting or environmental effects of offshore wind.

363. At the time that Windstream was awarded its FIT Contract, the OPA awarded 45 FIT contracts for waterpower projects. There are considerable similarities between offshore wind and waterpower projects, both from a regulatory and design and construction perspective:

⁵⁷⁹ C-0464, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 21, 2011).

⁵⁸⁰ C-0459, Email from Wallace, Marcia (ENE) to Rabbior, Mark (ENE) (January 14, 2011).

- a) Both are constructed in fresh water and similar impacts must be considered, such as ice buildup, coastal effects, and any effects on drinking water, sediment, fish, and birds;
- b) Construction of both types of projects requires similar construction techniques, and similar strategies for mitigating any construction-related impacts; and
- c) The REA approval process for both types of projects is nearly identical, involving studies of bird and fish impacts and approval by the Ministries of Natural Resources and of the Environment.⁵⁸¹

364. Waterpower projects have been built in Ontario since the late 1880s, and the environmental impacts of building these types of projects have been extensively studied.⁵⁸² In addition to waterpower facilities, both the Ontario government and the federal government are routinely asked for permits related to complex construction projects in fresh water lakes, rivers and streams, including the construction of drinking water intakes, cooling water intakes for nuclear facilities, bridges, wharfs, sewage outfalls, bridges, submarine cables, and tailings deposits. In some cases, project proponents seek approval to completely drain a lake, or dump significant fill into Lake Ontario (such as the Leslie Street Lakefill site in Toronto, which extends approximately 5 kilometres into Lake Ontario).⁵⁸³

365. The fact that Ontario had no specific regulatory or scientific experience with offshore wind facilities does not affect the fact that:

- a) MNR, the MOE and federal Department of Fisheries and Oceans all had extensive regulatory and scientific expertise at the time the moratorium was announced with in-lake developments with respect to the protection of fish and fish habitat;

⁵⁸¹ CWS-Baines ¶ 73.

⁵⁸² CWS-Baines ¶ 74.

⁵⁸³ CER-Powell ¶¶ 93, 96.

- b) many of the key potential impacts would have been commonplace during the construction or repair of in-water developments (e.g. bridges, dams, intakes, wharfs and piers); and
- c) like with other in-water projects, the precautionary selection of wind power locations and the timing of construction activities would have helped to minimize possible impacts.⁵⁸⁴

XVII. RELEVANT EMAILS FROM THE PREMIER'S OFFICE AND THE MINISTRY OF ENERGY CONCERNING WINDSTREAM WERE LIKELY DELETED

366. Windstream has learned much of the information described in the above section through Freedom of Information requests and document production during this arbitration. However, Canada has produced no documents from email accounts of Premier's Office staff involved in the energy portfolio, and only three relevant emails from the Minister of Energy's Chief of Staff, despite the central role played by Premier's Office and the Minister's Chief of Staff in the events that led to the moratorium. For the reasons set out below, Windstream submits that relevant documents from the Premier's Office and the Minister's Chief of Staff have been deleted, and asks that the Tribunal draw an adverse inference that such emails would have contained information detrimental to Canada's case.

367. In 2010 and 2011, as described in greater detail in Section XIX.A, Ontario cancelled two contracts for the construction and operation of gas-fired power plants in Ontario. When it emerged that the costs of this decision would be significantly higher than originally anticipated and that the decision to cancel the gas plants was taken for political reasons, a legislative investigation was initiated. On May 16, 2012, the Estimates Committee of the Legislative Assembly of Ontario required the MEI, the OPA and the former Minister of Energy to produce all correspondence produced between September 1, 2010 and December 31, 2011 related to the government's decisions in 2010 and 2011 to cancel the power plants.⁵⁸⁵ This initial request for

⁵⁸⁴ CER-Powell ¶ 96.

⁵⁸⁵ C-0656, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), Deleting Accountability: Records Management Practices of Political Staff (June 5, 2013), pp. 4-6.

documents, and the subsequent dearth of relevant productions by the relevant ministries, sparked an extensive investigation that revealed that staff at the relevant ministries at the Premier's Office had deleted potentially relevant emails relating to the cancellation of the gas plants. It has also resulted in criminal charges being brought against Premier McGuinty's former Chief of Staff.

368. The key events respecting the deleted emails investigation are as follows. The Minister of Energy initially resisted the Committee's May 16, 2012 order that it produce all relevant documents, prompting members of the official opposition to bring a contempt motion to the Speaker of the Legislative Assembly on August 27, 2010. The Speaker ordered the Minister to comply with the Estimates Committee's motion. Between September 24, 2012 and October 12, 2012, MEI and the OPA produced 56,000 documents in two sets. The Minister of Energy produced none.⁵⁸⁶ Three days after the documents were produced, Premier McGuinty resigned, and prorogued the Legislative Assembly.⁵⁸⁷ In March 2013, after the Legislature reconvened, the Standing Committee on Justice Policy initiated an investigation into the cancellation of the gas plants, and on April 9, 2013, received testimony from Craig MacLennan, Chief of Staff for the Minister of Energy. Mr. MacLennan admitted to deleting his emails on a regular basis, in contravention of Ontario's *Archives and Recordkeeping Act*.⁵⁸⁸ When asked by members of the Committee for details about the decision to cancel the gas plants and the total cost, Mr. MacLennan consistently replied he did not recall details relevant to the question.⁵⁸⁹

369. In light of Mr. MacLennan's testimony, a complaint was filed and an investigation initiated by Ontario's Information and Privacy Commissioner. The Commissioner's investigation was expanded to include the Premier's Office after it was revealed that David Livingstone,

⁵⁸⁶ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), *Deleting Accountability: Records Management Practices of Political Staff* (June 5, 2013), pp. 4-6.

⁵⁸⁷ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), *Deleting Accountability: Records Management Practices of Political Staff* (June 5, 2013), pp. 4-6.

⁵⁸⁸ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), *Deleting Accountability: Records Management Practices of Political Staff* (June 5, 2013), p. 5.

⁵⁸⁹ **C-0743**, Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, Standing Committee on Justice Policy (April 9, 2013), pp. JP-181-195.

Premier McGuinty's Chief of Staff and the person who took the "lead [in] the negotiations with TransCanada" concerning the cancellation of one of the two gas plants, made inquiries about how to "wipe clean" computers in their office after Premier McGuinty's resignation.⁵⁹⁰

370. The Information and Privacy Commissioner's report, in addition to concluding that Mr. MacLennan violated his record-keeping obligations,⁵⁹¹ made the following observations:

- a) [i]t is "quite frankly, unbelievable" that any member of a Minister's office would think it appropriate to delete all emails in their inbox (Mr. MacLennan claimed that he deleted emails to keep a clean inbox);⁵⁹²
- b) it was difficult "to accept that there was no attempt by staff in the former Minister's office to avoid transparency and accountability in relation to their work";⁵⁹³
- c) it "strains credulity" to claim that there are no responsive records at the former Minister's office in relation to a significant government initiative, such as closing two gas plants;⁵⁹⁴ and
- d) the Commissioner was unable to say with certainty that emails were inappropriately deleted by staff at the Premier's Office, but she found it "difficult to escape that conclusion."⁵⁹⁵

⁵⁹⁰ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), Deleting Accountability: Records Management Practices of Political Staff (June 5, 2013), p. 24.

⁵⁹¹ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), Deleting Accountability: Records Management Practices of Political Staff (June 5, 2013), p. 15.

⁵⁹² **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), Deleting Accountability: Records Management Practices of Political Staff (June 5, 2013), p. 13.

⁵⁹³ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), Deleting Accountability: Records Management Practices of Political Staff (June 5, 2013), p. 15.

⁵⁹⁴ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), Deleting Accountability: Records Management Practices of Political Staff (June 5, 2013), p. 15.

⁵⁹⁵ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), Deleting Accountability: Records Management Practices of Political Staff (June 5, 2013), p. 26.

371. Mr. Livingstone is currently facing criminal charges for breach of trust for his involvement in the deletion of emails at the Premier's Office following the cancellation of the gas plants.⁵⁹⁶

372. In addition, the Secretary of Cabinet testified before the Standing Committee that the email accounts of Chris Morley (former Chief of Staff to Premier McGuinty),⁵⁹⁷ Sean Mullin (former Deputy Director of Policy at the Premier's Office who was responsible for the energy portfolio from November 2009 to October 2011)⁵⁹⁸ and Jamison Steeve (former Principal Secretary to Premier McGuinty)⁵⁹⁹ were all deleted on instructions from Premier's Office staff during the transition from Dalton McGuinty to Kathleen Wynne as Premier.⁶⁰⁰ The Premier's Office Director of Human Resources confirmed that the email accounts of Chris Morley, Sean Mullin and Jamison Steeve were purged on August 17, 2012, a full three months after the Legislative Committee's motion requiring the production of materials relevant to the gas plant cancellation (the motion was passed May 16, 2012).⁶⁰¹

373. Mr. Wallace (the Secretary of the Cabinet) stressed that he had been "assured" by former staff at the Premier's Office that they had complied with their record-keeping obligations. However, the Cabinet Office does not have oversight over record retention at the Premier's Office. All they can do is inform Premier's Office staff of their obligations, and trust that

⁵⁹⁶ **C-0684**, Article (Postmedia News), Ontario police pursuing a criminal charge against McGuinty's chief of staff over gas plant scandal (March 27, 2014); **C-0691**, Article (The Globe and Mail), IT Expert linked to Ontario gas-plant scandal to testify by videoconference (April 14, 2014); **C-0681**, Letter from Wagmer, Wendy (Gowlings) to Cameron, Gord (Blake, Cassels & Graydon LLP) (March 19, 2014) with attached copy of the sealed Search Warrant materials re R. v. David Livingstone; **C-0696**, Article (Canadian Politics), Dalton McGuinty questioned in probe of alleged gas plant scandal coverup, OPP confirms (June 5, 2014).

⁵⁹⁷ **C-0662**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (June 18, 2013).

⁵⁹⁸ **C-0650**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 23, 2013), p. JP-298.

⁵⁹⁹ **C-0646**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 26, 2013).

⁶⁰⁰ **C-0660**, Legislative Assembly of Ontario, Standing Committee on Justice Policy (June 11, 2013).

⁶⁰¹ **C-0663**, Legislative Assembly of Ontario, Standing Committee on Justice Policy (June 18, 2013).

Premier's Office staff will comply.⁶⁰² In addition, John Brodhead, Premier McGuinty's Deputy Chief of Staff, testified that document retention training at the Premier's Office was inadequate.⁶⁰³

374. As described above, in the present arbitration, Canada has produced no emails from Sean Mullin or others in the Premier's Office, and only three emails from Mr. MacLennan.⁶⁰⁴ It is extremely unlikely that there are no relevant emails that were sent by the policy advisor at the Premier's Office responsible for the energy portfolio and only three relevant emails sent by the Minister of Energy's Chief of Staff during this period.

375. This conclusion is reinforced by the fact that Windstream received emails originating from other email addresses in the government that were directed at Mr. Mullin and Mr. MacLennan and which addressed the Windstream situation.⁶⁰⁵ Similarly, handwritten notes excerpted above in paragraph 347 from a meeting where offshore wind energy was discussed indicate that Mr. Mullin was present and that he expressed the government's concern about public opposition to offshore wind. Mr. Mullin was clearly involved in issues surrounding offshore wind.

376. Correspondence between staff at the relevant Ministries during their December 2010 and January 2011 discussions about offshore wind energy policy indicate direction was given by the Premier's Office and that relevant materials were forwarded to the Premier's Office, including:

⁶⁰² **C-0660**, Legislative Assembly of Ontario, Standing Committee on Justice Policy (June 11, 2013).

⁶⁰³ **C-0665**, Legislative Assembly of Ontario, Standing Committee on Justice Policy (August 13, 2013).

⁶⁰⁴ **C-0564**, Email from MacLennan, Craig (ENERGY) to McGoey, Eric (MNR) (November 25, 2011); **C-0565**, Email from MacLennan, Craig (ENERGY) to McGoey, Eric (MNR) (November 25, 2011); **C-0398**, Email from Penic, Jordon (MEI) to MacLennan, Craig (MEI) (December 5, 2010).

⁶⁰⁵ For example, another Premier's Office employee, Caitlin McClung, forwarded an email about Windstream from Bliss Baker, Windstream's government relations consultant, to Mr. Mullin and Mr. MacLennan asking whether the PO had a "game plan" to deal with the issue raised by Mr. Baker. **C-0540**, Email from McClung, Caitlin (OPO) Mullin, Sean (OPO) et al (June 16, 2011).

- a) Staff from the relevant Ministries noted that political staff met in December 2010 to discuss offshore policy.⁶⁰⁶
- b) The Premier's Office endorsed the [REDACTED] to offshore wind development.⁶⁰⁷
- c) On January 10, 2011 the Premier's Office requested a copy of the draft communications plan for the announcement of [REDACTED], and on January 11, 2011, a draft communications plan outlining [REDACTED] [REDACTED] was forwarded to the Premier's Office.⁶⁰⁸
- d) The shift [REDACTED] only came after the MEI received direction from the Premier's Office.⁶⁰⁹

377. Despite the Premier's Office involvement in discussions about offshore wind energy policy, no documents emanating from the Premier's Office have been produced. Given the temporal and subject-matter overlap between the gas plant scandal and the events at issue in this arbitration, the only reasonable conclusion is that emails relevant to offshore wind and Windstream likely were deleted along with emails concerning the gas plants cancellation.

378. Counsel for Canada has advised that the deleted emails cannot be recovered through any back-up tapes.

379. The Tribunal has issued a Procedural Order dated 16 September 2013 (the "Procedural Order") to guide the procedures of this arbitration. This Procedural Order is silent on the issue of destruction or withholding of documents. Paragraph 4.2 of the Procedural Order sets out that where neither the Procedural Order nor the 2010 UNCITRAL Arbitration Rules address a specific procedural issue, the Tribunal may seek guidance from the 2010 IBA Rules on the

⁶⁰⁶ See above ¶ 353.

⁶⁰⁷ See above ¶ 354.

⁶⁰⁸ See above ¶ 354.

⁶⁰⁹ See above ¶ 359.

Taking of Evidence in International Arbitration. Articles 9(5) and (6) of the IBA Rules clearly state that if a party fails without satisfactory explanation to produce any document ordered to be produced or to make available any other relevant evidence sought by a party, the Tribunal may infer that such evidence would be adverse to the interests of that party.⁶¹⁰

380. Tribunals have also recognized that they are free to draw adverse inferences from the failure to disclose documents or from the withholding of document that should have been disclosed. For example, the Tribunal in *Waste Management II* issued a Procedural Order that provided some guidance regarding disclosure. It cited the IBA rules, noting that under the IBA Rules, the ultimate sanction for non-disclosure is the drawing of an adverse inference against the non-disclosing party.⁶¹¹

381. For these reasons, Windstream submits that the Tribunal should draw an adverse inference from the destruction of internal emails from the Premier's Office.

XVIII. ONTARIO MAKES NO SERIOUS EFFORTS TO ADVANCE SCIENTIFIC RESEARCH FOLLOWING THE MORATORIUM

382. Although the Ontario Government's justification for the moratorium was the need to conduct further scientific research respecting the impacts of offshore wind energy, the documents obtained by Windstream through Freedom of Information requests and document production in this arbitration suggest that very little of that research appears to have been done at all. As described below, there has been, and continues to be, a lack of political will to proceed with and fund the research. Although the Ministries concerned in early 2012 identified work that

⁶¹⁰ **CL-006**, International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (29 May 2010), Article 9(5) ("If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.") and Article 9(6) ("If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.")

⁶¹¹ **CL-090**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Procedural Order concerning Disclosure of Documents, 1 October 2002 ¶ 6.

needed to be undertaken following the moratorium,⁶¹² they do not appear to have received the required funding to undertake the work or to otherwise have it completed. The research that should have been undertaken has been heavily delayed, and most of it appears to have never been initiated.

383. Aside from one study regarding the potential effects of electromagnetic frequencies from submarine cables on fish, no scientific research appears to have been completed – other than certain research studies that were commissioned and already underway before the moratorium was imposed. These pre-moratorium studies and their results, referred to at paragraphs 216 and 217 above and in Section XVIII.B below, reinforce the fact that the Ontario Government Ministries were not without the appropriate work to develop guidance for offshore wind prior to the moratorium. Interestingly, for no apparent reason other than what one MNR official calls “paranoid sensitivity” surrounding offshore wind science, the release of those pre-moratorium studies has been significantly delayed.⁶¹³

384. [REDACTED]

⁶¹² **C-0607**, Project Charter (MOE), Green Energy Program/Renewable Energy Approvals (March 29, 2012), **C-0598**, Presentation (MOE), Offshore Wind Power Development - Proposed Research Plan, MO Briefing (February 17, 2012); **C-0592**, Who's Doing What in Great Lakes (February 9, 2012), **C-0590**, Chart (MOE), Identified Research Needs - Chronological (February 6, 2012).

⁶¹³ **C-0532**, Email from Cain, Ken (MNR) to Carter, Peter (MNR) (May 13, 2011); **C-0593**, Email from Singh, Aastha (MNR) to Cain, Ken (MNR) (February 10, 2012); **C-0536**, Email from Orsatti, Sandra (MNR) to Dunlop, Erin (MNR) (June 7, 2011).

⁶¹⁴ **C-0584**, Offshore Wind Research (January 20, 2012).

A. Ministries in Charge of Conducting the Research Have Not Received the Required Funding to Undertake the Research

385. It appears from the documentation provided that the Ontario Government has not provided sufficient resources for the relevant Ministries to conduct the research they had committed to conduct.

386. In a document entitled “Identified Research Needs – Chronological” (dated February 7, 2012), all MOE research projects planned for 2012 onwards (noise, water quality, technical standards and safety, decommission and valuation of financial assurances, fisheries) are described as pending subject to “resource approval.”⁶¹⁵

387. As of May 2012, of the \$2.5 million to \$3.5 million required to undertake the required research to advance the offshore development framework, only \$216,500 (\$200,000 for fiscal year 2012-2013; \$16,500 for fiscal year 2013-2014) had been obtained – by the MOE to support the REA program for offshore wind.⁶¹⁶ In an email, Mr. Boysen of MNR stated that “[f]rom an MNR perspective, the research pegged to us is possible (doable) – but not within the current fiscal envelope.”⁶¹⁷

B. No Scientific Research Has Been Completed, Other Than Research That Was Commissioned and Conducted Before the Moratorium Was Imposed

388. As described at paragraph 216 above, MNR and MOE had commissioned a number of research studies respecting offshore wind well in advance of the February 2011 moratorium, as part of its process of developing regulatory standards for offshore wind development.⁶¹⁸ As described at paragraph 217 above, a number of those studies have been completed and some published. However, those studies commissioned before the moratorium were distinct from the studies the Ontario Government identified that it needed to carry out once the moratorium was imposed.

⁶¹⁵ C-0591, Report (MNR) - Identified Research Needs - Chronological (February 7, 2012).

⁶¹⁶ C-0611, Presentation (MOE), Offshore Wind Power Development - Proposed Research Plan (Confidential) (May 2012), ¶ 8; C-0583, Business Case (MOE), Green Energy Act (January 19, 2012), p. 7.

⁶¹⁷ C-0591, Report (MNR) – Identified Research Needs - Chronological (February 7, 2012).

⁶¹⁸ C-0559, Presentation (MOE), Status of Wind Energy Science (October 19, 2011).

389. Of those studies that the MNR, MOE and MEI identified they needed to carry out after the moratorium,⁶¹⁹ only one – on the impacts of electromagnetic fields from the Wolfe Island wind farm submarine cable – has been completed (though not published). The authors of that study found “no evidence that the [long, high voltage] cable, and resulting [electromagnetic fields], are having a detectable effect on fish distribution.”⁶²⁰

390. Internal MOE, MNR and MEI correspondence reflects a lack of direction or will to carry out studies respecting offshore wind issues. For example, it appears that MOE has not done work on noise studies since the moratorium, despite the fact that, according to MNR officials, the lack of noise studies was a “big piece of missing information to inform a setback requirement” and MOE “could easily do an “*in situ*” study by placing some meters on shore in Kingston to see if you can pick up any noise from turbines on Wolfe Island, for instance.”⁶²¹ November 2012 correspondence among MOE officials indicates that MOE had wanted “to move ahead with the noise work as a priority, however, there was no appetite to see this work move ahead early.”⁶²² This delay in conducting the required research may be explained by the fact that MOE officials regarded the two proposed noise studies as “contentious” and thought that the “Premier’s Office may not want to go down that road.”⁶²³ By November 1, 2012, none of the \$216,500 obtained by

⁶¹⁹ For a description of the proposed post-moratorium studies, see: **C-0597**, Appendix A (MOE): Identified Research Needs (February 16, 2012) (identifying five MNR and two MEI proposed studies); **C-0585**, Presentation (MOE), Off-shore Wind Development - Path Forward (January 2012), pp. 5-10 and **C-0583**, Business Case (MOE), Green Energy Act (January 19, 2012), ¶ 7 (identifying two MOE proposed sound studies); and **C-0628**, Email from SDB, Coordinator (ENE) to Radcliffe, Steve (ENE) (November 1, 2012) (identifying three additional proposed MOE studies proposed respecting offshore wind).

⁶²⁰ **C-0685**, Report (Final Draft), Erin S. Dunlop, Scott Reid, Meghan Murrant (MNR), Impacts of electromagnetic fields from the Wolfe Island wind power project submarine cable on fish biodiversity and distribution, Aquatic Research and Monitoring Section, Ontario Mini (March 31, 2014), ¶ 2.

⁶²¹ **C-0595**, Email from Neary, Anne (MNR) to Orsatti, Sandra (MNR) (February 14, 2012). In the Communications Rollout following the decision to impose the moratorium, Ontario indicated the “MOE will conduct research to develop appropriate noise modeling that will enable us to assess the noise impacts and ensure compliance with noise limits”: **C-0182**, Note - Offshore Wind Communications Note (February 2010).

⁶²² **C-0629**, Email from Klose, Steven (ENE) to Neary, Anne (ENE) (November 6, 2012).

⁶²³ **C-0612**, Email from Stark, Deb (ENE) to Buckley, Erin (ENE) (May 4, 2012).

MOE, as described in paragraph 387 above, had been spent on any studies. As one MOE staff member stated, “[i]t’s already November and the money will run out by March.”⁶²⁴

391. As noted above, with the exception of the electromagnetic fields study, it appears that the only studies being completed following the moratorium were those that had already been commissioned by MNR before the moratorium was announced. The fact that only these MNR studies were going ahead was a source of concern for government officials when they received media inquiries respecting research about offshore wind. As one MNR official stated in an internal email in October 2011, after receiving inquiries from the Toronto Star newspaper: “Just got off the call with Energy and Environment. Energy is going to try to keep the response [to the Toronto Star] as high level as possible. Initially, they probably won’t even offer the level of detail we’ve provided. All parties agreed that we didn’t want to send the message that only MNR is undertaking research. Environment flagged that at the time of the moratorium they had told several press outlets that they might conduct noise studies but to date they haven’t pursued it.”⁶²⁵ When discussing preparation of a news release on offshore wind in May 2012, MNR officials stated that “[t]he reality is that MNR’s work is the only science/research that the province of Ontario can put forward – other ministries did not undertake any research, even though the February 2011 government rational said that more science was needed.”⁶²⁶

392. But even MNR appears to have placed a low priority on carrying out research beyond the research it had commissioned prior to the moratorium. A February 14, 2012 email indicated that MNR already had “some pretty good information on birds and bats”, and that therefore it was not a research priority.⁶²⁷ A June 6, 2012 email stated that MNR would “not be doing a second year of field work related to the Wolfe Island cable, [electromagnetic fields] and fish.”⁶²⁸ Internal

⁶²⁴ **C-0628**, Email from SDB, Coordinator (ENE) to Radcliffe, Steve (ENE) (November 1, 2012).

⁶²⁵ **C-0554**, Email from Whytock, John (MNR) to Richard, Peter (MNR) et al (October 5, 2011).

⁶²⁶ **C-0615**, Email from Cain, Ken (MNR) to Dahari, Raj (MNR) (May 17, 2012). See also **C-0614**, Email from Orsatti, Sandra (MNR) to Neary, Anne (MNR) (May 8, 2012).

⁶²⁷ **C-0595**, Email from Neary, Anne (MNR) to Orsatti, Sandra (MNR) (February 14, 2012).

⁶²⁸ **C-0618**, Email from Orsatti, Sandra (MNR) to Reid, Scott (MNR) et al (June 6, 2012); **C-0622**, Next Steps: Offshore Windpower Development - Proposed Research Plan (July 17, 2012).

correspondence setting out the perspectives of the relevant MNR officials respecting this research casts doubt further on that the moratorium was truly motivated by a lack of science about offshore wind. In an email dated October 4, 2011, Mr. Cain of MNR states that he was hesitant to provide a list of science being undertaken in response to a query from a journalist at the Toronto Star: “I can give you the wonderful list of science we’re doing, but careful, we need to be sure that we have “approval” to speak to this science, in light of the government’s Feb 2011 decision that “lack of science” is the reason for the offshore wind deferral.”⁶²⁹ In another internal email sent on October 4, 2011 and related to the same query, Mr. Boysen of MNR states that “[a]s part of the deferral decision, government committed to doing further studies. We have a number we can point to, but they aren’t necessarily related to the commitment.”⁶³⁰ In a March 6, 2012 email responding to a query about “what science would be required in the short term to support an accelerated decision on a possible facility application”, Mr. Cain responds: “[we] have never had a magic list of minimum science or technical info needs. We always assumed we’d proceed with what we had at the time and that the proponent would be required to collect the balance – straight forward approach that is taken for all types of development on private or Crown land.”⁶³¹

393. The fact that this issue was more about politics than science is also supported by evidence of the difficulty that MNR officials appear to have had deciding whether or not to release the results of the studies MNR had commissioned prior to the moratorium. In February 2011 a “final version” of the MNR research on the impact on fisheries was circulated by one of the report’s authors, Erin Dunlop.⁶³² This report and a second report were readied for publication in August 2011 and a briefing note was prepared for the MNR indicating that the documents were to be published on the MNR’s website (the “usual practice for technical reports”).⁶³³ Despite the fact

⁶²⁹ C-0553, Email from Neary, Anne (MNR) to Cain, Ken (MNR) (October 4, 2011).

⁶³⁰ C-0553, Email from Neary, Anne (MNR) to Cain, Ken (MNR) (October 4, 2011).

⁶³¹ C-0604, Email from Orsatti, Sandra (MNR) to Cain, Ken (MNR) (March 6, 2012).

⁶³² C-0509, Email from Dunlop, Erin (MNR) to Carter, Peter (MNR) (February 28, 2011); C-0510, Report (MNR), The potential effects of offshore wind power projects on fish and fish habitat in the Great Lakes (February 28, 2011).

⁶³³ C-0545, Email from Orsatti, Sandra (MNR) to Cain, Ken (MNR) (August 24, 2011); C-0546, Briefing Note (MNR), Minister's Information Briefing Note (August 24, 2011); C-0547, Report (MNR) – Aquatic Research

that these reports were ready to be published, MNR chose not to publish them. An email in December 2011 from MNR indicated that “per direction” they would not be released until after the Minister’s Office was briefed on offshore windpower later in December.⁶³⁴ This was later pushed off to January 2012,⁶³⁵ and then February 2012.⁶³⁶

394. In a January 2012 email, an MNR official stated that there were “a lot of challenges trying to get approval to release the three reports offshore is very politicized at this point.”⁶³⁷ Another MNR email, written around the same time, suggests that releasing the reports may cause the MOE to “be a little sensitive, because it may expose that they have not yet undertaken any research.”⁶³⁸ The MNR also expressed a concern that withholding the reports any longer may “precipitate a [freedom of information] request.”⁶³⁹ It commented that their release could “be positively received by industry who will view their release as a precursor to a provincial policy on offshore wind” on one hand, and “be received negatively by anti-wind groups, anticipating future policy action by government on offshore wind” on the other.⁶⁴⁰

395. In August 2012, one of the three studies was “inadvertently” posted on the MNR website. It was immediately taken down.⁶⁴¹

Series 2011-01 – The potential effects of offshore wind power projects on fish and fish habitat in the great lakes (July 2011); **C-0548**, Report (MNR), Nienhuis, Sarah and Dunlop, Erin S. "Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat" Aquatic Research Series 2011-02 (July 2011).

⁶³⁴ **C-0571**, Email from Orsatti, Sandra (MNR) to Dunlop, Erin (MNR) (December 8, 2011).

⁶³⁵ **C-0578**, Email from Orsatti, Sandra (MNR) to Dunlop, Erin (MNR) (December 23, 2011).

⁶³⁶ **C-0599**, Email from Orsatti, Sandra (MNR) to Gorman, Natalie (MNR) (February 21, 2012).

⁶³⁷ **C-0589**, Email from Edwards, Kevin (MNR) to Nienhuis, Sarah (MNR) (February 2, 2012) (see email from Kevin Edwards (MNR) January 30, 2012).

⁶³⁸ **C-0582**, Email from Cicconi, Ottavio (MNR) to Cain, Ken (MNR) (January 9, 2012) (see email from Candace Major (MNR) January 4, 2012).

⁶³⁹ **C-0586**, Presentation (MNR), Offshore Wind Power Science (Confidential) (January 25, 2012), ¶ 7.

⁶⁴⁰ **C-0586**, Presentation (MNR), Offshore Wind Power Science (Confidential) (January 25, 2012), ¶¶ 7-8.

⁶⁴¹ **C-0624**, Email from Carter, Peter (MNR) to Boysen, Eric (MNR) et al (August 10, 2012) (see email from Peter Carter (MNR) August 10, 2012).

396. The three reports were posted again on the MNR website in February 2013 – an event that appears to have caused concern within the MNR⁶⁴² In response to this release, a MNR official asked:

It has come to my attention that offshore wind studies were posted on our MNR website Friday - I need some information about this file by tomorrow morning at 1030

1. Background on what these studies are - 5Ws
2. Who authorized the release and posting of these studies - DMO? ADMO? I am not aware of any approvals from the Deputy and this [is] something that the MO has been keeping an eye [on] and was in discussions with Premier's Office about. So it looks like they were released without approval. Please correct me if I'm wrong.
3. Why were they released?
4. What are the implications if we remove these reports temporarily?
5. Do we have key messages / comms plan in place to respond to the posting and potential questions? If not, do these need to be developed?⁶⁴³

397. The MNR immediately started preparing briefing documents to respond to the release of the studies. In these documents, MNR officials alluded to the fact that no scientific research was planned. For example, in February 2013 email correspondence, two MNR officials stated:

Sandra Orsatti: "I am not sure we can accept the bullet [in the Offshore wind Q&A briefing document] that Ontario is committed to continuing offshore research unless MOE has a confirmed work plan to do so."

Eric Boysen: "I wasn't concerned. It is an open-ended statement - not a commitment."

...

Eric Boysen: "A reasonable investment to inform a policy position. But no big studies for MNR. MOE will need to consider their noise thresholds."⁶⁴⁴

⁶⁴² **C-0642**, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) (February 14, 2013) (see email from Boysen, Eric (MNR) to Cain, Ken (MNR) February 13, 2013).

⁶⁴³ **C-0642**, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) (February 14, 2013) (see email from Hayley Berlin (MNR) February 13, 2013).

C.

[REDACTED]

398.

[REDACTED]

399.

[REDACTED]

⁶⁴⁴ C-0643, Email from Boysen, Eric (MNR) to Cain, Kevin (MNR) (February 14, 2013) (see email from Sandra Orsatti (MNR) to Eric Boysen (MNR) February 14, 2013).

⁶⁴⁵ C-0577, Assistant Deputy Minister's Information Briefing Note (MNR) (December 20, 2011).

⁶⁴⁶ C-0555, Presentation (MOE), Renewable Energy Approval (REA) Off-shore Wind (October 14, 2011).

⁶⁴⁷ C-0584, Offshore Wind Research (January 20, 2012).

⁶⁴⁸ C-0177, Email from Collins, Jason R. (ENERGY) to Cain, Ken (MNR) et al (January 10, 2010).

⁶⁴⁹ C-0616, Decision/Approval Note from Stark, Deb (ENE) to Deputy Beggs (May 28, 2012).

⁶⁵⁰ C-0617, Communications Plan Snapshot: Offshore Wind Turbine Research (May 30, 2012).

400. [REDACTED]

XIX. ONTARIO TREATS WINDSTREAM LESS FAVOURABLY THAN OTHER INVESTORS

A. Ontario Arranges to Relocate TransCanada’s Gas Generation Facility and to Keep TransCanada Whole

401. In late 2010, in the lead-up to the 2011 provincial election, Ontario cancelled a gas-fired power plant planned for Oakville, Ontario owned by TransCanada Energy Ltd. – a Canadian company.⁶⁵³ TransCanada’s project faced significant local opposition in Oakville, an electoral riding that was expected to be significantly contested in the upcoming election.⁶⁵⁴ TransCanada had a power purchase agreement with the OPA for its project,⁶⁵⁵ which was under *force majeure* as a result of a legal dispute between TransCanada and the Town of Oakville in connection with a municipal by-law that purported to prevent TransCanada from building the project.⁶⁵⁶

⁶⁵¹ C-0623, Email from SDB, Coordinator (ENE) to Radcliffe, Steve (ENE) (July 20, 2012).

⁶⁵² C-0628, Email from SDB, Coordinator (ENE) to Radcliffe, Steve (ENE) (November 1, 2012).

⁶⁵³ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 5; C-0714, Certificate of Compliance (Industry Canada) for TransCanada Energy Ltd. (August 15, 2014); C-0713, Certificate of Compliance (Industry Canada) for TransCanada Corporation (August 15, 2014).

⁶⁵⁴ C-0239, Article, Radwanski, Adam (Globe and Mail), Why Kevin Flynn Can't Stop the Oakville Gas Plant (April 28, 2010); C-0372, Article, Ferguson, Rob et al (Toronto Star), Worried Liberals Pull Plug on Oakville Gas Plant (October 7, 2010); C-0373, Article (The Canadian Press), Liberals Back Off Plans for Oakville Gas Plant Amid Intense Opposition (October 7, 2010); C-0697, Article (Kalinowski, Tess), Liberal Kevin Flynn Wins Oakville in Ontario Election (June 12, 2014); C-0672, Article, Howlett, Karen (Globe and Mail), McGuinty Could Have Cancelled Gas Plant with No Compensation Costs, Audit to Show (October 8, 2013).

⁶⁵⁵ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 5.

⁶⁵⁶ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), pp. 9, 14.

402. Ontario provided substantial compensation to TransCanada as a result of the cancellation of its project. On September 24, 2011 the government announced that it had agreed with TransCanada to relocate the Oakville gas plant to Ontario Power Generation Inc.'s Lennox Generating Station (the same location where the WWIS Project would have connected to Ontario's electricity grid). Ontario agreed to pay TransCanada \$40 million to cover sunk costs incurred for goods and services that cannot be moved to the Lennox site. The OPA also agreed to purchase the turbines that were to be used at the Oakville plant for \$210 million and use them at the Lennox Generating Station.⁶⁵⁷ The Auditor General of Ontario estimates that the total cost to Ontario of the decision to relocate the Oakville gas plant could be as high as \$675 million.⁶⁵⁸

403. During an investigation into the cost of the cancellation, it emerged that before cancelling the Oakville gas plant, officials from the Premier's Office had made a commitment to TransCanada that it would be "kept whole" in the event that the plant was cancelled. This commitment is evidenced in extensive testimony given before the Standing Committee on Justice and Policy of the Ontario Legislature. To this end, the government directed the OPA to reach an agreement with TransCanada that would ensure that TransCanada retained the full value of its contract. However, at the time, TransCanada, like Windstream, had made a declaration of *force majeure* under its contract with the OPA because of various regulatory hurdles the gas plant faced. And, like Windstream's FIT Contract, there was a provision in TransCanada's contract with the OPA that would have permitted the OPA to cancel TransCanada's contract in the event that the state of *force majeure* caused the MCOD for the Oakville gas plant to be delayed by 24 months without the OPA incurring any kind of penalty.

404. Further details respecting Ontario's arrangement with TransCanada are set out below.

⁶⁵⁷ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), pp. 16-17.

⁶⁵⁸ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 7.

1. TransCanada Obtains Power Purchase Agreement from OPA to Build Gas Plant in Oakville and Public Opposition Grows

405. TransCanada received its Contract following an RFP initiated by the OPA in the fall of 2008 for the procurement of approximately 850 megawatts of gas-fired electricity generation facilities in the Southwestern Greater Toronto Area.⁶⁵⁹ The OPA was directed to initiate this process by the Minister of Energy.⁶⁶⁰ The OPA accepted TransCanada's bid to construct a 900 megawatt facility in Oakville in September 2009, and in October 2009 the project contract was signed.⁶⁶¹

406. Even before the deal was signed, local resistance in Oakville had begun to grow. Throughout the spring of 2009, the Town of Oakville began to enact a series of measures to impede the construction of the gas plant within its borders.⁶⁶² The Mayor of Oakville later said that he would have fought efforts to build the plant all the way to the Supreme Court of Canada.⁶⁶³

2. TransCanada Contract Contained *Force Majeure* Provisions like Those in WWIS FIT Contract That Would Enable OPA To Terminate The Power Purchase Agreement without Liability if TransCanada's Gas Plant Was Cancelled and Could not be Constructed within Two Years of MCOB

407. Like Windstream's FIT Contract, TransCanada's contract allowed it to declare *force majeure* in the event of "any act, event, cause or condition that prevents a Party from performing its obligations (other than payment obligations) hereunder, and that is beyond the affected

⁶⁵⁹ **C-0142**, OPA, Request for Proposals for up to Approximately 850 MW of Generation in the Southwest Greater Toronto Area (SWGTA RFP), Fairness Review (September 24, 2009), ¶ 8; **C-0127**, Addendum No. 2, OPA's Southwest GTA Clean Energy Supply (CES) Contract (the "Southwest GTA Contract Addendum No. 2") in connection with the OPA's Southwest GTA RFP (June 19, 2009). (This is the form of contract entered into by TransCanada and the OPA).

⁶⁶⁰ **C-0085**, Letter from Smitherman, George (MEI) to Carr, Jan (OPA), (August 18, 2008).

⁶⁶¹ **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 13.

⁶⁶² **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 12.

⁶⁶³ **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 15.

Party's reasonable control."⁶⁶⁴ TransCanada was unable to secure the approvals required from the Town of Oakville and filed two notices of *force majeure*.⁶⁶⁵

408. TransCanada's contract contained a temporal limitation on *force majeure* identical to the one in Windstream's FIT Contract: a delay of more than 24 months beyond MCOB permitted either party to terminate the contract without penalty.⁶⁶⁶ The OPA, recognizing the Ontario Government's desire to cancel the Oakville gas plant and cognizant that, as TransCanada's counterparty it might face liability in the event the project did not move forward, retained Aird & Berlis LLP in February 2010 to provide a legal opinion about the OPA's potential liability in the event TransCanada was unable to move ahead with the project.⁶⁶⁷

409. The OPA, recognizing the Ontario Government's desire to cancel the Oakville gas plant and cognizant that, as TransCanada's counterparty it might face liability in the event the project did not move forward, retained Aird & Berlis LLP in February 2010 to provide a legal opinion about the OPA's potential liability in the event TransCanada was unable to move ahead with the project.⁶⁶⁸

410. Aird & Berlis LLP concluded that the OPA could rely on the limitation to terminate the contract without penalty in the event that a third party, such as the Town of Oakville, were to deny a permit that was necessary for TransCanada to meet its COD.⁶⁶⁹ In other words, in the event of *force majeure*, all the OPA would have to do is wait until the Project failed to become operational within two years of its milestone commercial operation date, at which point it would

⁶⁶⁴ **C-0127**, Addendum No. 2, OPA's Southwest GTA Clean Energy Supply (CES) Contract (the "Southwest GTA Contract Addendum No. 2") in connection with the OPA's Southwest GTA RFP (June 19, 2009), ¶ 82.

⁶⁶⁵ **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 14.

⁶⁶⁶ **C-0127**, Addendum No. 2, OPA's Southwest GTA Clean Energy Supply (CES) Contract (the "Southwest GTA Contract Addendum No. 2") in connection with the OPA's Southwest GTA RFP (June 19, 2009), section 11.1(h), ¶ 81.

⁶⁶⁷ **C-0186**, Memorandum from Aird & Berlis to Ontario Power Authority (OPA) (February 17, 2010).

⁶⁶⁸ **C-0186**, Memorandum from Aird & Berlis to Ontario Power Authority (OPA) (February 17, 2010).

⁶⁶⁹ **C-0186**, Memorandum from Aird & Berlis to Ontario Power Authority (OPA) (February 17, 2010), ¶ 7.

be entitled to cancel the contract at no cost to itself or to the ratepayers and taxpayers of Ontario.⁶⁷⁰

3. Ontario Cancels Oakville Gas Plant, Directs OPA to Negotiate Replacement Project with TransCanada

411. On October 7, 2010, the Minister of Energy announced the cancellation of the Oakville power plant. A number of witnesses before the Standing Committee, including former Premier McGuinty and current Premier Wynne, confirmed that the Oakville gas plant was cancelled for political reasons – namely, that the government determined that the siting for the plant in a residential area was no longer appropriate.⁶⁷¹ The government made this decision to cancel the plant even though it was not itself party to any contract with TransCanada. Like Windstream, TransCanada’s contract was with the OPA. That day, the OPA sent a letter to TransCanada which specified that: (i) the OPA would not proceed with the TransCanada Contract, (ii) TransCanada was to cease all work surrounding the Oakville plant, and (iii) TransCanada was entitled to reasonable damages, including “the anticipated financial value of the contract.”⁶⁷² The OPA informed the Auditor General of Ontario that “if it had been consulted, it would have advised the Premier’s Office against making the keeping-whole commitment to TCE [TransCanada] because the OPA’s contract with TCE had provisions protecting the OPA from liability.”⁶⁷³

412. TransCanada understood the government’s commitment to “keep it whole” to mean that it would be offered a project replacing the Oakville plant that would reflect the financial value of that plant’s contract, including lost profits.⁶⁷⁴ The Ontario Government directed the OPA to enter

⁶⁷⁰ C-0186, Memorandum from Aird & Berlis to Ontario Power Authority (OPA) (February 17, 2010).

⁶⁷¹ C-0652, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 30, 2013), ¶ JP-368; C-0653, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), ¶ JP-399.

⁶⁷² C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 15.

⁶⁷³ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 15.

⁶⁷⁴ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 15.

into negotiations with TransCanada to find a replacement for the Oakville facility. The OPA offered to compensate TransCanada for its sunk costs, and offered a new 25-year contract for the procurement of electricity from a new gas-fired generation facility,⁶⁷⁵ however an agreement could not be reached.⁶⁷⁶

413. On August 5, 2011, the Ontario Government, TransCanada and the OPA agreed to submit their dispute to arbitration. In the arbitration agreement, the OPA waived the protections provided for under the contract, and further, the arbitrator was instructed “to not consider the possibility that TCE [TransCanada] would not have been able to obtain necessary approvals to construct and operate the Oakville plant.”⁶⁷⁷ The Auditor General noted that this “put TCE [TransCanada] into a considerably advantageous position.”⁶⁷⁸

4. OPA and TransCanada Reach Agreement for Alternative Facility that will Incur Higher Gas Transportation Costs and Higher Electricity Transmission Costs

414. On September 12, 2012, the date that the OPA and TransCanada were required to submit settlement offers to an arbitrator, the parties agreed to return to negotiations to attempt to reach a settlement. An agreement in principle was reached on September 24, 2012, whereby TransCanada would construct a new 900 megawatt generating facility at the existing Lennox Generating Station in Napanee, Ontario.⁶⁷⁹ Napanee is approximately 200 kilometres from the Greater Toronto Area (where the electricity produced by the facility is destined), whereas Oakville is approximately forty-five kilometres from the Greater Toronto Area. This project was

⁶⁷⁵ C-0519, Presentation (OPA), Winding Up of the Oakville Generating Station (OGS) Contract , Board of Directors - For Information (April 6, 2011), ¶¶ 2, 7-8.

⁶⁷⁶ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 15.

⁶⁷⁷ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 16.

⁶⁷⁸ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 16.

⁶⁷⁹ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶¶ 16-17.

selected despite the higher costs associated with transporting the gas to Napanee and transmitting the electricity to the Greater Toronto Area.

415. A final agreement, a Clean Energy Supply Contract, was concluded between the OPA and TransCanada on December 14, 2012.⁶⁸⁰ In addition to providing for the rates payable by the OPA to TransCanada for electricity generated at the new Napanee facility, the Agreement provided that: the OPA and the Province would reimburse TransCanada for all sunk costs associated with the Oakville plant, including the cost of the gas turbines purchased by TransCanada, and that the OPA will be responsible for the costs of gas delivery, gas management, connecting the plant to a gas source and connecting the plant to the IESO-controlled grid.⁶⁸¹ Under TransCanada's earlier contract with the OPA, TransCanada would have borne these costs.⁶⁸²

5. Political Decision-Makers are Closely Involved at All Stages

416. Around the time TransCanada filed its notice of *force majeure*, it sought the assistance of the Premier's Office in dealing with the situation in Oakville.⁶⁸³ The Ontario Government's discussions with TransCanada focused on possible alternate locations for the facility. Staff from the Premier's Office met with TransCanada in the fall of 2010, and according to Ontario's Auditor General "TCE [TransCanada] left the meeting with the understanding that, if the government cancelled the plant, TCE would be kept whole."⁶⁸⁴ In exchange, TransCanada

⁶⁸⁰ **C-0634**, Clean Energy Supply (CES) Contract between TransCanada Energy Ltd. and Ontario Power Authority (December 14, 2012).

⁶⁸¹ **C-0634**, Clean Energy Supply (CES) Contract between TransCanada Energy Ltd. and Ontario Power Authority (December 14, 2012), ¶¶ 39-41, Exhibit Y; **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 17.

⁶⁸² **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶¶ 17, 20.

⁶⁸³ **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 14.

⁶⁸⁴ **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 14.

agreed to maintain a low-profile and avoid litigation against the Ontario Government.⁶⁸⁵ The OPA, the counterparty to the contract, was not involved in these discussions.⁶⁸⁶

417. OPA officials gave extensive testimony at hearings before the Ontario Legislature's Standing Committee on Justice Policy during the Committee's investigation into the decision to cancel the gas plants. That testimony confirms that the government made a commitment to TransCanada to "keep it whole."⁶⁸⁷

418. Michael Killeavy, Director of Contract Management at the OPA, testified that the direction to "mak[e] TCE [TransCanada] whole" came from the government.⁶⁸⁸ Ben Chin, former Vice-President of Communications with the OPA, agreed the message from the Premier's office was to "[k]eep TransCanada whole or close to it."⁶⁸⁹ Mr. Killeavy also testified that officials from the government, including Craig MacLennan, the Minister of Energy's Chief of Staff, directed the OPA to increase the value of their counteroffers to TransCanada during negotiations, and that but for direction from the government, the OPA would not have made higher offers to TransCanada. Further, he said that the OPA would never have agreed to pay TransCanada its lost profits without direction from the government to make TransCanada whole. Mr. Killeavy acknowledged that the government's commitment to TransCanada undermined the OPA's "capacity to get a good deal for ratepayers."⁶⁹⁰

⁶⁸⁵ **C-0535**, Notes to file of Calwell, Carolyn (MEI) and Perun, Halyna (MEI) re Meeting with Michael Barrack and John Finnegan (June 2, 2011).

⁶⁸⁶ **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), ¶ 15.

⁶⁸⁷ In addition to the testimony cited below, the commitment to TransCanada to "keep it whole" is evidenced in notes made public by the government that describe several meetings between TransCanada and government officials, including the commitment to TransCanada that it would be kept whole: **C-0535**, Notes to file of Calwell, Carolyn (MEI) and Perun, Halyna (MEI) re Meeting with Michael Barrack and John Finnegan (June 2, 2011).

⁶⁸⁸ **C-0654**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-448.

⁶⁸⁹ **C-0669**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (September 26, 2013), p. JP-966.

⁶⁹⁰ **C-0654**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-448-JP-449.

419. Michael Lyle, General Counsel for the OPA, confirmed that the government's commitment to keep TransCanada whole effectively set aside the protections granted to the OPA under the contract.⁶⁹¹

420. Colin Anderson, CEO of the OPA, confirmed that the OPA discussed with the government the possibility of simply allowing the state of *force majeure* to persist to "see what happens, because the onus is on the developer [...] to get their permitting and their approvals [...]".⁶⁹² He confirmed that there were verbal instructions from the Premier's Office to grant TransCanada the "anticipated financial value of the project", but that the OPA was reluctant to sign a letter sent to TransCanada on October 7, 2011 making this commitment, since it abandoned the OPA's defences under the contract.⁶⁹³

421. JoAnne Butler, Vice President, Electricity Resources at the OPA, confirmed that the government made a commitment to TransCanada to keep it whole, that the direction came from the Minister of Energy, and that once that decision had been made, the OPA had no choice but to "parlay [it] into another commercially reasonable deal."⁶⁹⁴ The OPA was never directed in writing to enter into negotiations with TransCanada, or to "keep TransCanada whole."

422. Sean Mullin, a political staffer at the Premier's Office under Premier McGuinty, testified that the government, specifically the Premier and one of his Ministers (presumably the Minister of Energy), had decided not to let the state of *force majeure* for TransCanada's contract continue so that the OPA could eventually terminate TransCanada's contract.⁶⁹⁵ Instead, they directed the OPA to enter into negotiations with TransCanada:

⁶⁹¹ C-0653, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), p. JP-424.

⁶⁹² C-0675, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (October 29, 2013), p. JP-1101.

⁶⁹³ C-0675, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (October 29, 2013), pp. JP-1101-1102.

⁶⁹⁴ C-0645, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013), p. JP-80.

⁶⁹⁵ C-0650, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 23, 2013).

I think that was one of the things that was always taken into consideration, which was—when I referenced earlier the notion of the option of simply letting it play out and hoping that TransCanada would fail, the risk associated with that would be that some costs would increase. Once I believe the Premier and the minister decided it was not appropriate to have that plan go forward, then it made sense to make that announcement as soon as possible and have the OPA start to negotiate as soon as possible.

423. David Lindsay, former Deputy Minister of Energy, testified that the Premier's Office and his political staff initiated the decision to relocate the Oakville gas plant:

Mr. Peter Tabuns: ... It all goes back to the Premier's office is what you're saying to me. Shelly Jamieson didn't initiate this. You didn't initiate this.

Mr. David Lindsay: No.

Mr. Peter Tabuns: The minister didn't initiate this.

Mr. David Lindsay: No.

Mr. Peter Tabuns: It was the Premier who initiated this.

Mr. David Lindsay: The Premier and his political officials, yes.⁶⁹⁶

424. Chris Breen, TransCanada's lobbyist to the Ontario Government, indicated that he and other representatives of TransCanada were informed in meetings with political staff from the Premier's Office (including Sean Mullin and Jamison Steeve, whose email accounts were deleted following their departure from the Premier's Office – see paragraph 366) and MEI that the Oakville gas plant was going to be cancelled.⁶⁹⁷

425. The Auditor General of Ontario, Bonnie Lysyk, testified that Ontario taxpayers and ratepayers would have paid lower costs if the government had not made a commitment to TransCanada in October 2010:

⁶⁹⁶ C-0649, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 18, 2013), p. JP-275.

⁶⁹⁷ C-0651, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 25, 2013).

Ms. Lisa MacLeod: So in theory, any government of any political stripe could have cancelled the Oakville gas plant project for little to no cost to the taxpayer if proper digression were exercised and proper due diligence was undertaken?

Ms. Bonnie Lysyk: I think what we're saying is that if they waited it out until it was obvious that TransCanada Energy wouldn't be able to have the plant constructed before 24 months after the original in-service date, there would be lesser costs.⁶⁹⁸

B. Ontario Allows Samsung, a South Korean Company Without a FIT Contract, to Develop the Very Solar Project that Windstream Proposed as an Alternative Project

426. In July 2011, just two months after the OPA rejected Windstream's proposal to build a 100 megawatt solar project, Samsung issued a Notice of Proposal to build a 100 megawatt solar project in the Counties of Lennox and Addington and the City of Kingston. The project, called the Sol-luce Kingston Solar PV Energy Project, would occupy a virtually identical footprint as Windstream's proposed solar project, and, like Windstream's proposed project, would connect to a 230 kv circuit on the X3H transmission line.⁶⁹⁹ Samsung did not have a FIT contract for this project when Ontario rejected Windstream's proposal to build a solar project. Rather, Samsung signed a power purchase agreement with the OPA for this project in August 2011.⁷⁰⁰

C. MNR Grants Applicant of Record Status to Other Wind Developers

427. In the over six years since Windstream applied for Applicant of Record status to develop WWIS on Crown land, during which time Windstream's application has been neither accepted nor denied, MNR has granted Applicant of Record status for the testing and constructing of wind energy facilities on Crown land to at least 19 other wind energy developers, in several cases for more than one project.⁷⁰¹ This is despite MNR's commitment to Windstream on August 9, 2010

⁶⁹⁸ **C-0673**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (October 10, 2013), p. JP-1009.

⁶⁹⁹ **C-0644**, Presentation (Windstream), Windstream-Samsung Solar Comparisons (February 21, 2013).

⁷⁰⁰ **C-0621**, Email from Patrick, Robert (MEI) to Block, Jennifer (MEI) et al (July 6, 2012).

⁷⁰¹ **C-0690**, Map (Ortech), Windstream Application v. Crown Land Wind Sites with Accepted Applications (April 8, 2014).

that Windstream would receive Applicant of Record status in a “timely manner” (described above in paragraph 208).

XX. BUT FOR THE MORATORIUM, WINDSTREAM WOULD HAVE BROUGHT THE PROJECT TO COMMERCIAL OPERATION ON TIME

A. WWIS Did Not Face Significant Regulatory Uncertainty and the Regulatory Environment was Sufficiently Developed for WWIS to Proceed

428. Windstream has retained Sarah Powell, a lawyer at Davies, Ward Phillips and Vineberg LLP and a leading expert on the regulatory aspects of renewable energy projects to provide an expert report explaining the regulatory environment for offshore wind projects at the time Windstream made its investments. According to Ms. Powell, at the time it was awarded a FIT contract, Windstream did not face significant regulatory uncertainty. There are at least four reasons for this:

- a) First, the award of the FIT Contract was the “key gating issue for any developer intending to build an offshore wind project.”⁷⁰² It was generally understood among renewable energy developers that MNR would work to support the Ontario Government’s commitment to increase the province’s renewable energy supply by aligning its Site Release process and timelines with OPA’s renewable energy procurement process. As a result, after it was awarded a FIT contract, “it would have been commercially reasonable for [Windstream] to assume that it would obtain the requisite Crown land tenure in due course and in a timely manner.”⁷⁰³
- b) Second, at the time WWIS signed the FIT Contract, Ontario had committed itself to, and was in the process of, developing setbacks and noise requirements for offshore wind energy projects. As of August 2010, a developer would have reasonably expected that the applicable setbacks would be determined based on a project-specific assessment as part of the *Offshore Wind Facility Report* that

⁷⁰² CER-Powell ¶ 106.

⁷⁰³ CER-Powell ¶ 107.

project proponents were required to prepare (described above in paragraph 138). To the extent the release of setbacks was delayed, it would have been reasonable for a developer to assume that they would have been permitted to develop a project-specific approach to demonstrate conformity with MOE's requirements.⁷⁰⁴

c) Third, the REA Regulation and the APRD provided the provincial requirements for offshore wind energy projects, thereby providing Windstream with reasonable regulatory certainty with respect to the assessment process for offshore wind energy projects.⁷⁰⁵

d) Fourth, large-scale offshore developments in the Great Lakes are common and regulators in Ontario have decades of experience regulating in-water development and have extensive knowledge of Great Lakes ecosystems.⁷⁰⁶

429. As a result, it would have been reasonable for Windstream to assume that it would be awarded Applicant of Record status because of the receipt of the FIT Contract. It would also have been reasonable for Windstream to assume that any issues related to offshore development would have been managed by MNR, MOE and the Federal Department of Fisheries in accordance with the existing regulatory framework on a site-specific, application-based approach. This understanding of the regulatory process is consistent with the understanding expressed by the Director of MNR's Biodiversity Branch of the Renewable Energy Program in an email sent before MNR undertook a review of its policies (described above in Section IV.A):

[...] We know that there are shipping lanes out there. That is a federal responsibility. Through site specific, constraint-based planning, these lanes would be identified (by the proponent as part of the planning exercise), and no turbines would be allowed there.

[...] Other "no-go" zones will include archaeological heritage sites (very local), some critical Fish habitat (also local) – but all to be identified by the proponent as part of planning.

⁷⁰⁴ CER-Powell ¶ 100.

⁷⁰⁵ CER-Powell ¶ 95.

⁷⁰⁶ CER-Powell ¶ 95.

As for migratory routes – the birds fly north for two weeks in the spring, and south for two weeks in the fall. This leaves 48 weeks of non-migration, with potential migration in the shoulder seasons. Plenty of time to run a wind farm without impact.

More birds will die by running into Toronto’s lit-up high rises.

The point is – we don’t have all of the information. Our process is one where we identify our concerns and the proponent spends his time and money figuring it all out to our satisfaction. It works that way on dry land as well.⁷⁰⁷

430. Similarly, in an April 2010 email, prior to MNR initiating a review of its Site Release policy, MNR staff clearly indicated that there was an existing framework in place for dealing with offshore wind projects:

Again, I reiterate my comment about having frameworks in place. We do - site release policy and Approvals and Permitting Requirements. If we gain further insight into impacts or environmental issues from the studies we already require we will modify our rules accordingly...

Current messaging leaves the inference that we are operating in a vacuum - and we aren’t.⁷⁰⁸

431. An email from the Manager of MNR’s Renewable Energy Program forwarding the above message to another MNR staff member similarly opines:

... I do not much like the MOE messaging that leaves the public with the misperception that the province has no guidance in place. It sounds like a sad admission. I think we need to rise to Rosalyn’s challenge to MOE and message that yes, we have adequate rules in place and we’ll improve as we go[.]

Nuff said...⁷⁰⁹

432. The Ontario Government’s assertion at paragraph 33 of its Response to Windstream’s Notice of Arbitration that the regulatory regime for offshore wind energy projects was not “fully developed” is misleading because it assumes that the regulatory regime for other sources of wind energy development was fully developed in 2010 or at the time MOE began to accept

⁷⁰⁷ C-0223, Email from Boysen, Eric (MNR) and Lawrence, Rosalyn (MNR) (April 20, 2010).

⁷⁰⁸ C-0203, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) et al. (April 7, 2010),

⁷⁰⁹ C-0204, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) et al. (April 7, 2010).

applications for REAs.⁷¹⁰ Regulatory regimes are frequently in flux and “rarely if ever static.”⁷¹¹ Instead, developers frequently make adjustments as regulations change. In addition, as described at paragraph 211 above, at the time WWIS entered into the FIT Contract in August 2010, Ontario was intending to finalize the offshore setback policies and have amendments to the REA Regulation respecting offshore wind in effect by January 2011.

433. As an example of this natural process of change in regulations, Ontario appears to have been in the midst of developing new checklists for offshore project submission requirements in late 2010 and early January 2011 (the “**Draft Checklist**”).⁷¹² The Draft Checklist is consistent with the regulatory process requirements for onshore projects. It does contain a new requirement for an MNR Clearance Letter, but this merely formalizes a long-standing practice that has been common in the environmental assessment process for years.⁷¹³

434. The Draft Checklist also contains two new technical requirements, related to noise and effects on drinking water. Windstream’s consultants have concluded, based on noise studies and a comparison of the Project’s layout to the proposed setback requirements for drinking water intakes, that the Project would have met both of these requirements.⁷¹⁴ There is nothing else in the Draft Checklist that would have been likely to prevent the Project from moving forward. Indeed, the document would have provided additional regulatory clarity that would have facilitated, not hindered, the Project’s progress through the approvals process.⁷¹⁵

435. When Windstream received its FIT Contract, MOE, MNR and the federal Department of Fisheries and Oceans all had extensive regulatory and scientific expertise with respect to in-lake

⁷¹⁰ Canada’s Response to the Notice of Arbitration.

⁷¹¹ CER-Powell ¶ 91.

⁷¹² **C-0452**, Draft Complete Submission Requirements Checklist for Off-shore Wind Projects under O.Reg. 359/09 (January 12, 2011).

⁷¹³ CWS-Roeper ¶ 84.

⁷¹⁴ CWS-Roeper ¶ 85.

⁷¹⁵ CWS-Roeper ¶ 85.

developments.⁷¹⁶ This view is confirmed by internal MNR emails discussed in paragraphs 90 and 129, which indicate that as early as 2008, MNR officials were confident that existing regulatory mechanisms were sufficient to deal with site-specific concerns for offshore wind projects. One example of an existing tool that could address construction-related concerns for an offshore wind energy project is MOE’s Guideline B-6 – *Guidelines for Evaluating Construction Activities Impacting on Water Resources*, which includes sections on sediments and water management plans in marine construction projects.⁷¹⁷

436. In any event, when faced with scientific uncertainty about the environmental impacts of particular types of development (a not uncommon occurrence for regulators) regulators in Ontario, including MNR, generally rely on an “adaptive management approach”, rather than an outright ban on that type of development. Through the adaptive management approach, regulators improve decision making by identifying uncertainties, establishing methods to test hypotheses related to those uncertainties, monitoring the outcome of different practices and adjusting subsequent management actions based on the knowledge gained.⁷¹⁸ For instance, MNR relies on adaptive management to address “knowledge gaps” in the effect of onshore wind turbines on bats.⁷¹⁹ In fact, a 2011 study commissioned by MNR titled *Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat* encouraged Ontario to take an adaptive management approach to address any scientific uncertainty in offshore wind energy development.⁷²⁰ Therefore, there was no uncertainty in the regulatory environment at the time Windstream invested in the Project that would have rendered Windstream’s investment commercially unreasonable.

⁷¹⁶ CER-Powell ¶ 96.

⁷¹⁷ CER-Powell ¶ 99; **C-722**, Guideline B-6 (MOE), *Guidelines for Evaluating Construction Activities Impacting on Water Resources* (January 1995).

⁷¹⁸ CER-Powell, ¶ 101, note 78.

⁷¹⁹ CER-Powell ¶ 101.

⁷²⁰ CER-Powell ¶ 101, note 79; **C-0543**, Report (MNR), Nienhuis, Sarah and Dunlop, Erin S., “The Potential Effects of Offshore Wind Power Projects on Fish and Fish Habitat in the Great Lakes”, Aquatic Research Series 2011-01 (July 6, 2011).

B. Windstream Would Have Received Applicant of Record Status, Including Tenure to the Grid Cells Proposed in Windstream’s 2010 Land Swap Proposal

437. As indicated above in paragraph 428, Sarah Powell, a leading expert in Ontario’s REA regime, concludes that “it would have been commercially reasonable for [Windstream] to assume that it would obtain the requisite Crown land tenure in due course and in a timely manner.”⁷²¹ Moreover, in the month leading up to the 2011 moratorium, internal emails from MNR suggest that a decision had been taken to allow Windstream’s grid-cell swap proposal to move forward. For instance, an email dated January 12, 2011 (one month before the moratorium was imposed) sent by the Manager of the Renewable Energy Program at MNR and which detailed “some of the outstanding issues associated with the communications planning” for the government’s decision concerning offshore, discussed how the decision to allow Windstream’s land-swap should be delivered:

The decision needs to clearly authorize the trading of “grid cells” for Windstream’s proposal, given that 85% of Windstream’s current project is situated within the 5 km exclusion zone. The decision needs to clearly provide that grid cell trading will only be permitted for Windstream, presumably because they are the only developer with a FIT Contract. Otherwise, many other applications within the 5 km zone (*e.g.* Southpoint) will also request grid cell testing to adjacent, shallow offshore waters that are currently not encumbered by other applications – particularly on Lake Erie.”⁷²²

438. A document entitled *MNR Staff Questions and Answers to Support Government Decision with regard to Offshore Moratorium* dated January 27, 2011 also suggests that a decision had been made to grant Windstream Applicant of Record status:

Q9. The government has decided to allow Windstream Wolfe Island Shoals Inc. to proceed with a pilot project in Lake Ontario. How will Windstream be granted access to Crown land for development of this project?

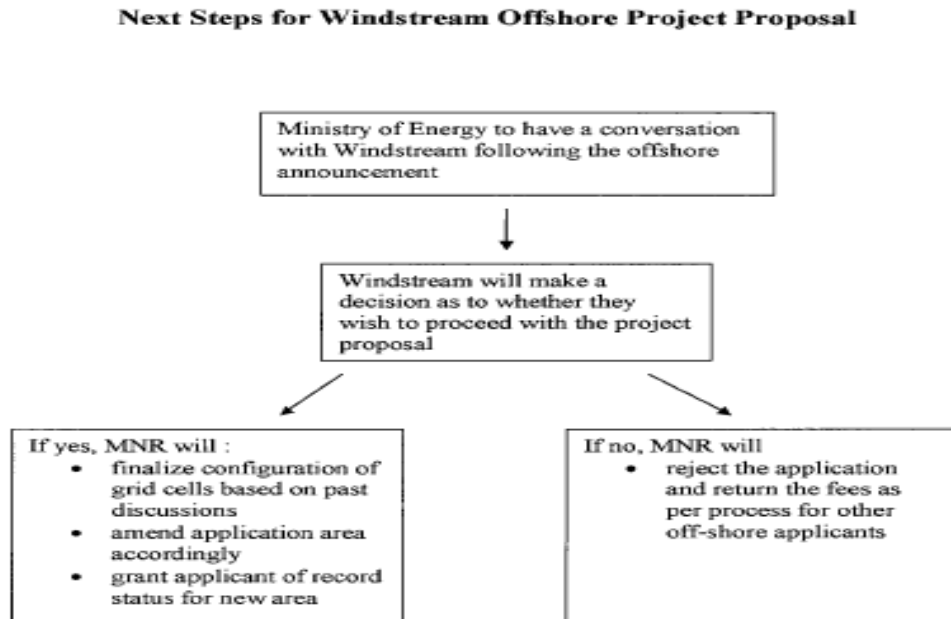
A9. MNR will be working with other ministries and Windstream to identify an area in eastern Lake Ontario to locate the initial pilot project and a future windpower development project. Once the location has been established, Windstream will be working with MNR’s Peterborough District Office to complete the site release process. Following this, Windstream will be required to

⁷²¹ CER-Powell ¶ 107.

⁷²² C-0454, Email from Cain, Ken (MNR) to Ing, Pearl (MEI) (January 12, 2011).

obtain all of the necessary permits and approvals associated with the development of such a renewable energy project.⁷²³

439. A chart titled *Next Steps for Windstream Offshore Project Proposal* that was produced on or before January 26, 2011 also suggests that MNR had made a decision to grant Windstream Applicant of Record status. The chart is reproduced below:⁷²⁴



C. The Project Was and Is Technically Feasible

440. Windstream retained Sgurr Energy (“**Sgurr**”), an internationally recognized authority on offshore wind energy projects, to opine on the technical feasibility of the Project (the “**Sgurr Report**”).⁷²⁵ Sgurr has provided technical advisory services for offshore wind, solar, wave and tidal, and hydro projects for over ten years, and has worked on 45 major offshore wind projects. Sgurr’s experience with offshore wind includes conducting feasibility studies, site identification

⁷²³ C-0467, MNR Questions and Answers to Support Government Decision on Offshore Moratorium, MNR Renewable Energy Program (January 27, 2011). This reference to Windstream had been removed in a February 2, 2011 version of this document: C-0469, MNR Questions and Answers to Support Government Decision on Offshore Moratorium, MNR Renewable Energy Program (February 2, 2011).

⁷²⁴ C-0465, Flowchart, Next Steps for Windstream Offshore Project Proposal (January 26, 2011).

⁷²⁵ CER-SgurrEnergy, p. 17.

and constraints mapping, noise analysis and impact assessment, reviews of wind turbines generators, and capital and operating cost reviews.⁷²⁶

441. In Sgurr’s opinion, the Project is technically feasible. Sgurr outlines several “notable” aspects of the Project that contribute to its feasibility: the signed FIT Contract; the grid connection approval received from IESO and Hydro One; aquatic conditions that are more favourable than those for many existing offshore wind energy projects; proximity to manufacturing facilities and raw materials; and the involvement of Siemens, an experienced and financially sound wind turbine generator supplier.⁷²⁷ In summary, the Sgurr Report concludes that WWIS is feasible and that it faces no feasibility hurdles that could foreseeably forestall the construction and operation of the project.⁷²⁸

442. As explained in detail in the Sgurr Report, Sgurr’s conclusion that the Project is feasible is based on the following considerations:

443. **Project’s Sponsors and Supporting Contractors Have the Capability to Complete the Project.** In addition to Windstream’s experienced management team, who Sgurr describes as “seasoned veterans”,⁷²⁹ Sgurr concludes that the project team selected by Windstream has the experience to move the Project through the design and development phase into the final design and implementation phase.⁷³⁰

444. **Siemens Wind Turbine Generators Selected are Suitable.** According to Sgurr, Siemens “is a reputable and bankable wind turbine supplier with significant experience in the offshore wind industry” and the turbine model selected is “well suited for the observed site conditions.”⁷³¹

⁷²⁶ CER-SgurrEnergy, p. 17.

⁷²⁷ CER-SgurrEnergy, pp. 4-5.

⁷²⁸ CER-SgurrEnergy, p. 5.

⁷²⁹ CER-SgurrEnergy, p. 38.

⁷³⁰ CER-SgurrEnergy, p. 47.

⁷³¹ CER-SgurrEnergy, p. 50.

445. **Wind Data Collection and Analysis Reveals Favourable Wind Resources at Project site.** Wind measurements at the Project site were collected by Ortech, AWS and GLGH. Sgurr concludes that the energy yield predictions for the Project compare favourably to those at existing onshore wind energy projects.⁷³² AWS concluded that the Project had a capacity factor of [REDACTED] and an annual energy yield of [REDACTED] gigawatt hours, GLGH concluded that the Project had a capacity factor of [REDACTED] and an annual energy yield of [REDACTED] gigawatt hours,⁷³³ and Ortech concluded that the Project had a capacity factor of [REDACTED] and an annual energy yield of [REDACTED] gigawatt hours.⁷³⁴

446. **Wolfe Island Shoals Area Appropriate for Project Development.** The Sgurr Report concludes that Windstream has conducted the appropriate studies in the project area that establish that the construction and operation of an offshore wind energy project at the Project site is feasible.⁷³⁵

447. **Windstream's Proposed Foundation Design and Foundation Installation Strategy is the Most Appropriate Foundation Solution.** The foundation design and installation strategy prepared by COWI Ocean and Coastal Consultants, a marine engineering firm, for Windstream is "the most appropriate foundation solution" in light of construction considerations, the geologic makeup of the Project site, and the nearby availability of raw materials and construction equipment.⁷³⁶ The *Foundation Conceptual Design and Installation Strategy* for the Project is described below in paragraph 451.

448. **Windstream's Plan for Wind Turbine Generator Installation is Feasible.** Sgurr concludes that an installation proposal prepared by Weeks Marine Inc. for project wind turbine

⁷³² CER-SgurrEnergy, pp. 61-62.

⁷³³ CER-SgurrEnergy, p. 61.

⁷³⁴ Ortech Energy Production Using Turbine [REDACTED], p. 6.

⁷³⁵ CER-SgurrEnergy, p. 67.

⁷³⁶ CER-SgurrEnergy, p. 91.

generator installation (discussed below in paragraph 452) is feasible, and similar to those employed in the construction of other offshore projects in North America.⁷³⁷

449. **Electrical Interconnection Proposed for the Project is Feasible.** In Sgurr’s opinion, the interconnection system proposed by WWIS is consistent with those employed at other offshore facilities, and its design has the potential to avoid significant costs when compared to similar projects.⁷³⁸

450. **Windstream’s Project Implementation Plan is Feasible.** Sgurr concludes that the implementation plan for the Project, including the project schedule,⁷³⁹ the availability of fabrication and staging facilities as well as construction vessels, the proposed submarine cables, and the relatively close location of the offshore substation, is feasible and faces fewer challenges than offshore projects of similar size in Europe.⁷⁴⁰

451. COWI Ocean and Coastal Consultants (“**COWI**”), an engineering firm with nearly 80 years of experience in marine, coastal and geotechnical engineering projects, prepared a foundation design and installation strategy for the Project’s turbine foundations (the “**COWI Report**”).⁷⁴¹ COWI selected a semi-floating gravity based foundation for the Project. The selected design reduces the need for heavy lift construction vessels and also attracts a lower wave and ice load than larger foundations.⁷⁴² There are several viable onshore sites near the Project site where the foundations can be built.⁷⁴³ Following construction, the foundations will be floated to the Project site and lowered into position using flotation devices and winch

⁷³⁷ CER-SgurrEnergy, p. 93.

⁷³⁸ CER-SgurrEnergy, p. 109.

⁷³⁹ **C-0375**, Spreadsheet - Wolfe Island Shoals Wind Farm - Overall Project Development Schedule Highlights (October 29, 2010).

⁷⁴⁰ CER-SgurrEnergy, p. 118.

⁷⁴¹ COWI Ocean and Coastal Consultants, *Wolfe Island Shoals Offshore Works Construction Plan: Foundation Conceptual Design and Installation Strategy* (March 2014).

⁷⁴² COWI Report, Appendix A to CER-SgurrEnergy, p. 12.

⁷⁴³ COWI Report, Appendix A to CER-SgurrEnergy, p. 12.

systems.⁷⁴⁴ COWI concludes that the 75 required foundations can be built and launched over the course of the Project’s three-year construction schedule.⁷⁴⁵

452. Weeks Marine Inc., a respected marine engineering and construction firm, has prepared a detailed construction plan for the construction of WWIS that takes into account known geotechnical, bathometric and weather data (the “**Weeks Report**”).⁷⁴⁶ The construction plan provides that WWIS will be built in the following stages: the dredging of turbine placement sites on the lake-bottom, the placement of one meter thick “bedding stones” on the dredged areas of the lakebed and subsequent surveys to ensure proper placement, the installation of turbine foundations on the bedding stones, filling the foundations with sand ballast, and finally the installation of wind turbine generator towers, nacelles and blades with the support of Siemens personnel.⁷⁴⁷

D. There Was No Material Impediment to the Project Obtaining a Renewable Energy Approval or Other Permits

453. Windstream retained experts to assess the environmental aspects of the Project, specifically with respect to (a) coastal processes and the maritime environment, including fish, (b) birds, (c) bats and (d) noise. Ortech summarized these reports in an *Overall Summary of the REA Process as it Pertains to the WIS Project*.⁷⁴⁸ Based on these reports, Ortech concludes that there is no reason to believe that the Project would not have been able to successfully complete the REA process or other permitting.

1. No Evidence of Impact on Coastal Processes or Maritime Environment that Would Prevent the Project from Obtaining REA or Other Permits

454. Windstream retained Baird & Associates, a respected aquatic engineering firm, to conduct an independent review of the technical and permitting feasibility of WWIS within the

⁷⁴⁴ COWI Report, Appendix A to CER-SgurrEnergy, p. 18.

⁷⁴⁵ COWI Report, Appendix A to CER-SgurrEnergy, p. 28.

⁷⁴⁶ Weeks Marine Inc., *Wolfe Island Shoals Gravity Based Foundation and Wind Turbine Generator Installation: Offshore Installation – Means and Methods* (May 2014).

⁷⁴⁷ Weeks Report, Appendix B to CER-SgurrEnergy, pp. 9, 11-13, 15, 17-19, 19-24.

⁷⁴⁸ CER-Ortech (REA Summary).

context of the Lake Ontario marine environment. Baird has previously been retained by MNR to prepare coastal engineering studies, including a report titled *Offshore Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations*.⁷⁴⁹ In its report prepared for this arbitration, Baird concluded that there are no immitigable environmental concerns that would have prevented WWIS from receiving renewable energy approval and that there is a reasonable expectation that approval would have been obtained. The Baird Report further concludes that there is sufficient similarity between conditions in Lake Ontario and the Baltic Sea to apply the lessons learned in Baltic Sea development to offshore development in Lake Ontario, contrary to the Ontario Government's assertions otherwise.⁷⁵⁰

455. Lessons learned in offshore development in Baltic Sea applicable in Lake Ontario.

Baird's report states "that the physical oceanographic conditions in Lake Ontario and the Baltic Sea are sufficiently similar to support direct comparisons of likely impacts from an offshore wind farm", and there "is no evidence" that tools or methods developed for the Baltic Sea are inapplicable in Lake Ontario.⁷⁵¹ This runs directly contrary to the Ontario Government's assertion that saltwater is "very different than fresh water like [Lake Ontario]."⁷⁵²

456. As set out in more detail in the Baird Report, Baird determined that there was no material impediment to the Project obtaining a REA other required permits.⁷⁵³ This conclusion is based on the following considerations:

457. In-water components of the Project "do not differ in any substantive manner" from existing and planned projects in Lake Ontario. Lake Ontario is already home to a significant

⁷⁴⁹ C-0530, Report (Baird), *Offshore Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ontario Ministry of Natural Resources* (May 2011).

⁷⁵⁰ CER-Baird, p. 4.

⁷⁵¹ CER-Baird, p. 78.

⁷⁵² C-0534, Article (John Hembrey CBC News), *Ontario Offshore wind development in doldrums* (May 17, 2011).

⁷⁵³ CER-Baird, p. 2.

number of structures built on the water or lakefills, and the cumulative footprint of the Project will be “at least an order of magnitude smaller than typical, existing lakefill structures in Lake Ontario.”⁷⁵⁴

458. **No evidence of impact on coastal processes and aquatic resources that would prevent WWIS from proceeding to the design, development and regulatory permitting stages.** Baird concludes that there is a reasonable expectation that approval can be obtained for the installation of wind turbine generators for the Project under current or planned regulations related to coastal processes, that the potential impacts of the Project on the coastal environment could be identified with reasonable certainty, and that any impacts could be mitigated during the construction, operation and decommissioning of the Project.⁷⁵⁵

459. **No evidence of negative impacts on fish or fish habitat that would materially impede the Project from receiving a Renewable Energy Approval or other required permits.**⁷⁵⁶ In preparing this portion of its report, Baird consulted with Beacon Environmental who previously prepared a report for MNR titled *Offshore Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations* in association with Baird, and Dr. Michael Risk, a specialist in the relationship between fish and electromagnetic fields. Beacon and Dr. Risk examined in detail the Project’s potential impact on fish and fish habitat.⁷⁵⁷ They concluded that construction and operational impacts by the Project on fish and fish habitat will be smaller in magnitude than existing or planned lakefill structures.⁷⁵⁸ In their opinion with appropriate mitigation measures in place there would have been no material impediment relating to fish or fish habitat that would have prevented the Project from obtaining a REA or other permits.⁷⁵⁹

⁷⁵⁴ CER-Baird, p. 2.

⁷⁵⁵ CER-Baird, p. 2.

⁷⁵⁶ CER-Baird, p. 123.

⁷⁵⁷ CER-Baird, p. 9.

⁷⁵⁸ CER-Baird, p. 118.

⁷⁵⁹ CER-Baird, p. 118.

460. **No evidence that WWIS is substantially different from other projects assessed under the *Clean Water Act*.** The Ontario Government cited uncertainties about the potential impact of offshore wind turbines in freshwater environments, and in particular on drinking water, as one basis for imposing the moratorium.⁷⁶⁰ The Baird Report concludes that the potential impacts from the construction, operation and decommissioning of WWIS, including increased turbidity, mobilization of contaminated sediments and accidental spills, “are in many ways, more limited” than those of other projects built in or on Lake Ontario, since the Project will be further from water intakes than many other projects.⁷⁶¹ As a result, existing mechanisms under the *Clean Water Act* are sufficient to assess any potential impact the Project may have on drinking water.⁷⁶²

461. **No evidence of any negative impacts on maritime archaeology.** Baird also worked with Scarlett Janusas, a marine archaeologist with extensive experience conducting archaeological assessments for projects in marine environments.⁷⁶³ Ms. Janusas concluded that, provided that Windstream conducts an archaeological assessment as part of its REA application and undertakes to mitigate any potential impact on cultural and/or archaeological resources by making adjustments to the Project’s layout and infrastructure, there is no material impediment from a cultural/archaeological perspective that would prevent the Project from receiving a REA or other permits.⁷⁶⁴

462. **Turbine positioning can be adjusted to provide passage sufficient for seaway traffic.** Baird concludes that the positioning of several turbines from the Project can be adjusted for seaway traffic in accordance with Canadian navigation regulations, standard international practice, and other shipping channel dimensions of the Great Lakes St. Lawrence Seaway System.⁷⁶⁵

⁷⁶⁰ **C-0482**, Decision on Policy (MNR), Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (February 11, 2011).

⁷⁶¹ CER-Baird, p. 138.

⁷⁶² CER-Baird, p. 139.

⁷⁶³ CER-Baird, p. 2.

⁷⁶⁴ CER-Baird, p. 8.

⁷⁶⁵ CER-Baird, p. 152.

2. No Evidence of Impact on Birds that Would Materially Impede the Project from Obtaining a REA

463. Dr. Paul Kerlinger has prepared a report for Windstream that assesses the Project's potential impact on birds. Dr. Kerlinger is an internationally recognized authority in bird migration who has been consulting on the impacts of wind turbines and communications towers on birds since 1994. He is a principal at Curry & Kerlinger, LLC, a consultancy specializing in the impacts of wind turbines on birds. He has extensive experience studying the impact of wind turbines on birds and has consulted on wind energy projects in Ontario and throughout North America, including serving as team leader for preconstruction surveys for roughly 3,000 wind turbines operating in the United States. He and his team have also conducted post-construction bird fatality studies at nearly 30 wind energy facilities. Dr. Kerlinger has also consulted on the potential impacts of offshore turbines in offshore wind projects in Ohio and Maryland.⁷⁶⁶

464. Dr. Kerlinger found that the installation and operation of WWIS would not have a significant biological impact on any bird species.⁷⁶⁷ As a result, Dr. Kerlinger concluded that there were no material impediments associated with birds that would prevent the Project from obtaining a REA.⁷⁶⁸

465. Further, in light of his conclusion that the Project would not have a significant biological impact on birds, and based on the assumption that the Project would employ the latest turbine technology and best practices for avoiding and monitoring bird collision impacts with turbines, Dr. Kerlinger determined that it was highly improbable that mitigation measures would be required to lessen the Project's impact on birds.⁷⁶⁹

⁷⁶⁶ CER-Kerlinger, ¶ 8.

⁷⁶⁷ CER-Kerlinger, ¶ 14.

⁷⁶⁸ CER-Kerlinger, ¶ 3.

⁷⁶⁹ CER-Kerlinger, ¶ 5.

3. No Evidence of Impact on Bats that Would Materially Impede the Project from Obtaining a REA

466. Windstream retained Dr. Scott Reynolds to conduct an independent assessment to determine whether WWIS would have a significant impact on bats that would serve as a material impediment to Windstream receiving a REA. Dr. Reynolds is a population biologist and an internationally recognized expert who has conducted research on bats for over 20 years. He has produced over 50 pre-construction impact assessments and has published 14 peer-reviewed articles, including articles on the impacts of wind turbines on bats.⁷⁷⁰

467. Dr. Reynolds found that the Project is unlikely to have any significant direct or indirect impacts on bats. In Dr. Reynolds' opinion, the Project is unlikely to cause direct impacts on bats (such as deaths as a result of turbine collisions) since bat concentrations are lower over large bodies of water than they are over land, and because bat migratory activities over open water are more sensitive to prevailing wind conditions.⁷⁷¹ As a result of these twin factors, Dr. Reynolds concludes that mitigation strategies employed at other offshore wind energy facilities are likely to be highly successful at reducing bat mortalities at the Project. Further, in his opinion there are unlikely to be any indirect impacts (primarily habitat destruction because of construction) because the large majority of the construction activities will take place in Lake Ontario.⁷⁷²

4. The Project Would Comply With MOE Noise Guidelines

468. Windstream further retained HGC Engineering to prepare a sound assessment report for the Project. HGC is a respected acoustic engineering firm that was retained by MOE in 2010 to prepare a literature review titled *Low Frequency Noise and Infrasound Associated with Wind Turbine Generator Systems*.⁷⁷³ The HGC Report assessed the noise that would be produced by WWIS at the nearest receptors (residences) using two different models: the ISO 9613-2 model, using the most conservative assumptions for the propagation of noise over water, and the model

⁷⁷⁰ CER-Reynolds, Appendix 1, pp. 4-5.

⁷⁷¹ CER-Reynolds, p. 20.

⁷⁷² CER-Reynolds, p. 20.

⁷⁷³ C-0407, Report (HGC Engineering), *Low Frequency Noise and Infrasound Associated with Wind Turbine Generator Systems* (December 10, 2010).

used by the Swedish Environmental Protection Agency.⁷⁷⁴ These are the two models most likely to be used by MOE in measuring sound levels at the Project.

469. Using the ISO 9613-2 model adjusted according to the most conservative estimates, WWIS would produce a sound-level of 36 dBA at the nearest receptor – a residence approximately 6,900 meters from the closest turbine.⁷⁷⁵ The Swedish Environmental Protection Agency model predicts a noise level of 38 dBA at the same receptor.⁷⁷⁶ Both are well-within the 40 dBA limit established by the MOE’s noise guidelines. Moreover, the cumulative impact of noise produced by the Project and the existing onshore Wolfe Island wind project on the receptor closest to the two projects would be 39 dBA, also within the noise limits established by the guidelines.⁷⁷⁷ As Ortech notes in its REA Report on the basis of the report prepared by HGC, there is no material impediment relating to noise to prevent the Project from obtaining a REA.⁷⁷⁸

E. The Project Was Financeable

470. Windstream retained Deloitte to determine the likelihood of Windstream obtaining financing to fund the Project within the timelines provided for in the FIT Contract. Deloitte found that but for the 2011 moratorium on offshore wind projects, the Project would have secured the requisite financing in order to proceed through the development, permitting and construction phases in order to meet its MCOB of May 4, 2015.⁷⁷⁹

471. This consistent with:

- a) the evidence of Mr. Ziegler, who confirms that the FIT Contract rendered the Project highly financeable, given that it provided a guaranteed \$5 billion revenue

⁷⁷⁴ CER-HGC, pp. 3-5.

⁷⁷⁵ CER-HGC, p. 6.

⁷⁷⁶ CER-HGC, p. 6.

⁷⁷⁷ CER-HGC, p. 6.

⁷⁷⁸ CER-Ortech, p. 10.

⁷⁷⁹ CER-Deloitte (Bucci), pp. 6-8.

stream with a credit-worthy counterparty,⁷⁸⁰ and that Windstream’s investors had a high degree of confidence that with the groups’ management and financial resources, it could bring the Project to a successful conclusion, given that the investor group had worked together for many decades and had financed and built numerous projects and companies that had substantially higher risk profiles and larger costs than WWIS.⁷⁸¹

- b) the evidence of Mr. Mars, who confirms that before the moratorium was imposed, there was significant interest in the Project from both debt and equity financiers.⁷⁸²
- c) the project feasibility analysis prepared by Ortech after the FIT Contract was awarded to WWIS, which confirmed that, with the FIT Contract in place, the internal rate of return for the Project would provide an attractive internal rate of return and that the Project would be “readily financeable.”⁷⁸³
- d) the evidence of Sarah Powell that the FIT program was intended to ensure that the FIT Contract would be “bankable”, i.e. financeable by way of long-term limited recourse debt financing to fund the project.⁷⁸⁴
- e) the FIT Contract price for offshore wind projects were developed using a Discounted Cash Flow model and designed to cover the cost of the initial capital

⁷⁸⁰ CWS-Ziegler ¶ 13.

⁷⁸¹ CWS-Ziegler ¶ 13.

⁷⁸² CWS-Mars ¶¶ 77, 79; **C-0472**, Email from Brown, Daniel (KeyBanc) to [REDACTED] (February 7, 2011); **C-0344**, Email from [REDACTED] to Mars, David (White Owl Capital) (August 15, 2010); **C-0405**, Email from Brown, Daniel (KeyBanc) to Baines, Ian (December 8, 2010).

⁷⁸³ **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010), p. 9; **C-0310**, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010); CWS-Roeper ¶¶ 28-34.

⁷⁸⁴ CER-Powell ¶ 19.

investment, on-going maintenance and operating expenses, and to ensure a reasonable rate of return over the 20-year term.⁷⁸⁵

F. The Project Would Have Been Built and Operational By the Deadlines Set Out in the FIT Contract

472. Windstream would have met its Milestone COD if MNR had followed through on its commitment given on November 24, 2009 to give Windstream's application for Applicant of Record status the "highest priority" and that the application would receive "priority attention from MNR."⁷⁸⁶ As noted in paragraph 219 above, according to Ortech's feasibility analysis, Windstream would require 21 months to complete engineering work and to obtain a REA and other required permits. It would then require 24 months to build the Project. Therefore, for example, had Applicant of Record status been granted by the fall of 2010 as promised, the Project could have achieved commercial operation by its May 4, 2015 milestone COD, and well before November 2016, after which WWIS would be in default of the FIT Contract.

473. As indicated in paragraph 175, Windstream was the recipient of the largest FIT contract in the first round of contract offers in April 2010.⁷⁸⁷ There were three other projects equaling or exceeding 100 megawatts that were awarded FIT contracts in the first round of offers: the Port Dover & Nanticoke wind facility (105 megawatts) operated by Capital Power, the Summerhaven Wind Energy Centre (124.4 megawatts) operated by Summerhaven Wind LP, a subsidiary of NextEra Energy Canada ULC, and the Dufferin Wind Energy Project (100 megawatts) operated by Dufferin Wind Power, a subsidiary of the China Longyuan Power Group.⁷⁸⁸

474. All three projects have received a REA and have either achieved commercial operation or are under construction:

⁷⁸⁵ CER-Compass, p. 7.

⁷⁸⁶ See Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) (November 24, 2009); **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009); **C-0158**, Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) (November 24, 2009).

⁷⁸⁷ **C-0209**, Chart, FIT Contracts, Applicant Legal Name Order (April 8, 2010).

⁷⁸⁸ **C-0209**, Chart, FIT Contracts, Applicant Legal Name Order (April 8, 2010).

- a) the Port Dover & Nanticoke wind facility received its REA on July 17, 2012, and began commercial operation on November 7, 2013;⁷⁸⁹
- b) the Summerhaven Wind Energy Project received its REA in March 2012 and achieved commercial operation on September 25, 2013;⁷⁹⁰ and
- c) the Dufferin Wind Energy Project received its REA on June 10, 2013, and is currently under construction; it is expected to reach commercial operation in 2014.⁷⁹¹

475. If the sample size of wind energy projects is expanded to all 13 wind energy projects over 50 megawatts that were offered FIT contracts in the first round of offers, 10 are either under construction or have reached commercial operation, and two are currently proceeding through a REA review. Windstream is the only project above 50 megawatts that has not been allowed to move towards commercial operation.⁷⁹²

XXI. ONTARIO HAS REALIZED AN ECONOMIC BENEFIT OF APPROXIMATELY \$1.3 TO \$2.1 BILLION BY TACITLY CANCELLING THE PROJECT

476. Windstream retained Power Advisory LLC (“**Power Advisory**”) to compare the cost of electricity that the OPA would have procured from the Project to the cost of electricity procured from other sources by the OPA to determine the economic benefit to Ontario realized as a direct consequence of having cancelled the Project in favour of less costly onshore wind and gas-fired generation projects. Power Advisory is a management consulting firm with extensive experience in the renewable energy generation market, including working with the OPA to develop the

⁷⁸⁹ **C-0631**, Presentation (Capital Power), Port Dover and Nanticoke Wind Project - Project Overview (November 21, 2012); **C-0677**, Article (Capital Power), Capital Power announces joint venture for Genesee 4 and 5 commercial operations at Port Dover & Nanticoke wind facility and capital cost reduction at Shepard Energy Centre (December 5, 2013).

⁷⁹⁰ **C-0668**, Article (NextEra), NextEra Energy Canada announces completion of Haldimand County wind farm (September 25, 2013).

⁷⁹¹ **C-0659**, Renewal Energy Approval (MOE), Dufferin Wind Power Project (June 10, 2013).

⁷⁹² CER-Powell, ¶ 24.

initial FIT Program.⁷⁹³ Power Advisory estimated the cost to the Province under the FIT Contract of electricity produced by the Project,⁷⁹⁴ and compared it to the cost of an equivalent amount of electricity procured from the replacement projects for cancelled gas-fired power plants (described above in Section XIX.A).⁷⁹⁵ Power Advisory concludes that by cancelling the Project, Ontario has realized an economic benefit of between \$1.3 billion and \$2.1 billion.⁷⁹⁶

477. In stark contrast to the economic benefit that Ontario has realized as a result of its decision to impose the moratorium on offshore wind, Windstream has lost the entire value of its Project as a result of Ontario’s cancellation of its Project.

PART THREE – THE TRIBUNAL HAS JURISDICTION OVER WINDSTREAM’S CLAIMS

XXII. THE TRIBUNAL HAS JURISDICTION OVER THE PARTIES TO THE DISPUTE

478. The Tribunal has jurisdiction over both Windstream and Canada, the parties to this proceeding.

479. Articles 1116(1) and 1117(1) of NAFTA permit an investor of a Party to bring a claim itself, or on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, for loss or damage arising out of a breach of Section A of Chapter Eleven of NAFTA by the other Party.

480. Article 1139 defines an “investor” of a Party to include an enterprise of a NAFTA Party that seeks to make, is making or has made an investment.

481. Article 1139 further defines an “investment” as, in relevant part:

- (a) an enterprise;

⁷⁹³ CER-Power Advisory, p. 1.

⁷⁹⁴ CER-Power Advisory, pp. 7-10.

⁷⁹⁵ CER-Power Advisory, pp. 10-17.

⁷⁹⁶ CER-Power Advisory, p. 24.

- (b) an equity security of an enterprise; [...]
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
 - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or
 - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise [...]

482. Article 201 defines enterprise as any “entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association,” and an enterprise of a Party as “an enterprise constituted or organized under the law of a Party.”

483. Windstream is a limited liability corporation constituted under the laws of the State of Delaware in the United States. It is therefore a juridical person of the United States within the meaning of Article 201 of NAFTA.

484. WWIS is a corporation incorporated under the laws of Ontario, Canada. It is therefore an enterprise of Canada within the meaning of Article 201 of NAFTA. As such, it qualifies as an “investment” under Article 1139.

485. Windstream owns 100% of WWIS, 85% directly and 15% indirectly through its wholly owned subsidiary, OCP Option Inc. Windstream is therefore an “investor” of the United States within the meaning of Article 1139, because it has made an “investment” in Canada, namely its ownership of WWIS. It follows that Windstream is an “investor of a Party” within the meaning of Article 1116(1) of NAFTA.

486. As a Party to NAFTA, the Tribunal has jurisdiction over Canada pursuant to Articles 1116, 1117 and 1122 of NAFTA, which provides Canada’s affirmative consent to arbitration.

487. Thus, the Tribunal has jurisdiction over both parties to this arbitration.

XXIII. THE TRIBUNAL HAS JURISDICTION OVER THE SUBJECT-MATTER OF THE DISPUTE

488. As noted above, Article 1116 of NAFTA provides that “an investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [Section A of NAFTA] and that the investor has incurred loss or damage by reason of, or arising out of the breach.”

489. Article 1117 of NAFTA permits an investor to bring a claim on behalf of an enterprise that is a juridical person that the investor owns or controls directly or indirectly, that the other Party has breached an obligation under Section A of NAFTA.

490. Section A imposes obligations on Canada with respect to “investors of another Party” and “investments of investors of another Party in the territory of the Party.” Under Article 1101, Chapter Eleven applies to measures adopted or maintained by a Party relating to investors of another Party and to their investments in the territory of the Party adopting or maintaining the measure.

491. As an enterprise of Canada wholly owned by Windstream, WWIS is an investment of Windstream in Canada. It therefore meets the definition of “investment of an investor of another Party” within the meaning of Article 1101.

492. Further, both the FIT Contract and the Project are investments of Windstream, indirectly through WWIS.

493. The Project is an investment of Windstream in Canada, indirectly owned through WWIS. The Project includes all of the following which are the result of a commitment of capital by Windstream, via WWIS:

- a) the FIT Contract;
- b) the \$6 million letter of credit;
- c) all of WWIS’ work product in connection with the development of the Project, including all of its studies to define the wind resource and determine the Project’s feasibility;

- d) all of the data that WWIS has collected or acquired in connection with the Project, including wind resource data and meteorological data;
- e) the meteorological tower;
- f) WWIS's turbine supply agreement with Siemens; and
- g) land leases concluded in connection with the Project.

494. As noted above, the definition of “investment” in Article 1139 includes “property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes” and an “interest arising from the commitment of capital.” Professor Newcombe and Dr. Paradell have defined investment as follows:

Normally an investment consists of a bundle of rights, both tangible and intangible. These might include leases of property, licenses and permits, contracts, inventory and other assets. As a consequence, investors have a legitimate expectation that these acquired rights will be protected and treated in accordance with state representations upon which the investor has relied.⁷⁹⁷

495. The expression “property, tangible or intangible” has a broad connotation and includes intangible rights such as contractual rights.⁷⁹⁸ WWIS engaged in developing the Project with the expectation that doing so would result in an economic benefit to WWIS, and by extension to its parent, Windstream. Further, the Project is an “interest arising from the commitment of capital.” Thus, the Project is an “investment” of WWIS in Canada.

⁷⁹⁷ **CL-109**, Newcombe A. & Paradell L., “Standards of Treatment” in *Law and Practice of Investment Treaties* (Kluwer Law International, 2009) (“**Newcombe & Paradell**”), p. 283.

⁷⁹⁸ **CL-082**, *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Award, February 6, 2007 (“**Siemens**”) ¶ 267; **CL-061**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case) Award, 31 March 2010 (“**Merrill & Ring**”) ¶¶ 140-142, 149; **CL-083**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award on the Merits, 20 May 1992 (“**Southern Pacific**”) ¶¶ 32-33; **CL-043**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2) Award, 31 October 2012 (“**Deutsche Bank**”) ¶ 506; **CL-097**, Dolzer R. & Schreuer C., *Principles of International Investment Law, Second Ed.* (Oxford University Press, 2012) (“**Dolzer & Schreuer**”), pp. 125-130. “Property” is also given a broad interpretation under the laws of Ontario and Canada applicable in Ontario and includes contractual rights, data and work product: CER-Powell, p. 45.

496. In addition, the FIT Contract is in and of itself an investment of Windstream in Canada, indirectly owned through WWIS. WWIS entered into the FIT Contract following a commitment of capital by itself directly (the work product involved in preparing the FIT application) and by Windstream (the letter of credit posted to secure the FIT Contract).

497. The FIT Contract is WWIS's most important property right and asset. It would have constituted WWIS's most significant source of revenue,⁷⁹⁹ had the project proceeded as planned. In Ontario, few, if any, renewable energy projects are viable without a FIT contract.⁸⁰⁰ Similarly, the failure to obtain a FIT Contract will generally mean that the project will be unable to proceed.⁸⁰¹

498. The FIT Contract contains specific provisions that allow WWIS to assign its rights, obligations and interests in the Project, subject to the OPA's consent, not to be unreasonably withheld.⁸⁰² The FIT Contract also contains specific provisions that allow WWIS to mortgage, charge, or otherwise encumber its interest in the FIT Contract to a secured lender.⁸⁰³ Under Ontario law, these provisions recognize the inherent value of the FIT Contract to WWIS and ensure that the FIT Contract can be dealt with in the same manner as any other property right.⁸⁰⁴

499. The FIT Contract is also an integral part of a project lender's collateral.⁸⁰⁵ It contains provisions and an exhibit that ensure that a secured lender, upon the exercise of its rights as a secured creditor pursuant to its security, maintains the ability to acquire WWIS's interest in the FIT Contract, subject to OPA's consent, not to be unreasonably withheld.⁸⁰⁶

⁷⁹⁹ CER-Powell ¶ 111.

⁸⁰⁰ CER-Powell ¶ 111.

⁸⁰¹ CER-Powell ¶ 113.

⁸⁰² CER-Powell ¶ 117.

⁸⁰³ CER-Powell ¶ 126.

⁸⁰⁴ CER-Powell ¶ 119.

⁸⁰⁵ CER-Powell ¶ 116.

⁸⁰⁶ CER-Powell ¶ 127.

500. The value of the FIT Contract increases once OPA issues its Notice to Proceed with the project or otherwise waives its unilateral Pre-Notice to Proceed Termination Right, which it has done with respect to the FIT Contract.⁸⁰⁷ At that point, project lenders are typically more willing to accept the risks related with the remaining rights and obligations that exist in the FIT Contract and thus accept to finance the project.⁸⁰⁸

501. Tribunals have consistently recognized that interests in early stage projects, for which construction has not yet started or regulatory approvals are still outstanding, nevertheless constitute “investments.” For example, in *PSEG Global v. Turkey*, the Tribunal found that the Claimant’s Concession Contract for the construction and operation of a power plant was an investment, despite the fact that key commercial terms of the contract were not concluded, other contracts necessary for the construction and operation of the project were not signed, and the project had not left “the drawing board.”⁸⁰⁹ The Tribunal found that the Claimants had a valid agreement and that this was a sufficient basis for it to assume jurisdiction. It ultimately found that the Respondent’s conduct violated the FET standard.⁸¹⁰

502. Like the Project, the FIT Contract is therefore an investment of Windstream in Canada, indirectly owned through WWIS.

⁸⁰⁷ CER-Powell ¶ 114; CER-Deloitte (Taylor and Low), ¶ 2.14.

⁸⁰⁸ CER-Powell ¶ 115.

⁸⁰⁹ **CL-077**, *PSEG-Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Decision on Jurisdiction, 4 June, 2004 (“**PSEG, Decision on Jurisdiction**”), ¶¶ 54, 67.

⁸¹⁰ **CL-076**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007 (“**PSEG**”) ¶¶ 246-251.

XXIV. THE MEASURES AT ISSUE ARE ATTRIBUTABLE TO CANADA

A. The Acts and Omissions Complained of Are Measures Under Article 1101 of NAFTA

503. Canada took measures in breach of its obligations under NAFTA. Article 1101 of NAFTA provides that it applies to “measures adopted or maintained by a Party” relating to investors of another Party and investments of investors of another Party.⁸¹¹

504. Article 201 of NAFTA defines “measure” as including “any law, regulation, procedure, requirement or practice.” The definition is “broad and non-exhaustive.”⁸¹² It encompasses both acts and omissions.⁸¹³ As explained by the Tribunal in *Eureko v. Poland*, “[i]t is obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions.”⁸¹⁴ A single measure may give rise to different types of claims and remedies under NAFTA.⁸¹⁵

505. The four inter-related measures at issue in this case are:

- a) the imposition by the Ontario Government of the February 11, 2011 moratorium on offshore wind development;
- b) the failure of the Ontario Government, or alternatively its state enterprise the OPA, to comply with the commitment made by the government, through MEI, to

⁸¹¹ **C-0001**, NAFTA, Article 1101.

⁸¹² **CL-030**, *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 July 2006 ¶ 148; see also **CL-005**, *Canada’s Statement on Implementation of the North American Free Trade Agreement*, Can. Gaz. Part IC(1) (January 1994), p. 80.

⁸¹³ **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006 (“**Saluka, Partial Award**”) ¶ 459; **CL-049**, *Eureko B.V. v. Republic of Poland* (Ad Hoc Arbitration) Partial Award, 19 August 2005 (“**Eureko, Partial Award**”) ¶ 186; **CL-028**, *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL) Award on Compensation and Costs, 30 June 1990 ¶¶ 207-210.

⁸¹⁴ **CL-049**, *Eureko*, Partial Award ¶ 186.

⁸¹⁵ **CL-089**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Arbitral Award, 2 June 2000 (“**Waste Management I**”) ¶ 27(a).

Windstream to take steps to ensure that Windstream's investments would not be impacted negatively by the moratorium;

- c) the failure of the Ontario Government, or alternatively its state enterprise the OPA, to keep Windstream "whole" following the moratorium, as it did with TransCanada following the cancellation of its project; and
- d) the failure of the Ontario Government, or alternatively of its state enterprise the OPA, to award a solar project to Windstream rather than to Samsung.

506. These actions and omissions qualify fall with the scope of the definition of a "measure" under NAFTA.

B. The Measures Complained of Were Attributable to Canada

1. Imposition of Moratorium Attributable to Canada

507. The first measure at issue is the imposition by the Ontario Government of the February 2011 moratorium. It is clear Canada is responsible for the acts and omissions of the Ontario Government in imposing the February 2011 moratorium, as well as any related actions of the MOE, MNR, MEI, Premier's Office and other organs of the Ontario Government.

508. Article 201(2) of NAFTA specifies that a reference to a state or province in NAFTA "includes local governments of that state or province." On this point, as the Tribunal in *Metalclad* explained,

Parties to [NAFTA] must "ensure that all necessary measures are taken in order to give effect to the provisions of the Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."
... A reference to a state or province includes local governments of that state or province.⁸¹⁶

The Government of Canada is therefore liable for the acts and omissions its provincial governments, including the Ontario Government.

⁸¹⁶ CL-062, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2001 ("*Metalclad*") ¶ 73.

509. The Ontario Government, in turn, is constituted of different state organs that exercise legislative, executive, judicial and administrative functions. The acts and omissions of each of these organs are ultimately attributable to Canada, pursuant to Article 4 of the *International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts*⁸¹⁷ (the “**Draft Articles**”). The Draft Articles and the associated commentary provide authoritative guidance for the attribution of wrongful acts to states.⁸¹⁸ The Draft Articles apply in all cases where a state has committed a wrongful act, including wrongful acts between states or “[a] breach by a state party to an investment treaty.”⁸¹⁹

510. Article 4 of the Draft Articles deals with organs of the state, and provides that:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

An organ includes any person or entity which has that status in accordance with the internal law of the State.

511. The MNR, MEI, MOE and the Premier’s Office are all organs of the Ontario Government pursuant to Article 4 of the Draft Articles and Article 201 of NAFTA, and the government of Canada is therefore responsible for their conduct, as well as that of the Ontario Government as a whole.⁸²⁰

⁸¹⁷ **CL-009**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Yearbook of the International Law Commission, vol. II, Part Two (2001) (the “**Draft Articles**”).

⁸¹⁸ **CL-056**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010 ¶ 171; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 (“*Cargill*”) ¶ 381.

⁸¹⁹ **CL-023**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007 (“**ADM**”) ¶ 275.

⁸²⁰ **CL-038**, *Claim of the Salvador Commercial Company v. the United States* (UNRIAA, vol. XV (Sales No. 66.V.3, 455) Award, 8 May 1902 ¶ 477; **CL-009**, Draft Articles, p. 40.

2. Failure to Take Steps to Ensure Windstream Not Negatively Impacted by Moratorium Also Attributable to Canada

512. The second measure at issue relates to the promise by the Ontario Government to Windstream, made by the Minister of Energy's Chief of Staff and described at paragraphs 263 and 265 above, that the OPA would take positive steps to ensure Windstream was not negatively affected by the moratorium. The failure of the Ontario Government, or alternatively its state enterprise the OPA, to comply with that commitment was a measure that is attributable to Canada.

513. First, as set out below, the Ontario Government, and MEI in particular, exercise *de jure* and *de facto* control over the OPA, and therefore could have caused the OPA to renegotiate Windstream's contract to protect the value of its investment in WWIS or to take other measures to ensure that Windstream's investment was not negatively impacted by the moratorium.

514. Second, in the alternative, if the Tribunal finds that the Ontario Government does not exercise *de jure* or *de facto* control over the OPA and therefore could not have caused the OPA to keep Windstream whole, then the failure to keep Windstream whole must be regarded as an omission of the OPA acting as a state enterprise exercising delegated governmental authority, for which Canada is liable under NAFTA Chapter 15.

a) Ontario Exercises and De Jure and De Facto Control over the OPA

515. The evidence shows that the Ontario Government exercises both *de facto* and *de jure* control over the OPA. As a result, the government could have caused the OPA to renegotiate Windstream's contract to protect the value of its investment in WWIS or to take other measures to ensure that Windstream's investment was not negatively impacted by the moratorium.

516. For example, the government could have ordered the OPA to renegotiate Windstream's contract to allow Windstream to develop alternative projects, or to remove the limitations on *force majeure* that have rendered the FIT Contract substantially worthless (and therefore the Project). Or, the government could have directed the OPA to take steps to ensure that Windstream was "kept whole", despite the moratorium. The government did both of these things

for TransCanada, as described above in Section XIX.A. It could have done the same for Windstream, but instead chose not to.

517. *Ontario exercises de jure control over the OPA.* The Ontario Government's de jure control over the OPA arises from several sources.

518. First, the Minister of Energy has the power to issue mandatory directives to the OPA. These directives "do not require either legislative approval or public consultation, implying they can be implemented without warning and on short notice."⁸²¹ In its submissions to the Ontario Superior Court of Justice in *Trillium Energy v. Ontario*, an action brought by another offshore wind energy developer, against Ontario in connection with the moratorium, Ontario acknowledged that the Minister has "broad discretion to give directions to the OPA regarding a program for the procurement of energy."⁸²² Ontario repeated this same submission to the Court of Appeal for Ontario.⁸²³

519. In particular, sections 25.30(2) of the *Electricity Act* empowers the Minister to issue detailed directives that the OPA is obliged to follow.⁸²⁴ At any time, the Minister can issue a new directive, amending or completely revoking a previous directive. Between March 2005 and July 2014, the Minister issued 84 such directives to the OPA.⁸²⁵ Examples of the directives issued by the Minister include directives to:

- a) establish the FIT Program;⁸²⁶

⁸²¹ **CL-103**, Holburn G., "Assessing and managing regulatory risk in renewable energy: Contrasts between Canada and the United States" 45 *Energy Policy* 654 (2012) ("**Holburn**"), p. 659.

⁸²² **C-0742**, *Trillium Power Wind Corporation v. Her Majesty the Queen* (Ontario Superior Court File No. CV-11-436012) Factum of the Defendant/Moving Party, Her Majesty the Queen, Motion to Strike Rules 21 and 25, 6 July 2012 ¶ 20.

⁸²³ **C-0641**, *Trillium Power Wind Corporation v. Her Majesty the Queen* (Court of Appeal for Ontario File No. C56208), Factum of the Respondent, Her Majesty the Queen in Right of Ontario, 11 February 2013 ¶ 25.

⁸²⁴ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15.

⁸²⁵ **C-0694**, Article (OPA), Directives to OPA from Minister of Energy (May 1, 2014).

⁸²⁶ **C-0141**, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009).

- b) enter into negotiations with TransCanada for a contract for a gas-fired power plant to be located in Lennox County to replace the cancelled contract for the facility in Oakville;⁸²⁷
- c) set annual procurement targets for the FIT Program of 150 megawatt for small FIT projects and 50 megawatts for mico-FIT projects and end procurement for large FIT projects;⁸²⁸
- d) enter into negotiations with Ontario Power Generation for the procurement of electricity produced by advanced biomass;⁸²⁹
- e) move forward with its Large Renewable Procurement Process by developing a draft Request for Proposal and a draft Request for Qualification;⁸³⁰
- f) undertake an evaluation process to identify opportunities to improve, streamline and better align the FIT Program support programs; and⁸³¹
- g) hold in reserve 500 megawatts of transmission capacity for the Korean consortium.⁸³²

520. Second, the *Electricity Act* grants the Minister, and the Ontario Government more generally, a number of other important powers of control over the OPA:

- a) The directors of the OPA serve at the pleasure of the MEI. This creates a “strong incentive for OPA board members to account for the preferences of the Minister in their decisions”;⁸³³

⁸²⁷ **C-0632**, Letter from Bentley, Chris (MEI) to Andersen, Colin (OPA) (December 13, 2012).

⁸²⁸ **C-0661**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 12, 2013).

⁸²⁹ **C-0693**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (May 1, 2014).

⁸³⁰ **C-0686**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (March 31, 2014).

⁸³¹ **C-0666**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (August 16, 2013).

⁸³² **C-0201**, Letter from Duguid, Brad (MEI) to Andersen, Colin (OPA) (April 1, 2010).

- b) If the OPA is dissolved and “after the payment of all debts and liabilities, the remaining property of the OPA is vested in Her Majesty in right of Ontario”,⁸³⁴
- c) The OPA’s proposed business plan for the fiscal year must be approved by the Minister of Energy;⁸³⁵
- d) The Auditor General of Ontario (a public body), may audit the accounts and transactions of the OPA;⁸³⁶
- e) The OPA shall submit an annual report on its affairs in the fiscal year to the MEI;⁸³⁷ and
- f) Under s. 25.32(2),⁸³⁸ the OPA cannot enter into a procurement contract that does not comply with regulations or specified provisions of the *Electricity Act*.

521. Regulations passed pursuant to the *Electricity Act* further demonstrate the Ontario Government’s *de jure* control over the OPA. For instance, Ontario Regulation 423/04 provides that before the OPA may invest or borrows funds, it must draft a borrowing and investment policy that must be approved by the Minister of Finance. Even after the policy is approved, the regulation only permits the OPA to invest in a narrow range of financial instruments.⁸³⁹

522. Further, a Memorandum of Understanding entered into by the Ontario Government and the Chair of the OPA to (among other things) establish accountability relationships between the province and the OPA, and to set out governance, operational and auditing arrangements between the OPA and MEI provides that:

⁸³³ **C-0580**, Article, Holburn, Guy, (Energy Policy) Assessing and managing regulatory risk in renewable energy: Contrasts between Canada and the United States (2012), ¶ 659.

⁸³⁴ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15, s. 25.2(3).

⁸³⁵ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15., s. 25.22.

⁸³⁶ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15, s. 25.24.

⁸³⁷ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15, s. 25.25(1).

⁸³⁸ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15, s. 25.32(2).

⁸³⁹ **C-0002**, *Electricity Act, 1998*, Ontario Regulation 423/04.

- a) the Chair shall ensure that the OPA conducts itself in accordance with the management principles of the Ontario Government;
- b) the province is responsible for legislative and regulatory framework within which the OPA operates;
- c) the governance by-law for the OPA shall be approved by the Minister;
- d) the MEI is accountable to the Legislative Assembly of Ontario and the Cabinet for the OPA's fulfillment of its mandate and compliance with applicable legislation; and
- e) the Chair of the OPA is accountable to Minister for the governance and oversight of the OPA.⁸⁴⁰

523. The government can also “enact new legislation to correct agency decisions that stray too far from the minister’s ideal [...]”⁸⁴¹ This legislative power was acknowledged by the OPA’s General Counsel Michael Lyle in his testimony before the Standing Committee on Justice Policy of the Ontario Legislature (discussed below), where, in response to a question asserting that the government cannot exercise ultimate power over the OPA’s board, he answered “That’s true, but I think our board recognized that the government ultimately has the tool of legislation.”⁸⁴²

524. ***Ontario Exercises De Facto Control over the OPA.*** The evidence shows that, even if the Ontario Government does not use its power to issue directives or otherwise exercise *de jure* control over the OPA, it can and, in fact, does exercise *de facto* control over the OPA.

525. The extent of the government’s *de facto* control over the OPA is demonstrated by the testimony of OPA staff in hearings before the Standing Committee on Justice Policy of the Ontario Legislature concerning the cancellation of TransCanada’s contract to build a gas-fired

⁸⁴⁰ **C-0683**, Memorandum of Understanding Between The Ministry of Energy and The Chair of The Ontario Power Authority (March 27, 2014), ¶¶ 5-7.

⁸⁴¹ **CL-103**, Holburn, p. 659.

⁸⁴² **C-0653**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), ¶ JP-421.

power plant in Oakville, Ontario. As described at paragraphs 401 to 415 above, testimony from OPA officials establishes that the Premier's Office reached an agreement with TransCanada, without the participation of the OPA, to cancel the Oakville power plant in response to constituent concerns and to "keep TransCanada whole" following the cancellation. The government was not a counterparty to this contract – it was between TransCanada and the OPA. Nevertheless, staff from MEI and the Premier's Office directed the OPA to negotiate a contract with TransCanada that was consistent with the terms that had been agreed upon. The OPA was under no legal obligation to follow these directions, yet it did. Moreover, officials from these offices actively interfered with the negotiations between the OPA and TransCanada. This is clear evidence of the Ontario Government's *de facto* control over the OPA.

526. In this testimony before the Standing Committee, OPA Chairman Jim Hinds confirmed that although the OPA was not legally obligated to renegotiate its contract with TransCanada to implement the government's promise to "keep TransCanada whole", it did so because it is the practice of the OPA to implement the policies of the of the Ontario Government:

Mr. Jim Hinds: ... the OPA generally implements the policy of the government of the day in respect of electricity, so I think our bias is to try to be helpful in doing that.

I think in this particular case, if we had said, "No, we don't want to be involved in this," I think that there were only a couple of other options, one of which was legislation. I guess the Legislature could have gotten together and passed a bill, and I guess that bill would have been required to speak to the damages.

In our experience, given that we deal with so many contracts and so many people, the last time I recall that happening was Bolivia, when they nationalized the tin mines. It's difficult, given that we want to keep a good reputation in the global community and we want to keep capital flowing into Ontario for these projects. If you're in the same food group as Bolivia, it's not a good thing.

...

I think if you read the paper, it was the government's decision, and if you read the testimony of the former Premier, it was the government's decision not to proceed with the plant. I think, as mentioned, the government did not have the legal ability

to terminate a contract once a directive had been issued or once the original procurement, in this case, had been done.⁸⁴³

527. Mr. Hinds further testified that the Minister of Energy instructed the OPA to begin work renegotiating TransCanada's contract by a letter sent on October 24, 2011:

[T]he minister sent the OPA a letter dated October 24. I sent the minister back a letter dated November 10, and then the minister sent another letter dated November 14. All these dates are in 2011. I think Mr. Bentley's testimony characterized it as an exchange between the minister and the OPA, which went along the lines of, to paraphrase former Minister Bentley, "Start to work to renegotiate this contract."⁸⁴⁴

528. The OPA's efforts to implement the policies of the "government of the day", particularly in the context of the cancellation of the Oakville gas plant, amply demonstrate the Ontario Government's control over the OPA. The Ontario Government announced the cancellation of the Oakville plant on October 7, 2010. On that same date, the OPA sent a letter to TransCanada indicating, among other things, that TransCanada was entitled "reasonable damages, including the anticipated value of the original contract."⁸⁴⁵ According to Michael Killeavy, Director of Contract Management at the OPA, "this was something that had been discussed between TransCanada and the government, and then, basically, the OPA was given the task of drafting a letter with TransCanada."⁸⁴⁶ But for instruction from the government, the OPA "would never have said that in a letter of agreement."⁸⁴⁷ Mr. Killeavy testified that he and the OPA began meeting with TransCanada in November 2010 to begin negotiating a "replacement project."⁸⁴⁸

⁸⁴³ C-0655, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee of Justice Policy (June 4, 2013), p. JP-583.

⁸⁴⁴ C-0655, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee of Justice Policy (June 4, 2013), p. JP-571.

⁸⁴⁵ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013) ¶ 15.

⁸⁴⁶ C-0654, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-450.

⁸⁴⁷ C-0654, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013).

⁸⁴⁸ C-0654, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-447.

He was told by TransCanada that the government had promised TransCanada a replacement project by December 15, 2010, though at the time, Mr. Killeavy testified he didn't know "exactly what sort of replacement project we were supposed to be negotiating with [TransCanada] as compensation for Oakville."⁸⁴⁹

529. Staff from various government ministries directed the OPA to take particular steps in its negotiations with TransCanada. In March 2011, TransCanada made an initial offer to settle. When the OPA's counter-proposal to this initial offer was insufficient, TransCanada "went to the government and complained about the fact that they weren't getting anywhere with us. And that basically led to the instruction coming to submit a second counter-proposal that had a bit higher financial value."⁸⁵⁰ According to Mr. Killeavy, instructions to offer a higher counter-proposal came from Craig MacLennan, Chief of Staff to the Minister of Energy. Minutes from a meeting of the OPA's Board of Directors indicates that the Premier's Office and MEI "verbally directed" the OPA to make a second, higher counter-proposal.⁸⁵¹ Mr. Killeavy testified that absent pressure from the "government writ large", the OPA would not have made the second counter-proposal.⁸⁵²

530. Several other witnesses from the OPA and the relevant ministries confirmed Mr. Killeavy's testimony about MEI and Premier's Office control over the OPA in its dealings with TransCanada. Ms. Shelly Jamieson, the former Clerk of the Cabinet of Ontario, confirmed that the Premier's Office was "driving the bus" on the decision to cancel the Oakville project.⁸⁵³ Michael Lyle, General Counsel at the OPA, testified that the decision to cancel the Oakville gas

⁸⁴⁹ **C-0654**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013).

⁸⁵⁰ **C-0654**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-449.

⁸⁵¹ **C-0654**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-456.

⁸⁵² **C-0654**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-449.

⁸⁵³ **C-0647**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 16, 2013), ¶ JP-221; **C-0645**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013), ¶ JP-87.

plant was made by the government, and that the OPA was informed that this was the government's policy by the Premier's Office on October 5.⁸⁵⁴ Mr. Lyle also testified that the government "insist[ed]" that the October 7, 2010 letter include language about TransCanada receiving the full value of the contract.⁸⁵⁵ With respect to the Mississauga plant, Mr. Lyle confirmed that the Ontario Government did not have legal authority to cancel the contract with TransCanada or any "ultimate power" over the board of the OPA but that the board nevertheless felt obligation to renegotiate its contract with TransCanada in accordance with the government's wishes. He testified:

Mr. Victor Fedeli: But they don't have any right or any ultimate power over your board. Am I correct in that?

Mr. Michael Lyle: That's true, but I think our board recognized that the government ultimately has the tool of legislation.

Mr. Victor Fedeli: So your board would have discussed this, Mr. Lyle?

Mr. Michael Lyle: I don't recall in what detail they discussed that. I think there was a recognition that, without government support for the project, the project would not be able to successfully move ahead.⁸⁵⁶

Mr. Lyle further testified that the OPA was not "terribly happy" that they were being, as one committee member put it, "undermined in [their] negotiations with TransCanada" by directions from the government to increase the amount of money being offered to TransCanada in the OPA's counter-proposals.⁸⁵⁷

531. Mr. Colin Anderson, the Chief Executive Officer of the OPA, confirmed that the decision to relocate the Oakville gas plant was reached after a meeting between the Premier's Office and

⁸⁵⁴ **C-0647**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 16, 2013), pp. JP-420, JP-421.

⁸⁵⁵ **C-0653**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), p. JP-421.

⁸⁵⁶ **C-0653**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), p. JP-424.

⁸⁵⁷ **C-0653**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), p. JP-421.

TransCanada, and that as a result the OPA, without having any input, would be required to negotiate an equivalent project with TransCanada:

[...] But what we did hear quite specifically was that the Premier's office and TransCanada had met, an announcement was going to be scheduled later that week, and the idea was that we would be proceeding with negotiations for TransCanada to find an equivalent type of project.⁸⁵⁸

532. Mr. Anderson ultimately promised TransCanada the entire value of its contract because of the “very strong intent – stated, clear intent – of the government that the project was not going to go forward, and because of the commitments that [the OPA] felt had been made with regard to keeping TransCanada whole [...]”⁸⁵⁹ He also acknowledged that the OPA receives direction from the Ontario Government in a number of different ways:

We do get direction—small-d direction—in a variety of different ways, right? Different instruments have different legal meaning, and a directive is the clearest one because it ties back to authorities under the Electricity Act. [...]

A letter from the minister doesn't always have legal impact, although it is a clear, stated intent on the part of the government that they expect us to act on. Sometimes we get letters from the deputy; sometimes we get emails from ministry staff. So we can get small-d direction in a lot of different ways but generally, where we feel it's necessary, we do consult with our legal branch to say, “Okay, do we actually have the authority to go on this,” and if not, strictly speaking, the legal authority, why would we do this? What more do we need?⁸⁶⁰

533. Ms. JoAnne Butler, the OPA's Vice President, Electricity Resources, testified that Mr. Mullin of the Premier's Office and Mr. MacLennan of MEI asked the OPA to repurpose the commitments made by the Ontario Government to TransCanada into a new project,⁸⁶¹ and that the instruction to offer a \$712 million settlement to TransCanada came from the office of the

⁸⁵⁸ **C-0645**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013), p. JP-424.

⁸⁵⁹ **C-0675**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (October 29, 2013), p. JP-1101.

⁸⁶⁰ **C-0675**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (October 29, 2013), p. JP-1102.

⁸⁶¹ **C-0645**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013), p. JP-87.

Minister of Energy (specifically from Mr. MacLennan), and also from Mr. Mullin.⁸⁶² She also acknowledged writing an email explaining that the “[OPA] hold[s] the contract [with TransCanada], and the government is making deals around us.”⁸⁶³ She also confirmed that the Ontario Government can and did control the OPA in its dealings with TransCanada:

Ms. JoAnne Butler: No, I don’t. The government made a decision. The government has explained why they made that decision. It was our job to take that decision and move it into good, commercial, reasonable electricity-generation projects—both of them—and I believe we’ve done that.

There’s no question, there was some back and forth in the early days. I don’t mind being told what to do. The government can tell me what to do any time they want. What we were reacting to were some of the decisions they made on how we were going to do it. We had the expertise to do it. We continue to have the expertise to do it.⁸⁶⁴

534. The Ontario Government’s *de facto* control over the OPA is also apparent in Windstream’s dealings with the OPA. For instance, on August 10, 2010, the OPA rejected Windstream’s request to extend the COD in its FIT Contract. Subsequent correspondence between Mr. Ungerman, MEI Director of Policy and Mr. Benedetti indicated that Mr. Ungerman had “dealt with” the OPA’s decision.⁸⁶⁵ Shortly thereafter, the OPA issued Windstream an amended FIT contract with an extended COD.⁸⁶⁶

535. Similarly, as described at paragraph 265 above, in a meeting held in February 2011, after the Ontario Government’s decision to impose a moratorium, that was attended by Craig MacLennan, Ian Baines and Chris Benedetti, Mr. MacLennan assured Windstream that the OPA

⁸⁶² C-0645, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013).

⁸⁶³ C-0645, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013), p. JP-81.

⁸⁶⁴ C-0645, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013), p. JP-91.

⁸⁶⁵ C-0338, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) (August 10, 2010).

⁸⁶⁶ C-0342, Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) et al. (August 12, 2010).

“would be open for business”, and that MEI would “meet with the OPA to resolve the issues. This would include Windstream maintaining its applications for land and its FIT Contract.”⁸⁶⁷

3. In alternative, the OPA is state enterprise and Canada has obligation to ensure that OPA acts consistently with Canada’s obligations under NAFTA Chapter 11

536. In the alternative, if the Tribunal finds that the Ontario Government does not exercise *de jure* or *de facto* control over the OPA and therefore could not have caused the OPA to keep Windstream whole, then the failure to keep Windstream whole must be regarded as an omission of the OPA acting as a state enterprise exercising delegated governmental authority, for which Canada is liable under NAFTA Chapter 15.

537. NAFTA Parties are responsible for the actions of state enterprises, pursuant to the specific obligations set out in Chapter 15 of NAFTA. Chapter 15 obligations supplement the other obligations that apply to state enterprises under Chapter 11 and Chapter 14 of NAFTA, including Articles 1105, 1102 and 1103. Under Article 1503(2), a Party will be liable for the acts or omissions of a state enterprise if the challenged acts or omissions were done in the exercise of governmental authority that was delegated to the state enterprise by the Party. Article 1503(2) provides:

Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party’s obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

538. The obligations under Chapter 15 remain with the State Party – they are not placed on the state enterprise. The purpose of Article 1503(2) is to ensure that state enterprises act consistently with Canada’s obligations under Chapter 11, regardless of whether Canada has delegated

⁸⁶⁷ C-0507, Email from Baines, Ian (WEI) to Vellone, John et al (February 19, 2011); CWS-Baines, ¶ 118.

governmental authority to a state enterprise. In other words, Canada cannot “avoid its obligations by delegating its authority to bodies outside the core government.”⁸⁶⁸

539. Assuming for the purposes of this argument that the Ontario Government does not exercise *de jure* or *de facto* control over the OPA and therefore could not have caused the OPA to keep Windstream whole, the OPA’s failure to honour the government’s commitment to keep Windstream whole must be regarded as an action of the OPA as a state enterprise exercising delegated governmental authority.

540. First, the OPA is a state enterprise. Article 1505 defines “state enterprise” as “an enterprise owned, or controlled through ownership interests, by a Party.” The Ontario Government has acknowledged that the OPA is a state enterprise, as defined in Article 1505. In its Counter-Memorial and Reply on Jurisdiction, dated February 28, 2014, in *Mesa Power Group, LLC v. Government of Canada*, a NAFTA arbitration conducted under the UNCITRAL rules, Canada conceded this point:

The Claimant advances a number of separate other arguments as to why the IESO, Hydro One, and the OPA are subject to the obligations in Chapter 11. Ultimately, none of these arguments need to be considered by the Tribunal. The Claimant has asserted that if the OPA, Hydro One and the IESO are not considered organs of the Ontario Government, they are at least state enterprises pursuant to Chapter 15 of NAFTA. Canada agrees. Accordingly, there is no further dispute between the parties about the status of these entities that requires resolution by the Tribunal.⁸⁶⁹

Canada has also taken the position before the WTO that the OPA is an agency of the Ontario Government⁸⁷⁰ and Ontario has argued in a domestic administrative proceeding that the OPA is a “branch of government.”⁸⁷¹

⁸⁶⁸ **CL-087**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002 (“*UPS, Award on Jurisdiction*”) ¶ 17.

⁸⁶⁹ **C-0678**, Government of Canada Counter-Memorial and Reply on Jurisdiction, *Mesa Power Group v. Government of Canada* (February 28, 2014),¶ 290 (internal references omitted).

⁸⁷⁰ WT/DS412/R; WT/DS426/R (December 19, 2012) ¶ 7.182.

⁸⁷¹ *Cabinet Office (Re)*, 2013 CanLII 89665 ¶ 47.

541. Second, the OPA's failure to implement the government's commitment to Windstream was an exercise of delegated governmental authority. The promise that the OPA would take steps to ensure Windstream was not negatively affected by the moratorium was a commitment of the Ontario Government, made by the Minister of Energy's Chief of Staff to Windstream. That Ministerial-level commitment was a governmental act, and its implementation or, in this case, failure to implement the commitment, must necessarily be regarded as a failure to exercise delegated governmental authority. As described at paragraph 108 above, the Minister of Energy, acting pursuant to s. 25.35 of the *Electricity Act*, had delegated to the OPA all responsibilities related to the preparation and management of the FIT Program. Thus, assuming for the sake of argument that the government could not require the OPA to make Windstream whole, it is clear that the OPA had sufficient delegated authority to implement the Government's commitment to Windstream – just as it had in the TransCanada case.

PART FOUR – CANADA IS LIABLE FOR BREACHES OF NAFTA

XXV. ONTARIO'S MEASURES HAVE SUBSTANTIALLY DEPRIVED WINDSTREAM OF THE VALUE OF ITS INVESTMENTS, IN VIOLATION OF ARTICLE 1110 OF NAFTA

542. The moratorium and Ontario's failure to fulfill its promise to take positive steps to ensure that Windstream was not penalized as a result of it have rendered Windstream's investments substantially worthless, while resulting in an economic benefit to Ontario of between \$1.3 and \$2.1 billion. Windstream has lost the entire value of its Project as a result of Ontario's conduct. Neither Ontario nor Canada has paid Windstream any compensation to remedy the effects of Ontario's conduct. Ontario's measures have substantially deprived Windstream of its investments and, therefore, amount to an unlawful expropriation of Windstream's investments, in breach of Article 1110 of NAFTA.

A. Indirect Expropriation Under Article 1110

543. Article 1110 of NAFTA prohibits the NAFTA Parties from expropriating the investments of investors without compensation. It states in relevant part:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6. [...]

544. Article 1110 contemplates direct and indirect expropriation. Direct expropriation has been described as “the compulsory transfer of title to property to the State or a third party, or the outright seizure of property by the State.”⁸⁷² By contrast, a measure or measures tantamount to expropriation is an interference with an investment that “deprives [the investor] of the possibility to utilize the investment in a meaningful way.”⁸⁷³ When measures are tantamount to expropriation, “there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant.”⁸⁷⁴ In practice, this phrase has been interpreted as simply emphasizing that indirect expropriation is included in NAFTA.⁸⁷⁵

545. As set out below, an indirect expropriation under Article 1110 of NAFTA occurs where the investor is substantially deprived of the value of its investment by measures attributable to the NAFTA Party.

546. Arbitral tribunals have generally applied the “sole effects” test to determine whether measures amount to an indirect expropriation.⁸⁷⁶ Under that test, expropriation occurs where the investor has been substantially deprived of the value or economic viability of its investment.

⁸⁷² **CL-099**, Fortier Y. & Drymer S., “Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor” *ICSID Rev. – F.I.L.J.* 293 (Fall 2004) (“**Fortier & Drymer**”), p. 297.

⁸⁷³ **CL-097**, Dolzer & Schreuer, p. 101; **CL-016**, UNCTAD, *Series on issues in international investment agreements: Taking of Property*, Doc. UNCTAD/ITE/IIT/15 (2000).

⁸⁷⁴ **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 (“**Waste Management II**”) ¶ 143.

⁸⁷⁵ **CL-074**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 (“**Pope & Talbot, Interim Award**”) ¶¶ 103-104.

⁸⁷⁶ **CL-029**, *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012 (“**Burlington Resources**”) ¶¶ 396-398; **CL-023**, *ADM* ¶ 240; **CL-071**, *Occidental*

547. The Tribunal in *Burlington Resources Inc. v. Ecuador* summarized the test for indirect expropriation as follows:

When assessing the evidence of an expropriation, international Tribunals have generally applied the sole effects test and focused on substantial deprivation. By way of example, one may cite *Pope & Talbot v. Canada*, where the Tribunal stated that “under international law, expropriation requires a ‘substantial deprivation’”, or *Occidental v. Ecuador*, where in relation to tax measures, the Tribunal referred to the same “criterion of ‘substantial deprivation’ under international law. In *Archer Daniels v. Mexico*, the Tribunal noted that ‘expropriation occurs if the interference is substantial.’

When a measure affects the environment or conditions under which the investor carries on its business, what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. In this sense, some Tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose the possibility as a result of a State measure, then they have lost the economic use of their investment.

Most Tribunals apply the test of expropriation, however it is phrased, to the investment as a whole. Applied to the investment as a whole, the criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable. The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return.⁸⁷⁷

548. NAFTA Tribunals have echoed that characterization of indirect expropriation. For example, the Tribunal in *Metalclad v. Mexico* described expropriation under Article 1110 as follows:

Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental

Exploration and Production Company v. The Republic of Ecuador (UNCITRAL, LCIA Case No. UN3467) Final Award, 1 July 2004 (“*Occidental Exploration*”) ¶¶ 87-88.

⁸⁷⁷ **CL-029**, *Burlington Resources* ¶¶ 396-98 (internal references omitted). See also **CL-042**, *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1) Final Award, 17 February 2000 (“*Santa Elena*”) ¶ 77; **CL-041**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007 (“*Vivendi II*”), ¶ 7.5.11; **CL-074**, *Pope & Talbot*, Interim Award ¶ 102; **CL-031**, *Cargill* ¶ 360.

interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁸⁷⁸

549. The Tribunal in *S.D. Myers v. Canada* similarly found that state action that deprives an investor of the economic benefits of its investment amounts to expropriation.⁸⁷⁹

550. To amount to expropriation, a deprivation must be “severe, fundamental or substantial and not ephemeral.”⁸⁸⁰ An expropriation may occur as a result of the “substantial deprivation of the entire investment or a substantial part of the investment.”⁸⁸¹ Tribunals have found that a substantial deprivation amounting to expropriation occurs where:

- a) the investment is no longer capable of generating a commercial return;⁸⁸²
- b) the investor has lost, in whole or in significant part, the use or reasonably-to-be expected economic benefit of the investment;⁸⁸³
- c) the most economically optimal use of the investment has been rendered useless;⁸⁸⁴
or

⁸⁷⁸ **CL-062**, *Metalclad* ¶ 103.

⁸⁷⁹ **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 (“*S.D. Myers*”), ¶ 283.

⁸⁸⁰ **CL-074**, *Pope & Talbot*, Interim Award ¶ 102 (“substantial deprivation”); **CL-086**, *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18) Award, 26 July 2007 (“*Tokios*”) ¶ 120 (“Although neither the relevant treaty text nor existing jurisprudence have clarified the precise degree of deprivation that will qualify as “substantial”, one can reasonably infer that a diminution of 5% of the investment’s value will not be enough for a finding of expropriation, while a diminution of 95% would likely be sufficient. The determination in any particular case of where along that continuum an expropriation has occurred will turn on the particular facts before the Tribunal.”)

⁸⁸¹ **CL-045**, *Eastern Sugar B.V. v. Czech Republic* (SCC Case No. 088/2004) Partial Award, 27 March 2007 ¶ 210.

⁸⁸² **CL-029**, *Burlington Resources* ¶ 398.

⁸⁸³ **CL-062**, *Metalclad* ¶ 103; **CL-023**, *ADM* ¶ 240; **CL-041**, *Vivendi II* ¶¶ 7.5.11-7.5.16.

⁸⁸⁴ *ADM* ¶ 246.

- d) the investment's economic value has been neutralized or destroyed, as if the rights related thereto had ceased to exist.⁸⁸⁵

551. A substantial deprivation may be caused by a temporary measure, provided that the deprivation is permanent.⁸⁸⁶ This occurs where there is no immediate prospect that the investment's value can be recovered,⁸⁸⁷ such as for example where the investment's success is tied to a fixed timeline that can no longer be met.⁸⁸⁸

552. Further, an intent to expropriate is not a precondition to expropriation.⁸⁸⁹ For example, the tribunal in *Vivendi II* explained that “[w]hile intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor.”⁸⁹⁰ Evidence of an expropriatory intent may only serve to confirm the expropriation under the effects test, but is not a requirement in and of itself.⁸⁹¹

⁸⁸⁵ **CL-084**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003 (“*Tecmed*”) ¶ 115; **CL-048**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (“*Electrabel*”), ¶ 6.62; **CL-039**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001 (“*CME, Partial Award*”) ¶ 604.

⁸⁸⁶ **CL-029**, *Burlington Resources* ¶ 483; **CL-059**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006 (“*LG&E*”) ¶ 193; **CL-081**, *S.D. Myers*, Partial Award ¶¶ 282-283; **CL-025**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006 (“*Azurix*”) ¶ 313.

⁸⁸⁷ **CL-039**, *CME*, Partial Award ¶ 607.

⁸⁸⁸ **CL-059**, *LG&E* ¶ 193; *ADM* ¶ 243.

⁸⁸⁹ **CL-041**, *Vivendi II* ¶ 7.5.20; **CL-068**, *National Grid plc v. The Argentine Republic* (UNCITRAL) Award, 3 November 2008 (“*National Grid*”) ¶ 147; **CL-078**, *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation* (SCC No. 24/2007) Award, 20 July 2012 ¶ 45.

⁸⁹⁰ **CL-041**, *Vivendi II* ¶ 7.5.20. See also **CL-109**, *Newcombe & Paradell*, p. 342.

⁸⁹¹ **CL-029**, *Burlington Resources* ¶ 401.

553. When considering multiple measures, expropriation “will depend on the duration of their cumulative effect.”⁸⁹²

554. The Tribunal in *Tecmed v. Mexico* considered that the determination of whether the investor has been substantially deprived of its investment is critical to distinguish between an ordinary regulatory measure that might have negative economic effects on an investor – such as newly-imposed environmental compliance measures or taxes – and a *de facto* expropriation, which is a measure that deprives the investment of any real substance.⁸⁹³

B. CANADA HAS INDIRECTLY EXPROPRIATED WINDSTREAM’S INVESTMENTS

555. The measures attributable to Canada described above – the moratorium and Ontario’s failure to fulfill its promise to take positive steps to ensure that Windstream was not penalized as a result of it – have rendered WWIS, the Project and the FIT Contract substantially worthless, without any reasonable prospect that their value can be recovered. Therefore, the measures have substantially deprived Windstream of its investments and amount to an indirect expropriation.

556. Under the FIT Contract, WWIS has the obligation to bring the Project into commercial operation by May 4, 2015.⁸⁹⁴ This deadline may be extended by up to two years (to May 4, 2017), by reason of *force majeure*.⁸⁹⁵ Thereafter, either party may terminate the FIT Contract.⁸⁹⁶

557. While the FIT Contract is currently under *force majeure*, there is no longer any prospect that the Project may reach commercial operation by May 4, 2017. Indeed, that deadline became unachievable as of May 4, 2012, over two years before the date of this memorial.⁸⁹⁷

⁸⁹² CL-025, *Azurix* ¶ 313.

⁸⁹³ CL-084, *Tecmed* ¶ 115.

⁸⁹⁴ CWS-Baines, ¶ 104.

⁸⁹⁵ C-0245, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), ¶ 32.

⁸⁹⁶ C-0245, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), ¶ 32.

558. This has had very far-reaching and drastic consequences for the Project. First, the Project is no longer financeable. As set out above in paragraphs 323 to 325, Windstream is no longer able to attract financing for the Project because the FIT Contract – which would be the key element to securing financing – is now at risk of being terminated by the OPA. Without the necessary financing in place, Windstream could not build the Project and bring it into commercial operation by its deadline under the FIT Contract even if the moratorium were to be lifted.

559. As noted above, the FIT Contract gave WWIS the right to receive \$190 per megawatt hour in payments, indexed annually, over a 20-year term.⁸⁹⁸ Ontario's measures have prevented WWIS from being able to do what it was contractually obligated to do – to develop the Project and bring it into commercial operation by May 4, 2017, at the latest – so that WWIS (and Windstream) could receive the financial benefit of the FIT Contract.

560. As a direct consequence of the moratorium, Windstream's investments in WWIS, the Project and the FIT Contract are now substantially worthless. Because of the moratorium, Windstream has lost the entire value of investments which would otherwise have been worth between \$422.9 and 505 million had the moratorium not been put in place, or at least had the Project been allowed to proceed in a timely way so that it could meet its deadlines under the FIT Contract.

561. Further, even if the OPA were to waive its ability to terminate the FIT Contract, the government's actions have created a level of uncertainty around offshore wind and mistrust in the investor community that will take decades to repair.⁸⁹⁹ None of the strategic partners that Windstream was negotiating with would now entertain an investment in the Project or in the Ontario offshore wind industry.⁹⁰⁰

⁸⁹⁷ **C-0711**, Spreadsheet (WWIS), Overall Project Development Schedule Highlights (Detailed – COD May 2017) (August 1, 2014).

⁸⁹⁸ **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

⁸⁹⁹ CWS-Mars ¶ 101.

⁹⁰⁰ CWS-Ziegler ¶ 19.

562. The destruction of the value of Windstream’s investments was not the necessary consequence of the moratorium. Indeed, Ontario promised that Windstream’s Project would be effectively frozen and that it was not cancelled as a result of the moratorium.⁹⁰¹ Ontario promised to negotiate a solution acceptable to Windstream to ensure that Windstream was “happy” with the process and that the government would allow the Project to continue.⁹⁰² Minister of Energy Brad Duguid even stated in the media that Windstream’s Project “won’t be cancelled, it’ll be extended until the science is done.”⁹⁰³

563. Ontario could have fulfilled its promises and taken steps to ensure that Windstream was not penalized as a result of the moratorium. For example, pending the lifting of the moratorium, the MEI could have directed the OPA to remove the *force majeure* limitation that kept the clock running on Windstream’s deadline to bring the Project into commercial operation, constrained the OPA’s termination rights for the Project, and returned Windstream’s security in the meantime.⁹⁰⁴ That would have had the effect of “freezing” the Project, as Ontario had promised to do. Or Ontario could have replaced the Project with an alternative, equivalent project as Windstream proposed on many occasions and as Ontario did for TransCanada after the government made a political decision to cancel TransCanada’s Oakville gas plant. The OPA could have taken those steps even without direction from the MEI. All of those steps would have kept Windstream whole, or close to whole.

564. Instead, and contrary to its promises, Ontario allowed the moratorium to cause delays in the Project so drastic that the Project can now not be developed in time to meet the deadlines in the FIT Contract that Ontario refused to remove. Ontario did that with full knowledge that, without removing the deadlines in the FIT Contract, moratorium-related delays would crystallize into an effective cancellation of the Project – a *de facto* cancellation, if not a formal one. This

⁹⁰¹ **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011; **C-0484**, Transcription of Audio Recording of Telephone Conference call held February 11, 2011; **C-0503**, Email from Cecchini, Perry (OPA) to Killeavy, Michael (OPA) et al. (February 16, 2011).

⁹⁰² See ¶¶ 263 and 265 above.

⁹⁰³ **C-0498**, Article (Toronto Star), Ontario scraps offshore wind power plans (February 12, 2011); **C-0487**, Email from McGhee, Karen to Baines, Ian (WEI) (February 11, 2011).

⁹⁰⁴ See ¶ 263 above.

form of “cancellation by *force majeure*” is an option the OPA had considered with respect to TransCanada, before the Premier’s Office decided to keep TransCanada whole.⁹⁰⁵ In effecting its cancellation of the Project in this way, realized an economic benefit of between \$1.3 and \$2.1 billion.⁹⁰⁶

565. The effect of the moratorium and of Ontario’s failure to ensure that Windstream was not penalized by it was to substantially and permanently deprive Windstream of the entire value of its investments in WWIS, the Project and the FIT Contract. Therefore, it amounts to an indirect expropriation of Windstream’s investments.

C. Canada’s Expropriation of Windstream’s Investments was Unlawful

566. An expropriation is an unlawful breach of Article 1110 unless it meets the following criteria: (1) it is for a public purpose, (2) it was conducted on a non-discriminatory basis, (3) it was conducted in accordance with due process of law and Article 1105(1), and (4) compensation was paid in accordance with Articles 1110(2) to (6). None of these requirements are met here.

567. Expropriation not for a public purpose. An expropriation must be for a public purpose to be lawful. As stated by the International Law Commission:

[T]he power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d’être* is plainly absent, the measure of expropriation is “arbitrary” and therefore involves the international responsibility of the state.⁹⁰⁷

568. As set out above, the moratorium was not adopted for a legitimate public purpose. Moreover, there can have been no legitimate public purpose to Ontario’s failure to fulfill its promises to ensure that Windstream’s Project was “frozen” and not “cancelled.”

⁹⁰⁵ C-0186, Memorandum from Aird & Berlis to Ontario Power Authority (OPA) (February 17, 2010), ¶ 7.

⁹⁰⁶ CER-Power Advisory, p. 24.

⁹⁰⁷ CL-008, International Law Commission, *Documents of the Eleventh Session: Report of the Commission to the General Assembly on State Responsibility*, Fourth Report by F.V. Garcia Amador, UN Doc. A/CN.4/119 (1959).

569. Further, an expropriation will not be lawful if the expropriatory regulatory measure results in a direct economic benefit to the State, even if expropriation is not its intended purpose.⁹⁰⁸ Ontario has realized an economic benefit of between \$1.3 billion to \$2.5 billion by imposing the moratorium and indirectly cancelling the Project.⁹⁰⁹

570. **Expropriation discriminatory.** To be lawful, an expropriation must not be arbitrary and discriminatory, “within the generally accepted meaning of the terms.”⁹¹⁰ Discrimination must be assessed by comparing the treatment of the claimant with that of foreign investors as a whole.⁹¹¹ The moratorium discriminated against Windstream, as a FIT contract holder, by preventing it from proceeding through the permitting process in order to bring its Project into operation by the deadline in its FIT Contract. This constraint was not imposed on other FIT Contract holders.

571. **Expropriation not completed in accordance with due process.** The requirement that a measure be adopted in accordance with due process encompasses a number of basic legal mechanisms. As explained by the Tribunal in *ADC*:

...”due process of law”, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.⁹¹²

⁹⁰⁸ **CL-101**, Heiskanen V., “The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal” 8:2 *Journal of World Investment & Trade* 215 (April 2007), p. 230 (emphasis added); see also **CL-043**, *Deutsche Bank* ¶ 524.

⁹⁰⁹ CER-Power Advisory, p. iv.

⁹¹⁰ **CL-097**, Dolzer & Schreuer, p. 100.

⁹¹¹ **CL-049**, *Eureko* ¶ 442.

⁹¹² **CL-021**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16) Award of the Tribunal, 2 October 2006 (“*ADC*”) ¶ 435.

572. For an expropriatory measure to be in accordance with due process, it must comply both with international standards of due process and with the law of the host state.⁹¹³

573. For example, in *Metalclad*, the Tribunal found that the government of Mexico's unjustified delay in granting a permit, as well as the adoption of an Ecological Decree, amounted to an unlawful expropriation, partly because it was in breach the requirement of due process and the absence of "a timely orderly or substantive basis" for the denial of the required construction permit.⁹¹⁴

574. Ontario has failed to conduct itself in accordance with its obligation of due process. Indeed, it indirectly cancelled the Project by imposing a moratorium that overrides the provisions of the REA Regulation and of Wind Policy 4.10.04 with respect to offshore wind projects. This regulatory framework applies equally to offshore wind projects as it does to onshore ones, yet has been eviscerated with respect to offshore wind projects. Ontario's failure to apply its own regulations – adopted to encourage Windstream and other developers to invest in renewable energy projects in Ontario – demonstrates a lack of due process to contrary to Canada's obligations under Article 1110.

575. ***Canada has not paid any compensation.*** Finally, the fact that Canada has not paid any compensation to Windstream is sufficient to render the expropriation unlawful. An expropriation may only be lawful under Article 1110 if it is accompanied by payment of compensation in accordance with Articles 1110(2) to (6). This is true even if the expropriation is for a public purpose, not discriminatory and completed in accordance with due process.⁹¹⁵ Compensation must be equivalent to the fair market value of the expropriated investment as of the date of the expropriation, and shall be made without delay and be fully realizable. As Canada has not paid any compensation to Windstream, let alone fair market value compensation, it has failed to meet this requirement.

⁹¹³ CL-109, Newcombe & Paradell, p. 376.

⁹¹⁴ CL-062, *Metalclad* ¶¶ 107, 109.

⁹¹⁵ C-0001, NAFTA, Art. 1110(1); CL-081, *S.D. Myers*, Partial Award ¶ 308.

576. Therefore, Canada has unlawfully expropriated Windstream’s investments in WWIS, the Project and the FIT Contract, in breach of Article 1110 of NAFTA.

D. The Rationale for the Moratorium Is Not Relevant to the Expropriation Analysis

577. In its Amended Response to the Notice of Arbitration, Canada argues that the moratorium cannot be found to have the effect of substantially depriving Windstream’s investment because “it was a *bona fide*, non-discriminatory governmental decision implemented in the public interest” and that “Article 1110 does not prohibit such legitimate governmental decision making.”⁹¹⁶ Canada’s argument should be rejected for several reasons.

578. *No public policy exception to expropriation.* First, as a matter of law, the Tribunal should reject Canada’s argument that regulatory measures that have a legitimate public purpose cannot be expropriatory. This argument is unsupported by, and indeed is inconsistent with, the language of Article 1110.

579. Canada’s argument is based on the notion, posited by the *Methanex* tribunal, that regulations that have a public policy rationale and were adopted in good faith are somehow incapable of being expropriatory – and therefore of giving rise to an obligation to compensate an aggrieved investor, whatever their regulation’s effect on the investment. The *Methanex* tribunal broadened the scope of the “police powers” doctrine, which seeks to make certain types of general regulatory measures (traditionally measures related to tax, criminal law and public order)⁹¹⁷ non-compensable, whatever their effect.⁹¹⁸ Importantly, the *Methanex* tribunal’s comments were made in a context in which the tribunal found that the challenged measures did not substantially deprive Methanex of the value of its investment.

⁹¹⁶ Government of Canada’s Amended Response to the Notice of Arbitration (December 5, 2013) ¶ 60.

⁹¹⁷ **CL-108**, Mostafa B., “The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law” 15 *Austl. Int’l L.J.* 267 (2008), p. 274.

⁹¹⁸ **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (“*Methanex*”) ¶ 1456.

580. Many tribunals have rejected attempts to apply a broad “public purpose” exception to render measures that have a legitimate public purpose non-expropriatory. For example, the tribunal in *Santa Elena v. Costa Rica* found that measures taken by Costa Rica to protect nesting sea turtles were expropriatory, even though they had a legitimate (even laudable) public purpose. It stated:

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.

Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.⁹¹⁹

581. Relying on *Santa Elena*, the tribunal in *Vivendi II* was heavily critical of the suggestion that a legitimate public purpose could render non-expropriatory a measure that substantially deprives an investor of its investment. It concluded:

There is extensive authority for the proposition that the state’s intent, or its subjective motives are at most a secondary consideration. While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the effect of the measure on the investor, not the state’s intent, is the critical factor. As Professor Christie explained in his famous article in the *British Yearbook of International Law* more than 40 years ago, a state may expropriate property where it interferes with it even though the state expressly disclaims such intention. **Indeed international Tribunals, jurists and scholars have consistently appreciated that states may accomplish expropriations in ways other than by formal decree; often in ways that may seek to cloak expropriative conduct with a veneer of legitimacy.**⁹²⁰ [...]

Also, the structure of Article 5(2) of the Treaty directs the Tribunal first to consider whether the challenged measures are expropriatory, and only then to ask

⁹¹⁹ CL-042, *Santa Elena* ¶¶ 71-72.

⁹²⁰ CL-041, *Vivendi II* ¶ 7.5.17 (emphasis added).

whether they can comply with certain conditions, i.e. public purpose, non-discriminatory, specific commitments, et cetera. If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid. Respondent's public purpose arguments suggest that state acts causing loss of property cannot be classified as expropriatory. **If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose.**⁹²¹

582. As the *Vivendi II* tribunal observed,⁹²² the application of a public policy exception to expropriation is inconsistent with the plain language of Article 1110 (and many expropriation provisions in BITs). Article 1110 provides that a failure to compensate an investor for the expropriation of its investment is a breach, *even* if the expropriation is for a public purpose. To import a public policy exception into the expropriation analysis would be squarely inconsistent with the language of Article 1110, because it would render a legitimate public purpose both a defence to expropriation and a prerequisite to a finding of lawful expropriation.⁹²³ The tribunal should reject such an untenable interpretation of Article 1110.

583. *Moratorium not adopted in good faith or for a legitimate public purpose.* Second, Canada's argument relies on the moratorium having been adopted in good faith and based on a sound public policy rationale.⁹²⁴ But as set out above in Sections XVI and XVIII, the moratorium was politically motivated and was not based on a rationale that would engage the application of the police powers doctrine. Instead, it was motivated by concerns about the cost of offshore power and public opposition to wind turbine projects, particularly in certain key electoral ridings for the governing Liberal Party.⁹²⁵ The "scientific uncertainty" rationale that Ontario put forward

⁹²¹ **CL-041**, *Vivendi II* ¶ 7.5.20 (emphasis added). See also **CL- 062**, *Metalclad* ¶ 111, where the tribunal found that it needed not consider the motivation or intent of an ecological decree in concluding that the decree constituted an expropriation.

⁹²² Applying similar language in the Argentina-France Bilateral Investment Treaty.

⁹²³ **CL-109**, Newcombe & Paradell, pp. 340-341, citing **CL-041**, *Vivendi II* ¶ 7.5.21.

⁹²⁴ See Section XVI.B above.

⁹²⁵ CER-Power Advisory; CWS-Roeper ¶ 44; CWS-Ziegler ¶ 14.

was based on political expediency, and was not the application of Ontario's police powers. Further, Ontario's rationale is undermined by many elements of the record, including that:

- a) it was a rationale arrived at by politicians (rather than scientific personnel) only after a number of other rationales for constraining offshore wind were considered and rejected,⁹²⁶
- b) several key government officials expressed skepticism about the legitimacy of scientific uncertainty as a rationale for imposing a moratorium on offshore wind,⁹²⁷
- c) it was inconsistent with Minister Cansfield's statement in 2009 that the government's "research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place,"⁹²⁸ and
- d) Ontario has made no serious efforts to advance scientific research following the moratorium.⁹²⁹

584. This alone defeats Canada's argument that the moratorium is incapable of being expropriatory.

585. *Measures' effects disproportionate to their stated public policy rationale.* Third, even tribunals that accept a public policy exception to expropriation apply it only when the measures' effects are proportionate to the public interest that is their stated rationale.⁹³⁰ Here, the moratorium, combined with Ontario's failure to follow through on its promises to ensure that Windstream would not be penalized by it, made Windstream's investments worthless while

⁹²⁶ See ¶¶ 351-362.

⁹²⁷ See ¶¶ 391-394.

⁹²⁸ See ¶ 127; **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

⁹²⁹ See Section XVIII above.

⁹³⁰ **CL-084**, *Tecmed* ¶ 122; **CL-043**, *Deutsche Bank* ¶ 522.

simultaneously resulting in an economic benefit to Ontario of billions of dollars. If Ontario's objective was – as it claims – to ensure that the Project would be built in an environmentally responsible manner, it had means to achieve that objective that were far less debilitating to Windstream's investments. Most simply, Ontario could have allowed the Project to proceed through the REA process as promised, which is designed to ensure that renewable energy projects are environmentally sound. It also could have allowed the Project to proceed as a pilot project, as Windstream proposed on many occasions.

586. If Ontario was intent on preventing the Project from proceeding, it had a number of other options available to it that would have preserved the value of Windstream's investments. It could have fulfilled its promises to renegotiate the FIT Contract to ensure that the Project was "frozen" and not "cancelled." Or it could have allowed Windstream to develop an alternative project, as it did for TransCanada after the government made a political decision to cancel its project. It did neither of those things. Far from it, in fact: it gave Windstream's main proposed alternative project to Samsung. Consequently, the value of Windstream's investments has been destroyed. The measures' effects are drastically disproportionate to Ontario's interest in ensuring that the Project was developed in an environmentally sound manner.

587. *Measures contrary to Ontario's specific commitments and Windstream's legitimate expectations.* Fourth, tribunals that accept a public policy exception to expropriation do not apply it where the measure is contrary to the state's specific commitments to the investor or to the investor's legitimate expectations.⁹³¹ The moratorium was a stark reversal of Ontario's self-promotion as "open for business" for offshore wind, of Ontario's repeated assurances that it supported the Project and of Ontario's commitments and assurances to Windstream.⁹³² This too defeats Canada's argument that the moratorium is not expropriatory despite its devastating effects on Windstream's investments.

⁹³¹ **CL-063**, *Methanex* ¶ IVD.7; **CL-068**, *National Grid* ¶ 151; **CL-102**, Higgins R., "The Takings of Property by the State: Recent Developments in International Law" *Collected Courses of the Hague Academy of International Law* 176 (1982), p. 338.

⁹³² See Sections VI and IX; **C-0507**, Email from Baines, Ian (WEI) to Vellone, John et al (February 19, 2011); CWS-Baines ¶ 118.

XXVI. ONTARIO HAS FAILED TO GRANT WINDSTREAM'S INVESTMENTS FAIR AND EQUITABLE TREATMENT, IN BREACH OF CANADA'S OBLIGATIONS UNDER NAFTA ARTICLE 1105(1)

588. The moratorium was a breach of commitments and representations Ontario made that if Windstream applied for and obtained a FIT contract, the Project would be permitted to proceed through the regulatory approvals process. These commitments and representations were intended to, and did, encourage Windstream to invest in the Project, enter into the FIT Contract and put capital at risk. The moratorium was a repudiation of these commitments, and indeed of Ontario's entire regulatory framework for renewable energy projects as it applied to offshore wind, contrary to Ontario's commitment that it was "open for business" for offshore wind.

589. Far from being "open for business" for offshore wind, Ontario's conduct rendered Windstream's investments effectively worthless. Ontario's conduct is particularly egregious given its ulterior, political motives for imposing the moratorium, which it has attempted to conceal, and its failure to fulfill its promises to ensure that Windstream would not suffer as a result of Ontario's about-face on offshore wind. The arbitrariness and bad faith of Ontario's conduct would be sufficient on its own to breach Canada's obligation under Article 1105(1) of NAFTA to accord fair and equitable treatment to Windstream's investments.

590. Ontario's conduct toward Windstream is even more grossly unfair, unpredictable and discriminatory in the light of Ontario's far more favourable treatment of:

- a) TransCanada, which Ontario kept whole and which was given an alternative project after Ontario made a similar political decision to cancel TransCanada's Oakville gas plant;
- b) Samsung, to which Ontario gave a solar project substantially identical to one Windstream had proposed to build as an alternative to the Project;
- c) other applicants for Crown land, 19 of which have received Applicant of Record status from Ontario even though they applied for it after Windstream did, and despite Ontario's promise that Windstream's application (submitted nearly five years ago) would be granted in a "timely manner" and would be given the "highest priority"; and

- d) the 15 other developers of large-scale wind projects who were awarded FIT Contracts at the same time as Windstream, 13 of which now have projects that are either operational or under construction, and two of which are currently proceeding through the regulatory approvals process.

A. The Requirement to Grant Fair and Equitable Treatment under Article 1105(1)

591. Article 1105(1) of NAFTA provides that “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

592. In 2001, the NAFTA Free Trade Commission stated in a *Note of Interpretation* that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”⁹³³

593. The tribunal in *Merrill & Ring* expressed the standard protected under Article 1105(1) as follows:

[T]he standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness. Of course, the concepts of fairness, equity and reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair.

[...] against the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become part of customary international law.”⁹³⁴

594. Similarly, in *Mondev International v. United States*, the tribunal interpreted Article 1105(1) to protect investments against treatment that is unfair or inequitable:

⁹³³ CL-010, NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions (31 July 2001).

⁹³⁴ CL-061, *Merrill & Ring* ¶¶ 210-211.

To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat a foreign investment unfairly and inequitably without necessarily acting in bad faith ... the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.⁹³⁵

595. Other NAFTA tribunals have preferred to define the standard by reference to arbitrariness and breach by the state of representations made to the investor to induce the investor to invest, contrary to the investor's legitimate expectations. For example, the tribunal in *Mobil Investments Canada Inc. v. Canada* articulated the standard of protection under Article 1105(1) as follows:

(1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;

(2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.

(3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of

(i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and

(ii) were, by reference to an objective standard, reasonably relied on by the investor, and

(iii) were subsequently repudiated by the NAFTA host State.⁹³⁶

⁹³⁵ **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("**Mondev**") ¶ 119.

⁹³⁶ **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012 ("**Mobil**") ¶ 152; see also **CL-085**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013 ("**TECO**") ¶ 454.

596. As set out in greater detail below, examples of treatment that has been described as falling below the fair and equitable treatment standard in Article 1105(1) include treatment that:

- a) breaches commitments to the investor made to induce the investment or breaches the investor's legitimate expectations arising from state representations and assurances;⁹³⁷
- b) fails to maintain regulatory fairness and predictability;⁹³⁸
- c) is unfair, inequitable or unreasonable;⁹³⁹
- d) is grossly unfair, unjust or idiosyncratic;⁹⁴⁰
- e) is arbitrary,⁹⁴¹ or
- f) is discriminatory.⁹⁴²

597. ***Breach of commitments and of the investor's legitimate expectations.*** NAFTA tribunals have consistently recognized that Article 1105(1) protects investors against unfair treatment arising from a state's breach of commitments made to encourage the investor to invest, and of the investor's legitimate expectations.

598. As set out above, the tribunal in *Mobil* noted that a state's breach of representations made to an investor that were reasonably relied on by the investor and subsequently repudiated could

⁹³⁷ **CL-091**, *Waste Management II* ¶ 98; **CL-064**, *Mobil* ¶ 152.

⁹³⁸ **CL-051**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004 ("**GAMI**") ¶ 104 ("outright and unjustified repudiation" of legal rules).

⁹³⁹ **CL-061**, *Merrill & Ring* ¶ 210; **CL-066**, *Mondev* ¶¶ 119, 125.

⁹⁴⁰ **CL-064**, *Mobil* ¶ 152; **CL-091**, *Waste Management II* ¶ 98; **CL-061**, *Merrill & Ring* ¶ 199; **CL-031**, *Cargill* ¶ 296; **CL-085**, *TECO* ¶ 454.

⁹⁴¹ **CL-064**, *Mobil* ¶ 152; **CL-091**, *Waste Management II* ¶ 98; **CL-081**, *S.D. Myers*, Partial Award ¶¶ 262-263; **CL-061**, *Merrill & Ring* ¶ 187; **CL-051**, *GAMI* ¶ 94; **CL-085**, *TECO* ¶ 454.

⁹⁴² **CL-064**, *Mobil* ¶ 152; **CL-091**, *Waste Management II* ¶ 98; **CL-051**, *GAMI* ¶ 94; **CL-085**, *TECO* ¶ 454.

amount to a breach of Article 1105.⁹⁴³ Similarly, the tribunal in *Waste Management II* noted that “[i]n applying [the fair and equitable treatment standard under Article 1105] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”⁹⁴⁴ In *BG Group v. Argentina*, the tribunal adopted the reasoning of the *Waste Management* tribunal in concluding that “commitments to the investor are relevant to the application of the minimum standard of protection under international law.”⁹⁴⁵ Similarly, the tribunal in *Glamis Gold* held that a breach of an investor’s legitimate expectations could constitute a breach of Article 1105(1) “where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct. In this way, a State may be tied to the objective expectations that it creates in order to induce investment.”⁹⁴⁶

599. The tribunal in *Merrill & Ring* accepted that Article 1105 protects investors’ legitimate expectation that their business may be conducted in a normal framework free of government interference, even in the absence of specific representations made to induce the investment.⁹⁴⁷

Similarly, the tribunal in *International Thunderbird* considered that:

⁹⁴³ **CL-064**, *Mobil* ¶¶ 152, 154.

⁹⁴⁴ **CL-091**, *Waste Management II* ¶ 98.

⁹⁴⁵ **CL-027**, *BG Group Plc. v. The Republic of Argentina* (UNCITRAL) Final Award, 24 December 2007 (“**BG Group**”) ¶ 294.

⁹⁴⁶ **CL-053**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009 (“**Glamis Gold**”) ¶ 621, citing **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Arbitral Award, 26 January 2006 (“**International Thunderbird**”) ¶ 147.

⁹⁴⁷ **CL-061**, *Merrill & Ring* ¶ 233. In addition, there is a rich body of investment arbitration decisions applying the fair and equitable treatment standard in which tribunals have held that the “dominant element” of the fair and equitable treatment standard is the protection of an investor’s legitimate expectations: **CL-044**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008 (“**Duke Energy**”) ¶ 339-40; **CL-048**, *Electrabel* ¶ 7.78; **CL-080**, *Saluka*, Partial Award ¶ 302; **CL-059**, *LG&E* ¶ 175; **CL-084**, *Tecmed* ¶ 173; **CL-039**, *CME*, Partial Award ¶ 611. Canada has argued in other cases that tribunal decisions interpreting fair and equitable treatment provisions that are not defined by reference to the minimum standard of treatment are irrelevant to the interpretation of NAFTA Article 1105(1). However, that position relies on a distinction without a difference. As a number of tribunals have recognized, with respect to a state’s protection of foreign investments, the so-called “autonomous” fair and equitable treatment standard and the fair and equitable treatment standard as part of the minimum standard of treatment under customary international law are not substantively different: see e.g. **CL-049**, *Eureko* ¶ 234-235; **CL-021**, *ADC* ¶ 445; **CL-059**, *LG&E* ¶¶ 121-123; **CL-076**, *PSEG* ¶¶ 238-239; **CL-044**, *Duke Energy* ¶

[L]egitimate expectations relate to an examination under Article 1105(1) in such situations where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.⁹⁴⁸

600. **Regulatory fairness and predictability.** NAFTA tribunals have also recognized that Article 1105(1) encompasses a state's obligation to ensure regulatory fairness and predictability to investors. The *Chemtura* tribunal found that "Article 1105 of NAFTA seeks to ensure that investors from NAFTA member states benefit from regulatory fairness."⁹⁴⁹ Similarly, the tribunal in *Merrill & Ring* confirmed that "[t]he stability of the legal environment is also an issue to be considered in respect of fair and equitable treatment."⁹⁵⁰ Specifically, the tribunal found that "state practice and jurisprudence have consistently supported such a requirement in order to avoid sudden and arbitrary alterations of the legal framework governing the investment."⁹⁵¹ The tribunal adopted a contextual analysis and held that what matters is the abruptness of the change in the legal environment.⁹⁵² The *Metalclad* tribunal found that failure to ensure a transparent and predictable framework for business planning and investment points toward violation of the fair and equitable treatment standard.⁹⁵³ In *Mobil*, the tribunal accepted that Article 1105 may protect investors from regulatory changes if those changes are arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard.⁹⁵⁴

337. The expert report of Professor Rudolf Dolzer, on which Windstream relies, reaches the same conclusion: CER-Dolzer.

⁹⁴⁸ **CL-057**, *International Thunderbird* ¶ 147.

⁹⁴⁹ **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010 ("*Chemtura*") ¶ 179.

⁹⁵⁰ **CL-061**, *Merrill & Ring* ¶ 232.

⁹⁵¹ *Ibid.*

⁹⁵² *Ibid.* See also **CL-062**, *Metalclad* ¶ 99.

⁹⁵³ **CL-062**, *Metaclad* ¶ 100.

⁹⁵⁴ **CL-064**, *Mobil* ¶ 153. See also **CL-031**, *Cargill* ¶ 290, where the tribunal recognized that an obligation to provide a stable business framework could be protected under Article 1105 where such expectations "arise from a contract or quasi-contractual basis."

601. **Arbitrariness.** The international minimum standard of treatment includes an obligation not to behave in an arbitrary manner.⁹⁵⁵ According to the *Cargill* tribunal, this includes conduct that moves “beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.”⁹⁵⁶ Tribunals have consistently found the failure to grant regulatory approvals for an ulterior, political motive to be arbitrary, and thus a breach of the fair and equitable treatment standard.⁹⁵⁷

602. **Discrimination.** NAFTA tribunals have also found that discriminatory conduct by a state breaches the minimum standard of treatment.⁹⁵⁸ The protection against discrimination under Article 1105 is distinct, and broader, than the protection in Articles 1102 and 1103.

603. **Bad faith is persuasive, but not necessary.** In establishing a breach of Article 1105(1), the claimant need not demonstrate bad faith or intent to injure by the state, although bad faith is persuasive in establishing a breach of the standard.⁹⁵⁹ This was recognized in *Cargill* when the tribunal stated that the standard was “not so strict as to require ‘bad faith’ or ‘willful neglect of duty,’” though the presence of these factors will suffice to establish a breach of the standard.⁹⁶⁰

⁹⁵⁵ **CL-064**, *Mobil* ¶ 152; **CL-091**, *Waste Management II* ¶ 98; **CL-081**, *S.D. Myers*, Partial Award ¶ 263; **CL-061**, *Merrill & Ring* ¶ 187; **CL-051**, *GAMI* ¶ 94; **CL-085**, *TECO* ¶ 454; See also **CL-112**, Schreuer C., *The Future of Investment Arbitration* (C.A. Rogers, R.P. Alford eds, 2009), p. 190: “In a number of cases, Tribunals have dealt with the prohibition of unreasonable or arbitrary measures in close conjunction with the fair and equitable treatment standard. This tendency is particularly pronounced with Tribunals applying the NAFTA. It may be explained, at least in part, by the fact that the NAFTA does not contain a separate provision on arbitrary or discriminatory treatment.”

⁹⁵⁶ **CL-031**, *Cargill* ¶¶ 291, 293.

⁹⁵⁷ **CL-062**, *Metalclad* ¶ 92; **CL-049**, *Eureko*, Partial Award ¶ 233; **CL-058**, *Ronald S. Lauder v. The Czech Republic* (UNCITRAL) Final Award, 3 September 2001 (“*Lauder*”) ¶¶ 221, 232.

⁹⁵⁸ **CL-064**, *Mobil* ¶ 152; **CL-091**, *Waste Management II* ¶ 98; **CL-051**, *GAMI* ¶ 94; **CL-061**, *Merrill & Ring* ¶ 187; **CL-085**, *TECO* ¶ 454; **CL-081**, *S.D. Myers*, Partial Award ¶ 263; **CL-066**, *Mondev* ¶ 156; **CL-060**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003 (“*Loewen*”) ¶ 135; **CL-037**, *Chemtura* ¶¶ 215 et seq.

⁹⁵⁹ **CL-031**, *Cargill* ¶ 296; **CL-053**, *Glamis Gold* ¶ 560; **CL-040**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) Award, 12 May 2005 (“*CMS*”), ¶ 280; **CL-091**, *Waste Management II* ¶ 93; **CL-084**, *Tecmed* ¶ 153; **CL-109**, *Newcombe & Paradell*, p. 277.

⁹⁶⁰ **CL-031**, *Cargill* ¶ 296; **CL-109**, *Newcombe & Paradell*, p. 277.

The tribunal in *TECO Guatemala* confirmed this by stating “the minimum standard is part and parcel of the international principle of good faith. ... a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached.”⁹⁶¹ Similarly, the tribunal in *Tecmed v. Mexico* stated that “the commitment of fair and equitable treatment [...] is an expression and part of the *bona fide* principle recognized in international law although bad faith from the State is not required for its violation.”⁹⁶²

B. Canada Breached Windstream’s Right to Fair and Equitable Treatment under Article 1105(1)

1. The Moratorium Was Arbitrary, Grossly Unfair and Contrary to Ontario’s Commitments and Representations and Windstream’s Legitimate Expectations

604. The moratorium on offshore wind development was a stark reversal of Ontario’s repeatedly expressed commitment to offshore wind and to the Project, and a repudiation of the pro-investor principles enshrined in the *Green Energy Act* with respect to offshore wind. Its effect was to render the Project, which Windstream invested in in reliance on Ontario’s commitments and assurances, effectively worthless. Because it was an abrupt reversal of Ontario’s promises to support offshore wind and the Project, the moratorium was arbitrary, grossly unfair and contrary to Ontario’s commitments and representations and to Windstream’s legitimate expectations, and therefore amounts to a breach of Article 1105(1).

605. *Moratorium breached Ontario’s commitments and representations and Windstream’s legitimate expectations.* The moratorium was a breach of commitments and representations Ontario made that if Windstream applied for and obtained a FIT contract, the Project would be permitted to proceed through the regulatory approvals process. As described in greater detail above in Section IX, these commitments are representations that were numerous and intended to encourage Windstream to enter into the FIT Contract, and put capital at risk. They created a

⁹⁶¹ CL-085, *TECO* ¶ 456.

⁹⁶² CL-084, *Tecmed* ¶ 153.

legitimate expectation for Windstream that, if it applied for and obtained a FIT contract, and invested in the Project, the Project would be permitted to proceed through development.

606. They include commitments, representations and assurances that:

- a) Ontario was “open for business” for offshore wind;⁹⁶³
- b) timely approval of applications to use Crown land for offshore wind energy development could be expected by those submitting applications;⁹⁶⁴
- c) the streamlined regulatory approvals process created by the *Green Energy Act* applied equally to all renewable energy projects, including offshore wind projects;⁹⁶⁵
- d) the *Green Energy Act*, and the FIT Program and REA process it created, would make Ontario the “destination of choice for green power developers [...] including wind, both onshore and offshore” by providing “certainty that government would issue permits in a timely way” and a fair price guaranteed “for decades”, and that the Act would “coordinate approvals from the [MOE and MNR] into a streamlined process with a service guarantee”;⁹⁶⁶
- e) Ontario was satisfied that its research “made clear” that developing offshore wind was environmentally sound, and as a result lifted the earlier deferral on accepting applications for offshore wind project development;⁹⁶⁷

⁹⁶³ **C-0081**, Email from Cooper, John (MNR) to Morencie, Mike (MNR) et al attaching Toronto Star article (June 30, 2008).

⁹⁶⁴ CWS-Baines ¶ 42.

⁹⁶⁵ See ¶ 102.

⁹⁶⁶ **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009); see **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009); **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

⁹⁶⁷ **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

- f) the Project had the “highest priority” for receiving Applicant of Record status and would receive “priority attention from MNR”;⁹⁶⁸
- g) the Ontario Government, including the Premier’s Office, supported the Project;⁹⁶⁹
- h) the government was working “feverishly” to develop offshore REA guidelines and that, as of May 2010, the guidelines would be available “very soon”;⁹⁷⁰
- i) the MNR “appreciate[ed] Windstream’s need for certainty” before it signed a FIT contract, and would “move as quickly as possible through the remainder of the application review process in order that [WWIS] may obtain Applicant of Record status in a timely manner”;⁹⁷¹
- j) the approval process for the Project would be expedited;⁹⁷² and
- k) the Project could proceed as an offshore wind pilot project.⁹⁷³

607. Without this repeated and continuous confirmation of the government’s support for the Project, Windstream would not have invested time and capital in the Project.⁹⁷⁴ Indeed, Ontario’s repeated assurances and representations that it supported the Project, offshore wind and

⁹⁶⁸ **C-0158**, Letter from Lawrence, Rosalyn (MNR) to Homung, Robert (Canadian Wind Energy Association) (November 24, 2009); **C-0146**, OPA Feed-In Tariff Program, FIT Rules Version 1.1 (September 30, 2009), s. 3.1(e); **C-0214**, Email from Baines, Ian (WEI) to Roeper, Uwe (Ortech) (April 14, 2010); CWS-Baines ¶ 56; Prior to the April 19, 2010 meeting, an MNR official sent an email to Mr. Baines which noted Mr. Baines’ “substantial development experience” (April 13, 2010).

⁹⁶⁹ **C-0214**, Email from Baines, Ian (WEI) to Roeper, Uwe (Ortech) (April 14, 2010); CWS-Baines ¶ 87; CWS-Mars ¶ 69; CWS-Chamberlain, ¶ 16.

⁹⁷⁰ **C-0270**, Email from Roeper, Uwe (Ortech) to Ing, Pearl (MEI) (May 25, 2010); CWS-Roeper ¶ 29.

⁹⁷¹ **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

⁹⁷² See ¶ 196 above; **C-0285**, Memorandum from Adam Chamberlain (BLG) to WEI (June 17, 2010); CWS-Chamberlain ¶ 15.

⁹⁷³ CWS-Benedetti ¶¶ 51-54; **C-0468**, Email from Baines, Nancy (WEI) to Mars, David (White Owl Capital) (January 29, 2011); **C-0471**, Email from Mars, David (White Owl Capital) to Benedetti, Chris (Sussex Strategy) (February 7, 2011), pp. 2, 3.

⁹⁷⁴ CWS-Mars ¶ 71.

renewable energy were the very reason Windstream decided to invest in Ontario in the first place.⁹⁷⁵

608. The moratorium was an abrupt withdrawal of Ontario’s support for the Project, particularly when considered in light of Ontario’s failure to follow through on its promises to ensure that Windstream was not penalized as a result of the moratorium (discussed below) and the devastating consequences that the moratorium has had on the Project, rendering it substantially worthless. This withdrawal of support – and the drastic consequences that resulted from it – were in direct contradiction of Ontario’s commitments to support the Project and assurances that it was “open for business” for offshore wind and that it would provide “certainty” to developers like Windstream.⁹⁷⁶

609. By applying the moratorium and deciding not to process any REA application from WWIS, and indeed by making it impossible for WWIS to engage in environmental work,⁹⁷⁷ the MOE breached Ontario’s commitments to ensure that the Project could proceed through the approvals process that had been established for renewable energy projects under the REA Regulation, which included offshore wind projects. Most egregiously, the moratorium is directly contrary to Minister Smitherman’s multiple commitments that the *Green Energy Act*, which applied equally to offshore wind as it did to all other forms of renewable energy, would provide developers with “certainty” that MNR and MOE “would issue permits in a timely way” in a “streamlined process with a service guarantee.”⁹⁷⁸ It further breached Ontario’s commitment,

⁹⁷⁵ See Section IX.I above.

⁹⁷⁶ See ¶ 101 above; **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009); **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009).

⁹⁷⁷ See Section XXVI.B above.

⁹⁷⁸ **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009); see **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009); **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

made in May 2010 before Windstream entered into the FIT Contract, to issue REA guidelines applicable to offshore wind “very soon.”⁹⁷⁹

610. Further, by applying the moratorium and deciding not to process WWIS’ application for Applicant of Record status, the MNR breached its commitments to “move as quickly as possible” through the remainder of the application process, to ensure that WWIS obtained Applicant of Record status “in a timely manner” and that the Project “had the highest priority” for obtaining Applicant of Record status. Thus, MNR prevented Windstream from obtaining the tenure to Crown land that it needed in order to develop the Project, in direct violation of the promise it made to Windstream in order to encourage it to enter into the FIT Contract and put capital at risk.

611. As noted above, tribunals have consistently held that failure to fulfill commitments that the investor relied upon in making the investment is strong evidence of a breach of the fair and equitable treatment standard.⁹⁸⁰ For example, in *Metalclad*, the tribunal found a breach of Article 1105 where the investor invested in a project in reliance on the government’s representations that a permit would be granted, and the permit was not granted as promised.⁹⁸¹ In this case, the moratorium was not only a repudiation of one commitment but of a series of commitments made by senior officials from a numbers of different branches of the Ontario government over the course of over two-and-a-half years. These commitments culminated in an assurance that the Project had the support of the Premier’s Office – the highest office in Ontario.⁹⁸² Windstream relied on these commitments in investing in the Project, and in entering into the FIT Contract. The moratorium, which has now crystallized into an effective cancellation, is a repudiation of Ontario’s commitments to Windstream and amounts to a breach of Article 1105.

⁹⁷⁹ C-0270, Email from Roeper, Uwe (Ortech) to Ing, Pearl (MEI) (May 25, 2010); CWS-Roeper ¶ 29.

⁹⁸⁰ See Section XXVI.A; *Waste Management II* ¶ 98; *Mobil* ¶ 152.

⁹⁸¹ CL-062, *Metalclad* ¶¶ 87-89. See also CL-067, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Award, 25 May 2004 (“*MTD Equity*”) ¶ 163.

⁹⁸² See ¶ 64 above. The Premier is the *de facto* head of the Government of Ontario. Under the *Constitution Act, 1867*, the Lieutenant Governor in Council is the head of the Government of Ontario; however, in practice, the Lieutenant Governor in Council is apolitical and does not participate in the day-to-day governance of the province.

612. *Moratorium was an abrupt repudiation of the applicable regulatory framework for offshore wind.* Rather than amending the regulatory framework in place for offshore wind projects at the time Windstream invested in the Project, in adopting the moratorium Ontario decided to override that framework by fiat, with complete disregard for the regulatory process that the Ontario government is required to follow.

613. Despite being based on nothing more than policies announced via postings on the EBR Registry and via press releases – and therefore having no formal legal standing or authority – the moratorium eviscerated the REA Regulation as it applied to offshore wind. The moratorium was applied by Ontario to override the REA Regulation, which expressly provided that proponents of offshore wind projects could apply for, and obtain, a Renewable Energy Approval.⁹⁸³ Indeed, the REA Regulation has never been amended, and continues to expressly permit applications for Renewable Energy Approvals from (Class 5) offshore energy projects.⁹⁸⁴ No efforts have been made to date to amend the REA Regulation to implement the moratorium, or otherwise to consult regarding the moratorium in accordance with the requirements of Ontario law.⁹⁸⁵

614. Although the REA Regulation applies equally to offshore wind projects as it does to onshore wind and other renewable energy projects, the MOE’s Policy Decision on the EBR Registry by which it imposed the moratorium stated that “Ontario is not proceeding with any development of offshore wind projects.”⁹⁸⁶ This decision conflicts with the REA Regulation, which expressly permits offshore wind projects to proceed through the REA process. As it relates to offshore wind, the moratorium renders impossible the achievement of the *Green Energy Act’s* purpose and goals, which was to streamline the regulatory approvals process for renewable energy projects in order to encourage investment and to ensure “certainty” in the

⁹⁸³ See ¶ 118 above; **C-0103**, *Environmental Protection Act*, Ontario Regulation 359/09.

⁹⁸⁴ CER-Powell ¶ 86.

⁹⁸⁵ CER-Powell ¶ 86.

⁹⁸⁶ **C-0494**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Offshore Wind Facilities - An Overview of the Proposed Approach (February 11, 2011).

regulatory approvals process and a “service guarantee” for renewable energy project proponents.⁹⁸⁷

615. The moratorium is the very kind of “shocking and unexpected repudiation of a policy’s very purpose and goals” and “willful disregard of the law” that tribunals have consistently found to be arbitrary and grossly unfair, and consequently a breach of the fair and equitable treatment standard.⁹⁸⁸

616. *Moratorium was politically motivated.* The arbitrariness, unfairness and lack of transparency in the decision to impose the moratorium is only made more clear when its stated rationale – scientific uncertainty – is scrutinized. As demonstrated in Section XVI above, “scientific uncertainty” was nothing more than a politically expedient pretext for the moratorium. The moratorium appears actually to have been motivated by a desire to indefinitely stall offshore wind development, for political motives that include cost savings and countering public opposition to offshore wind development in ridings that were key to the government’s success in the 2011 elections.

617. The “scientific uncertainty” rationale for the moratorium was untenable from its inception. It was inconsistent with the Minister Cansfield’s confirmation, when the Green Energy Act was announced, that “[o]ur research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place” and that the 2006-2008 deferral on offshore wind applications was lifted “[a]s a result.”⁹⁸⁹

618. It is also completely undermined by the documents produced by Canada in this proceeding. These documents show that the “scientific uncertainty” justification was hastily developed only after other options for stalling offshore wind were eliminated. This included establishing “go” and “no-go” zones for offshore wind based on transmission constraints (and

⁹⁸⁷ See ¶ 101 above; **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009); **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009).

⁹⁸⁸ **CL-031**, *Cargill* ¶¶ 291, 293; **CL-085**, *TECO* ¶ 621.

⁹⁸⁹ **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

not scientific uncertainty).⁹⁹⁰ The decision to adopt the moratorium was driven not by the MOE and MNR’s technical and policy experts – who in 2009 and 2010 were developing policies that would allow for the development of offshore wind projects within the framework of the Green Energy Act – but by the Premier’s Office, the Ministers and their political staff.

619. Senior MNR staff appear to have recognized that the new moratorium was inconsistent with the lifting in 2008 of the earlier moratorium on offshore wind. Indeed, immediately after the moratorium was announced, the Assistant Deputy Minister of MNR sent an email to her staff entitled “URGENT”, which stated “When you google offshore, Cansfields 2008 NR lifting moratorium on offshore pops up. CAN WE BURY THIS PLEASE.”⁹⁹¹

620. Further, as set out above in Section XVIII, very little has been done since the moratorium to advance scientific research. Indeed, efforts by lower-level staff to engage in research projects have been left unapproved and unfunded.⁹⁹²

621. That Ontario’s repudiation of the regulatory framework in place for offshore wind was made for ulterior, political reasons unrelated to its stated rationale shows that Ontario was acting arbitrarily and in bad faith, in breach of the obligation to grant fair and equitable treatment to Windstream. It is all the more shocking given that, by effectively cancelling the Project, Ontario has realized an economic benefit of between \$1.3 and \$2.1 billion. That economic benefit, along with electoral politics, reflects the real reason for the moratorium.⁹⁹³ As Minister Duguid stated after the moratorium was put in place, “[i]f we’re reaching our clean energy objectives with

⁹⁹⁰ See ¶ 352 above; **C-0315**, Email from Cain, Ken (MNR) to Nowlan, James (MNR) et al (July 9, 2010); **C-0306**, Email from Boysen, Eric (MNR) to Au, Dave (MNR) et al. (June 29, 2010).

⁹⁹¹ **C-0479**, Email from Lawrence, Rosalyn (MNR) to Linley, Richard (MNR) (February, 11, 2011).

⁹⁹² **C-0607**, Project Charter (MOE), Green Energy Program/Renewable Energy Approvals (March 29, 2012), **C-0598**, Presentation (MOE), Offshore Wind Power Development - Proposed Research Plan, MO Briefing (February 17, 2012); **C-0592**, Who's Doing What in Great Lakes (February 9, 2012), **C-0590**, Chart (MOE), Identified Research Needs - Chronological (February 6, 2012)

⁹⁹³ See ¶ 476 above; CER-Power Advisory, p. 24.

onshore projects in solar, wind, bioenergy, why would we then want to expand into offshore which is going to be more costly?”⁹⁹⁴

622. Tribunals have repeatedly found that measures taken for an ulterior motive amount to a breach of the fair and equitable treatment standard.⁹⁹⁵ The ulterior, political motivation that underlies the moratorium further highlights its arbitrariness and gross unfairness, in breach of the fair and equitable treatment standard.

2. Ontario Failed to Fulfill Its Promises to Ensure that the Moratorium Would Not Penalize Windstream

623. The devastating effects of the moratorium on Windstream were compounded by Ontario’s failure to take steps to ensure that Windstream was not penalized as a result of the moratorium, in breach of the promises it made to do that very thing. As set out above, even if it was intent on halting all offshore wind, including the Project, there were still several options open to Ontario to treat Windstream fairly and in compliance with Canada’s obligations under Article 1105(1). Ontario could have followed through on its promise to ensure that the Project was “frozen” and not “cancelled” by removing the contractual deadlines that applied even though Windstream could no longer meet the deadlines because of the moratorium. It could also have given Windstream an alternative project, like it did for TransCanada after Ontario decided to cancel TransCanada’s project for political reasons. Instead, Ontario chose to breach its further commitments to Windstream, on which Windstream relied in continuing to invest to develop the Project even after the moratorium was announced.⁹⁹⁶

3. Ontario Discriminated Against Windstream

624. Ontario’s conduct is all the more shocking when compared to its preferential treatment of TransCanada, Samsung, other applicants for Crown land and the other developers of large-scale

⁹⁹⁴ **C-0504**, Article (Spears, John), Ontario Denies Losing Its Taste for Renewable Energy (February 17, 2011).

⁹⁹⁵ **CL-031**, *Cargill* ¶¶ 291, 293, 299; **CL-026**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009 ¶ 376.

⁹⁹⁶ See Sections XII and XV above. Alternatively, if failure to fulfill Ontario’s promises was an act or omission of the OPA in its capacity as a state enterprise, then Canada is liable for the OPA’s conduct under Article 1503 of NAFTA.

projects who were awarded FIT contracts at the same time as Windstream. Ontario's discriminatory treatment of Windstream further breaches Canada's obligations to grant fair and equitable treatment to Windstream's investments.

625. *Ontario keeps TransCanada whole after cancelling its project, but refused to do the same for Windstream.* As set out above in Section XIX.A in the fall of 2010, Ontario faced substantial local opposition to TransCanada's gas-fired electricity generation facility project in Oakville, an important electoral riding for the governing Liberal party. It also faced substantial local opposition to offshore wind development in other key Liberal ridings.

626. Ontario chose to cancel TransCanada's project for political reasons. Premiers McGuinty and Wynne both acknowledged that the TransCanada project's cancellation was politically motivated because of local opposition to the Project in Oakville.⁹⁹⁷ As is now apparent, Ontario also chose to cancel Windstream's Project for political reasons, though it has attempted to cloak its decision with a veneer of legitimacy by adopting the pretext that the moratorium is intended to remedy "scientific uncertainty."

627. TransCanada and Windstream were in strikingly similar situations. They both had power purchase agreements with the OPA that guaranteed them a fixed price for electricity once their projects reached commercial operation. Both contracts were under *force majeure*. TransCanada's contract was under *force majeure* because of a legal dispute with the Town of Oakville over municipal by-laws that purported to prohibit the construction of TransCanada's project, which the Mayor of Oakville pledged he would pursue all the way to the Supreme Court of Canada. Windstream's contract was under *force majeure* because of the MNR's failure to process its application for Applicant of Record status. The *force majeure* provisions in both contracts were identical – both provided that the OPA could terminate the contract if the project did not reach commercial operation within two years of its original commercial operation date. Because of the

⁹⁹⁷ See ¶ 401 above; **C-0239**, Article, Radwanski, Adam (Globe and Mail), Why Kevin Flynn Can't Stop the Oakville Gas Plant (April 28, 2010); **C-0372**, Article, Ferguson, Rob et al (Toronto Star), Worried Liberals Pull Plug on Oakville Gas Plant (October 7, 2010); **C-0373**, Article (The Canadian Press), Liberals Back Off Plans for Oakville Gas Plant Amid Intense Opposition (October 7, 2010); **C-0697**, Article (Kalinowski, Tess), Liberal Kevin Flynn Wins Oakville in Ontario Election (June 12, 2014); **C-0672**, Article, Howlett, Karen (Globe and Mail), McGuinty Could Have Cancelled Gas Plant with No Compensation Costs, Audit to Show (October 8, 2013).

force majeure events outside their control, both projects were unable to meet that ultimate deadline.⁹⁹⁸

628. Ontario chose two very different solutions to solve two identical problems. It agreed to keep TransCanada whole. In September 2011, fulfilling that promise, Ontario agreed to compensate TransCanada for its sunk costs, and gave it an alternative project with a new power purchase agreement on terms even more favourable to TransCanada than the original. Ontario further committed to allowing TransCanada's Project to be connected to the grid at the Lennox connection point where Windstream's Project would have been connected. Ontario's Auditor General has estimated that the total cost to Ontario of the decision to relocate the Oakville gas plant could be as high as \$675 million.⁹⁹⁹

629. Meanwhile, Ontario should have been carrying out its promises to ensure that Windstream's project was "frozen" and not "cancelled" following the moratorium and to create a solution acceptable to Windstream. Although those promises are reflected in the OPA's internal correspondence, the government never directed the OPA to modify Windstream's FIT Contract to address the commercial realities created by the moratorium or to constrain OPA's termination rights under the Contract. As a result, the FIT Contract continues to require that the Project be brought into commercial operation by May 4, 2017 at the latest. Nor did Ontario grant Windstream an alternative project, as it did for TransCanada. Ontario barely even entertained that possibility, despite Windstream having proposed it several times.

630. The result is drastically different treatment of TransCanada and Windstream. Faced with a political decision to cancel its project, TransCanada received a new project, a new contract and reimbursement of its sunk costs and relocation costs, at a cost of approximately \$675 million to Ontario. In contrast, similarly faced with a political decision to cancel its project, Windstream received no compensation, no new project, and no new contract. Ontario's decision not to keep Windstream whole – which must have been made at the same time Ontario was negotiating its settlement with TransCanada – resulted in an economic benefit to Ontario of between \$1.3 and

⁹⁹⁸ See ¶¶ 407 to 410 above.

⁹⁹⁹ **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 7.

\$2.1 billion. This amounts to severely discriminatory and unfair treatment, in breach of Canada's obligations under Article 1105.¹⁰⁰⁰

631. ***Ontario gives Windstream's proposed alternative solar project to Samsung.*** Ontario's preferential treatment of other energy investors over Windstream did not stop with TransCanada. As set out in Section XIX.B, one of the alternative projects that Windstream had proposed to Ontario as an alternative to the Project was a solar project, which Ontario refused to entertain as a possibility. Only two months after Ontario rejected Windstream's proposal, it awarded a nearly identical solar project – on the same site, connected to the same transmission line – to Samsung. In doing so, Ontario prevented Windstream from salvaging the value of its FIT Contract and Project, and instead favoured the interests of Samsung.

632. ***Ontario gives Crown land to 19 other developers, but not to Windstream.*** In the over six years since Windstream applied for Applicant of Record status to develop WWIS on Crown land, during which time Windstream's application has been neither accepted nor denied, MNR has granted Applicant of Record status for the testing and constructing of wind energy facilities on Crown land to at least 19 other wind energy developers, in several cases for more than one project.¹⁰⁰¹ This is despite MNR's commitment to Windstream on August 9, 2010 that Windstream would receive Applicant of Record status in a "timely manner" (described above in paragraph 208).

633. ***Ontario allows the other developers of large wind projects to develop and build their projects, but not Windstream.*** Moreover, Ontario has allowed every other developer of a large wind project that was awarded a FIT contract at the same time as Windstream to develop its Project, and receive the benefits of its FIT contract, unimpeded by the government or by any moratorium. As the only developer of an offshore wind project that was awarded a FIT contract, Windstream has been singled out and prevented from receiving the benefit of its FIT Contract

¹⁰⁰⁰ Alternatively, if failure to keep Windstream whole was an act or omission of the OPA in its capacity as a state enterprise, then Canada is liable for the OPA's conduct under Article 1503 of NAFTA.

¹⁰⁰¹ **C-0690**, Map (Ortech), Windstream Application v. Crown Land Wind Sites with Accepted Applications (April 8, 2014).

when all other developers of large-scale wind projects who were awarded a FIT contract have been allowed to proceed through the regulatory process.¹⁰⁰²

XXVII. ONTARIO HAS TREATED WINDSTREAM LESS FAVOURABLY THAN CANADIAN AND FOREIGN INVESTORS, CONTRARY TO CANADA'S OBLIGATIONS UNDER ARTICLES 1102 AND 1103 OF NAFTA

634. Ontario has treated Windstream less favourably in like circumstances than it has treated TransCanada, one of its own investors, and Samsung, an investor of a third party. As set out above, after it made the decision to cancel TransCanada's project for political reasons, Ontario kept TransCanada whole by awarding it a new project and compensating it for its costs associated with the cancellation. In contrast, after Ontario made the political decision to cancel Windstream's project, Ontario initially promised to keep Windstream whole (like it did for TransCanada) but then failed to fulfill that promise. It therefore treated Windstream less favourably than TransCanada in like circumstances, contrary to Canada's obligations under Article 1102 of NAFTA. By awarding the very solar plant that Windstream proposed to build as an alternative project to Samsung, Ontario also treated Windstream less favourably than Samsung, an investor of a third party, in like circumstances, in breach of Canada's obligations under Article 1103.

B. Test for Less Favourable Treatment under Articles 1102 and 1103

635. Article 1102 of NAFTA provides investors and their investments with a guarantee that the host state will accord them treatment "no less favorable than that it accords, in like circumstances. Article 1103 protects investors from less favourable treatment accorded in like circumstances to investors "of any other Party or of a non-Party". The treatment protected is that "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

636. Three elements must be established to establish a *prima facie* violation of Articles 1102 or 1103:

¹⁰⁰² CER-Powell, ¶ 111.

1. The Party State has accorded to the foreign investor or its investment “treatment” with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;
2. The foreign investor or investment is in “like circumstances” to investors from the host State or investments of host State nationals (the “comparator”) (Article 1102) or to investors from other states (Article 1103); and
3. The foreign investor or investment has received a treatment that is “less favourable” than that accorded to the comparator.¹⁰⁰³

637. **Treatment.** To be a breach of Articles 1102 or 1103, the investor or investment must have been given “treatment” with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. This requirement has been interpreted very broadly:

This is a broad definition indeed, as it includes almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor’s business activity. The treatment is not different than the aggregate of all the regulatory measures applied to that business.¹⁰⁰⁴

638. **Like circumstances.** Second, treatment must be less favourable to investors or investments from the host state or other states that are in “like circumstances.” The tribunal in *Pope & Talbot II* explained that this requirement is flexible: “By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.”¹⁰⁰⁵ A wide range of circumstances may qualify as being “like” those of the claimant.¹⁰⁰⁶

639. Tribunals have looked at three factors to identify comparators in “like circumstances”:

¹⁰⁰³ **CL-088**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 (“*UPS*”) ¶ 83; **CL-031**, *Cargill* ¶ 228.

¹⁰⁰⁴ **CL-061**, *Merrill & Ring* ¶ 79.

¹⁰⁰⁵ **CL-075**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 (“*Pope & Talbot*”) ¶ 75.

¹⁰⁰⁶ **CL-075**, *Pope & Talbot*, ¶ 75.

- a) Investors who operate in the same business or economic sector;¹⁰⁰⁷
- b) Investors who produce or provide competing goods or services; and¹⁰⁰⁸
- c) Investors who are subject to a comparable legal regime or requirement.¹⁰⁰⁹

640. **Treatment no less favourable.** Third, treatment must be less favourable than that accorded to the investors in like circumstances. The expression “no less favourable” has been interpreted to mean “equivalent to, not better or worse than, the best treatment” available to any other domestic investor or investment operating in like circumstances.¹⁰¹⁰ Less favourable treatment means treatment that accords “any kind of significant benefit for nationals over non-nationals.”¹⁰¹¹ Less favourable treatment may be either *de jure* (measures that are discriminatory on their face) or *de facto* (neutral measures that result in differential treatment).¹⁰¹²

641. **Relationship to a rational policy.** Once the claimant has established that it was afforded a treatment that is less favourable than that accorded in like circumstances to national investors, the burden shifts to the NAFTA Party to establish that the discriminatory treatment has a “reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.”¹⁰¹³ The Tribunal in *Pope & Talbot II* was clear that Article 1102 requires that “any difference in treatment ... be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of

¹⁰⁰⁷ CL-075, *Pope & Talbot*, ¶ 78; CL-081, *S.D. Myers*, Partial Award ¶ 250; CL-088, *UPS* ¶¶ 101-104.

¹⁰⁰⁸ CL-023, *ADM*, ¶ 199.

¹⁰⁰⁹ CL-054, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 (“*Grand River*”) ¶¶ 165-67; CL-031, *Cargill* ¶ 205; CL-075, *Pope & Talbot* ¶¶ 76, 88; CL-022, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 (“*ADF*”) ¶ 156; CL-061, *Merrill & Ring* ¶¶ 82, 89.

¹⁰¹⁰ CL-075, *Pope & Talbot II*, ¶ 42; CL-023, *ADM* ¶ 205.

¹⁰¹¹ CL-075, *Pope & Talbot* ¶ note 59.

¹⁰¹² CL-023, *ADM* ¶ 193.

¹⁰¹³ CL-075, *Pope & Talbot* ¶ 78; CL-023, *ADM* ¶ 205.

domestic over foreign owned investments.”¹⁰¹⁴ To meet this burden, the state must not have had any alternatives in order to achieve its policy objective.¹⁰¹⁵

C. Ontario Has Accorded to Windstream Treatment that is Less Favourable than that Accorded to TransCanada and Samsung in Like Circumstances

642. *Ontario’s treatment of Windstream was less favourable than its treatment of TransCanada, a Canadian company, in like circumstances.* TransCanada and Windstream were in like circumstances in connection with the termination of their respective projects, indeed strikingly so. As set out in paragraphs 401 to 406 above, TransCanada and Windstream were both parties to power purchase agreements with the OPA that guaranteed them a fixed price for electricity once their projects reached commercial operation. As proponents of development-stage projects to produce electricity under contract with the OPA, TransCanada and Windstream operate in the same business sector.

643. Both contracts were under *force majeure*. TransCanada’s contract was under *force majeure* because of a legal dispute with the Town of Oakville over municipal by-laws that purported to prohibit the construction of TransCanada’s project, which the Mayor of Oakville pledged he would pursue all the way to the Supreme Court of Canada. Windstream’s contract was under *force majeure* because of the MNR’s failure to process its application for Applicant of Record status. The *force majeure* provisions in both contracts were identical – both provided that the OPA could terminate the contract if the project did not reach commercial operation within two years of its original commercial operation date. Because of the *force majeure* events outside their control, both projects were unable to meet that ultimate deadline. Ontario decided to terminate both contracts for political reasons. With respect to the termination of their contracts, TransCanada and Windstream operated under a nearly identical legal framework, that is, they were both counterparties with the OPA to power purchase agreements that were under *force majeure* and that provided that the OPA could terminate the agreement if the project was delayed by two years by reason of *force majeure*.

¹⁰¹⁴ CL-075, *Pope & Talbot* ¶ 79.

¹⁰¹⁵ CL-081, *S.D. Myers*, Partial Award ¶ 255.

644. Ontario provided Windstream with “treatment” by failing to keep Windstream “whole” following the moratorium, contrary to its promises to do so. In contrast, Ontario kept TransCanada “whole” following its decision to cancel TransCanada’s project. Indeed, TransCanada received a new contract on favourable terms, a new project, and compensation for its sunk costs and its relocation costs. Windstream received none of this. Thus, Ontario treated TransCanada more favourably in like circumstances than it treated Windstream. As there can be no rational policy to justify such discriminatory treatment of Windstream vis-à-vis TransCanada, this difference in treatment breaches Canada’s obligations under Article 1102.¹⁰¹⁶

645. *Ontario’s treatment of Windstream was less favourable than its treatment of Samsung, a South Korean company, in like circumstances.* Ontario’s treatment of Windstream was less favourable than its treatment of Samsung, a South Korean company, in like circumstances. Based on facts currently known to Windstream, Ontario offered a FIT contract to Samsung for the very solar project that Windstream proposed following the moratorium as an alternative project. Windstream and Samsung were in like circumstances as two possible recipients of contracts to develop the solar project. The circumstances surrounding the awarding of the solar project to Samsung are not currently known to Windstream, but given the similarity of the project ultimately given to Samsung to that which Windstream had originally proposed, it appears that Samsung received better treatment than Windstream in connection with the award of the solar project, in breach of Canada’s obligations under Article 1103.

PART FIVE – DAMAGES AND INTEREST

XXVIII. WINDSTREAM IS ENTITLED TO DAMAGES FOR CANADA’S NAFTA VIOLATIONS

646. Canada has breached Articles 1102, 1103, 1105, and 1110 of NAFTA. These breaches have caused Windstream to lose the entire value of its investments. Under NAFTA, Windstream is entitled to damages that will put it in the position it would have been in but for Canada’s breaches of its NAFTA obligations.

¹⁰¹⁶ Alternatively, if the treatment was provided by the OPA in its capacity as a state enterprise, then Canada is liable for the OPA’s conduct under Article 1503 of NAFTA.

647. Windstream claims compensation equal to the economic losses suffered by it as a result of Canada's NAFTA breaches, as calculated in the expert report of Richard Taylor and Robert Low of Deloitte LLP (the "**Deloitte Report**") as of the date of expropriation or as will be calculated by Deloitte as of the date of the award, whichever is highest, plus pre and post-judgment interest.

A. The General Test for Determining Damages

648. Article 1135 of NAFTA sets out the types of reparation that a Tribunal may order against a Party. A Tribunal may order, separately or in combination,

- a) monetary damages and any applicable interest;
- b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

649. Because NAFTA does not describe a method for determining reparation for *illegal* acts, customary international law applies. The long-standing authority on this issue is the *Chorzów Factory* decision, issued by the Permanent Court of International Justice:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in. [sic] all probability, have existed if that act had not been committed...¹⁰¹⁷

650. The *Chorzów Factory* principle has been affirmed by a number of international tribunals, including by the Court's successor, the International Court of Justice¹⁰¹⁸ and is authoritative in the context of NAFTA.¹⁰¹⁹

¹⁰¹⁷ **CL-034**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser. A) No. 17 (September 13, 1928) ("**Chorzów Factory**") ¶ 125. The *Chorzów Factory* compensation principle was accepted in **CL-081**, *S.D. Myers*, Partial Award ¶ 311 and **CL-050**, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. Reports 7 (Judgment, 25 September 1997) ("**Gabcikovo**") ¶ 149.

¹⁰¹⁸ **CL-041**, *Vivendi II* ¶¶ 8.2.4-8.2.5; **CL-040**, *CMS* ¶ 400; **CL-073**, *Petrobart Limited v. The Kyrgyz Republic* (Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003) Award, 29 March 2005, pp. 77-78; **CL-050**, *Gabcikovo* ¶ 149.

651. It has also been codified in Article 31 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (the "**Draft Articles**"), which reads as follows:

Article 31 Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.¹⁰²⁰

652. As the Tribunal in *Vivendi II* has stated, the award of damages must be "sufficient to compensate the affected party fully and to eliminate the consequences of the state's action."¹⁰²¹

653. The *Chorzów Factory* principle applies equally to breaches of Articles 1102, 1103, 1105(1) and 1110 of NAFTA.

B. Damages for Unlawful Expropriation Are Calculated According to the *Chorzów Factory* Standard

654. Article 1110(1) of NAFTA provides that an investment may not be expropriated except if the State Party does so for a public purpose, on a non-discriminatory basis, in accordance with due process of law and Article 1105(1), and on payment of compensation in accordance with the requirements of paragraphs 1110(2) to (6). Article 1110(2) requires that compensation shall be equivalent to the fair market value of the investor's expropriated investment immediately before the expropriation took place. The valuation of the compensation will take the following criteria into account: going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.¹⁰²²

¹⁰¹⁹ **CL-081**, *S.D. Myers*, Partial Award ¶ 311; **CL-062**, *Metalclad* ¶ 122.

¹⁰²⁰ **CL-009**, Draft Articles, Art. 31. See also **CL-071**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11) Award, 5 October 2012 ("*Occidental Petroleum*") ¶ 793.

¹⁰²¹ **CL-041**, *Vivendi II* ¶ 8.2.7.

¹⁰²² **C-0001**, NAFTA, Article 1110(2).

655. However, the compensation valuation method found at Art. 1110(1) is applicable to lawful expropriation only. It does not limit the damages payable for unlawful expropriation or for breaches of other NAFTA provisions – all of which are governed by the *Chorzów Factory* damages standard.

656. Tribunals have consistently applied this approach – limiting the application of the compensation for expropriation provision of an investment treaty to lawful expropriations and applying the *Chorzów Factory* standard to unlawful expropriations.¹⁰²³ As Professor Marboe states, “in case of lawful expropriations the treaty applies while in case of unlawful expropriations – i.e. expropriations in violation of the treaty provisions on expropriation – the customary international law rules of the law of State responsibility apply.”¹⁰²⁴

657. The distinction between compensation for lawful and for unlawful expropriation was drawn in the *Chorzów Factory* case itself.¹⁰²⁵ Referring to the consequences of the fact that an expropriation by Poland of a factory belonging to German nationals was unlawful, the PCIJ stated:

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated.¹⁰²⁶

¹⁰²³ See e.g. **CL-021**, *ADC* ¶¶ 481-484; **CL-082**, *Siemens* ¶¶ 349-352; **CL-079**, *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/070) Award, 30 June 2009 (“*Saipem*”) ¶ 201; **CL-093**, *Yukos Universal Limited (Isle of Man) v. the Russian Federation* (PCA Case No. AA 227) Final Award, 18 July 2014 (“*Yukos*”) ¶¶ 1765-1766.

¹⁰²⁴ **CL-107**, Marboe I., “The Difference between Lawful and Unlawful Expropriations with Regard to the Amount of Compensation” (presented at 2008 Remedies in Commercial, Investment and Energy Arbitrations, Houston, TX, April 17-19, 2008), p. 11.

¹⁰²⁵ *Ibid*, p. 8.

¹⁰²⁶ **CL-034**, *Chorzów Factory* ¶ 124.

C. In Case of Unlawful Expropriation Investor May Elect Between a Valuation as of the Expropriation Date and as of the Date of the Award

658. Article 1110(2) provides that for lawful expropriation, damages shall be calculated “immediately before the expropriation took place.” However, damages for unlawful expropriation need not be calculated as of that date. Instead, as described above, a state responsible for an illegal expropriation is obliged to put the injured party into the position it would be in if the wrongful act had not taken place – an obligation of restitution that applies as of the date when the award is rendered. Tribunals have adopted this approach because compensation for unlawful expropriation and other treaty breaches must take into account events that follow the initial taking or breach, as they may affect the extent of the damage caused by the illegal act and hence must be reflected in the calculation. As Professor Marboe states:

It follows, thus, from the principle of full reparation as formulated by the PCIJ in *Chorzów Factory*, that the valuation is not normally limited to the perspective of the date of the illegal act or some other date in the past. An increase in value of the valuation object, consequential damage, subsequent events and information, at least up until the date of the judgment or award, must be taken into account in the evaluation of damages.¹⁰²⁷

659. Tribunals have also held that, just as investors should enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the award, they should not bear the risk of unanticipated events decreasing the value of an expropriated asset over that time period. Consequently, an investor that has been subject to an unlawful expropriation is entitled to elect between a valuation as of the expropriation date and as of the date of the award.¹⁰²⁸

660. This applies equally to damages arising from Canada’s breaches of Articles 1105(1), 1102 and 1103.¹⁰²⁹

¹⁰²⁷ **CL-106**, Marboe I., “Compensation and Damages in International Law – The Limits of ‘Fair Market Value’” 7 *J. World Invest. & Trade* 723 (2006), p. 753.

¹⁰²⁸ **CL-093**, *Yukos* ¶ 1763.

¹⁰²⁹ **CL-082**, *Siemens* ¶¶ 349, 352, 360.

D. Windstream Is Entitled to Damages for Canada's Breaches of NAFTA

661. Windstream is entitled to damages in a quantum sufficient to eliminate the consequences of Canada's breaches of Articles 1110, 1105(1), 1102 and 1103 of NAFTA. As set out in Section XV above, the moratorium, combined with Ontario's failure to fulfill its promises to keep Windstream whole, has rendered Windstream's investments in the Project, WWIS and the FIT Contract effectively worthless. Like Mexico's breaches of NAFTA in *Metaclad*, Canada's breaches of NAFTA resulted in "the complete frustration" of Windstream's investment and "negate[d] the possibility of any meaningful return" on its investment.¹⁰³⁰

662. *Damages for breach of Article 1110.* For Canada's breach of Article 1110, Windstream is entitled to be put in the position it would have been in had the moratorium not been imposed, as of the date on which it was substantially deprived of its investments or the date of the award, whichever is higher. As set out in Section XV above, Windstream's investments in WWIS, the Project and the FIT Contract became substantially worthless as of May 4, 2012. Thus, Windstream is entitled to be put in the position it would have been had the moratorium not been imposed, either as at May 4, 2012 or the date of the award, whichever is higher.

663. *Damages for breach of Article 1105(1).* Canada breached Article 1105(1) both because Ontario imposed the moratorium and because it failed to insulate Windstream from its effects as promised. Thus, Windstream is entitled to damages that put it in the position it would have been in had either (a) the moratorium not been imposed, or (b) Ontario had kept Windstream whole by putting it in the position it would have been in had the moratorium not been imposed. In either case, the result is the same: Windstream is entitled to be put in the position it would have been in had the moratorium not been imposed, whichever is higher.

664. *Damages for breach of Article 1102.* Canada breached Article 1102 by keeping TransCanada whole following the cancellation of its project, but refusing to accord the same treatment to Windstream. For Canada's breach of Article 1102, Windstream is entitled to be put in the same position it would have been in had Ontario treated Windstream the same as it treated TransCanada, that is, had Ontario kept Windstream whole following the moratorium. Thus,

¹⁰³⁰ CL-062, *Metaclad* ¶ 113.

Windstream's damages resulting from Canada's breach of Article 1102 are the same as its damages resulting from Canada's breach of Article 1105(1).

665. *Damages for breach of Article 1103.* Canada breached Article 1103 as a result of Ontario's decision to award to Samsung the very solar project that Windstream proposed as an alternative to the Project. Windstream is entitled to be put in the position it would have been in had Ontario awarded the solar project to Windstream. Since the damages that flow from Canada's breach of Article 1103 are different than those that flow from the breaches of Articles 1110, 1105(1) and 1102, and would involve an alternate DCF analysis, Deloitte has not calculated those damages in its report. In the event that the Tribunal were to dismiss Windstream's claims for breaches of Articles 1110, 1105(1) and 1102 but allow Windstream's claim for breach of Article 1103, Deloitte would prepare an alternate DCF calculation arising from that breach.

E. Use of Discounted Cash Flow Method to Determine Full Reparation

666. Where an investment had been rendered substantially worthless by an illegal act, tribunals have frequently accepted the Discounted Cash Flow ("DCF") method to determine the value the investment would have had "but for" the illegal act.

667. The DCF method, which measures the present value of the future cash flows available to equity, and the market-based approach, which seeks to value an investment based on comparable transactions, are two of the most commonly used valuation methods in business practice.¹⁰³¹ Other methods, like the asset-based method which seeks to determine the value of an investment's assets, are less commonly used because they do not take into account that the value of a business often greatly exceeds the book value of its assets.¹⁰³²

668. According to the DCF method, net cash flows are determined by first setting out the flow of benefits the claimants would have reasonably been expected to earn in a hypothetical world

¹⁰³¹ **CL-104**, Kantor M., *Valuation for arbitration: compensation standards valuation methods and expert evidence* (Kluwer Law International, 2008) ("**Kantor**"), pp. 119, 131.

¹⁰³² **CL-105**, Marboe I., *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2009), p. 268 ¶ 5.276.

but for the breach (subtracting any cash flow earned by the investors in the actual world where the breaches took place).¹⁰³³ The DCF method's five main components of value are (1) revenues, (2) operating expenses (including sales, general and administrative expenses), (3) capital expenditures, (4) taxes, and (5) discount rate.¹⁰³⁴

669. The DCF method is widely used in international investment arbitration to determine the value an investment would have had but for an illegal act. Tribunals have found it to be appropriate where projected cash flows are capable of determination and are not speculative.¹⁰³⁵ Examples of circumstances that tribunals have found sufficient to establish an ability to produce profits include where:

- a) there is a long-term contract or concession in place that guarantees a certain level of profits;¹⁰³⁶
- b) there is a predictable revenue stream;¹⁰³⁷
- c) in the case of a development-stage project, there is sufficient evidence that the project would more likely than not have become operational had it not been prevented from doing so by the illegal act;¹⁰³⁸
- d) the investor has sufficient expertise and a proven track record of profitability in similar circumstances;¹⁰³⁹

¹⁰³³ **CL-071**, *Occidental Petroleum* ¶ 708.

¹⁰³⁴ **CL-055**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17) Award, 31 January 2014 ("**Rurelec**") ¶ 453.

¹⁰³⁵ **CL-071**, *Occidental Petroleum* ¶¶ 690, 708; **CL-046**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, 11 June 2012 ("**EDFI**") ¶ 1188; **CL-055**, *Rurelec* ¶¶ 453, 604; **CL-047**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011 ("**El Paso**"), ¶¶ 711-712.

¹⁰³⁶ **CL-065**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20) Final Award, 11 December 2013 ("**Micula**"), ¶ 1010.

¹⁰³⁷ **CL-046**, *EDFI* ¶ 1188.

¹⁰³⁸ **CL-072**, *Oil Company Sapphire International Petroleum, Ltd. v. National Iranian Oil Company* (35 ILR (1967) 136) Award, 15 March 1963 ("**Sapphire**") p. 198.

- e) there is a proven record of profitability by others in similar circumstances;¹⁰⁴⁰
- f) feasibility studies, business plans, internal memoranda and budget documents demonstrate the investor's intentions to operate the business to generate a profit;¹⁰⁴¹ and
- g) the state has recognized that the project's potential profitability.¹⁰⁴²

670. The use of the DCF method is particularly appropriate in cases where, as here, the investor has foregone alternative investment opportunities.¹⁰⁴³

F. The Discounted Cash Flow Method Provides the Correct Valuation of Windstream's Losses

671. In Deloitte's opinion, the DCF method is the most appropriate and reliable approach for quantifying Windstream's losses for the following reasons:

- a) WWIS' revenues can be forecast with a relatively high degree of confidence, given that the FIT Contract guaranteed a specified price per kilowatt-hour and wind production can be reasonably estimated, with estimates supported by independent wind studies, and therefore revenues are readily determinable.¹⁰⁴⁴

¹⁰³⁹ **CL-041**, *Vivendi II* ¶¶ 8.3.4., 8.3.10.

¹⁰⁴⁰ **CL-041**, *Vivendi II* ¶¶ 8.3.4., 8.3.10.

¹⁰⁴¹ **CL-065**, *Micula* ¶ 1113.

¹⁰⁴² **CL-072**, *Sapphire*, p. 189.

¹⁰⁴³ **CL-110**, Ripinsky S. & Williams K., *Damages in International Investment Law* (BIICL, 2008) ("**Ripinsky & Williams**"), p. 291, quoted in **CL-052**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3) Award, 16 June 2008 ("**Gemplus**") ¶ 13-87. See also *Sapphire*, pp. 187-88 ("... in such cases the existence of damage is uncertain, case law has looked at the position at the time when the opportunity was lost and has accepted that this opportunity itself has a value whose loss gives rise to compensation.")

¹⁰⁴⁴ CER-Deloitte (Taylor and Low), ¶ 4.10(a).

- b) The majority of the Project’s capital costs would have been contractual (for example, contracts with construction and other companies that specify pricing), and were compared with benchmark data.¹⁰⁴⁵
- c) Operating costs are expected to be relatively stable and can be established contractually or estimated using benchmark data or reasonable estimates.¹⁰⁴⁶
- d) Engineering for the Project does not involve any novel technology given that there are similar projects operating internationally, and the equipment required for turbine installation existed at the relevant dates, reducing the risk associated with having to construct custom equipment required for installation.¹⁰⁴⁷

672. Indeed, as set out in Section XX above, the evidence that Windstream has adduced in this arbitration proves that “but for” the moratorium, the Project would more likely than not have achieved commercial operation and generated the revenues guaranteed to it under the FIT Contract. Windstream has established that:

- a) the Project did not face significant regulatory risk and the regulatory environment was sufficiently developed for WWIS to proceed with the Project;¹⁰⁴⁸
- b) but for the moratorium, the Project would have received tenure to the Crown land necessary to develop and build the Project;¹⁰⁴⁹
- c) the Project was an is technically feasible;¹⁰⁵⁰
- d) but for the moratorium, there was no material impediment to the Project obtaining a Renewable Energy Approval and other permitting;¹⁰⁵¹

¹⁰⁴⁵ CER-Deloitte (Taylor and Low), ¶ 4.10(b).

¹⁰⁴⁶ CER-Deloitte (Taylor and Low), ¶ 4.10(c).

¹⁰⁴⁷ CER-Deloitte (Taylor and Low), ¶ 4.10(d).

¹⁰⁴⁸ CER-Powell, ¶ 106-110.

¹⁰⁴⁹ CER-Powell, ¶ 107.

¹⁰⁵⁰ CER-SgurrEnergy, p. 5.

- e) but for the moratorium, the Project would have been financeable;¹⁰⁵² and
- f) but for the moratorium, the Project would have achieved commercial operation by the deadlines set out in the FIT Contract.¹⁰⁵³

673. Thus, WWIS' cash flows from the Project are capable of being determined with a reasonable degree of certainty and are not speculative.

674. In addition, Windstream's investors' track record of successfully developing, financing and building large-scale energy projects in both onshore and offshore environments further supports the conclusion that, but for the moratorium (and Ontario's failure to keep Windstream whole) the Project would more likely than not have reached commercial operation and generated revenues in accordance with the FIT Contract.¹⁰⁵⁴

675. Accordingly, the DCF method provides the most reliable and accurate measure of Windstream's losses resulting from Canada's breaches of Articles 1110, 1105(1) and 1102 of NAFTA.

G. Quantum of Windstream's Losses

676. Deloitte has calculated Windstream's losses using the DCF method as at (a) May 4, 2012 and (b) August 19, 2014, the date of their report, which will be updated to the date of the award.

677. *Valuation date.* As set out above, Windstream's damages may be valued as of (a) the date of the unlawful act, or (b) the time of the award, whichever is higher.¹⁰⁵⁵ While the moratorium was imposed on February 11, 2011, its damage to the Project crystallized on May 2, 2012, the date on which the Project became worthless because Windstream was no longer able to

¹⁰⁵¹ CER-Baird, p. 99; CER-Kerlinger ¶ 3; CER-Reynolds, p. 20; CER-ORTECH, p. 10.

¹⁰⁵² CER-Baird, p. 99; CER-Kerlinger ¶ 3; CER-Reynolds, p. 20; CER-ORTECH, p. 10.

¹⁰⁵³ CER-Deloitte (Bucci), pp. 6-8.

¹⁰⁵⁴ See ¶ 470 above.

¹⁰⁵⁵ **CL-104**, Kantor, pp. 64-65; **CL-093**, *Yukos* ¶ 1763.

develop it within the time frames set out in the FIT Contract.¹⁰⁵⁶ Further, as of that date, Ontario had definitively refused to fulfill its promise to ensure that the Project was “frozen” and not “cancelled, as evidenced by the fact that Windstream never received a response to its email to Mr. Brodhead of the Premier’s Office explaining that Ontario had failed to keep its word.¹⁰⁵⁷ Thus, Windstream submits that the appropriate valuation date is either May 4, 2012 or the date of the award, whichever is higher.

678. *Windstream’s losses.* In Deloitte’s opinion, Windstream’s losses resulting from Canada’s breaches of Articles 1110, 1105(1) and 1102 are as follows:¹⁰⁵⁸

CAD millions	At May 4, 2012		At August 19, 2014	
	Low	High	Low	High
NAFTA 1110 (unlawful expropriation)/1105/1102				
Economic Losses after tax	251.7	313.1	288.5	346.6
Tax rate	26.5%	26.5%	26.5%	26.5%
Gross-up to pre-tax	342.5	426.0	392.5	471.6
Past costs incurred	15.0	15.0	15.0	15.0
Total	357.5	441.0	407.5	486.6
Add: Pre-judgment interest	38.9	48.0	15.4	18.3
Total with pre-judgment interest	396.4	489.0	422.9	505.0

679. As explained in the Deloitte Report, the key parameters and inputs that comprise Deloitte’s DCF analysis are:

- a) *Revenue:* Deloitte calculated WWIS’s projected revenues by applying the inflation-adjusted price under the FIT Contract to an assumed annual energy

¹⁰⁵⁶ See ¶ 320 above; C-0711, Spreadsheet (WWIS) Overall Project Development Schedule Highlights (Detailed – COD May 2017) (August 1, 2014); CWS-Baines ¶ 142; CWS-Roeper ¶ 87.

¹⁰⁵⁷ CWS-Baines ¶ 141.

¹⁰⁵⁸ CER-Deloitte (Taylor and Low), ¶¶ 1.40, 4.2.

production of ██████ megawatts, based on 300 megawatts of Project capacity, 365.25 days per year, 24 hours per day of wind production and a net capacity factor of ██████. The net capacity factor was determined by GL Garrad Hassan in a study commissioned by WWIS and is consistent with other wind resource analyses conducted by Windstream's consultants. The net capacity factor accounts for potential losses in production due to maintenance and downtime.¹⁰⁵⁹

- b) Capital costs: Deloitte determined capital costs under the rubrics of planning and development costs, turbine costs, foundation costs and electrical infrastructure costs. Deloitte relied on a detailed capital cost report prepared by 4C Offshore for Windstream.¹⁰⁶⁰ 4C Offshore are a United Kingdom-based leading provider of market information and market consulting services to the offshore wind industry. 4C Offshore tracks information concerning over 1,000 offshore wind projects in development globally. 4C Offshore developed an estimate of the Project's capital costs on the basis of comparable projects where actual costs incurred are available. In inputting capital costs into its DCF model, Deloitte used the median of the range developed by 4C Offshore for each category of capital costs. It then conducted research to corroborate the capital costs, including industry benchmarks and guideline projects.¹⁰⁶¹
- c) Operating costs: Deloitte determined operating costs based on the following categories: repair and maintenance costs, insurance, owner's administration and operation, legal support, engineering support, post-construction environmental monitoring, owner's operator/facility manager, owner's maintenance crew and contingency. Deloitte calculated these costs based on the Project Feasibility Analyses prepared by Ortech, and confirmed the reasonableness of the costs estimates by conducting a benchmarking analysis of the operating costs estimated

¹⁰⁵⁹ CER-Deloitte (Taylor and Low), ¶¶ 4.21-4.23.

¹⁰⁶⁰ CER-4C Offshore; CER-Deloitte (Taylor and Low) ¶¶ 4.25-4.30.

¹⁰⁶¹ CER-Deloitte (Taylor and Low), ¶¶ 4.25-4.27; C-0257, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010).

by Ortech against industry reports and operating costs estimated by Mott MacDonald and by 4C Offshore.¹⁰⁶²

d) Annual wind land rental charge: Deloitte calculated the annual wind land rental charge owed to the MNR based on the formula published by the MNR.¹⁰⁶³

e) Foreign exchange translation: As most of the benchmark and reported costs are stated in foreign currencies (euros or U.S. dollars), Deloitte translated the foreign currency capital cost estimates into Canadian dollars using the spot rate as at September 4, 2012, consistent with the date on which the Project was projected to achieve financial close.¹⁰⁶⁴

f) Financing: Deloitte conducted market research to determine the probable financing arrangements for the Project. Based on Deloitte's research, it determined that the following financing arrangements would have been arranged in mid-2012:

[REDACTED]

[REDACTED]. These terms are consistent with Deloitte's knowledge of financing of renewable energy projects and market research.¹⁰⁶⁵

¹⁰⁶² CER-Deloitte (Taylor and Low), ¶¶ 4.31-4.33.

¹⁰⁶³ CER-Deloitte (Taylor and Low), ¶ 4.24.

¹⁰⁶⁴ CER-Deloitte (Taylor and Low), ¶¶ 4.34-4.35.

¹⁰⁶⁵ CER-Deloitte (Taylor and Low), ¶¶ 4.36-4.38.

- g) Discount rate: Deloitte determined a discount rate based on their review of the available returns on alternative investments, the operations of WWIS, the relative risks of the Project, and assuming a market-based capital structure. In this regard, Deloitte applied the weighted average cost of capital (“WACC”) to the Project’s projected cash flows in its determination of lost profits. Deloitte calculated the WACC for the Project to be [REDACTED] based on an after-tax cost of debt in the order of [REDACTED], a market debt to capital ratio of [REDACTED] debt and [REDACTED] equity, and an after-tax cost of equity from [REDACTED] (approximately), which is comprised of a risk-free rate, a market equity risk premium, a levered beta factor and unsystematic equity risk factors, such as a size premium, country risk adjustment factor and a company specific risk adjustment.¹⁰⁶⁶
- h) Costs incurred to date: Deloitte included WWIS’ development and financing related costs incurred to date in its analysis. Although those costs would have been incurred to achieve profits, they were included as they were deducted from the determination of lost profits and were incurred by WWIS and therefore cannot be avoided. In addition, given that the OPA has refused to return WWIS’ \$6 million letter of credit,¹⁰⁶⁷ Deloitte also included this amount as part of its analysis (and only this amount, even though the letter of credit was secured by US\$6,623,842 as of August 14, 2014.) This amount will be updated in the event that the OPA returns WWIS’ letter of credit.¹⁰⁶⁸

680. Deloitte has not included a reclamation cost or salvage value at the end of the 20-year FIT Contract term. In Deloitte’s opinion, it is probable that the wind turbines will be operational beyond the FIT Contract time period. However, the circumstances impacting the value of the Project at the end of the FIT Contract’s term are uncertain. Therefore, Deloitte has assumed that the costs required to restore the land and lake bed to its original condition and use would

¹⁰⁶⁶ CER-Deloitte (Taylor and Low), ¶ 4.55.

¹⁰⁶⁷ C-680, Letter from Killeavy, Michael (OPA) to Chamberlain, Adam (BLG) (January 10, 2014).

¹⁰⁶⁸ CER-Deloitte (Taylor and Low), ¶¶ 4.59-4.60.

approximate the economic value related to the continued use or salvage value of the turbines and foundations.¹⁰⁶⁹

681. The resulting fair market valuation of damages using the DCF method is, in Deloitte's opinion, between \$375.5 and \$486.6 million.

682. Further, Deloitte's DCF analysis is based on a Project design that assumes a five-kilometre setback. Had a setback of less than five kilometres been adopted, Windstream's costs would have been lower. Deloitte estimates that Windstream's losses would be between \$427.9 and \$568.5 million if the five-kilometre setback did not apply and the turbines for the Project were built closer to shore.¹⁰⁷⁰

683. These amounts are significantly less than the \$1.3 to \$2.1 billion in economic benefits Ontario has realized from cancelling the Project.

XXIX. INTEREST

684. Windstream is entitled to interest, compounded annually, applied pre- and post- award, including on costs.

685. It is an "accepted legal principle" that, absent treaty terms to the contrary, tribunals may include an award of interest in a Claimant's favour.¹⁰⁷¹ The purpose of an award of interest is "to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive."¹⁰⁷²

¹⁰⁶⁹ CER-Deloitte (Taylor and Low), ¶¶ 1.42, 4.12.

¹⁰⁷⁰ CER-Deloitte (Taylor and Low), ¶¶ 4.3-4.4.

¹⁰⁷¹ **CL-041**, *Vivendi II* ¶ 9.2.1; see also Draft Articles, Art. 38(1) ("Interest on any principal sum ... shall be payable when necessary to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.")

¹⁰⁷² **CL-041**, *Vivendi II* ¶ 9.2.3. See also Draft Articles, Art. 38(1) ("Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.")

686. In the context of *lawful* expropriation, Article 1110(4) of the NAFTA provides that compensation must include interest at a commercially reasonable rate. The Article provides: “If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.”¹⁰⁷³ It is even “more appropriate” for a tribunal to order interest on compensation for *wrongful* expropriation.¹⁰⁷⁴ In the context of expropriation, interest has invariably been calculated from the date of the taking.¹⁰⁷⁵

687. In applying the *Chorzów Factory* standard of full reparation, it is appropriate for the Tribunal to award compound rather than simple interest.¹⁰⁷⁶ Compound interest reflects the additional sum that an investor would have earned if the money had been reinvested each year at the prevailing rate of interest.¹⁰⁷⁷

688. Simple interest provides inappropriate reparation because it “fail[s] to account accurately for the time value of money until the date of payment.”¹⁰⁷⁸ Compound interest, in contrast, is consistent with the *Chorzów* principle of full reparation because it more often reflects the actual damages suffered.¹⁰⁷⁹ Contrary to simple interest, compound interest ensures that the amount of compensation reflects the additional sum that an investor would have earned if the money had been reinvested each year at generally prevailing rate of interest.

¹⁰⁷³ **C-0001**, NAFTA, Article 1110(4).

¹⁰⁷⁴ **CL-041**, *Vivendi II* ¶ 9.2.2.

¹⁰⁷⁵ **CL-093**, *Yukos* ¶ 1669.

¹⁰⁷⁶ **CL-071**, *Occidental Petroleum* ¶ 834 describes compound rates as “the norm” in recent ICSID cases; see also **CL-041**, *Vivendi II* ¶ 9.2.4 (“To the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule”); *El Paso* ¶ 746 (“The Tribunal shares the view expressed by these awards that compound interest reflects economic reality and will therefore better ensure full reparation of the Claimant’s damage.”)

¹⁰⁷⁷ **CL-092**, *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award, 8 December 2000 (“*Wena*”) ¶ 129; **CL-042**, *Santa Elena* ¶ 104; **CL-093**, *Yukos* ¶ 1689.

¹⁰⁷⁸ **CL-046**, *EDFI* ¶ 1337.

¹⁰⁷⁹ **CL-041**, *Vivendi II* ¶¶ 8.3.20, 9.2.4, 9.2.6, 9.2.8.

689. Tribunals that have awarded compound interest have predominantly ordered the annual compounding of interest.¹⁰⁸⁰ Tribunals have also generally granted interest “until the date of full payment of the award.”¹⁰⁸¹ In practice, this “automatically turns pre-award interest into post-award” interest.¹⁰⁸²

690. Deloitte has determined that the appropriate rate of interest is the Canadian bank prime interest rate, compounded annually, because it is a common and widely accepted reference point for financing or investment decisions in Canada.¹⁰⁸³

¹⁰⁸⁰ **CL-093**, *Yukos* ¶ 1671.

¹⁰⁸¹ **CL-093**, *Yukos* ¶ 1672.

¹⁰⁸² **CL-110**, Ripinsky & Williams, p. 387.

¹⁰⁸³ CER-Deloitte (Taylor and Low), ¶ 1.43.

PART SIX – RELIEF REQUESTED

691. For the reasons set out above, Windstream requests:

- a) a declaration that Canada has unlawfully expropriated Windstream's investments in WWIS, the Project and the FIT Contract, contrary to Article 1110 of NAFTA;
- b) a declaration that Canada has failed to accord Windstream's investments fair and equitable treatment in accordance with international law, contrary to Article 1105 of NAFTA;
- c) a declaration that Canada has failed to accord Windstream's investments treatment no less favourable than that accorded, in like circumstances, to its own investors contrary to Article 1102 of NAFTA;
- d) a declaration that Canada has failed to accord Windstream's investments treatment no less favourable than that accorded, in like circumstances, to investors of any Party or non-Party, contrary to Article 1103 of NAFTA;
- e) alternatively, a declaration that Canada has breached Article 1503 of NAFTA;
- f) alternatively, a declaration that Canada has failed to ensure through regulatory control, administrative supervision or the application of other measures, that its state enterprise, the OPA, acts in a manner consistent with Canada's obligations under Chapter 11 of NAFTA;
- g) damages in the range of between \$357.5 and \$486.6 million, to be updated as at the time of the hearing, or alternatively between \$427.9 and \$568.5, to be updated as at the time of the hearing;
- h) pre-and post-award interest at a rate to be fixed by the Tribunal;
- i) all legal fees and costs associated with this arbitration; and
- j) such other relief as the Tribunal considers appropriate.

DATED: August 19, 2014

Respectfully submitted on behalf of Windstream Energy LLC,

Torys LLP per [Signature]

Torys LLP

Counsel for the Claimant, Windstream Energy LLC

PART SEVEN – CAST OF CHARACTERS

Name	Title	Entity	Relationship
Baines, Ian	President of Windstream Energy Inc. (WEI) Director of Windstream Wolfe Island Shoals Inc. (WWIS)	Windstream Energy Inc. (WEI) Windstream Wolfe Island Shoals Inc. (WWIS)	Windstream
Baker, Bliss	President	Bentham & Associates	Windstream
Benedetti, Chris	Principal	Sussex Strategy Group Inc.	Windstream
Boysen, Eric	Director of Biodiversity Branch, Renewable Energy Program	Ministry of Natural Resources (MNR)	Government
Brodhead, John	Executive Director	Office of Premier of Ontario (OPO)	Government
Butler, JoAnne	Vice-President of Electricity Resources	Ontario Power Authority (OPA)	Government
Cansfield, Donna	Minister of Natural Resources	MNR	Government
Cecchini, Perry	Manager, RESOP/FIT	OPA	Government
Chamberlain, Adam	Partner	Borden Ladner Gervais	Windstream
Dumais, Doris	Director, Approvals Program, Environmental Assessment and Approvals Branch	MOE	Government
Evans, Paul	Assistant Deputy Minister, Environmental Programs Division	MOE	Government
Hayward, Neil	Business Manager, Renewable Energy Program	MNR	Government
Ing, Pearl	Director, Renewables and Energy Facilitation Branch	MEI	Government
Killeavy, Michael	Director, Contract Management	OPA	Government
Lawrence, Rosalyn	Assistant Deputy Minister, Natural Resource Management Division	MNR	Government
Linley, Richard	Special Assistant Policy	MNR	Government
Lo, Sue	Assistant Deputy Minister, Renewables and Energy Efficiency Division	MEI	Government

Name	Title	Entity	Relationship
MacLennan, Craig	Chief of Staff	MEI	Government
Mars, David	Co-founder, Officer & Director of Windstream Energy LLC	Windstream Energy LLC and its subsidiaries	Windstream
McGuinty, Dalton	Premier	OPO	Government
Mitchell, Andrew	Senior Policy Advisor (Renewables)	MEI	Government
Neary, Anne	Director, Applied Research and Development Branch	MNR	Government
Orsatti, Sandra	Manager, Aquatic Research and Development Section	MNR	Government
Roeper, Uwe	President	ORTECH Consulting Inc.	Windstream
Smitherman, George	Deputy Premier, Minister	MEI	Government
Ungerman, Paul	Director of Policy	MEI	Government
Zaveri, Mirrun	Deputy Director of Renewable Energy Facilitation Office	MEI	Government
Ziegler, William	Co-Founder and Chairman	Windstream Energy	Windstream
Zindovic, Bojana	FIT Contract Management, Electricity Resources	OPA	Government

PART EIGHT – TABLE OF ABBREVIATIONS AND DEFINED TERMS

Abbreviation	Description
ADMs	Assistant Deputy Ministers
AOR	Applicant of Record
APRD	Approval and Permitting Requirements Documents
CAFTA	Central American Free Trade Agreement
CanWEA	Canadian Wind Energy Association
CCEA	Connection Cost Estimate Agreement
CCRA	Connection Cost Recovery Agreement
CIA	Customer Impact Assessment
COD	Commercial Operation Date
CPI	Competition Policy International
CREC	Canadian Renewable Energy Corporation
CSD	Canadian Soil Drilling
DARSIWA	International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts
DMs	Deputy Ministers
EBR	Environmental Bill of Rights
ECT	Economic Connection Test
EMF	Electro Magnetic Field
EWEA	European Wind Energy Association
FIPPA	Ontario's <i>Freedom of Information and Protection of Privacy Act</i>
FIT	Feed-in Tariff (Ontario Power Authority Program)
GEA	<i>Green Energy and Green Economy Act, 2009</i>
GEI	<i>Green Energy Investment Agreement</i>
GS	Generating Station
GWh	GigaWatt Hour
HONI	Hydro One Networks Inc.
IESO	Independent Electricity System Operator
IPO	Initial Public Offering
IPSP	Ontario's Integrated Power System Plan
IRR	Internal Rate of Return
KWh	KiloWatt Hour
LTEP	Long-Term Energy Plan (Ontario)
MCL	Ministry of Culture
MCOD	Milestone Date for Commercial Operation
MEI	Ministry of Energy and Infrastructure
MNR	Ministry of Natural Resources
MO	Minister's Office
MOE	Ministry of the Environment

Abbreviation	Description
MOU	Memorandum of Understanding
MTC	Ministry of Tourism, Culture and Sport
MW	MegaWatt
MWh	MegaWatt Hour
NAFTA	North American Free Trade Agreement
NHA	Natural Heritage Assessment
NRSA	Natural Resource Solutions Inc.
NYSERDA	New York State Energy Research and Development Authority
OCP	Ontario Clean Power Ltd.
OEB	Ontario Energy Board
OPA	Ontario Power Authority
OPO/PO	Office of the Premier of Ontario
PPA	Power Purchase Agreement
RBS	Royal Bank of Scotland
REA	Renewal Energy Approval
REFO	Renewable Energy Facilitation Office
RFP	Request for Proposals
SIA	System Impact Assessment
SOI	Statement of Intent
the Project	The Windstream Wolfe Island Shoals Project
TSA	Turbine Supply Agreement
WEI	Windstream Energy Inc.
Windstream Inc.	Windstream Energy
WIS	Wolfe Island Shoals
WTG	Wind Turbine Generator
WTO	World Trade Organization
WWIS	Windstream Wolfe Island Shoals Inc.