

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

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

COUNTER-MEMORIAL

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Department of Foreign Affairs,
Trade and Development
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TABLE OF ABBREVIATIONS

Abbreviation	Definition
ADM	Assistant Deputy Minister
AOR	Applicant of Record
APRD	Approval and Permitting Requirements Document for Renewable Energy Projects
BRG	Berkeley Research Group
CanWEA	Canadian Wind Energy Association
CES	Clean Energy Supply
COD	Commercial Operation Date
CSA	Canadian Standards Association
DM	Deputy Minister
DOE	Department of Energy
EA	Environmental Assessment
EAASIB	Environmental Approvals Access and Service Integration Branch
EAB	Environmental Approvals Branch
EBR	Environmental Bill of Rights
EPA	<i>Environmental Protection Act, R.S.O. 1990, c. E.19</i>
ERA	<i>Electricity Restructuring Act, 2004</i>
ERT	Environmental Review Tribunal
FET	Fair and Equitable Treatment
FIT	Feed-in Tariff
FTC	Free Trade Commission
GBS	Gravity Base Structure
GEGEA	<i>Green Energy and Green Economy Act, 2009</i>
GEIA	<i>Green Energy Investment Agreement</i>
GLWC	Great Lakes Wind Collaborative
GLWQA	Great Lakes Water Quality Agreement

Abbreviation	Definition
HONI	Hydro One Networks Inc.
HST	Harmonized Sales Tax
IBA	International Bar Association
ICJ	International Court of Justice
IESO	Independent Electricity Supply Operator
IJC	International Joint Commission
ILC	International Law Commission
ISO	International Organization for Standardization
LEEDCo	Lake Erie Energy Development Corporation
LTEP	Long-Term Energy Plan
MBCA	<i>Migratory Birds Convention Act, 1994</i>
MCOD	Milestone Date of Commercial Operation
MEI	Ministry of Energy and Infrastructure
MMAH	Ministry of Municipal Affairs and Housing
MNR	Ministry of Natural Resources
MOE	Ministry of the Environment
MTC	Ministry of Tourism and Culture
MW	MegaWatt
NAFTA	North American Free Trade Agreement
NPA	<i>Navigation Protection Act, R.S.C., 1985, c. N-22</i>
NTP	Notice to Proceed
OEB	Ontario Energy Board
OPA	Ontario Power Authority
PCIJ	Permanent Court of International Justice
PDR	Project Description Report
PLA	<i>Public Lands Act, R.S.O. 1990, c. P.43</i>
PO	Premier's Office
PPA	Power Purchase Agreement

Abbreviation	Definition
REA	Renewable Energy Approval
REA Regulation	<i>Environmental Protection Act</i> , R.S.O. 1990, c. E.19, O. Reg. 359/09
REFO	Renewable Energy Facilitation Office
RES	Renewable Energy Supply
RESOP	Renewable Energy Standard Offer Program
RFP	Request for Proposal
RFQ	Request for Qualifications
SARA	<i>Species at Risk Act</i> , S.C. 2002, c. 29
SOI	Statement of Intent
TSA	Turbine Sales Agreement
WEI	Windstream Energy Inc.
WWIS	Windstream Wolfe Island Shoals Inc.

INTRODUCTION

I. Overview

1. The development of an offshore wind facility is an inherently “high-risk” activity. Today, only nine fully commissioned offshore wind facilities with a capacity of 300 MW or more exist in the world, all of them in Europe, and none of them in a freshwater environment. Not a single offshore wind facility is operational in North America.

2. The reason why there are so few operational offshore wind facilities is simple. Developing one requires overcoming significant challenges with respect to getting financing, obtaining access to a site, connecting to the electricity grid, conducting relevant research, acquiring the requisite permits, obtaining the necessary equipment and expertise, and securing onshore and offshore facilities to support construction. Most importantly, though, it requires time – particularly if it is a novel type of project, such as a freshwater wind facility, or first-of-a-kind project in a jurisdiction. The proponent requires enough time to ensure that it has gathered the relevant information, done the appropriate studies, obtained the necessary financing, consulted with all relevant stakeholders, and constructed the project efficiently, safely and properly. The regulatory authorities also need sufficient time to understand and evaluate all of the potential effects of the proposed project, and to develop the regulatory standards, guidelines and permitting requirements necessary to protect people and the environment from harm or interference through appropriate mitigation measures. Such timeframes for both the proponent and the government regulators are measured in years, not months. North America’s most advanced offshore wind project, the Cape Wind project, remains unconstructed more than a decade after filing for its initial permits.

3. Time is ultimately what this claim is about, and in particular, the time that the Government of Ontario requires to develop the regulatory framework necessary to assess the Claimant’s proposal to construct the first ever large-scale freshwater wind facility in the world. Put differently, this dispute is about whether Ontario has the right to proceed with caution when determining how to assess an activity that has never been attempted before and which would have uncertain effects on the Great Lakes environment and the millions of people who depend on it. The Claimant alleges that the fact that the Government of Ontario did not complete all the

work necessary to develop the regulatory framework by May 4, 2012 violates Canada's obligations under the NAFTA. The Claimant is wrong. NAFTA does not prohibit reasonable regulatory delays, which the Claimant deems unreasonable due to its own risk taking.

4. In 2007, the Claimant invested in Ontario with the idea of erecting a wind facility on the shoals off of Wolfe Island in Lake Ontario (the "Project"). At the time, the Ministry of Natural Resources ("MNR") was not accepting applications for Crown land for offshore wind projects, the Ontario Power Authority ("OPA") had no program to procure energy from offshore wind projects, and the Ministry of the Environment ("MOE") had no regulatory process applicable to the environmental review of offshore wind projects that streamlined the necessary approvals.

5. Apparently undeterred by these risks, when the opportunity to apply for Crown land opened in 2008, the Claimant seized it. On February 20 and June 30, 2008, the Claimant applied for Crown land on the lakebed near Wolfe Island and Amherst Island in Lake Ontario for the purposes of developing its proposed offshore wind facility. A portion of the Crown land making up the Claimant's application was situated in the narrows between Kingston and Wolfe Island. The rest extended out from Wolfe Island towards the U.S. border.

6. The Claimant was not the only prospector of renewable energy projects on Crown land. At \$1,000¹ per Crown land application, the cost of applying was hardly a deterrent. The Claimant's Crown land applications were among over 500 that MNR received by December 2008, 144 of which were to develop offshore wind farms. In the end, 16 different proponents had applied for Crown land to develop a total of 35 offshore wind projects. However, the OPA still had no program for procuring energy generated from offshore wind facilities, and there was no streamlined regulatory approval process in place specific to offshore wind development.

7. In 2009, the *Green Energy and Green Economy Act, 2009* ("GEGEA") was introduced by the Government of Ontario. The GEGEA had numerous broad goals related to renewable energy and conservation, but of particular relevance to this case are two of its initiatives. First, the GEGEA paved the way for the OPA to establish a Feed-in Tariff ("FIT") Program in Ontario. This procurement program for renewable energy provided standard program rules, standard

¹ Unless otherwise specified, all dollar (\$) amounts are stated in Canadian dollars (CAD).

contracts and standard pricing based on classes of generation facilities. Under the FIT Program, the OPA would not assess the feasibility of the project. Instead, it would offer a FIT Contract to a proponent if there was sufficient capacity at the proponent's proposed connection point to accommodate the amount of electricity that it proposed to provide. A FIT Contract provided no guarantee that a project would actually proceed or that necessary permits would be granted. It was left entirely to proponents to "navigate through the regulatory approvals necessary to bring their projects to life".² Second, the GEGEA consolidated many of the provincial environmental approvals for renewable energy projects into a streamlined approval known as the Renewable Energy Approval ("REA"), and made MOE the primary regulator.

8. When the OPA launched the FIT Program on October 1, 2009, it was flooded with hundreds of applications for FIT Contracts. Yet, only two proponents applied for offshore wind projects. Thus, only two of the 16 proponents that applied to MNR for Crown land to develop offshore wind projects by December 2008 applied for a FIT Contract, despite the fact that seven of them had already obtained Applicant of Record ("AOR") status and were therefore eligible to proceed to the permitting stage. The lack of interest in the FIT Program for offshore wind development was not a surprise. With no experience having been built up in the province (or in North America), neither industry nor the Government of Ontario was ready.

9. The Claimant was one of the two proponents to apply under the FIT Program for a contract for an offshore wind project. In November 2009, the Claimant submitted eleven FIT applications for wind power projects totalling 1,045 MW. Ten of its applications were for onshore wind projects totalling 745 MW, and one was for a 300 MW, 130-turbine offshore wind facility. At the time of its application, the Claimant's offshore wind project was no more than a dream. The proponent had applied for access to some Crown land, but it had not yet been granted site access over a single hectare. Further, it had no plan on how to bring its dream to a reality – it applied to the FIT Program without having conducted a proper feasibility study. It seems that although the Claimant was no more ready than other proponents, it was more willing to gamble.

² C-0137, Ministry of Energy, Press Release, "Ontario Makes it Easier, Faster to Grow Green Energy" (Sep. 24, 2009).

10. The Government of Ontario was not ready to process offshore wind projects either. At the time the FIT Program was launched, the regulatory framework in Ontario for approving an offshore wind project, including its development, construction, operation and decommissioning, remained incomplete. The REA process, created by the GEGEA and the REA Regulation, established the framework for the regulatory approval of offshore wind projects in Ontario. However, in contrast with the proponent-driven environmental assessment (“EA”) process, the REA process is prescriptive in nature, with clear requirements for a project proponent to satisfy. When the REA Regulation came into force on September 24, 2009, MOE had yet to finalize the regulatory requirements for offshore wind facilities. For example, while it contained technology-specific rules and requirements for onshore wind facilities, which set out precise setback distances from noise receptors, property lines and land-based transportation corridors, the REA Regulation merely stipulated that an offshore wind facility report would be required for a Class 5 offshore wind facility. It did not contain the prescriptive rules that the Claimant would be required to satisfy. As the Claimant’s representative and expert witness explained at the time, “many of the rules governing off-shore projects have yet to be written.”³

11. The OPA considered the Claimant’s FIT applications in the early months of 2010. In its application to the FIT Program for an offshore wind facility, the Claimant selected a connection point that could easily accommodate 300 MW. Since the application met the appropriate requirements under the FIT Program, the OPA had no other choice but to offer the Claimant a FIT Contract. It notified the Claimant that it would be offered a FIT Contract for its 300 MW Wolfe Island Shoals project in April 2010, and formally offered the contract on May 4, 2010. It remains the only FIT Contract for an offshore wind project that the OPA offered.

12. At the launch of the FIT Program, the standard FIT Contract for offshore wind facilities required projects to achieve Commercial Operation four years following the contract date, and subjected them to termination if their date of Commercial Operation did not occur within 18 months of that date. From the moment it was informed by the OPA that it would be offered a FIT Contract, the Claimant had doubts about whether it could satisfy such standard conditions. The Claimant expressed its concerns as early as April 19, 2010. A four-year Milestone Date of

³ **R-0105**, ORTECH Consulting, Project Management Plan for the Wolfe Island Shoals Wind Farm, Rev.0 (May 10, 2010), p. 12 (“ORTECH Project Management Plan”).

Commercial Operation (“MCOD”) would make any proponent nervous, but particularly a proponent hoping to build Canada’s largest wind facility, and the first of its kind in the world.

13. There were many development and construction risks for the Claimant’s Project. For example, the 130 massive 3,000 metric tonne foundations that the Claimant planned to use would have created considerable challenges in terms of lakebed preparation, fabrication, storage and transportation. Further, the presence of a major international shipping lane through the proposed site strongly suggests that the Project’s layout would have to change and that some of the 130-turbines would have been dropped. There would have been a number of serious construction risks as well. In particular, seasonal construction restrictions and weather disruptions, the lack of available specialized vessels, and the time required for manufacturing the foundations, all made Commercial Operation within a four-year period likely impossible.

14. Moreover, the Claimant had an even more obvious reason to be concerned about the viability of its proposal in the spring and summer of 2010. On June 25 and August 18, 2010, MOE and MNR, respectively, had posted for public comment on the Environmental Registry, policy proposal notices regarding offshore wind and access to Crown land for offshore wind projects. In particular, MOE’s June 25, 2010 proposal notice (the “Offshore Wind Policy Proposal Notice”) explained that work on the regulatory framework for offshore wind development was ongoing, and that the requirements for offshore wind projects under the REA Regulation remained incomplete. It noted that MOE would be engaging with other ministries to make the necessary regulatory and policy changes to provide greater certainty and clarity on offshore wind requirements.

15. The Offshore Wind Policy Proposal Notice also discussed human health and environmental considerations around offshore wind development and solicited input on a proposed five kilometre shoreline exclusion zone for offshore wind projects. In particular, it highlighted the need to protect water bodies and to ensure that Ontarians enjoy safe drinking water, beaches, food and fish, as well as preserve the province’s natural and cultural heritage. The notice anticipated that the future offshore-specific guidance documents would include Cultural Heritage Guidance for Offshore Renewable Energy Projects from the Ministry of Tourism and Culture (“MTC”), Offshore Wind Noise Guidelines from MOE, and Coastal Engineering Study

Guidance from MNR. The notice made clear that the proposed direction was subject to change, depending on the feedback received from the public through the *Environmental Bill of Rights* (“EBR”) process and research underway by MOE, MNR, and MTC.

16. It was at this juncture that the Claimant, once again, demonstrated its extraordinary risk tolerance. While MOE was still receiving feedback from the public and conducting its own research, the Claimant signed its FIT Contract on August 20, 2010. The only difference between its FIT Contract and the standard contract was that it had five years, instead of four years, to bring its Project into Commercial Operation.

17. In signing its FIT Contract, the Claimant took a number of high-risk gambles. It gambled that MOE would adopt only a five kilometre setback as a means of addressing all of the concerns raised by the public and the research. Given that 85 per cent of the Crown land that the Claimant had applied for was located within the proposed five kilometre setback, the Claimant also gambled that it would be allowed to swap its existing Crown land applications for Crown land located outside the proposed five kilometre setback. Finally, in signing its FIT Contract, the Claimant accepted the OPA's termination rights and gambled that it would be able to bring its project into Commercial Operation within five years, despite being well aware that the regulatory process for its permits and approvals was still under development.

18. The public response to MOE's Offshore Wind Policy Proposal Notice was unprecedented. MOE received many more comments in response than for any other EBR posting related to renewable energy, and 65 per cent of those received were opposed to offshore wind development altogether. The majority of comments considered that more scientific research was required to ensure that a five kilometre setback would be sufficient. Specific concerns for further study included measures to protect drinking water, transportation and navigation, and potential effects on fish and wildlife and shoreline ecosystems. The heightened public interest in offshore wind along with strong likelihood that a REA decision on the first project would be challenged, made it clear to MOE that its policy on offshore wind development had to be bullet-proof.

19. MOE continued its work to develop the REA policies and guidelines for offshore wind throughout the summer and fall of 2010. It conducted a review of what other jurisdictions were doing and held a number of technical workshops with both government experts and independent

experts on noise, water quality, technical specifications and safety issues. This review and the discussions at those meetings made clear that further scientific work was required to understand the risks associated with offshore wind development, operation and decommissioning in the Great Lakes. As the Great Lakes Wind Collaborative (“GLWC”) later recognized, Great Lakes region-specific research on the ecological impacts of offshore wind is “notably lacking”, and “[a]dditional research and studies are needed to direct how wind projects are planned, sited and operated in the region.”⁴ It forecasted the research needed to answer these questions will likely take “years and possibly decades”.⁵ In line with these opinions, the Government of Ontario worked with the [REDACTED]

[REDACTED] Ontario initially envisaged a three-year plan to complete its work.

20. As a result, by January 2011, it was clear to the Minister of Environment that the scientific underpinnings for the regulations required years of research, and that any policy on offshore wind development had to be supported by sound science because it would be closely scrutinized. He therefore decided, along with his colleagues, the Ministers of Energy and Natural Resources, to defer offshore wind development altogether. Contrary to the Claimant’s baseless allegations of political interference, the Minister of the Environment’s decision was grounded in the precautionary principle. He made the decision in the discharge of his duties to protect human health and the environment.

21. The only question that remained was what to do with the Claimant’s FIT Contract and the other Crown land applications for offshore wind. Ultimately, the Government of Ontario decided to cancel all Crown land applications for offshore wind sites with the exception of the Claimant’s. Given the Claimant’s unique position as the only FIT Contract holder for offshore wind, its contract was frozen until the regulatory framework could be finalized. Upon communicating this message to the Claimant, government representatives invited it to meet with the OPA to reach a suitable arrangement, which might include changes to the FIT Contract’s

⁴ **R-0268**, Great Lakes Wind Collaborative, *State of the Science: An Assessment of Research on the Ecological Impacts of Wind Energy in the Great Lakes Region* (Nov. 2011), p. 16 (emphasis added) (“GLWC Report”). Available at: <http://glc.org/files/docs/2011-scientific-assessment-wind-energy.pdf>.

⁵ *Ibid.*

Force Majeure, security deposit and termination provisions. Such meetings with the OPA occurred, but the Claimant rejected the reasonable solutions put forward to accommodate it, and instead made unreasonable and unrealistic demands of the OPA and the Government of Ontario. It was the Claimant that ultimately abandoned the discussions.

22. Ontario has not abandoned its efforts to complete the science required to move forward with offshore wind development. In fact, it is still undertaking the work required in order to allow it to develop the required regulatory framework, with additional studies being commissioned and money continuing to be spent on new science.

23. Throughout this entire time, the Government of Ontario has acted reasonably and fairly, and it has appropriately balanced all of the various interests involved. The fact is that Ontario needs more time to develop the regulatory framework for offshore wind development in the Great Lakes, a common concern of all Great Lake partners. NAFTA does not require a government to rush into decisions simply because the Claimant took unnecessary risks in choosing to sign a FIT Contract that requires Commercial Operation by a certain date. To the contrary, NAFTA Parties have maintained the regulatory space to proceed with caution and ensure that their programs and policies have an adequate scientific foundation.

24. Moreover, as the evidence in the record shows, Ontario has done everything reasonably possible to accommodate the Claimant and its project while the necessary scientific foundation for the regulation of offshore wind development is laid. To be clear, Ontario did not revoke any of the Claimant's permits. The Claimant had none. Ontario did not impose a halt on ongoing construction. Construction had not even begun. Ontario did not cancel or invalidate the Claimant's FIT Contract with the OPA or direct the OPA to change any of its terms. The Claimant's FIT Contract remains in force and is binding today. Ontario did not even materially change the regulatory environment that existed when the Claimant made its investment. In fact, the status quo that existed when the Claimant invested in Ontario continues to exist today. What Ontario did do was offer the Claimant the opportunity to freeze its contract and remain protected from termination. It was the Claimant that refused.

25. It was the Claimant's choice to assume the risks associated with the FIT Contract, and it did so with full knowledge of the development, construction and regulatory risks involved. It

should not be compensated just because those risks have materialized. Indeed, contrary to its allegations, the Claimant also needed more time if it was to have any chance of successfully developing a project. However, it did not have that luxury. The Claimant's FIT Contract contains specific termination rights in favour of the OPA, and there should be little dispute that at the time of the decisions being challenged here, the Claimant had an unviable project. Given where the Claimant was in the development process when it signed its FIT Contract, and given the first-of-a-kind nature of its proposal, the Windstream Wolfe Island Shoals offshore wind facility was doomed to fail from the moment that the Claimant signed on the dotted line. It was simply not a project that could be built within the timelines required by the FIT Contract. NAFTA Chapter 11 is not intended to provide a windfall to a Claimant merely because it had an idea.

26. In sum, the Claimant has failed to prove that any aspect of the Government of Ontario's decision to defer offshore wind development on February 11, 2011 breached Canada's obligations under the NAFTA or caused it any losses. Canada has structured the remainder of its submissions as follows.

27. First, Canada will provide an overview of the relevant facts related to this dispute. In particular, Canada will describe the FIT Program, the Provincial and Federal approval and permitting requirements applicable to renewable energy projects, the Claimant's proposal and the circumstances surrounding its signing of its FIT Contract, the Government of Ontario's decision to defer the development of offshore wind facilities, and the Government of Ontario's efforts to do the science required to support the development of a regulatory framework for offshore wind projects.

28. Second, Canada explains that the Tribunal lacks jurisdiction to consider the legality of measures which are not measures of the Government of Ontario, but of state enterprises that were not acting in the exercise of delegated governmental authority, namely the OPA.

29. Third, Canada shows that, pursuant to Article 1108, Articles 1102 and 1103 do not apply in this dispute because the measures challenged as a breach of those articles constitute or involve procurement.

30. Fourth, Canada explains that even if the Tribunal were to consider the alleged breaches of Articles 1102 and 1103, these claims are meritless. The Claimant has failed to demonstrate that either TransCanada Corporation (“TransCanada”), Samsung, or any other comparator, was accorded more favourable treatment in like circumstances. Neither TransCanada nor Samsung were FIT proponents, and neither sought to develop an offshore wind project in Ontario. As a result, the decision to defer offshore wind development did not apply to them. In fact, the treatment accorded to the Claimant was more favourable than the treatment of investors with whom it was in like circumstances, namely other proponents of offshore wind projects in Ontario who applied for FIT Contracts. The Claimant’s Project was kept alive, but all others were cancelled.

31. Fifth, Canada shows that it has also not violated any of its obligations under Article 1105. While the Claimant has tried to tell a story of political interference and asked for an adverse inference to be drawn from unrelated events, there is no evidence that the deferral decision was politically motivated. Contrary to the Claimant’s baseless allegations, the Government of Ontario’s approach was based on the need for additional research, something that U.S. Great Lake jurisdictions equally require. In particular, it was based on the need for research to develop and support an adequately informed and scientifically defensible regulatory framework for offshore wind. Furthermore, the decision to defer offshore wind development was, itself, entirely consistent with the REA Regulation and did not violate any specific commitments made by the Government of Ontario to the Claimant. The Claimant has failed to establish that it had any legitimate expectations that its Project would be able to proceed quickly through the regulatory process before the requirements for offshore wind facilities were put in place, or that Ontario made any specific representations and assurances that induced its investments. Far from being shocking or egregious, the treatment accorded to the Claimant was reasonable and accommodating.

32. Sixth, Canada explains why the alleged measures do not violate Canada’s obligations under NAFTA Article 1110. There has been no expropriation, since the deferral has not resulted in a substantial deprivation of the Claimant’s investments. In particular, neither the Claimant’s Project nor its key asset, the FIT Contract, had economic value prior to the alleged expropriation and further, even if they did, the deferral is merely temporary in nature. The deferral is a good

faith, non-discriminatory general measure adopted for the public purpose of ensuring that the Government of Ontario is in a position to adequately assess any environmental, health and safety risks associated with offshore wind energy development. It is not an unlawful expropriation.

33. Finally, Canada shows that even if this Tribunal were to find a breach of Canada's obligations, the Claimant did not suffer any losses as a result of that breach. The Claimant could not have brought its Project into operation within the deadlines in the FIT Contract, and hence, the Project was valueless before any of the measures being challenged here were adopted by Ontario. Further, even if the Tribunal were to ignore this fact, there are numerous other factors associated with the riskiness and costs of the Claimant's Project that would have rendered it valueless on the valuation date. This was a project that simply was not viable within the contractual constraints to which the Claimant agreed and accordingly it had no value at the time of the alleged wrongful conduct.

II. The Roles and Mandates of the Ministries of the Ontario Government and the Ontario Power Authority Relative to Renewable Energy Projects in Ontario

34. Several ministries of the Government of Ontario, and the independent OPA, are involved in the renewable energy sector in Ontario, each with a different mandate.

- **The Ministry of the Environment and Climate Change**, or the **Ministry of the Environment** ("MOE") as it was known previously,⁶ is responsible for promoting clean and safe air, land, and water to ensure healthy communities, ecological protection and sustainable development for Ontarians.⁷ It is the primary regulator of renewable energy projects in Ontario, through the administration of Part V.0.1 of the *Environmental Protection Act*⁸ and its implementing regulation, the *Renewable Energy Approval Regulation*.⁹ When making decisions in respect of renewable energy, MOE is guided by the purpose of Part V.0.1 of the EPA which provides for the protection and conservation not only of the natural environment (i.e. air, land and water, and plant and animal life including human life), but also of the human environment, including the social, economic and cultural conditions that influence

⁶ The Ministry changed its name to the Ministry of Environment and Climate Change on June 24, 2014, but is referred to as "MOE", since this is how it was known during the facts relevant to this dispute and it is how the Claimant has referred to it.

⁷ **R-0394**, Ministry of the Environment, website excerpt, "About the Ministry of the Environment and Climate Change". Available at: <https://www.ontario.ca/government/about-ministry-environment>.

⁸ **C-0105**, *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("EPA").

⁹ **C-0103**, *Renewable Energy Approvals under Part V.0.1 of the Act*, O. Reg. 359/09 ("REA Regulation").

human and community life.¹⁰ MOE also administers a number of other statutes including the *Clean Water Act, 2006*, the *Environmental Assessment Act*, the *Ontario Water Resources Act*, the *Environmental Bill of Rights, 1993* and the *Safe Drinking Water Act, 2002*.¹¹

- **The Ministry of Natural Resources and Forestry**, or the **Ministry of Natural Resources (“MNR”)** as it was known previously,¹² exercises stewardship over Ontario’s provincial parks, forests, fisheries, wildlife, mineral aggregates, petroleum resources and Crown land and waters.¹³ It has two main roles relating to renewable energy in Ontario. First, MNR is responsible for the management, sale and disposition of Crown land under the *Public Lands Act*.¹⁴ Second, MNR is responsible for reviewing the natural heritage component (birds, bats and fish) of REA applications before they are submitted to MOE. It also administers additional permits that may be required during the development of a renewable energy project, including permits to conduct geotechnical testing of the lakebed.
- **The Ministry of Energy**, or the **Ministry of Energy and Infrastructure (“MEI”)** as it was known previously,¹⁵ establishes energy policy and the legislative and regulatory framework in which regulated entities and electricity-sector participants must operate in order to develop the electricity generation, transmission and other energy-related facilities that help power the Ontario economy in a sustainable manner.¹⁶ MEI is responsible for publishing the Long-Term Energy Plan,¹⁷ which guides the policies for energy procurement and conservation in the province. MEI is responsible for the administration of the *Green Energy Act*,¹⁸ which established the Renewable Energy Facilitation Office (“REFO”), a “one-window access point” where proponents of renewable energy projects can obtain information and connect

¹⁰ C-0105, EPA, ss. 47.1, 47.2.

¹¹ R-0394, Ministry of the Environment, website excerpt, “About the Ministry of the Environment and Climate Change”.

¹² The Ministry changed its name to the Ministry of Natural Resources and Forestry on June 24, 2014, but is referred to as “MNR”, since this is how it was known during the facts relevant to this dispute and it is how the Claimant has referred to it.

¹³ R-0322, Ministry of Natural Resources, Results-based Plan 2013-14, pp. 3-4. Available at: <https://dr6j45jk9xcmk.cloudfront.net/documents/3011/stdprod-109513.pdf>.

¹⁴ R-0007, *Public Lands Act*, R.S.O. 1990, c. P.43 (“*Public Lands Act*”)

¹⁵ The Ministry of Energy was integrated as the Ministry of Energy and Infrastructure between 2007 and 2010 before it became the Ministry of Energy on August 18, 2010. For the purposes of this Counter-Memorial, the ministry is referred to as “MEI”, and its Minister is referred to as “the Minister of Energy”.

¹⁶ R-0423, Ministry of Energy, website excerpt, “About the Ministry”. Available at: <http://www.energy.gov.on.ca/en/about/>.

¹⁷ C-0387, Ontario’s Long-Term Energy Plan (Nov. 22, 2010) (“2010 LTEP”).

¹⁸ C-0123, *Green Energy Act and Green Economy Act*, 2009, c. 12, Schedule A (“GEGEA”).

with the appropriate government and agency resources.¹⁹ Through REFO, the Ministry plays a coordinating role for specific renewable energy projects.

- **The Ministry of Tourism, Culture and Sport** or the **Ministry of Tourism and Culture (“MTC”)** as it was known previously, is responsible for reviewing the cultural heritage resources (archaeological resources and heritage resources) components of REA applications, before they are submitted to MOE.²⁰
- **The Ontario Power Authority (“OPA”)**, was, prior to January 1, 2015, an independent non-share capital corporation²¹ established pursuant to the *Electricity Restructuring Act, 2004*. On January 1, 2015, amendments to the *Electricity Act, 1998* came into force to provide for the amalgamation of the OPA and the Independent Electricity System Operator (“IESO”). The new entity was continued under the IESO name.²² The predecessor OPA was responsible for medium and long-term system planning, conservation, demand management and procurement of new generation through long-term power purchase agreements (“PPAs”).²³ It was also charged with developing integrated power system plans to manage and respond to the demand, supply and transmission goals identified by the Government of Ontario.²⁴ The *Electricity Act, 1998* provided that the predecessor OPA was not an agent of the Crown.²⁵ Pursuant to 25.32 and 25.35 of the *Electricity Act, 1998*, the Minister of Energy has the power to issue directions to the OPA with respect to energy procurement programs. The OPA developed and the IESO continues to administer the FIT Program and is the creditworthy counterparty of FIT Contract holders.

III. Materials Submitted by Canada

35. Along with this Counter-Memorial and the attached exhibits and authorities, Canada has submitted the following documents:

- **Witness Statement of John Wilkinson:** Mr. Wilkinson served as Member of Provincial Parliament in the Legislative Assembly of Ontario from October 2, 2003 to September 7, 2011. During his first term, Mr. Wilkinson acted as Parliamentary Assistant to the former Minister of the Environment Leona Dombrowsky. During his second term he served in the provincial Cabinet, first as Minister of Research and

¹⁹ **R-0416**, Ministry of Energy, website excerpt: “Renewable Energy Facilitation Office”. Available at: <http://www.energy.gov.on.ca/en/renewable-energy-facilitation-office/>.

²⁰ **R-0424**, Ministry of Tourism, Culture and Sport, website excerpt, “Culture”. Available at: <http://www.mtc.gov.on.ca/en/culture/culture.shtml>.

²¹ **C-0003**, *Electricity Act, 1998*, S.O. 1998, c. 15, s. 25.1 (“*Electricity Act, 1998*”).

²² **R-0480**, *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A, ss. 5, 25.8(1) (amended as of 1 January 2015).

²³ **C-0003**, *Electricity Act*, Part II.1, s. 25.2; **R-0040**, Ontario Power Authority, Supply Mix Advice (Dec. 9, 2005), p. 10 (“Supply Mix Advice”).

²⁴ **C-0003**, *Electricity Act*, Part II.1, s. 25.2(1); **R-0040**, Supply Mix Advice, pp. 9-10.

²⁵ **C-0003**, *Electricity Act*, s. 25.3.

Innovation, then as Minister of Revenue, and finally as Minister of the Environment from August 18, 2010 to October 20, 2011. He made the decision to defer offshore wind development in the discharge of his duties as the Minister of the Environment.

- **Witness Statement of Marcia Wallace:** Dr. Wallace is currently the Regional Director, Municipal Services Office – Central Ontario, at the Ministry of Municipal Affairs and Housing (“MMAH”) of the Government of Ontario. Prior to this, she was Manager, Renewable Energy, in MOE’s Environmental Programs Division from November 2008 to July 2010. She then became the Director, Modernization of Approvals until October 2013 when she started her position at MMAH. She navigated MOE through the design, development and implementation of the GEGEA by coordinating and leading the development of a regulatory framework for the new Renewable Energy Program. Dr. Wallace has knowledge of the regulatory framework for the approval of renewable energy projects in Ontario and is familiar with work undertaken by MOE to develop the regulatory framework for offshore wind. She participated on behalf of MOE in the multi-ministry process of developing policy options for offshore wind in the months before the deferral.
- **Witness Statement of Doris Dumais:** Ms. Dumais is MOE’s current Director, Modernization of Approvals, and has nearly three decades of experience in the areas of program delivery and program development for environmental permitting and approvals. She worked in MOE’s Operations Division as Director of the Approvals Program from December 2007 to September 2011, when she became Director of the new Environmental Approval Access and Service Integration Branch. Ms. Dumais led the team of technical specialists responsible for screening and reviewing applications for REAs, including the Directors who decide whether or not it is in the public interest to issue or refuse to issue a REA.
- **Witness Statement of Rosalyn Lawrence:** Ms. Lawrence is the Assistant Deputy Minister of the Policy Division at MNR, which is responsible for all policy development related to natural resource management matters. She has general knowledge about the issuance of MNR permits and approvals related to renewable energy, including issues related to Crown land offshore wind development, and the development of a regulatory framework for offshore wind.
- **Witness Statement of Susan Lo:** Ms. Susan (“Sue”) Lo was the Assistant Deputy Minister of the Renewables and Energy Efficiency Division at MEI from June 2009 until February 2013. She was involved in the implementation of the GEGEA, including the FIT Program and the establishment of REFO. Ms. Lo was further involved in the development of the Government of Ontario’s 2010 Long-Term Energy Plan (the “2010 LTEP”) and MEI’s policy discussions regarding options for moving forward with offshore wind development.
- **Witness Statement of Perry Cecchini:** Prior to January 1, 2015, Mr. Cecchini was Manager RESOP/FIT in the Electricity Resources Contract Management group at the OPA; on January 1, 2015, the OPA was merged with the IESO, where Mr. Cecchini retains the same functional role in the Market and Resource Development division.

Mr. Cecchini was involved in the administration of FIT contracts and, along with his team, remains responsible for ensuring that FIT Contract counterparties develop and operate renewable energy generation facilities in accordance with the terms of their particular FIT Contract.

- **Expert Report of URS:** URS has provided an expert report assessing the environmental permitting and engineering feasibility of the Claimant's Project. URS is a global engineering company with experience in complex and diverse engineering projects all over the globe, including renewable energy projects. URS is considered one of the world's foremost engineering companies.
- **Expert Report of Berkeley Research Group:** Mr. Chris Goncalves, of Berkeley Research Group ("BRG") has provided an expert report assessing the Claimant's damages claim. He and his team are economics and valuation experts with experience assessing the value of renewable energy projects, and in assessing damages in international arbitration.

THE FACTS

I. Background on Renewable Energy Policy in Ontario

A. Ontario's Early Renewable Energy Initiatives 2003-2008

36. In 2003, the newly elected Government of Ontario was faced with the need to restructure an electricity system that was dependent for approximately one quarter of its generation capacity on heavily polluting coal-fired power plants.²⁶ In light of the health and environmental concerns associated with such facilities, their elimination became one of the key priorities of the new government's election campaign in 2003.²⁷ An independent study commissioned by the new government in 2005, entitled *Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation*, estimated that the elimination of coal-fired generation would lead to annual savings of \$4.4 billion, when health and environmental costs were taken into consideration.²⁸

37. The decision to eliminate coal-fired generation signalled an era of significant change in Ontario's energy policy, with new energy initiatives, legislation and evolving regulatory frameworks being developed, adopted and implemented across multiple ministries. In order to

²⁶ C-0387, 2010 LTEP, pp. 5-6; R-0024, Ontario Electricity Conservation & Supply Task Force, "Tough Choices: Addressing Ontario's Power Needs - Final Report to the Minister" (Jan. 9, 2004), p. 24.

²⁷ R-0040, Supply Mix Advice, vol. 3, p. 8.

²⁸ R-0323, Ministry of Energy, News Release, "Ontario Getting Out of Coal-fired Generation" (Jan. 9, 2013); R-0033, DSS Management Consultants Inc. and RWDI Air Inc., "Cost Benefit Analysis: Replacing Ontario's Coal-Fired Electricity Generation" (Apr. 1, 2005).

replace, at least in part, the coal-fired electricity generation capacity that was being eliminated, the Government of Ontario sought to significantly increase electricity supply and capacity from renewable sources of energy generation, such as solar, wind, bioenergy and hydro-electric energy.

38. As a first step, in June 2004 the government introduced the *Electricity Restructuring Act, 2004* (“ERA”) in the Legislative Assembly of Ontario (“Ontario Legislature”).²⁹ One of the purposes of the ERA was “to restructure Ontario’s electricity sector, and to promote the expansion of electricity supply and capacity, including supply and capacity from alternative and renewable energy sources.”³⁰ The ERA was passed by the Ontario Legislature and came into force in December 2004.³¹

39. A major feature of the ERA was the establishment of the OPA through amendments to the *Electricity Act, 1998*.³² The OPA was an independent non-share capital corporation responsible for medium and long-term system planning, conservation, demand management and procurement of new generation through long-term PPAs.³³ It was constituted with independent legal personality by being given the “capacity, rights, powers and privileges of a natural person for the

²⁹ **R-0026**, Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 38th Parl., 1st Sess., No. 62A (Jun. 15, 2004).

³⁰ **R-0325**, Ontario Energy Board, website excerpt, “Electricity Restructuring Act, 2004” (Updated Jan. 17, 2013). Available at: <http://www.ontarioenergyboard.ca/OEB/Industry/About%20the%20OEB/Legislation/History%20of%20the%20OEB/Electricity%20Restructuring%20Act%202004>.

³¹ **R-0030**, Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 38th Parl., 1st Sess., No. 100A (Dec. 9, 2004), p. 4869; **R-0031**, Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 38th Parl., 1st Sess., No. 101 (Dec. 13, 2004), p. 4892.

³² **C-0003**, *Electricity Act*, Schedule A. Note that on January 1, 2015, amendments to the *Electricity Act* came into force which merged the OPA and the Independent Electricity System Operator (“IESO”) under the name IESO. The two corporations were amalgamated and continued as one new non-share capital corporation named IESO, which assumed all outstanding debts, liabilities and obligations of the predecessor corporations. The relevant legislative amendments also provided for the continuing applicability of agreements entered into by each predecessor and directions previously issued to the OPA. The merger was intended as a consolidation of agencies for efficiency gains and cost containment, and is not expected to have material impact on the FIT Program aside from the change in identity of the program administrator and contract counter-party. See **R-0374**, *Building Opportunity and Securing Our Future Act (Budget Measures)*, 2014, S.O. 2014, c. 7, Schedule 7; **R-0360**, Ministry of Finance, Ontario Budget 2014 “Building Opportunity, Securing Our Future” (2014), p. 161. Canada will continue to refer to the former OPA and its enabling legislation prior to these amendments, current to 2014, as reflected in Exhibit C-0003.

³³ **C-0003**, *Electricity Act*, Part II.1, ss. 25.1(1), 25.2; **R-0040**, Supply Mix Advice, pp. 9-10.

purpose of carrying out its objects".³⁴ The *Electricity Act, 1998* expressly stipulates that the OPA is not an agent of the Crown.³⁵

40. The ERA specifically empowered the OPA "to enter into contracts relating to the procurement of electricity supply and capacity",³⁶ including from alternative and renewable energy sources.³⁷ It also charged the OPA with developing integrated power system plans to manage and respond to the demand, supply and transmission goals identified by the Government of Ontario in supply mix directives made pursuant to the *Electricity Act, 1998*.³⁸

41. Because the OPA is an independent corporation, the *Electricity Act, 1998* specifically empowers the Minister of Energy to direct the OPA to take certain specified actions with respect to its energy procurement programs. This allows, for example, the Minister of Energy to direct the OPA to take actions that relate to the government's broader energy policy objectives. The decision of whether or not to issue a direction to the OPA is entirely within the discretion of the Minister of Energy.³⁹ The scope of the Minister's authority to issue directions to the OPA is limited to the types of directions specified in sections 25.32 and 25.35 of the *Electricity Act, 1998*.

42. In conjunction with and following the introduction of the ERA, the Government of Ontario directed the OPA to implement a number of renewable energy procurement initiatives, including (1) the Renewable Energy Supply ("RES") I and II procurements, which ran in 2004 and 2005 and together resulted in nineteen contracts being awarded for approximately 1,300 MW of capacity, and (2) the Renewable Energy Standard Offer Program ("RESOP"), which ran from 2006 until May 2008 and resulted in 314 contracts being awarded for approximately 1,300 MW of capacity.⁴⁰

³⁴ **C-0003**, *Electricity Act*, Part II.1, s. 25.2(4).

³⁵ **C-0003**, *Electricity Act*, Part II.1, s. 25.3.

³⁶ **C-0003**, *Electricity Act*, Part II.1, s. 25.2(5)(b)-(c).

³⁷ **C-0003**, *Electricity Act*, Part II.1, s. 25.2(5)(c).

³⁸ **C-0003**, *Electricity Act*, Part II.1, s. 25.2(5)(f); **R-0040**, Supply Mix Advice, p. 10.

³⁹ **C-0123**, *Electricity Act*, Part II.1, ss. 25.32, 25.35.

⁴⁰ **R-0027**, Ministry of Energy, Request for Proposals for 300 MW of Renewable Energy Supply, Request For Proposal No. SSB-065230 (Jun. 24, 2004); **R-0038**, Letter (Direction) from Donna Cansfield, Minister of Energy to

B. The Green Energy and Green Economy Act, 2009

43. On February 23, 2009, the Government of Ontario introduced the *Green Energy and Green Economy Act, 2009* (“GEGEA”) into the Ontario Legislature.⁴¹ It was passed and received Royal Assent on May 14, 2009.⁴² The GEGEA aimed to build and support a strong green economy and to better protect the environment,⁴³ by “making it easier to bring renewable energy projects to life” and by fostering a culture of conservation by promoting lower energy use.⁴⁴ To accomplish these aims, the GEGEA created new standalone legislation, the *Green Energy Act, 2009*,⁴⁵ and amended fifteen other existing statutes.

44. Among other things, the GEGEA:

- amended the *Planning Act*⁴⁶ to exempt certain renewable energy projects from municipal plans, bylaws and orders related to land use and zoning;⁴⁷

the Ontario Power Authority (Nov. 7, 2005); **R-0036**, Ministry of Energy, Request for Proposals for Up To 1,000 MW of Renewable Energy Supply from Renewable Generating Facilities with a Contract Capacity of Between 20.0 MW and 200.0 MW, Inclusive, Request For Proposal No: SSB-071540 (Jun. 17, 2005); **R-0039**, Letter (Direction) from Donna Cansfield, Minister of Energy to the Ontario Power Authority (Nov. 16, 2005); **R-0044**, Letter (Direction) from Donna Cansfield, Minister of Energy to the Ontario Power Authority (Mar. 21, 2006); **R-0051**, Ontario Power Authority, Report, “Ontario’s Renewable Energy Standard Offer Program” (Jun. 1, 2008); **R-0309**, Ontario Power Authority, Presentation, “Ontario’s Renewable Energy Standard Offer Program: Lessons from a Large Scale Distribution Connected Electricity Procurement Program” (Dec. 10-12, 2008). Available at: http://www.conference-on-integration.com/pres/16_MacDougall.pdf; **R-0489**, Ontario Power Authority, Presentation, “Renewable and Clean Energy Supply Procurement Update” (May 13, 2008); **R-0050**, Ontario Power Authority, “Backgrounder: Ontario Renewable Energy – Successes and Improvements” (May 13, 2008). Available at: http://www.powerauthority.on.ca/sites/default/files/news/6460_ORE_-_Backgrounder.pdf.

⁴¹ **C-0116**, Legislative Assembly of Ontario, Hansard Transcript, 39th Parl., 1st Sess., No. 112 (Feb. 23, 2009), (Hon. George Smitherman); **C-0123**, GEGEA.

⁴² **R-0067**, Ministry of Energy Archived News Release, “Ontario Legislature Passes Green Energy Act” (May 14, 2009). Available at; <http://news.ontario.ca/mei/en/2009/05/ontario-legislature-passes-green-energy-act.html>; **C-0123**, GEGEA; **R-0068**, Legislative Assembly of Ontario, Hansard Transcript, 39th Parl., 1st Sess., No. 151 (May 14, 2009). Available at: <http://hansardindex.ontla.on.ca/hansardeissue/39-1/1151.htm>.

⁴³ **C-0116**, Legislative Assembly of Ontario, Hansard Transcript, 39th Parl., 1st Sess., No. 112 (February 23, 2009), (Hon. George Smitherman); **C-0115**, Ministry of Energy, News Release, “Ontario’s Bold New Plan for a Green Economy” (Feb. 23, 2009). Available at: <http://news.ontario.ca/mei/en/2009/02/ontarios-bold-new-plan-for-a-green-economy.html>.

⁴⁴ **C-0116**, Legislative Assembly of Ontario, Hansard Transcript, 39th Parl., 1st Sess., No. 112 (Feb. 23, 2009), (Hon. George Smitherman); **C-0115**, Ministry of Energy, News Release, “Ontario’s Bold New Plan for a Green Economy” (Feb. 23, 2009).

⁴⁵ **C-0123**, GEGEA, Schedule A.

⁴⁶ **R-0006**, *Planning Act*, R.S.O. 1990, c. P. 13 (“*Planning Act*”).

⁴⁷ **R-0006**, *Planning Act*, ss. 62.02(3), 62.02(6); **C-0123**, GEGEA, Schedule K.

- established REFO within MEI⁴⁸ to act as a “one-window access point” responsible for connecting renewable energy stakeholders with the relevant government ministries and regulatory authorities;⁴⁹
- granted the Minister of Energy authority to direct the OPA to establish a feed-in tariff program designed to procure energy from renewable energy sources,⁵⁰ and
- established the REA process in order to “coordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process”.⁵¹

II. The FIT Program

A. The Creation of the FIT Program

45. The GEGEA added section 25.35 to the *Electricity Act, 1998*, authorizing the Minister of Energy to direct the OPA to develop a feed-in tariff program.⁵² A feed-in tariff program is a renewable energy standard offer procurement program that features standardized program rules, contract prices designed to reflect the costs of generation, and economic incentives for proponents of renewable generation.⁵³ Feed-in tariff programs are used worldwide to encourage and promote the greater use of renewable energy sources. In fact, in the summer of 2008, the Minister of Energy made trips to Denmark, Germany, Spain and California where he reviewed their approaches to renewable energy, including their use of feed-in tariff programs.⁵⁴

46. On September 24, 2009, the Minister of Energy exercised the authority granted to him and directed the OPA, pursuant to sections 25.35 and 25.32 of the *Electricity Act, 1998*, to “develop a

⁴⁸ C-0123, GEGEA, Schedule A, s. 11.

⁴⁹ R-0416, Ministry of Energy website excerpt, “Renewable Energy Facilitation Office”. Available at: <http://www.energy.gov.on.ca/en/renewable-energy-facilitation-office/#.UuFJWJIo7Qc>; RWS-Lo, ¶ 17.

⁵⁰ C-0003, *Electricity Act*, s. 25.35(1); R-0067, Ministry of Energy Archived News Release, “Ontario Legislature Passes Green Energy Act” (May 14, 2009).

⁵¹ C-0116, Legislative Assembly of Ontario, Hansard Transcript, 39th Parl., 1st Sess., No. 112 (Feb. 23, 2009), (Hon. George Smitherman).

⁵² C-0003, *Electricity Act*, ss. 25.35(1), 25.35(4); C-0123, GEGEA, Schedule B, s. 7; RWS-Lo, ¶ 9.

⁵³ R-0064, Ontario Power Authority Presentation, “Proposed Feed-in Tariff Program Stakeholder Engagement – Session 1” (Mar. 17, 2009), pp. 26-27. Available at: http://fit.powerauthority.on.ca/Storage/10117_Session_1_Presentation_-_March_17.pdf; C-0387, 2010 LTEP, p. 31.

⁵⁴ R-0058, Tyler Hamilton, The Star News Article, “The wind at his back” (Sep. 27, 2008). Available at: http://www.folkecenter.net/mediafiles/folkecenter/awards/Smitherman_The_wind_at_his_back.pdf; R-0057, Murray Campbell, “Dougs’ take warning: Curious George is keen on green” (Sep. 25, 2008). Available at: <http://www.theglobeandmail.com/news/national/dougs-take-warning-curious-george-is-keen-on-green/article716206/>.

feed-in tariff (“FIT”) program [...] designed to procure energy from a wide range of renewable energy sources,” including wind, solar photovoltaic, bioenergy, and smaller-scale (50 MW or less) waterpower (together, referred to as the “Minister’s Direction”).⁵⁵ The program was publicly announced the same day.⁵⁶

47. The Minister’s Direction established the following objectives for the FIT Program:

- increase capacity of renewable energy supply to ensure adequate generation and reduce emissions;
- introduce a simpler method to procure and develop generating capacity from renewable sources of energy;
- enable new green industries through new investment and job creation; and
- provide incentives for investment in renewable energy technologies.⁵⁷

48. The Minister’s Direction further specified that FIT Contracts would take the form of 20-year PPAs for all renewable fuels except waterpower, which would have 40-year PPAs.⁵⁸ However, the Minister’s Direction emphasized that, notwithstanding the obtaining of a FIT Contract, projects would still need to obtain regulatory approval. In particular, the Minister’s Direction stated that proponents would be “subject to all laws and regulations of the Province of Ontario and Government of Canada.”⁵⁹ The concurrent press release announcing the FIT Program also noted that while the FIT Program would simplify the OPA’s contracts and pricing

⁵⁵ **C-0141**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009).

⁵⁶ **C-0137**, Ministry of Energy, Press Release, “Ontario Makes it Easier, Faster to Grow Clean Energy” (Sep. 24, 2009); **C-0143**, Office of the Premier, News Release, “Green Energy Rules Make Ontario A North American Leader” (Sep. 24, 2009); **R-0073**, Ministry of Energy, Press Release, “Ontario’s Ten Steps to Green Energy” (Sep. 24, 2009). Available at: <http://news.ontario.ca/mei/en/2009/09/ontarios-ten-steps-to-green-energy-1.html>.

⁵⁷ **C-0141**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 1.

⁵⁸ **C-0141**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 2.

⁵⁹ **C-0141**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 1.

for new renewable energy projects, proponents still had to “navigate through the regulatory approvals [that were] necessary”.⁶⁰

B. The FIT Rules

49. On September 30, 2009, a week after receiving the direction to establish the FIT Program, the OPA released Version 1.1 of the FIT Rules.⁶¹ The OPA had consulted the public and other stakeholders extensively during the development of the FIT Rules throughout the summer of 2009.⁶²

50. The FIT Rules govern all aspects of the FIT Program including eligibility, application requirements, application review and acceptance, connection availability management, the contract form and execution, contract pricing, settlement arrangements, Aboriginal and

⁶⁰ **C-0137**, Ministry of Energy, Press Release, “Ontario Makes it Easier, Faster to Grow Clean Energy” (Sep. 24, 2009); *See also* **R-0073**, Ministry of Energy, Press Release, “Ontario’s Ten Steps to Green Energy” (Sep. 24, 2009).

⁶¹ **C-0146**, Ontario Power Authority, FIT Program Rules, Version 1.1 (Sep. 30, 2009) (“FIT Program Rules, v. 1.1”). A number of modifications were subsequently made to the FIT Rules resulting in the release of versions 1.2 and 1.3 on November 19, 2009 and March 9, 2010 respectively. *See* **R-0082**, Ontario Power Authority, FIT Program Rules, Version 1.2 (Nov. 19, 2009) (“FIT Program Rules, v. 1.2”); **R-0091**, Ontario Power Authority, FIT Program Rules, Version 1.3 (Mar. 9, 2010) (“FIT Program Rules, v. 1.3”). Version 1.3 of the FIT Rules is the version that is applicable to Windstream since their FIT Contract offer was made in May 2010.

⁶² *See* **R-0484**, Ontario Power Authority, web site excerpt, “Past Events – 2009”. Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009>. *See also* **R-0485**, Ontario Power Authority, web site excerpt, “Archive: March 17 Session Info - Objectives of FIT Program”. Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009/archive-march-17-session-info-objectives-fit-progra>; **R-0064**, Ontario Power Authority, Presentation, “Proposed Feed-in Tariff Program Stakeholder Engagement – Session 1” (Mar. 17, 2009). Available at: http://fit.powerauthority.on.ca/Storage/10117_Session_1_Presentation_-_March_17.pdf; **R-0486**, Ontario Power, web site excerpt, “Archive: March 24 Session Info - FIT Application Process”. Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009/archive-march-24-session-info-fit-application-proce>; **R-0481**, Ontario Power Authority, Presentation, “Proposed Feed-in Tariff Project Eligibility, Application Requirements, Application Review – Stakeholder Engagement Session 2” (Mar. 24, 2009). Available at: http://fit.powerauthority.on.ca/Storage/10120_Session_2_Presentation_-_March_24_2009.pdf; **R-0487**, Ontario Power Authority, web site excerpt, “Archive: May 12 Session Info - Revised Price Schedule, Revised Program Rules, and Draft Contract”. Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009/archive-may-12-session-info-revised-price-schedule->; **R-0482**, Ontario Power Authority, presentation, “Proposed Feed-in Tariff Program – Revised Rules, Draft Contract and Revised Price Schedule” (May 12, 2009). Available at: http://fit.powerauthority.on.ca/Storage/10219_May_12_-_Pricing_slides_update_and_rule_changes.pdf; **R-0488**, Ontario Power Authority, web site excerpt, “Archive: July 21 Revised FIT Program Rules, Standard Definitions and Price Schedule”. Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009/archive-july-21-revised-fit-program-rules-standard->; **R-0483**, Ontario Power Authority, Presentation, “Proposed Feed-in Tariff Program – Revisions to Draft FIT Rules” (Jul. 21, 2009). Available at: http://fit.powerauthority.on.ca/Storage/10333_FIT_July_21_Presentation.pdf.

community projects, program review and amendments, confidentiality, and program launch.⁶³ Pursuant to the FIT Rules, to be eligible to participate in the FIT Program, an applicant had to meet only certain basic project eligibility requirements. In the case of applications for wind power projects, the only substantive requirements were that the applicant's proposed generating facility had to:

- be located in the Province of Ontario;
- constitute a renewable generating facility, but not be an Existing Generating Facility at the time of the application (subject to exceptions for incremental projects);
- connect to a distribution system, a host facility or the IESO-controlled grid; and
- not have or have had a prior contract relating to the proposed facility⁶⁴

51. In addition to the foregoing basic eligibility requirements, the FIT Rules also established application requirements for ensuring that a renewable energy project, including a wind project, met the program eligibility conditions. Specifically, applicants had to submit to the OPA:

- non-refundable application fee, based on Contract Capacity, of a maximum of \$5,000;⁶⁵
- application security, based on the size of the project, to a maximum of \$10,000/MW;⁶⁶
- an authorization letter authorizing the local distribution company and IESO to provide the OPA information relating to the applicant or project;⁶⁷
- connection details regarding the project, including contract capacity, renewable fuel(s), proposed connection point and other information such as name of feeder, transformer station or high-voltage circuit) or an indication that it intended to be enabler requested;⁶⁸

⁶³ C-0091, FIT Program Rules, v. 1.3, ss. 1-13.

⁶⁴ C-0091, FIT Program Rules, v. 1.3, s. 2.1(a).

⁶⁵ C-0091, FIT Program Rules, v. 1.3, s. 3.1(a).

⁶⁶ C-0091, FIT Program Rules, v. 1.3, s. 3.1(b).

⁶⁷ C-0091, FIT Program Rules, v. 1.3, s. 3.1(c).

⁶⁸ C-0091, FIT Program Rules, v. 1.3, s. 3.1(d).

- evidence of site access (land ownership, land lease, option agreement, etc.) or evidence of having applied for site access where the proposed project was on provincial Crown land;⁶⁹ and
- a valid email address for the purposes of correspondence related to the FIT Program.⁷⁰

52. If a project met the eligibility requirements, and filed a correct and complete application, then the application would be reviewed by the OPA and ranked in accordance with the relevant criteria specified in the FIT Rules.⁷¹ Generally, applications were ranked based on the time that they were received by the OPA. However, at the launch of the FIT Program, all applications were treated as though they were received at the same time, and were given a ranking based on whether they met certain shovel-readiness criteria. Applications were then considered for FIT Contracts in the order of their provincial ranking.⁷² Whether an application would be offered a FIT Contract depended solely upon whether there was connection capacity at the point that it had specified in its FIT Contract.⁷³ Accordingly, even a low-ranked project could receive an offer of a FIT Contract if there was still capacity at the point on the electricity system where it chose to connect when its application was considered by the OPA. The offer of a FIT Contract was not a guarantee that the project would proceed or that it would be commercially successful.

C. The Standard FIT Contract

53. Like the FIT Rules, the standard form FIT Contract was also released on September 24, 2009 after having been subject to public and stakeholder consultation process during the summer months.⁷⁴ The FIT Contract is a standard long-term fixed-price contract that provides standard

⁶⁹ **C-0091**, FIT Program Rules, v. 1.3, s. 3.1(e).

⁷⁰ **C-0091**, FIT Program Rules, v. 1.3, s. 3.1(f).

⁷¹ **C-0091**, FIT Program Rules, v. 1.3, ss. 4.1(a), 13.2(a), 13.5.

⁷² **R-0077**, Ontario Power Authority, FIT Program Overview, Version 1.1 (Sep. 30, 2009), s. 5 (“FIT Program Overview, v. 1.1”); **C-0091**, FIT Program Rules, v. 1.3, s. 4.2(d).

⁷³ **R-0077**, FIT Program Overview, v. 1.1, s. 5; **C-0091**, FIT Program Rules, v. 1.3, s. 5.

⁷⁴ **R-0078**, Ontario Power Authority, Feed-in Tariff Contract, Version 1.1 (Sep. 30, 2009) (“FIT Contract, v. 1.1”). In line with the modifications to the FIT Rules, modifications were made to the FIT Contract, resulting in the release of versions 1.2 and 1.3 on November 19, 2009 and March 9, 2010 respectively. **R-0083**, Ontario Power Authority, FIT Contract, Version 1.2 (Nov. 19, 2009) (“FIT Contract, v. 1.2”); **R-0092**, Ontario Power Authority, FIT Contract, Version 1.3 (Mar. 9, 2010) (“FIT Contract, v. 1.3”); Version 1.3 of the FIT Contract is the version that is applicable to Windstream since their FIT Contract offer was made in May 2010. *See also*, **R-0066**, Ontario Power Authority, Presentation, “Proposed Feed-in Tariff Contract Overview” (Apr. 14, 2009). Available at: [http://fit.powerauthority.on.ca/Storage/10159_Session_5_FIT_-_Contract_Overview_\(HP\).pdf](http://fit.powerauthority.on.ca/Storage/10159_Session_5_FIT_-_Contract_Overview_(HP).pdf).

terms and conditions applicable to all FIT projects, as well as terms and conditions specific to the different types of renewable energy fuels under the FIT Program.⁷⁵

1. Term and Pricing

54. As noted above, the Minister's Direction mandated that PPAs entered into pursuant to the FIT Program would be 20 years in length for projects other than water power projects, which would receive a 40-year term.⁷⁶ The FIT Rules require the pricing of FIT Contracts to be set in accordance with the price schedule in force at the time of the Offer Notice.⁷⁷ The FIT Program was initially developed to offer prices with a reasonable rate of return for renewable energy.⁷⁸ For example, in 2009, when the FIT Program was launched, the specified price was 13.5 cents/kWh for onshore wind facilities, 19.0 cents/kWh for offshore wind facilities, and between 44.3 cents and 80.2 cents/kWh for solar projects.⁷⁹

2. The Milestone Date for Commercial Operation

55. FIT Contract holders (also known as "Suppliers") are required to bring their project into Commercial Operation by the "Milestone Date for Commercial Operation" ("MCOD") applicable under Exhibit A of their FIT Contract.⁸⁰ When entering into a FIT Contract with the OPA, a Supplier expressly acknowledges that "time is of the essence to the OPA with respect to obtaining Commercial Operation [...] by the [MCOD] set out in Exhibit A"⁸¹ and commits to bring its project into timely Commercial Operation by the MCOd. A project is deemed to have achieved Commercial Operation when the FIT Contract holder meets all the requirements as

⁷⁵ **R-0425**, Ontario Power Authority website excerpt, "Contract, Exhibits and Forms". Available at: <http://fit.powerauthority.on.ca/program-resources/contract-exhibits-and-forms>.

⁷⁶ **C-0141**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 2.

⁷⁷ **R-0091**, FIT Program Rules, v. 1.3, s. 7.1.

⁷⁸ RWS-Lo, ¶ 15.

⁷⁹ **R-0074**, Ontario Power Authority, Feed-in Tariff Prices for Renewable Energy Projects in Ontario (Sep. 24, 2009). Available at: http://fit.powerauthority.on.ca/Storage/11126_FIT_Price_Schedule.pdf.

⁸⁰ **R-0092**, FIT Contract, v. 1.3, s. 2.5.

⁸¹ **R-0092**, FIT Contract, v. 1.3, s. 2.5.

outlined in section 2.6 of the FIT Contract, including receiving a Notice to Proceed (“NTP”) from the OPA.⁸²

56. The MCOD is defined in terms of a period of time following the Contract Date, which is the date on which the FIT Contract was awarded, as set out on the contract cover page.⁸³ Time frames for achieving Commercial Operation vary depending on the renewable fuel type.⁸⁴ The MCOD time periods set at the launch of the FIT Program were three years for an onshore wind facility, three years for a solar project, four years for an offshore wind facility, and five years for a waterpower facility.⁸⁵

3. Force Majeure

57. The FIT Contract allows Suppliers who encounter difficulty in meeting their obligations under the FIT Contract, including achieving their MCOD due to factors outside their control, to invoke Force Majeure. Section 10.1 of the FIT Contract, which contains the provisions on Force Majeure, provides that if an event of Force Majeure prevents the Supplier from meeting an obligation, including achieving Commercial Operation by the MCOD, the Supplier will be excused and relieved from performing or complying with such obligation during the period in which the Supplier is in Force Majeure status.⁸⁶

58. So long as the OPA is notified in a timely fashion that the Supplier is invoking Force Majeure and the Supplier provides the full particulars of the event of Force Majeure as required by Section 10.1 of the FIT Contract, Force Majeure is deemed to have been invoked with effect from the commencement of the event or circumstances constituting the Force Majeure (the “Force Majeure event”).⁸⁷ If the Force Majeure event prevents the Supplier from achieving

⁸² **R-0243**, Ontario Power Authority, FIT Program, Commercial Operation Date Instructions, Version 1.0 (May 13, 2011); **R-0092**, FIT Contract, v. 1.3, ss. 2.4, 2.6.

⁸³ **C-0195**, FIT Contract, Appendix 1- Standard Definitions (Mar. 9, 2010).

⁸⁴ **R-0092**, FIT Contract, v. 1.3, Exhibit A.

⁸⁵ **R-0426**, Ontario Power Authority, website excerpt, “Commercial Operation”. Available at: <http://fit.powerauthority.on.ca/contract-management/commercial-operation>; **R-0427**, Ontario Power Authority, website excerpt, “Milestone Date for Commercial Operation”. Available at: <http://fit.powerauthority.on.ca/contract-management/commercial-operation/timelines/supplier-timelines/milestone-date-commercial-oper>; **R-0092**, FIT Contract, v. 1.3, s. 2.5 and Exhibit A.

⁸⁶ **R-0092**, FIT Contract, v. 1.3, s. 10.1(a)(iii).

⁸⁷ **R-0092**, FIT Contract, v. 1.3, s. 10.1(b).

Commercial Operation by its MCOD, the FIT Contract requires that the OPA extend the MCOD for the reasonable period of delay directly resulting from the Force Majeure event.⁸⁸

4. The OPA's Termination Rights

(a) Supplier Default Termination

59. The Supplier accepts the risks of being unable to meet the MCOD specified in its FIT Contract. The Term of the FIT Contract expires on the day before the twentieth anniversary of the earlier of the MCOD and actual Commercial Operation date.⁸⁹ Thus, if a Supplier is unable to meet its MCOD, then it may not be able to capitalize on the full value of the FIT Contract, unless the OPA extends the Term,⁹⁰ or the Supplier does by making payment to the OPA at a rate and within the timeframe specified in the FIT Contract.⁹¹

60. More importantly, however, under the FIT Contract, if more than 18 months have passed since the MCOD ("the Default Date"), it is considered a Supplier Event of Default unless the project is in Force Majeure status.⁹² After the Default Date, the OPA may unilaterally terminate the FIT Contract without penalty, set-off amounts owed by the Supplier against outstanding monies owed by the OPA, or draw on all, or a portion of, the Completion and Performance Security.⁹³

(b) Force Majeure Termination

61. Pursuant to Section 10.1(g), both the OPA and the Supplier have the right to unilaterally terminate a FIT Contract if one or more events of Force Majeure delay Commercial Operation for an aggregate of more than 24 months past the original MCOD. Similarly, under Section 10.1(h), both parties have the right to unilaterally terminate the FIT Contract if one or more events of Force Majeure prevent the Supplier from complying with obligations (aside from

⁸⁸ **R-0092**, FIT Contract, v. 1.3, s. 10.1(f).

⁸⁹ **R-0092**, FIT Contract, v. 1.3, ss. 2.5, 8.1. Note that the expiry date was 40 years in the case of a waterpower project.

⁹⁰ **R-0092**, FIT Contract, v. 1.3, s. 8.1(c). Note that the expiry date was 40 years in the case of a waterpower project.

⁹¹ **R-0092**, FIT Contract, v. 1.3, s. 8.1(d).

⁹² **R-0092**, FIT Contract, v. 1.3, s. 9.1(j).

⁹³ **R-0092**, FIT Contract, v. 1.3, ss. 9.2(a), (b) and (d).

payment obligations and the obligation to achieve MCOB) for more than an aggregate of 36 months in any 60 month period during the Term of the FIT Contract.

62. In both cases, where either party exercises its Force Majeure termination rights, the Supplier is entitled to the return of its security.⁹⁴

(c) Pre-Notice to Proceed Termination

63. One of the main requirements for a Contract Facility to be deemed to have achieved Commercial Operation under Section 2.6(a) of the FIT Contract is for the OPA to have issued a NTP under Section 2.4 of the FIT Contract. To obtain a NTP, a Supplier has to demonstrate that it fulfilled all NTP Pre-requisites, including documentation of a completed REA (or any other equivalent environmental and site plan approvals, as applicable), a Financing Plan including signed commitment letters for at least 50 per cent of expected development costs and agreement in principle to fund the entire development costs, a Domestic Content Plan, and documentation of application for and completion of all applicable Impact Assessments.⁹⁵

64. Until the OPA issues a NTP and the Supplier pays Incremental NTP Security, pursuant to Section 2.4(a), both the OPA and the Supplier have the right to terminate the agreement in their sole and absolute discretion.⁹⁶ The OPA's and Supplier's mutual rights of termination under Section 2.4(a) are described as "pre-NTP termination rights".

65. If the OPA exercises its termination right under Section 2.4(a), the Supplier is entitled to request return of all Completion and Performance Security and the OPA must refund it within 20 business days.⁹⁷ In addition, the OPA would be liable to the Supplier for its Pre-Construction Development Costs incurred prior to the Termination Date, subject to an upper limit specified in Exhibit A.⁹⁸ In the case of an offshore wind project, the OPA's liability is capped at \$500,000

⁹⁴ **R-0092**, FIT Contract, v. 1.3, ss. 10.1(g) and (h).

⁹⁵ **R-0092**, FIT Contract, v. 1.3, s. 2.4(b).

⁹⁶ **R-0092**, FIT Contract, v. 1.3, s. 2.4(a).

⁹⁷ *Ibid.*

⁹⁸ **R-0092**, FIT Contract, v. 1.3, s. 2.4(a)(i); **C-0195**, FIT Contract, Appendix 1- Standard Definitions, s. 191.

plus \$2 per kW of the total capacity under the FIT Contract.⁹⁹ Before the OPA issues a NTP, the OPA is not liable for any costs the Supplier incurred beyond the liability cap.¹⁰⁰

66. If the Supplier exercises its termination right under Section 2.4(a), the Supplier is liable to the OPA for payment of liquidated damages equivalent to the amount of the Completion and Performance Security, and would forfeit its security.¹⁰¹

67. On August 2, 2011, the Minister of Energy directed the OPA to offer all Suppliers under the FIT Program the opportunity to obtain a waiver of the OPA's pre-NTP termination rights under Section 2.4(a) of the FIT Contract.¹⁰² The purpose of offering this waiver to all Suppliers was to support manufacturing supply chain development.¹⁰³ The Claimant accepted this offer and the OPA's pre-NTP termination rights in the FIT Contract with the Claimant were waived on August 29, 2011.¹⁰⁴

5. Domestic Content

68. FIT Contract holders must construct their projects in accordance with a Minimum Required Domestic Content Level, which varies based on the type of renewable energy.¹⁰⁵ The requirements are specified in the FIT Rules, expressed as a percentage of a project's components that must be domestically sourced and is calculated following the Commercial Operation Date.¹⁰⁶

⁹⁹ **R-0092**, FIT Contract, v. 1.3, Exhibit A (Type 8), s. 1.2(d).

¹⁰⁰ **R-0092**, FIT Contract, v. 1.3, s. 2.4(a)(i).

¹⁰¹ **R-0092**, FIT Contract, v. 1.3, s. 2.4(a)(ii).

¹⁰² **R-0258**, Letter (Direction) from Brad Duguid, Minister of Energy to the Ontario Power Authority (Aug. 2, 2011); **R-0259**, Ontario Power Authority website excerpt, "Waiver of OPA termination rights available" (Aug. 2, 2011). Available at: <http://fit.powerauthority.on.ca/program-updates/newsroom/waiver-OPA-termination-rights-available>; **R-0260**, Ministry of Energy, News Release, "Moving Clean Energy Projects Forward: McGuinty Government Providing More Stability, Creating Clean Energy Jobs" (Aug. 2, 2011). Available at: <http://www.powerauthority.on.ca/news/moving-clean-energy-projects-forward>.

¹⁰³ **R-0258**, Letter (Direction) from Brad Duguid, Minister of Energy to the Ontario Power Authority (Aug. 2, 2011); **R-0259**, Ontario Power Authority website excerpt, "Waiver of OPA termination rights available" (Aug. 2, 2011).

¹⁰⁴ **C-0549**, Ontario Power Authority, Waiver Agreement: Pre-NTP Termination Right between the Ontario Power Authority and Windstream Wolfe Island Shoals Inc. (Aug. 29, 2011).

¹⁰⁵ **R-0092**, FIT Contract, v. 1.3, s. 2.2(f).

¹⁰⁶ **R-0091**, FIT Program Rules, v. 1.3, s. 6.4(a); **R-0092**, FIT Contract, v. 1.3, Exhibit D.

69. The FIT Contract enumerates the criteria for meeting the domestic content requirements.¹⁰⁷ It specifies “designated activities” for which a qualifying percentage is applied if that activity has been completed using domestic resources. The cumulative total of the qualifying percentages allocated to the contract facility must be equal to, or greater than, the minimum required Domestic Content Level.¹⁰⁸

D. The Steps Remaining in the Development of FIT Projects Following FIT Contract Award

70. Obtaining a FIT Contract does not guarantee or make it any more likely that a project will be permitted to proceed to development, or that it will reach Commercial Operation.¹⁰⁹ Numerous regulatory approvals, permits and licenses are required prior to the commencement of construction on any project. These include provincial approvals or permits (such as a REA, in the case of a wind project) as well as federal approvals and permits, various technical impact assessments, the approval of completed financing plan, and the approval of a completed Domestic Content Plan.¹¹⁰ Thereafter, as part of the requirements for Commercial Operation, the Supplier must submit a Supplier's certificate regarding Commercial Operation,¹¹¹ an independent engineers certificate regarding Commercial Operation,¹¹² a Metering Plan (or relevant metering information), and an as-built single line electrical drawing. A *Workplace Safety and Insurance Act* clearance certificate, an Ontario Energy Board (“OEB”) Generator Licence, and connection confirmation from the local distribution company are also required.¹¹³ Some of these approvals are significant hurdles for FIT Contract holders. In fact, over half of all projects with FIT Contracts have yet to obtain NTP.¹¹⁴

¹⁰⁷ **R-0091**, FIT Program Rules, v. 1.3, s. 6.4(a); **R-0092**, FIT Contract, v. 1.3, Exhibit D, Table 1.

¹⁰⁸ The domestic content level of a project is calculated in accordance with the methodology contained in Exhibit D of Schedule 1 to the FIT Contract. See also **R-0091**, FIT Program Rules, v. 1.3, s. 6.4(b).

¹⁰⁹ **R-0092**, FIT Contract, v. 1.3, s. 2.4; **R-0429**, Ontario Power Authority, Website excerpt, “Notice to Proceed”. Available at: <http://fit.powerauthority.on.ca/contract-management/notice-proceed>.

¹¹⁰ **R-0092**, FIT Contract, v. 1.3, s. 2.4.

¹¹¹ **R-0092**, FIT Contract, v. 1.3, Exhibit F – Form of Supplier's Certificate Re Commercial Operation.

¹¹² **R-0092**, FIT Contract, v. 1.3, Exhibit G – Form of Independent Engineer's Certificate Re Commercial Operation.

¹¹³ **R-0092**, FIT Contract, v. 1.3, s. 2.

¹¹⁴ RER-BRG, ¶ 77.

III. The Provincial Approval and Permitting of Renewable Energy Projects in Ontario

A. The Renewable Energy Approval (REA) Process

71. Prior to the enactment of the GEGEA, the approval process for a renewable energy project included a patchwork of environmental approvals processes under the *Environmental Protection Act*¹¹⁵ (“EPA”), environmental assessments under the *Environmental Assessment Act*,¹¹⁶ and local land use planning process under the *Planning Act*.¹¹⁷ By adding Part V.0.1 to the EPA¹¹⁸ and making related legislative amendments, the GEGEA consolidated the majority of these processes into one streamlined process, and made MOE the primary regulator of renewable energy projects in Ontario.¹¹⁹ MOE was mandated to ensure the purpose of Part V.0.1 of the EPA, which is the protection and conservation of the environment.¹²⁰

72. Pursuant to new subsection 47.3(1) of the EPA, a proponent is prohibited from constructing or operating certain renewable energy facilities, including most onshore and offshore wind facilities, “except under the authority of and in accordance with a renewable energy approval issued by the Director” through MOE.¹²¹

73. However, the amended EPA did not specify what form the application for a renewable energy approval should take, what its contents should be, or how it should be assessed by regulators. The details of the REA process including its application requirements were to be set out in the regulations made under the EPA.¹²² Indeed, the EPA provides the authority to make regulations governing the preparation and submission of REA applications, REA application

¹¹⁵ C-0105, EPA, c. E.19.

¹¹⁶ R-0005, *Environmental Assessment Act*, R.S.O. 1990, c. E.18 (“*Environmental Assessment Act*”). Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e18_e.htm.

¹¹⁷ R-0006, *Planning Act*; RWS-Wallace, ¶ 6.

¹¹⁸ See C-0123, GEGEA, Schedule G, s. 4(1).

¹¹⁹ C-0105, EPA, s. 47.3(1).

¹²⁰ C-0105, EPA, s. 47.2(1).

¹²¹ C-0105, EPA, s. 47.3(1).

¹²² C-0105, EPA, s. 176(4.1). The statute stipulates that the regulations were to be made by the Lieutenant Governor in Council, which in practice means the Lieutenant Governor of Ontario acting on the advice of the Premier and his or her cabinet.

eligibility requirements, and the rules, standards, and requirements applicable to renewable energy projects (from planning to construction, operation, and decommissioning or closure).¹²³

74. In contrast with the iterative, proponent-driven EA process, the REA process was designed to be prescriptive. The regulator would decide in advance what criteria proponents had to fulfil. It would communicate those requirements through “clear, up-front provincial rules”,¹²⁴ and evaluate a proponent’s application against the standards specified in those rules.¹²⁵

75. To allow time to develop these regulations, the GEGEA provided that the REA-related amendments would not come into force until a date to later be proclaimed.¹²⁶ Following the enactment of the GEGEA, MOE, led by the Manager of Renewable Energy, Dr. Marcia Wallace, was responsible for leading the development of the implementing regulations.¹²⁷

1. The Development and Establishment of the REA Regulation

76. On June 9, 2009, MOE posted a proposal for public comment on Ontario’s Environmental Registry (the “REA Regulation Proposal Notice”),¹²⁸ including a document outlining in detail the proposed regulatory requirements for the REA Regulation (the “Proposed REA Regulation Content”).¹²⁹ On September 24, 2009, after the required comment period closed, the government adopted the regulation, *Renewable Energy Approvals under Part V.0.1 of the Act*, O. Reg. 359/09¹³⁰ (the “REA Regulation”), and Part V.0.1 of the EPA came into force.¹³¹ The same day,

¹²³ **C-0105**, EPA, ss. 47(4)(1), 176(4.1).

¹²⁴ **R-0072**, Ministry of the Environment, “Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Green Energy and Green Economy Act, 2009” (EBR Registry No. 010-6516) (Sep. 24, 2009) (“REA Regulation Decision Notice”). Available at: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTA2NDQ5&statusId=MTYxMzcx&language=en>.

¹²⁵ See RWS-Dumais, ¶ 11 (“The REA regime marked a fundamental shift in MOE’s approach to permitting and approvals for renewable energy projects, from an iterative, proponent-driven process to one that was prescriptive and standardized.”).

¹²⁶ **C-0123**, GEGEA, Schedule K, s. 4.

¹²⁷ See RWS-Wallace, ¶ 3.

¹²⁸ **R-0070**, Ministry of the Environment, “Regulation Proposal Notice: Proposed Ministry of the Environment Regulations to Implement the Green Energy and Green Economy Act, 2009” (EBR Registry No. 010-6516) (Jun. 9, 2009) (“REA Regulation Proposal Notice”). Available at: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTA2NDQ5&statusId=MTU5NjQ1>.

¹²⁹ **C-0126**, Ministry of the Environment, “Proposed Content for the Renewable Energy Approval Regulation under the Environmental Protection Act” (Jun. 9, 2009) (“Proposed REA Regulation Content”).

¹³⁰ **C-0103**, Renewable Energy Approvals under Part V.0.1 of the Act, O. Reg. 359/09 (“REA Regulation”).

MOE posted a decision notice on the Environmental Registry in respect of the regulation (the “REA Regulation Decision Notice”).¹³² The REA Regulation Decision Notice informed the public of the establishment of the REA Regulation, summarized its main requirements, and also summarized the results of the public consultation and how the public consultation was taken into account in the development of the regulation.

77. According to the press backgrounder released by MEI on September 24, 2009, the REA Regulation was “designed to ensure that renewable energy projects are developed in a way that is protective of human health, the environment, and Ontario’s cultural and natural heritage.”¹³³ It represented a new approach to regulating renewable energy generation facilities that “integrate[d] provincial review of the environmental issues and concerns that were previously addressed through the local land use planning process (e.g. zoning or site planning), the environmental assessment process and the environmental approvals process (e.g. Certificates of Approval, Permits to Take Water).”¹³⁴

2. The Approvals Process under the REA Regulation

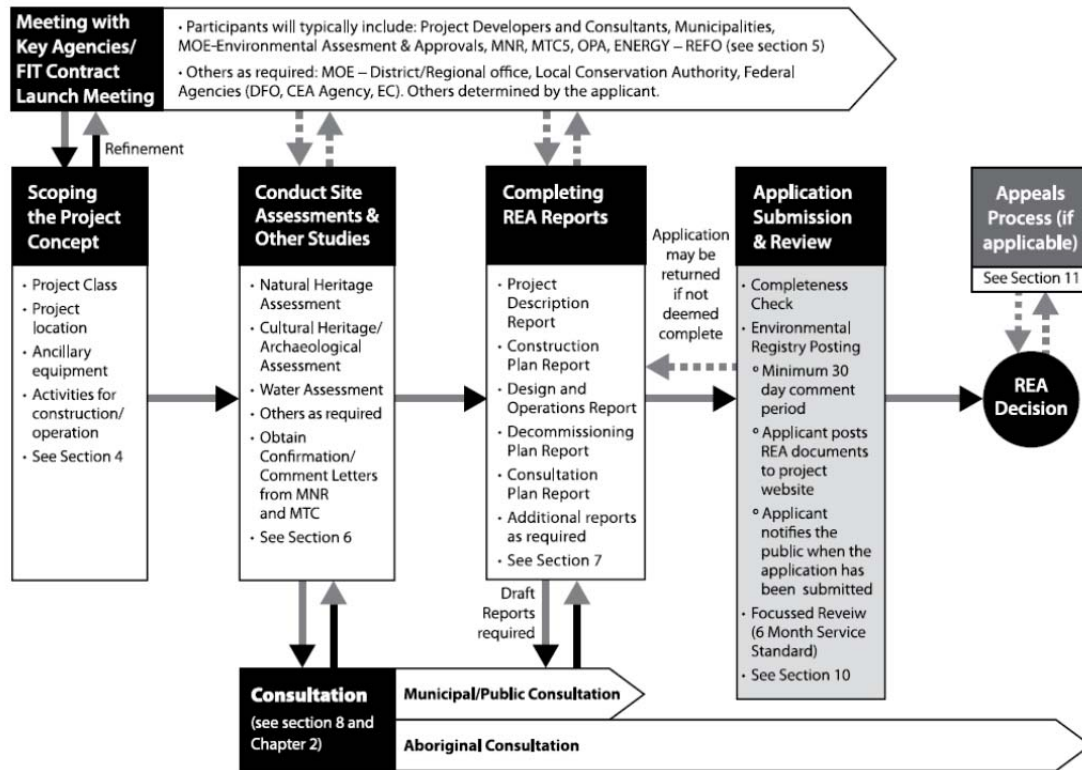
78. The following diagram summarizes the overall REA process. The various steps reflected in this diagram are discussed at length below.

¹³¹ **C-0123**, GEGEA, Schedule G proclaimed in force September 24, 2009. **R-0080**, O. Gaz. Vol. 142, Iss. 41 (Oct. 10, 2009), p. 2881.

¹³² **R-0072**, REA Regulation Decision Notice. Note that the Decision Notice was updated on November 6, 2009, to correct a drafting error.

¹³³ **C-0137**, Ministry of Energy, Press Release, “Ontario Makes It Easier, Faster To Grow Green Energy” (Sep. 24, 2009); **R-0073**, Ministry of Energy, Press Release, “Ontario’s Ten Steps to Green Energy” (Sep. 24, 2009).

¹³⁴ **R-0072**, REA Regulation Decision Notice.

Figure 1: Overview of the principal elements of the REA application process.¹³⁵**(a) REA Requirements**

79. The REA Regulation prescribes technology-specific requirements for different types of renewable energy generation facilities depending on the renewable energy source that the facility uses to generate electricity.¹³⁶ The REA Regulation further divides most of the types of renewable energy generation facilities into classes and applies customized requirements to each class.¹³⁷ There are five classes of wind facilities—four for onshore (Classes 1-4) and one for offshore (Class 5).¹³⁸ If one or more parts of a wind turbine are located in direct contact with surface water other than a wetland, the facility falls into Class 5 (offshore).¹³⁹ In addition to certain technology-specific requirements applicants for Class 5 facilities must submit with their

¹³⁵ C-0729, Ministry of the Environment, Technical Guide to Renewable Energy Approvals (2013), p. 23 (“Technical Guide”).

¹³⁶ C-0103, REA Regulation; See RWS-Wallace, ¶¶ 13-15 for a description of the standard rules and requirements for renewable energy projects, as well as examples of some technology-specific requirements.

¹³⁷ C-0103, REA Regulation, ss. 3-6; R-0072, REA Regulation Decision Notice.

¹³⁸ C-0103, REA Regulation, s. 6, Table 1.

¹³⁹ C-0103, REA Regulation, s. 6, Table 1.

REA application an offshore wind facility report. As Dr. Wallace explains, the requirements for the report were intentionally left “broad, non-specific and descriptive” because MOE “had not yet established prescriptive technology-specific rules and requirements by the time the REA Regulation was adopted.”¹⁴⁰ The offshore wind facility report served as a “placeholder” for the technology-specific requirements for offshore wind that MOE would develop over time based on research and consultation, and adopt through regulatory amendments, policies and guidelines.¹⁴¹

(b) REA Exemptions

80. The REA Regulation exempts certain classes of renewable energy projects from having to obtain a REA. For example, Class 1 wind facilities, which have minimal capacity of less than 3 kW (enough to power a home dishwasher and refrigerator) are exempted.¹⁴² In addition, while Class 2 wind facilities, known as “small-scale wind” due to their lower capacity of less than 50 kW (enough to support less than 40 households or supplement a small Commercial Operation), must obtain a REA, they are subject to less onerous requirements than onshore wind facilities with higher capacity (Classes 3 and 4).¹⁴³

81. The REA process also does not apply to waterpower projects. As explained by Dr. Wallace, the REA Regulation specifically exempts all waterpower facilities from the requirement to obtain a REA, and waterpower projects remain subject to the EA and environmental approvals processes that applied before the coming into force of the GEGEA.¹⁴⁴ Waterpower projects were excluded from the REA requirement due to their unique engineering and site-specific design, and because they were already regulated through a streamlined approval system through the Class EA for Waterpower Projects put in place just prior to the establishment of the REA Regulation.¹⁴⁵ Establishing the Class EA for Waterpower Projects had taken approximately three years and involved extensive consultation and approval by Cabinet.¹⁴⁶ Additionally, the provincial Class

¹⁴⁰ RWS-Wallace, ¶ 17.

¹⁴¹ RWS-Wallace, ¶ 18.

¹⁴² **C-0103**, REA Regulation, s. 8(b); **R-0072**, REA Regulation Decision Notice.

¹⁴³ **R-0072**, REA Regulation Decision Notice.

¹⁴⁴ RWS-Wallace, ¶¶ 8-11. See also **C-0103**, REA Regulation, s. 9(1)(6); **R-0072**, REA Regulation Decision Notice; **C-0729**, Technical Guide, p. 26.

¹⁴⁵ **R-0072**, REA Regulation Decision Notice; RWS-Wallace, ¶ 9.

¹⁴⁶ RWS-Wallace, ¶ 9.

EA was coordinated with the federal EA process pursuant to a federal-provincial agreement,¹⁴⁷ and subjecting waterpower projects to the REA process would have negated the benefits of this coordinated approach.¹⁴⁸

(c) **Pre-Submission Activities**

(i) **Pre-Submission Consultation Meeting and the Draft Project Description Report**

82. The process of obtaining a REA typically begins with a pre-submission consultation meeting with the Environmental Approvals Access and Service Integration Branch (“EAASIB”) of MOE.¹⁴⁹ The pre-submission consultation meeting is recommended, but not mandatory.¹⁵⁰ Regardless of whether the proponent schedules this pre-submission consultation, it must submit to MOE a draft project description report (“PDR”) and request from MOE a list of Aboriginal communities with which the proponent must consult (the “Aboriginal consultation list”).¹⁵¹

83. The PDR is the central summary document in the REA application process, and is critical to MOE review and public consultation.¹⁵² It includes a brief description of the renewable energy project and all negative environmental effects that may result from it.¹⁵³ Submission of the draft PDR is the first prescribed step in the REA application process, and is required to provide MOE with all the necessary details about facility components and proposed activities (i.e. construction, operation, decommissioning).¹⁵⁴ One of the key elements defined in the draft PDR is the project location, which is needed in order to proceed with the required assessments.¹⁵⁵

¹⁴⁷ **R-0028**, Canada-Ontario Agreement on Environmental Assessment Cooperation (Nov. 1, 2004).

¹⁴⁸ RWS-Wallace, ¶ 9.

¹⁴⁹ EEASIB was established in September 2011. From 2009 to 2011, it was known as the “Approvals Program” in the former Environmental Assessment and Approvals Branch. RWS-Dumais, ¶ 3.

¹⁵⁰ RWS-Dumais, ¶ 45.

¹⁵¹ RWS-Dumais, ¶ 46. See also **C-0103**, REA Regulation, s. 14(1).

¹⁵² **C-0729**, Technical Guide, p. 86.

¹⁵³ **C-0103**, REA Regulation, Table 1; **C-0729**, Technical Guide, p. 86.

¹⁵⁴ **C-0729**, Technical Guide, p. 27.

¹⁵⁵ *Ibid.*

84. The Claimant never requested a pre-submission consultation meeting from the EAASIB.¹⁵⁶ It met with MOE representatives on multiple occasions beginning on April 19, 2010, but this was to discuss Ontario's policy on offshore wind in general, as opposed to discussing the Claimant's specific Project.¹⁵⁷ Nor did the Claimant ever submit a draft PDR or request an Aboriginal consultation list.¹⁵⁸ As such, it never initiated the process of applying for a REA.

85. The Claimant's approach to advancing its project contrasts with that of other proponents of offshore wind projects, such as Trillium Wind Power Corporation ("Trillium"), which did not apply for a FIT Contract, and SouthPoint Wind, which applied for three FIT Contracts.¹⁵⁹ By the spring of 2010, both had initiated the REA process with MOE by submitting a draft PDR.¹⁶⁰ In addition, Trillium had requested an Aboriginal consultation list.¹⁶¹

86. The pre-submission requirements to the REA application process include consulting with Aboriginal communities, municipalities and the public about the project, conducting the prescribed studies and assessments, obtaining comments and confirmations necessary from MTC and MNR on heritage and natural heritage requirements, and preparing the technical reports prescribed in Table 1 of the REA Regulation.

87. Table 1 of the REA Regulation sets out five "core reports" that must be submitted as part of a REA application: (1) a PDR, (2) a consultation report, (3) a construction plan report, (4) a design and operations report and (5) a decommissioning report.¹⁶² Proponents must also provide the documentation submitted to MNR and MTC, along with any comments received. In addition,

¹⁵⁶ RWS-Dumais, ¶¶ 20, 53.

¹⁵⁷ RWS-Dumais, ¶¶ 8, 17-31, 52-53.

¹⁵⁸ RWS-Dumais, ¶¶ 8, 46, 53.

¹⁵⁹ Trillium's proposed TPW1 project is a large-scale (414 MW) offshore wind farm sited in Lake Ontario near Main Duck Island on the Ducks-Galloo Ridge, to the southwest of the proposed WWIS project. **R-0111**, Golder Associates, Draft Project Description Report: Trillium Wind Power 1 (TPW1) (May 28, 2010), ¶ 1.1.2 ("Golder Associates, Trillium Draft PDR"). Available at: <http://www.trilliumpower.com/downloads/trillium-power-draft-project-description.pdf>. SouthPoint Wind had applied for FIT Contracts for three 10 MW projects in Lake Erie. See **R-0093**, Ministry of Energy, Information Note - Offshore Wind Power (Mar. 31, 2010), p. 2.

¹⁶⁰ **R-0111**, Golder Associates, Trillium Draft PDR; **R-0093**, Ministry of Energy, Information Note, "Offshore Wind Power" (Mar. 31, 2010).

¹⁶¹ **R-0111**, Golder Associates, Trillium Draft PDR, ¶ 1.1.1.

¹⁶² **C-0103**, REA Regulation, Table 1.

Table 1 specifies the reports required for specific types of renewable energy facilities. In the case of an offshore wind facility, this includes an offshore wind facility report.¹⁶³

(ii) The REA's Consultation Requirements

88. The REA Regulation requires applicants to consult with Aboriginal communities, municipalities and the general public.¹⁶⁴ The requirements exist to ensure that stakeholders are notified about projects and provided an opportunity to give feedback and information to the applicant.¹⁶⁵ Consultation is a critical component of the REA process, and an application will not be deemed complete until the applicant has met or exceeded all consultation requirements.¹⁶⁶

89. MOE must and does take Aboriginal consultation requirements very seriously, due to the Crown's constitutional duty to consult.¹⁶⁷ While the Crown is ultimately responsible for ensuring that the duty has been met, it has delegated certain procedural aspects of consultation to REA applicants through the EPA and REA Regulation.¹⁶⁸

90. Aboriginal consultation begins when the proponent requests an Aboriginal consultation list from MOE. This list identifies Aboriginal communities that the proponent must consult because they have constitutionally protected Aboriginal or treaty rights, or because they may be adversely affected by the project or may be interested in any negative environmental effects of the project.¹⁶⁹ MOE develops this list in collaboration with other ministries of the Government of Ontario, based on the proponent's draft PDR.¹⁷⁰

¹⁶³ *Ibid.*

¹⁶⁴ **C-0103**, REA Regulation, ss. 14-18; **C-0729**, Technical Guide, pp. 48, 53-64; **R-0312**, Ministry of the Environment, Aboriginal Consultation Guide for Preparing a REA Application (2013), p. 6 ("Aboriginal Consultation Guide").

¹⁶⁵ **C-0729**, Technical Guide, p. 48.

¹⁶⁶ **C-0729**, Technical Guide, pp. 48, 54, 60, 62.

¹⁶⁷ RWS-Dumais, ¶ 47; **R-0312**, Aboriginal Consultation Guide, p. 6.

¹⁶⁸ **R-0312**, Aboriginal Consultation Guide, p. 4; **C-0105**, EPA, s. 176(4.1); **C-0103**, REA Regulation, ss. 14-17.

¹⁶⁹ **C-0103**, REA Regulation, s. 14(1)(b); **C-0729**, Technical Guide, p. 56; **R-0312**, Aboriginal Consultation Guide, p. 10.

¹⁷⁰ **C-0729**, Technical Guide, p. 56; RWS-Dumais, ¶ 46.

91. Aboriginal consultation prescribed in the REA regulation involves providing communities on the Aboriginal consultation list with initial notice of the project, a draft PDR at least 30 days in advance of the first public meeting, and information on potential adverse impacts that the project may have on constitutionally protected Aboriginal or treaty rights. It also requires seeking and incorporating comments on most draft REA application documents, and providing drafts of most of the REA application documents at least 60 days in advance of the final public meeting.¹⁷¹ In addition, the REA Regulation gives the Director the discretion to require additional Aboriginal consultations where the proposed project has the potential to have a significant adverse impact on the exercise of Aboriginal rights.¹⁷² This would likely include applications for “large scale wind facilities that are expected to have significant environmental impacts, and are proposed to be located on Crown land where one or more Aboriginal communities are known to exercise an Aboriginal or treaty right.”¹⁷³

92. In addition to Aboriginal communities, a REA applicant must consult the public in general.¹⁷⁴ The overall public consultation process usually begins when the applicant publishes in a local newspaper a Notice of Proposal to Engage in a Project, which includes a brief description of the project proposal including a map of the project location as well as contact information of the applicant.¹⁷⁵ The proponent must also hold at least two public meetings, giving at least 30 days’ notice before the first public meeting and 60 days’ notice before the last public meeting.¹⁷⁶

93. REA applicants must also consult with the municipalities and local authorities of the area in which the proposed project is situated.¹⁷⁷ Municipal consultation involves providing initial notice of the project, providing a draft PDR and municipal consultation form at least 30 days in

¹⁷¹ **C-0103**, REA Regulation, ss. 15(6), 17(1); **C-0729**, Technical Guide, p. 56; **R-0312**, Aboriginal Consultation Guide, p. 11-12.

¹⁷² **C-0103**, REA Regulation, s. 17(4); **R-0312**, Aboriginal Consultation Guide, p. 15.

¹⁷³ **R-0312**, Aboriginal Consultation Guide, pp. 15-16.

¹⁷⁴ **C-0103**, REA Regulation, s. 16.

¹⁷⁵ **C-0103**, REA Regulation, s. 15(1); **C-0729**, Technical Guide, p. 57.

¹⁷⁶ **C-0103**, REA Regulation; **C-0729**, Technical Guide, p. 58.

¹⁷⁷ **C-0103**, REA Regulation, s. 18; **C-0729**, Technical Guide, pp. 62–63.

advance of the first public meeting, and providing drafts of most of the REA application documents at least 90 days in advance of the final public meeting.¹⁷⁸

94. Once it has completed the consultation requirements, the proponent must prepare a consultation report to include in its REA application. The report provides a record of comments and information received through the consultation process, and how they were considered, including whether the project was modified as a result.¹⁷⁹ It allows MOE to determine if the proponent has met the consultation requirements for a complete application.

95. The following diagram summarizes the consultation requirements of the REA process:

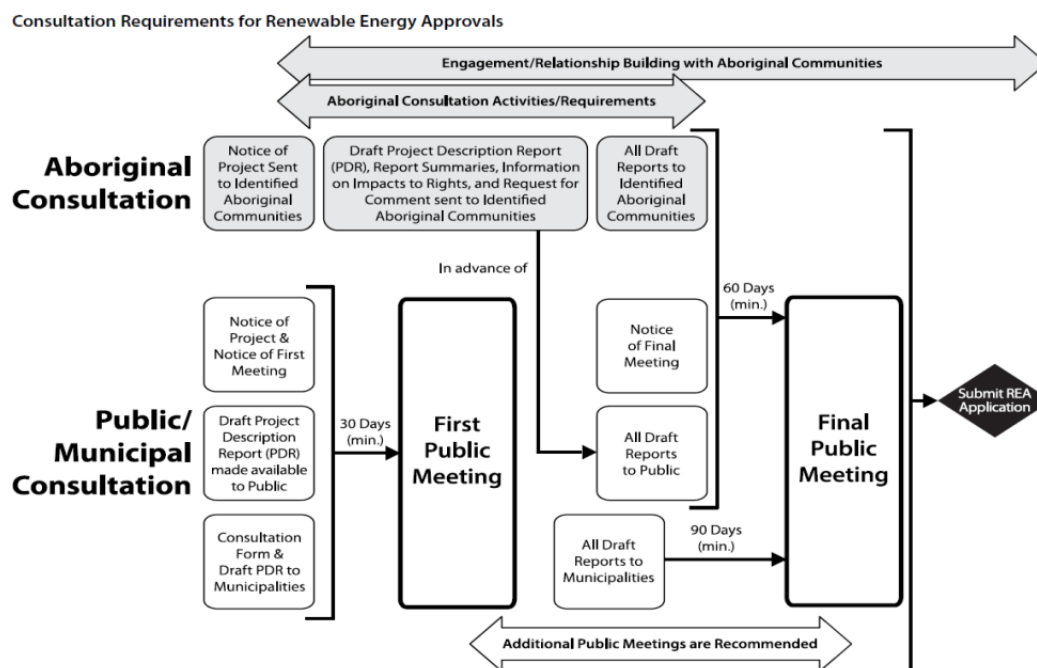


Figure 2: Overview of consultation requirements in the REA application.¹⁸⁰

(iii) The REA’s Cultural Heritage and Natural Heritage Requirements

96. In preparing a REA application, proponents must determine and address the potential negative effects of the project on cultural heritage resources and natural heritage resources at and

¹⁷⁸ C-0103, REA Regulation, ss. 15(6), 18(3); C-0729, Technical Guide, pp. 62-63.

¹⁷⁹ C-0729, Technical Guide, p. 65; R-0312, Aboriginal Consultation Guide, p. 18.

¹⁸⁰ C-0729, Technical Guide, p. 55.

near the project site. Ontario's cultural heritage resources include archaeological resources, built heritage resources and cultural heritage landscapes.¹⁸¹ A REA applicant must conduct both an archaeology assessment and a heritage assessment unless it determines that there is low potential for archaeological resources and heritage resources at the project location.¹⁸²

97. Archaeological resources are defined as archaeological sites or marine archaeological sites.¹⁸³ An archaeological site is "any property that contains an artifact or any other physical evidence of past human use or activity that is of cultural heritage value or interest".¹⁸⁴ A marine archaeological site is "an archaeological site that is fully or partially submerged or that lies below or partially below the high-water mark of any body of water".¹⁸⁵

98. The archaeology assessment must be undertaken by a consultant archaeologist licensed by MTC.¹⁸⁶ This consultant archaeologist must also prepare an archaeological assessment report, which the applicant is required to submit for review by MTC.¹⁸⁷ The applicant must also submit this report and any comments received from MTC with its REA application to MOE.¹⁸⁸

99. Heritage resources are defined as "real property that is of cultural heritage value or interest", including buildings, structures, and landscapes.¹⁸⁹ If the site has potential for the presence of a heritage resource, the presence or absence of a heritage resource must be confirmed by applying the regulatory criteria for determining cultural heritage value or interest.¹⁹⁰

¹⁸¹ **R-0346**, Ministry of Tourism, Culture and Sport, Cultural Heritage Resources: An Information Bulletin for Projects Subject to Ontario Regulation 359/09 - Renewable Energy Approvals (Aug., 2013), p. 3. Available at: http://www.mtc.gov.on.ca/en/publications/REA_INFO_BULLETIN.pdf.

¹⁸² **C-0103**, REA Regulation, ss. 21(3), 23(2)(a); **C-0729**, Technical Guide, p. 37.

¹⁸³ **C-0103**, REA Regulation, s. 1(1).

¹⁸⁴ **C-0103**, REA Regulation, s. 1(1); **R-0023**, *Ontario Heritage Act*, O. Reg. 170/04, *Definitions*, s. 1.

¹⁸⁵ *Ibid.*

¹⁸⁶ **C-0103**, REA Regulation, ss. 1(1), 21(2)(a); **R-0041**, *Ontario Heritage Act*, O. Reg. 8/06, *Licences Under Part VI of the Act - Excluding Marine Archaeological Sites*, s. 1(1).

¹⁸⁷ **C-0103**, REA Regulation, ss. 21(2)(b).

¹⁸⁸ **C-0103**, REA Regulation, ss. 22(a), 22(b).

¹⁸⁹ **C-0103**, REA Regulation, s. 1(1).

¹⁹⁰ **C-0103**, REA Regulation, s. 23(1); **R-0042**, *Ontario Heritage Act*, O. Reg. 9/06, *Criteria for Determining Cultural Heritage Value or Interest*.

100. If the presence of a heritage resource is confirmed, the heritage assessment must evaluate the impact of engaging in the renewable energy project on heritage resources and provide recommendations for measures to avoid, eliminate or mitigate that impact.¹⁹¹ The applicant must then submit its heritage assessment report for review by MTC, and include the report and comments received from MTC in its REA application to MOE.¹⁹²

101. The REA Regulation protects natural heritage features including areas of natural and scientific interest, wetlands, woodlands, wildlife habitat, sand barrens, savannah, tallgrass prairies and alvars.¹⁹³ All REA applicants must conduct a natural heritage assessment, consisting of a records review and site investigation to identify such natural features in the vicinity of the project location, and an evaluation of the significance of each natural feature identified.¹⁹⁴ The applicant must submit a natural heritage assessment report to MNR.¹⁹⁵ REA applicants for Class 3, 4 and 5 wind facilities must also submit to MNR an environmental effects monitoring plan in respect of birds and bats in accordance with the applicable MNR guidelines.¹⁹⁶

102. The applicant must obtain written confirmation from MNR that its natural heritage assessment was conducted in accordance with MNR's Natural Heritage Assessment Guide.¹⁹⁷ It must include that confirmation letter and any comments received from MNR on its environmental effects monitoring plan in its REA application package.¹⁹⁸

¹⁹¹ **C-0103**, REA Regulation, s. 23(1).

¹⁹² **C-0103**, REA Regulation, ss. 23(2.1), 23(3).

¹⁹³ **C-0103**, REA Regulation, ss. 1(1), 26(2).

¹⁹⁴ **C-0103**, REA Regulation, s. 24(1); **C-0729**, Technical Guide, p. 40.

¹⁹⁵ **C-0103**, REA Regulation, s. 28(1).

¹⁹⁶ **C-0103**, REA Regulation, s. 23.1; **R-0273**, Ministry of Natural Resources, "Birds and Bird Habitats: Guidelines for Wind Power Projects" (Dec. 2011). Available at: <https://dr6j45jk9xcmk.cloudfront.net/documents/2718/stdprod-071273.pdf>; **R-0252**, Ministry of Natural Resources, "Bats and Bat Habitats: Guidelines for Wind Power Projects" (Jul. 2011). Available at: <https://dr6j45jk9xcmk.cloudfront.net/documents/2719/stdprod-088155.pdf>.

¹⁹⁷ **C-0103**, REA Regulation, s. 28(2); **R-0304**, Ministry of Natural Resources, Natural Heritage Assessment Guide for Renewable Energy Projects, 2nd ed. (Nov. 2012). Available at: <https://dr6j45jk9xcmk.cloudfront.net/documents/2716/stdprod-101413.pdf>.

¹⁹⁸ **C-0103**, REA Regulation, s. 28(3).

(iv) The REA's Water Assessment Requirement

103. All renewable energy projects except Class 2 wind facilities are required to conduct a water assessment in respect of water bodies, consisting of a records review and site investigation, and submit a water assessment report with the REA application to MOE.¹⁹⁹

(d) Submission and Review of REA Applications

104. When a proponent has fulfilled all of the pre-submission requirements, it may submit the complete application to MOE for screening.²⁰⁰ The EAASIB reviews the application to ensure it is complete, focusing only on whether the regulatory requirements for a complete application have been met, and not on the sufficiency of the substantive content of the application.²⁰¹ The EAASIB may deem it complete or return it to the proponent if it is missing information.²⁰²

105. An application that has been deemed complete proceeds to technical review by a team of inter-ministerial technical experts led by MOE's Environmental Approvals Branch ("EAB").²⁰³ It reviews the application substantively to determine whether it meets the regulatory requirements and whether or not there is adequate information to allow the Director to make a decision in the public interest to issue or not issue a REA.²⁰⁴ MOE has a six-month service standard for reviewing REA applications, but as Ms. Doris Dumais, MOE's Director, Modernization of Approvals and former Director of the Approvals Program, explains "while MOE makes best efforts to complete the technical review in six months, this timeframe is a target only" and there is no guarantee or "legal requirement for the target to be met."²⁰⁵ In some cases, the review of Class 3 and 4 onshore projects has taken as long as 13 months.²⁰⁶ Since there would be a "steep

¹⁹⁹ C-0103, REA Regulation, ss. 29-31.

²⁰⁰ C-0103, REA Regulation, s. 12; RWS-Dumais, ¶ 55-58.

²⁰¹ RWS-Dumais, ¶ 56.

²⁰² *Ibid.*

²⁰³ RWS-Dumais, ¶¶ 59-60.

²⁰⁴ *Ibid.*

²⁰⁵ RWS-Dumais, ¶ 61. See also R-0369, *Big Thunder Windpark Inc. v. Her Majesty the Queen in Right of Ontario*, 2014 ONSC 3050, ¶ 6 (Ont. Div. Ct.) ("[t]he service standard adopted by the Ministry... does not give rise to any enforceable right, as it is not prescribed by a statute or regulation.").

²⁰⁶ RWS-Dumais, ¶ 64.

learning curve” with the first review of a REA for an offshore wind facility, it would likely take “more than a year”.²⁰⁷

(e) **Decisions on REA Applications**

106. At the end of the technical review, the Director decides whether to issue or refuse to issue a REA to the applicant. Under the authority of the EPA, the Director makes an independent and discretionary determination of whether or not it is in the public interest to issue a REA. The EPA and the REA Regulation do not define the term “public interest”. However, it is clear that the public interest is not limited to the two considerations cited by the Claimant: serious harm to human health or serious and irreversible harm to the natural environment.²⁰⁸ These are merely the grounds upon which the Environmental Review Tribunal (“the ERT”) may set aside a Director’s decision if it has been appealed by a member of the public.²⁰⁹

107. In contrast to the limited mandate of the ERT, the Director’s determination of what is in the public interest is based on many considerations. In particular, it will necessarily be informed by the purpose of Part V.0.1 of the EPA on renewable energy, which is the protection and conservation of the environment, including not only the natural environment, but also human life and the social, economic and cultural conditions that influence the community and human life.²¹⁰ A decision in the public interest will also necessarily be informed by MOE’s Statement of

²⁰⁷ *Ibid.*

²⁰⁸ See Claimant’s Memorial, ¶ 139.

²⁰⁹ **C-0105**, EPA, s. 142.1(3); **R-0124**, Environmental Review Tribunal, A Guide to Appeals by Members of the Public regarding Renewable Energy Approvals under section 142.1 of the Environmental Protection Act (Jul. 9, 2010), p. 2 (“Environmental Review Tribunal Guide”). Available at: <http://www.ert.gov.on.ca/stellent/groups/public/@abcs/@www/@ert/documents/webasset/ec082683.pdf>; **C-0729**, Technical Guide, p. 52.

²¹⁰ For the purposes of Part V.0.1 of the EPA, “environment” means (a) air, land or water, (b) plant and animal life, including human life, (c) the social, economic and cultural conditions that influence the life of humans or a community, (d) any building, structure, machine or other device or thing made by humans, (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or (f) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario. **C-0105**, EPA, ss. 47.1, 47.2(1); **R-0005**, *Environmental Assessment Act*, s. 1(1).

Environmental Values, which recognizes the need to use a precautionary, science-based approach in decision-making to protect human health and the environment.²¹¹

108. An MOE Director may issue or refuse to issue a REA.²¹² Even if the applicant does obtain a REA, it will be subject to multiple binding conditions including those related to timelines for starting construction, revising decommissioning plans, implementing procedures for recording complaints about adverse effects from the facility, and/or building the facility according to plans in the application documents, among others.²¹³

(f) Appeals of Decisions on REA Applications

109. A Director's decision on a REA application is subject to appeal to the ERT by the applicant and by any resident of Ontario.²¹⁴ The decision of the ERT which hears the appeal is then subject to an appeal to the Ontario Divisional Court on a question of law and to the Minister of the Environment on any matter other than a question of law.²¹⁵ In total, there have been 33 appeals from the 47 REAs issued for Class 3 and 4 (0.05 MW capacity and greater) onshore wind facilities, representing a 70 per cent appeal rate.²¹⁶

3. The REA Regulation and Offshore Wind Projects

(a) Ontario's Lack of Experience with and Precautionary Approach to Offshore Wind Projects

110. Prior to enacting the GEGEA, Ontario had nearly 15 years of experience assessing the impacts of and regulating onshore wind facilities.²¹⁷ According to the Canadian Wind Energy

²¹¹ **R-0430**, Ministry of the Environment, website excerpt, "Statement of Environmental Values: Ministry of the Environment". Available at: <http://www.ebr.gov.on.ca/ERS-WEB-External/content/sev.jsp?pageName=sevList&subPageName=10001>.

²¹² See RWS-Dumais, ¶¶ 41, 60, 66. There is precedent for a REA being refused. See RWS-Dumais, ¶ 41, fn. 37.

²¹³ **C-0729**, Technical Guide, p. 52. See also RWS-Dumais, ¶¶ 41-43.

²¹⁴ **C-0105**, EPA, ss. 139, 142.1.

²¹⁵ **C-0105**, EPA, s. 20.16(1); **R-0124**, Environmental Review Tribunal Guide, p. 14.

²¹⁶ RWS-Dumais, ¶ 67, fn. 60.

²¹⁷ Ontario Power Generation's Tiverton Wind Turbine with capacity of 0.60 MW came online in 1995. See **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014). Available at: http://canwea.ca/wp-content/uploads/2014/12/Installedcap_PublicWebsite-Dec2014_dk.pdf.

Association (“CanWEA”), 25 onshore wind facilities were operational in Ontario by the end of 2009, with an aggregate capacity of 1,168.3 MW and an average capacity of 46.7 MW.²¹⁸

111. However, Ontario had no equivalent experience in regulating large-scale offshore wind facilities. In conjunction with this lack of regulatory experience, the Government of Ontario had several concerns, including how Great Lakes wind development might conflict with existing commercial and recreational uses.²¹⁹ There was also uncertainty around whether existing provincial infrastructure was sufficient to support offshore wind development, and around the impact of offshore wind development on large freshwater lakes in terms of coastal impacts, sediment movement and ice build-up, as well as public concern about projects near populated shorelines.²²⁰ Another area MOE was particularly concerned about was noise emissions, from construction of onshore components and onshore assembly of wind turbines, from installation and decommissioning, as well as from operation.²²¹ MOE’s particular concern was that “[o]nshore wind setbacks are not sufficient as sound carries over water differently”.²²²

112. As a result, Ontario would proceed cautiously with respect to offshore wind development. In November 2006, MNR decided to defer consideration of Crown land applications from offshore wind projects.²²³ While the Minister of Natural Resources, Donna Cansfield, announced that she was lifting the deferral in January 2008,²²⁴ this decision only “open[ed] the door to exploring the development of Ontario’s vast offshore wind energy potential.”²²⁵ It did not imply that any such applications would be granted site access or that the Government of Ontario had

²¹⁸ These figures were calculated by Canada based on the list of wind farms published by CanWEA, current to December 1, 2014. See **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

²¹⁹ **R-0089**, Ministry of the Environment, Presentation, “Developing Offshore Wind Project Requirements (Mar. 2010), slide 5.

²²⁰ *Ibid.*

²²¹ **R-0089**, Ministry of the Environment, Presentation, “Developing Offshore Wind Project Requirements (Mar. 2010), slide 9.

²²² *Ibid.*

²²³ **C-0460**, Ministry of Natural Resources, Presentation, “Issues Management Plan: Offshore Wind Power – Temporary Deferral” (Nov. 2006); **C-0049**, Ministry of Natural Resources, Confidential Draft, “Key Messages” (Dec. 6, 2006).

²²⁴ **C-0058**, Ministry of Natural Resources, Press Release, “Ontario Lays Foundation For Offshore Wind Power” (Jan. 17, 2008).

²²⁵ *Ibid.*

fully developed the regulatory processes for assessing offshore wind projects. As a result, project proponents remained cautious. Not wanting to assume the risk of completing any work prior to the lifting of the deferral, proponents chose to direct funds to the development of their other projects.²²⁶

113. In October 2009, just a few weeks after the launch of the FIT Program, Minister Cansfield acknowledged the continued existence of regulatory uncertainty with respect to offshore wind projects, stating that MNR's research had "made it clear that developing offshore wind potential would be practical and environmentally sound *once the appropriate infrastructure is in place.*"²²⁷ Minister Cansfield's statement referred not only to physical infrastructure, but to regulatory infrastructure, including Crown land site release policies.

114. When it was developing the REA Regulation in 2009, MOE had considered exempting offshore wind facilities from the requirement to obtain a REA, as it did for waterpower facilities.²²⁸ As described above, instead of a REA, waterpower facilities must undertake an EA pursuant to the Class EA for waterpower projects under the *Environmental Assessment Act*.²²⁹ However, while offshore wind facilities, like waterpower projects, were considered complex, there was no equivalent class EA already in place for offshore wind facilities, and no federal-provincial understanding about harmonization of the EA process for offshore wind facilities.²³⁰ As a result, the Government of Ontario decided to include offshore wind facilities under the REA Regulation.

115. However, as explained by Dr. Wallace, the REA Regulation adopted in 2009 did not include the necessary technology-specific rules and requirements for offshore wind facilities, as it did for other classes of renewable energy facilities.²³¹ In this regard, it is important to note that MNR's Approval and Permitting Requirements Document for Renewable Energy Projects

²²⁶ **R-0081**, Letter from Robert Hornung, CanWEA to Rosalyn Lawrence, Ministry of Natural Resources (Nov. 5, 2009).

²²⁷ **C-0147**, Ministry of Natural Resources, Event Note (Oct. 21, 2009), p. 5 (emphasis added).

²²⁸ See **C-0103**, REA Regulation, s. 9(1); RWS-Wallace, ¶ 10.

²²⁹ See ¶ 81 above; RWS-Wallace, ¶¶ 8-11.

²³⁰ RWS-Wallace, ¶ 9.

²³¹ RWS-Wallace, ¶¶ 12-30.

("APRD")²³² provides only minimal elaboration on the requirements for the offshore wind facility report and only for issues within the mandate of MNR.²³³ In particular, the APRD requires the offshore facility report to include additional information, including the location of shipping channels and commercial fisheries zones, the proposed location of submarine cables and connection to on-shore transmission, the location of existing dispositions of the lake bed, and the location of offshore oil and gas licenses, leases, wells and works.²³⁴ In addition, the APRD specifies that the records review as part of the natural heritage assessment for an offshore wind project needs to include information on fish and fish habitat, fish populations and fisheries, rare vegetation communities as defined by MNR's Natural Heritage Information Centre, species and habitat protected under the *Endangered Species Act, 2007*²³⁵ ("*Endangered Species Act*") wildlife species and their habitat, and hazard lands.²³⁶ Finally, the APRD specifies that applicants are also required to undertake a coastal engineering study to address the potential effect of the proposed project on natural erosion and accretion, and to establish baseline information for MNR.²³⁷

116. The APRD requirements relate primarily to the natural heritage component of the REA Regulation. They do not address the other aspects necessitating standardized rules and requirements. For example, in contrast to onshore wind facilities, there were no comparable noise-based rules specified in respect of wind turbines placed in waterbodies, nor were there safety-based setbacks prescribed from water-based transportation corridors (e.g. shipping lanes).²³⁸

117. As Dr. Wallace confirms, MOE clearly communicated the underdeveloped state of the regulatory framework for offshore wind to interested stakeholders, including industry and the

²³² **C-0136**, Ministry of Natural Resources, Approval and Permitting Requirements Document for Renewable Energy Projects (Sep. 24, 2009).

²³³ **C-0136**, Ministry of Natural Resources, Approval and Permitting Requirements Document for Renewable Energy Projects (Sep. 24, 2009), p. 32.

²³⁴ *Ibid.*

²³⁵ **R-0046**, *Endangered Species Act, 2007*, S.O. 2007, c. 6. Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_07e06_e.htm.

²³⁶ **C-0136**, Ministry of Natural Resources, Approval and Permitting Requirements Document for Renewable Energy Projects (Sep. 24, 2009), p. 32.

²³⁷ *Ibid.*

²³⁸ **C-0103**, REA Regulation, ss. 53(1) and s. 54(1).

general public, through EBR postings on the Environmental Registry, both before and after the adoption of the REA Regulation.²³⁹ These EBR postings spanned from June 2009 to June 2010, and included the following:

- June 9, 2009 REA Regulation Proposal Notice: The posting cautioned that the proposed regulation did not include the to-be-developed regulatory requirements specific to offshore, stating that “[t]he Ministry of the Environment and Ministry of Natural Resources are working together to develop future setbacks related to offshore wind energy facilities that will address natural heritage, coastal impacts, and noise emissions.”²⁴⁰ It also stated that the future regulatory requirements would include noise requirements, and proposed that proponents would have to “submit a noise study that would take into account the unique noise conditions created by off-shore development.”²⁴¹
- September 24, 2009 REA Regulation Decision Notice: This posting explicitly stated that “special rules” would apply to offshore wind projects and that “[t]he Ministry of the Environment and the Ministry of Natural Resources continue to work on a coordinated approach to off-shore wind facilities which would include province-wide minimum separation distance standards for noise.”²⁴²
- March 1, 2010 Technical Bulletins Policy Proposal Notice: This posting proposed draft technical bulletins that MOE had developed as potential guidance documents intended to assist proponents of renewable energy projects in interpreting the requirements of the REA Regulation and in preparing reports for their REA submission. It attached six draft technical bulletins, including one for wind turbine setbacks (“Draft Technical Bulletin Six”).²⁴³ Draft Technical Bulletin Six noted that the REA Regulation did not yet specify minimum noise, property, or road setback distances for offshore wind turbines, but stated that setbacks would nonetheless play a significant role in the assessment under the offshore wind facility report.²⁴⁴
- June 25, 2010 Offshore Wind Policy Proposal Notice: As described below, this posting contained MOE’s proposal for developing the regulatory framework for offshore wind and advised of a second posting that would be made for phase 2 of MNR’s Crown Land Renewable Energy Policy Review. In this posting, MOE acknowledged the need “to provide greater certainty and clarity on off-shore wind

²³⁹ RWS-Wallace, ¶¶ 19-24.

²⁴⁰ **C-0126**, Proposed REA Regulation Content, p. 15.

²⁴¹ *Ibid.*

²⁴² **R-0072**, REA Regulation Decision Notice.

²⁴³ **C-0194**, Ministry of the Environment, “Technical Bulletin Six: Required Setbacks for Wind Turbines” (Mar. 1, 2010) (“Ministry of the Environment, Technical Bulletin Six”).

²⁴⁴ **C-0194**, Ministry of the Environment, Technical Bulletin Six, p. 5.

requirements.”²⁴⁵ It also included a discussion paper which acknowledged the need to “introduce greater clarity” about Ontario’s offshore wind policy, and to more fully develop the approach and offshore wind specific-requirements, through future regulatory amendments, EBR postings and guidance documents.

(b) MOE’s Offshore Wind Policy Proposal Notice, June 25, 2010

118. As a result of its initial work and in consideration of the work that remained to be done on developing the regulatory framework for offshore wind, on June 25, 2010, MOE posted a policy proposal on the Environmental Registry outlining its proposed approach to regulating offshore wind facilities under the REA Regulation.²⁴⁶ The proposal was entitled “Renewable Energy Approval Requirements for Off-shore Wind Facilities—An Overview of the Proposed Approach” (the “Offshore Wind Policy Proposal Notice”). A discussion paper outlined the proposed approach in greater detail (the “Offshore Wind Requirements Discussion Paper”).²⁴⁷

119. The Offshore Wind Policy Proposal Notice explained that development of the regulatory framework for offshore wind facilities was ongoing, and that the EBR posting was one part in the early stages of an overall policy development process to resolve the regulatory uncertainty around the requirements for offshore wind facilities under the REA Regulation:

Partner ministries are working together to provide greater certainty and clarity on off-shore wind requirements. The Ontario government is proposing an approach and is seeking input from interested members of the public, early in the process, to inform the work that will be completed to finalize the approach and the off-shore wind specific requirements under the REA regulation. This approach will also be supplemented by the outcome of research underway by the Ministry of the Environment, Ministry of Natural Resources (MNR), and Ministry of Tourism and Culture and will be the subject of subsequent Environmental Registry postings that will outline requirements for off-shore wind development as proposed amendments to O. Reg. 359/09 and the REA process.²⁴⁸

²⁴⁵ **R-0118**, Ministry of the Environment, “Policy Proposal Notice: Renewable Energy Approval Requirements for Off-shore Wind Facilities - An Overview of the Proposed Approach” (EBR Registry No. 011-0089) (Jun. 25, 2010) (“Offshore Wind Policy Proposal Notice”). Available at: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTA5OTIz&statusId=MTY0OTkz>.

²⁴⁶ **R-0118**, Offshore Wind Policy Proposal Notice.

²⁴⁷ **C-0298**, Ministry of the Environment, “Discussion Paper: Offshore Wind Facilities Renewable Energy Approval Requirements” (Jun. 25, 2010) (“Offshore Wind Discussion Paper”).

²⁴⁸ **R-0118**, Offshore Wind Policy Proposal Notice.

120. The Offshore Wind Policy Proposal Notice also stated that MNR had completed Phase 1 of its Crown Land Renewable Energy Policy Review, and would soon post Phase 2 on the Environmental Registry, including “consideration of where, when and how the Government makes Crown land available for off-shore wind projects.”²⁴⁹

121. The Offshore Wind Requirements Discussion Paper discussed and solicited input from interested stakeholders, including industry and the general public, on a proposed five kilometre shoreline exclusion zone for offshore wind projects. MOE proposed the five kilometre exclusion zone in light of its commitment to protect water bodies, including the Great Lakes, and to ensure that Ontarians enjoy safe drinking water, beaches, food and fish, and natural and cultural heritage.²⁵⁰

122. The Offshore Wind Requirements Discussion Paper also discussed “various considerations relevant to offshore wind projects and the protection of human health and the environment, including the province’s natural and cultural heritage.”²⁵¹ Through the discussion paper, MOE sought to bring stakeholders greater clarity about Ontario’s direction for the regulatory framework for offshore wind. However, like the posting on the Environmental Registry, it also reiterated that MOE was still at the beginning of a policy development process which would ultimately result in changes to the REA process, and future guidance documents and regulatory amendments to be proposed in later Environmental Registry postings, taking into account the public comments received in the first posting.²⁵² It anticipated that the future offshore-specific guidance documents would include Cultural Heritage Guidance for Offshore Renewable Energy Projects from MTC, Offshore Wind Noise Guidelines from MOE, and Coastal Engineering Study Guidance from MNR.²⁵³

123. The public consultation period for the Offshore Wind Policy Proposal Notice was originally open for 60 days until August 23, 2010, but due to significant public interest in the notice, MOE extended the consultation period by an extra fourteen days until September 7,

²⁴⁹ *Ibid.*

²⁵⁰ **C-0298**, Ministry of the Environment, Offshore Wind Discussion Paper (Jun. 25, 2010), p. 1.

²⁵¹ *Ibid.*

²⁵² **C-0298**, Ministry of the Environment, Offshore Wind Discussion Paper (Jun. 25, 2010), p. 1.

²⁵³ **C-0298**, Ministry of the Environment, Offshore Wind Discussion Paper (Jun. 25, 2010), p. 5.

2010.²⁵⁴ During the 74-day consultation period, MOE received an unprecedented total of 1,403 comments, including comments from individual members of the public, community-based associations, environmental non-governmental organizations, municipalities, energy-proponents and Aboriginal communities.²⁵⁵ This level far surpassed the number of comments MOE received when it had consulted on proposed amendments to the REA Regulation in 2011 and 2012, and was even more than MOE received when it consulted on its proposal for the REA Regulation in 2009.²⁵⁶

124. Over 65 per cent of respondents opposed offshore wind development,²⁵⁷ and a majority of respondents expressed concern either that the proposed five kilometre exclusion zone may not be far enough from the shoreline, or that there were significant areas of scientific uncertainty resulting in the need for further study. Specific considerations for further study included measures to protect drinking water, transportation and navigation, and potential effects on fish and wildlife and shoreline ecosystems.²⁵⁸ When the newly appointed Environment Minister, John Wilkinson, became aware of these concerns, he determined that it was particularly important that

²⁵⁴ **R-0421**, Ministry of the Environment, Preliminary Summary of EBR Comments (EBR Registry #011-0089), p. 1.

²⁵⁵ MOE received four responses from First Nation and Métis communities: two submissions from Caldwell First Nation, one submission from Walpole First Nation and one submission from Historic Saugeen Métis. RWS-Dumais, ¶ 49, fn. 46. **R-0421**, Ministry of the Environment, Preliminary Summary of EBR Comments (EBR Registry # 011-0089), p. 1; **C-0725**, Ministry of the Environment, “Policy Decision Notice: Renewable Energy Approval Requirements for Off-shore Wind Facilities - An Overview of the Proposed Approach” (EBR Registry No. 011-0089) (Feb. 11, 2011) (“EBR Decision Notice”).

²⁵⁶ MOE had received 1,266 comments in response to the original REA Regulation Proposal Notice in 2009, and it only received between 42 and 285 comments for each of the postings related to regulatory amendments in 2011 and 2012. RWS-Dumais, ¶ 49; **R-0072**, REA Regulation Decision Notice; **R-0190**, Ministry of the Environment, “Proposed Amendments to O.Reg. 359/09 (Renewable Energy Approvals)” (EBR Registry No. 011-0181) (Dec. 20, 2010). Available at: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTEwMDEy&statusId=MTY3NDU3&language=en&language=en>; **R-0298**, Ministry of the Environment, “Amendments to O.Reg. 359/09 (Renewable Energy Approvals under Part V.0.1 of the Act), Reg. 334 (General) and the Technical Guide to Renewable Energy Approvals” (EBR Registry No. 011-5932) (Jun. 29, 2012). Available at: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTIwMzg2&statusId=MTgwMTk1>; **R-0305**, Ministry of the Environment, “Regulation Decision Notice: Additional Amendments to O. Reg. 359/09 (Renewable Energy Approvals under Part V.0.1 of the Environmental Protection Act)” (EBR Registry No. 011-6509) (Nov. 2, 2012). Available at: <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTE2NzA0&statusId=MTc2Mzg1&language=en>.

²⁵⁷ **R-0421**, Preliminary Summary of EBR Comments (EBR Registry #011-0089), p. 1.

²⁵⁸ **C-0725**, EBR Decision Notice.

the regulatory framework be firmly supported by sound science and the precautionary principle.²⁵⁹

(c) MOE's Jurisdictional Review and Relevant Great Lakes Considerations

125. While it was consulting on the five kilometre shoreline exclusion zone, MOE also conducted a review of approaches to setbacks in the Great Lakes Region.²⁶⁰ According to this review, Ohio and Michigan were also considering proposed setbacks of 5.5 km to nine km.²⁶¹

126. MOE's review of regulations and policies in other jurisdictions confirms that uncertainty in the regulation of offshore wind development is not unique to Ontario. This is also supported by documents prepared in 2010 and 2011 by the International Joint Commission ("IJC") and a more recent report commissioned by the U.S. Department of Energy ("DOE") from Navigant Consulting Inc. (the "Navigant Report").²⁶² Both reports indicate that Ontario is not unique in its view that the state of the science must be advanced before offshore wind development can responsibly be permitted in the Great Lakes.

127. The IJC is an international organization created by the Canada-U.S. *Boundary Waters Treaty*,²⁶³ which prevents and resolves boundary waters disputes between the U.S. and Canada and pursues the common good of both countries as an independent and objective advisor to the two governments.²⁶⁴ In particular, the IJC "rules upon applications for approval of projects affecting boundary or transboundary waters and may regulate the operation of these projects; it

²⁵⁹ RWS-Wilkinson, ¶ 9.

²⁶⁰ **R-0127**, Ministry of the Environment, "Proposed Requirements for Offshore Wind Development in Great Lakes Jurisdictions" (Jul. 19, 2010).

²⁶¹ **R-0127**, Ministry of the Environment, "Proposed Requirements for Offshore Wind Development in Great Lakes Jurisdictions" (Jul. 19, 2010), p. 1.

²⁶² **R-0268**, GLWC Report, p. 16 (emphasis added); **R-0381**, Navigant Consulting Inc., Report Commissioned by the U.S. Department of Energy, Offshore Wind Market and Economic Analysis: 2014 Annual Market Assessment (Aug. 27, 2014), p. 89 ("Navigant Report"). Available at: <http://energy.gov/sites/prod/files/2014/08/f18/2014%20Navigant%20Offshore%20Wind%20Market%20%26%20Economic%20Analysis.pdf>.

²⁶³ **R-0001**, *Treaty between the United States and Great Britain relating to boundary waters, and questions arising between the United States and Canada*, 11 January 1909, 36 Stat. 2448 (entered into force 5 May 1910).

²⁶⁴ **R-0431**, International Joint Commission website, "About the IJC". Available at: http://www.ijc.org/en/About_the_IJC.

assists the two countries in the protection of the transboundary environment, including the implementation of the Great Lakes Water Quality Agreement (“GLWQA”)²⁶⁵ and the improvement of transboundary air quality; and it alerts the governments to emerging issues along the boundary that may give rise to bilateral disputes.”²⁶⁶

128. In September, 2010, the Co-Chairs of the Council of Great Lakes Research Managers (the IJC’s principal advisor on research programs and research needs), wrote to the IJC Commissioners regarding Great Lakes research related to offshore renewable energy development projects (including wind projects), urging the Commission to “open a dialog with the [U.S. and Canadian] governments to stimulate more foundational research, coordination, and planning on offshore renewable energy development as it applies to the waters of the Great Lakes.”²⁶⁷ The Council noted that existing regulatory schemes were “disparate”, creating “an atmosphere of disarray and uncertainty”, which could result in jurisdiction shopping by offshore wind project proponents searching for the weakest regulations.²⁶⁸ This concern led the Council to emphasize the critical importance of consistent, informed, research-based decision making to address the environmental impacts of wind farms based on sound science.²⁶⁹

129. The IJC replied on February 14, 2011, stating its appreciation of the Council’s advice and recommendations on “the need for a harmonized approach to offshore renewable energy development across the Great Lakes and the development of support for consistent, informed, research-based decision making”, and its particular interest in offshore wind energy.²⁷⁰ The IJC further requested the Council to prepare a report on the state of knowledge concerning potential

²⁶⁵ **R-0327**, *Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983 and on November 18, 1987*, 7 September 2012 (entered into force 12 February 2013). Available at: http://www.ec.gc.ca/grandslacs-greatlakes/A1C62826-72BE-40DB-A545-65AD6FCEAE92/1094_Canada-USA%20GLWQA%20_e.pdf.

²⁶⁶ *Ibid.*

²⁶⁷ **R-0149**, Letter from Council of Great Lakes Research Managers to IJC Commissioners (Sep. 20, 2010), p. 1; **R-0432**, International Joint Commission, website excerpt, “Council of Great Lakes Research Managers”. Available at: <http://ijc.org/en /cglrm>.

²⁶⁸ **R-0149**, Letter from Council of Great Lakes Research Managers to International Joint Commissioners (Sep. 20, 2010), p. 1.

²⁶⁹ **R-0149**, Letter from Council of Great Lakes Research Managers to International Joint Commissioners (Sep. 20, 2010), pp. 1, 3.

²⁷⁰ **R-0222**, Letter from International Joint Commission to the Council of Great Lakes Research Managers (Feb. 14, 2011), p. 1.

environmental effects that offshore wind energy may pose on the Great Lakes and identifying a list of prioritized research needs.²⁷¹

130. Since the GLWC was already preparing a similar report on the state of the science of offshore wind, the Council decided it would provide comments for incorporation in that report rather than drafting an independent report.²⁷² The GLWC is a multi-sector and inter-disciplinary coalition of wind energy stakeholders working to facilitate the sustainable development of wind power in the Great Lakes region affiliated with the Great Lakes Commission, a U.S. interstate agency in which the Canadian provinces of Ontario and Quebec participate as associate members.²⁷³

131. The GLWC finalized and published its report in November 2011 (the “GLWC Report”), concluding as follows:

The body of scientific literature about ecological impacts of wind energy is still relatively young. Great Lakes region-specific research, particularly as it relates to offshore wind, is notably lacking. Additional research and studies are needed to direct how wind projects are planned, sited and operated in the region. Answers are needed to questions such as: What are acceptable levels of take for a species? What are appropriate buffers from important ecological areas? How is “ecologically-defensible” determined?

The research needed to answer these questions will likely take years and possibly decades.²⁷⁴

132. In relation to aquatic resources in particular, the report found it “difficult to address knowledge gaps related to Great Lakes offshore wind power at the present time” given the

²⁷¹ *Ibid.*

²⁷² **R-0234**, Council of Great Lakes Research Managers, Meeting Record 53rd Meeting of the Council of Great Lakes Research Managers (Apr. 13, 2011), pp. 4-5. Available at: http://ijc.org/files/tiny/mce/uploaded/CGLRM/CGLRM_MtgRecord13April2011.pdf.

²⁷³ **R-0433**, Great Lakes Wind Commission, website excerpt, “Great Lakes Wind Collaborative”. Available at: <http://glc.org/projects/energy/wind/>; **R-0434**, Great Lakes Commission, Website excerpt, “About Us”. Available at: <http://glc.org/about/>; **R-0002**, Great Lakes Commission, Great Lakes Basin Compact (With State & Federal Legislative History) (Jul. 24, 1968). Available at: <http://glc.org/files/main/GreatLakesBasinCompact.pdf>; **R-0013**, Great Lakes Commission, Declaration of Partnership (1999). Available at: <http://glc.org/files/main/GreatLakesCommission-Declaration-of-Partnership.pdf>; **R-0435**, Great Lakes Commission, website excerpt, “Associate Members”. Available at: <http://glc.org/about/glc-associate-members/>.

²⁷⁴ **R-0268**, GLWC Report.

absence of any existing projects to study in the region.²⁷⁵ Further, the report questioned the appropriateness of relying on European experience with offshore wind when predicting environmental effects in the Great Lakes, since “it is difficult to say with any certainty that these impacts will be analogous with those in the Great Lakes ecosystem since both environments are so different.”²⁷⁶ It is also important to note that the scope of the report was restricted to environmental effects on birds, bats and aquatic resources (e.g. fish and aquatic mammals), and it did not address the broader regulatory considerations related to the human environment such as noise and technical standards and safety. Nor did it address other concerns raised by the public, such as those related to noise, decommissioning, navigation, and drinking water.

133. Like the IJC documents, the Navigant Report commissioned by the U.S. DOE also refers to overall regulatory uncertainty in the Great Lakes region, noting that it led to the conclusion of a bipartisan federal-state Memorandum of Understanding between five Great Lakes Governors and ten federal agencies “to support the efficient, expeditious, orderly and responsible review of proposed offshore wind energy projects in the Great Lakes”.²⁷⁷ The report also noted that “[p]resently none of the Great Lakes states has a policy (e.g., laws or regulations) or permitting program designed to address the permitting issues specific to offshore wind.”²⁷⁸ It confirmed that “the environmental impacts of offshore wind in the United States are not well understood” and form a barrier to regulatory development. It also notes that “not one offshore wind project is under construction or operating in the Great Lakes”.²⁷⁹ Two of the experts retained by the Claimant in this proceeding, COWI and SgurrEnergy, contributed to the Navigant Report.²⁸⁰

(d) MOE's Technical Workshops, Summer 2010

134. In conjunction with the Offshore Wind Policy Proposal Notice, MOE held several technical workshops during the spring and summer of 2010 on topics relevant to the development of a regulatory framework for offshore wind. Subject matter experts from within

²⁷⁵ **R-0268**, GLWC Report, p. 11.

²⁷⁶ *Ibid.*

²⁷⁷ **R-0381**, Navigant Report, p. 89.

²⁷⁸ *Ibid.*

²⁷⁹ **R-0381**, Navigant Report, pp. 53, 88, 132.

²⁸⁰ **R-0381**, Navigant Report, p. iv.

and outside of government participated in these sessions, which were held on the issues of noise, water quality and sediment management, and technical and safety standards.

(i) **Noise**

135. MOE held technical workshops on noise on April 29, 2010 and August 23, 2010.²⁸¹ The first session covered noise propagation over water, ground attenuation, atmospheric effects on noise propagation over water, the mathematical expression for determining wind shear, wind turbines and transformers, noise setback distances, noise receptors, combined effects of multiple offshore wind facilities, and noise measurements of offshore wind facilities.²⁸² Participants included industry consultants such as HGC Engineering, Zephyr North Ltd., and Helimax.²⁸³

136. Following the first noise workshop, a representative of Helimax acknowledged that MOE was “facing a huge hurdle” since no satisfactory noise model existed.²⁸⁴ This representative advised that consultation with a noise specialist from GL Garrad Hassan indicated that the International Organization for Standardisation (“ISO”) model should be discarded after one kilometre of propagation over water, and that a “Swedish model [was] seen also as too conservative.”²⁸⁵

137. The goal of the second noise workshop was to recommend an appropriate noise propagation model for offshore wind projects in Ontario, following a discussion of fundamental issues such as worst-case scenario noise modelling, reflection from an upper layer, and wind shear, and of available propagation models used in other jurisdictions.²⁸⁶ In advance, MOE circulated to participants a background document on modelling noise propagation from offshore

²⁸¹ **R-0103**, Ministry of the Environment, “Technical Session: Off-shore Wind Facilities – Noise Agenda” (Apr. 29, 2010); **R-0133**, Ministry of the Environment, Agenda for Second Technical Stakeholder Session Off-Shore Wind Farms – Noise Issues (Aug. 23, 2010).

²⁸² **R-0103**, Ministry of the Environment, Technical Session: Off-shore Wind Facilities - Noise Agenda (Apr. 29, 2010).

²⁸³ **R-0104**, Ministry of the Environment, Off-shore Wind Noise - Technical Session List of Attendees (Apr. 29, 2010).

²⁸⁴ **R-0117**, E-mail from Vic Schroter, Ministry of the Environment to Dilek Postacioglu, Ministry of the Environment (Jun. 17, 2010).

²⁸⁵ *Ibid.*

²⁸⁶ **R-0133**, Ministry of the Environment, Second Technical Stakeholder Session Agenda, Off-Shore Wind Farms - Noise Issues (Aug. 23, 2010).

wind facilities.²⁸⁷ Invited participants included representatives of industry including Helimax, Golder Associates, Zephyr North and HGC Engineering, as well as MOE representatives.²⁸⁸ According to a MOE staff member, most of the noise experts and consultants dealing with wind turbine noise in Ontario were in attendance.²⁸⁹

138. At the conclusion of this workshop, the objective of recommending an appropriate noise propagation model was not achieved as the experts advised they could not endorse any of the options and that MOE's background document may not be the most appropriate for offshore wind noise propagation modelling.²⁹⁰ The experts provided two main recommendations: first, that, at a minimum, theoretical research be conducted, and second (and preferably), empirical data should be collected through measurements.²⁹¹ The first recommendation could be undertaken based on available data with one to two months' work. The second recommendation included taking measurements over the following May to July of 2011, with all work being finished in December 2011.²⁹²

139. Following this workshop, MOE concluded that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁸⁷ **R-0132**, Ministry of the Environment, Noise Propagation Models for Off-shore Wind Farms and Applicable Setback Distances (Aug. 20, 2010).

²⁸⁸ **R-0131**, E-mail from Mansoor Mahmood, Ministry of Environment to Vic Schroter, Ministry of Environment (Aug. 19, 2010).

²⁸⁹ **R-0135**, E-mail from Vic Schroter, Ministry of Environment to Mansoor Mahmood, Ministry of Environment (Aug. 24, 2010).

²⁹⁰ **R-0134**, Off-shore Wind Noise Workshop Meeting Notes of Dilek Postacioglu, Ministry of Environment (Aug. 23, 2010).

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ **R-0265**, Ministry of the Environment, Presentation, "Renewable Energy Approval (REA) Off-shore Wind" (Oct. 14, 2011), slide 3.

(ii) Water Quality and Sediment Management

140. MOE held a water quality and sediment management workshop on July 16, 2010.²⁹⁵ The workshop was intended to determine the data and modelling studies that would be required to predict, quantify and test water quality impacts from the construction, maintenance, operation, and decommissioning of an offshore wind project, including potential impacts from excavation or dredging during installation, and to determine the water and sediment quality monitoring studies and procedures that would be required for offshore wind projects.²⁹⁶

141. The workshop indicated that there were potentially 14 different Aboriginal communities who would be interested in and/or affected by the development of offshore wind projects in Ontario, and that they may claim Aboriginal title over the lakebed.²⁹⁷ It also indicated the need to develop better information sharing tools about water quality and make them available to proponents over the web.²⁹⁸ The workshop suggested that no development should be allowed within one kilometre of an intake protection zone 1, and that water quality modelling would need to be conducted within intake protection zones 2 and 3.²⁹⁹

142. The workshop also raised the need to ensure proper management of the dredged sediment associated with the installation of transmission cables and turbine foundations.³⁰⁰ The workshop confirmed to MOE that [REDACTED]

²⁹⁵ **R-0125**, Ministry of the Environment, Offshore Wind Facilities - Water Quality and Sediment Management Workshop” (Jul. 16, 2010).

²⁹⁶ **R-0125**, Ministry of the Environment, Offshore Wind Facilities - Water Quality and Sediment Management Workshop” (Jul. 16, 2010), p. 3.

²⁹⁷ **R-0436**, Ministry of the Environment, Offshore Wind Facilities: Water Quality and Sediment Management Workshop Recap.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.* A “surface water intake protection zone” is defined as “an area that is related to a surface water intake and within which it is desirable to regulate or monitor drinking water threats”. **R-0043**, *Clean Water Act, 2006*, S.O. 2006, c. 22, s. 2(1); **R-0047**, *Clean Water Act, 2006*, O. Reg. 287/07, s. 1(1).

³⁰⁰ **C-0555**, Ministry of the Environment, Presentation, “Renewable Energy Approval (REA) Off-shore Wind” (Oct. 14, 2011), slide 3.

³⁰¹ *Ibid.*

(iii) Federal-Provincial Collaboration

143. MOE hosted a workshop on federal-provincial collaboration with respect to offshore wind projects on August 4, 2010.³⁰² The meeting included a brainstorming session on the process steps and timelines of the provincial REA and the federal major projects management/screening environmental assessment for proposed offshore wind projects in Ontario, as well as a discussion of technical aspects of offshore wind projects and opportunities for collaboration on technical study requirements.³⁰³ The key questions explored related to areas for potential collaboration between the provincial REA and federal major projects management/screening environmental assessment processes, technical areas of collaboration between federal and provincial experts, and identifying gaps and overlaps in these areas.³⁰⁴

(iv) Technical Specifications and Safety Issues

144. On September 13, 2010, MOE held a workshop on technical specifications and safety issues, as well as spectrum interference.³⁰⁵ Topics covered at the workshop included available international guidelines for offshore wind turbine support structures and their applicability to offshore wind development in Ontario, ice and ice flow issues, and spectrum and other interference issues.³⁰⁶

145. Participants in this workshop included members of the Canadian Standards Association (“CSA”), a representative of the Department of National Defence in radio communications systems, a representative of the Royal Canadian Mounted Police in the areas of spectrum engineering, and representatives of Nav Canada, as well as representatives of federal and provincial governments involved in regulating or overseeing the energy sector.³⁰⁷

³⁰² **R-0130**, Meeting Notes of Jim Chan, Canadian Environmental Assessment Agency, “Off-shore Wind Meeting: Summary Action Items and Notes of the Meeting” (Aug. 4, 2010) (“Jim Chan Notes”).

³⁰³ **R-0130**, Jim Chan Notes, p. 2.

³⁰⁴ *Ibid.*

³⁰⁵ **R-0141**, Ministry of Environment, Off-shore Wind Development in Ontario, Technical Specifications, Spectrum Interference and Safety Issues Technical Workshop Agenda (Sep. 13, 2010); **R-0144**, Ministry of the Environment, “Attendees” List (Sep. 14, 2010).

³⁰⁶ **R-0141**, Ministry of Environment, Off-shore Wind Development in Ontario, Technical Specifications, Spectrum Interference and Safety Issues Technical Workshop Agenda (Sep. 13, 2010).

³⁰⁷ **R-0144**, Ministry of the Environment, “Attendees” List (Sep. 14, 2010).

146. The workshop indicated that CSA was doing some work to adopt international design standards for offshore wind turbines, but that some modifications were necessary for the Great Lakes context.³⁰⁸ However, standards specific to all other offshore wind facility components (e.g. foundations, cables, and transformers) would require further study as it was unclear whether existing standards were sufficient.³⁰⁹

(e) The Continued Uncertainty with Respect to Offshore Wind Projects in the Great Lakes

147. The substantial work that MOE did in the context of attempting to develop the detailed requirements for offshore wind projects made clear to Ontario that it was widely accepted that the science was simply not sufficient. Indeed, by late 2010, there were strong indications that years of science could be needed before adequate and comprehensive regulations for offshore wind projects in the Great Lakes could be put into place.

B. Access to Crown Land for Wind Projects in Ontario

148. As noted above, while the REA sought to streamline most of the existing approvals and permits needed for renewable energy projects into a single process, there still remained some permits that had to be obtained outside of the REA process altogether. One such set of permits and approvals particularly relevant to offshore wind projects relates to access to Crown land.

1. MNR's Policies on Access to Lakebed Crown Land

149. The beds of most navigable lakes and rivers in Ontario are Crown land over which MNR has stewardship responsibility under the authority of the *Public Lands Act*.³¹⁰ Pursuant to this statute, the Minister of Natural Resources controls the management and disposition of all public lands.³¹¹ The *Public Lands Act* also prohibits any person from taking possession of public lands without lawful authority or placing any material, substance or thing on public lands without

³⁰⁸ **R-0145**, E-mail from Dilek Postacioglu, Ministry of Environment to Barry Duffey, Ministry of Environment (Sep. 14, 2010).

³⁰⁹ *Ibid.*

³¹⁰ **R-0007**, *Public Lands Act*; RWS-Lawrence, ¶ 6; **R-0011**, Ministry of Natural Resources, Policy PL 1.01.01, "Strategic Directions for Management of Ontario Crown Land" (Feb. 1993), p. 3. Available at: <http://www.ontario.ca/environment-and-energy/strategiC-directions-management-ontario-crown-land-policy>.

³¹¹ **R-0007**, *Public Lands Act*, s. 2(1).

written consent.³¹² Thus, to undertake the on-site testing, field studies and the construction work necessary to develop and operate a renewable energy project on Crown land, the proponent must obtain access to Crown land from MNR through the Crown land Site Release process.³¹³

150. MNR first established its formal policy governing the Crown land Site Release process for wind projects on January 27, 2004 as Policy PL 4.10.04, entitled “Wind Power Development on Crown Land”.³¹⁴ This policy had the goal of “providing a fair, orderly and consistent approach” to the development of wind power on Crown land in Ontario.³¹⁵ MNR also issued accompanying procedural guidance as Procedure PL 4.10.04,³¹⁶ which was updated in November 2004.³¹⁷ MNR updated both Policy and Procedure PL 4.10.04 in April 2005,³¹⁸ January 2008,³¹⁹ and July 2010.³²⁰ MNR further updated Procedure PL 4.10.04 in May 2013³²¹ and also replaced Policy PL 4.10.04 with Policy PL 4.10.06, entitled “Renewable Energy on Crown Land”, in February 2014.³²²

151. When the FIT Program was launched, MNR had a three-stage process for establishing a wind project on Crown land under Policy and Procedure 4.10.04: (1) windpower testing

³¹² **R-0007**, *Public Lands Act*, ss. 26(1), 27(1).

³¹³ RWS-Lawrence, ¶¶ 8-10.

³¹⁴ **R-0025**, Ministry of Natural Resources, Policy PL 4.10.04 “Wind Power Development on Crown Land” (Jan. 27, 2004).

³¹⁵ **R-0025**, Ministry of Natural Resources, Policy PL 4.10.04 “Wind Power Development on Crown Land” (Jan. 27, 2004), s. 3.4.

³¹⁶ **R-0025**, Ministry of Natural Resources, Procedure PL 4.10.04 “Wind Power Development on Crown Land” (Jan. 27, 2004).

³¹⁷ **R-0029**, Ministry of Natural Resources, Procedure PL 4.10.04 “Wind Power Development on Crown Land” (Nov. 18, 2004).

³¹⁸ **C-0004**, Ministry of Natural Resources, Policy PL 4.10.04 “Wind Power Development on Crown Land” (Apr. 1, 2005); **C-0005**, Ministry of Natural Resources, Procedure PL 4.10.04 “Wind Power Development on Crown Land” (Apr. 1, 2005).

³¹⁹ **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008); **C-0059**, Ministry of Natural Resources, Procedure PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008).

³²⁰ **R-0122**, Ministry of Natural Resources, Policy PL 4.10.04 “Policy on Onshore Windpower Development on Crown Land” (Jul. 5, 2010); **R-0123**, Ministry of Natural Resources, Procedure PL 4.10.04 “Procedure on Onshore Windpower Development on Crown Land” (Jul. 5, 2010).

³²¹ **R-0340**, Ministry of Natural Resources, Procedure PL 4.10.04 “Onshore Windpower Development on Crown Land – Non-Competitive Application” (May 9, 2013). Available at: <http://files.ontario.ca/environment-and-energy/crown-land/280452.pdf>.

³²² **R-0362**, Ministry of Natural Resources, Policy PL 4.10.06 “Renewable Energy on Crown Land” (Feb. 10, 2014). Available at: http://files.ontario.ca/environment-and-energy/crown-land/stdprod_095543.pdf.

application and review; (2) windpower development review; and (3) issuing permits and tenure for development of a wind farm on Crown land.³²³ The first two stages represented the site release process, through which the applicants for Crown land sought to obtain status as the Applicant of Record (“AOR status”) in respect of specific “grid cells” or groupings of grid cells of Crown land.³²⁴ Obtaining site release or AOR status allowed an applicant to proceed to the third stage, at which point it could request the relevant permits and approvals necessary for the development of the wind project.³²⁵

152. The applicant with AOR status was the only applicant awarded an opportunity, through a site release process, to pursue the required approvals and permits for the development of a wind facility on a given Crown land site.³²⁶ While several applicants could apply for the same grid cells of Crown land, only one applicant could be granted AOR status. As such, the applicant that obtained AOR status (site release) would have the exclusive opportunity to pursue the necessary approvals and permits to proceed with feasibility testing and the eventual development of an offshore wind project at that location.³²⁷ This gave the applicant holding AOR status a degree of certainty since it could be comfortable that MNR would not accept applications for wind testing or development on the same area of Crown land from any other applicant.³²⁸

153. Despite the certainty of having the sole right to apply for permits and approvals, AOR status conferred no legal rights or tenure on the Applicant.³²⁹ As stated in Policy 4.10.04, “[t]he

³²³ **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008); **C-0059**, Ministry of Natural Resources, Procedure PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008); RWS-Lawrence, ¶¶ 8-10.

³²⁴ **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008); **C-0059**, Ministry of Natural Resources, Procedure PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008). A “grid cell” is defined as “an area bounded by lines of 30 second intervals of latitude and longitude”, and a “grid cell group” consists of “a number of contiguous grid cells”. **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008), p. 1.

³²⁵ RWS-Lawrence, ¶ 9; **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008); **C-0059**, Ministry of Natural Resources, Procedure PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008).

³²⁶ **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008), p. 1.

³²⁷ RWS-Lawrence, ¶¶ 8-9.

³²⁸ RWS-Lawrence, ¶ 9.

³²⁹ RWS-Lawrence, ¶ 8.

site release is not a disposition; it is the completion of a process to select an appropriate Applicant for potential windpower testing and an Applicant of Record for subsequent windpower development.”³³⁰ The applicant holding AOR status was simply “awarded the opportunity to proceed through the environmental assessment processes and apply for the necessary approvals for the development of a wind facility.”³³¹ It was still “required to complete all [e]nvironmental [a]ssessment requirements for the proposal prior to any authorizations or approvals being issued by MNR.”³³² Further, as confirmed by Rosalyn Lawrence, the Assistant Deputy Minister of MNR’s Natural Resource Management Division, the AOR status holder must meet regulatory and/or development milestones as described in the AOR letter.³³³

2. The Procedure for Obtaining AOR Status and the FIT Program

154. Applications for Crown land for renewable energy projects are only received during “windows of opportunity” established by MNR, under terms and conditions determined by MNR.³³⁴ Outside of these windows of opportunity, MNR does not accept or consider applications for Crown land for renewable energy projects. The last application window occurred from February 20 to December 10, 2008, which is when the Claimant applied for Crown land in Lake Ontario, near Wolfe Island.

155. Following the closing of that window, prior to the establishment of the FIT Program, MNR was facing a backlog of applications for Crown land,³³⁵ with 100 applications for waterpower projects and over 400 applications for wind projects,³³⁶ including 144 applications for offshore

³³⁰ **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008), p. 5.

³³¹ **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008), p. 6. Note that the policy refers to the environmental assessment (“EA”) process as it was drafted prior to the enactment of the GEGEA. However, the relationship between the REA process and the EA process was the same.

³³² *Ibid.*

³³³ RWS-Lawrence, ¶ 9.

³³⁴ **C-0060**, Ministry of Natural Resources, Policy PL 4.10.04, “Windpower Site Release and Development Review - Crown Land” (Jan. 28, 2008), p. 4.

³³⁵ RWS-Lawrence, ¶ 12.

³³⁶ **R-0096**, E-mail from Richard Linley, Ministry of Natural Resources to Utilia Amaral, Ministry of Environment and Jordan Penic, Ministry of Energy (Apr. 13, 2010).

wind power development from 16 proponents, representing 35 projects.³³⁷ Only 14 of these 144 applications, representing 7 proponents, obtained AOR status.³³⁸

156. MNR saw the FIT Program as a unique opportunity to address this backlog and manage the ongoing applications.³³⁹ By conducting a review of the outstanding applications for Crown land after the OPA had awarded the FIT Contracts, MNR could give priority consideration to applicants that would be developing their Crown land parcels in order to meet the conditions of their FIT Contracts.³⁴⁰ This strategy proved successful in narrowing the pool of applications for consideration by MNR, as only 78 of the over 400 wind power applications for Crown land (both onshore and offshore) were included as part of a FIT application.³⁴¹

157. As part of the implementation of this strategy, the day the FIT Program was announced, Minister of Natural Resources Donna Cansfield sent a standard form letter to every proponent of a wind or waterpower project that had applied for Crown land including the Claimant.³⁴² The letter stated that “[i]n order to maintain priority position within MNR’s site release process, you must submit an application to the FIT Program within the FIT Program launch period.”³⁴³

158. After the Minister sent this letter, members of the wind industry sought additional clarification as to how the site release process would work in conjunction with the FIT Program.³⁴⁴ As a result, on October 28, 2009, Ms. Lawrence, met with CanWEA,³⁴⁵ whose President subsequently wrote to Ms. Lawrence. He further outlined the concerns of CanWEA

³³⁷ **C-0219**, Ministry of Natural Resources Presentation, Offshore Wind Power Development (Apr. 19, 2010); **R-0110**, Ministry of Environment, House Note – Offshore Windpower Environmental Registry Posting (May 26, 2010); RWS-Lawrence, ¶ 12.

³³⁸ RWS-Lawrence, ¶ 12.

³³⁹ RWS-Lawrence, ¶ 13.

³⁴⁰ **R-0096**, E-mail from Richard Linley, Ministry of Natural Resources to Utilia Amaral, Ministry of Environment and Jordan Penic, Ministry of Energy (Apr. 13, 2010).

³⁴¹ RWS-Lawrence, ¶ 13.

³⁴² **R-0096**, E-mail from Richard Linley, Ministry of Natural Resources to Utilia Amaral, Ministry of Environment and Jordan Penic, Ministry of Energy (Apr. 13, 2010); **R-0075**, Letter from Donna Cansfield, Minister of Natural Resources to Waterpower on Crown Land Applicants (Sep. 24, 2009); **C-0144**, Letter from Donna Cansfield, Minister of Natural Resources to Ian Baines, WWIS (Sep. 24, 2009).

³⁴³ **C-0144**, Letter from Donna Cansfield, Minister of Natural Resources to Ian Baines, WWIS (Sep. 24, 2009), p. 1.

³⁴⁴ RWS-Lawrence, ¶¶ 14-15.

³⁴⁵ RWS-Lawrence, ¶ 15.

members regarding MNR's approach to aligning the goals of the GEGEA with existing applications for Crown land sites.³⁴⁶

159. Ms. Lawrence replied to the CanWEA President on November 24, 2009, explaining the approach that would be implemented to determine the priority of applications for Crown land.³⁴⁷

Her letter stated:

[e]xisting 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.³⁴⁸

160. Ms. Lawrence's letter further explained that "where application(s) are received for the same grid cell(s), the MNR date and time stamp will determine the priority applicant on that site."³⁴⁹

161. The Claimant alleges that it understood from the above passages in these letters that if it applied for and was awarded a FIT Contract, it would be awarded land tenure and would receive priority attention from MNR.³⁵⁰ However, as conveyed in the letters, the Claimant's "priority" status, if it obtained AOR status, would relate to its grid cell applications vis-à-vis other potential applicants for the same grid cells, not to all applications for Crown land. If any applicant, including the Claimant, applied for a particular grid cell location and there was an overlapping application for that particular grid cell from another applicant, priority would go to the applicant awarded a FIT Contract. This meant that if it obtained a FIT Contract, the Claimant's application for Crown land would be considered before any other application for the same grid cells of

³⁴⁶ **R-0081**, Letter from Robert Hornung, CanWEA, to Rosalyn Lawrence, Ministry of Natural Resources (Nov. 5, 2009).

³⁴⁷ **C-0158**, Letter from Rosalyn Lawrence Ministry of Natural Resources to Robert Hornung, CanWEA (Nov. 24, 2009).

³⁴⁸ **C-0158**, Letter from Rosalyn Lawrence Ministry of Natural Resources to Robert Hornung, CanWEA (Nov. 24, 2009), p. 1.

³⁴⁹ *Ibid.*

³⁵⁰ Claimant's Memorial, ¶ 164.

Crown land that it had applied for. This did not mean, however, that MNR would expedite or grant its Crown land application.³⁵¹

162. Both of the above-referenced letters contained express caveats in this regard. First, Minister Cansfield's letter stated that it did not amount to a representation that Crown land or any other permits or approvals would necessarily be forthcoming:

This letter and the attached mapping information do not in any way constitute any commitment, obligation or approval of your project by the Government of Ontario. Should you decide to proceed with your application(s) it will be necessary for you to follow all processes outlined in any applicable policies, procedures or guidance material and to ensure that you adhere to all applicable federal and provincial legislation as well as relevant local municipal bylaws.³⁵²

163. Second, Ms. Lawrence's letter reminded wind project proponents that "an application for Crown land does not create a legal entitlement or confer rights", and that access to Crown land is discretionary, stating that "the Minister of Natural Resources has the sole authority to approve or deny any application for the use of Crown land to support wind power testing or development."³⁵³

IV. The Federal Approval and Permitting of Renewable Energy Projects in Ontario

164. In addition to the REA and other provincial permits and approvals, renewable energy projects can require extensive federal permits, approvals and licences.³⁵⁴ For example, depending on the project, approvals and permits can be required under the *Fisheries Act*,³⁵⁵ the *Species at Risk Act*³⁵⁶ ("SARA"), the *Navigation Protection Act*³⁵⁷ ("NPA"), the *Coasting Trade Act*,³⁵⁸ and

³⁵¹ RWS-Lawrence, ¶ 17.

³⁵² **C-0144**, Letter from Donna Cansfield, Minister of Natural Resources to Ian Baines, WWIS (Sep. 24, 2009), p. 1.

³⁵³ **C-0158**, Letter from Rosalyn Lawrence Ministry of Natural Resources to Robert Hornung, CanWEA (Nov. 24, 2009), p. 3.

³⁵⁴ **C-0729**, Technical Guide, p. 92; **R-0311**, Ministry of Energy, Renewable Energy Development: A Guide for Municipalities (Dec. 14, 2012), p. 35 ("Guide for Municipalities"). Available at: <http://www.energy.gov.on.ca/en/files/2014/09/RenewableEnergyDevelopment.pdf>.

³⁵⁵ **R-0003**, *Fisheries Act*, R.S.C. 1985, c. F-14 ("*Fisheries Act*").

³⁵⁶ **R-0016**, *Species at Risk Act*, S.C. 2002, c. 29 ("*Species at Risk Act*").

³⁵⁷ **R-0004**, *Navigation Protection Act*, R.S.C., 1985, c. N-22 ("*Navigation Protection Act*").

³⁵⁸ **R-0009**, *Coasting Trade Act*, S.C. 1992, c. 31 ("*Coasting Trade Act*").

the *Migratory Birds Convention Act, 1994*³⁵⁹ (“MBCA”). Renewable energy projects must also comply with federal laws on the protection of migratory birds.³⁶⁰ The project proponent has sole responsibility to ensure these federal regulatory requirements are met.³⁶¹ Federal permits and approvals required under these statutes are not streamlined, and must be obtained separately from the relevant federal departments.

A. The Fisheries Act

165. The *Fisheries Act* contains provisions related to fisheries protection and pollution prevention that exist to provide for the sustainability and on-going productivity of commercial, recreational and Aboriginal fisheries.³⁶² In particular, it prohibits any person from carrying on “any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery”, except under strict conditions.³⁶³ This prohibition extends not only to works, undertakings, or activities that result in the death of fish but also in any permanent alteration to, or destruction of, fish habitat.³⁶⁴

166. However, it is possible under the *Fisheries Act* and related regulations³⁶⁵ to obtain authorization to carry on a work, undertaking or activity that would otherwise amount to a contravention. This authorization must be sought from the Department of Fisheries and Oceans, on behalf of the Minister of Fisheries and Oceans.

B. The Species at Risk Act

167. The SARA prohibits the killing, harming, harassing, capturing or taking of an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened

³⁵⁹ **R-0012**, *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22 (“*Migratory Birds Convention Act*”).

³⁶⁰ *Ibid*; **R-0370**, *Migratory Birds Regulations*, C.R.C., c. 1035 (Last amended May 29, 2014) (“*Migratory Birds Regulations*”).

³⁶¹ **R-0311**, *Guide for Municipalities*, p. 35.

³⁶² **R-0003**, *Fisheries Act*, s. 6.1.

³⁶³ **R-0003**, *Fisheries Act*, s. 35(1).

³⁶⁴ **R-0003**, *Fisheries Act*, s. 2(2).

³⁶⁵ **R-0354**, *Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations*, S.O.R./2013-191 (Last amended Nov. 25, 2013).

species.³⁶⁶ It also prohibits any damage to or destruction of the residence of individuals of endangered or threatened wildlife species, as well as for extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.³⁶⁷

168. Permits are available under SARA and related regulations³⁶⁸ to authorize work that would otherwise be prohibited³⁶⁹ as long as certain pre-conditions are met. To obtain a SARA permit: (1) all reasonable alternatives to the activity that would reduce the impact on the species must have been considered and the best solution been adopted; (2) all feasible measures must be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and (3) the activity must not jeopardize the survival or recovery of the species.³⁷⁰

C. *The Navigation Protection Act*

169. The NPA prohibits the construction, placement, alteration, repair, rebuilding, removal, or decommissioning of a work in, on, over, under, through or across any navigable water that is listed in the schedule, except in accordance with the NPA or any other federal statute.³⁷¹ If undertaking these activities in listed waters would substantially interfere with navigation, it is necessary to apply for an approval from the Minister of Transport.³⁷² Such approval is necessary in the case of a wind project sited in Lake Ontario, which is listed in the NPA Schedule of navigable waters.³⁷³

D. *The Coasting Trade Act*

170. Pursuant to the *Coasting Trade Act*, foreign ships are prohibited from engaging in coasting trade in Canadian waters without a licence.³⁷⁴ The coastal trade includes the carriage of goods by

³⁶⁶ **R-0016**, *Species at Risk Act*, s. 32(1).

³⁶⁷ **R-0016**, *Species at Risk Act*, s. 33.

³⁶⁸ **R-0313**, *Permits Authorizing an Activity Affecting Listed Wildlife Species Regulations*, S.O.R./2013-140.

³⁶⁹ **R-0016**, *Species at Risk Act*, s. 73(1).

³⁷⁰ **R-0016**, *Species at Risk Act*, s. 73(3).

³⁷¹ **R-0004**, *Navigation Protection Act*, s. 3.

³⁷² **R-0004**, *Navigation Protection Act*, s. 6(1).

³⁷³ **R-0004**, *Navigation Protection Act*, Schedule.

³⁷⁴ **R-0009**, *Coasting Trade Act*, s. 3(1).

ship and the engagement by ship in any marine activity of a commercial nature.³⁷⁵ Such a licence is necessary for the construction of an offshore wind project to the extent that the proponent needs to transport components of the structure to the project site using a ship that is not a Canadian ship. To obtain a licence from the Minister of Transport to use a foreign ship, the applicant must demonstrate it has met certain conditions including that no Canadian ship is suitable and available to provide the service or perform the activity required.³⁷⁶

E. The Migratory Birds Convention Act, 1994

171. Most species of birds in Canada are protected under the MBCA and the *Migratory Birds Regulations*.³⁷⁷ Pursuant to this statute and regulation, it is an offence in Canada for anyone to kill, hunt, capture, injure, harass, take or disturb a migratory bird or to damage, destroy, remove or disturb a migratory bird nest or eggs without a permit.³⁷⁸ Permits may only be granted for scientific purposes, aviculture, taxidermy, damage or danger, airport safety, eiderdown collection and hunting.³⁷⁹ Permits are not available for “incidental take” of migratory birds, or the inadvertent harming, killing, disturbance or destruction of migratory birds, nests and eggs that may result from industrial activities,³⁸⁰ such as the construction or operation of a wind facility.

V. The Proposed Wolfe Island Shoals Project and Its FIT Contract

A. The Claimant's Application for a FIT Contract

172. The OPA opened the FIT Program to applications the day after the release of the standard FIT Rules and FIT Contract, on October 1, 2009.³⁸¹ On November 27, 2009, Windstream Wolfe

³⁷⁵ **R-0009**, *Coasting Trade Act*, s. 2(1).

³⁷⁶ **R-0009**, *Coasting Trade Act*, s. 4(1)(a).

³⁷⁷ **R-0012**, *Migratory Birds Convention Act*; **R-0370**, *Migratory Birds Regulations*; **R-0344**, Environment Canada, website excerpt, “Birds Protected in Canada Under the Migratory Birds Convention Act, 1994 and Regulations” (Jul. 5, 2013). Available at: <https://www.ec.gc.ca/nature/default.asp?lang=En&n=496E2702-1>.

³⁷⁸ **R-0012**, *Migratory Birds Convention Act*, s. 13; **R-0370**, *Migratory Birds Regulations*, ss. 2(1), 5-6; **R-0192**, Environment Canada, “Construction and the Protection of Migratory Birds: Know Your Legal Obligations” (2011), p. 2. Available at: http://publications.gc.ca/collections/collection_2011/ec/CW66-297-2-2011-eng.pdf.

³⁷⁹ **R-0370**, *Migratory Birds Regulations*, ss. 19-32; **R-0192**, Environment Canada, “Construction and the Protection of Migratory Birds: Know Your Legal Obligations” (2011), p. 2.

³⁸⁰ **R-0378**, Environment Canada, website excerpt, “Incidental Take of Migratory Birds in Canada” (Aug. 18, 2014), <http://www.ec.gc.ca/paom-itmb/>.

³⁸¹ **C-0208**, Ontario Power Authority, Backgrounder, “Ontario's Feed-in Tariff Program” (Apr. 8, 2010), p. 1.

Island Shoals Inc. (“WWIS”) and the Claimant’s other subsidiaries applied for eleven FIT Contracts: ten for onshore wind facilities and one for an offshore wind facility.³⁸²

173. In addition to the Claimant’s application, only one other proponent, SouthPoint Wind, filed complete and eligible FIT applications for offshore wind projects. However, its projects were on a smaller scale by an order of magnitude.³⁸³ Each of SouthPoint Wind’s three applications was for a 10 MW wind project located in Lake Erie, one to 1.5 km offshore of Leamington, Union and Kingsville respectively.³⁸⁴

174. The fact that only two proponents filed applications for FIT Contracts for offshore wind projects in November 2009 is contrasted by the fact that sixteen different proponents had applied for Crown land by December 2008 to develop 35 offshore wind projects.³⁸⁵ Seven of those proponents had been granted AOR status by the time of the FIT launch period.³⁸⁶ The low proportion of offshore wind proponents that applied for a FIT Contract reflects the highly speculative nature of offshore wind development in Ontario in November 2009, and difficulties proponents knew they would face. Only two proponents out of the entire industry were willing to take on the Supplier risks under the FIT Contract for an offshore wind project. Of those two, only one submitted a project for a wind project over 10 MW—Windstream, with a project 30 times larger, and it had not yet obtained AOR status for its site.

B. The Site and Layout of the Claimant’s Project

175. According to its FIT application, the Claimant’s proposed Project was an offshore wind facility with a nameplate capacity of 300 MW to be located in Lake Ontario off Wolfe Island.³⁸⁷ As required, the FIT application stated that the proposed Project site was located on Crown land,

³⁸² Claimant’s Memorial, ¶ 165; CWS-Baines, ¶ 70; CWS-Roeper, ¶ 21.

³⁸³ **R-0093**, Ministry of Energy, Information Note - Offshore Wind Power (Mar. 31, 2010), p. 2.

³⁸⁴ **R-0093**, Ministry of Energy, Information Note - Offshore Wind Power (Mar. 31, 2010), p. 2.

³⁸⁵ **C-0219**, Ministry of Natural Resources Presentation, Offshore Wind Power Development (Apr. 19, 2010); **R-0110**, Ministry of Environment, House Note – Offshore Windpower Environmental Registry Posting (May 26, 2010); RWS-Lawrence, ¶ 12.

³⁸⁶ RWS-Lawrence, ¶ 12.

³⁸⁷ **R-0084**, FIT Program Application Form, FIT-FALCB9K - Wolfe Island Shoals Wind Farm (Nov. 29, 2009), pp. 2-3.

and identified the specific grid cells of the proposed site by providing the reference numbers for existing Crown land applications the company had filed with MNR.³⁸⁸

176. The corporate predecessor of WWIS had filed these Crown land applications when the MNR opened a window for accepting wind power applications for Crown land in 2008. Two of the applications (WP-2008-214 and WP-2008-215) were filed on February 20, 2008, and the remaining five (WP-2008-292 to WP-2008-296) were filed on June 30, 2008.³⁸⁹ MNR had confirmed receipt of these applications on May 12, 2008 and July 2, 2008, and had also provided Application Status/Fact Sheets summarizing each of the applications at the time Minister Cansfield wrote to Windstream in November 2009.³⁹⁰

177. Both the Crown land applications and Application Status/Fact Sheets identified the specific 302 grid cells applied for, which amounted to approximately 42,350 acres of Crown land.³⁹¹ These grid cells spanned the waters around all of the western shores of Wolfe Island. They also spanned the waters from the northwestern shoreline of Wolfe Island across the St. Lawrence to the eastern tip of Amherst Island (which is located nine km west of Wolfe Island). Part of this

³⁸⁸ **R-0084**, FIT Program Application Form, FIT-FALCB9K - Wolfe Island Shoals Wind Farm (Nov. 29, 2009).

³⁸⁹ **C-0068**, OCP Foymount Inc., Windpower Application for Crown Land, no. WP-2008-214 (Feb. 20, 2008); **C-0069**, OCP Foymount Inc., Windpower Application for Crown Land, no. WP-2008-215 (Feb. 20, 2008); **R-0052**, OCP Foymount Inc., Windpower Application for Crown Land, no. WP-2008-292 (Jun. 30, 2008); **R-0053**, OCP Foymount Inc., Windpower Application for Crown Land, no. WP-2008-293 (Jun. 30, 2008); **R-0054**, OCP Foymount Inc., Windpower Application for Crown Land, no. WP-2008-294 (Jun. 30, 2008); **R-0055**, OCP Foymount Inc., Windpower Application for Crown Land, no. WP-2008-295 (Jun. 30, 2008); **R-0056**, OCP Foymount Inc., Windpower Application for Crown Land, no. WP-2008-296 (Jun. 30, 2008). Note that the application with handwritten notation "June 2008 #3" is no. WP-2008-294, not WP-2008-293 as the handwritten notation indicates. Note also that while the applications were signed on February 19 and June 26, they were filed on February 20 and June 30.

³⁹⁰ **C-0074**, Letter from Jennifer Keyes to Ian Baines (May 12, 2008); **C-0082**, Letter from Jennifer Keyes to Ian Baines (Jul. 2, 2008); **C-0151**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application # WP-2008-214 (Nov. 20, 2009); **C-0152**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application # WP-2008-215 (Nov. 20, 2009); **C-0153**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application # WP-2008-292 (Nov. 20, 2009); **C-0154**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application # WP-2008-293 (Nov. 20, 2009); **C-0155**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application # WP-2008-294 (Nov. 20, 2009); **C-0156**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application # WP-2008-295 (Nov. 20, 2009); **C-0157**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application # WP-2008-296 (Nov. 20, 2009).

³⁹¹ See **C-0202**, Letter from Neil Hayward, Ministry of Natural Resources to Ian Baines, Windstream (Apr. 7, 2010), p. 1; **C-0129**, Windstream Energy Inc., "Land Status" (Jul. 21, 2009). Note that the total of 48,400 acres indicated in the document includes 6,050 acres for application # WP-2008-213, which was not included in the land Windstream identified in its FIT Application. See **R-0084**, FIT Program Application Form, FIT-FALCB9K - Wolfe Island Shoals Wind Farm (Nov. 29, 2009), p. 3.

span lay between Wolfe Island and the mainland Kingston area. The grid cells also spanned the waters from the southern shores of the centre of Wolfe Island and all along the southern shore of Amherst Island.

178. The map below illustrates the location of grid cell applications for the Claimant’s Project:

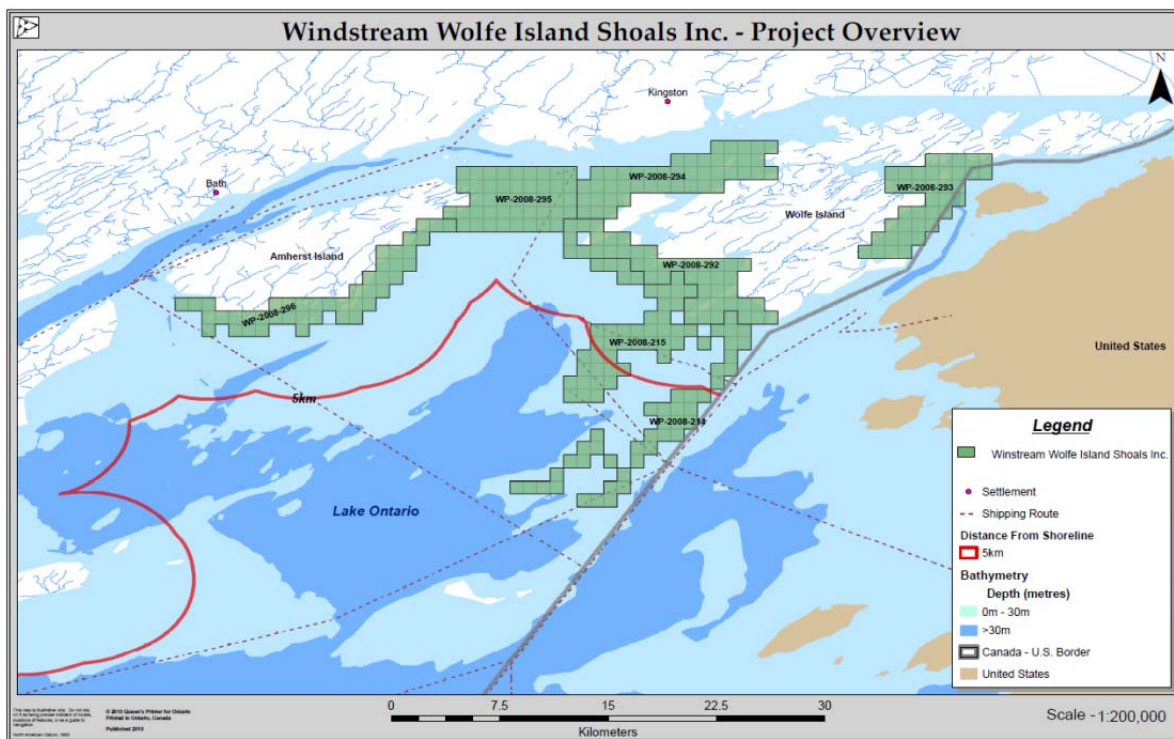


Figure 3: The Crown land applications for the Claimant’s Project³⁹²

179. The Claimant had selected a subset of these grid cells to use for the Project site as proposed in its application for a FIT Contract, specifically the grid cells occupying the area to the southwest of Wolfe Island referred to as the Wolfe Island Shoals. As of June 9, 2010, the Claimant had developed the following 100-turbine layout for its project:

³⁹² R-0437, Windstream Wolfe Island Shoals Inc. – Project Overview (Undated).

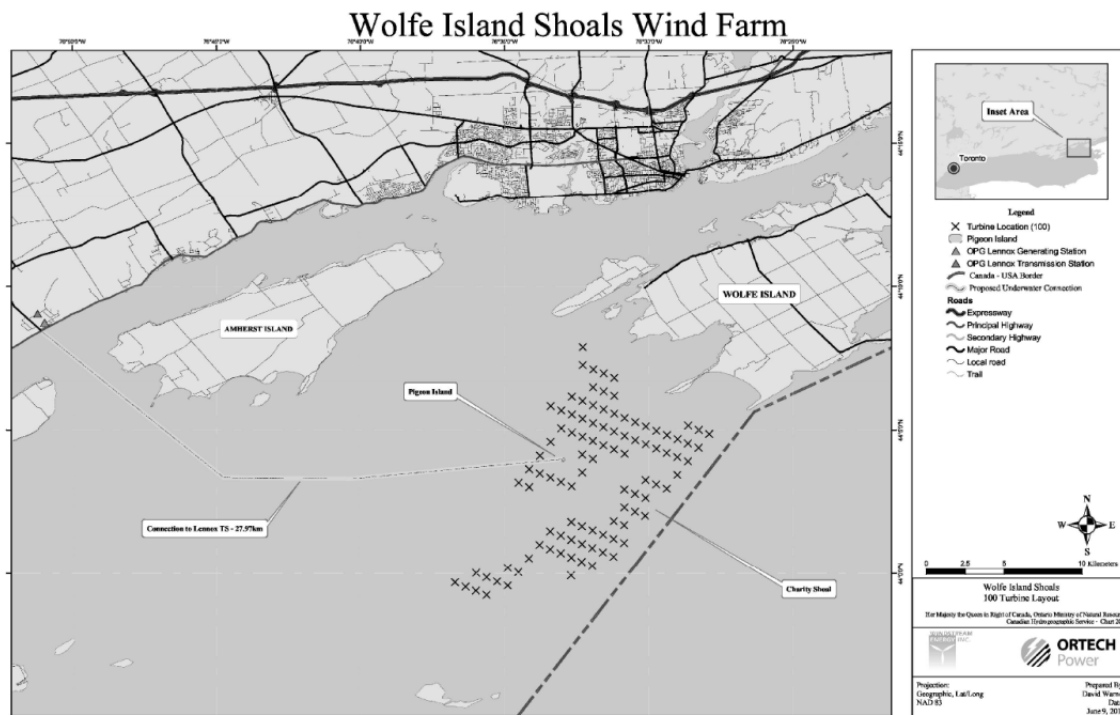


Figure 4: The turbine layout for the Claimant's Project, as of June 9, 2010³⁹³

180. A company related to the Claimant, OCP South River Inc., had also applied for another area of Crown land on Lake Ontario to the southwest of Amherst Island, represented by application no. WP-2008-213.³⁹⁴ However, the Claimant did not identify this as a part of its planned site area in its application for a FIT Contract.³⁹⁵

C. The Unique Nature and Size of the Claimant's Project

1. First Offshore Wind Project in North America

181. Before it signed its FIT Contract, the Claimant had identified the fact that it was the first offshore wind project in Great Lakes and in North America as a "key issue".³⁹⁶ Had it proceeded to development by its original MCOD, the proposed Project would indeed have been the first and

³⁹³ **R-0139**, ORTECH Power, Map, "Wolfe Island Shoals Wind Farm" (Jun. 9, 2010).

³⁹⁴ **C-0067**, OCP South River Inc., Windpower Application for Crown Land (Feb. 19, 2008).

³⁹⁵ See **R-0084**, FIT Program Application Form, FIT-FALCB9K - Wolfe Island Shoals Wind Farm (Nov. 29, 2009), p. 3.

³⁹⁶ **C-0237**, E-mail from Nancy Baines, Windstream Energy Inc. to Ian Baines et al. RE: Mott MacDonald Teleconference Meeting Minutes (Apr. 28, 2010).

only offshore wind project of any kind in Canada or even North America. Despite proposals for offshore wind projects in other Canadian provinces and in the U.S., to date none has been constructed and not a single offshore wind facility is operational in North America.³⁹⁷

182. For example, the NaiKun Wind Energy Group Inc. began work in 2003 to develop a 110-turbine, 396 MW wind project in the Hecate Strait, an area between Prince Rupert and Haida Gwaii in British Columbia.³⁹⁸ Although it did obtain federal environmental approval eight years later,³⁹⁹ the project is viewed as “excessively risky” and has been in “survival mode” since 2011 due to a lack of financing.⁴⁰⁰ Outside Ontario, the only other offshore wind development activity in Canada is Beothuk Energy Inc.’s September 2013 announcement of a proposed 180 MW, 30-turbine offshore project in the gulf of St. Lawrence off the western coast of Newfoundland.⁴⁰¹

183. The situation in the U.S. is similar, with no offshore wind projects currently constructed and operational. The most advanced is Energy Management Inc.’s 468 MW, 130-turbine Cape Wind project, located off the coastline of Massachusetts near Cape Cod.⁴⁰² Billed as “America’s first offshore wind farm”, Cape Wind filed federal permit applications in November 2001 and remains under development thirteen years later, waiting for the financing necessary to construct

³⁹⁷ As of January 17, 2015, a search on the 4C Global Offshore Wind Farm Database demonstrates that the status of all of the offshore wind projects in Canada, the United States and Mexico are conceptual/early planning, consent authorized, development zone, failed proposals, dormant, decommissioned or cancelled. For more information, see <http://www.4coffshore.com/offshorewind/>.

³⁹⁸ **R-0438**, NaiKun Wind Energy Inc., website excerpt, “Frequently Asked Questions”. Available at: <http://naikun.ca/information/faq.php>.

³⁹⁹ **R-0225**, NaiKun Wind Energy Group Inc., News Release, “Federal Environmental Approval for NaiKun Wind Positions Northern B.C. to Become Canada’s First Offshore Wind Producing Region” (Mar. 17, 2011). Available at: http://naikun.ca/news_media/news.php?id=124.

⁴⁰⁰ **R-0229**, CBC News, “NaiKun headaches hold lessons for offshore wind projects” (Mar. 31, 2011). Available at: <http://www.cbc.ca/news/canada/naikun-headaches-hold-lessons-for-offshore-wind-projects-1.992837>.

⁴⁰¹ **R-0348**, Beothuk Energy Inc., News Release, “Beothuk Energy Inc. Announces Offshore Wind Project And Corner Brook, NL Manufacturing Facility” (Sep. 20, 2013). Available at: <http://www.beothukenergy.com/article1.html>; **R-0439**, Beothuk Energy Inc., News Release, “Beothuk Plans 180 MW Wind Farm”. Available at: (<http://www.beothukenergy.com/articles2.html#top>; **R-0387**, The Globe and Mail, Article, “Canada falls behind global growth of offshore wind power: report” (Sep. 16, 2014). Available at: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/offshore-wind-grows-in-popularity-report/article20630772/>.

⁴⁰² **R-0440**, Cape Wind Project Overview, “Cape Wind is nearing construction to become America’s first offshore wind farm”. Available at: <http://www.capewind.org/what/overview>.

the project and bring it into operation⁴⁰³ It took Cape Wind nearly a decade to obtain final permits from the U.S. Army Corps of Engineers and the Environmental Protection Agency.⁴⁰⁴ Additionally, it is worth noting that both the NaiKun and Cape Wind projects are proposed for saltwater and not freshwater environments.

2. First Large-scale Freshwater Wind Project in the World

184. Not only would the Claimant's Project have been the first offshore wind project in North America, it would have been only the second offshore wind project located in freshwater in the world. Only nine fully commissioned offshore wind facilities with a capacity of 300 MW or more exist in the world, all of them in Europe.⁴⁰⁵ The sole freshwater offshore wind project currently in operation is Vindpark Vänern, located in Lake Vänern, Sweden, which came into operation in 2010.⁴⁰⁶ However, Vindpark Vänern is a much smaller-scale facility of 10-turbines with a capacity 30 MW.⁴⁰⁷ Moreover, a 22.5 MW extension of this project was recently cancelled.⁴⁰⁸ The Lake Erie Energy Development Corporation ("LEEDCo") of Ohio has been attempting since 2009 to build what is has called "the first offshore freshwater wind project in North America".⁴⁰⁹ Like Vindpark Vänern, LEEDCo's proposed Icebreaker project has a smaller scale of 18 MW and six-turbines.⁴¹⁰ Additionally, the proposed location of LEEDCo was 7 miles

⁴⁰³ **R-0366**, Cape Wind website excerpt, "Cape Wind Project Timeline" (May 2, 2014). Available at: <http://www.capewind.org/when/timeline>; **R-0441**, Cape Wind website excerpt, "Cape Wind Project Status and Timeline". Available at: <http://www.capewind.org/when>.

⁴⁰⁴ **R-0366**, Cape Wind website excerpt, "Cape Wind Project Timeline".

⁴⁰⁵ See Project Specifications for the following facilities: See Project Specifications for the following facilities: Anholt (**R-0402**); Bard Offshore 1 (**R-0403**); Greater Gabbard (**R-0404**); London Array (**R-0405**); Sheringham Shoal (**R-0406**); West of Duddon Sand (**R-0407**); Thanet (**R-0408**); Walney Phase 1 (**R-0409**); Walney Phase 2 (**R-0410**); Thornton Bank Phase 1 (**R-0411**); Thornton Bank Phase 2 (**R-0412**); and Thornton Bank Phase 3 (**R-0413**). Available at: <http://www.4coffshore.com/offshorewind/>.

⁴⁰⁶ **R-0442**, 4C Offshore website excerpt, "Key Project Dates for Vindpark Vänern". Available at: <http://www.4coffshore.com/windfarms/project-dates-for-vindpark-v%C3%A4nern-se06.html>.

⁴⁰⁷ **R-0443**, 4C Offshore, website excerpt, "Vindpark Vänern". Available at: <http://www.4coffshore.com/windfarms/vindpark-v%C3%A4nern-sweden-se06.html>.

⁴⁰⁸ **R-0444**, 4C Offshore, website excerpt, "Vindpark Vänern - Extension". Available at: <http://www.4coffshore.com/windfarms/vindpark-v%C3%A4nern---extension-sweden-se22.html>.

⁴⁰⁹ **R-0445**, LeedCo, website excerpt, "About". Available at: <http://www.leedco.org/about>.

⁴¹⁰ **R-0446**, LeedCo, website excerpt, "Icebreaker". Available at: <http://www.leedco.org/icebreaker>.

offshore.⁴¹¹ Nevertheless, Icebreaker has failed to secure the permits or funding necessary to proceed with development.⁴¹²

185. Thus, the Claimant's Project would have been the first and only large-scale offshore wind project located in freshwater anywhere in the entire world.

3. Largest Wind Project in Canada

186. In addition to being the first offshore wind project in North America and the first large-scale freshwater offshore wind project in the world, the Claimant's Project would also have ranked as the largest wind project in Canada in general.

187. Canada currently has 9,219.4 MW of installed wind energy capacity, all onshore.⁴¹³ The 166-turbine, 298.8 MW Blackspring Ridge Wind Project, located in Vulcan County, Alberta,⁴¹⁴ and the 124-turbine, 270.0 MW South Kent Wind Farm, located in the Municipality of Chatham-Kent, Ontario,⁴¹⁵ are by far the largest. They are the only projects with capacity greater than 200 MW,⁴¹⁶ and they came into operation in 2014, after over two decades of Canadian experience with onshore wind since the first micro and small-scale projects in 1993 (two 0.2 MW projects and one 21.4 MW project).⁴¹⁷

188. Most of the 205 operational wind projects in Canada are much smaller in scale, with 132 (approximately 65 per cent) having capacity of 50 MW or less.⁴¹⁸ For all operational wind

⁴¹¹ **R-0445**, LeedCo, website excerpt, "About".

⁴¹² **R-0368**, John Arthur Hutchison, The News-Herald, News Article, "LEEDCo wind turbine projects in Lake Erie now in doubt" (May 8, 2014). Available at: <http://www.news-herald.com/general-news/20140508/leedco-wind-turbine-projects-in-lake-erie-now-in-doubt>.

⁴¹³ This figure was calculated by Canada based on the list of wind farms published by CanWEA, current to December 1, 2014. See **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

⁴¹⁴ **R-0447**, EDF Energies Nouvelles, website excerpt, "Blackspring Ridge Community Project Funding". Available at: <http://www.edf-en.ca/blackspring-ridge-wind-project>. **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

⁴¹⁵ **R-0448**, South Kent Wind Overview: "South Kent Wind Fast Facts". Available at: <http://www.southkentwind.com/overview/>; **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

⁴¹⁶ These figures were calculated by Canada based on the list of wind farms provided by CanWEA, current to December 1, 2014. See **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

⁴¹⁷ See **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

⁴¹⁸ These figures were calculated by Canada based on the list of wind farms provided by CanWEA, current to December 1, 2014. See **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

projects in Canada, the average capacity is approximately 45 MW and the median capacity is 20 MW.⁴¹⁹

D. The Offer and Acceptance of the FIT Contract for the Claimant's Project

1. The Announcement of FIT Contract Offers on April 8, 2010

189. On April 8, 2010 the OPA issued a press release announcing the first round of contract offers for large-scale renewable energy projects under the FIT Program.⁴²⁰ The OPA awarded over 184 contracts totalling 2,500 MW, including one offshore wind project – the Claimant's.⁴²¹ None of the Claimant's applications for onshore wind projects were offered FIT Contracts.

190. The Claimant has suggested that during the application review process, the OPA determined its project demonstrated "shovel-readiness", in terms of financial support and experience.⁴²² Yet this is not something the OPA considered in relation to the Claimant's application. For FIT applications filed during the first sixty days after the launch of the FIT Program, the OPA was willing to consider a project's shovel-readiness in its ranking of applications, but only if the applicant "bid" for certain shovel-readiness criteria points established by the OPA in the FIT Rules.⁴²³ As acknowledged by David Mars, one of the Claimant's investors, the Claimant did not bid for any of these launch period criteria points because a positive decision by the OPA would have resulted in an earlier MCOD, which Mr. Mars was not confident they could achieve.⁴²⁴ Hence, the reason that the Claimant's offshore wind Project received an offer of a FIT Contract was because it selected a connection point which had available capacity, not because it was deemed shovel-ready by the OPA. Indeed, by April 2010 Windstream had only obtained initial financing and filed FIT and Crown land applications. The steps remaining in the development process included obtaining additional

⁴¹⁹ These figures were calculated by Canada based on the list of wind farms provided by CanWEA, current to December 1, 2014. See **R-0395**, CanWEA, List of Wind Farms in Canada (Dec. 1, 2014).

⁴²⁰ **C-0206**, News Release (OPA), Ontario Announces 184 Large Scale Renewable Energy Projects (Apr. 8, 2010). The Claimant has inaccurately characterized this OPA press release as a Ministry of Energy press release (Claimant's Memorial, ¶ 173).

⁴²¹ **C-0206**, News Release (OPA), Ontario Announces 184 Large Scale Renewable Energy Projects (Apr. 8, 2010).

⁴²² Claimant's Memorial, ¶¶ 176-177.

⁴²³ **R-0091**, FIT Program Rules, v. 1.3, s. 13.

⁴²⁴ CWS-Mars, ¶ 62.

financing, obtaining AOR status, applying for and obtaining land use permits to conduct on-site testing, conducting field work, meeting the requirements of the REA Regulation and applying for and obtaining a REA, applying for and obtaining federal permits and authorizations in terms of navigation, fisheries, migratory birds and endangered species, and conducting surveys and obtaining land tenure.

191. The OPA informed the Claimant of its contract award by letter on the same day that the awards were publicly announced.⁴²⁵ This letter reminded the Claimant that pursuant to Section 2.4 of the FIT Contract, the Claimant would not be able to obtain a NTP and begin construction of the Project “until all necessary regulatory approvals and permits are obtained and provided to the OPA”, including the REA, federal approvals and any other environmental and site plan approvals required.⁴²⁶ The letter advised the Claimant that if it had any questions on how to obtain regulatory approvals or permits, it should contact REFO.⁴²⁷

2. The OPA's Offer Notice to the Claimant

192. On May 4, 2010, the OPA issued the Claimant an Offer Notice for its FIT Contract.⁴²⁸ The notice enclosed a completed FIT Contract Cover Page which incorporated the applicable general terms and conditions, exhibits, and schedules.⁴²⁹ The FIT Contract identified the Contract Date as May 4, 2010, and, consistent with the standard terms, stipulated that the contract imposed on the project a MCOD of four years following the Contract Date (i.e. May 4, 2014).⁴³⁰

193. The Claimant had ten business days (until May 18, 2010) to accept the Contract and return it to the OPA (“sign back the Contract”).⁴³¹ As discussed below, the Claimant did not sign the

⁴²⁵ **C-0207**, Letter from JoAnne Butler, Ontario Power Authority to Nancy Baines, Windstream Energy Inc. (Apr. 8, 2010).

⁴²⁶ **C-0207**, Letter from JoAnne Butler, Ontario Power Authority to Nancy Baines, Windstream Energy Inc. (Apr. 8, 2010), p. 1.

⁴²⁷ *Ibid*

⁴²⁸ **C-0246**, Letter from JoAnne Butler, Ontario Power Authority to Nancy Baines, Windstream Energy Inc. (May 4, 2010).

⁴²⁹ *Ibid*; **C-0348**, FIT Contract, FIT Ref. # FIT-FALCB9K (May 4, 2010).

⁴³⁰ **R-0092**, FIT Contract, v. 1.3, Exhibit A - Technology-Specific Provisions (Type 8); **C-0246**, Letter from JoAnne Butler, Ontario Power Authority to Nancy Baines, Windstream Energy Inc. (May 4, 2010), p. 2.

⁴³¹ **R-0091**, FIT Program Rules, v. 1.3, s. 6.1(b).

Contract and return it to the OPA by this deadline due to the regulatory risk it perceived and sought to resolve.

3. The Claimant's Reluctance to Sign Back the FIT Contract Due to the Regulatory Uncertainty Around Offshore Wind

(a) The Risk Identified in ORTECH's Preliminary Project Management Analysis in Advance of the April 19, 2010 Meeting

194. Soon after the Claimant's FIT Contract award was announced, but prior to offer of the FIT Contract, Mr. Boysen of MNR proposed a meeting between the Claimant and representatives of the Government of Ontario from MNR, MEI, MOE and MTC.⁴³² Although the Claimant describes the April 19, 2010 meeting as a "kick-off meeting",⁴³³ in Mr. Boysen's words it was a "policy challenge / issues exchange meeting".⁴³⁴ His intention in calling the meeting was for Mr. Baines to "paint them a picture of [his] vision for the project" while identifying the challenges faced by the Government of Ontario.⁴³⁵ When proposing the meeting, Mr. Boysen reminded Mr. Baines that offshore wind was a new area of endeavour for the province.⁴³⁶ Mr. Baines agreed to the meeting and advised that the Claimant's consultant, Uwe Roeper of ORTECH Consulting, would also attend.⁴³⁷

195. In advance of the meeting, Mr. Roeper wrote to Mr. and Ms. Baines identifying areas of uncertainty in the regulatory process the Claimant faced and where it should seek clarity from MNR. In particular, he suggested that the Claimant seek clarity: (1) on what Aboriginal consultation was required and with which Aboriginal communities; (2) on what technical issues MNR would raise, so the Claimant could do the field studies in time; and (3) on the land tenure

⁴³² C-0214, E-mail from Ian Baines, Windstream Energy Inc. to Uwe Roeper, Ortech (Apr. 14, 2010).

⁴³³ See Claimant's Memorial, ¶ 194; RWS-Roeper, ¶ 24.

⁴³⁴ R-0097, E-mail from Eric Boysen, Ministry of Natural Resources to Doris Dumais, Ministry of Environment and Pearl Ing, Ministry of Energy (Apr. 13, 2010).

⁴³⁵ C-0214, E-mail from Ian Baines, Windstream Energy Inc. to Uwe Roeper, Ortech (Apr. 14, 2010).

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

[REDACTED] ⁴⁴⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ⁴⁴⁷

199. With this risk assessment in mind, Mr. Baines and Mr. Roeper attended the April 19, 2010 meeting. At this meeting, Mr. Baines and Mr. Roeper discussed with Government of Ontario representatives the fact that “off-shore permitting is a new area and lacks well defined study criteria.”⁴⁴⁸

(b) The Risk Identified in ORTECH’s Draft Project Management Plan in Advance of the May 13, 2010 Meeting

200. Following that meeting, in early May Mr. Baines sought a meeting with Michael Killeavy, the OPA’s Director of Contract Management.⁴⁴⁹ The meeting was scheduled for May 13, 2010.

201. A few days in advance of the May 13, 2010 meeting, ORTECH provided the Claimant with a draft project management plan, which discussed the project management in greater detail than the initial analysis provided by Mr. Roeper.⁴⁵⁰ Estimated capital costs remained at [REDACTED] billion, with an allocation in excess of [REDACTED] million for project management, engineering and permitting, in excess of [REDACTED] million on construction financing, and the balance on security deposits, procurement and construction.⁴⁵¹ [REDACTED]
[REDACTED]
[REDACTED] ⁴⁵²

202. In terms of the uncertainty associated with the REA requirements for offshore wind, ORTECH specifically cautioned that “the regulatory agencies do not have well established

⁴⁴⁶ *Ibid.*
⁴⁴⁷ **C-0218**, Letter from Uwe Roeper, Ortech to Ian Baines, Windstream Energy Inc. (Apr. 18, 2010), p. 3.
⁴⁴⁸ **C-0235**, Proposal from Leah Deveaux, Ortech to Nancy Baines, Windstream Energy Inc. (Apr. 27, 2010), p. 1.
⁴⁴⁹ **R-0106**, E-mail from Michael Killeavy, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (May 11, 2010).
⁴⁵⁰ **R-0105**, ORTECH Project Management Plan.
⁴⁵¹ **R-0105**, ORTECH Project Management Plan, p. 1.
⁴⁵² **R-0105**, ORTECH Project Management Plan, pp. 10-11.

guidelines for off-shore projects adding to the uncertainty of the REA process” and that “many of the rules governing off-shore projects have yet to be written.”⁴⁵³

(c) **The Risk Raised by the Claimant at Its May 13, 2010 Meeting with the OPA**

203. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁴⁵⁴ The Claimant also raised as an issue the regulatory uncertainty for offshore wind projects, and asked whether the Force Majeure provisions of the FIT Contract would apply to difficulties the Claimant anticipated could occur in obtaining the permits, certificates, approvals, impact assessments and licences required to develop the Claimant's Project and bring it into Commercial Operation.⁴⁵⁵

[REDACTED]⁴⁵⁶

204. At the meeting and in an e-mail the next day, Mr. Killeavy stated categorically that “[t]he OPA [was] not in a position to advise Windstream on how it ought to manage the regulatory risk associated with offshore wind energy projects”,⁴⁵⁷ referring Mr. Baines to REFO which would be in a position to provide “the most current information on regulatory approvals for offshore wind projects.”⁴⁵⁸ In other words, FIT Contracts and the OPA were independent from the permitting and approvals processes. Mr. Killeavy also stated that the OPA would not restrict or change its discretion to exercise pre-NTP termination rights under section 2.4(a) of the FIT Contract, and reminded Mr. Baines that the right was mutual.⁴⁵⁹

⁴⁵³ **R-0105**, ORTECH Project Management Plan, pp. 11-12.

⁴⁵⁴ **C-0260**, E-mail from Michael Killeavy, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (May 14, 2011), p. 1.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

205. Mr. Baines replied by letter on May 16, 2010. This letter provided a summary of the meeting including issues discussed related to regulatory uncertainty. Mr. Baines stated that “[a]s the first off-shore wind facility in Ontario, [the Claimant was] struggling with considerable regulatory uncertainty caused by unknown setback requirements for off-shore wind, uncertainty in the site release process for Crown land, and uncertainty in the detailed requirements of the REA on the other.”⁴⁶⁰ Mr. Baines’s letter also informed Mr. Killeavy that at his suggestion the Claimant had contacted REFO “explaining [its] commitment to working together with the REFO to make the Project a success.”⁴⁶¹

206. The letter sent by Mr. Baines to REFO repeated the same statements that the Claimant was struggling with the expectation under the FIT Contract to achieve a four-year MCOB in light of the considerable regulatory uncertainty associated with offshore wind in Ontario.⁴⁶² Mr. Baines also stated that the Claimant assumed that since it had been awarded a FIT Contract, MEI and related ministries were “all committed to resolving the uncertainty for off-shore wind projects by putting in place the necessary policies in such a time and manner as will not compromise the ability of Windstream to meet its Project commitments under the FIT Contract.”⁴⁶³ He asked that REFO advise in writing to correct his assumption if incorrect.⁴⁶⁴

207. As explained by Ms. Lo, “REFO was not in a position to provide a response affirming or denying this information since other ministries, such as MOE and MNR, were responsible for developing the regulatory framework for offshore wind”.⁴⁶⁵ Rather than providing any guarantees with respect to the finalization of the regulatory framework, REFO's response to the Claimant on May 21, 2010, “that MEI and MOE were working towards developing the regulatory framework

⁴⁶⁰ C-0262, Letter from Ian Baines, Windstream Energy Inc. to Michael Killeavy, Ontario Power Authority (May 16, 2010).

⁴⁶¹ C-0262, Letter from Ian Baines, Windstream Energy Inc. to Michael Killeavy, Ontario Power Authority (May 16, 2010), p. 2.

⁴⁶² C-0258, Letter from Ian Baines, Windstream Energy Inc. to Mirrun Zaveri, Ministry of Energy, p. 1.

⁴⁶³ *Ibid.*

⁴⁶⁴ C-0258, Letter from Ian Baines, Windstream Energy Inc. to Mirrun Zaveri, Ministry of Energy, p. 2.

⁴⁶⁵ RWS-Lo, ¶ 23.

for offshore wind projects was meant only to signal to the proponent to expect additional information from the ministries.”⁴⁶⁶

(d) The OPA's First Extension of the Signing Date on May 17, 2010

208. On May 17, 2010, the OPA granted the Claimant an extension on the deadline for signing back its FIT Contract until June 2, 2010.⁴⁶⁷ Mr. Killeavy explained the rationale for granting this extension as related to the fact that MOE had “not yet published its approvals process for offshore wind”, and that given the uncertainty around that approvals process, he thought it would be a good idea to extend the deadline for accepting the offer of the FIT Contract by ten business days.⁴⁶⁸ This rationale was communicated to the Claimant's counsel Adam Chamberlain of the law firm Borden Ladner Gervais, LLP who advised Mr. Baines that the OPA had considered the extension reasonable in light of the environmental regulatory uncertainties faced by the Claimant, including around set-back requirements.⁴⁶⁹

209. Shortly after the OPA granted this extension, Mr. Roeper wrote to Mr. Baines stating that the lack of responsiveness from the government to resolving the Claimant's regulatory concerns was creating a “business risk” and that they needed to “step up the contact effort.”⁴⁷⁰ Mr. Roeper then contacted Pearl Ing, Director of MEI's Renewables and Energy Facilitation Branch, for an update on the status of the regulatory requirements that would apply to the Claimant's Project.⁴⁷¹ Mr. Roeper's follow-up e-mail indicated that Ms. Ing advised that the MEI had received the Claimant's May 13, 2010 letter to REFO, that offshore wind REA guidelines were still under development, and that it was not clear when they would be available.⁴⁷²

210. In the follow up e-mail, Mr. Roeper informed Ms. Ing that the Claimant was concerned about the lack of harmonization of the MNR site release process with the REA permitting

⁴⁶⁶ RWS-Lo, ¶ 23; **C-0270**, E-mail from Uwe Roeper, Ortech to Pearl Ing, Ministry of Energy (May 25, 2010).

⁴⁶⁷ **C-0265**, E-mail from Adam Chamberlain (BLG) to Nancy Baines et al. (May 17, 2010), pp. 1-2.

⁴⁶⁸ **R-0107**, E-mail from Sheri Bizarro, Ontario Power Authority to Perry Cecchini and Bojana Zindovic, Ontario Power Authority (May 17, 2010).

⁴⁶⁹ **C-0265**, E-mail from Adam Chamberlain (BLG) to Nancy Baines et al. (May 17, 2010), p. 1.

⁴⁷⁰ **C-0270**, E-mail from Uwe Roeper, Ortech to Pearl Ing, Ministry of Energy (May 25, 2010), p. 2.

⁴⁷¹ **C-0270**, E-mail from Uwe Roeper, Ortech to Pearl Ing, Ministry of Energy (May 25, 2010), p. 1.

⁴⁷² *Ibid.*

process.⁴⁷³ Mr. Roeper stated that if set-back guidelines were going to be imposed, this would cause the Claimant's Project to lose areas of its Project location based on its original 2008 grid cell applications. Therefore, the Claimant was considering asking MNR to, according to Mr. Roeper, "make up for some of the land using blocks that are further out in the water (but not currently included in the Claimant's site release applications)."⁴⁷⁴ Mr. Roeper requested MEI's assistance in this regard.

211. As the June 2, 2010 deadline approached, the Claimant's counsel, Mr. Chamberlain, wrote to the OPA to request an amendment to the Contract Date from May 4, 2010 to June 2, 2010, to account for the signing extension that the OPA had granted.⁴⁷⁵ Mr. Chamberlain also requested that the Contract Date be amended with any additional extensions granted by the OPA.⁴⁷⁶

(e) The OPA's Second and Third Extensions of the Signing Date on June 1, 2010 and June 15, 2010

212. On June 1, 2010, the OPA granted the Claimant an extension to sign back the FIT Contract until June 16, 2010, without an extension of the Contract Date.⁴⁷⁷ The following day, Mr. Baines requested a meeting with representatives of MEI, MNR, and MOE for June 15, 2010.⁴⁷⁸ In his letter, Mr. Baines indicated that to meet the MCOB, it was critical for the regulatory uncertainty to be resolved and for the company to begin field testing in the summer of 2010.⁴⁷⁹ Mr. Baines stated:

[w]e are unclear about the criteria being considered [for offshore guidelines] and the nature of the constraints [the MOE] may impose on the existing project and related timelines [...] MOE guidance is required so that an assessment can be made of how such guidelines might constrain our development area. Depending on the impact of new guidelines, Windstream may need to discuss with the MNR how Windstream could adapt the project layout into a more suitable configuration. Also affected would be the area of focus for our environmental

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ **R-0112**, E-mail from John Vellone, Borden Ladner Gervais to Application.FIT (May 28, 2010).

⁴⁷⁶ *Ibid.*

⁴⁷⁷ **C-0284**, E-mail from Nancy Baines to Sheri Bizarro and Application FIT (June 15, 2010).

⁴⁷⁸ **R-0114**, Letter from Ian Baines, Windstream Energy Inc. to Sue Lo, Ministry of Energy (Jun. 2, 2010).

⁴⁷⁹ **R-0114**, Letter from Ian Baines, Windstream Energy Inc. to Sue Lo, Ministry of Energy (Jun. 2, 2010), p. 1.

field work. In order to allow us to accommodate any required changes within the timelines of the FIT Contract (especially in view of the fact that the 2010 summer field season is essentially at hand), we require immediate dialog [...]

As noted above we urgently need input from MOE, MNR and other agencies regarding the type of field information that will be required to satisfy the REA process. Moreover, field work on Lake Ontario is constrained by wind, weather and seasons. If we do not obtain the necessary regulatory input, our 2010 field data collection program is at risk and could delay our project by an entire year. As noted above, the OPA FIT Contract requirements do not provide flexibility for that sort of delay.⁴⁸⁰

213. Mr. Baines also stated that Windstream would need to be awarded AOR status before the risk of taking on the contract would be justified.⁴⁸¹

214. In light of these concerns, the Claimant initiated another meeting which was held on June 15, 2010 with Mr. Baines, Mr. Roeper and Mr. Chamberlain attending for the Claimant along with representatives of MEI, MOE and MNR.⁴⁸² At this meeting, the Claimant expressed its “[c]oncern regarding the extent that new setback guidance documents [...] could result in substantial portions of the proposed Project lands being unavailable for the Project.”⁴⁸³ The Claimant also stated that it would need MOE and MNR approval processes to proceed in parallel instead of in series. Typically, Crown land access must be obtained prior to conduct the testing necessary to prepare a complete REA application. In this regard, the Claimant expressed concern “that the normal ‘series’ approach would result in delays that would make the Project very difficult to complete in the 4 year period [...] allowed by the OPA.”⁴⁸⁴

215. At this meeting, Mr. Baines also said that the Claimant was losing the summer season for conducting its studies and that the Project had “already missed key deadlines” for some of the studies.⁴⁸⁵ However, Mr. Baines was also reminded by MNR that the Claimant did not have any

⁴⁸⁰ *Ibid.*

⁴⁸¹ **R-0114**, Letter from Ian Baines, Windstream Energy Inc. to Sue Lo, Ministry of Energy (Jun. 2, 2010), pp. 2-3.

⁴⁸² **C-0285**, Memorandum from Adam Chamberlain, Borden Ladner Gervais to Windstream Energy Inc. (Jun. 17, 2010).

⁴⁸³ **C-0285**, Memorandum from Adam Chamberlain, Borden Ladner Gervais to Windstream Energy Inc. (Jun. 17, 2010), p. 2.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

legal or proprietary interest in any of the Crown land required for its project and that it was merely an applicant in the process.⁴⁸⁶ Out of this meeting, the only commitments from representatives of the Government of Ontario, as reflected by a list of “Action Items” in the meeting minutes recorded by Claimant’s counsel Mr. Chamberlain, were to organize briefings and discussions about the Project for MEI, MNR, MOE and OPA officials.⁴⁸⁷

216. The same day as this meeting, the OPA granted the Claimant a third extension of its contract signing date to June 30, 2010.⁴⁸⁸

(f) The OPA’s Fourth to Seventh Extensions of the Signing Date, from June 25 to August 18, 2010

217. On June 25, 2010 the Claimant’s counsel Mr. Chamberlain wrote to Perry Cecchini, Manager RESOP/FIT in the Market and Resource Development division at the OPA requesting a further extension on the deadline to sign the FIT Contract.⁴⁸⁹ Mr. Chamberlain requested an extension to September or at least to the end of July, in order to allow for “adequate time to assess” the upcoming setback requirements.⁴⁹⁰ Mr. Cecchini responded that he only had authority to provide ten working days from the announcement of the setbacks.⁴⁹¹ On June 29, 2010, the OPA granted an extension to the signing deadline to July 12, 2010.⁴⁹²

218. Subsequently the Claimant met with representatives of MEI and MNR on July 5 and July 7.⁴⁹³ On July 8, 2010 Mr. Chamberlain requested a fifth extension to the signing deadline on behalf of the Claimant due to continuing uncertainty around issues related to MNR’s site release

⁴⁸⁶ *Ibid.*

⁴⁸⁷ **C-0285**, Memorandum from Adam Chamberlain, Borden Ladner Gervais to Windstream Energy Inc. (Jun. 17, 2010), p. 3.

⁴⁸⁸ **C-0284**, E-mail from Nancy Baines, Windstream Energy Inc. to Sheri Bizarro and Application.FIT (Jun. 15, 2010).

⁴⁸⁹ **C-0299**, E-mail from Nancy Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy Group (Jun. 25, 2010), p. 2.

⁴⁹⁰ *Ibid.*

⁴⁹¹ **C-0299**, E-mail from Nancy Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy Group (Jun. 25, 2010), p. 1.

⁴⁹² **C-0305**, E-mail from Sheri Bizarro, Ontario Power Authority to Nancy Baines, Windstream Energy Inc. (Jun. 29, 2010).

⁴⁹³ **C-0308**, Memorandum from ORTECH Power to Windstream Energy Inc. (Jul. 6, 2010); **C-0312**, E-mail from Nancy Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy (Jul. 7, 2010).

process and how it would interact with MOE's proposed exclusion zone.⁴⁹⁴ The OPA agreed and the same day granted a further extension until August 12, 2010.⁴⁹⁵

219. On August 9, 2010 the Claimant's lobbyist, Chris Benedetti of Sussex Strategy Group, wrote to JoAnne Butler, the OPA's Vice President of Electricity Resources, with a further request to amend the Claimant's FIT Contract.⁴⁹⁶ Mr. Benedetti requested that the MCOB be amended and that the Contract Date be changed to a future date when the Claimant obtained AOR status from MNR.⁴⁹⁷ Ms. Butler replied that the OPA did not intend to amend the MCOB, and reminded Mr. Benedetti that the Claimant had assumed the risk when submitting its FIT application, stating that his client "knew that when they submitted their application that there were many unknowns and they were obviously prepared to take those risks. We do now not intend to pass them to the ratepayers of Ontario. As you know, the FIT program was heavily stake-holdered and the four years for offshore COD, given what was known at the time, was not opposed."⁴⁹⁸

220. The next day, Mr. Benedetti repeated his request for an amendment to the MCOB and Contract Date.⁴⁹⁹ Ms. Butler responded with a compromise, saying that the OPA believed they had identified a mutually agreeable solution, which Mr. Cecchini would inform the Claimant of that afternoon.⁵⁰⁰ Mr. Cecchini confirmed to the Claimant on August 12, 2010 that the OPA would issue a revised Offer Notice for the Claimant's FIT Contract, containing a reference to a Schedule 2 providing Special Terms and Conditions.⁵⁰¹ Mr. Cecchini also advised that the OPA

⁴⁹⁴ **C-0313**, E-mail from Joanne Butler, Ontario Power Authority to Adam Chamberlain, Borden Ladener Gervais (Jul. 8, 2010).

⁴⁹⁵ *Ibid.*

⁴⁹⁶ **C-0341**, E-mail from Ian Baines, Windstream Energy Inc. to David Mars, Collective Solution (Aug. 11, 2010).

⁴⁹⁷ **C-0341**, E-mail from Ian Baines, Windstream Energy Inc. to David Mars, Collective Solution (Aug. 11, 2010).

⁴⁹⁸ *Ibid.* The term "stake-holdered" is colloquialism used to mean that the FIT Rules and standard terms and conditions of FIT Contracts, including the MCOB, were subject to stakeholder consultation, as described at paragraphs 47 and 52.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ **C-0343**, E-mail from Perry Cecchini to Adam Chamberlain and Chris Benedetti (Aug. 12, 2010).

agreed to change the MCOB from four-years to five-years following the Contract Date, which would remain the same.⁵⁰²

221. On August 18, 2010 the OPA granted the revision to the Claimant's MCOB as Mr. Cecchini had described, extending it from four-years to five-years following the Contract Date through a revised Offer Notice and the addition of Schedule 2 Special Terms and Conditions to the Contract.⁵⁰³ With this revision to the contract offer, the OPA also granted the Claimant an additional three business days to sign back the FIT Contract.⁵⁰⁴

4. The Claimant's Decision to Assume the Risk and Sign Back the FIT Contract on August 20, 2010

222. On August 20, 2010, the Claimant executed the FIT Contract.⁵⁰⁵ By doing so, it accepted all the rights and obligations stipulated in the standard FIT Contract Version 1.3 and FIT Rules Version 1.3, the only variation being Schedule 2 containing the one-year extension to its MCOB. It accepted these obligations despite knowing that the regulatory framework had not been finalized and having expressed serious concerns about this. On August 30, 2010, Mr. Baines' reported to the Board of Directors, noting expressly that "[t]he REA permitting process [...] replaces the former provincial environmental assessment (EA) process", and that "the regulatory agencies as yet do not have well established guidelines for access and control of off-shore property rights available for renewable energy projects, adding to the uncertainty of the REA process."⁵⁰⁶

⁵⁰² *Ibid.* The OPA planned to grant the extra year to all future FIT proponents that were successful in obtaining a FIT Contract for off-shore wind projects. See RWS-Cecchini, ¶ 13.

⁵⁰³ **C-0347**, E-mail from Nancy Baines to Ian Baines et al. (Aug. 19, 2010); **C-0349**, Letter from JoAnne Butler, Ontario Power Authority to Windstream Wolfe Island Shoals (Aug. 18, 2010); **C-0348**, FIT Contract, FIT Ref. # FIT-FALCB9K (May 4, 2010), p. 1; **C-0243**, Schedule 2, FIT Contract, Special Terms and Conditions, Wind (Off-Shore Facilities) (May 4, 2010).

⁵⁰⁴ **C-0349**, Letter from JoAnne Butler, Ontario Power Authority to Nancy Baines, Windstream Wolfe Island Shoals (Aug. 18, 2010).

⁵⁰⁵ **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

⁵⁰⁶ **R-0138**, Windstream Energy LLC Report to the Board of Directors, Windstream Energy Wolfe Island Shoals Wind Project, Eight Month Work Schedule and Budget (Aug. 30, 2010), p. 13.

223. Although the Claimant did not sign the FIT Contract until August 20, 2010 its Contract Date remained as the original offer date of May 4, 2010.⁵⁰⁷ With the additional year it had obtained from the OPA, the Claimant's MCOD was now May 4, 2015.

VI. The Claimant's Invocation of Force Majeure under the FIT Contract

224. Knowing that the REA requirements for offshore wind projects had yet to be set out, and that public consultations were ongoing, the Claimant turned to MNR for approval to swap its Crown land applications for land outside of the projected setbacks, and to proceed with the new area through the site release process, so that it could begin its wind testing.

225. Shortly after signing the FIT Contract, the Claimant wrote to MNR to request site access at Charity Shoals, a shallow spot seven kilometres west of Wolfe Island where a navigational device was located, and on September 9, 2010, it met with MNR officials.⁵⁰⁸

226. MNR officials notified the Claimant of the pending updates to technical guidance documents on coastal impacts, birds and bats, and reminded it that "there was no policy or procedure in place for offshore development."⁵⁰⁹ MNR informed the Claimant that it was free to apply for permits to commence field studies, such as surveying or sampling, while the public consultations on offshore wind continued and the site release process was on hold. However, officials made clear that the Claimant would proceed with any such studies at its own risk, given that the policy consultations were ongoing.⁵¹⁰

227. Officials also noted that testing facilities would not be permitted. Anchoring a platform, erecting a test turbine, or attaching any other test facility to the lake bed for more than sixteen days required a temporary land use permit, which the Claimant could not obtain without first having had its Site Verification approved.⁵¹¹ The Government of Ontario's decision on its policy

⁵⁰⁷ RWS-Cecchini, ¶ 13.

⁵⁰⁸ C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (Sep. 9, 2010).

⁵⁰⁹ C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (Sep. 9, 2010), p. 2.

⁵¹⁰ *Ibid*; RWS-Lawrence, ¶¶ 41-42.

⁵¹¹ RWS-Lawrence, ¶ 42; C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (Sep. 9, 2010).

consultations for offshore wind was outstanding, as described above,⁵¹² having posted its Offshore Wind Policy Proposal Notice on June 25, 2010 and MNR having posted its own policy proposal notice on the Environmental Registry on August 18, 2010. MNR's policy notice invited public comment on areas of Crown land that should be constrained from offshore wind development. Since the policy process was ongoing, MNR explained that it would be premature to grant land use rights to a site that may or may not fall outside a setback area and therefore be eligible for offshore wind development.⁵¹³

228. Even though the Claimant had not moved beyond the Site Verification stage of the Site Release Process,⁵¹⁴ MNR nevertheless provided it with a draft Site Description Package. The Site Description Package had been prepared based on the Crown land grid cells that the Claimant applied for in 2008. It set out the potential stakeholders that would be implicated by the Project, a list of permits and approvals, species at risk, and a variety of other information, as well as gaps in information, applicable to the site. The package was made available with the express caution that it was not assembled in relation to the new grid cells sought by the Claimant which would change its Project site, and therefore did not constitute the final package. Officials made clear that this would only be provided "once the policy framework for offshore wind development is in place."⁵¹⁵

229. During that meeting, and several times throughout September to November 2010,⁵¹⁶ the Claimant requested a "grid cell swap", and the response from MNR was consistent. MNR officials said they were open to discussing a potential grid cell swap, but it was not usual practice, and no determination could be made until the policy discussion with respect to setbacks was concluded.⁵¹⁷ Since the offshore wind policy review was outstanding, MNR was not able to

⁵¹² See ¶¶ 118-124 above.

⁵¹³ **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (Sep. 9, 2010); RWS-Lawrence, ¶¶ 36,42.

⁵¹⁴ RWS-Lawrence, ¶¶ 11, 42; **C-0730**, Procedure PL.4.10.04, Windpower Site Release (Non-Competitive) – Crown Land (Jan. 28, 2008).

⁵¹⁵ **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (Sep. 9, 2010).

⁵¹⁶ **C-0366**, Letter from Ian Baines, Windstream Energy Inc. to Eric Boysen, Ministry of Natural Resources (Sep. 30, 2010); **C-0368**, Presentation (WWIS), Wolfe Island Shoals (WIS) Wind Farm, Regulatory Overview (Mtg. 22 October 2010) (Oct. 2010); **C-0369**, Letter from Ian Baines (Oct. 4, 2010).

⁵¹⁷ RWS-Lawrence, ¶¶ 34-36, 43.

re-configure the Claimant's grid cells, and consequently, could not advance the Claimant's Project through the Applicant of Record process.⁵¹⁸ The Claimant was also made aware that since no process existed under MNR's Crown land policies and procedures for swapping grid cells, it would have to make a formal application.⁵¹⁹ Since applications were normally only allowed during windows of opportunity, and given that the Crown land site release process for renewable energy was under review, it was not at all clear what the process of application would entail.

230. On September 30, 2010, the Claimant wrote asking MNR to reconsider its decision on testing facilities.⁵²⁰ It argued that wind speed testing is separate from the Site Release process and does not provide any land tenure rights. It also pushed for a change to the existing process whereby "testing would occur earlier in the Site Release Process than under the current process".⁵²¹ The Claimant was aware that MNR was in the process of reviewing its Site Release Policy in order to streamline it with the FIT Program, and it argued that it would not be "inconsistent with the trends emerging in the recent policy review process".⁵²² Without such access, the Claimant was very concerned that it would not be able to satisfy the conditions of its FIT Contract. According to the Claimant, "the only action that might make possible any advancement of the Project would be the further defining of the Project area" and permission "to conduct certain studies and testing."⁵²³

⁵¹⁸ RWS-Lawrence, ¶¶ 36, 43; **C-0388**, E-mail from Ken Cain, Ministry of Natural Resources to Uwe Roeper, Ortech (Nov. 22, 2010); **R-0153**, E-mail from Eric Boysen, Ministry of Natural Resources to Karen Slawner, Ministry of Energy and Marcia Wallace, Ministry of Environment (Sep. 29, 2010).

⁵¹⁹ **R-0138**, Windstream Energy LLC Report to the Board of Directors, Windstream Energy Wolfe Island Shoals Wind Project, Eight Month Work Schedule and Budget (Aug. 30, 2010), p. 6.

⁵²⁰ **C-0366**, Letter from Ian Baines, Windstream Energy Inc. to Eric Boysen, Ministry of Natural Resources (Sep. 30, 2010).

⁵²¹ **C-0366**, Letter from Ian Baines, Windstream Energy Inc. to Eric Boysen, Ministry of Natural Resources (Sep. 30, 2010), p. 2.

⁵²² **C-0366**, Letter from Ian Baines, Windstream Energy Inc. to Eric Boysen, Ministry of Natural Resources (Sep. 30, 2010), p. 2.

⁵²³ **C-0406**, Exhibit "A" Force Majeure Notice (Dec. 10, 2010).

231. On November 22, 2010, Ken Cain from MNR responded to the Claimant's request, indicating that no decision on new project area or permission to conduct testing should be expected while the government's offshore windpower policy review is still outstanding.⁵²⁴

232. On December 10, 2010, Windstream submitted a claim for Force Majeure with the OPA.⁵²⁵ Windstream sought to have one year of Force Majeure relief granted to it on account of the lack of regulatory assistance from MNR and MOE.⁵²⁶

233. The OPA subsequently determined that the delays faced by Windstream with respect to the Crown land site release process constituted a valid Force Majeure event commencing on November 22, 2010 and advised Windstream accordingly.⁵²⁷ The OPA also indicated that it would determine the appropriate relief to be granted following notice of termination of the Force Majeure event.⁵²⁸

234. On February 9, 2011, the OPA announced that it would offer to amend the contracts of all FIT counterparties who had not yet reached Commercial Operation so that these suppliers could extend their MCOB by up to one year.⁵²⁹ Over February and March 2011, the OPA contacted each FIT supplier, including the Claimant, with an offer to execute an amending agreement that would extend the MCOB by up to one year in exchange for trade-offs by the supplier on certain Force Majeure rights.⁵³⁰ This extension was offered in response to feedback from renewable energy project proponents that they needed more time to prepare the material for a complete

⁵²⁴ **C-0388**, E-mail from Ken Cain, Ministry of Natural Resources to Uwe Roeper, Ortech (Nov. 22, 2010).

⁵²⁵ **C-0408**, FIT Contract Form of Force Majeure Notice (Dec. 10, 2010); **C-0406**, Exhibit "A" Force Majeure Notice (Dec. 10, 2010).

⁵²⁶ **C-0408**, FIT Contract Form of Force Majeure Notice (Dec. 10, 2010); **C-0406**, Exhibit "A" Force Majeure Notice (Dec. 10, 2010), p. 8.

⁵²⁷ **C-0550**, Letter from Michael Killeavy, Ontario Power Authority to Nancy Baines, Windstream Wolfe Island Shoals (Sep. 9, 2011).

⁵²⁸ *Ibid.*

⁵²⁹ **C-0475**, Ontario Power Authority, "FAQs on FIT COD Extension" (Feb. 9, 2011), p. 1.

⁵³⁰ **C-0475**, Ontario Power Authority, "FAQs on FIT COD Extension" (Feb. 9, 2011), p. 1; **R-0449**, FIT Amending Agreement Re: Extension of Milestone Date for Commercial Operation for Non-CAE Projects.

submission for a REA, as the new process had meant adjustments for several ministries and a learning curve for proponents.⁵³¹ Windstream did not accept this offer of a one-year extension.

VII. Ontario's February 11, 2011 Decision to Defer the Development of Offshore Wind Projects

A. The Discussions on How to Proceed with Offshore Wind Development

1. Offshore Wind Policy Discussions in 2010

235. Since MOE had responsibility for administering the REA Regulation, it led the discussions on how to finalize the regulatory framework for offshore wind, as described above.⁵³² Early on, MOE had considered a number of regulatory options, [REDACTED]

236. In its effort to set out clear requirements for offshore wind facilities, MOE recognized, based in part on what it was being told by independent experts at the meetings and workshops discussed above,⁵³⁴ that scientific work was required in a number of areas, including coastal impacts, sediment movement, ice build-up, public safety, water quality, technical standards, and noise.⁵³⁵

237. MNR and MEI also contributed to the policy discussion around offshore wind. MEI brought the discussions to "Energy Issues Meetings".⁵³⁶ As explained in the witness statement of Sue Lo, "[t]he purpose of these meetings was to serve as a discussion table on a variety of

⁵³¹ **C-0475**, Ontario Power Authority, "FAQs on FIT COD Extension" (Feb. 9, 2011), p. 1.

⁵³² See ¶¶ 110-147 above.

⁵³³ **R-0089**, Ministry of the Environment, Presentation, "Developing Offshore Wind Project Requirements (Mar. 2010), p. 14.

⁵³⁴ See Section III.A.3(d).

⁵³⁵ **R-0089**, Ministry of the Environment, Presentation, "Developing Offshore Wind Project Requirements (Mar. 2010), pp. 5, 9.

⁵³⁶ See for example, **R-0189**, Ministry of Energy, Energy Issues Meeting Agenda (Dec. 16, 2010); **R-0188**, E-mail from Jesse Kulendran, Ministry of Energy to Sue Lo and Jason Collins, Ministry of Energy (Dec. 15, 2010); **R-0196**, E-mail from Jesse Kulendran, Ministry of Energy to Sean Mullin, Office of the Premier et al. (Jan. 6, 2011); **C-0430**, Presentation (MEI), Offshore Wind: Options for Moving Forward (Jan. 6, 2011).

different energy policy issues amongst senior level officials across the relevant ministries, Premier's Office and Cabinet Office".⁵³⁷

238. [REDACTED]

[REDACTED] MOE and MNR officials were also working on new regulatory requirements, including noise setbacks, which were forecasted to be between five and ten kilometres, [REDACTED]

[REDACTED].⁵³⁹ At the time, officials hoped to be able to make any necessary regulatory amendments by fall 2010.⁵⁴⁰

239. MEI brought considerations additional to those raised by the scientific work being steered by MOE. In particular, MEI was concerned about the costs to the ratepayers and transmission constraints that would be caused by the "massive quantities of offshore wind" that would be introduced by proponents that were in the process of developing facilities but had not yet applied to the FIT Program.⁵⁴¹ Together, these projects were proposing more than 8,000 MW of generation capacity. At the prevailing FIT price for offshore wind of 19 cents/kWh, if all of the proposed large-scale offshore projects were to proceed, it would have resulted in significant increases in electricity bills.⁵⁴²

240. In May and July 2010 briefings, MEI advised its Minister's Office that MOE, MNR, MTC and MEI were working to set out "rigorous provincial approvals" that would address potential concerns, including "noise setbacks, protection of lake ecology, water quality, birds and bats,

⁵³⁷ RWS-Lo, ¶ 32.

⁵³⁸ C-0240, Ministry of Energy Presentation, "Offshore Wind and the *Green Energy Act*, PO Briefing (Apr. 30, 2010), p. 5.

⁵³⁹ C-0240, Ministry of Energy Presentation, "Offshore Wind and the *Green Energy Act*, PO Briefing (Apr. 30, 2010), p. 7.

⁵⁴⁰ C-0240, Ministry of Energy Presentation, "Offshore Wind and the *Green Energy Act*, PO Briefing (Apr. 30, 2010), p. 5.

⁵⁴¹ C-0240, Ministry of Energy Presentation, "Offshore Wind and the *Green Energy Act*, PO Briefing (Apr. 30, 2010), p. 2.

⁵⁴² RWS-Lo, ¶ 19.

natural and cultural heritage, safety, shipping routes, commercial fishing and recreation”.⁵⁴³ The briefings also flagged that consultations with adjoining U.S. jurisdictions would likely be necessary since “turbines may affect currents and fish habitat in U.S. waters.”⁵⁴⁴

241. Up until the August 23, 2010 workshop with noise experts,⁵⁴⁵ MOE officials remained hopeful that the necessary research for noise setbacks could be conducted by the end of the year, allowing for regulatory changes to be made early in 2011. However, as noted above,⁵⁴⁶ experts strongly discouraged that option. Accordingly, officials sought direction from Deputy Ministers, providing [REDACTED] options for consideration on offshore wind noise requirements.⁵⁴⁷ [REDACTED]

[REDACTED]

[REDACTED]

242. Upon consulting with MNR and MEI, MOE updated its presentation to Deputy Ministers on September 16, 2010 to include [REDACTED] additional options:⁵⁴⁸ [REDACTED]

[REDACTED]

[REDACTED]

⁵⁴³ C-0264, Ministry of Energy Presentation, “Offshore Wind”, Minister’s Briefing (May 17, 2010), p. 2; R-0129, Ministry of Energy Presentation, “Offshore Wind”, Minister’s Office Briefing (Jul. 30, 2010), p. 2.

⁵⁴⁴ C-0264, Ministry of Energy Presentation, “Offshore Wind”, Minister’s Briefing (May 17, 2010), p. 4; R-0129, Ministry of Energy Presentation, “Offshore Wind”, Minister’s Office Briefing (Jul. 30, 2010), p. 3.

⁵⁴⁵ See ¶ 135 above.

⁵⁴⁶ See ¶¶ 110-117 above.

⁵⁴⁷ R-0140, Ministry of the Environment, Presentation, “Off-shore Wind Noise Requirements: Technical Workshop Findings: Path Forward - Options” (Aug. 31, 2010); R-0137, E-mail from Barry Duffey, Ministry of the Environment, to Marcia Wallace, Ministry of the Environment (Aug. 25, 2010); R-0134, Off-shore Wind Noise Workshop Meeting Notes of Dilek Postacioglu, Ministry of Environment (Aug. 23, 2010).

⁵⁴⁸ R-0142, Ministry of the Environment, Presentation, “Offshore Wind Noise Requirements: Deputy Minister’s Briefing” (Sep. 13, 2010) (“Noise Requirements DM Briefing #1”). Note that the meeting was originally scheduled for September 13, 2010 but was rescheduled to September 16, 2010. R-0146, E-mail from Alyssa Cates, Ministry of Environment to Ahmid Al-Dhaher, Ministry of Environment (Sep. 14, 2010). See also, R-0152, Ministry of the Environment, Presentation, “Off-shore Wind Noise Requirements: Deputy Minister’s Briefing”, p. 9 (Sep. 29, 2010) (“Noise Requirements DM Briefing #3”); RWS-Wallace, 32-36.

⁵⁴⁹ R-0140, Ministry of the Environment, Presentation, “Off-shore Wind Noise Requirements: Technical Workshop Findings: Path Forward – Options” (Aug. 31, 2010); RWS-Wallace, ¶ 37.

[REDACTED]

⁵⁵⁰ R-0128, [REDACTED]. See also R-0157, E-mail from Paul Evans, Ministry of Environment to Mary Shenstone et al. (Oct. 7, 2010); RWS-Wallace, 41.

⁵⁵¹ R-0147, Ministry of Environment, Deputy Minister's Information Note, [REDACTED] (Sep. 14, 2010), p. 1.

⁵⁵² R-0170, Ministry of the Environment, [REDACTED] (Oct. 26, 2010) ("MOE Research Priorities"); RWS-Wallace, 42.

⁵⁵³ R-0157, E-mail from Paul Evans, Ministry of Environment to Mary Shenstone et al. (Oct. 7, 2010).

⁵⁵⁴ R-0177, E-mail from Marcia Wallace, Ministry of Environment to Pearl Ing et al. (Nov. 16, 2010); R-0178, Government of Ontario, Presentation, "Offshore Wind Development: Strategies for a Path Forward" (Nov. 16, 2010).

[REDACTED]

[REDACTED]

[REDACTED]

247. [REDACTED]

⁵⁵⁵ **R-0180**, E-mail from Adam Leus, Ministry of Environment to Eric Boysen, Ministry of Natural Resources and Pearl Ing, Ministry of Energy (Nov. 29, 2010); **R-0174**, Government of Ontario, Presentation, “Offshore Windpower” (Nov. 2010).

⁵⁵⁶ **R-0174**, Government of Ontario, Presentation, “Offshore Windpower” (Nov. 2010), p. 3.

⁵⁵⁷ **R-0174**, Government of Ontario, Presentation, “Offshore Windpower” (Nov. 2010), p. 2.

⁵⁵⁸ **R-0183**, E-mail from Paul Evans, Ministry of Environment to Marcia Wallace, Ministry of Environment (Dec. 2, 2010); RWS-Wallace, 47-48.

⁵⁵⁹ **C-0240**, Ministry of Energy Presentation, “Offshore Wind and the *Green Energy Act*,” PO Briefing (Apr. 30, 2010).

⁵⁶⁰ **C-0327**, Ministry of Energy Presentation, “Offshore Wind”, Premier’s Office Information (Aug. 5, 2010).

⁵⁶¹ **R-0153**, E-mail from Eric Boysen, Ministry of Natural Resources to Karen Slawner, Ministry of Energy and Marcia Wallace, Ministry of Environment (Sep. 29, 2010).

scientific research to be conducted while allowing the Claimant to proceed with the development of its Project.⁵⁶²

248. [REDACTED]
[REDACTED].⁵⁶³ Such a project would be a massive undertaking by any measure, and one that had never occurred in freshwater.⁵⁶⁴ MNR was of the view that a project of 10 or 20 turbines (like the project in Lake Vänern, Sweden) could be contemplated as a pilot, but not one with 130-turbines.⁵⁶⁵

249. MNR was also reluctant to proceed with a deferral of offshore wind development on the basis of the need for further scientific research, considering that it had already put a similar deferral in place between 2006 and 2008.⁵⁶⁶ As Rosalyn Lawrence explains, “MNR was accustomed to undertaking site-specific analysis of issues” so MNR “expressed its concern and highlighted the challenges [it] saw with the one-size-fits-all approach preferred by MOE.”⁵⁶⁷

250. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁵⁷⁰ According to Ms. Dumais, MOE has previously approved pilots “on a smaller scale than the actual proposed project” since it helps to “assess potential environmental impacts” and “avoid costly errors”.⁵⁷¹ [REDACTED]
[REDACTED]

⁵⁶² RWS-Lo, ¶ 31.

⁵⁶³ **R-0153**, E-mail from Eric Boysen, Ministry of Natural Resources to Karen Slawner, Ministry of Energy and Marcia Wallace, Ministry of Environment (Sep. 29, 2010); RWS-Lawrence, ¶ 48.

⁵⁶⁴ See ¶ 184 above.

⁵⁶⁵ RWS-Lawrence, ¶ 48.

⁵⁶⁶ RWS-Lawrence, ¶ 46.

⁵⁶⁷ RWS-Lawrence, ¶¶ 46-47.

⁵⁶⁸ RWS-Wallace, ¶ 61; **R-0208**, E-mail from Marcia Wallace, Ministry of Environment to Doris Dumais, Ministry of Environment (Jan. 13, 2011).

⁵⁶⁹ RWS-Dumais, ¶ 33.

⁵⁷⁰ **R-0154**, E-mail from Barry Duffey, Ministry of Environment to Ken Cain, Ministry of Natural Resources (Sep. 29, 2010). See also RWS-Dumais, ¶¶ 32-34; RWS-Wallace, ¶¶ 49-51.

⁵⁷¹ RWS-Dumais, ¶ 33.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] .⁵⁷³

251. On January 6, 2011, MEI presented [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. The Decision to Defer the Development of Offshore Wind

252. On February 11, 2011, the Government of Ontario announced that “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.”⁵⁷⁸ This announcement reflected the Minister of the Environment’s decision, based on the information available at the time and applying the precautionary principle, that Ontario lacked the science

⁵⁷² **R-0184**, E-mail from Marcia Wallace, Ministry of Environment to Barry Duffey, Ministry of Environment (Dec. 2, 2010).

⁵⁷³ *Ibid*

⁵⁷⁴ **C-0429**, E-mail from Mirrun Zaveri, Ministry of Energy to Eric Boysen, Ministry of Natural Resources (Jan. 6, 2011); **C-0430**, Ministry of Energy Presentation, “Offshore Wind: Options for Moving Forward” (Jan. 6, 2010).

⁵⁷⁵ **C-0430**, Ministry of Energy Presentation, “Offshore Wind: Options for Moving Forward” (Jan. 6, 2010), slide 6.

⁵⁷⁶ *Ibid*.

⁵⁷⁷ **C-0430**, Ministry of Energy Presentation, “Offshore Wind: Options for Moving Forward” (Jan. 6, 2010), slides 8-9.

⁵⁷⁸ See **C-0725**, EBR Decision Notice; **C-0482**, Ministry of Natural Resources, “Policy Decision Notice: Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development; **C-0480**, Ministry of the Environment, News Release, “Ontario Rules Out Offshore Wind Projects: McGuinty Government Committed to Renewable Energy while Protecting the Environment” (Feb. 11, 2011).

necessary to inform the regulatory changes required to allow large-scale offshore wind development to proceed while ensuring protection of human health and the environment. As former Minister Wilkinson explains in his witness statement,

I made the deferral decision in the discharge of my duties as the Minister of the Environment and to protect human health and the environment. I believe that my decision in 2011, based on the information in front of me at that time, was both sound and fulfilled my obligations under the Oath of Office I took when sworn in as Minister as the Environment. I stand by it today.⁵⁷⁹

253. The Minister based his decision on briefings he received and consultation with the Deputy Minister of the Environment. The briefings and consultation led him to conclude that Ontario lacked the science necessary to inform the regulatory changes required to allow large-scale offshore wind development to proceed while ensuring protection of human health and the environment.⁵⁸⁰

254. At the same time, the Minister recognized from the public comments on the Offshore Wind Policy Proposal Notice that the first REA decision relating to an offshore wind project would likely be challenged, meaning that it was particularly important that the regulatory framework be supported by sound science and the precautionary principle.⁵⁸¹

255. The public comments raised a variety of environmental concerns, and consequently the Minister was briefed on noise emissions, disturbance of benthic life forms, navigation, potential structure failure or safety hazards and decommissioning. It was public concern over Ontario's drinking water that weighed most heavily on the Minister.⁵⁸² In particular, Minister Wilkinson was concerned about the lack of information on the effect of construction of more than 100 turbines in Lake Ontario might have on Ontario's drinking water and how long that potential effect might last.⁵⁸³ These concerns were not only an issue for Lake Ontario, but for Lakes Huron

⁵⁷⁹ RWS-Wilkinson, ¶ 23.

⁵⁸⁰ RWS-Wilkinson, ¶¶ 6-16.

⁵⁸¹ RWS-Wilkinson, ¶ 9.

⁵⁸² RWS-Wilkinson, ¶¶ 10-16.

⁵⁸³ RWS-Wilkinson, ¶¶ 10-16.

and Erie, the latter of which, is a “shallow, sandy-bottomed lake with historically contaminated sediments”.⁵⁸⁴

256. The concerns regarding drinking water also had cross-jurisdictional implications that were not restricted to Ontario and related to Canada's international obligations under the *Boundary Waters Treaty*⁵⁸⁵ and the *Great Lakes Water Quality Agreement*.⁵⁸⁶ Minister Wilkinson was of the view that:

If Ontario allowed wind turbines to be erected on the Canadian side of the lake, we would not be excused from harm caused in U.S. waters. As Environment Minister, it was my responsibility to protect the environment in Ontario, but also not to jeopardize the water resources we share with the U.S. In my view, this was not only a legal but a moral responsibility.⁵⁸⁷

257. Based on the foregoing, Minister Wilkinson felt that MOE did not have a sufficient scientific foundation to establish rules and requirements for offshore wind that would adequately protect human health and the environment.⁵⁸⁸ Consequently, he decided to impose a deferral on offshore wind development.⁵⁸⁹ This general policy decision was supported by the Ministers of Energy and Natural Resources.⁵⁹⁰

258. Sue Lo learned of the preferred option on January 14, 2011. She communicated it to her counterparts at MOE, MNR and MTC as a deferral on offshore wind “for [the] next 3-5 years to provide time to develop the science and create uniform rules and policies in collaboration with the Great Lakes States.”⁵⁹¹

⁵⁸⁴ RWS-Wilkinson, ¶ 11.

⁵⁸⁵ RWS-Wilkinson, ¶ 12. **R-0001**, *Treaty between the United States and Great Britain relating to boundary waters, and questions arising between the United States and Canada*, 11 January 1909, 36 Stat. 2448 (entered into force 5 May 1910).

⁵⁸⁶ **R-0327**, *Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, 1978, as Amended on October 16, 1983, and on November 18, 1987*, 7 September 2012 (entered into force 12 February 2013).

⁵⁸⁷ RWS-Wilkinson, ¶ 12.

⁵⁸⁸ RWS-Wilkinson, ¶ 6.

⁵⁸⁹ RWS-Wilkinson, ¶ 16.

⁵⁹⁰ RWS-Wilkinson, ¶ 18.

⁵⁹¹ RWS-Lo, ¶ 34; **C-0180**, E-mail from Paul Evans, Ministry of Environment to Sue Lo, Ministry of Energy et al. (Jan. 14, 2011).

259. Subsequently, officials were directed to develop two different options specifically regarding how to proceed with the Claimant's Project: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁹²

260. On February 11, 2011, an MOE news release publicly announced the decision that no offshore wind projects would proceed any further at that time.⁵⁹³ This meant that applications for offshore wind projects in the FIT Program would no longer be accepted and that existing applications were suspended.⁵⁹⁴ The announcement was specifically worded such that the Claimant's Project would not be cancelled. It was merely "frozen" until the necessary scientific research was completed and an adequately informed policy framework had been developed.⁵⁹⁵

261. As further explained in MOE's decision notice for the Offshore Wind Policy Proposal Notice, which was published on the Environmental Registry on February 11, 2011:

in light of the comments received in response to the two postings and in particular the identified need for further study, Ontario is not proceeding with any development of offshore windpower projects until the necessary scientific research is completed and an adequately informed policy framework can be developed.⁵⁹⁶

262. The decision was rooted the strongly held belief that the underpinnings of the regulatory framework for offshore wind had to be based on sound science and research as a general matter

⁵⁹² **R-0213**, E-mail from Andrew Mitchell, Ministry of Energy to Jennifer Wismer, Jesse Kulendran and Alicia Johnston, Ministry of Energy (Jan. 20, 2011); **R-0215**, E-mail from Mirrun Zaveri, Ministry of Energy to Ken Cain et al. (Jan. 20, 2011); **C-0464**, Ministry of Energy, Presentation, "Offshore Wind: Options for Moving Forward" (Jan. 21, 2011), slides 4-6.

⁵⁹³ **C-0480**, Ministry of the Environment, News Release, "Ontario Rules Out Offshore Wind Projects: McGuinty Government Committed to Renewable Energy while Protecting the Environment" (Feb. 11, 2011).

⁵⁹⁴ These FIT applications were eventually cancelled. **C-0480**, Ministry of the Environment, News Release, "Ontario Rules Out Offshore Wind Projects: McGuinty Government Committed to Renewable Energy while Protecting the Environment" (Feb. 11, 2011).

⁵⁹⁵ RWS-Lo, ¶ 37; **C-0480**, Ministry of the Environment, News Release, "Ontario Rules Out Offshore Wind Projects: McGuinty Government Committed to Renewable Energy while Protecting the Environment" (Feb. 11, 2011); and **C-0482**, Decision on Policy (MNR), Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (Feb. 11, 2011).

⁵⁹⁶ **C-0482**, Decision on Policy (MNR), Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (Feb. 11, 2011).

of precautionary policy-making, particularly given the heightened public concern with offshore wind and the risk of legal challenges. Based on the Mr. Baines' summary of events, this fact was communicated to him when he spoke to the Minister of Energy's Chief of Staff a week after the deferral announcement.⁵⁹⁷

C. The Conference Call to Communicate the Deferral to the Claimant

263. Immediately prior to the announcement of the deferral on offshore wind, the Government of Ontario had a meeting with the Claimant's lobbyist, Chris Benedetti, followed by a call with the Claimant and the OPA to explain the forthcoming announcement and how it would affect the Claimant.⁵⁹⁸

264. In an email to Mr. and Ms. Baines, Mr. Benedetti described the forthcoming announcement as follows: "[t]he government will be suspending offshore development, killing everyone but Windstream. However, there is no pilot. MOE will be doing further study that they will walk through, and the timelines involved. They will propose options for the project, but the timelines for development will be significantly extended."⁵⁹⁹

265. During the phone call with the Claimant, officials explained that the Government of Ontario had decided that it "will not be moving forward with offshore wind until further science regulatory work and co-ordination with our U.S. partners is complete".⁶⁰⁰ However, given the Claimant's unique position as the only FIT Contract holder for an offshore wind project, its contract would be "frozen" until the regulatory framework on offshore was finalized.⁶⁰¹ The Claimant's Project would be on hold until the release of the REA requirements for offshore wind. All other site release applications for lakebed would be cancelled.⁶⁰²

⁵⁹⁷ **C-0507**, E-mail from Ian Baines, Windstream Energy Inc. to John Vellone, Borden Ladner Gervais LLP et al. (Feb. 19, 2011).

⁵⁹⁸ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011).

⁵⁹⁹ **C-0486**, E-mail from Chris Benedetti, Sussex Strategy to John Vellone, Borden Ladner Gervais LLP (Feb. 11, 2011).

⁶⁰⁰ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011).

⁶⁰¹ **C-0503**, E-mail from Perry Cecchini, Ontario Power Authority to Michael Killeavy, Ontario Power Authority et al. (Feb. 16, 2011); **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), p. 7.

⁶⁰² **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011).

266. When Mr. Baines stated “what I am hearing very clearly is the project has been terminated by the government,” Mr. Cecchini of the OPA responded “no, that is not what you are hearing.”⁶⁰³ Instead, both sides recognized that the Project was being put “on hold until such time as the province can establish a regulation under the Ministry of the Environment under REA pertaining to offshore wind.”⁶⁰⁴ So, while it was made clear that “there will be no further movement on offshore wind development for anybody,” and that “all other projects are essentially quashed or cancelled”, the Claimant’s Project was “deferred” or “frozen”.⁶⁰⁵

267. During this phone call, Mr. Baines asked how long it would take for the science to be undertaken and the regulatory framework to be in place. In response, and Brenda Lucas, a Senior Policy Advisor for the Minister of the Environment at the time, stated that this was uncertain but she expected that it would be “years”.⁶⁰⁶

268. The Claimant alleges that it was promised to be “kept whole”,⁶⁰⁷ but Mr. Cecchini confirms that the OPA, as the counterparty of Windstream’s FIT Contract, never made any such representation.⁶⁰⁸ In fact, the OPA made a conscious decision prior to the February 11, 2011, conference call not to use those words. Its “approach was to tell Windstream that we would work with them to examine the implications of the deferral on the proposed Project and explore ways to effectively ‘freeze’ the Project within the parameters of the FIT Contract until the deferral was lifted.”⁶⁰⁹

269. The Claimant was invited to meet with OPA representatives to reach a suitable arrangement within the existing framework of the FIT Contract to ensure that its Project was not

⁶⁰³ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011).

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid*; **R-0125**, Ministry of Environment, Off-shore Wind Facilities – Water Quality and Sediment Management Workshop (Jul. 16, 2010).

⁶⁰⁷ See Claimant’s Memorial, ¶¶ 12(b), 18, 403, 416, 516, 590(a).

⁶⁰⁸ RWS-Cecchini, ¶ 17.

⁶⁰⁹ *Ibid.*

terminated, but frozen. Officials specifically pointed to contractual flexibility around Force Majeure, security deposits and the termination rights associated with Force Majeure.⁶¹⁰

D. The Claimant's Post-Deferral Negotiations with the OPA

270. After having been invited to meet with the OPA to agree to contractual changes, including around Force Majeure, security deposits and the termination rights, that would keep the Claimant's FIT Contract intact, the Claimant made the following requests:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

⁶¹⁰ *Ibid.*

- [REDACTED]
- [REDACTED]

271. The OPA informed the Claimant on March 18, 2011 that it was not in a position to grant these numerous and unreasonable requests, some of which would require the action of the Government of Ontario rather than the OPA.⁶¹² The OPA had no authority to create new arrangements or bind the Government of Ontario in any way.⁶¹³ The OPA was not in a position to accept any proposal that required direction or approval from the Minister of Energy.

272. In light of these limitations, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

273. The Claimant responded to the OPA's letter on June 7, 2011 again seeking an [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶¹¹ **R-0223**, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Perry Cecchini and Michael Killeavy, Ontario Power Authority (Feb. 23, 2011); see also **C-0512**, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Perry Cecchini and Michael Killeavy (Mar. 8, 2011).

⁶¹² **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Mar. 18, 2011).

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

⁶¹⁵ **R-0247**, Letter from Ian Baines, Windstream Energy Inc. to Bojana Zindovic, Ontario Power Authority (Jun. 7, 2011).

[REDACTED]

[REDACTED].⁶¹⁶

274. The OPA's final letter on June 24, 2011 reiterated its position [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

275. In the end, the Claimant refused to accept any proposals put forth by the OPA and correspondence fell silent following the OPA's letter of June 24, 2011,⁶¹⁹ the Claimant's letter of July 5, 2011⁶²⁰ and the OPA's subsequent correspondence on October 12, 2011.⁶²¹

276. In addition to the negotiations over its FIT Contract terms with the OPA, the Claimant also approached the OPA and MEI with several alternative proposals between April 2011 and May 2012, including (1) a 300 MW solar project; and (2) a 300 MW onshore wind project.⁶²² Subsequently, the Claimant also approached political staff in the Government of Ontario with its proposal that the Project be developed as a pilot. None of these proposals were acceptable to the

⁶¹⁶ *Ibid.*

⁶¹⁷ **R-0250**, Letter from Perry Cecchini, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (Jun. 24, 2011).

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

⁶²⁰ **R-0254**, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Ron Clark, Aird & Berlis LLP (Jul. 5, 2011).

⁶²¹ RWS-Cecchini, ¶ 22; **R-0264**, E-mail from Geetu Lalla, Aird & Berlis LLP to Adam Chamberlain, Borden Ladner Gervais LLP attaching Letter from Ron Clark, Aird & Berlis LLP to Adam Chamberlain, Borden Ladner Gervais LLP (Oct. 12, 2011).

⁶²² **R-0236**, Letter from Ian Baines, Windstream Energy Inc. to Bojana Zindovic, Ontario Power Authority et al. (Apr. 15, 2011); **R-0248**, Letter from Ian Baines, Windstream Energy Inc. to Bojana Zindovic, Ontario Power Authority (Jun. 13, 2011); RWS-Cecchini, ¶ 23.

OPA, which did not have the authority to accept them, or to the Government of Ontario.⁶²³ This included the Minister of Energy, who determined that it was not appropriate to issue a direction to the OPA to allow the alternative project proposals to go forward.⁶²⁴

VIII. Ontario's Efforts to Develop the Regulatory Framework for Offshore Wind Development

A. Ontario's Initial Offshore Wind Development Research Plan Proposal

277. After the deferral, MOE began developing a proposal for a research plan to study the issues that Ontario had identified as needing to be addressed before it could allow offshore wind development to move forward.⁶²⁵ Emphasizing the novelty of offshore wind, this initial research plan proposal identified the need for further scientific research by MOE in the areas of noise propagation modelling and measurement requirements over water and ice, water quality requirements (including those related to effects from decommissioning), technical design requirements and safety issues for support and foundation structures and submarine cables.⁶²⁶

278. The initial research plan proposal also noted the need for MNR and MTC to contribute to offshore wind research.⁶²⁷ In particular, it noted that MNR would need to undertake research related to constraint analysis (in terms of defining areas where development should be restricted) as well as ecological impact assessment requirements and coastal engineering study requirements. It also noted that MTC would need to develop marine archaeology study requirements and guidelines.

279. The Government of Ontario's initial research plan proposal was to [REDACTED]

⁶²³ RWS-Cecchini, ¶ 24; **C-0644**, Windstream Presentation, Windstream-Samsung Solar Comparisons (Feb. 21, 2013); **C-0538**, E-mail from Sue Lo, Ministry of Energy to Pearl Ing, Ministry of Energy et al. (Jun. 8, 2011); **C-0526**, Presentation, Discussion with OPA, Windstream Energy (Apr. 14, 2011); **C-0537**, E-mail from Andrew Mitchell, Ministry of Energy to Sue Lo, Ministry of Energy (Jun. 7, 2011).

⁶²⁴ RWS-Lo, ¶ 41.

⁶²⁵ **R-0228**, Ministry of the Environment, "Offshore Wind Development Research Plan" (Mar. 29, 2011); **R-0230**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 1 (Mar. 31, 2011); **R-0231**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 2 (Apr. 4, 2011); **R-0232**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011).

⁶²⁶ **R-0232**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011).

⁶²⁷ **R-0232**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011). p. 4.

[REDACTED]

280. Over the spring and summer of 2011, MOE continued to refine the research plan, elaborating research needs and responsibilities in further detail, and establishing a timeline for achieving its goals.⁶³⁰ The plan anticipated that research scoping and coordination of research needs between ministries would take place until the fall of 2011, [REDACTED] [REDACTED] Ontario and the [REDACTED] would finalize a research agenda in the fall of 2011 and research would start in 2012, continuing to the end of 2014.⁶³² Following that, Ontario's regulatory requirements and program development would occur over two years during 2015 and 2016.⁶³³

B. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶²⁸ **R-0232**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011), p. 1.

⁶²⁹ *Ibid.*

⁶³⁰ **R-0227**, Ministry of the Environment, Offshore Research Work Plan & Timeline v3 (Mar. 28, 2011), p. 1.

⁶³¹ *Ibid.*

⁶³² *Ibid.*

⁶³³ *Ibid.*

⁶³⁴ **R-0205**, Letter from [REDACTED] to Paul Genest, Deputy Minister for Intergovernmental Affairs (Jan. 10, 2011).

⁶³⁵ *Ibid.*

283 [REDACTED]

[REDACTED].⁶⁴⁰ The writ of election was dropped on September 7, 2011 and the election was held on October 6, 2011, with the Premier and his party being re-elected to government.⁶⁴¹

C. Ontario's Continuing Development and Finalization of the Research Plan

284. On January 11, 2012 the Premier's Office requested an update on the status of research on the impacts of offshore wind, in light of the upcoming anniversary of the deferral imposed by the Minister of the Environment.⁶⁴² MNR, MOE and MEI provided an update the following day, highlighting the work to date of MNR and MOE.⁶⁴³ Following this briefing, MOE continued work on the research plan, in consultation with MEI, MNR and MTC.⁶⁴⁴ In late January 2012,

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ R-0237, E-mail from Mary Shenstone, Cabinet's Office to Paul Evans, Ministry of Environment et al. (Apr. 19, 2011); R-0238, [REDACTED]

⁶³⁹ R-0245, E-mail from Sue Lo, Ministry of Energy to Paul Evans, Ministry of Environment et al. (Jun. 3, 2011); R-0246, [REDACTED]

R-0255, E-mail from Sue Lo to Sue Lo (Jul. 22, 2011); R-0256, [REDACTED]

⁶⁴⁰ R-0283, Government of Ontario, Offshore Wind Research (Jan. 12, 2012); R-0261, Office of the Premier of Ontario, Archived News Release, "Ontario Election on October 6, 2011" (Sep. 7, 2011). Available at: <http://news.ontario.ca/opo/en/2011/09/ontario-election-on-october-6-2011.html>

⁶⁴¹ R-0263, Jane Taber, Globe and Mail News Article, "McGuinty's Liberals held to minority in third straight Ontario win" (Oct. 6, 2011). Available at: <http://www.theglobeandmail.com/news/politics/mcguintys-liberals-held-to-minority-in-third-straight-ontario-win/article556321/>.

⁶⁴² R-0282, E-mail from Jason Collins, Ministry of Energy to Bill Carr, Cabinet's Office et al. (Jan. 11, 2012).

⁶⁴³ R-0283, Government of Ontario, Offshore Wind Research (Jan. 12, 2012).

⁶⁴⁴ R-0289, E-mail from Ottavio Cicconi, Ministry of Natural Resources to Priya Tandon, Ministry of Natural Resources (Feb. 8, 2012).

MOE briefed the Minister of the Environment with another update on offshore wind development and the path forward, [REDACTED] and a preliminary research agenda.⁶⁴⁵ The offshore science research plan was finalized in February 2012.⁶⁴⁶

285. Under the proposed research plan, MOE would lead a coordinated effort to develop the science required to inform program development decision-making for requirements of offshore wind facilities under the REA Regulation.⁶⁴⁷ The research plan proposed that Ontario would publicly communicate the current status of offshore wind research and upcoming work, and [REDACTED] [REDACTED] [REDACTED] complete the research already underway, host technical workshops to discuss completed and upcoming research and seek academic and technical expert input to review and comment on all findings.⁶⁴⁹ The research plan envisioned that in the medium to longer term (from 2013 to 2017 or longer), Ontario would confirm the scope and timing of its research studies, incorporate academic involvement, and facilitate expert input and validation in the process as studies are completed.⁶⁵⁰

⁶⁴⁵ **R-0285**, E-mail from Marcia Wallace, Ministry of Environment to Brian Nixon, Ministry of Environment (Jan. 30, 2012); **R-0280**, Ministry of Environment, Presentation, “Off-shore Wind Development - Update and Path Forward” (Jan. 2012).

⁶⁴⁶ **C-0598**, Government of Ontario, Presentation, “Offshore Wind Power Development - Proposed Research Plan” (Feb. 2012).

⁶⁴⁷ **C-0598**, Government of Ontario, Presentation, “Offshore Wind Power Development - Proposed Research Plan” (Feb. 2012), slide 2.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

286. The research plan identified the following activities to be undertaken by Ontario and [REDACTED], independently and jointly:

Research Topic	Ontario	[REDACTED]	Shared
Wind resource characterization		X	
Water quality	X		
Erosion control/ coastal engineering			X
Noise	X		
Wildlife			X
Technical standards and safety (load, build-up, drift & throw of ice)			X
Infrastructure and construction vessel needs		X	
Spatial planning and socioeconomic interests		X	
International transmission and grid interconnection			X
Technology Assessment (underwater cabling)			X
Decommissioning and Financial Assurance	X		
Shoreline Heritage and Tourism	X		
Marine archaeological resources	X		

Figure 5: Preliminary research agenda proposed in Ontario's research plan.⁶⁵¹

287. The preliminary research plan listed Ontario's intended research activities in these areas in greater detail, allocating activities to immediate, short-term, medium-term and long-term research.

288. Ontario updated the research plan in May 2012.⁶⁵² This updated research plan identified the total expected costs associated with offshore wind research at \$2.5 to \$3.6 million over five to six years (approximately \$500,000 to \$700,000 annually).⁶⁵³ It further listed Ontario's completed research projects, as well as its short-term, medium-term and long-term research initiatives.

⁶⁵¹ C-0598, Government of Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (Feb. 2012), slide 5.

⁶⁵² C-0611, Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012).

⁶⁵³ C-0611, Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012), slide 8.

289. The following studies were identified as completed in the research plan:

Research Topic	Activity
Coastal Engineering (MNR)	Baird and Associates Coastal Engineers Ltd. and Beacon Environmental May 2011 "Offshore Wind Power Coastal Engineering Report – Synthesis of Current Knowledge and Coastal Engineering Study Recommendations"
Fisheries (MNR)	Literature review of the existing science - Nienhuis, Sarah and Dunlop, Erin S. July 2011 "The Potential Effects of Offshore Wind Power Projects on Fish and Fish Habitat in the Great Lakes", Aquatic Research Series 2011-01, MNR
Fisheries (MNR)	Literature review of the existing science - Nienhuis, Sarah and Dunlop, Erin S. July 2011 "Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat", Aquatic Research Series 2011-02, MNR

Figure 6: Completed studies of Ontario's May 2012 research plan.⁶⁵⁴

290. The following research topics were identified for short, medium and long-term work under the research plan:

Research Topic	Activity
Wildlife (MNR)	Research study- two separate studies using acoustic monitoring to identify potential bird and bat migratory corridors and identify influence of geographic features in Great Lakes region. Collaborative research with University of Western Ontario
Fisheries (MNR)	Research study - Impacts of electromagnetic fields from the Wolfe Island wind power project submarine cable on fish biodiversity and distribution (Dunlop and Reid, MNR); a recommendation from the fish and fish habitat literature reviews
Wildlife (MNR)	Research study- Analysing weather pattern radar data to identify spatial distribution of nocturnal migratory birds and bats
Wildlife (MNR)	Research study- Collecting marine radar information to evaluate nocturnal migrating bird and bat flight heights and concentrations
Water Quality* (MOE)	Assess sediment transportation potentially caused by contaminated sediment being disrupted during foundation construction, and the efficacy of municipal water treatment technologies in removing any resulting contaminants that may be drawn into drinking water intakes.
Technical Standards and Safety* (MOE)	Desk-top study to be undertaken by an external consultant to gather and assess information from domestic and international jurisdictions pertaining to technical standards and safety requirements for the construction, operation and decommissioning of an off-shore wind turbine facility. Identify gaps and determine which standards and safety requirements could be applied to an Ontario-regulated scenario.

Figure 7: Short-term research topics under Ontario's May 2012 research plan.⁶⁵⁵

⁶⁵⁴ C-0611, Ministry of Environment Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012), slide 10.

⁶⁵⁵ C-0611, Ministry of Environment Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012), slide 11.

Research Topic	Activity
Noise* (MOE)	Conduct baseline ambient noise measurements at waterfront land based receptor sites, using MOE noise testing procedures for wind turbines, to determine if the 40 dBA sound level criteria is below, equal to or above ambient sound levels at receptor locations.
Decommission and valuation of financial assurance* (MOE)	Desk-top study to be undertaken by an external consultant to gather and assess information from international jurisdictions to determine the extent of and costs to dismantle/decommission all components of an off-shore wind turbine facility (including cables and on-shore infrastructure), with the intent of determining Financial Assurance requirements for an REA approval.
Fisheries focus on write-up of existing work instead (MNR)	Research study - Mitigation of submarine cable construction and electronic magnetic fields through the creation of fish habitat for species such as American eel. Analysis and writing in 2013 with final report available in 2013/14 - a recommendation from the fish and fish habitat literature reviews
Marine Archaeology (MTCS)	Research on how jurisdictions that support offshore wind address: (a) potential impacts on marine archaeological resources, with a focus on fresh water lakes; (b) potential impacts on shoreline cultural heritage resources; and (c) marine and shoreline tourism and sport/recreation assets.
Marine Archaeology (MTCS)	Historical research, literature review and community/academic partnerships to enhance Ontario's database of known marine archaeological resources and known areas of high potential in the Great Lakes.

Figure 8: Medium-term research topics under Ontario's May 2012 research plan.⁶⁵⁶

Research Topic	Activity
Coastal Engineering (MNR)	Model Development to understand/predict impact of multiple foundations on ice sheets, with a focus on Lake Erie
Fisheries (MNR)	Mapping tool – Inventory of existing biodiversity conservation and aquatic habitats information in the nearshore of the Great Lakes to inform site selection for wind farms – this would require partners eg. Federal government and U.S. jurisdictions
Noise (MOE)	Conduct a study to determine a suitable approach to sound propagation modelling for offshore wind turbines in a marine environment [REDACTED]
Wildlife (MNR)	Acoustic monitoring and marine and weather pattern radar study of migrating birds and bats to identify risks/ potential impacts associated with offshore development
Technology Assessment (ENE)	Ontario-specific studies required to evaluate operating characteristics and technology specific to the connection and integration of offshore wind, such as use of direct current, underwater cabling, etc.
Fisheries (MNR)	Research studies about the effects of offshore wind construction in the Great Lakes on fish and fish habitat; Field studies pre-construction (base-line), during construction, and post-construction phases to examine various mitigation methods during construction (noise, vibration, siltation), and post-construction (habitat creation) and to inform Ontario offshore guidance; 5 to 10 year field study during all three phases of a pilot wind farm project; recommendations from the fish and fish habitat literature reviews
Shoreline Heritage, Tourism and Sport/Recreation (MTCS)	Research to determine if current requirements to assess potential impacts to onshore cultural heritage resources can be applied to shoreline elements of offshore wind projects. Research and potential GIS mapping to identify marine and shoreline heritage, tourism and sport/recreation assets (scope TBD).
Electricity Markets (ENE)	Assess needs, opportunities and impacts on inter-jurisdictional planning, trading and/or market operations from incorporating large intermittent resources.
Marine Archaeology (MTCS)	Research to develop screening criteria for identifying additional areas of high marine archaeological potential in the Great Lakes.

Figure 9: Longer-term research topics under the May 2012 research plan.⁶⁵⁷

⁶⁵⁶ C-0611, Ministry of Environment Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012), slide 12.

⁶⁵⁷ C-0611, Ministry of Environment Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012), slide 13.

291. Ontario planned for MOE's water quality, technical standards and safety, noise and decommissioning studies to begin within two years using funds budgeted to MOE in 2012-2013.⁶⁵⁸

[REDACTED]

E. Ontario's Efforts to Complete the Science Necessary to Develop a Regulatory Framework for Offshore Wind

294. [REDACTED], Ontario had to re-consider how to proceed with the necessary research. MOE maintained the lead role under the

⁶⁵⁸ **C-0611**, Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012), slide 8.

⁶⁵⁹ **R-0295**, Ministry of Environment, Offshore Wind - Status (Apr. 18, 2012), p. 1; **R-0296**, E-mail from Karen Slawner, Ministry of Energy to Ceiran Bishop and Jonathan Norman, Ministry of Energy (May 2, 2012).

⁶⁶⁰ **R-0297**, E-mail from Karen Slawner, Ministry of Energy to Jennifer Heneberry, Ministry of Energy (May 22, 2012).

⁶⁶¹ **C-0623**, E-mail from Steven Radcliffe, Ministry of Environment to SDB Coordinator (Jul. 20, 2012); **R-0300**, E-mail from Deb Stark, Ministry of Environment to [REDACTED] (Jul. 20, 2012); **R-0306**, E-mail from Duncan Boyd, Ministry of Environment to Steve Radcliffe, Ministry of Environment (Nov. 5, 2012).

⁶⁶² **R-0300**, E-mail from Deb Stark, Ministry of Environment to [REDACTED] (Jul. 20, 2012); **R-0301**, E-mail from Steve Klose, Ministry of Environment to Michael Maddock, Ministry of Environment (Jul. 23, 2012); **R-0306**, E-mail from Duncan Boyd, Ministry of Environment to Steve Radcliffe, Ministry of Environment (Nov. 5, 2012).

⁶⁶³ **R-0306**, E-mail from Duncan Boyd, Ministry of Environment to Steve Radcliffe, Ministry of Environment (Nov. 5, 2012).

research plan and continued with its focus on the areas of noise, water and sediment quality, technical standards and safety, and decommissioning and valuation of financial assurance. It developed an updated MOE-specific research plan in March 2013 which indicated that research would not be completed until at least the end of 2016.⁶⁶⁴

295. Ontario has now completed numerous research studies related to renewable energy projects and offshore wind.⁶⁶⁵ The completed research relating to offshore wind specifically includes the following studies commissioned or funded by MNR:

- Impacts of electromagnetic fields and Wolfe Island study on fish biodiversity and distribution;⁶⁶⁶
- a 2011 report on offshore wind power coastal engineering that investigates the scientific and technical issues associated with potential offshore wind power development on the Great Lakes;⁶⁶⁷
- a 2011 coastal engineering workshop, which determined that further study on impacts of offshore wind projects to shoreline erosion was required;⁶⁶⁸
- a 2011 report which investigates the potential effects of offshore wind power projects on fish and fish habitat in the Great Lakes, based on existing marine literature and knowledge of Great Lakes ecosystems;⁶⁶⁹
- a 2011 report on background information and science considerations for fish and fish habitat relevant to offshore wind power projects on the Great lakes, which describes ways to prevent the negative effects from offshore wind energy production and to

⁶⁶⁴ **R-0333**, E-mail from SDB Coordinator to Steve Klose, Ministry of Environment (Mar. 22, 2013); **R-0334**, Ministry of the Environment, “Offshore Wind Power - Ministry of the Environment Research Plan” (Mar. 22, 2013), p. 6.

⁶⁶⁵ **R-0391**, Ministry of Environment, website excerpt, “Research related to renewable energy projects” (Oct. 9, 2014), Available at: <https://www.ontario.ca/environment-and-energy/research-related-renewable-energy-projects>.

⁶⁶⁶ **R-0194**, Scott Reid, Meghan Murrant & Erin Dunlop, MNR Aquatic Research and Development Section Report, “Impacts of Electromagnetic Fields from the Wolfe Island Wind Power Project Submarine Cable on Fish Biodiversity and Distribution: 2011-12 Project Report on Nearshore Fish Community Sampling” (2011-2012).

⁶⁶⁷ **C-0572**, W.F. Baird & Associates Coastal Engineers Ltd. & Beacon Environmental, “Offshore Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ministry of Natural Resources” (May 2011).

⁶⁶⁸ **R-0266**, E-mail from Nicole Worsley, Ministry of Environment to Barry Duffey (MTO) (Oct. 18, 2011); **R-0265**, Ministry of the Environment, Presentation, “Renewable Energy Approval (REA) Off-shore Wind” (Oct. 14, 2011), slide 6.

⁶⁶⁹ **C-0543**, Sarah Nienhuis and Erin S. Dunlop, “The potential effects of offshore wind power projects on fish and fish habitat in the Great Lakes”, MNR Aquatic Research Series 2011-01 (Jul. 6, 2011).

enhance the potential benefits from offshore wind energy production within a Great Lakes context;⁶⁷⁰

- a 2012 biology master's thesis entitled "Spatial and Temporal Activity of Migratory Bats at Landscape Features", which received MNR funding.⁶⁷¹ Contrary to the Claimant's assertion,⁶⁷² this study is publicly available; and
- MNR's Renewable Energy Atlas, an interactive online tool that provides a publicly accessible GIS-based mapping tool identifying wind resources, allowing users to create and view maps of wind energy across the province.⁶⁷³ Contrary to the Claimant's assertion,⁶⁷⁴ this tool has not been removed from the web and remains accessible to the public.

296. In addition to these MNR-commissioned or funded studies, MOE completed an in-house study on water quality impacts within the Lake Ontario nearshore in 2012.⁶⁷⁵ Further, on August 29 and September 3, 2014, MOE released a Request for Proposals ("RFPs") for a preliminary noise study and a decommissioning study.⁶⁷⁶

297. The noise study will result in a report based on a technical evaluation of sound propagation modelling methodologies to predict offshore wind facility noise impacts (both over water and at land receptors).⁶⁷⁷ This report, which will include a literature review and consultation of technical and government specialists, will be used to inform any future rules and requirements related to

⁶⁷⁰ **C-0548**, Sarah Nienhuis and Erin S. Dunlop, "Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat", MNR Aquatic Research Series 2011-02 (Jul. 2011).

⁶⁷¹ **R-0279**, Rachel M. Hamilton, Spatial and Temporal Activity of Migratory Bats at Landscape Features (2012). Available at: <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=2177&context=etd>.

⁶⁷² Claimant's Memorial, ¶ 217.

⁶⁷³ See **C-0555**, MOE, Presentation, "Renewable Energy Approval (REA): Off-shore Wind" (Oct. 14, 2011), slide 7; **C-0559**, Ontario, Presentation, "Status of Wind Energy Science" (Oct. 19, 2011), slide 2. MNR's Renewable Energy Atlas, powered by Land Information Ontario, is accessible at <http://www.gisocoeapp.lrc.gov.on.ca/web/MNR/Integration/Renewable/Viewer/Viewer.html>.

⁶⁷⁴ Claimant's Memorial, ¶ 217.

⁶⁷⁵ **C-0637**, Peter C. Nettleton, "Application of the MIKE3 model to examine water quality impacts within the Lake Ontario Nearshore in 2008 in support of the Great Lakes Nearshore Monitoring and Assessment Program" (Dec. 28, 2012).

⁶⁷⁶ **R-0383**, Merx Opportunity Abstract, "Technical Evaluation to Predict Offshore Wind Farm Noise Impacts in Ontario" (Sep. 9, 2014) ("Noise Study RFP"); **R-0384**, Merx Opportunity Abstract, "Assessment of Offshore Wind Farm Decommissioning Requirements" (Sep. 9, 2014) ("Decommissioning Study RFP").

⁶⁷⁷ **R-0383**, Noise Study RFP; **R-0388**, Del Franco, Mark, "The Song Remains The Same: Ontario Seeks More Science Before Lifting Offshore Ban" (Sep. 16, 2014), http://www.nawindpower.com/e107_plugins/content/content.php?content.13410.

noise.⁶⁷⁸ However, additional work relating to field measurements, validation testing and potentially purchasing an offshore wind noise model will remain to be completed after this preliminary noise study.⁶⁷⁹

298. The decommissioning study will involve a technical evaluation of decommissioning methodologies for offshore wind facilities to potentially be built in Ontario.⁶⁸⁰ It “will gather the best available science related to how wind turbines and other equipment should be managed at the end of their lifecycle and identify what type of financial assurance should be established.”⁶⁸¹ Like the preliminary noise study, the decommissioning study will also be based on a literature review and consultation of technical and government specialists.⁶⁸²

299. Bidding on these RFPs closed in early October 2014.⁶⁸³ The studies will proceed once MOE completes the RFP process and has selected vendors to conduct them.

THE TRIBUNAL LACKS JURISDICTION TO HEAR SOME OF THE CLAIMANT'S CLAIM

I. Summary of Canada's Position

300. In its Memorial, the Claimant provides lengthy arguments as to why actions of the OPA are attributable to Canada as a matter of international law.⁶⁸⁴ In over twenty pages of submissions, the Claimant provides the Tribunal with an incorrect interpretation of the international law surrounding attribution in a failed attempt to demonstrate that the OPA is an organ of the Government of Ontario, or that alternatively the OPA was exercising delegated government authority in its capacity as a state enterprise. However, all of the measures that the Claimant challenges are actually measures of the Government of Ontario, not measures of the OPA. Accordingly, the Claimant's arguments about whether acts of the OPA can be attributed to

⁶⁷⁸ *Ibid.*

⁶⁷⁹ **R-0383**, Noise Study RFP.

⁶⁸⁰ **R-0384**, Decommissioning Study RFP.

⁶⁸¹ **R-0388**, Del Franco, Mark, “The Song Remains The Same: Ontario Seeks More Science Before Lifting Offshore Ban” (Sep. 16, 2014).

⁶⁸² **R-0384**, Decommissioning Study RFP.

⁶⁸³ *Ibid.*

⁶⁸⁴ Claimant's Memorial, ¶¶ 503-541.

Canada for the purposes of Chapter 11 are irrelevant. The Tribunal simply does not need to decide this question in order to assess the merits of the Claimant's allegations.

301. In light of the claims that they have made, it is unclear why the Claimant has devoted so much time to the question of whether or not the acts of the OPA can be attributed to Canada. Nevertheless, in the interest of completeness and in light of the errors of international law in the Claimant's submissions that need to be corrected, the following section will demonstrate that even if the Claimant were challenging measures of the OPA, it has failed to prove that the Tribunal has jurisdiction to consider whether such measures violated Canada's obligations under the NAFTA. The OPA is not an organ of Ontario. It is a state enterprise and pursuant to Article 1503(2), the Tribunal has jurisdiction only to consider the measures of a state enterprise if those measures were adopted or maintained in the exercise of delegated governmental authority. With respect to the Claimant's FIT Contract, the Claimant cannot point to a single act or omission of the OPA that was carried out in the exercise of delegated governmental authority. As a result, the Tribunal has no jurisdiction to hear any claims arising out of the conduct of the OPA.

II. The Claimant Is Not Challenging Any Measures Adopted or Maintained by the OPA

302. In its Memorial, the Claimant alleges that Canada has breached its obligations under the NAFTA as a result of certain omissions by the OPA. For example, the Claimant appears to directly challenge the failure of the OPA to comply with commitments made by MEI to Windstream "to take steps to ensure that Windstream's investments would not be impacted negatively" by the deferral on offshore wind;⁶⁸⁵ to "keep Windstream 'whole'" following the deferral;⁶⁸⁶ and "to award a solar project to Windstream rather than to Samsung".⁶⁸⁷

303. However, when it further discusses these specific measures, the Claimant explains that "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

⁶⁸⁵ Claimant's Memorial, ¶ 505(b).

⁶⁸⁶ Claimant's Memorial, ¶ 505(c).

⁶⁸⁷ Claimant's Memorial, ¶ 505(d).

investment was not negatively impacted by the [deferral].”⁶⁸⁸ Similarly, with respect to the alleged failure to award the Claimant a solar contract, the Claimant points to Ontario’s refusal to entertain such a possibility.⁶⁸⁹ Accordingly, it is clear that the Claimant is actually challenging the failure of the Ministry of Energy to direct the OPA to act in a certain way, not the fact that the OPA failed to adopt or maintain other measures. As such, the question of whether any measures of the OPA can be attributed to Ontario is wholly irrelevant in this arbitration.⁶⁹⁰

III. The Claimant Has Failed to Meet its Burden of Establishing that this Tribunal Has Jurisdiction to Consider Measures Adopted or Maintained by the OPA

304. If the Claimant were actually challenging measures adopted or maintained by the OPA with respect to its FIT Contract, then it would have the burden of establishing that this Tribunal has jurisdiction to consider those measures. This fundamental principle was recently confirmed in *Apotex v. United States* where the tribunal held that “Apotex (as claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal’s jurisdiction in this regard”.⁶⁹¹ In so holding, the *Apotex* Tribunal followed earlier NAFTA tribunals, including those in *Methanex v. United States*, *Bayview v. Mexico* and *Grand River v. United States*, which have all consistently affirmed that it is for the claimant to establish that its claims fall within NAFTA Chapter 11 and within the tribunal’s jurisdiction.⁶⁹² If there is any ambiguity as to whether or not the Claimant has met its burden in this regard, the Tribunal should decline to act.⁶⁹³

⁶⁸⁸ Claimant’s Memorial, ¶ 513 (emphasis added).

⁶⁸⁹ Claimant’s Memorial, ¶ 631. See also Claimant’s Memorial, ¶ 645.

⁶⁹⁰ The Claimant seems to recognize as much by arguing at Memorial ¶ 541, for example, that: (“[t]he promise that the OPA would take steps to ensure Windstream was not negatively affected by the [deferral] was a commitment of the Ontario Government, made by the Minister of Energy’s Chief of Staff to Windstream”) (emphasis added). As Canada discusses in Section III (E)(5) below, the failure of the Government of Ontario to direct the OPA to renegotiate Windstream’s FIT Contract does not violate NAFTA Chapter 11.

⁶⁹¹ **RL-006**, *Apotex Inc. v. United States* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 150 (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶¶ 58-64 (“summarising previous decisions, and concluding that ‘if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase’”).

⁶⁹² **CL-037**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award on Jurisdiction, 7 August 2002, ¶¶ 120-121 (finding that a claimant must establish that the requirements of NAFTA Articles 1116-1121 have been met) (“*Methanex - Partial Award on Jurisdiction*”); **RL-009**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/05/01) Award, 19 June 2007, ¶¶ 63, 122 (finding that “Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven” and rejecting claimant’s submission that “Respondent bears the burden of demonstrating that the Tribunal should not hear the claim [...]”); **CL-054**, *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (UNCITRAL)

305. For the reasons explained below, the Claimant has not met its burden with respect to the alleged acts and omissions, if any, of the OPA. Accordingly, to the extent such claims are being made, they should be dismissed.

A. The OPA Is Not an Organ of the Government of Ontario

306. There is no dispute between the parties that this Tribunal has jurisdiction to hear a claim that the acts of an organ of the Government of Ontario, such as MNR, MOE, MEI and the Premier's Office, are in violation of Chapter 11 of NAFTA. The international responsibility of a State for the acts of the organs of its national and sub-national governments is one of the cornerstones of international law.⁶⁹⁴

307. The Claimant alleges that the OPA is also an organ of the Government of Ontario, and that its measures can be attributed to Canada on these grounds.⁶⁹⁵ The Claimant is incorrect. At customary international law, a person or entity is an "organ" of a State if it is one of the individuals or collective entities that "make up the organization of the state and act on its

Award, 12 January 2011 ("*Grand River – Award*"), ¶ 122: ("Claimants must [...] establish an investment that falls within one or more of the categories established by that Article [1139]"). Outside of the NAFTA-context, see **RL-053**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48: ("[a]s a party bears the burden of proving the facts it asserts, it is for the Claimant to satisfy the burden of proof required at the jurisdictional phase."); **RL-008**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶ 192: ("[Claimant] has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); **RL-030**, *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision on Jurisdiction, 22 April 2005, ¶ 79 (Claimant acknowledged it had the burden of proving jurisdiction).

⁶⁹³ **RL-028**, *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280. This principle has been long established at the International Court of Justice. **RL-028**, *ICS Inspection – Award on Jurisdiction*, ¶ 280, fn. 307. See also **RL-001**, *Achmea B.V. v. The Slovak Republic* (formerly *Eureko B.V. v. The Slovak Republic*) (UNCITRAL) Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 219: (the "[t]ribunal must satisfy itself of the existence and extent of its jurisdiction.").

⁶⁹⁴ See Claimant's Memorial, ¶¶ 509-511. This customary international legal principle is reflected in Article 4 of the *International Law Commission's Articles on State Responsibility*. **RL-029**, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (New York: Cambridge University Press, 2002) ("*ILC Articles - Commentary*"). Canada's responsibility at international law for measures of its sub-national governments is also reaffirmed in Article 105 of NAFTA: ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.").

⁶⁹⁵ Claimant's Memorial, ¶¶ 512-535.

behalf.”⁶⁹⁶ This definition can be met in one of two ways: (1) if the person or entity has the status of an organ, under the law of the State in question (i.e. it is a *de jure* organ); or (2) if the person or entity may, for the purposes of international responsibility, be equated with a State organ, even if it does not have that status in the internal law of the State (i.e. it is a *de facto* organ).⁶⁹⁷ The OPA is neither a *de jure* nor *de facto* organ of the Government of Ontario.

308. As codified in paragraph 2 of Article 4 of the International Law Commission's Articles on State Responsibility (“*ILC Articles*”), a person or entity is a *de jure* organ of a State at international law if it has the status of an organ in a State's internal law.⁶⁹⁸ The OPA does not have this status under Ontario law. There are no Ontario laws which define the organs of the Government of Ontario. The fact is that the OPA (now the IESO) is a non-share capital corporation⁶⁹⁹ with independent legal personality.⁷⁰⁰ Its principle purpose is to, among other things, “engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario”.⁷⁰¹ In so doing, the OPA acts independently, not as an agent of the Crown.⁷⁰² Contrary to what the Claimant may believe, the mere fact that the OPA is a creature of statute does not make it an organ of the State.⁷⁰³ As explained in the commentaries to the *ILC Articles*, “[t]he fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.”⁷⁰⁴ Although these corporate entities may be owned by the State, they are

⁶⁹⁶ **RL-029**, *ILC Articles - Commentary*, Article 4, p. 94; See also **RL-027**, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J Reports 2007, Judgment, 26 February 2007, ¶ 388 (“*Genocide Convention Case*”).

⁶⁹⁷ **RL-027**, *Genocide Convention Case*, ¶¶ 386, 392.

⁶⁹⁸ **RL-029**, *ILC Articles - Commentary*, Article 4; **RL-027**, *Genocide Convention Case*, ¶ 386.

⁶⁹⁹ **C-0003**, *Electricity Act*, s. 25.1(1).

⁷⁰⁰ *Ibid*, s. 25.1(4).

⁷⁰¹ *Ibid*, s. 25.2(1)(c).

⁷⁰² **C-0003**, *Electricity Act*, s. 25.3. Section 25.3 of Part II.1 of the *Electricity Act, 1998* specifically states that “[t]he OPA is not an agent of Her Majesty for any purpose”.

⁷⁰³ **RL-031**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008, ¶ 170 (“*Jan de Nul – Award*”); **CL-056**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶ 202 (“*Gustav – Award*”) (explaining that “[i]t is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.”).

⁷⁰⁴ **RL-029**, *ILC Articles - Commentary*, Article 8, p. 112 (citing as an example the Workers' Councils considered in *Schering Corporation v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984), *Otis Elevator*

“considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority”.⁷⁰⁵

309. The OPA is also not a *de facto* organ of the Government of Ontario. It is only in “exceptional” circumstances that persons or entities without the status of organs at internal law can be considered organs at international law. Indeed, it is only when such persons or entities act “in ‘complete dependence’ on the State, of which they are ultimately merely the instrument”, that such status attaches.⁷⁰⁶ This requires an exceptionally high level of dependence, on the one hand, and control on the other hand.⁷⁰⁷ The OPA is not in a relationship of “complete dependence” on the Government of Ontario, nor does the Government of Ontario exercise complete control over the OPA. As discussed above, the OPA has independent legal personality, and it is not even funded by government revenues. Such a relationship of dependence and control would be antithetical to the independent nature of the OPA.

B. The Acts and Omissions of the OPA that the Claimant Appears to Challenge Were Not Done in the Exercise of Delegated Governmental Authority

310. While the OPA is not an organ of government, there is no dispute between the parties that it does qualify as a state enterprise for the purposes of NAFTA.⁷⁰⁸ Article 1503 establishes the NAFTA Parties’ obligations with regards to state enterprises. Specifically, Article 1503(2) provides that:

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 11 (Investment) and Fourteen (Financial Services) wherever such enterprises exercises any regulatory, administrative, or other governmental

Company v. The Islamic Republic of Iran, Iran-U.S. C.T.R., vol. 14, p. 283 (1987) and *Eastman Kodak Company v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17, p. 153 (1987)).

⁷⁰⁵ *Ibid.*

⁷⁰⁶ **RL-027**, *Genocide Convention Case*, ¶¶ 392-393.

⁷⁰⁷ **RL-039**, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, (*Nicaragua v. United States of America*) [1986] I.C.J. Rep., Judgment, 27 June 1986, ¶¶ 109, 115-116 (“*Nicaragua – Award*”); **RL-027**, *Genocide Convention Case*, ¶¶ 388, 394-395. See also **RL-025**, *Fireman’s Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/01) Award, 17 July 2006, ¶¶ 149-150 (“*Fireman’s Fund – Award*”); **CL-051**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 110.

⁷⁰⁸ See Claimant’s Memorial, ¶¶ 505, 512, 514, 536-541.

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.

311. Thus, as explained by the tribunal in *UPS*, Article 1503(2) creates a *lex specialis* which means that the customary international law rules regarding when the acts of a state enterprise can violate a State's international law obligations do not apply.⁷⁰⁹ As the Tribunal noted:

Chapter 15 provides a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and the method of implementation.⁷¹⁰

312. Accordingly, it is only where a state enterprise acts in the exercise of delegated governmental authority that the obligations in Chapter 11 apply to it. The tribunal in *UPS* was faced with the task of interpreting Article 1503(2), and in particular, considering whether a state enterprise was acting in the exercise of delegated governmental authority when considering a claim against Canada based on the conduct of Canada Post. The tribunal held that although Canada Post was a creature of statute created to serve the public interest and with “an essential role in the economic, social and cultural life of Canada”,⁷¹¹ not all of its acts in the exercise of its statutory mandate were done in the exercise of governmental authority.⁷¹² In particular, the Tribunal found that the decisions relating to the use of Canada Post of its own infrastructure were not made in the exercise of public authority.⁷¹³

313. Further, while the general rules of customary international law are not controlling because of the *lex specialis* created by Article 1503(2), the decisions of other tribunals as to the meaning of the similar term “governmental authority” in Article 5 of the ILC's Articles can be informative.

314. In *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, the Tribunal considered a claim against Egypt based on the conduct of the Suez Canal Authority

⁷⁰⁹ **CL-088**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 62 (“*UPS – Award*”).

⁷¹⁰ **CL-088**, *UPS – Award*, ¶ 62.

⁷¹¹ **CL-088**, *UPS – Award*, ¶ 57.

⁷¹² **CL-088**, *UPS – Award*, ¶ 77.

⁷¹³ **CL-088**, *UPS – Award*, ¶ 78.

(“SCA”), an entity that the Egyptian government had created by statute to manage maintain and develop the Suez canal.⁷¹⁴ The claim in question involved the authority’s exercise of that statutory mandate related to a contract to widen and deepen the southern regions of the canal.⁷¹⁵ The tribunal explained that it was irrelevant that the “subject matter” of the disputed conduct “related to the core functions of the SCA”, which was acting for the government’s and public’s benefit in managing the Suez canal.⁷¹⁶ In particular, it held that “[w]hat matters is not the “*service public*” element, but the use of “*prérogatives de puissance publique*” or governmental authority.”⁷¹⁷

315. None of the acts or omissions of the OPA that the Claimant identifies in its Memorial involve the use of governmental authority. For example, the Claimant argues that the OPA’s failure to implement the Government of Ontario’s alleged commitment to the Claimant that it would not be negatively affected by the deferral, and the Government of Ontario’s alleged promise to “keep it whole” was an exercise of delegated governmental authority.⁷¹⁸ First, the Claimant has introduced no evidence that the Minister of Energy delegated the implementation of this alleged commitment to the OPA.⁷¹⁹ Second, even if it had introduced such evidence, the alleged commitment of MEI,⁷²⁰ is not an exercise of governmental authority. There is nothing inherently governmental about the conduct of negotiations to settle a dispute pertaining to a contract between a state enterprise and an investor.

⁷¹⁴ **RL-031**, *Jan de Nul – Award*, ¶ 45.

⁷¹⁵ **RL-031**, *Jan de Nul – Award*, ¶ 46.

⁷¹⁶ **RL-031**, *Jan de Nul – Award*, ¶ 169.

⁷¹⁷ **RL-031**, *Jan de Nul – Award*, ¶ 170; See also **CL-056**, *Gustav – Award*, ¶ 202 (explaining that “[i]t is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.”).

⁷¹⁸ See Claimant’s Memorial, ¶ 541.

⁷¹⁹ As discussed at Section I(A) of the Facts section above, the *Electricity Act, 1998*, empowers the Minister of Energy to direct the OPA to take certain specified actions with respect to its energy procurement programs. The scope of the Minister’s authority to issue directions to the OPA is limited to the types of directions specified in sections 25.32 and 25.35.

⁷²⁰ The Claimant itself identifies the alleged promise that the OPA would take steps to ensure Windstream was not negatively affected by the deferral was a commitment of the Ministry of Energy, not the OPA. See Claimant’s Memorial, ¶ 541.

316. Similarly, the Claimant challenges the OPA's failure "to award a solar project to Windstream rather than to Samsung".⁷²¹ Again, the Claimant has not proven that such a decision was made, or if it was, that such a decision constitutes an exercise of "governmental authority." Indeed, the Claimant does not provide any further explanation on how such acts could constitute government authority aside from its mere assertion that the acts are attributable to Canada. That is not enough to meet its burden. As explained above, simply because the OPA is a creature of statute, and is subject to the directions of the Minister of Energy, or the fact that it is implementing government procurement programs, like the FIT Program, does not mean that each and every one of its actions is an exercise of "government authority."⁷²² Simply put, the consideration of how to resolve a contractual dispute within that program is not an issue of exercising "governmental authority."

IV. Conclusion

317. The Claimant challenges measures of the Government of Ontario, not measures of the OPA. Accordingly, the Claimant's arguments about whether acts of the OPA can be attributed to Canada for the purposes of Chapter 11 are irrelevant. However, even if the Claimant were challenging measures of the OPA, it has failed to prove that the Tribunal has jurisdiction to consider whether such measures violated Canada's obligations under NAFTA.

CANADA HAS NOT VIOLATED ITS NAFTA OBLIGATIONS

I. Articles 1102 and 1103 Do Not Apply to the FIT Program by Virtue of the Procurement Exemption in Article 1108

A. Summary of Canada's Position

318. The Claimant alleges that certain measures of the Government of Ontario after the February 11, 2011 deferral violated Articles 1102 and 1103. Specifically, the Claimant has alleged that Canada has violated Article 1102 because the Government of Ontario's decided to keep TransCanada "whole by awarding it a new project and compensating it for its costs associated with the cancellation" following the cancellation of TransCanada's procurement

⁷²¹ Claimant's Memorial, ¶ 505 (d).

⁷²² Canada further notes that while the Minister of Energy may direct the OPA to take certain specified actions with respect to its energy procurement programs as specified in sections 25.32 and 25.35, simply directing the OPA in this manner does mean the OPA is exercising delegated governmental authority.

contract for a gas-fired electricity generation facility but failed to offer a similar deal to the Claimant.⁷²³ Second, it argues that Canada has breached Article 1103 because “Ontario offered a FIT contract to Samsung for the very solar project that Windstream proposed following the moratorium as an alternative project.”⁷²⁴

319. The Claimant’s allegations are meritless. Further, the Claimant is factually incorrect. For example, the Government of Ontario’s decision to award a PPA to Samsung for a solar project was made pursuant to a specific investment agreement, the Green Energy Investment Agreement (“GEIA”).⁷²⁵ It was not a FIT Contract, and in this regard, the Claimant even admits that it has no information concerning the circumstances surrounding its 1103 arguments.⁷²⁶ The Claimant’s allegations are bare assertions without any substantiation and do not refer to any specific measures. However, to the extent that the Claimant is alleging Canada breached the NAFTA in failing to offer certain treatment in the context of the FIT Program, the Tribunal need not consider the Claimant’s arguments as they are precluded by Article 1108(7)(a). That Article expressly preserves the NAFTA Parties’ right to pursue policy objectives in carrying out procurement programs, even where doing so amounts to discriminatory treatment.

320. As will be shown below, when interpreted in accordance with its ordinary meaning, it is evident that Article 1108 applies to the measures in dispute, precluding the Claimant’s claim under Articles 1102 and 1103. Ultimately, all of the claims are based on the Claimant’s inability to develop its Project or obtain some other resolution pursuant to the FIT Contract it obtained under the FIT Program. Articles 1102 and 1103 “do not apply” to such measures as they “involve” procurement by a Party or state enterprise.⁷²⁷

⁷²³ Claimant’s Memorial, ¶ 634.

⁷²⁴ Claimant’s Memorial, ¶ 645.

⁷²⁵ **R-0087**, Ministry of Energy Archived Backgrounder, “Ontario Delivers \$7 Billion Green Investment (Jan. 21, 2010).

⁷²⁶ Claimant’s Memorial, ¶ 645.

⁷²⁷ NAFTA, Articles 1108(7)(a), 1108(8)(b); **CL-022**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003, ¶¶ 160-170 (“*ADF – Award*”).

B. The Exclusion of Procurement from the Coverage of Chapter 11's Obligations

321. In NAFTA Chapter 11, the NAFTA Parties carved out for themselves significant policy space with respect to the use of their procurement powers. In particular, they excluded procurement from the coverage of certain obligations. Article 1108 provides, in relevant part:

7. Articles 1102, 1103, and 1107 do not apply to:

(a) procurement by a Party or a state enterprise [...]

322. Article 1108 thus applies when: (1) the measure involves procurement; and (2) the measure was adopted or maintained by a Party or a state enterprise. When both of these conditions are met, the obligations in Articles 1102 and 1103 do not apply.⁷²⁸ As is shown below, the measures challenged by the Claimant involve procurement by a Party or state enterprise. Accordingly, the Claimant's Article 1102 and 1103 claims must be dismissed.

C. The FIT Program and the Measures Taken by Ontario with Respect to the Claimant's FIT Contract Involve Procurement**1. The Ordinary Meaning of "Procurement" in Its Context**

323. The first element that must be met for Article 1108 to apply is that the measure must involve procurement. NAFTA Chapter 11 does not define "procurement". The ordinary meaning of the term has, however, been specifically considered in *ADF v. U.S.* and *UPS v. Canada*.⁷²⁹ In *ADF*, the tribunal was faced with a challenge under Articles 1102 to the domestic content requirements imposed by the U.S. on steel to be used by a foreign investor in a highway interchange project procured by the State of Virginia. The Tribunal looked to the ordinary meaning of the term "procurement" and explained:

In its ordinary or dictionary connotation, "procurement" refers to the act of obtaining, "as by effort, labor or purchase." To procure means "to get; to gain; to come into possession of." In the world of commerce and industry, "procurement" may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth.⁷³⁰

⁷²⁸ CL-022, *ADF – Award*, ¶¶ 160-161.

⁷²⁹ CL-022, *ADF – Award*, ¶¶ 160-174; CL-088, *UPS – Award*, ¶¶ 121-136.

⁷³⁰ CL-022, *ADF – Award*, ¶ 161.

324. The tribunal in *UPS* adopted a similarly broad interpretation of the term “procurement” as used in Article 1108. In that case, the tribunal was faced with a challenge that the Government of Canada paid Canada Post to conduct material handling, data entry and duty collection services, but it required UPS Canada to perform similar services for free.⁷³¹ UPS did not dispute the government’s right to contract for services, but argued that the contract provided more favourable treatment.⁷³² After analysing the contract, the tribunal held that Article 1102 did not apply to it because it constituted a procurement contract within the meaning of Article 1108(7).⁷³³ In coming to this conclusion, the tribunal relied on the fact that the service in question was provided pursuant to a “commercial fee-for-service contract”⁷³⁴ that covered services provided to the government, such as duty collection.⁷³⁵ It came to this conclusion despite the fact that the service was provided for the benefit of, and paid for by, the persons or companies importing goods by mail rather than by the government.⁷³⁶

325. Thus, the ordinary meaning of the term “procurement”, as it is used in Article 1108, covers all measures constituting or involving the lease or purchase of goods or services for any purpose, regardless of whether the government ultimately paid the cost, and regardless of whether the government retained possession of the end product. The FIT Program therefore constitutes procurement under a plain language interpretation of Article 1108.

⁷³¹ **CL-088**, *UPS – Award*, ¶¶ 121-136.

⁷³² **CL-088**, *UPS – Award*, ¶ 128.

⁷³³ **CL-088**, *UPS – Award*, ¶¶ 135-136.

⁷³⁴ **CL-088**, *UPS – Award*, ¶¶ 132-134. Ultimately, the *UPS* Tribunal held that: (“NAFTA Article 1108(7) does not require, as the Claimant alleges, that the fee for the service provided be paid according to a specific formula or in a particular manner in order to fall within the scope of the exception. There is no such basis for such a requirement in the text of the Article”).

⁷³⁵ **CL-088**, *UPS – Award*, ¶ 132.

⁷³⁶ The fee is described as “the government’s efforts to help recover costs from those who benefit from services, and is similar to arrangements in the United States and other countries.” **R-0490**, Canada Post, website excerpt, “Customs Requirements” (Jan. 12, 2015). Available at: <http://www.canadapost.ca/tools/pg/manual/PGcustoms-e.asp>.

2. The FIT Program and the Measures Adopted Relating to the Claimant's FIT Contract Involve the Procurement of Electricity

326. As shown below, the FIT Program was designed and implemented as a means for procuring electricity derived from renewable energy generation projects. As stated above,⁷³⁷ when elected in 2003, the Government of Ontario had committed to eliminate Ontario's coal-fired electricity generation.⁷³⁸

327. As part of government's overall strategy to move away from fossil fuel-based energy production and toward a cleaner supply mix, it introduced the GEGEA and amended several statutes, including the *Electricity Act, 1998*.⁷³⁹ One of the key changes to the *Electricity Act, 1998* was the addition of section 25.35, which stated, in relevant part:

(1) The Minister may direct the OPA to develop a feed-in tariff program that is designed to procure energy from renewable energy sources under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require.

[...]

(4) In this section, "feed-in tariff program" means a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities differentiated by energy source or fuel type, generator capacity and the manner by which the generation facility is used, deployed, installed or located.⁷⁴⁰

328. Relying on this authority, on September 24, 2009, the Minister of Energy directed the OPA to establish a FIT Program, "designed to procure energy from a wide range of renewable sources".⁷⁴¹ The direction states that the objectives of the FIT Program are to, among other

⁷³⁷ See ¶ 36 above.

⁷³⁸ **R-0040**, Supply Mix Advice, vol. 3, p. 8. See **C-0387**, 2010 Long-Term Energy Plan, p. 20.

⁷³⁹ The *Green Energy and Green Economy Act, 2009* amended the *Electricity Act, 1998* by adding s. 25.35, which provides the statutory basis for the FIT Program. **C-0123**, GEGEA, Schedule B, s. 7.

⁷⁴⁰ **R-0480**, *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A (amended as of 1 January 2015).

⁷⁴¹ **C-0141**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 1 (emphasis added).

things, “introduce a simpler method to procure and develop generating capacity from renewable sources of energy”.⁷⁴²

329. In implementing this Direction, the OPA developed and implemented the FIT Rules.⁷⁴³ The FIT Rules confirm that the OPA is procuring electricity generation from renewable energy generators. In particular, they state that “[a]pplicants must [...] enter into a FIT Contract with the OPA pursuant to which the OPA will pay the Supplier for Electricity delivered from its generating facility”.⁷⁴⁴ Similarly, the FIT Rules state that “[t]he OPA’s payment obligations under the FIT Contract will be [...] to pay for Hourly Delivered Electricity at the Contract Price”.⁷⁴⁵

330. The standard FIT Contract that the OPA enters into with generators is expressly called a “power purchase agreement”.⁷⁴⁶ These agreements are fixed-price long-term supply contracts⁷⁴⁷ pursuant to which the OPA purchases “Electricity and Future Contract Related Products” from the generator.⁷⁴⁸ As further evidence that the OPA is procuring electricity generation, the FIT Contract also confirms that, by paying the Contract Price, the OPA obtains the “environmental attributes” of the renewable energy that is generated, including carbon credits.⁷⁴⁹

331. Accordingly, the FIT Program is a measure through which electricity generation is procured and the FIT Contract that was issued to the Claimant pursuant to it constitutes or involves procurement. As a result, the Government of Ontario’s and the OPA’s treatment of the Claimant with respect to its FIT Contract, and the resolution of any disputes that arose out of that contract, are measures that constitute or involve procurement.

⁷⁴² *Ibid.*

⁷⁴³ **C-0146**, FIT Program Rules, v. 1.1.

⁷⁴⁴ **C-0146**, FIT Program Rules, v. 1.1, s. 1.2 (emphasis added).

⁷⁴⁵ **C-0146**, FIT Program Rules, v. 1.1, s. 6.3(a) (emphasis added).

⁷⁴⁶ **C-0141**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 2.

⁷⁴⁷ **C-0146**, FIT Program Rules, v. 1.1, s. 6.3(a).

⁷⁴⁸ See **R-0078**, FIT Contract, v. 1.1, ss. 3.4, 3.5.

⁷⁴⁹ **R-0078**, FIT Contract, v. 1.1, s. 2.10(a): (“[t]he Supplier hereby transfers and assigns to, or to the extent transfer or assignment is not permitted, holds in trust for, the OPA who thereafter shall, subject to Section 2.10(d), retain, all rights, title, and interest in all Environmental Attributes associated with the Contract Facility”).

332. The applicability of Article 1108 is apparent on the face of the Claimant's claims. First, the Claimant appears to be alleging as a violation of Article 1102 the fact that Ontario refused to settle the Claimant's claim by paying out the value of the procurement contract that it had entered into with the OPA. Second, the Claimant asserts that it was a violation of Article 1103 for Ontario to direct the OPA to procure solar generating capacity from Samsung instead of directing the OPA to procure such capacity from the Claimant. At their core, both of these measures constitute or involve procurement decisions being made by Ontario and being implemented by the OPA.

D. The FIT Program and the Challenged Measures with respect to the Claimant's FIT Contract Are Procurement "by a Party or State Enterprise"

1. The Ordinary Meaning of "by a Party or State Enterprise"

333. The second element that must be met for the exception found in Article 1108 to apply is that the procurement be "by a Party or state enterprise".

334. While the NAFTA does not define "Party", there is no dispute that the obligations in Chapter 11 apply to measures at the federal and the provincial levels of government in Canada.⁷⁵⁰ If the obligations are applicable to both the central government and the governments of the territorial units,⁷⁵¹ it is logical that the exceptions would apply to all levels of government as well unless explicitly expressed otherwise. This was the express holding of the tribunal in *ADF v. United States*, which was squarely presented with this issue. In that case, the tribunal held that "the exclusionary effect of Article 1108(7)(a) and 8(b) operates on both federal and state governmental procurement."⁷⁵² Thus, as applied in the Canadian context, the phrase "procurement by a Party" includes procurement by either the federal government or a provincial government.

335. NAFTA defines "state enterprise" in Articles 201 and 1505 as "an enterprise owned, or controlled through ownership interests, by a Party." Again, while the term Party is not defined in

⁷⁵⁰ See NAFTA, Article 105, which provides that "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance [...] by state and provincial governments".

⁷⁵¹ **RL-029**, *ILC Articles - Commentary*, Article 4.

⁷⁵² **CL-022**, *ADF – Award*, ¶ 170.

the text of the NAFTA, as explained above, in this particular context, it would include a state enterprise owned or controlled through ownership interests by any level of government in a NAFTA Party.

2. The FIT Program and the Challenged Measures Here Involve Procurement by a Party and a State Enterprise

336. The FIT Program is a procurement program that was established pursuant to the Direction of the Minister of Energy. The Ministry of Energy directed the OPA to develop the FIT Program using sufficiently beneficial terms to ensure that investors would be willing to take the commercial risks necessary to develop a renewable energy sector that would be sufficiently robust to meet the province's future needs.⁷⁵³ Furthermore, the FIT Program is administered by the OPA – which Canada has demonstrated above is a state enterprise. Under the FIT Program, the OPA procures the generation of electricity pursuant to the terms of the FIT Contracts. Finally, the decision not to pay out the Claimant's FIT Contract and not to alternatively procure solar capacity from the Claimant, were also measures of Party that were implemented by a state enterprise.

E. Conclusion

337. For the above reasons, the FIT Program and the decisions made with respect to the Claimant's FIT Contract which form the basis of the Claimants Article 1102 and 1103 claims constitute or involve procurement by a NAFTA Party or state enterprise. Accordingly the exclusion in Article 1108(7)(a) applies and Articles 1102 and 1103 do not apply to the conduct at issue in this arbitration.⁷⁵⁴ The Claimant's claims based on those Articles must be dismissed.

II. The Claimant Has Failed to Demonstrate a Violation of Articles 1102 and 1103 – National Treatment and Most-Favoured-Nation Treatment

A. Summary of Canada's Position

338. The Claimant alleges that Canada has violated Article 1102 (National Treatment) through the Government of Ontario's decision to keep TransCanada "whole by awarding a new project

⁷⁵³ RWS-Lo, ¶ 15.

⁷⁵⁴ NAFTA, Articles 1108(7)(a), 1108(8)(b); **CL-022**, *ADF – Award*, ¶ 170.

and compensating it for its costs associated with the cancellation”⁷⁵⁵ following the cancellation of TransCanada’s contract for a gas-fired electricity generation facility. Second, it argues that Canada breached Article 1103 on the basis that “Ontario offered a FIT contract to Samsung for the very solar project that Windstream proposed following the moratorium as an alternative project”.⁷⁵⁶ As explained above in Section I, these claims are barred by the procurement exemption in Article 1108(7)(a). Nevertheless, if the Tribunal were to disagree, these claims are wholly without merit because the Claimant has failed to identify treatment accorded in like circumstances.

339. For its Article 1102 claim, the Claimant compares its treatment within the FIT Program to the treatment that the Ontario Government accorded to TransCanada when it cancelled the CES for a gas-fired generation facility, which provides a non-renewable source of energy and was not awarded under the FIT Program. For its Article 1103 claim, the Claimant points to the treatment that the Government of Ontario accorded to Samsung, pursuant to the GEIA. In drawing these comparisons, the Claimant ignores the different circumstances underlying the treatment accorded to each of these investors.

340. Not only has the Claimant identified comparators that are not in like circumstances, such as other types of energy source projects (i.e. gas and solar) that were developed pursuant to separate and different procurement programs, but it has also overlooked the treatment that was accorded to other entities in more like circumstances, namely, other offshore wind proponents. The Claimant does not point to other offshore wind proponents because it received more favourable treatment than they did, which clearly establishes that there was no nationality-based discrimination. The Claimant’s Project was kept alive whereas all other Crown land applications for offshore wind development were cancelled.

B. The Claimant Bears the Burden of Establishing the Essential Elements of Articles 1102 and 1103

341. NAFTA Articles 1102 and 1103 ensure treatment of foreign investors in accordance with the principles of national treatment and most-favoured nation treatment.

⁷⁵⁵ Claimant’s Memorial, ¶ 634.

⁷⁵⁶ Claimant’s Memorial, ¶ 645.

342. Article 1102 requires, in relevant part that:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

343. Article 1103 provides the same obligation on the basis of treatment accorded to investors and investments from a third country.

344. The Claimant bears the burden of showing that: (1) the government accorded both the claimant and the comparators “treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition” of their respective investment;⁷⁵⁷ (2) the government accorded the alleged treatment “in like circumstances”;⁷⁵⁸ and (3) the treatment accorded to the Claimant or its investments was “less favourable” than the treatment accorded to the comparator investors or investments.⁷⁵⁹

345. As noted by the *UPS* tribunal, “failure by the investor to establish one of these three elements will be fatal to its case”.⁷⁶⁰ This burden falls squarely on a claimant’s shoulders,⁷⁶¹ and it

⁷⁵⁷ **CL-061**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶¶ 81-82 (“*Merrill & Ring – Award*”); **CL-088**, *UPS – Award*, ¶ 83.

⁷⁵⁸ **CL-088**, *UPS – Award*, ¶ 83; **CL-060**, *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America* (ICSID Case No. ARB/98/3) Award on Merits, 26 June 2003, ¶ 139 (“*Loewen – Award*”); **CL-023**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007, ¶ 205 (“*ADM – Award*”); **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶ 252 (“*S.D. Myers – Partial Award*”).

⁷⁵⁹ **CL-088**, *UPS – Award*, ¶ 83.

⁷⁶⁰ **CL-088**, *UPS – Award*, ¶ 84. For example, if a comparator is determined not to be in like circumstances, NAFTA tribunals have concluded that there can be no violation of Article 1102 or 1103; **CL-088**, *UPS – Award*, ¶ 181; **CL-060**, *Loewen – Award*, ¶ 140; **RL-017**, *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01) Decision on Responsibility, 15 January 2008, ¶¶ 116-117.

⁷⁶¹ **CL-088**, *UPS – Award*, ¶ 84.

does not shift, as the Claimant suggests, “to the NAFTA Party to establish that the discriminatory treatment has a ‘reasonable nexus to rational government policies [...]’”⁷⁶²

346. Canada does not dispute that the Claimant has been accorded treatment, only that the treatment accorded to it was not in like circumstances to the treatment accorded to TransCanada or Samsung. The need for the Claimant to identify treatment accorded “in like circumstances” is a precondition to a finding of less favourable treatment, since treatment can only be less favourable with respect to the appropriate class of comparators.

C. The Claimant Has Failed to Identify Comparators that Are Accorded Treatment “in like circumstances”

347. The “like circumstances” analysis requires “consideration [...] of all of the relevant circumstances in which the treatment is accorded”.⁷⁶³ In particular, “the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority.”⁷⁶⁴ This is because “like circumstances” is often determined by the rationale for the measure that was being challenged.⁷⁶⁵ As explained by the tribunal in *Pope & Talbot*, “[a]n important element of the surrounding facts will be the character of the measures under challenge”.⁷⁶⁶ Therefore, a consideration of the meaning of ‘like circumstances’ requires a consideration of the overall legal context.

348. In this case, the Claimant’s investment was accorded treatment in its capacity as a participant in the FIT Program, a renewable energy procurement program with “standardized program rules, prices and contracts”.⁷⁶⁷ As explained in Section II of the Facts section above, the FIT Program is specifically designed to achieve certain public policy objectives, which include the procurement of energy from a wide-range of renewable energy sources and the promotion of

⁷⁶² Claimant’s Memorial, ¶ 641.

⁷⁶³ **CL-088**, *UPS – Award*, ¶ 87.

⁷⁶⁴ **CL-061**, *Merrill & Ring – Award*, ¶¶ 89-93; See also **CL-054**, *Grand River – Award*, ¶ 167.

⁷⁶⁵ **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 206-210, 213 (“*Cargill – Award*”).

⁷⁶⁶ **CL-075**, *Pope & Talbot Inc. v. Canada* (UNCITRAL) Award on the Merits, Phase II, 10 April 2001, ¶¶ 76-78.

⁷⁶⁷ **R-0450**, Ontario Power Authority website excerpt, “General Information about the FIT and microFIT Programs”. Available at: <http://fit.powerauthority.on.ca/program-resources/faqs/general-information-about-fit-and-microfit-programs>. See also sections II B-C of the Facts section above.

a green energy economy.⁷⁶⁸ The standardized features of the FIT Program and underlying policy objective are wholly different from the RFP for a gas-fired plant, which resulted in TransCanada's contract, and the GEIA, the investment agreement pursuant to which Samsung is accorded treatment. Neither TransCanada nor Samsung are participants in the FIT Program and neither of them had applied for Crown land to develop an offshore wind facility.

1. Treatment Accorded to TransCanada Was Not “In Like Circumstances”

349. The Claimant argues that the treatment accorded to TransCanada and Windstream is in like circumstances because they were “both parties to power purchase agreements with the OPA that guaranteed them a fixed price for electricity once their projects reached Commercial Operation”,⁷⁶⁹ “both contracts were under *Force Majeure*” and both contracts could be terminated by the OPA.⁷⁷⁰ The Claimant's analysis fails to consider: (1) that TransCanada's proposed Oakville power plant project (the “Oakville Plant”) was not a renewable energy project and it did not participate in the FIT Program; and (2) the different circumstances underlying each of the contracts, including differences pertaining to the Force Majeure situation, cancellation and settlement of TransCanada's Oakville Plant. Therefore, TransCanada and Windstream are not in like circumstances.

350. First, TransCanada's Oakville Plant was not a renewable energy project and it did not participate in the FIT Program. The Southwest GTA CES contract to build a 900 MW combined-cycle gas-fired electricity generation facility in Oakville was awarded to TransCanada as a result of a competitive procurement process initiated by a Direction from the Minister of Energy.⁷⁷¹ The OPA initiated the procurement process by releasing a Request for Qualifications (“RFQ”), which resulted in a shortlist of four proponents, followed by a Request for Proposals from the four shortlisted proponents.⁷⁷² An RFQ process is used to eliminate unqualified proponents, ensuring

⁷⁶⁸ Section II of Facts section above; See also RWS-Lo, ¶¶ 12-16.

⁷⁶⁹ Claimant's Memorial, ¶¶ 642-643.

⁷⁷⁰ Claimant's Memorial, ¶ 643.

⁷⁷¹ **C-0632**, Letter (Direction) from Chris Bentley, Minister of Energy to Colin Andersen, Ontario Power Authority (Dec. 13, 2012), p. 1; **C-0085**, Letter (Direction) from George Smitherman, Minister of Energy to Jan Carr, Ontario Power Authority (Aug. 18, 2008).

⁷⁷² **R-0079**, Ontario Power Authority website excerpt, “Southwest Greater Toronto Area” (Sep. 30, 2009 and Oct. 9, 2009). Available at: <http://www.powerauthority.on.ca/procurement-archive/southwest-greater-toronto-area>; **R-0060**, Ontario Power Authority, Request for Qualifications For Up To Approximately 850 MW of Generation in

that only those with the financial and technical expertise to complete the project are considered. No such process was followed in the FIT Program within which contracts were offered solely on the basis of transmission access and capacity.

351. Second, the Force Majeure situation of TransCanada was different from the Claimant's situation. TransCanada invoked Force Majeure because its efforts to obtain pre-construction approvals and permits⁷⁷³ were frustrated by the Town of Oakville's actions against the decision to locate a power plant there.⁷⁷⁴ In contrast, the Claimant invoked Force Majeure because MNR could not process its Crown land applications or entertain its request for a grid cell swap on account of MOE's undeveloped policy on offshore wind development.⁷⁷⁵

352. Third, TransCanada's specific contract to build a gas plant was cancelled by the Government of Ontario.⁷⁷⁶ TransCanada was to cease all further work and activities, enter into negotiations with the OPA for a settlement that would terminate the CES contract and compensate TransCanada for the economic consequences associated with the contract's termination.⁷⁷⁷ The decision to cancel TransCanada's project was by definition unique, in that this specific decision did not apply to any other gas plant in Ontario. In contrast, the deferral was a generally applicable government decision not to proceed with offshore wind development, which cancelled all FIT applications except for the Claimant's.

353. Finally, the circumstances following the cancellation of TransCanada's Oakville Plant and the decision to defer offshore wind development were different. In the case of TransCanada, the

the Southwest Greater Toronto Area (Oct. 2, 2008). Available at:

http://www.powerauthority.on.ca/sites/default/files/page/1212_Southwest_GTA_RFQ_-_October_2,_2008.pdf.

⁷⁷³ **R-0071**, Southwest GTA Clean Energy Supply Contract Blackline (May 12 – Jun. 19, 2009), s.11.1 and Exhibit F.

⁷⁷⁴ **R-0451**, Town of Oakville website excerpt, "Proposed TransCanada Power Plant – Cancelled by the Province". Available at: <http://www.oakville.ca/environment/proposed-transcanada-power-plant.html>; **R-0452**, Town of Oakville website excerpt, "Power Generation Facility Background". Available at: <http://www.oakville.ca/assets/general%20-%20environment/PPChronologyOfEvents.pdf>.

⁷⁷⁵ See **C-0408**, FIT Contract Form of Force Majeure Notice, Exhibit A, ¶¶ 2-15 (Dec. 10, 2010).

⁷⁷⁶ **C-0632**, Letter (Direction) from Chris Bentley, Minister of Energy to Colin Andersen, Ontario Power Authority (Dec. 13, 2012).

⁷⁷⁷ See **R-0453**, TransCanada website excerpt, "TransCanada Corporation 2010 Annual Report – Energy Opportunities and Developments". Available at: http://www.transcanada.com/investor/annual_reports/2010/mda/energy/opportunities_and_developments/.

Government of Ontario, the OPA and TransCanada entered into an arbitration agreement, which eventually led to an agreement on a relocation settlement.⁷⁷⁸ On the other hand, the Claimant was told that its project was being frozen and that, together with the OPA, it should arrange a satisfactory solution with respect to Force Majeure, termination rights and security for costs.

354. It is clear from the review of the two sets of circumstances that they are far from like. Indeed, accepting the Claimant's position that they are in like circumstances would lead to absurd results. It would place all recipients of PPA's for electricity in like circumstances regardless of the type of energy sources being procured, the method of procurement, the contract at issue, or the regulatory framework within which such procurement occurs. It would also prevent the Government from being able to reach individualized settlement solutions.

2. Treatment Accorded to Samsung Was Not "in like circumstances"

355. The Claimant alleges that the "treatment of Samsung, a South Korean company [is] in like circumstances" because "Ontario offered a FIT contract to Samsung for the very solar project that Windstream proposed following the [deferral]".⁷⁷⁹ Yet, the Claimant does not elaborate this argument or provide any evidence to support it, merely stating that "the circumstances surrounding the awarding of the solar project to Samsung are not currently known to Windstream".⁷⁸⁰ The Claimant's failure to consider all of the relevant circumstances demonstrates that it has not met its burden of proving that Samsung was accorded treatment "in like circumstances".

356. In addition, the assumptions that the Claimant makes are false. Samsung did not participate in the FIT Program and it never received a FIT Contract. Rather, it entered into the GEIA, a specific investment agreement negotiated with the Ontario Government that was valued at \$7

⁷⁷⁸ **C-0632**, Letter (Direction) from Chris Bentley, Minister of Energy to Colin Andersen, Ontario Power Authority (Dec. 13, 2012), p. 1; **R-0158**, Ministry of Energy, News Release, "Oakville Power Plant Not Moving Forward" (Oct. 7, 2010). Available at: <http://news.ontario.ca/mei/en/2010/10/oakville-power-plant-not-moving-forward.html>; **R-0491**, Memorandum of Understanding between TransCanada Energy Ltd. and Her Majesty the Queen in Right of Ontario and Ontario Power Authority (Sep. 24, 2012). Available at: http://www.powerauthority.on.ca/sites/default/files/news/DOCS-%2311803315-v8-Oakville_GS_Alternative_Project_MOU.PDF; **R-0492**, Ontario Power Authority, web site excerpt, "Contract Finalized to Relocate TransCanada Power Plant to Napanee" (Dec. 17, 2012). Available at: <http://www.powerauthority.on.ca/news/contract-finalized-relocate-transcanada-power-plant-napanee>.

⁷⁷⁹ Claimant's Memorial, ¶ 645.

⁷⁸⁰ Claimant's Memorial, ¶ 645.

billion.⁷⁸¹ The GEIA provided for the construction of 2,500 MW of renewable energy generation in Ontario (2,000 MW of wind power and 500 MW of solar), which was expected to occur in five phases.⁷⁸² In particular, the development discussions between Ontario and Samsung for the 100 MW Sol-luce Kingston Solar PV Energy Project began in 2010 with environmental studies of the area commencing in February 2011.⁷⁸³

357. This means that the development of the Sol-luce project was already well underway by the time Windstream approached the Ontario Government with its proposal for a 300MW solar energy project in Lennox County in April 2011.⁷⁸⁴ Therefore, it is impossible to conclude that “Windstream and Samsung were in like circumstances as two possible recipients of contracts to develop the solar project”.⁷⁸⁵

D. The Claimant Was Accorded More Favourable Treatment than Investors that Were in More Like Circumstances

358. The Claimant overlooks other investors that have been accorded treatment in more like circumstances to it, namely the other offshore wind proponents, who were affected by the Government of Ontario's decision not to proceed with offshore wind development. All of these investors, irrespective of their nationality, were not allowed to proceed to develop an offshore wind project.

359. The Claimant seeks to distinguish itself from the above class of comparators on the basis that it was the only offshore wind proponent that was offered a FIT Contract. Although true, this does not justify its attempt to ignore an entire class of comparators who are in more like

⁷⁸¹ See **R-0076**, The Star News Article, Hamilton, Tyler, “Ontario eyes green job bonanza” (Sep. 26, 2009). Available at: http://www.thestar.com/business/2009/09/26/ontario_eyes_green_job_bonanza.html; **R-0087**, Ministry of Energy Archived Backgrounder, “Ontario Delivers \$7 Billion Green Investment” (Jan. 21, 2010). Available at: <http://news.ontario.ca/mei/en/2010/01/backgrounder-20100121.html>.

⁷⁸² **R-0087**, Ministry of Energy Archived Backgrounder, “Ontario Delivers \$7 Billion Green Investment” (Jan. 21, 2010).

⁷⁸³ For example, as stated in the draft project description report, “environmental studies of the area commenced in February 2011”. **R-0253**, AMEC, Samsung Sol-Luce Kingston Solar PV Energy Project: Project Description Report Draft (Jul. 2011), p. 2, s. 1.4. Available at: www.samsungrenewableenergy.ca/sites/default/files/pdf/SRE-ProjectDescriptionReport-20110726.pdf.

⁷⁸⁴ **C-0522**, Announcement (Windstream Energy Inc.), Windstream Intention to Develop Lennox Area Ground-Mount Solar PV (Apr. 11, 2011); **C-0523**, Map (Ortech), Windstream-Potential Development Areas (Apr. 11, 2011); **C-0524**, Map (Ortech), Usable Areas (Apr. 11, 2011).

⁷⁸⁵ Claimant's Memorial, ¶ 645.

circumstances in favour of remote comparators. As explained by the *ADM* Tribunal, “when no identical comparators exist, the foreign investor may be compared with less like comparators, if the overall circumstances of the case suggest that they are in like circumstances.”⁷⁸⁶

360. Given that the Claimant was the only offshore wind proponent to receive a FIT Contract, the better comparators are other offshore wind proponents who were affected by the February 11, 2011 decision not to proceed to with offshore wind development.⁷⁸⁷ The decision cancelled all existing FIT and Crown land applications and precluded any new applications. However, it also stipulated that “the MNR will be cancelling all existing Crown land applications for offshore wind development that do not have a Feed-In-Tariff contract”.⁷⁸⁸ This meant that every Crown land application for offshore wind was cancelled except for the Claimant's. Furthermore, the Claimant's FIT Contract was not cancelled.⁷⁸⁹ Since the Claimant's Project was frozen and its Crown land application was not cancelled, it was in fact accorded more favourable treatment than this class of comparators. Therefore, its claims of breaches of Articles 1102 and 1103 must fail.

III. The Claimant Has Failed to Demonstrate a Violation of Article 1105(1) – Minimum Standard of Treatment

A. Summary of Canada's Position

361. The Claimant alleges that the Government of Ontario's adoption and implementation of its decision to defer the development of offshore wind farms in the Great Lakes until it had completed the necessary scientific research to support the creation of a comprehensive and adequate regulatory structure violated Canada's obligations under Article 1105. In particular, the Claimant alleges that Ontario's adoption and implementation of the deferral violated Canada's

⁷⁸⁶ **CL-023**, *ADM – Award*, ¶ 202.

⁷⁸⁷ As of February 11, 2011, the OPA had received four offshore wind FIT applications, which included three 10 MW FIT applications from SouthPoint Wind. In addition, Ontario was aware of at least three other large-scale offshore wind projects proposed by proponents, including Toronto Hydro, Trillium Power Wind Corporation and Erie Wind. **R-0089**, Ministry of Environment, Presentation, “Developing Offshore Wind Project Requirements” (Mar. 2010), slide 6; **R-0098**, E-mail from Marcia Wallace, Ministry of the Environment to Agatha Garcia-Wright, Ministry of the Environment (Apr. 13, 2010); **C-0240**, Ministry of Energy Presentation, “Offshore Wind and the *Green Energy Act*, PO Briefing (Apr. 30, 2010), slide 3.

⁷⁸⁸ **C-0725**, EBR Decision Notice.

⁷⁸⁹ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), pp. 7-9.

obligation to provide the Claimant with the customary international law minimum standard of treatment because it (1) was arbitrary and grossly unfair;⁷⁹⁰ (2) constituted a repudiation of the regulatory framework;⁷⁹¹ (3) violated the commitments and representations made by Ontario contrary to the Claimant's legitimate expectations;⁷⁹² and (4) was discriminatory.⁷⁹³ The Claimant's allegations are meritless.

362. First, the decision to defer the development of offshore wind farms was neither manifestly arbitrary nor grossly unfair. Far from being "politically motivated" as alleged by the Claimant,⁷⁹⁴ the decision was the result of legitimate environmental policy concerns to ensure that the regulatory framework would be developed, and offshore wind development allowed to proceed, on a scientific basis protective of human health and the environment.

363. Second, the decision was not a repudiation of the regulatory framework. To the contrary, the decision to defer the development of offshore wind farms was taken based on a precautionary approach to the administration of the REA Regulation and reflected the need for further research before a regulatory framework for offshore wind could be finalized.

364. Third, the Claimant has failed to demonstrate that Article 1105 obligates Canada to respect all of the Claimant's expectations. It does not. Article 1105 does not guarantee an unchanging regulatory framework and the Claimant has failed to identify any specific commitments or representations by the Government of Ontario that could reasonably have been relied on by the Claimant in deciding to invest in Ontario.

365. Fourth, the Claimant has failed to demonstrate that the minimum standard of treatment under customary international law protects investors against the sort of discrimination that the Claimant alleges that it suffered. Indeed, it is entirely unclear how the Claimant's claim for a breach of Article 1105 is any different from its baseless claims under Article 1102 and 1103.

⁷⁹⁰ Claimant's Memorial, ¶¶ 604-622.

⁷⁹¹ Claimant's Memorial, ¶¶ 612-615.

⁷⁹² Claimant's Memorial, ¶¶ 604-622.

⁷⁹³ Claimant's Memorial, ¶¶ 624-633.

⁷⁹⁴ Claimant's Memorial, ¶¶ 616-622.

While Article 1105 might obligate Canada to avoid invidious forms of discrimination such as racial or religious discrimination, it does not overlap with Articles 1102 and 1103.

366. Ultimately, Article 1105 obligates Canada to refrain from only the sort of egregious conduct that would shock the judicial conscience. None of the challenged measures in this case amount to such conduct. The Claimant may be disappointed that the regulatory framework for offshore wind has not developed as quickly as it would have liked. However, the NAFTA does not guarantee that every legitimate policy decision made by a government will operate to the benefit of foreign investors. The Claimant decided to invest in Ontario's new green energy economy, fully knowing that the regulatory regime for offshore wind projects was still under development and without any guarantee that it would be developed in time for it to fulfil its obligations under the FIT Contract. By accepting the OPA's FIT Contract offer, the Claimant not only committed to bringing its project to Commercial Operation by the MCOB stated in its FIT Contract, but it also accepted the risks associated with not meeting the MCOB.⁷⁹⁵ Moreover, when it was clear that the regulatory framework would not be developed as quickly as needed for the Claimant to comply with its obligations under the FIT Contract, the OPA was willing to take measures that would have ensured that the Claimant was not prejudiced by the operation of the deferral.⁷⁹⁶ The Claimant refused these offers. In sum, all of the measures in this dispute, considered in their whole and in the appropriate context, were consistent with Canada's obligations under Article 1105.

B. Article 1105(1) only Requires Canada to Accord the Customary International Minimum Standard of Treatment of Aliens

367. NAFTA Article 1105(1) provides:

Article 1105: *Minimum Standard of Treatment* 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.

⁷⁹⁵ R-0092, FIT Contract, v. 1.3, Schedule 1, s. 2.5.

⁷⁹⁶ The OPA's accommodation of Windstream's Project included the extensions granted for the signing of the FIT Contract and the one year extension of the MCOB. See Facts Section V (D).

368. The proper interpretation of Article 1105 was confirmed by the NAFTA Free Trade Commission (“FTC”) in its binding Note of Interpretation of July 31, 2001, which states:

1. 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.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).⁷⁹⁷

369. The FTC Note of Interpretation represents the definitive meaning to be given to Article 1105(1) and is binding on all arbitration tribunals constituted under NAFTA Chapter 11.⁷⁹⁸ As the tribunal in *ADF v. United States* observed, “[n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA is possible.”⁷⁹⁹ Since the FTC Note of Interpretation, NAFTA tribunals have invariably recognized its binding effect, and affirmed that Article 1105(1) only requires treatment in accordance with the customary international law minimum standard of treatment.⁸⁰⁰

370. As the International Court of Justice (“ICJ”), prominent scholars, and several NAFTA tribunals have all confirmed, the party alleging the existence of a rule of customary international

⁷⁹⁷ **CL-010**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions (31 July 2001), s. 2 (“NAFTA, Note of Interpretation”).

⁷⁹⁸ NAFTA, Chapter 11, Article 1131(2) states “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”

⁷⁹⁹ **CL-022**, *ADF – Award*, ¶ 177.

⁸⁰⁰ NAFTA, Chapter 11, Article 1131(2). See **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chap. C, p. 9, ¶ 20 (“*Methanex – Award*”); **CL-066**, *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶¶ 100-125 (“*Mondev – Award*”); **CL-022**, *ADF – Award*, ¶¶ 175-178; **CL-060**, *Loewen – Award*, ¶ 126; **CL-091**, *Waste Management, Inc. v. United Mexican States*, Award (ICSID ARB(AF)/00/3), 30 April 2004, ¶¶ 90-91 (“*Waste Management II – Award*”); **C-057**, *International Thunderbird Gaming Corporation v. United Mexican States*, (UNCITRAL) Award, 26 January 2006, ¶¶ 192-193 (“*Thunderbird – Award*”); **CL-053**, *Glamis Gold, Ltd. v. United States of America*, (UNCITRAL), Award, 8 June 2009, ¶ 599 (“*Glamis – Award*”). **CL-031**, *Cargill – Award*, ¶ 268; **CL-064**, *Mobil – Award*, ¶ 135; **RL-005**, *Apotex Inc. v. United States* (UNCITRAL) Award, 25 August 2014, ¶¶ 9.3-9.4 (“*Apotex – Award*”).

law has the burden of proving it.⁸⁰¹ The Claimant must therefore discharge two burdens: first, it must show that a customary rule of international law exists, and second, that Canada has breached it. The *UPS* Tribunal explained that “to establish a rule of customary international law, two requirements must be met: consistent State practice and an understanding that the practice is required by law”.⁸⁰² Similarly, the *Cargill* Tribunal held that where the existence of custom has not been demonstrated, “it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted”.⁸⁰³

C. The Claimant Has Failed to Prove that the Autonomous Fair and Equitable Treatment Standard and the Customary International Law Minimum Standard of Treatment of Aliens Are the Same Standard

371. Through the Expert Report of Professor Dr. Rudolf Dolzer, the Claimant argues that:

⁸⁰¹ **RL-056**, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176, Judgment, 27 August 1952, p. 200 citing *The Asylum Case (Colombia v. Peru)*, [1950] I.C.J. Rep. 266: (“The Party which relies on custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”); See also, **RL-011**, Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p. 12: (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.”) (“*Brownlie*”); **CL-022**, *ADF – Award*, ¶ 185: (“The investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that the current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); See also, **CL-087**, *United Parcel Service of America, Inc. v. Government of Canada (UNCITRAL) Award on Jurisdiction*, 22 November 2002 (“*UPS – Award on Jurisdiction*”), ¶ 84: (“the obligations imposed by customary international law may and do evolve. The law of state responsibility of the 1920s may well have been superseded by subsequent developments. It would be remarkable were that not so. *But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law.*”[emphasis added]).

⁸⁰² **CL-087**, *UPS - Award on Jurisdiction*, ¶ 84; See also, **CL-069**, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969], I.C.J. Rep. 4, Judgment, 20 February 1969 (“*North Sea Continental Shelf Cases – Judgment*”), ¶ 74: (it is “an indispensable requirement” to show that “State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”); **CL-032**, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* [1985] I.C.J. Rep.13, ¶ 27: (“it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States [...]”); **RL-039**, *Nicaragua - Award*, ¶ 207: (“For a new customary rule to be formed, not only must the acts concerned ‘amount to settled practice’, but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or the other States in a position to react to it must have behaved so that their conduct is ‘evidence of a belief that this is practice is rendered obligatory by the existence of a rule of law requiring it.’”).

⁸⁰³ **CL-031**, *Cargill – Award*, ¶ 273.

there is no functional difference between FET provisions that are autonomous and FET provisions that provide for FET protection “in accordance with international law” or “in accordance with customary international law.”⁸⁰⁴

372. Professor Dolzer bases his conclusion solely on “the proliferation of BITs and other investment treaties that contain FET provisions, combined with the fact that states are acting out of a sense of obligation in entering into these provisions”.⁸⁰⁵ He argues that this is sufficient to provide evidence of both state practice and *opinio juris*. However, this position fails to recognize the fact that the two formulations of the provisions in question (referred to below as the “autonomous standard” and the “customary international law minimum standard of treatment”) are substantively different standards of treatment.

373. Professor Dr. Dolzer's current opinion is at odds with the position that he and Professor Schreuer previously held. In 2008, they argued that “in the context of NAFTA, the three state parties decided that the standards of ‘fair and equitable treatment’ and ‘full protection and security’ must be understood to require host states to observe customary [international] law and *not more demanding autonomous treaty-based standards*.”⁸⁰⁶

374. In the 2012 edition of the same text, the Professors maintained their view that “[i]n contrast to the NAFTA practice,” arbitral tribunals applying the autonomous FET standard have tended to interpret the provision “on the basis of their respective wording.”⁸⁰⁷ However, they added that “[s]ome of these tribunals” have “insisted that FET is not different from the international minimum standard.”⁸⁰⁸ This minority of cases is apparently what they rely upon to conclude that “[t]here are growing doubts” about the whole debate.⁸⁰⁹ It would appear that they changed their

⁸⁰⁴ CER-Dolzer, ¶ 64.

⁸⁰⁵ CER-Dolzer, ¶ 64.

⁸⁰⁶ **RL-018**, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), p. 16.

⁸⁰⁷ **RL-060**, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), p. 137 (“*Dolzer 2012*”).

⁸⁰⁸ *Ibid.*

⁸⁰⁹ **RL-060**, *Dolzer 2012*, p. 138.

opinion based on “some” non-NAFTA tribunal decisions, rather than on the two well-established constitutive elements of custom: state practice or *opinio juris*.⁸¹⁰

375. The FTC Note of Interpretation is clear on this point: the concept of “fair and equitable treatment” in Article 1105 “[does] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”⁸¹¹

376. Despite recognizing the evolution of customary international law, NAFTA tribunals have consistently found that arbitral awards applying “autonomous standard[s] provide[] no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom.”⁸¹² Such awards are not relevant in the context of NAFTA Article 1105 because they apply a different standard. As the *Cargill* Tribunal most recently explained, “significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom”.⁸¹³

377. Accordingly, for an arbitral decision to be at all relevant to understanding the content of Article 1105, the tribunal rendering it must at least be considering the customary international law minimum standard of treatment. As the tribunal in *Glamis v. United States* explained, international arbitration awards can “serve as illustrations of customary international law if they involve an examination of customary international law,” but they “do not constitute State practice and thus cannot create or prove customary international law”.⁸¹⁴ While fair and equitable treatment may be described in the decisions of international tribunals, this does not mean that fair and equitable treatment, itself, has become a rule of customary international law.

⁸¹⁰ **RL-060**, *Dolzer 2012*, pp. 134-139.

⁸¹¹ **CL-010**, NAFTA, Note of Interpretation, ¶ 2.2.

⁸¹² **CL-053**, *Glamis – Award*, ¶ 608; *See also* **CL-031**, *Cargill – Award*, ¶ 278 (Arbitral awards are “relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”).

⁸¹³ **CL-031**, *Cargill – Award*, ¶ 276. *See also* **CL-087**, *UPS - Award on Jurisdiction*, ¶ 97: (“in terms of *opinio juris* there is no indication that [the BITs] reflect a general sense of obligation.”).

⁸¹⁴ **CL-053**, *Glamis - Award*, ¶¶ 605-607; *See also* **CL-031**, *Cargill – Award*, ¶ 277: (“It is important to emphasize, however, as Mexico does in this instance that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom.”).

378. Similarly, tribunals interpreting the autonomous standard of “fair and equitable treatment” have also emphasized the distinction to be made with the customary international law minimum standard of treatment. For example, as the *Enron* Tribunal concluded, “the fair and equitable treatment standard, at least in the context of the treaty applicable in this case [the U.S. – Argentina BIT], can also require a treatment additional to, or beyond that of, customary international law.”⁸¹⁵ While Professor Dolzer has cited the *El Paso* Tribunal’s determination that the “position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law”, this statement was only made with respect to its determination that the fair and equitable treatment standard was to be interpreted in accordance with international law, rather than national law.⁸¹⁶ In doing so, the Tribunal decided not to rule on the issue regarding the relationship between the fair and equitable treatment standard and minimum standard of treatment.⁸¹⁷

379. In light of the distinct scope of the substantive standards included in various treaties, Professor Dolzer’s conclusion that states are generally required by customary international law to provide fair and equitable treatment to investors of other states must be rejected. The autonomous fair and equitable treatment standard and the minimum standard of treatment under customary international law are different standards.

D. The Threshold to Establish a Breach of Article 1105 Is High

380. The Claimant’s erroneous approach to establishing the content of Article 1105, described above, leads the Claimant to misconstrue the threshold for a violation of Article 1105(1). Article 1105(1) was included in NAFTA Chapter 11 “to avoid what might otherwise be a gap”⁸¹⁸

⁸¹⁵ **RL-023**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID No. ARB/01/3) Award, 22 May 2007, ¶ 258; *See also*, **RL-049**, *Sempra Energy International v. Argentine Republic* (ICSID No. ARB/02/16) Award, 28 September 2007, ¶ 302.

⁸¹⁶ **CL-047**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, ¶¶ 336-337 (“*El Paso – Award*”).

⁸¹⁷ Specifically, as explained by the tribunal in ¶ 335, it considered this discussion to be “somewhat futile as the scope and content of the minimum standard of international law is as little defined as the BIT’s FET standard”, **CL-047**, *El Paso – Award*, ¶¶ 331-335.

⁸¹⁸ **CL-081**, *S.D. Myers – Partial Award*, ¶ 259.

and to establish a “floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner”.⁸¹⁹

381. The “floor” articulated in Article 1105 does not invite NAFTA tribunals to second-guess government policy and decision-making. To the contrary, international law provides a “high measure of deference ... to the right of domestic authorities to regulate matters within their own borders.”⁸²⁰ As noted by the *S.D. Myers* tribunal, “[w]hen interpreting and applying the ‘minimum standard’, a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making” as “[g]overnments have to make many potentially controversial choices”.⁸²¹

382. Accordingly, the threshold for proving a violation of the customary international law minimum standard of treatment under Article 1105(1) is extremely high.⁸²² Indeed, following the FTC Note of Interpretation, NAFTA tribunals have consistently affirmed that a violation of the minimum standard of treatment under customary international law will not be found unless there is evidence of egregious conduct, such as serious malfeasance, manifestly arbitrary behaviour or denial of justice by the respondent NAFTA Party.

383. The tribunal in *S.D. Myers* elaborated on the international minimum standard as follows:

[t]he Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international

⁸¹⁹ *Ibid.*

⁸²⁰ **CL-081**, *S.D. Myers – Partial Award*, ¶ 263.

⁸²¹ **CL-081**, *S.D. Myers – Partial Award*, ¶ 261.

⁸²² NAFTA tribunals since the FTC *Note of Interpretation* was issued in July 2001 have confirmed that the threshold for a violation of Article 1105 is high and requires an action that amounts to gross misconduct or manifest unfairness such that it breached the international minimum standard of treatment. See **CL-066**, *Mondev – Award*, ¶ 127: (“In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable [...]”). The *ADF* Tribunal held that “something more than simple illegality or lack of authority under the domestic law of a State is necessary” to establish a violation of Article 1105(1) (**CL-022**, *ADF – Award*, ¶ 190). In summarizing the consideration of what constituted a breach of the minimum standard of treatment, the *Waste Management* Tribunal indicated that the standard would be breached by conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in the administrative process.” (**CL-091**, *Waste Management II – Award*, ¶ 98).

perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.⁸²³

384. Similarly, the *Thunderbird* Tribunal observed that “the threshold for a violation of the minimum standard of treatment still remains high”, holding that the conduct of the host State would have to be “manifestly arbitrary or unfair” in order to breach Article 1105.⁸²⁴ In that case, mere “arbitrary” conduct of an administrative agency was insufficient to constitute a breach of Article 1105(1); rather, as that Tribunal explained, the government action must amount to a “gross denial of justice or manifest arbitrariness falling below accepted international standards” in order to breach the minimum standard of treatment.⁸²⁵

385. The tribunal in *Waste Management v. Mexico* summarized the minimum standard of treatment under customary international law as described by previous NAFTA Chapter 11 tribunals in *S.D. Myers v. Canada*, *Mondev v. United States*, *ADF v. United States* and *Loewen v. United States* and concluded that in order for there to be a breach of Article 1105, the impugned conduct must have been “arbitrary, grossly unfair, unjust or idiosyncratic” or “involve[] a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings...”⁸²⁶

386. The *Glamis* Tribunal summarized the high threshold as follows:

⁸²³ **CL-081**, *S.D. Myers – Partial Award*, ¶ 263.

⁸²⁴ **CL-057**, *Thunderbird – Award*, ¶¶ 194, 197: (“[T]he Tribunal cannot find sufficient evidence on the record establishing that the SEGOB proceedings were arbitrary or unfair, *let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment.*”) (emphasis added). It is also noteworthy that the Tribunal acknowledged that administrative proceedings “may have been affected by certain procedural irregularities”). However, the tribunal held that there were no “administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment.” **CL-057**, *Thunderbird – Award*, ¶ 200.

⁸²⁵ **CL-057**, *Thunderbird – Award*, ¶ 194.

⁸²⁶ See **CL-091**, *Waste Management II – Award*, ¶ 98 (“Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”).

[a] violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105.⁸²⁷

387. Citing with approval the exacting standard described by the tribunal in *Waste Management II*, the tribunal in *Cargill v. Mexico* confirmed again that a measure must be of serious gravity to breach the threshold protected by Article 1105. Echoing the same rule set out by the *Glamis* Tribunal,⁸²⁸ the *Cargill* Tribunal wrote:

[t]o determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained-of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected or shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.⁸²⁹

388. Finally, most recently the tribunal in *Mobil v. Canada* had the opportunity to discuss the applicable standard in relation to Article 1105.⁸³⁰ It noted that:

Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no

⁸²⁷ **CL-053**, *Glamis – Award*, ¶ 627 (emphasis added).

⁸²⁸ **CL-053**, *Glamis – Award*, ¶ 627.

⁸²⁹ **CL-031**, *Cargill – Award*, ¶ 296 (emphasis added).

⁸³⁰ **CL-064**, *Mobil Investments Canada, Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012), ¶¶ 152-153 (“*Mobil – Decision*”).

material changes to the regulatory framework within which an investment is made. Governments change, policies change and rules change.⁸³¹

389. While the content of the international minimum standard may evolve over time with the development of customary international law,⁸³² it is clear from the consistent post-FTC Note of Interpretation NAFTA jurisprudence discussed above that the measure in question must hit a high level of severity and gravity in order to breach the exacting threshold set by Article 1105.⁸³³ Indeed, the use of adjectives such as “egregious,” “shocking,” “gross,” “blatant,” “manifest,” “complete,” and “wilful” is no accident. All of the tribunals noted above have recognized the extremely high threshold for establishing a violation of Article 1105(1). All recognized the high level of deference to be accorded to domestic authorities in governing affairs within their own borders.

E. The Claimant Has Failed to Prove that Both the Decision to Defer the Development of Offshore Wind Farms and Ontario's Subsequent Treatment of the Claimant Was a Breach of Article 1105

1. The Decision to Defer the Development of Offshore Wind Farms Was Neither Manifestly Arbitrary Nor Grossly Unfair

390. The Claimant's allegation that Ontario's decision to defer the development of offshore wind was made because of “economic benefit, along with electoral politics” is unsubstantiated by the evidentiary record. Indeed, the Claimant's allegation that “Ontario has realized an

⁸³¹ **CL-064**, *Mobil – Decision*, ¶ 153; see also **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 305: (“No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”) (“*Saluka – Partial Award*”); **RL-041**, *Parkerings-Compagniet AS v. Republic of Lithuania*, Award (ICSID ARB/05/8), 11 September 2007, ¶ 332: (“It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made his investment.”).

⁸³² As Canada stated in its Article 1128 submission in the *ADF* case: (“Canada's position has never been that the customary international law regarding the treatment of aliens was “frozen in amber” at the time of the *Neer* decision. Obviously, what is shocking or egregious in the year 2002 may differ from that which was considered shocking or egregious in 1926. Canada's position has always been that customary international law can evolve over time, but that the threshold for finding violation of minimum standard of treatment is still high.”), **RL-002**, *ADF Group Inc. v. United States*, Second Submission of Canada Pursuant to NAFTA Article 1128 (ICSID ARB(AF)/00/1), 19 July 2002, ¶ 33.

⁸³³ See **RL-019**, Patrick Dumberry, *The Fair And Equitable Treatment Standard: A Guide To NAFTA Case Law On Article 1105* (2013), p. 262 (past NAFTA tribunals “have emphasized that a high threshold of severity and gravity is required in order to conclude that the host state has breached any of the elements contained within the FET standard under Article 1105.”), cited with approval in **RL-005**, *Apotex – Award*, ¶ 9.47.

economic benefit of between \$1.3 and \$2.1 billion” as a result of the deferral, is based on the Claimant’s own assumptions about cost of production, pricing, how much energy the Claimant’s Project would generate and how much energy Ontario needs.⁸³⁴ The Claimant’s assumptions are flawed. For example, contrary to what it assumes, the cost projections in the 2010 LTEP included the 300 MW allotted for the Claimant’s FIT Contract.⁸³⁵ But more importantly, the Claimant’s allegation is based on the assumption that the Government of Ontario terminated the Claimant’s Project. This did not occur. As explained above, Ontario did not and has not attempted to terminate the Claimant’s Project. Moreover, the evidence in the record does not support the Claimant’s argument that the reason the Government of Ontario deferred offshore wind development was because of economics.

391. Similarly, there is no evidence in the record to support the Claimant’s allegation that the decision to defer offshore wind development was made because of electoral politics. The Claimant has failed to cite a single contemporaneous government document that has been produced in this arbitration, from four separate ministries, Cabinet Office and the Premier’s Office, containing any reference whatsoever to political considerations driving this decision. This is an allegation that has been manufactured by the Claimant and other interested industry participants who opposed the actual basis for the decision. Mr. John Wilkinson, the Minister of the Environment at the time, has confirmed that his decision had nothing to do with politics.⁸³⁶

392. In contrast to the dearth of evidence presented by the Claimant to back up its wild accusations, the record is replete with evidence concerning the reason for the deferral. As explained in the February 11, 2011 announcement of the deferral itself, the reason for this decision was that additional scientific research was needed to ensure that the policy framework for offshore wind that was under development would have an adequate foundation.⁸³⁷

⁸³⁴ Claimant’s Memorial, ¶¶ 476-477, 621.

⁸³⁵ RWS-Lo, ¶ 36.

⁸³⁶ RWS-Wilkinson, ¶¶ 21-22.

⁸³⁷ **C-0725**, EBR Decision Notice; **C-0480**, Ministry of the Environment, News Release, “Ontario Rules Out Offshore Wind Projects: McGuinty Government Committed to Renewable Energy while Protecting the Environment” (Feb. 11, 2011).

393. As explained above,⁸³⁸ the REA process was intended to be a standardized and prescriptive process that was able to ensure that renewable energy projects were developed in a way that was protective of human health and the environment.⁸³⁹ Accordingly, the determination of the requirements that a proponent would be required to satisfy was a necessary prerequisite for the issuance of REAs for offshore wind projects.

394. Further, the REA process also provides third-parties with a right to appeal the Director's decision to the ERT and to further appeal a decision of the tribunal to the Divisional Court and the Minister of the Environment.⁸⁴⁰ In this context, Ontario adopted a cautious approach, especially in light of the public opposition to offshore wind. As explained by Ms. Dumais:

MOE needed to be in a position to defend a Director's decision to grant or refuse a REA for an offshore wind project before we would issue a decision. We needed to be confident that any decision made with regards to any offshore wind project be an evidence-based decision, using the best available science, which at the time we felt we did not have.⁸⁴¹

395. Indeed, as Dr. Wallace indicates, given the worldwide lack of experience with respect to large-scale offshore wind projects in freshwater, MOE and MNR had not yet fully determined the rules, standards and requirements for offshore wind proponents to obtain a REA.⁸⁴² The underdeveloped status of the REA Regulation for offshore wind projects was communicated to the public even before the FIT Program was established, and certainly before the Claimant filed its FIT Applications. It was announced through the MOE's June 2009 REA Regulation Proposal Notice, September 2009 REA Regulation Decision Notice and its March 2010 Technical Bulletins Policy Proposal Notice, which expressly stated that MOE and MNR were to continue to work on developing future regulatory requirements for offshore wind facilities.⁸⁴³ The ongoing

⁸³⁸ See ¶¶ 71-147 above.

⁸³⁹ RWS-Wallace, ¶ 7.

⁸⁴⁰ **C-0103**, *Environmental Protection Act*, Ontario Regulation 359/09; RWS-Dumais, ¶ 64.

⁸⁴¹ RWS-Dumais, ¶ 66.

⁸⁴² RWS-Wallace, ¶ 11, 17-18.

⁸⁴³ RWS-Wallace, ¶¶ 13-16. See **R-0070**, REA Regulation Proposal Notice; **C-0126**, Proposed REA Regulation Content; **R-0072**, REA Regulation Decision Notice; **C-0188**, Ministry of the Environment, "Policy Proposal Notice: Renewable Energy Approval Technical Guidance Bulletins" (EBR Registry No. 010-9235) (Mar. 1, 2010) ("Technical Bulletins Policy Proposal Notice"). Available at: <http://www.ebr.gov.on.ca/ERS-WEB->

development of the regulatory framework for offshore was also publicly communicated on June 25, 2010, during the time that the Claimant was evaluating the OPA's FIT Contract offer and prior to its acceptance of that offer.⁸⁴⁴

396. Following MOE's technical studies on offshore wind and the closing of the consultation period of its Offshore Wind Policy Proposal Notice, MOE began considering options for how to move forward in developing the regulatory framework for offshore wind.⁸⁴⁵ At the same time, Ontario was working with its U.S. neighbours to explore opportunities to undertake collaborative research,⁸⁴⁶ which was meant to leverage resources and expertise from within the entire Great Lakes region. The scientific and technical challenges around large-scale freshwater offshore wind development that needed to be addressed included how noise promulgates over water and ice, foundation designs, water quality impacts, and impacts to shoreline ecosystems and wildlife.⁸⁴⁷

397. The technical discussions around these issues, the lack of experience worldwide with freshwater offshore wind, the unprecedented level of response from the public on the Offshore Wind Policy Proposal Notice, and the fact that the project might have effects not just in Ontario, but in the U.S. too, led to Ontario's decision to defer offshore wind development.⁸⁴⁸ Specifically, the decision reflected the Minister of the Environment's opinion that his Ministry lacked the science necessary to inform the regulatory changes required to allow large-scale offshore wind development to proceed while ensuring the protection of the environment and human health.⁸⁴⁹ While data existed for onshore wind facilities, MOE lacked the data applicable to understand the impacts that the construction and operation of an offshore wind facility would have on its

<External/displaynoticecontent.do?noticeId=MTA5MTE3&statusId=MTYzODk4>; **C-0194**, Ministry of the Environment, Draft Technical Bulletin Six.

⁸⁴⁴ **C-0296**, Ministry of the Environment, Policy Decision Notice, Renewable Energy Approval Requirements for Off-Shore Wind Facilities - An Overview of the Proposed Approach (Jun. 25, 2010).

⁸⁴⁵ RWS-Wallace, ¶ 31.

⁸⁴⁶ **C-0725**, EBR Decision Notice; See ¶¶ 243-246.

⁸⁴⁷ **C-0725**, EBR Decision Notice.

⁸⁴⁸ RWS-Wilkinson, ¶ 12.

⁸⁴⁹ RWS-Wilkinson, ¶¶ 4, 16.

environment.⁸⁵⁰ Research was required to address numerous concerns including noise emissions, water quality, disturbance on benthic life forms, and the potential of structural failure.⁸⁵¹ MOE wanted to “get it right” before proceeding with offshore regulations, because the Government of Ontario recognized that the regulatory framework for offshore wind had to be “bulletproof” and survive challenges.⁸⁵² The decision, which was grounded in the precautionary principle, was to wait until sufficient research had been conducted so that an adequately informed policy framework for offshore wind could be developed.⁸⁵³

398. The Claimant attempts to cast doubt on the credibility of the contemporaneous statements made by the Government of Ontario which indicate that the need for more science motivated the decision to defer by suggesting that “very little has been done” since the deferral. This too is inaccurate. As discussed above,⁸⁵⁴ since February 2011, Ontario has pursued the scientific research necessary to develop a regulatory framework for offshore wind, which includes its efforts to develop of an offshore wind development research plan proposal,⁸⁵⁵ [REDACTED] the research studies that have since been commissioned and funded by MNR on topics such as the impact of electromagnetic fields, mitigation of submarine cable construction, the potential impact of offshore wind projects on fish and fish habitat in the Great Lakes,⁸⁵⁷ MOE’s in-house study on

⁸⁵⁰ RWS-Wilkinson, ¶¶ 9-16.

⁸⁵¹ RWS-Wilkinson, ¶ 16.

⁸⁵² **C-0507**, Email from Ian Baines, Windstream Energy Inc. to John Vellone et al. (Feb. 19, 2011).

⁸⁵³ RWS-Wilkinson, ¶¶ 4, 9, 14-16; **C-0180**, E-mail from Paul Evans, Ministry of Energy to Sue Lo, Ministry of Energy, et al (Jan. 14, 2010).

⁸⁵⁴ See ¶¶ 277-299 above.

⁸⁵⁵ **R-0228**, Ministry of the Environment, “Offshore Wind Development Research Plan” (Mar. 29, 2011); **R-0230**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 1 (Mar. 31, 2011); **R-0227**, Ministry of the Environment, Offshore Research Work Plan & Timeline v3 (Mar. 28, 2011); **R-0232**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011); **-0598**, Ontario, Presentation, “Offshore Wind Power Development – Proposed Research Plan” (Feb. 2012); **C-0611**, Ministry of the Environment, Presentation, “Offshore Wind Power Development – Proposed Research Plan” (May 2012). See also ¶¶ 284-293 above.

⁸⁵⁶ **R-0232**, Ministry of the Environment, Offshore Wind Development Research Plan, Vol. 3 (Apr. 5, 2011). See ¶¶ 281-282 above.

⁸⁵⁷ See ¶¶ 294-299 above. **C-0572**, W.F. Baird & Associates Coastal Engineers Ltd. & Beacon Environmental, “Offshore Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ministry of Natural Resources” (May 2011); **R-0267**, E-mail from Nicole Worsley, Ministry of the Environment to Barry Duffey, Ministry of Tourism and Culture (Oct. 18, 2011; **R-0265**,

water quality impacts within the Lake Ontario nearshore,⁸⁵⁸ and MOE's recent RFPs for a preliminary noise study and a decommissioning study.⁸⁵⁹

399. In the end, the Government of Ontario decided to institute a temporary deferral on offshore wind development in order to conduct the science it had been telling proponents for years that it would have to do, which was necessary for developing the framework. This was neither manifestly arbitrary nor grossly unfair. As Dr. Bryan Schwartz recognized in his separate opinion in *S.D. Myers, Inc. v. Canada*:

Faced with a new technology or set of circumstances, public authorities may need some time to investigate the risks involved, to consult, to think through the appropriate measures, and to go through the proper steps required to enact legislation or regulations. Governments may sometimes want to take immediate temporary measures with the intention of reconsidering and, when necessary, revising them after it has had a reasonable opportunity to study the matter.⁸⁶⁰

400. This is especially the case here, since the government was aware that the first decision relating to a REA approval of an offshore wind facility would face a legal challenge and could only be defended on the basis of appropriate and scientifically grounded regulatory requirements.⁸⁶¹ Having these projects bogged down for long periods in litigation solely because the government did not take sufficient time to understand the science and develop an appropriate regulatory framework would have been a highly undesirable result and clearly not a prudent

Ministry of Environment, Presentation, "Renewable Energy Approval (REA) Off-shore Wind" (Oct. 14, 2011), slide 6; **C-0543**, Sarah Nienhuis and Erin S. Dunlop, "The potential effects of offshore wind power projects on fish and fish habitat in the Great Lakes", Ministry of Natural Resources Aquatic Research Series 2011-01 (2011); **C-0548**, Sarah Nienhuis and Erin S. Dunlop, "Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat", Ministry of Natural Resources, Aquatic Research Series 2011-02 (2011); **R-0279**, Rachel M. Hamilton, Spatial and Temporal Activity of Migratory Bats at Landscape Features (2012); **C-0555**, Ministry of the Environment, Presentation, "Renewable Energy Approval (REA): Off-shore Wind" (Oct. 14, 2011), slide 7; **C-0559**, Ministry of the Environment, Presentation, "Status of Wind Energy Science" (Oct. 19, 2011), slide 2. MNR's Renewable Energy Atlas, powered by Land Information Ontario, is accessible at <http://www.giscoeapp.lrc.gov.on.ca/web/MNR/Integration/Renewable/Viewer/Viewer.html>

⁸⁵⁸ See ¶¶ 294-299 above; **C-0637**, Peter C. Nettleton, "Application of the MIKE3 model to examine water quality impacts within the Lake Ontario nearshore in 2008 in support of the Great Lakes Nearshore Monitoring and Assessment Program" (Dec. 28, 2012).

⁸⁵⁹ See ¶¶ 294-299 above; **R-0383**, Noise Study RFP; **R-0384**, Decommissioning Study RFP.

⁸⁶⁰ **RL-046**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000, ¶ 163.

⁸⁶¹ RWS-Wilkinson, ¶ 9.

course of action for any government. Further, though the development of the regulatory framework may not have proceeded as quickly as the Claimant would have liked, the failure of government to enact regulations without delay is not the sort of “grossly unfair” or “arbitrary” treatment which gives rise to a breach of Article 1105.

2. The Decision to Defer the Development of Offshore Wind Farms Was Not a Repudiation of the Regulatory Framework for Offshore Wind

401. The Claimant also alleges that the decision to defer offshore wind development while the science was being done to further support the creation of guidelines and requirements was an “abrupt repudiation of the applicable regulatory framework for offshore wind”.⁸⁶² This is incorrect and is based on its mischaracterization of the REA Regulation. Indeed, contrary to what the Claimant alleges, the deferral did not “override that framework by fiat”⁸⁶³ and did not require any amendment to the existing provisions. Indeed, it is fully in support of the development of offshore wind policies in the REA Regulation.

402. As explained above, the specific rules, standards and requirements applicable to offshore wind facilities are not fully defined in the REA Regulation. While “the REA Regulation applies equally to offshore wind projects as it does to onshore wind and other renewable energy projects”,⁸⁶⁴ the Claimant glosses over or even ignores the technology-specific requirements in the REA Regulation. As explained above, the regulation stipulates rules and requirements that apply to a renewable energy generation facility depending on its Class. Pursuant to REA Regulation, offshore wind facilities constitute a separate class of facility (i.e. Class 5), as opposed to onshore wind facilities, which fall within Classes 1-4 and are subject to different REA requirements.⁸⁶⁵ As further explained in MOE’s November 2009 REA Regulation Decision Notice, “special rules” would eventually apply to offshore wind projects and the Ministry was continuing to work with MNR to develop the relevant regulatory requirements.⁸⁶⁶ At the time of

⁸⁶² Claimant’s Memorial, ¶ 612.

⁸⁶³ Claimant’s Memorial, ¶ 612.

⁸⁶⁴ Claimant’s Memorial, ¶ 614.

⁸⁶⁵ C-0103, REA Regulation, s. 6, Table 1.

⁸⁶⁶ R-0072, REA Regulation Decision Notice.

the deferral, the “special rules” for the approval of an offshore wind project were simply not in place.⁸⁶⁷

403. Thus, far from “conflicting with the REA Regulation”,⁸⁶⁸ the decision not to proceed with offshore wind was necessary to develop the REA Regulation. In particular, it was necessary in order to allow the regulator sufficient time to determine the rules, requirements and standards that the proponent of an offshore wind facility would have to satisfy prior to the issuance of a REA. Simply put, the Government of Ontario could not “repudiate” requirements that did not yet exist. As described above, Ontario is continuing to pursue to the necessary research for the development of the regulatory framework for offshore wind facilities.⁸⁶⁹

3. Neither the Decision to Defer the Development of Offshore Wind Farms Nor Ontario’s Subsequent Conduct with Respect to the Claimant Violated any Specific Commitments to the Claimant

404. The Claimant alleges that the deferral was “contrary to Ontario’s commitments and representations” and Windstream’s legitimate expectations. However, it fails to demonstrate how the failure to fulfil Windstream’s legitimate expectations resulted in “arbitrary” or “grossly unfair” treatment. The mere breach of a commitment or representation is insufficient to demonstrate a breach of Article 1105. And even if it were, the Claimant fails to provide any evidence that Ontario made any specific assurances, which could reasonably have been relied upon by the Claimant to induce it to invest in Ontario.

(a) The Customary International Law Minimum Standard of Treatment Does Not Require a State to Respect an Investor’s Legitimate Expectations

405. Contrary to what the Claimant alleges,⁸⁷⁰ the mere failure to fulfil a commitment does not, without more, fall below the customary international law standard of treatment required by NAFTA Article 1105. Indeed, the Claimant has submitted no evidence of state practice or *opinio juris* to support its assertion that it does. There is simply no evidence of the practice of the three

⁸⁶⁷ RWS-Wallace, ¶¶ 17-18.

⁸⁶⁸ Claimant’s Memorial, ¶ 614.

⁸⁶⁹ See ¶¶ 277-299 above.

⁸⁷⁰ Claimant’s Memorial, ¶ 605.

NAFTA Parties,⁸⁷¹ let alone evidence of practice of any of the other 193 members of the United Nations, sufficient to show that the protection of legitimate expectations has become a rule of customary international law. In fact, in making its arguments, the Claimant ignores the fact that Canada and the U.S. have consistently rejected the argument that Article 1105 includes an obligation to respect an investor's legitimate expectations.⁸⁷²

406. Contrary to what the Claimant argues, the *Waste Management II* Tribunal only went as far as to say that a breach of representations made by the host State, which were reasonably relied on by the investor, was “relevant” as to whether the NAFTA Party acted in a way that was “grossly unfair, unjust or idiosyncratic” or exhibited “a complete lack of transparency and candour in an administrative process.”⁸⁷³ Similarly, the *Thunderbird* Tribunal saw legitimate expectations of the investor as part of the NAFTA “context” but found that the impugned actions would still have to rise to a level that amounted to a “gross denial of justice or manifest arbitrariness falling below acceptable international standards.”⁸⁷⁴

407. In *Glamis*, the Tribunal considered it possible that “the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations” could be a factor as to whether there has been a sufficiently egregious and shocking act so as to fall below the minimum standard of treatment.⁸⁷⁵ But the *Glamis* Tribunal did not suggest that frustration of the legitimate expectations of an investor was an obligation in and of itself, and

⁸⁷¹ As discussed below, the NAFTA Parties have been consistent in their position that customary international law does not impose liability on States because legitimate changes to regulations interfere with an investor's expectations. See ¶¶ 406-409 below.

⁸⁷² **CL-064**, *Mobil – Decision*, ¶¶ 133-134; **RL-036**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Submission of the United States of America, 25 July 2014, ¶ 8. This is consistent with what the United States argued in the *Glamis* arbitration, arguments which the tribunal in that case accepted. See **CL-053**, *Glamis – Award*, ¶¶ 575-582. The United States has expressed the same position in non-NAFTA arbitrations applying the customary international law minimum standard of treatment as well. See e.g., **RL-051**, *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Submission of the United States of America, 23 November 2012, ¶ 6.

⁸⁷³ **CL-091**, *Waste Management II – Award*, ¶ 98.

⁸⁷⁴ **CL-057**, *Thunderbird – Award*, ¶¶ 147, 194.

⁸⁷⁵ **CL-053**, *Glamis – Award*, ¶ 627.

took “no position on the type or nature of repudiation measures that would be necessary to violate international obligations.”⁸⁷⁶

408. The *Mobil* Tribunal, upon which the Claimant also relies,⁸⁷⁷ concluded that the repudiation by a State of its “clear and explicit representations made [...] to induce the investment” and which were objectively and reasonably relied upon by the investor was a “relevant factor” in determining whether there has been a breach of Article 1105, but only when it amounts to “egregious behaviour.”⁸⁷⁸ The *Mobil* Tribunal stated:

[Article 1105] does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, other otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies change and rules change. These are facts of life with which investors and all legal and natural persons have to live with.⁸⁷⁹

409. In sum, while NAFTA tribunals have considered as a relevant element the repudiation of the legitimate expectations of foreign investors, assuming they reasonably existed at the time the investment was made and were based on specific representations to induce the investment, they have not found that the mere failure to respect an investor's expectations when making changes to the regulatory environment constituted in and of itself a breach of the customary international law of the minimum standard of treatment under Article 1105. Something more is required to cause the measure to breach the requisite threshold of egregiousness.

⁸⁷⁶ CL-053, *Glamis – Award*, ¶ 627, fn. 1278.

⁸⁷⁷ Claimant's Memorial, ¶ 595.

⁸⁷⁸ CL-064, *Mobil – Decision*, ¶¶ 152-153.

⁸⁷⁹ CL-064, *Mobil – Decision*, ¶ 153 (emphasis added).

(b) Only Expectations that Are Objective and Reasonable, Based on Specific Assurances Made to Induce the Investment, and Existing at the Time of the Investment Are Relevant to an Article 1105 Analysis

410. Before the expectations of a foreign investor may even be considered as relevant to the question of whether or not a State has acted in such an egregious way that it has breached the customary international law minimum standard of treatment, a claimant must first prove that its expectations: (1) were more than just its subjective beliefs, and that they were objective and legitimate expectations, taking into account “all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State”;⁸⁸⁰ (2) were based on a specific assurance or promise by the State made to induce the investment;⁸⁸¹ and (3) must have existed at the time the investor decided to make the investment.⁸⁸²

411. The Claimant rejects the second requirement and instead argues that “Article 1105 protects investors’ legitimate expectation that their business may be conducted in a normal framework free of government interference, even in the absences of specific representations made to induce

⁸⁸⁰ **CL-044**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 340, cited with approval in **RL-008**, *Bayindir – Award*, ¶ 192. See also **CL-080**, *Saluka – Partial Award*, ¶ 304: (“This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States’ obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances.*”); **RL-020**, *EDF (Services) Limited v. Romania*, Award (ICSID ARB/05/13), 8 October 2009, ¶ 219 (“*EDF (Romania) – Award*”) (“Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State’s power to regulate its economic life in the public interest.”); **CL-053**, *Glamis – Award*, ¶ 627: (“Creation by the state of objective expectations in order to induce investment [...]”).

⁸⁸¹ **CL-053**, *Glamis – Award*, ¶ 620: (“Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.”); **CL-091**, *Waste Management II – Award*, ¶ 98 (there must be a “breach of representations made by the host State which were reasonably relied on by the claimant.”); **RL-020**, *EDF (Romania) – Award*, ¶ 217: (“Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate or reasonable.”)

⁸⁸² **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, ¶¶ 190-191: (“Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest. There is no reason not to follow this view here.”); **CL-044**, *Duke Energy – Award*, ¶ 340.

the investment".⁸⁸³ This conclusion is meritless and the Claimant's reference to *Merrill & Ring*, which concluded there was no breach of Article 1105, provides no support to its argument.⁸⁸⁴

412. Furthermore, the Claimant's position is also contrary to the findings of the NAFTA tribunals in *Mobil*, *Glamis*, *Metalclad*, *Waste Management II* and *Thunderbird*, which expressly considered whether the respondent NAFTA Party had made specific assurances to the investor that were later repudiated.⁸⁸⁵ Given the differences with respect to the autonomous fair and equitable treatment standard and the minimum standard of treatment under customary international law,⁸⁸⁶ the Claimant's reliance on non-NAFTA awards, which did not undertake any examination of the content of the minimum standard of treatment under customary international law, is also of no assistance with respect to its interpretation of Article 1105.

(c) The Claimant Has Failed to Prove that It Had any Expectations that Would Be Relevant to an Article 1105 Analysis

413. In order to support its argument that it had legitimate expectations that it would be allowed to proceed through the regulatory process and develop its project, the Claimant points to a number of general pronouncements, as well as the mere fact that the Government of Ontario did not exclude offshore wind projects from the FIT Program and the REA Regulation. In addition, the Claimant argues that the fact that the OPA, an independent state enterprise, awarded it a FIT Contract guaranteed that its project could be developed. None of these events would give rise to

⁸⁸³ Claimant Memorial, ¶ 599 (emphasis added).

⁸⁸⁴ **CL-061**, *Merrill & Ring – Award*, ¶ 233.

⁸⁸⁵ **CL-062**, *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000, ¶ 89: ("Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit will be granted."); **CL-091**, *Waste Management II – Award*, ¶ 98: ("In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); **CL-057**, *Thunderbird – Award*, ¶¶ 146-148 (concept of legitimate expectations involves reliance on the specific assurances provided by government officials but concluding that the Mexican SEGOB did not generate such expectations through its *Oficio* relating to gambling machines). See also **CL-054**, *Grand River – Award*, ¶ 141: ("Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party.") Even the opinion of Professor Thomas Walde in *International Thunderbird* expressed his view that mere informal or general assurances would have to be a "quite high" threshold in order to support the existence of a legitimate expectation. **RL-052**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Separate Opinion, 1 December 2005, ¶ 32.

⁸⁸⁶ See ¶¶ 371-379 above.

an objective and legitimate expectation on the part of the Claimant that would be relevant to an analysis under Article 1105. First, any expectation that these facts meant that the Claimant's project would be able to proceed quickly through the regulatory process ignores the circumstances prevailing in Ontario at the time. Second, none of these facts involve specific representations and assurances made to the Claimant in order to induce its investments. Finally, these expectations could not have existed at the time the Claimant made its investments in Ontario, because all occurred after it had done so.

(i) The Claimant Had No Objective and Legitimate Expectation that Its Application for Crown Land Would Be Approved

414. The Claimant states that it had the following legitimate expectations: the “timely approval of applications to use Crown land for offshore wind energy development could be expected by those submitting application”,⁸⁸⁷ the Claimant's Project had the “highest priority” for receiving AOR status and would receive “priority attention from MNR”⁸⁸⁸ and the approval process for its project would be expedited.⁸⁸⁹ Looking more closely at each of these expectations demonstrates that none of them are relevant to an analysis under Article 1105.

415. The Claimant points to the announcement of Minister of Natural Resources Donna Cansfield, on January 17, 2008, that Ontario was lifting its existing deferral on proposals for offshore wind projects and that MNR would be accepting new onshore and offshore applications for AOR status in the near future.⁸⁹⁰ In the context of this announcement, the Toronto Star reported that Minister Cansfield had stated that Ontario was “open for business” for offshore wind.⁸⁹¹ Notably, the Claimant ignores the fact that any expectations that the Claimant may have had arising from this statement are not relevant because the Claimant had already acquired its interest in its Project in October 2007, prior to Minister Cansfield making this statement.⁸⁹²

⁸⁸⁷ Claimant's Memorial, ¶ 606(b).

⁸⁸⁸ Claimant's Memorial, ¶ 606(f).

⁸⁸⁹ Claimant's Memorial, ¶ 606(j).

⁸⁹⁰ **C-0058**, Ministry of Natural Resources, Press Release, “Ontario Lays Foundation for Offshore Wind Power” (Jan. 17, 2008).

⁸⁹¹ **C-0081**, Email from John Cooper, Ministry of Natural Resources to Mike Morencie, Ministry of Natural Resources, et al. attaching Toronto Star article (Jun. 30, 2008).

⁸⁹² Claimant's Memorial, ¶ 49.

Further, this announcement was made over a year before the GEGEA or the FIT Program existed, so it could not have induced the Claimant to apply for a FIT Contract.

416. However, even if it were relevant, the mere fact that the 2006 deferral was lifted, and that applications for Crown Land, including the Claimant's, were accepted for consideration, could not have been the source of any objective expectation that the Claimant would be able to obtain access to Crown Land in order to support its particular projects or that it would be able to obtain the other provincial regulatory approvals necessary to proceed in developing an offshore wind project, most important a REA. Nothing in Minister Cansfield's announcement provided any specific assurances regarding the timing and approvals process for Crown land applications, nor did it speak to the environmental review process conducted by other Ministries of the Government of Ontario including MOE and MTC through the REA process.

417. Similarly, the alleged statement by Minister Cansfield that she had "instructed the Ministry of Natural Resources to proceed as quickly as possible to provide Applicant of Record Status",⁸⁹³ does not provide any assurance regarding approvals for the use of Crown land. As explained by Rosalyn Lawrence, applicants who are granted AOR status are merely provided priority with respect to "the opportunity to apply for and potentially obtain required permits for testing and development" before any other applicant on the same Crown land site.⁸⁹⁴ The granting of AOR status "has no bearing on how quickly its project permits will be processed, or for that matter, whether they will be considered at all".⁸⁹⁵ Furthermore, the submission of a Crown land application does not guarantee the granting of AOR status, which, according to the *Public Lands Act*, is at the discretion of Minister of Natural Resources.⁸⁹⁶ Therefore, a proponent could not reasonably expect that by simply submitting a Crown land application it would obtain approvals for the use of Crown land.

⁸⁹³ CWS-Baines, ¶ 41.

⁸⁹⁴ RWS-Lawrence, ¶ 9.

⁸⁹⁵ RWS-Lawrence, ¶ 9.

⁸⁹⁶ **R-0007**, *Public Lands Act*, s. 2.

418. Likewise, statements by MNR staff that the Claimant's Project had the "highest priority"⁸⁹⁷ and it would "move as quickly as possible through the remainder of the application process in order that [Windstream] may obtain Applicant of Record status in a timely manner"⁸⁹⁸ could not have reasonably been interpreted as providing any specific assurances regarding the length of time it would take MNR to grant AOR status, or for that matter whether MNR would grant it at all. Specifically, the former statement was made in the context of a letter to the President of CanWEA, which sought to clarify the prioritization of MNR's review of the applications where there are overlapping applications on the same Crown land site.⁸⁹⁹ It did not relate to the actual granting of AOR status. The latter statement was made in respect of the Claimant's "grid cell swap" proposal and was only intended to provide guidance on the steps that would follow *after* the reconfiguration of the project site application. That reconfiguration was never finalized.⁹⁰⁰

419. Furthermore, the Claimant's expectations regarding the approval of its Crown land applications ignore the cautions expressly provided by government officials. For example, prior to the Claimant's signing of the FIT Contract, MNR officials made clear that it would not consider the Claimant's request to swap Crown land or allow drilling or the erection of a test turbine until after the public consultations were complete and a decision had been made with respect to setbacks.⁹⁰¹ At the same time, MNR officials made clear that the Claimant was free to access the area to conduct tests, but it would assume all of the risk given that the public consultation on setbacks was outstanding and it remained unclear whether and where the Claimant's Project would be allowed to be located.⁹⁰²

420. The Government of Ontario's messaging to the public was equally careful. The Claimant relies on a September 2009 MNR presentation to the GLWC to argue that Ontario was presenting itself as a jurisdiction welcoming offshore wind development where no scientific

⁸⁹⁷ **C-0158**, Letter from Rosalyn Lawrence, Ministry of Natural Resources to Robert Hornung, Canadian Wind Energy Association (Nov. 24, 2009).

⁸⁹⁸ **C-0334**, Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Wolfe Island Shoals Inc. (Aug. 9, 2010).

⁸⁹⁹ RWS-Lawrence, ¶¶ 15-18.

⁹⁰⁰ **C-0334**, Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Wolfe Island Shoals Inc. (Aug. 9, 2010).

⁹⁰¹ RWS-Lawrence, ¶¶ 34, 42.

⁹⁰² **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals Kick-Off Meeting (Sep. 9, 2010); RWS-Lawrence, ¶ 42.

uncertainty stood in the way of development.⁹⁰³ However, that same presentation warns participants that the “[p]rovince [is] in [the] midst of [a] broad policy review of approach to offshore wind development” which “may result in shoreline exclusion zones and constrained areas” such as navigational lanes, areas of core commercial fishing activity, sensitive environmental and ecological areas and features, areas subject to important recreational activities, cultural heritage features, areas of natural gas activity and other Great Lake considerations.⁹⁰⁴

421. In sum, none of the statements made by the Government of Ontario provided any assurances that the Claimant would be able to obtain tenure to Crown land in order to develop its Project.

(ii) The Claimant Had No Objective and Legitimate Expectation that It Would Be Permitted to Proceed Through the REA Process before the Establishment of the Requirements for Offshore Winds Facilities

422. The Claimant next alleges that it held legitimate and objective expectations that its Project would be allowed to proceed through the REA process based on general statements made by then-Minister of Energy George Smitherman and the fact that offshore wind projects were not excluded from the REA Regulation. However, nothing in these general statements could have generated a legitimate expectation that the project could proceed to permitting without the REA requirements having been established.

423. Contrary to the Claimant's argument that it would have been reasonable for a developer to assume that it would have been permitted to proceed on a project-specific basis using the “adaptive management approach”,⁹⁰⁵ such an approach was inappropriate in the case of offshore wind development. As explained by Ms. Dumais, the adaptive management approach is used when there are mitigation measures to deal with scientific uncertainty and its anticipated impacts.⁹⁰⁶ This was not the case with offshore wind, where the environmental impacts of

⁹⁰³ Claimant's Memorial, ¶¶ 213, 214.

⁹⁰⁴ C-0363, Ministry of Natural Resources Presentation, Offshore Windpower Development in Ontario: Provincial Update & Ontario's First Power Purchase Agreement (Sep. 17, 2011), p.11.

⁹⁰⁵ Claimant's Memorial, ¶¶ 428, 436.

⁹⁰⁶ RWS-Dumais, ¶ 36.

offshore wind facilities in freshwater and the Great Lakes were not well understood and there were no standards or guidelines against which to assess the project.⁹⁰⁷ Due to the unknown and unpredictable impacts of offshore wind technology, Ontario decided to take a precautionary approach to developing the regulatory framework for offshore wind.⁹⁰⁸

424. In any event, the Claimant cannot dispute that the GEGEA was enacted with the goal of “making it easier to bring renewable energy projects to life”.⁹⁰⁹ Indeed, when introducing the proposed legislation to the Ontario Legislature, Minister Smitherman explained that the general intent of the GEGEA was to make Ontario “the destination of choice for green power proponents” by providing “the certainty that creates an attractive investment climate”, which included “certainty that government would issue permits in a timely way”.⁹¹⁰

425. However, he further clarified what he meant, explaining that:

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.⁹¹¹

426. An objective investor at the time would have understood that the “necessary documentation” for offshore wind projects in the Great Lakes was not yet clear. In this regard, the Claimant’s assertion that the REA Regulation “applies equally to offshore wind projects as it does to onshore wind and other renewable energy projects”, glosses over the technology-specific requirements in the regulation.⁹¹² The REA Regulation does not establish a right to a REA and the EPA provides that the Director may issue the REA if it is in the public interest to do so.⁹¹³ As a result, in order for the REA Regulation to “permit[] offshore wind projects to proceed through

⁹⁰⁷ RWS-Dumais, ¶ 37.

⁹⁰⁸ RWS-Dumais, ¶ 37; RWS-Wilkinson, ¶¶ 4, 9.

⁹⁰⁹ **C-0116**, Excerpt of Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 39th Parl., 1st Sess., No. 112 (Feb. 23, 2009), p. 1320; **C-0115**, Ontario Ministry of Energy, News Release, “Ontario’s Bold New Plan for a Green Economy” (Feb. 23, 2009).

⁹¹⁰ **C-0114**, Notes for a Statement to the Legislature by George Smitherman, Minister of Energy, Introduction of the Proposed *Green Energy and Green Economy Act*, 2009 (Feb. 23, 2009).

⁹¹¹ *Ibid* (emphasis added).

⁹¹² Claimant’s Memorial, ¶ 614; See RWS-Wallace, ¶¶ 12-18.

⁹¹³ **C-0105**, *Environmental Protection Act*, s. 47.5(1); **C-0103**, REA Regulation.

the REA process”,⁹¹⁴ the necessary technology specific rules, requirements and standards for offshore wind projects had to be in place. They were not. The reason why is simple – MOE was still deciding what it was going to require from offshore wind proponents in order to obtain a REA.⁹¹⁵

427. The evidence shows that the Claimant was aware of this lack of necessary detail in the REA Regulation. For example, Mr. Baines’ May 13, 2010 letter to MEI expressly stated that:

Windstream is struggling with the expectation in the FIT Contract that the Project will achieve Commercial Operations in 4 years on the one hand and the considerable regulatory uncertainty caused by unknown setback requirements for off-shore wind, uncertainty in the site release process for Crown land, and uncertainty in the detailed requirements of the REA on the other.⁹¹⁶

428. These concerns were also reiterated in Mr. Baines’ letter to the OPA on May 16, 2010,⁹¹⁷ during Windstream’s meeting with MOE, MNR and MEI on June 15, 2010,⁹¹⁸ and in Mr. Baines’ report to the Board of Directors on August 30, 2010, when he wrote that “the regulatory agencies as yet do not have well established guidelines for access and control of off-shore property rights available for renewable energy projects, adding to the uncertainty of the REA process.”⁹¹⁹

429. On June 25, 2010, MOE published its Offshore Wind Policy Proposal Notice including a proposal for a five kilometre shoreline exclusion zone applicable to offshore wind projects, along with a discussion paper titled “Offshore Wind Requirements Discussion Paper” on the Environmental Registry.⁹²⁰ This was shortly followed by the publication of MNR’s complimentary posting of its policy proposal, entitled “Offshore Wind Power: Consideration of

⁹¹⁴ Claimant’s Memorial, ¶ 614.

⁹¹⁵ RWS-Wallace ¶¶ 17-18.

⁹¹⁶ **C-0258**, Letter from Ian Baines, Windstream Energy Inc. to Mirrun Zaveri, Ministry of Energy (May 13, 2010).

⁹¹⁷ **C-0262**, Letter from Ian Baines, Windstream Energy Inc. to Michael Killeavy, Ontario Power Authority (May 16, 2010).

⁹¹⁸ **C-0285**, Memorandum from Adam Chamberlain, Borden Ladner Gervais LLP to Windstream Energy Inc. (Jun. 17, 2010).

⁹¹⁹ **R-0138**, Windstream Energy LLC, Report to the Board of Directors, Windstream Energy LLC Wolfe Island Shoals Wind Project, Eight Month Work Schedule and Budget (Aug. 30, 2010), p. 13.

⁹²⁰ **R-0118**, Offshore Wind Policy Proposal Notice.

Additional Areas to be Removed from Future Development” on the Environmental Registry on August 18, 2010.⁹²¹ Nothing related to these EBR postings is inconsistent with MEI’s alleged statements to Uwe Roeper on May 25, 2010, that MEI and MOE were “working on defining offshore REA guidelines as quickly as possible” and though “it was not clear exactly when the guidelines may be available” this was expected to be “very soon”.⁹²² In accordance with the *Environmental Bill of Rights, 1993*, the ministries of the Government of Ontario are required to provide notice and consult with the public regarding any proposed policy, Act or regulation that could have significant effect on the environment.⁹²³ Therefore, the EBR postings were the next step towards establishing REA guidelines for offshore wind and determining the policy for making Crown land available for offshore wind development. Moreover, MEI’s alleged statements acknowledging that MOE was working hard and that the guidelines were expected very soon are not specific assurances of the type that can legitimately create expectations of the sort guaranteed by Article 1105.

430. The Claimant’s knowledge of the underdeveloped state of offshore REA requirements is likely a reason why it never formally initiated the process for applying for a REA⁹²⁴ – because it had difficulty discerning what information it would have to submit. In fact, the lack of regulatory certainty was the very reason cited by the Claimant in its requests for FIT Contract signing extensions, including its requests after MOE’s June 25, 2010 EBR posting.⁹²⁵ When considered together with all the other relevant circumstances, the Claimant could have had no legitimate and objective expectations that the statement of Minister Smitherman when introducing the GEGEA and the mere existence of the REA Regulation meant that its project would be able to proceed quickly through the REA process.

⁹²¹ **R-0118**, Offshore Wind Policy Proposal Notice.

⁹²² **C-0270**, Email from Uwe Roeper, ORTECH Consulting Inc. to Pearl Ing, Ministry of Energy (May 25, 2010).

⁹²³ **R-0010**, *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, ss. 15-18.

⁹²⁴ See Facts, ¶¶ 84-85.

⁹²⁵ **C-0340**, Email from Paul Ungerman, Ministry of Energy and Infrastructure to Chris Benedetti, Sussex Strategy (Aug. 10, 2010); **R-0121**, Email from Adam Chamberlain, Borden Ladner Gervais LLP to Perry Cecchini, Ontario Power Authority (Jun. 29, 2010).

(iii) The Claimant Had No Objective and Legitimate Expectation that Its Project Would Be Permitted to Proceed Merely Because the OPA, an Independent State Enterprise, Offered It a FIT Contract

431. As explained in paragraphs 46-48 above, the OPA is a state enterprise, independent of the Government of Ontario that was charged with developing and implementing the FIT Program. In its implementation, the OPA offered FIT Contracts to proponents whose projects could be accommodated on the transmission or distribution grid. The Claimant's Project was one such project, and thus, it received a FIT Contract offer on May 4, 2010.⁹²⁶ However, pursuant to the FIT Rules, in making contract offers, the OPA did not and could not consider whether or not a project was feasible or likely to obtain its necessary regulatory approvals. As Mr. Cecchini indicates:

When FIT applicants are presented with an offer of a FIT Contract, it is the applicant who must assess and bear any regulatory and development risks associated with signing the contract to develop a FIT project, not the OPA. It is the responsibility of each FIT applicant to decide, based on the existing regulatory framework, whether it is able to comply with the terms of the FIT Contract, including the requirement to meet its Milestone Date for Commercial Operation ("MCO").⁹²⁷

432. Thus, when offered a FIT Contract, it was the responsibility of the proponent to assess whether it should execute that contract, and bear the regulatory and development risks associated with it.⁹²⁸ The offering of a FIT Contract could not lead to any objective and legitimate expectation that a project would be allowed to proceed or that it would obtain its approvals. Indeed, section 3.3 of the FIT Rules specifically states that applicants are solely responsible for ensuring the technical, regulatory and financial viability of their projects.⁹²⁹

433. As explained at length above, the Claimant was well aware of the regulatory uncertainty surrounding the offshore wind approvals process when it entered into its FIT Contract. It had numerous discussions with consultants the OPA, and the Government of Ontario about the lack

⁹²⁶ C-0246, Letter from Joanne Butler, Ontario Power Authority to Nancy Baines, Windstream Energy Inc. (May 4, 2010).

⁹²⁷ RWS-Cecchini, ¶¶ 5-6.

⁹²⁸ RWS-Cecchini, ¶ 6.

⁹²⁹ R-0091, FIT Program Rules, v. 1.3, s. 3.3.

of an adequately developed regulatory process and how that might impact the development of its project in the timelines required in the FIT Contract. It was for this reason that it delayed signing that contract for months after it was offered.⁹³⁰ During that period, the Claimant attempted to seek “comfort” from the OPA and the Government of Ontario.⁹³¹ However, none of the responses it received provided any specific assurances regarding the timing for the development of the offshore wind policies applicable to its project. For example, Mr. Killeavy from the OPA stated categorically that [REDACTED]

[REDACTED] As also indicated by Mr. Cecchini:

The OPA reiterated to Windstream that the FIT program was a standard offer program and it was for Windstream to determine whether it wanted to accept the terms of the standard FIT Contract. The OPA was not in a position, nor was it willing, to modify the terms of the FIT Contract for an individual FIT proponent.⁹³³

434. In fact, the OPA offered the Claimant specific extensions in the signing of its FIT Contract so that the Claimant would have sufficient time to consider the risks it would be taking on by signing the FIT Contract.⁹³⁴ Mr. Cecchini explains that:

As OPA was aware of the regulatory uncertainty regarding offshore wind at the time the FIT Contract was offered to Windstream, in making the decision to grant Windstream the requested extension to the signing date, we wanted Windstream to have the opportunity to acquire additional information about setback requirements for off-shore wind turbines and have sufficient time to consider the regulatory risk it would be taking on by signing the FIT Contract. It was for these

⁹³⁰ **C-0258**, Letter from Ian Baines, Windstream Energy Inc. to Mirrun Zaveri, Ministry of Energy and Infrastructure (May 13, 2010) as acknowledged in the Claimant's Memorial ¶¶ 187-193; **R-0115**, Windstream Wolfe Island Shoals Inc., Current Project Status and Regulatory Issues (Jun. 8, 2010).

⁹³¹ RWS-Cecchini, ¶¶ 8-13; RWS-Lo, ¶ 23.

⁹³² **C-0260**, Email from Michael Killeavy, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (May 14, 2010), p. 1.

⁹³³ RWS-Cecchini, ¶ 8

⁹³⁴ RWS-Cecchini, ¶ 12; **C-0283**, E-mail from Nancy Baines, Windstream Energy Inc. to Ian Baines, Windstream Energy Inc. et al (Jun. 15, 2010); **C-0305**, E-mail from Sheri Bizarro, Ontario Power Authority to Nancy Baines, Windstream Energy Inc. (Jun. 29, 2010); **C-0284**, E-mail from Nancy Baines, Windstream Energy Inc. to Sheri Bizarro, Ontario Power Authority (Jun. 15, 2010); **C-0313**, E-mail from JoAnne Butler, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Jul. 8, 2010).

reasons, the OPA granted Windstream's requests for further extensions over the course of the following three months.⁹³⁵

435. Similarly, the Claimant's alleged expectation that "WWIS would receive the support requested"⁹³⁶ is not based on any specific assurance provided by the Government of Ontario, but rather on its own assumptions fabricated from a non-representation. For example, the Claimant relies on the fact that it received no indication that "the Project would be treated any differently from any other project for which a FIT contract had been awarded"⁹³⁷ The Claimant also cites the statement in its May 13, 2010 letter to MEI, which outlined its *own* assumption that:

Since the Province has granted a FIT Contract that provides a 4 year window to develop the Project, we assume that your ministry and related ministries are all committed to resolving the uncertainty for off-shore wind projects by putting in place the necessary policies in such a time and manner as will not compromise the ability of Windstream to meet its Project commitments in the FIT Contract.⁹³⁸

436. MEI's lack of written response to the above statement created no objective expectations that the regulations and policies would be put in place in the way the Claimant assumed. As explained by Ms. Lo, "MEI was not responsible for developing the regulatory rules regime governing offshore wind; that was the responsibility of other ministries."⁹³⁹ Moreover, MEI's May 21, 2010 response to the Claimant explained that MEI and MOE were working towards developing REA guidelines and signalled that additional information would be forthcoming from the ministries (i.e. the EBR postings).⁹⁴⁰ It did not provide any guarantees with respect to when the REA Regulation would actually be finalized.⁹⁴¹

437. Nor could MOE's indication that guidelines for setbacks were being developed, and inquiry as to Windstream's "drop dead deadline for the project",⁹⁴² be reasonably interpreted as

⁹³⁵ RWS-Cecchini, ¶ 12.

⁹³⁶ Claimant's Memorial, ¶ 196.

⁹³⁷ Claimant's Memorial, ¶ 194.

⁹³⁸ **C-0258**, Letter from Ian Baines, Windstream Energy Inc. to Mirrun Zaveri, Ministry of Energy (May 13, 2010) (emphasis added).

⁹³⁹ RWS-Lo, ¶ 22.

⁹⁴⁰ Claimant's Memorial, ¶ 606 (h).

⁹⁴¹ RWS-Lo, ¶ 23.

⁹⁴² Claimant's Memorial, ¶ 198 (b).

“commitments with respect to working with Windstream to expedite the approval process for the project.”⁹⁴³ As Ms. Dumais has confirmed, “This is an unrealistic and inappropriate interpretation, as proponents were well aware that MOE was not in a position to make any commitments on approval decisions, particularly for offshore wind projects.”⁹⁴⁴ The MOE official was merely seeking to better understand the project’s timelines so that MOE could prepare to process any application that might be forthcoming.⁹⁴⁵

438. Similarly, the alleged general statements expressing the Government of Ontario’s “support” for the Claimant’s Project could not give rise to any reasonable expectation that the development of “the approval process for the Project would be expedited” for the Claimant to honour the timeframes of the FIT Contract. From the perspective of the Government of Ontario, “support” for renewable energy projects, included “assisting proponents in navigating through existing regulatory approvals and permitting processes and conveying the general interests of the developer community to the relevant government ministries, aboriginal and community groups, manufacturers and suppliers”.⁹⁴⁶ This type of “support” is demonstrated by Ontario’s efforts to develop offshore wind guidelines, which included: the EBR postings on offshore wind;⁹⁴⁷ MOE’s technical workshops during the spring and summer of 2010 on noise, water quality and sediment management, federal-provincial collaboration and technical specifications and safety issues;⁹⁴⁸

[REDACTED]

[REDACTED]

439. Moreover, Ontario’s specific support for the Claimant’s Project included MNR’s willingness to consider the Claimant’s “grid cell swap” proposal;⁹⁵⁰ MEI’s discussions with the

⁹⁴³ Claimant’s Memorial, ¶ 198.

⁹⁴⁴ RWS-Dumais, ¶¶ 23-25.

⁹⁴⁵ *Ibid.*

⁹⁴⁶ RWS-Lo, ¶ 18.

⁹⁴⁷ See ¶¶ 117, 188-124 above.

⁹⁴⁸ See ¶¶ 134-146 above.

⁹⁴⁹ **R-0205**, Letter from [REDACTED] to Paul Genest, Deputy Minister for Intergovernmental Affairs (Jan. 10, 2011).

⁹⁵⁰ **C-0334**, Letter from Eric Boysen, Ministry of Natural Resources to Ian Baines, Windstream Wolfe Island Shoals Inc. (Aug. 9, 2010).

OPA regarding the extension of the MCOB in Windstream's FIT Contract;⁹⁵¹ and Ontario's decision to temporarily freeze the Claimant's Project as a result of the deferral.⁹⁵² Nevertheless, the Government of Ontario's "support" for the Claimant's Project did not ensure that the offshore wind approvals process be finalized in accordance with timelines in its FIT Contract. It was therefore unreasonable for the Claimant to rely on such general statements as a basis for assuming that the necessary policies would be aligned with its commitments in the FIT Contract.

(iv) The Claimant Had No Objective and Legitimate Expectation that Its Project Would Be Permitted to Proceed as a Pilot Project Proposal

440. The Claimant provides no evidence on which it could base its expectations that its Project could "proceed as an offshore wind pilot project".⁹⁵³ Instead, it relies on statements from the Claimant's own witnesses indicating that Ontario was considering a pilot project for offshore wind.⁹⁵⁴ Whereas the Claimant subjectively understood these representations to mean that "WWIS would shortly be receiving confirmation that the pilot project proposal was acceptable to the Ontario Government",⁹⁵⁵ there is nothing in these statements that objectively provides any express commitment with respect to such an approach. While MEI and MNR had initially considered and supported the idea of a pilot, this option was ultimately rejected due to the size of the proposed pilot.⁹⁵⁶

441. Even if such a representation could reasonably be relied upon, the expectation that the Claimant's Project could proceed as a pilot fails to give rise to a breach of Article 1105, since

⁹⁵¹ **C-0314**, Email from Paul Ungerman, Ministry of Energy and Infrastructure to Ian Baines, Windstream Energy Inc. (Jul. 8, 2010); **C-0343**, E-mail from Perry Cecchini, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP and Chris Benedetti, Sussex Strategy (Aug. 12, 2010); **C-0313**, E-mail from Joanne Butler, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Jul. 8, 2010); RWS-Cecchini, ¶ 13.

⁹⁵² **C-0483**, Audio Recording of Telephone Conference Call (Feb. 11, 2011); **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011); **C-0482**, Ministry of Natural Resource, Decision on Policy, "Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development" (Feb. 11, 2011).

⁹⁵³ Claimant's Memorial, ¶ 264.

⁹⁵⁴ Claimant's Memorial, ¶¶ 253-256; 606 (k); CWS-Baines, ¶ 108.

⁹⁵⁵ Claimant's Memorial, ¶ 255; CWS-Baines, ¶ 110.

⁹⁵⁶ Similarly, when Windstream reached out political staff in 2012 to revive its proposal that the WWIS project to be developed as a pilot. See ¶¶ 247-251 above and ¶ 454 below; **R-0288**, E-mail from Jeff Garrah to Nancy Baines, Windstream Energy Inc. (Feb. 2, 2012).

these discussions took place in December 2010, *after* the Claimant's decision to enter into the FIT Contract.⁹⁵⁷ As such, the Claimant's expectation of proceeding as a pilot project could not possibly have induced it to invest in Ontario and, tellingly, the Claimant has not suggested otherwise.

4. The Decision to Defer the Development of Offshore Wind Farms and Ontario's Subsequent Conduct with Respect to the Claimant Did Not Amount to Prohibited Discrimination against the Claimant

442. The Claimant's allegation that Ontario discriminated against it in violation of Article 1105 is meritless. As a starting point, the Claimant has failed to make any distinction between its Article 1105 claims with respect to TransCanada and Samsung and its Article 1102 and 1103 claims.⁹⁵⁸ The FTC Note of Interpretation clearly states that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)".⁹⁵⁹ Therefore, it is inappropriate for the Claimant to rely on its allegations of discriminatory treatment under Articles 1102 and 1103 to also establish that there has been a breach of Article 1105. While Article 1105 might prohibit certain types of invidious discrimination, such as racial or religious discrimination, its coverage does not overlap with Articles 1102 and 1103 because nationality based discrimination has never been prohibited as a matter of customary international law.

443. Further, even if there was overlap between Articles 1105 and 1102/1103, for the reasons explained above, the Claimant has failed to prove that it was subject to any discriminatory treatment. The Government of Ontario's treatment of the Claimant was in its capacity as a FIT proponent and in respect of the offshore wind deferral. It is inappropriate to compare the treatment accorded to Claimant with the treatment accorded to TransCanada or Samsung, since neither investor was a participant in the FIT Program.⁹⁶⁰

444. In addition, none of the comparators identified by the Claimant are offshore wind proponents. Though the Claimant alleges that "19 wind energy proponents" have been granted

⁹⁵⁷ CWS-Baines, ¶¶ 108-110.

⁹⁵⁸ These allegations are addressed in ¶¶ 338-360 above.

⁹⁵⁹ **CL-010**, NAFTA, Note of Interpretation, ¶ 3.

⁹⁶⁰ See ¶ 348 above.

Applicant of Record status,⁹⁶¹ none of those proponents have been identified by the Claimant. Further, its argument presumes that there is only one permitting process for all wind energy proponents. By proceeding on this presumption, the Claimant overlooks the prescriptive requirements set out in the REA, which necessarily treat different facilities differently. The fact is, there are currently no offshore wind proponents in Ontario with AOR status.⁹⁶² Similarly, whereas the Claimant has not identified any of the “other developers of large wind projects”⁹⁶³ that have allegedly been allowed to develop and build their projects, Canada can also confirm that no other offshore wind projects have been developed or proceeded through the REA process in Ontario.⁹⁶⁴

445. Contrary to the Claimant’s assertion that it was “singled out and prevented from receiving the benefit of its FIT Contract”,⁹⁶⁵ the Claimant’s Project actually received more favourable treatment than any other offshore wind proponent in Ontario pursuant to the deferral decision. Whereas the FIT applications and the Crown land applications of all other offshore wind proponents were cancelled, the Claimant’s Project was merely frozen and could continue after the necessary science is conducted and an adequate policy framework can be developed.

5. Ontario Made All Reasonable Efforts to Ensure that the Claimant Was Not Negatively Affected by Its Decision to Defer the Development of Offshore Wind Farms

446. In asserting that Ontario’s decision to defer offshore wind development pending the development of science to support an adequate regulatory process violated Canada’s obligations to the Claimant under Article 1105, the Claimant ignores the fact that Ontario took all reasonable measures to accommodate the Claimant.

⁹⁶¹ Claimant’s Memorial, ¶ 632.

⁹⁶² As explained in MOE’s decision notice for the Offshore Wind Policy Proposal posted on February 11, 2011, “the MNR will be cancelling all existing Crown land applications.” **C-0725**, Ministry of the Environment, Policy Decision Notice, Renewable Energy Approval Requirements for Off-shore Wind Facilities - An Overview of the Proposed Approach, EBR Registry Number: 011-0089 (Feb. 11, 2011).

⁹⁶³ Claimant’s Memorial, ¶ 633.

⁹⁶⁴ As stated in the Ontario Government’s announcement of the deferral decision “[n]o Renewable Energy Approvals for offshore have been issued and no offshore projects will proceed at this time.”; **C-0480**, Ministry of the Environment, News Release, “Ontario Rules Out Offshore Wind Projects: McGuinty Government Committed to Renewable Energy while Protecting the Environment” (Feb. 11, 2011).

⁹⁶⁵ Claimant’s Memorial, ¶ 633.

447. Prior to the announcement of the deferral on February 11, 2011, a teleconference was scheduled between the Claimant and MEI, MOE, MNR and OPA, which was meant to provide the Government of Ontario with the opportunity to explain how the decision not to move forward with offshore wind would affect the Claimant's Project.⁹⁶⁶ During the call, Ontario confirmed that whereas all other offshore FIT and Crown land applications were cancelled, the Claimant's Project and its Crown land applications were not terminated.⁹⁶⁷ Ontario also acknowledged that the Claimant's Project was "unique in that it has a FIT Contract" and for that reason the Claimant was invited to engage the OPA in "without prejudice" negotiations specifically in respect of the Force Majeure, two-year Force Majeure termination clause and security deposit provisions in the FIT Contract.⁹⁶⁸

448. However, the Claimant did not pursue the available options presented by the OPA which were intended to keep its project alive and instead chose to make unreasonable and unrealistic demands of Ontario and the OPA. It sought an extension of its MCOB until such date as the Claimant elected to resume the project as well as the return of the full amount of the security deposit, a removal of the time limitations on Force Majeure, and removal of the OPA's termination right. In addition, the Claimant made requests unrelated to mitigating the impact of the deferral, such as the removal of its domestic content requirement.⁹⁶⁹

449. An email from Chris Benedetti to Mr. and Ms. Baines, which was sent on the same day as the Claimant's letter to the OPA, indicated that the Claimant was aware, prior to making its proposal, that these demands were unreasonable:

[...] I spoke to Craig again this morning (his acceptance is necessary for the meeting with the Minister). He is still nervous about committing to the meeting next week – he fully expects that Windstream is going to come in with needs, asks et al, and has said that their preference is for Windstream to negotiate through the OPA (he mentioned that this was the preference of the Premier's office as well). The problem here of course is that, as per my note the other day, I do not believe

⁹⁶⁶ **C-0483**, Audio Recording of Telephone Conference Call (Feb. 11, 2011); **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011).

⁹⁶⁷ *Ibid.*

⁹⁶⁸ **C-0483**, Audio Recording of Telephone Conference Call (Feb. 11, 2011); **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011), pp. 1, 8-9.

⁹⁶⁹ RWS-Cecchini, ¶ 21.

that the OPA will be able to receive or respond to much of what I believe Windstream intends to table (beyond keeping the contract on hold).

[...]

I'm not sure about your reference to OPA having no strategy; this is not my understanding from discussions with Perry; but I might be missing something. I think their strategy is to simply keep the contract intact, but little more.

If you are looking for more, we will have to start bringing this forward and lobbying hard.⁹⁷⁰

450. The exchange of correspondence that followed included counter-proposals from the OPA, which were never accepted by the Claimant, including [REDACTED]

[REDACTED] In the end, the Claimant refused to accept any proposals put forth by the OPA and correspondence fell silent following the OPA's letter of June 24, 2011, the Claimant's letter of July 5, 2011 and the OPA's subsequent correspondence on October 12, 2011.⁹⁷² If the Claimant had accepted the OPA's proposal, then the harm that it claims occurred on May 4, 2012, when its financing backed out because of the OPA's termination rights, never would have happened.

451. Instead of negotiating with the OPA about its FIT Contract, the Claimant elected to make several alternative proposals between April 2011 and May 2012. These proposals were equally unreasonable. None of these project proposals were acceptable since they were inconsistent with the FIT Rules and would result in major implications to ratepayers and other renewable energy projects that were already under development.

452. Its first proposal was for a 300 MW solar project (or alternatively, the Claimant requested that it be allocated capacity for a 100 MW solar project, while maintaining 200 MW of its

⁹⁷⁰ **C-0506**, Email from Ian Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy, et al (Feb. 18, 2011).

⁹⁷¹ RWS-Cecchini, ¶ 22.

⁹⁷² RWS-Cecchini, ¶ 22; **R-0250**, Letter from Perry Cecchini, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (Jun. 24, 2011); **R-0254**, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Ron Clark, Aird & Berlis LLP (Jul. 5, 2011); and **R-0265**, E-mail from Geetu Lalla, Aird & Berlis LLP to Adam Chamberlain, Borden Ladner Gervais LLP attaching Letter from Ron Clark, Aird & Berlis LLP to Adam Chamberlain, Borden Ladner Gervais LLP (Oct. 12, 2011).

connection capacity in reserve for the development of an offshore wind project). Agreeing to this proposal would have required a change to the FIT Rules, which capped solar projects at 10 MW.⁹⁷³ Even the Claimant recognized that “a single 300 MW solar PV project is not allowed under the FIT Rules and it is highly doubtful [the OPA] would want this”, and if its proposal was accepted, its FIT Contract would need to be replaced with “30 projects of 10 MW each”.⁹⁷⁴ The OPA was unwilling to make such a change for an individual proponent in a standard offer program without a Ministerial Direction.⁹⁷⁵ And from MEI’s perspective, this proposal had implications on the connection availability and land resources available for other FIT projects, as well as Samsung’s 100 MW Sol-luce Project, which was being developed pursuant to the GEIA.⁹⁷⁶ Based on these policy considerations, the OPA and MEI determined that it would not be appropriate to accept the Claimant’s solar proposal.⁹⁷⁷

453. The Claimant’s second proposal was to replace its project with a 300 MW onshore wind project.⁹⁷⁸ This was also unacceptable because it would require different connection points on the transmission grid than were stipulated in the Claimant’s FIT Contract.⁹⁷⁹ As a result, it would have required the OPA to act to the prejudice of other proponents (who may have been more highly ranked than the Claimant) who may have already selected the same connection points for their projects.

454. Subsequently, in early 2012, the Claimant re-approached Ontario’s political staff with its proposal to develop its project as a pilot. The Claimant first approached local MPs in the Kingston area, who viewed the proposal as a “tough sell”.⁹⁸⁰ Instead, the Claimant was encouraged “to start smaller and make it a real pilot or drop the pilot idea”.⁹⁸¹ This was the same

⁹⁷³ RWS-Cecchini, ¶ 21; **R-0082**, FIT Program Rules, v. 1.2, s. 2.1(a)(iii), **R-0091**, FIT Program Rules, v. 1.3.0, s. 2.1(a)(iii).

⁹⁷⁴ **R-0233**, E-mail from Ian Baines, Windstream Energy Inc. to Chris Benedetti, Sussex Strategy, et al (Apr. 9, 2011).

⁹⁷⁵ RWS-Cecchini, ¶ 21.

⁹⁷⁶ RWS-Lo, ¶ 41.

⁹⁷⁷ *Ibid.*

⁹⁷⁸ Claimant’s Memorial, ¶ 290.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ **R-0288**, E-mail from Jeff Garrah to Nancy Baines, Windstream Energy Inc. (Feb. 2, 2012).

⁹⁸¹ **R-0288**, E-mail from Jeff Garrah to Nancy Baines, Windstream Energy Inc. (Feb. 2, 2012).

reason [REDACTED] Nevertheless, the Claimant persisted and pitched its proposal for a 300 MW pilot project to John Brodhead, who was in charge of the energy file in the Premier's Office, as well as Moira McIntyre, the Minister of the Environment's Chief of Staff.⁹⁸³ This proposal was never accepted by the Government of Ontario.

455. To date, the Claimant's FIT Contract continues to be "frozen" and has not been "cancelled" as a result of the deferral or any other action of the Government of Ontario. Instead, of agreeing to the reasonable solutions put forward by the OPA to accommodate the Claimant while the deferral put in place by the government continued, the Claimant chose to reject the OPA's offers and to make unreasonable and unrealistic demands to the OPA and Government of Ontario instead. It was the Claimant's right to do so – but it cannot now bring an Article 1105 claim based on the deferral and ignore the full range of treatment that the Government of Ontario and the OPA accorded to it.

6. Conclusion

456. The Claimant's allegation that the decision of Ontario to defer the development of offshore wind projects violated Article 1105 is baseless. The deferral was based on the need for additional research so that an adequately informed policy framework for offshore wind could be developed under the REA Regulation. This policy decision was consistent with the REA Regulation, which MOE described as having "special rules" for offshore wind projects and being subject to future development.⁹⁸⁴ The Claimant was well aware of the uncertainty surrounding the requirements of the offshore wind regulatory regime prior to signing its FIT Contract and has introduced no evidence of any representations which could have reasonably been relied upon by it in making an investment in Ontario.

⁹⁸² RWS-Lo, ¶ 33; RWS-Dumais, ¶¶ 32-34. See ¶¶ 247-250 above.

⁹⁸³ See Claimant's Memorial, ¶¶ 293, 297; **C-0603**, Windstream Energy Inc., Presentation, Lake Ontario Offshore Wind Discussion, Meeting with John Brodhead, Premier's Office (Mar. 2, 2012); RWS-Dumais, ¶ 30; **R-0292**, E-mail from Nancy Baines to Moir McIntyre and Doris Dumais, Ministry of the Environment (Mar. 1, 2012); **C-0602**, Windstream Wolfe Island Shoals Inc., Presentation, "Windstream Wolfe Island Shoals Offshore Wind Project Research Proposal: Addressing Questions through Science" (Mar. 2012).

⁹⁸⁴ See ¶ 117 above.

457. Moreover, when considered in its entirety, it is clear that the treatment accorded to the Claimant's investment by the Government of Ontario is far from shocking and egregious. To the contrary, it has been more than reasonable and fully accommodating. To date, Windstream's FIT Contract has not been cancelled by the Government of Ontario and the deferral has not resulted in any discriminatory treatment of the Claimant, as no offshore wind projects have been granted AOR status or developed in Ontario. In sum, the actions of the Government of Ontario did not violate Canada's obligation to act in accordance with the minimum standard of treatment in customary international law.

IV. The Claimant Has Failed to Demonstrate a Violation of Article 1110 – Expropriation and Compensation

A. Summary of Canada's Position

458. The Claimant alleges that Ontario's decision to defer the development of offshore wind projects, coupled with its alleged "failure to fulfill its promise to take positive steps to ensure that Windstream was not penalized," resulted in "far-reaching and drastic consequences for the Project" rising to the level of an unlawful indirect expropriation in violation of the obligations under Article 1110.⁹⁸⁵ The Claimant's allegations have no merit as a matter of fact or law.

459. As an initial matter, and as described in detail above, Ontario never made any promises to the Claimant, let alone a promise to take "positive steps to ensure" that the Claimant was not adversely affected by the deferral. To assert otherwise is a misrepresentation of the facts in this case. Further, the evidence in the record shows that despite having no obligation to do so, Ontario and the OPA did make significant good-faith efforts to work with the Claimant in order to mitigate the deferral's effects, if any. The Claimant rejected those attempts. Accordingly, in what follows, Canada focuses on the allegation that the imposition of the deferral is an indirect expropriation in violation of Article 1110. As will be shown below, it is not.

460. First, the Claimant's argument that the deferral has rendered its "FIT Contract substantially worthless"⁹⁸⁶ in violation of Article 1110 must fail because the FIT Contract is not an investment capable of being expropriated. Second, the deferral does not constitute an expropriation of the

⁹⁸⁵ Claimant's Memorial, ¶ 542, 558.

⁹⁸⁶ Claimant's Memorial, ¶ 555.

Claimant's enterprise or its project because: (1) its economic impact does not rise to the level of a substantial deprivation; (2) it did not significantly interfere with any reasonable investment-backed expectations; and (3) it is a non-discriminatory measure taken to protect legitimate public welfare objectives such as health, safety and the environment, and thus, does not have the character of an indirect expropriation.

B. Expropriation: Definition and Methodology

461. NAFTA Article 1110(1) provides that “[n]o 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 if the expropriation meets certain conditions.

462. The NAFTA does not define the term “expropriation.” As a result, NAFTA Chapter 11 tribunals have interpreted it in accordance with international law.⁹⁸⁷ A direct expropriation occurs in the case where the State seizes the title to the investment. An indirect expropriation occurs where a measure or series of measures have an effect equivalent to direct expropriation without formal transfer of title or outright seizure.⁹⁸⁸ As the Claimant admits,⁹⁸⁹ under international law both direct and indirect expropriation require a “taking” of fundamental ownership rights that causes a substantial deprivation of the economic value of the investment.⁹⁹⁰

⁹⁸⁷ **CL-081**, *S.D. Myers – Partial Award*, ¶ 280: (“The term ‘expropriation’ in Article 1110 must be interpreted in the light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases.”); **CL-053**, *Glamis – Award*, ¶ 354: (“The inclusion in Article 1110 of the term ‘expropriation’ incorporates by reference the customary international law regarding that subject”).

⁹⁸⁸ Recent treaty practice by Canada and the United States includes a clarifying definition of “indirect expropriation”. See, for example, **RL-012**, *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (entered into force 1 October 2014) at Annex B.10 (Expropriation), 1: (“Indirect expropriation results from a measure or series of measures of a Contracting Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure”). Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng>; **RL-055**, *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (November 2005), at Annex B (Expropriation), 4: (“The second situation addressed by Article 6(1) is known as indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure”).

⁹⁸⁹ Claimant's Memorial, ¶¶ 542-554.

⁹⁹⁰ **CL-074**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 (“*Pope & Talbot – Interim Award*”), ¶ 102: (“[...] under international law, expropriation requires a ‘substantial deprivation[.]’”); **CL-054**, *Grand River – Award*, ¶ 148: (“Other NAFTA Tribunals have regularly construed

463. NAFTA tribunals have generally applied a three-step analysis to determine whether a Party's measures have breached the standards of Article 1110.⁹⁹¹ First, the Tribunal must identify an investment that is capable of being expropriated. Second, the Tribunal must determine whether that investment has been expropriated. Third, if an expropriation is found, then the Tribunal will determine whether it was lawful under the sub-paragraphs of Article 1110(1).⁹⁹²

464. Canada agrees that if an expropriation is found to have occurred in this case, then it is an unlawful expropriation as no compensation has been paid to the Claimant. Hence, Canada will focus on the first two prongs of the analysis above.

C. The FIT Contract Is Not an Interest Capable of Being Expropriated

465. Article 1110 prohibits a NAFTA Party from expropriating an "investment". The Claimant alleges that "the FIT Contract is in and of itself an investment".⁹⁹³ In support of its argument that its FIT Contract is an investment, the Claimant relies on *PSEG Global v. Turkey*. However, that case is irrelevant here. The tribunal in *PSEG v. Turkey* was considering a dispute under the Turkey-U.S. BIT. That treaty provides defined an open-ended definition of "investment" that specifically includes "investment contracts" and "any right conferred by law or contract".⁹⁹⁴ As such, in that case there was no question that contracts and "any right" conferred thereunder could constitute investments under the Treaty. There was also no dispute that the claimant had signed a concession contract with Turkey. tribunal was whether the concession agreement was valid under Turkish law.⁹⁹⁵

Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment [...]""); **CL-053**, *Glamis – Award*, ¶ 357.

⁹⁹¹ See **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 242 ("Chemtura – Award").

⁹⁹² **RL-025**, *Fireman's Fund – Award*, ¶ 174: ("[T]he conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110."); **RL-024**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award and Dissenting Opinion, 16 December 2002, ¶ 98 ("*Feldman - Award*"); **CL-037**, *Chemtura – Award*, ¶ 242.

⁹⁹³ Claimant's Memorial, ¶ 496.

⁹⁹⁴ **RL-062**, *Turkey – United States Bilateral Investment Treaty*, 3 December 1985 (entered into force 18 May 1990, Article 1(c).

⁹⁹⁵ **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, ¶ 85.

466. In contrast, NAFTA contains a closed definition of an investment. Accordingly, the Claimant must demonstrate that the FIT Contract is among the exhaustive list of investments found in Article 1139. The Claimant does not even attempt to do so – it does not even identify under which of the categories in Article 1139 its FIT Contract qualifies.

467. NAFTA Article 1139(g) and (h) are the only sub-items that might capture the Claimant's FIT Contract. They define "investment" as follows:

- (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.

468. The NAFTA does not define the terms "property" or "interest." At international law, the term "property" refers to the right to use, enjoy and dispose of a property.⁹⁹⁶ However, "property" does not normally include rights that are contingent or that have not been acquired.⁹⁹⁷ As a result, tribunals interpreting the terms of the NAFTA have consistently held that the definition of investment does not include rights that are contingent or that have not been acquired.

469. In *Feldman*, the tribunal explained that a deprivation or a taking must concern a "vested right" or a right otherwise "possessed" by the Claimant.⁹⁹⁸ Similarly, the tribunal in *Thunderbird*

⁹⁹⁶ See, e.g., **RL-033**, *Libyan American Oil Company v. Libya*, Award, 12 April 1977, 20 LL.M. 1 (1981), ¶ 89: ("One of the fundamental rights universally recognized is the right to private ownership or property (Dominium). The Classical concept of this right defines it as the right to use, exploitation, and disposition (usus, fructus, abusus) of the object owned."). See **RL-059**, B.A. Wortley, *Expropriation in Public International Law* (Cambridge: Cambridge University Press, 1959), p. 50: ("[A] withdrawal of all the attributes of ownership, of the rights of *uti, frui* or *abuti*, over a thing, leaving the owner with a mere shadow of title, will be confiscation and may be treated as such.").

⁹⁹⁷ **CL-049**, *Eureko B.V. v. Republic of Poland* (UNCITRAL) Partial Award, 19 August 2005, ¶ 151: ("Eureko had a contingent right and an investor cannot be deprived of a contingent right with the reach of the Treaty as long as the contingency had not been realized.").

⁹⁹⁸ **RL-024**, *Feldman – Award*, ¶ 152: ("However, as with *S.D. Myers*, it may be questioned as to whether the Claimant ever possessed a "right" to export that has been "taken" by the Mexican government.").

explained that “compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”⁹⁹⁹ Further, the tribunal in *Merrill & Ring* held that in order to fall under the definition of “investment” in Article 1139(h):

[t]he right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the *Feldman* tribunal’s conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.¹⁰⁰⁰

470. Outside of the NAFTA context, the tribunal in *Emmis v. Hungary* recently similarly determined that “the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. [...]”¹⁰⁰¹

471. The Claimant appears to implicitly argue that the FIT Contract meets these requirements because it gives the Claimant the right to “a guaranteed revenue stream over a 20-year period”.¹⁰⁰² This allegation is simply false. The FIT Contract does not give the Claimant an actual and demonstrable entitlement to a certain benefit. Contrary to its allegations, the Claimant never had a vested right in the business activity of generating revenue from the operation of a wind project in accordance with its FIT Contract. The FIT Contract is expressly conditioned on the Claimant acquiring all of the permits and approvals needed to develop, construct and operate its proposed project.¹⁰⁰³ Payment under the FIT Contract is also expressly conditioned upon the Claimant’s Project being in operation and producing electricity by a specific deadline.

472. If the Claimant’s Project does not obtain all of its permits, and is not operational by the time required in its contract, then it has no rights to any payment from the OPA. Indeed, as BRG demonstrates, and as the Claimant’s own experts admit, the FIT Contract has no value if the

⁹⁹⁹ **CL-057**, *Thunderbird – Award*, ¶ 208.

¹⁰⁰⁰ **CL-061**, *Merrill & Ring – Award*, ¶ 142.

¹⁰⁰¹ **RL-022**, *Emmis International Holding, B.V. et al. v. Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014, ¶ 169.

¹⁰⁰² Claimant’s Memorial, ¶ 3.

¹⁰⁰³ **R-0092**, FIT Contract, v. 1.3, Schedule 1, s. 2.4.

Claimant could not bring its Project into Commercial Operation within the time frames that contract required.¹⁰⁰⁴

473. As explained above, at the time of the alleged expropriation, the Claimant had no permits and its site was not operational. Accordingly, as of February 11, 2011, the FIT Contract was not in and of itself an investment capable of being expropriated.

D. The Claimant's Investment Has Not Been Expropriated

474. While the FIT Contract is not in and of itself an investment, Canada does not dispute that the Claimant has made some investments in Canada, including its enterprise, WWIS. However, as will be shown below, that investment has not been indirectly expropriated as the Claimant alleges.

475. Determining whether a measure constitutes an indirect expropriation requires a case-by-case, fact-based inquiry. Recent Canadian and U.S. investment treaties set out interpretive annexes¹⁰⁰⁵ intended to assist tribunals by explaining further what States mean and have always meant by the term "indirect expropriation".¹⁰⁰⁶ As such, while the NAFTA does not contain the same annex, the factors laid out in these recent interpretative texts provide useful guidance to assess whether there has been an indirect expropriation in this case. These Annexes provide that:

¹⁰⁰⁴ RER-BRG, ¶¶ 23, 58; CER-Powell, ¶ 151.

¹⁰⁰⁵ See, e.g., **RL-014**, *Free Trade Agreement between Canada and the Republic of Panama*, 14 May 2010 (entered into force 1 April 2013), Can. T.S. 2013/9, Chapter Nine, Annex 9.11(b)(i)-(iii). Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/chapter-chapitre-9.aspx?lang=eng>; **RL-013**, *Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments*, 28 June 2009 (entered into force 14 December 2009), Annex B.13(1)(b)(i)-(iii). Available at: <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105176&lang=eng>; **RL-058**, Office of the United States Trade Representative, 2012 U.S. Model Bilateral Investment Treaty, Annex B, s. 4(a)(i)-(iii). Available at: <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; **RL-054**, *Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Promotion of Investment*, 19 February 2008 (entered into force 1 January 2012), Annex B, s. 4(a)(i)-(iii). Available at: <http://www.state.gov/documents/organization/101735.pdf>.

¹⁰⁰⁶ As stated by the former Chief of the NAFTA Arbitration Division in the Office of the Legal Adviser for the U.S. Department of State, the clarifications on the meaning of the expropriation provisions in recent investment agreements of the U.S. "do not change the nature of the substantive obligations that existed under the United States' prior agreements; instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties' intent in agreeing to those obligations." **RL-035**, Andrea J. Menaker, "Benefiting From Experience: Developments in the United States' Most Recent Investment Agreements" (2006), 12:1 U.C. Davis J. Int'l L. Pol'y, p. 122. Available at: <http://jilp.law.ucdavis.edu/issues/volume-12-1/menaker1-19.pdf>; **RL-061**, Andrew Newcombe, "Canada's New Model Foreign Investment Protection Agreement" (Aug. 2004), pp. 5-6.

- a. Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
- b. The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact based inquiry that considers, among other factors:
 - i. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred,
 - ii. the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and
 - iii. the character of the measure or series of measures;
- c. Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

476. An assessment of each of these factors demonstrates that there has not been an indirect expropriation in the circumstances of this case.

1. The Economic Impact of the Deferral Does Not Amount to an Expropriation

477. An expropriation requires a “taking” of fundamental ownership rights that causes a substantial deprivation of the economic value of an investment.¹⁰⁰⁷ Tribunals have considered a number of factors to determine whether a measure has substantially deprived a claimant of its investment. In particular, to assess the economic impact of a measure, tribunals have looked to the severity and the duration of the measure.¹⁰⁰⁸ With respect to the first, tribunals have

¹⁰⁰⁷ **CL-074**, *Pope & Talbot – Interim Award*, ¶ 102: (“[...] under international law, expropriation requires a ‘substantial deprivation[.]’”); **CL-061**, *Merrill & Ring – Award*, ¶ 145: (“The standard of substantial deprivation identified in *Pope & Talbot*, and followed by many other decisions, both in the context of NAFTA and other investment protection agreements, is the appropriate measure of the requisite degree of interference.”); **CL-054**, *Grand River – Award*, ¶ 148; **CL-053**, *Glamis – Award*, ¶ 357.

¹⁰⁰⁸ **CL-023**, *ADM – Award*, ¶ 240: (“the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure”); **CL-053**, *Glamis – Award*, ¶ 356: (“the threshold

consistently emphasized that to constitute expropriation, the taking must approach “total impairment.”¹⁰⁰⁹ Indeed, the requisite degree of interference must be such that the claimant’s enjoyment of the property is “effectively neutralized”¹⁰¹⁰ or “sterilis[ed].”¹⁰¹¹ The loss of economic use or viability of the investment must go beyond loss of profits – there must be proof that the investment’s continuing capacity to generate a return has been virtually extinguished.¹⁰¹² With respect to the second, tribunals have confirmed that for an indirect expropriation to have occurred, the deprivation suffered by the Claimant, even if severe, must be “permanent, and not ephemeral or temporary”.¹⁰¹³

478. The deferral does not constitute an indirect expropriation in these circumstances because (1) the Claimant’s Project had no value at the time of the alleged measure and (2) the deferral is temporary in nature.

(a) The Project Had No Value at the Time of the Deferral

479. Substantial deprivation is a high threshold to meet. It has been characterized as a “significant”, “fundamental”, “radical” or “serious” deprivation.¹⁰¹⁴ As the NAFTA Chapter 11 tribunal in *Fireman’s Fund* indicated:

[t]he taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).¹⁰¹⁵

examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of the impact.”).

¹⁰⁰⁹ **RL-025**, *Fireman’s Fund – Award*, ¶ 176(c).

¹⁰¹⁰ **CL-040**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005 (“*CMS – Award*”), ¶ 262.

¹⁰¹¹ See **CL-091**, *Waste Management II – Award*, ¶¶ 156-160. See also **RL-025**, *Fireman’s Fund – Award*, ¶ 176; **CL-040**, *CMS – Award*, ¶ 262; **CL-074**, *Pope & Talbot – Interim Award*, ¶ 102.

¹⁰¹² **CL-029**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012, ¶ 399. See also **CL-023**, *ADM – Award*, ¶ 251.

¹⁰¹³ **RL-025**, *Fireman’s Fund – Award*, ¶ 176(d); **CL-053**, *Glamis – Award*, ¶ 360. See also **RL-048**, Christoph Schreuer, “*The Concept of Expropriation under the ETC and Other Investment Protection Treaties*”, in 2 *Transnational Dispute Management 1* (May 2005) pp. 28-29 and generally at p. 29: (“The deprivation would have to be permanent or for a substantial time.”).

¹⁰¹⁴ **RL-025**, *Fireman’s Fund – Award*, fn. 157.

¹⁰¹⁵ **RL-025**, *Fireman’s Fund – Award*, ¶ 176(c).

480. As a result, a substantial deprivation does not occur where an investment has lost its economic value prior to the alleged expropriation for other reasons.¹⁰¹⁶ A State cannot deprive something of value if it had no value to begin with.

481. As demonstrated in detail in paragraphs 529-556 below, and in the report of URS¹⁰¹⁷ and BRG¹⁰¹⁸, the Claimant's Project had no value on the day that Ontario decided to defer the development of offshore wind in February 2011. Given the lack of development of the project at the time, the minimum development and construction periods that would be required, the unavoidable risks associated with the Claimant's Project, and its high costs, this was a project that was not viable within the constraints imposed by the FIT Contract.¹⁰¹⁹ Thus, the deferral did not substantially deprive the Claimant's investment of value – it was already valueless.

(b) The Deferral Is a Temporary Measure

482. Despite an early NAFTA decision that suggested partial or temporary deprivation may be sufficient to establish an expropriation,¹⁰²⁰ later case law has stressed the need to show that the expropriation is “permanent, and not ephemeral or temporary”.¹⁰²¹ For example, the *Tecmed* and *Al-Bahloul* decisions held that for an indirect expropriation to have occurred in relation to contractual rights, “the conduct of the State must result in an irreversible and permanent taking or destruction of the Claimant's rights.”¹⁰²²

483. As discussed above,¹⁰²³ on February 11, 2011, the Government of Ontario publicly announced its decision that offshore wind development in the Province would not proceed “until

¹⁰¹⁶ **RL-057**, *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶ 20.30.

¹⁰¹⁷ RER-URS, ¶¶ 5-11.

¹⁰¹⁸ RER-BRG, ¶¶ 23, 48.

¹⁰¹⁹ RER-URS, ¶¶ 5-11.

¹⁰²⁰ **CL-081**, *S.D. Myers - Partial Award*, ¶ 283.

¹⁰²¹ **RL-025**, *Fireman's Fund – Award*, ¶ 176(d); **CL-053**, *Glamis – Award*, ¶ 360; **CL-031**, *Cargill – Award*, ¶ 248. See also **RL-048**, Christoph Schreuer, *The Concept of Expropriation under the ETC and Other Investment Protection Treaties* in 2 *Transnational Dispute Management* 1 (May 2005), pp. 28-29 and generally at p. 29: (“The deprivation would have to be permanent or for a substantial time.”).

¹⁰²² **RL-003**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (S.C.C. Case No. V(064/2008) Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 281; **CL-084**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, ¶ 116 (“*Tecmed – Award*”).

¹⁰²³ See ¶¶ 259-262 above.

the necessary scientific research is completed and an adequately informed policy framework can be developed.”¹⁰²⁴ As indicated by the notice itself, the deferral is intended to last only as long as necessary to conduct the scientific research and develop and implement an adequately informed framework for offshore wind projects in Ontario. When the decision to implement the deferral was made, this task was expected to take until approximately 3-5 years.¹⁰²⁵

484. As described in detail above, since the announcement of the deferral decision, the Government of Ontario has been working to conduct the required scientific studies.¹⁰²⁶ [REDACTED], but while the failure of such efforts resulted in some delay, Ontario has been moving forward with its research plan.¹⁰²⁷

485. Ontario has completed several studies relating to offshore wind. Specifically, as described above, MNR has commissioned or funded reports on coastal engineering;¹⁰²⁸ a workshop on coastal engineering;¹⁰²⁹ two reports on fish and fish habitat in the Great Lakes;¹⁰³⁰ a study on migratory bats;¹⁰³¹ and a mapping tool.¹⁰³² Indeed, MNR has completed a number of the

¹⁰²⁴ **C-0482**, Ministry of Natural Resource, Decision on Policy, “Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development” (Feb. 11, 2011).

¹⁰²⁵ **R-0232**, Offshore Wind Development Research Plan, Vol. 03 (Apr. 5, 2011). The science plan was subsequently revised in February and March 2012 to reflect a longer time period for research to be conducted (approximately 2017). See **C-0598**, Ontario, Presentation, “Offshore Wind Power Development – Proposed Research Plan” (Feb. 2012); **C-0611**, Ministry of the Environment, Presentation, “Offshore Wind Power Development – Proposed Research Plan” (May 2012).

¹⁰²⁶ See ¶¶ 277-299 above.

¹⁰²⁷ *Ibid.* **C-0598**, Government of Ontario, Presentation, “Offshore Wind Power Development - Proposed Research Plan” (Feb. 2012); **C-0611**, Ontario, Presentation, “Offshore Wind Power Development - Proposed Research Plan” (May 2012).

¹⁰²⁸ **C-0572**, W.F. Baird & Associates Coastal Engineers Ltd. & Beacon Environmental, “Offshore Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ontario Ministry of Natural Resources” (May 2011).

¹⁰²⁹ **R-0267**, E-mail from Dilek Postacioglu, Ministry of the Environment to Nicole Worsley, Ministry of the Environment, et al (Oct. 18, 2011); **R-0265**, Ministry of the Environment, Presentation, “Renewable Energy Approval (REA) Off-shore Wind” (Oct. 14, 2011), slide 6.

¹⁰³⁰ **C-0543**, Sarah Nienhuis and Erin S. Dunlop, “The potential effects of offshore wind power projects on fish and fish habitat in the Great Lakes”, MNR Aquatic Research Series 2011-01 (2011); **C-0548**, Sarah Nienhuis and Erin S. Dunlop, “Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat”, MNR Aquatic Research Series 2011-02 (2011).

¹⁰³¹ **R-0279**, Rachel M. Hamilton, Spatial and Temporal Activity of Migratory Bats at Landscape Features (2012). Available at: <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=2177&context=etd>.

outstanding studies within its areas of responsibility relating to offshore wind development.¹⁰³³ MOE has also completed some of the necessary research, through its study on water quality within the Lake Ontario nearshore.¹⁰³⁴ Further, only a few months ago, MOE began efforts to procure a preliminary noise study and a decommissioning study.¹⁰³⁵ As such, the Government of Ontario continues to complete the work required to develop regulatory rules and requirements for offshore wind facilities, demonstrating that the deferral is a temporary measure. As such, it cannot amount to an expropriation.

486. The Claimant asserts that the Tribunal should ignore these facts and conclude that its Project has been cancelled. In particular, it argues that the deferral has caused such “drastic” delays in the Project that it has “crystallize[d] into an effective cancellation of the Project - a *de facto* cancellation, if not a formal one.”¹⁰³⁶ This assertion misrepresents the current status of the Project. While the Claimant has experienced delays as a result of the deferral, the Government of Ontario and the OPA have been more than accommodating in attempting to mitigate the effects of these delays on the Claimant and allow it to maintain the possible benefits of its FIT Contract.

487. The Claimant has been repeatedly informed that its project is on hold until the regulatory rules and requirements for offshore wind projects are developed.¹⁰³⁷ This is in contrast to all other offshore projects. Rather than being “essentially quashed or cancelled” like one other FIT application and a number of other Crown land applications, the Claimant’s Project was “deferred”, “frozen” or “kept alive”.¹⁰³⁸ The Claimant’s own lobbyist Mr. Benedetti described the Government’s decision as “will be suspending offshore development, killing everyone but

¹⁰³² **R-0265**, Ministry of the Environment, Presentation, “Renewable Energy Approval (REA) Off-shore Wind” (Oct. 14, 2011), slide 7; **C-0559**, Ontario, Presentation, “Status of Wind Energy Science” (Oct. 19, 2011), slide 2. MNR’s Renewable Energy Atlas, powered by Land Information Ontario, is accessible at <http://www.giscoeapp.lrc.gov.on.ca/web/MNR/Integration/Renewable/Viewer/Viewer.html>.

¹⁰³³ RWS-Lawrence, ¶ 51.

¹⁰³⁴ **C-0637**, Peter C. Nettleton, “Application of the MIKE3 model to examine water quality impacts within the Lake Ontario Nearshore in 2008 in support of the Great Lakes Nearshore Monitoring and Assessment Program” (Dec. 28, 2012).

¹⁰³⁵ **R-0383**, Noise Study RFP; **R-0384**, Decommissioning Study RFP.

¹⁰³⁶ Claimant’s Memorial, ¶ 564.

¹⁰³⁷ See ¶¶ 260, 263-276, 353 above.

¹⁰³⁸ **C-0484**, Transcription of Audio Recording of Telephone Conference Call (Feb. 11, 2011).

Windstream.”¹⁰³⁹ The fact is that the Claimant’s Project was merely “frozen” and can continue to be developed once the necessary science, rules and policies for offshore wind are in place.¹⁰⁴⁰ As Mr. Benedetti explained to the Claimant, “the timelines for development will be significantly extended.”¹⁰⁴¹

488. In this regard, the Claimant was invited to sit down with the OPA to find a negotiated solution within the terms of their FIT Contract that would allow the Project to proceed following the lifting of the deferral without any impact on its FIT Contract.¹⁰⁴² As described above,¹⁰⁴³

[REDACTED]

[REDACTED] In fact, the OPA went so far as to [REDACTED]
[REDACTED] The Claimant failed to accept this offer.¹⁰⁴⁷

[REDACTED]

[REDACTED]⁸ This demonstrates that the cause of any “*de facto* cancellation” the

¹⁰³⁹ C-0486, Email from Chris Benedetti, Sussex Strategy to John Vellone, Borden Ladner Gervais LLP (Feb. 11, 2011).

¹⁰⁴⁰ RWS-Lo, ¶ 37.

¹⁰⁴¹ C-0486, Email from Chris Benedetti, Sussex Strategy to John Vellone, Borden Ladner Gervais LLP (Feb. 11, 2011).

¹⁰⁴² RWS-Cecchini, ¶¶ 18-19.

¹⁰⁴³ See ¶¶ 270-276 above.

¹⁰⁴⁴ RWS-Cecchini, ¶¶ 5, 18-22.

¹⁰⁴⁵ RWS-Cecchini, ¶¶ 18-22; R-0226, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Mar. 18, 2011); R-0250, Letter from Perry Cecchini, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (Jun. 24, 2011).

¹⁰⁴⁶ R-0226, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Mar. 18, 2011); R-0250, Letter from Perry Cecchini, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (Jun. 24, 2011).

¹⁰⁴⁷ RWS-Cecchini, ¶ 22.

¹⁰⁴⁸ R-0223, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Perry Cecchini and Michael Killeavy, Ontario Power Authority (Feb. 23, 2011).

Claimant argues is the result of its own behaviour, and as such, any permanent effect of the deferral on the Claimant is a result of its own doing. The deferral itself is intended to be a temporary measure that will last only as long as necessary.

2. The Deferral Has Not Significantly Interfered with the Claimant's "Distinct, Reasonable, Investment-Backed Expectations"

490. A claimant's reasonable investment-backed expectations have been considered by some tribunals as a relevant factor in determining whether indirect expropriation has occurred.¹⁰⁴⁹ Any such expectations must also be considered in light of, *inter alia*, "the regulatory regime in place at the time of investment."¹⁰⁵⁰ As noted by the tribunal in *Glamis Gold*, "[t]he purpose of consideration of [the claimants'] investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'"¹⁰⁵¹

491. In assessing the Claimant's expectations, it is important to keep in mind that it is not the function of Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on a NAFTA Party the burden of compensating for the failure of a business plan that was not prudent in the circumstances.¹⁰⁵² As described by the *Azinian* tribunal: "It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities [...] NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its term so provides."¹⁰⁵³ Nor is NAFTA meant to operate as a "Midas touch" for every commercial operator doing business in a foreign state who finds himself in a dispute.¹⁰⁵⁴

¹⁰⁴⁹ **RL-025**, *Fireman's Fund – Award*, ¶ 176(k); **RL-043**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Award, 29 June 2012, ¶¶ 116-123.

¹⁰⁵⁰ **RL-016**, Jack Coe, Jr., and Noah Rubins, "Regulatory Expropriation and the Tecmed Case: Context and Contributions", in Todd Weiler, Ed., *International Investment Law and Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties And Customary International Law* (2005) 597 at 624.

¹⁰⁵¹ **CL-053**, *Glamis – Award*, fn. 704, citing *Cane Tenn., Inc. v. United States*, 63 Fed. Cl. 715 (2005).

¹⁰⁵² See **CL-091**, *Waste Management II – Award*, ¶¶ 160, 177; **RL-025**, *Fireman's Fund – Award*, ¶¶ 184, 218.

¹⁰⁵³ **RL-007**, *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States*, (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, ¶ 83.

¹⁰⁵⁴ See **RL-040**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* (ICSID No. ARB(AF)/11/1) Award, 30 April 2014, ¶ 82.

492. As explained above,¹⁰⁵⁵ the Claimant could not have had any reasonable investment-backed expectations at the time of the alleged expropriation that changes to the regulatory system were not forthcoming. Indeed, the Claimant's Project required regulatory change to proceed. Its complaint here is that the regulatory change it predicted has not been adopted within its preferred timeframe. The Claimant knew of and accepted these risks when it invested in Ontario and eventually signed its FIT Contract. NAFTA Article 1110 does not provide insurance for that informed decision.

493. The tribunal in *Methanex* explained that, "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."¹⁰⁵⁶ The Government of Ontario made no commitments to the Claimant with respect to its FIT Contract, or any of the regulatory permits and approvals it would have needed to reach Commercial Operation.¹⁰⁵⁷

3. The Character of the Measure Is Not Consistent with It Being Found to Be Indirect Expropriation

494. Many types of government regulation will have effects on an investment, and potentially even significant effects. However, prohibitions against indirect expropriation do not function so as to limit the policy space of governments to such an extent that they are handcuffed in their ability to regulate in the public interest. As the tribunal in *Feldman* explained,

governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek

¹⁰⁵⁵ See ¶¶ 401-437 above.

¹⁰⁵⁶ CL-063, *Methanex – Award*, Part IV, Ch. D., ¶ 7.

¹⁰⁵⁷ See ¶¶ 401-437 above.

compensation, and it is safe to say that customary international law recognizes this.¹⁰⁵⁸

495. Accordingly, a non-discriminatory measure, designed to protect legitimate public welfare objectives such as health, safety and the environment, is not an indirect expropriation except in the rare circumstance where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.¹⁰⁵⁹ Such a principle is also reflected in the police powers doctrine which applies to expropriations which are carried out by States to protect public health and the environment.¹⁰⁶⁰

496. In *Suez InterAgua v. Argentina*, the tribunal ruled that “[...] in evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.”¹⁰⁶¹ NAFTA tribunals have approached and applied the doctrine the same way. As the tribunal in *Saluka*, citing to *Methanex* held, “[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required.”¹⁰⁶² In that case, the tribunal concluded that because it “was made for a public purpose, was non-discriminatory and was accomplished with due process”, and because no specific commitments were made to Methanex, California’s ban on the use of methyl tertiary butyl ether “from the standpoint of international law [...] was a lawful regulation and not an expropriation.”¹⁰⁶³

¹⁰⁵⁸ **RL-024**, *Feldman – Award*, ¶ 103.

¹⁰⁵⁹ See ¶ 475 above.

¹⁰⁶⁰ **RL-004**, George H. Aldrich, “What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claim Tribunal”, (1994) 88 Am. J. Int’l L. 585 at p. 609: (“[I]ability does not arise from actions that are non-discriminatory and are within the commonly accepted taxation and police powers of states.”) See also **RL-038**, Andrew Newcombe, “The Boundaries of Regulatory Expropriation in International Law”, (2005) 20:1 ICSID Rev. 1 at p. 22. As Professor Newcombe explains: (“[t]he general rationale for non-compensation is that property rights have inherent limitations – they are never absolute. Property is a social institution that serves social functions. Property cannot be used in a way that results in serious harms to public order and morals, human health or the environment. A comparative study of domestic legal systems would surely confirm this as a general principle of law.”) (“*Newcombe – I*”); **RL-038**, *Newcombe – I*, p. 21.

¹⁰⁶¹ **RL-050**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Liability, 30 July 2010, ¶ 128.

¹⁰⁶² **CL-080**, *Saluka – Partial Award*, ¶ 262.

¹⁰⁶³ **CL-063**, *Methanex - Award*, Part IV, Ch. D, ¶ 15.

497. More recently, in *Chemtura*, a manufacturer of a lindane-based pesticide challenged the ban on lindane introduced by Canada as an expropriation in violation of Article 1110. In addition to finding that the measures did not amount to a substantial deprivation of the claimant's investment, the tribunal held that the State agency "took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation."¹⁰⁶⁴

498. The Claimant argues implicitly that all of these authorities are wrong. In particular, it relies on the awards in *Santa Elena v. Costa Rica* and *Vivendi II* and suggests that tribunals have "rejected attempts to apply a broad 'public purpose' exception to render measures that have a legitimate public purpose non-expropriatory."¹⁰⁶⁵ However, leaving aside the question of whether these two cases are correctly decided, they are not applicable in the circumstances here.

499. In *Santa Elena*, the government of Costa Rica had expropriated by decree a specific piece of property consisting of over 30 kilometres of Pacific coastline, numerous rivers, springs, valleys, forests and mountains.¹⁰⁶⁶ There was no dispute in that case as to whether an expropriation had occurred—the only issue in the case was the amount of compensation owed by Costa Rica to the claimant.¹⁰⁶⁷ In *Vivendi II*, the issue was whether the actions of an Argentine province directed at a particular concessionaire amounted to an indirect expropriation.¹⁰⁶⁸ What both of these cases have in common which distinguishes them from cases such as *Feldman*, *Methanex*, and *Chemtura*, is that they involved measures targeted at a particular investment as opposed to regulatory measures of general application.

500. At the very least, it is clear that the NAFTA Parties cannot indirectly expropriate an investment merely by adopting, in good faith and based on the precautionary principle, non-

¹⁰⁶⁴ CL-037, *Chemtura – Award*, ¶ 266.

¹⁰⁶⁵ Claimant's Memorial, ¶ 580.

¹⁰⁶⁶ CL-042, *Santa Elena*, ¶ 15.

¹⁰⁶⁷ CL-042, *Santa Elena*, ¶¶ 18, 54.

¹⁰⁶⁸ CL-041, *Compagna de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case ARB/97/3) Award, 20 August 2007, ¶ 7.4.19 ("*Vivendi – Award*").

discriminatory measures of general application that are intended to protect health and the environment.¹⁰⁶⁹ For all of the reasons explained above,¹⁰⁷⁰ and summarized below, the Government of Ontario's decision to defer the development of offshore wind fits squarely within the policy space that it is afforded under the NAFTA.

501. First, there were legitimate concerns that the science was not sufficient to support the development of a regulatory framework that would be capable of assessing the effects of the first large scale freshwater offshore wind farm in the world. The idea behind the precautionary principle is to anticipate and avoid environmental damage before it occurs. In the field of human health and environmental protection, the need for taking precautionary measures while scientific studies are undertaken to identify the risk or risks associated with a course of action is well established.¹⁰⁷¹ In a transboundary setting, like Lake Ontario, the principle of prevention is particularly important. The ICJ has recently pointed out that the precautionary principle is a customary rule that has its origins in the due diligence that is required of a State in its territory. According to the ICJ, a State "is obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."¹⁰⁷²

502. Further, Ontario received with an unprecedented level of response from the public on offshore projects and anticipated that REAs for offshore wind projects would be appealed to administrative tribunals and the courts. For all of these reasons, the government knew that it had

¹⁰⁶⁹ See **RL-026**, Samy Friedman, *Expropriation in International Law* (London: Stevens, 1953), pp. 50-51; **RL-011**, *Brownlie*, pp. 536-537: ("Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, i.e. exercise of police power, health measures, and the like."). See also **RL-038**, *Newcombe – I*, at p. 22; **RL-044**, *Restatement (Second) of the Law: Foreign Relations, Law of the United States*, American Law Institute (1965), § 197(1): ("Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in s. 165 if it is reasonably necessary for (a) the maintenance of public order, safety, or health [...]").

¹⁰⁷⁰ See ¶¶ 389-397 above.

¹⁰⁷¹ **RL-045**, 1992 United Nations "Conference on Environment and Development" (UNCED). The Rio Declaration consisted of 27 principles intended to guide future sustainable development around the world. Principle 15 of the Rio Declaration indicates: ("[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.").

¹⁰⁷² **RL-042**, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* International Court of Justice, Judgments, 20 April 2010, ¶ 101.

to proceed cautiously. The record shows that the Government of Ontario recognized that the underpinnings of the regulatory framework for offshore wind needed to be solid. According to Mr. Baines' notes from his conversation with the Minister of Energy's Chief of Staff, Mr. Baines was told that "future offshore regulations [needed to] be "bulletproof" and survive challenges."¹⁰⁷³ MOE, in particular, wanted to "get it right" before proceeding with offshore regulations.¹⁰⁷⁴

503. Second, the deferral was of general application and non-discriminatory. The Claimant argues that the Tribunal should ignore the fact that the deferral applied to "any development of offshore wind projects",¹⁰⁷⁵ and that all FIT applications and Crown land applications to build offshore wind facilities were cancelled, with only one exception: the Claimant's. Instead, the Claimant suggests the Tribunal consider whether the deferral on offshore wind development applied to all other FIT Contract holders regardless of whether they were using offshore wind.¹⁰⁷⁶ That suggestion is untenable. With an underdeveloped regulatory infrastructure for offshore wind, the Government of Ontario needed to act to ensure that, pending further scientific research no offshore wind projects would move forward. The fact that FIT Contract holders for other sources of renewable energy, where there was not such uncertainty, were not affected, does not make the deferral discriminatory. The environmental permitting process is different for each type of renewable fuel. If the Claimant is correct that all FIT Contract holders had to be treated the same way, then the government could only have had two options. Either, it could have chosen to apply the prescriptive regulations for onshore wind, solar and biogas to offshore wind development despite their different environmental impacts, or, it could have adopted a deferral on all forms of renewable energy. There would be no rational reason to adopt such an "untargeted" approach, and NAFTA does not require it.

504. Third, the impacts of the deferral on the Claimant are not so severe in the light of its purpose that the deferral cannot be reasonably viewed as having been adopted and applied in

¹⁰⁷³ C-0507, Email from Ian Baines, Windstream Energy Inc. to John Vellone et al. (Feb. 19, 2011).

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ C-0482, Ministry of Natural Resources, Policy Decision Notice, "Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development" (Feb. 11, 2011).

¹⁰⁷⁶ Claimant's Memorial, ¶ 570.

good faith. The purpose of the deferral was to allow time for the Government of Ontario to do the needed scientific studies. In this light, as explained at length above, the decision to merely freeze or pause the Claimant's FIT Contract while the work was ongoing is a proportionate response to the legitimate public policy purpose of the government. Both the Government of Ontario and the OPA attempted to ensure that the Claimant was not overly negatively affected by the deferral. The Claimant's position that the government had no right to even pause development in order to finalize the regulatory framework would severely limit the Government of Ontario's powers to act in the public interest. NAFTA does not require such a result. Accordingly, for all of the reasons above, Ontario's February 2011 decision on offshore wind development is not an indirect expropriation.

THE CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS FOR THE ALLEGED VIOLATIONS OF NAFTA

I. Summary of Canada's Position

505. In order to be entitled to recover damages in this arbitration, the Claimant bears the burden of proving both that the alleged breaches actually caused its losses, and the quantum of those losses. It has not, and indeed, cannot meet its burden in this case. Even if the challenged measures in this case are in breach of Canada's obligations under the NAFTA, those measures were not the cause of any loss in value of the Claimant's investment. The reason is simple – at the time of those measures, the Claimant's Project had no value.

506. The Claimant dreamed of constructing the first large-scale freshwater offshore wind project in the world. Its plan was to install more than one hundred turbines on top of massive, custom-made concrete foundations that would have to be floated, using novel technology, more than 175 km and then dropped onto the shoals off of Wolfe Island in Lake Ontario – the Lake that provides the drinking water for half of the province. The Claimant planned to locate its wind project in the middle of an existing international shipping lane and up against the U.S. border. And, it planned to do all of this in the incredibly harsh climate of Lake Ontario where wind, waves and ice make construction impossible for significant periods of the year.

507. In its FIT Contract, the Claimant committed to bring its Project into operation within five years. However, when it signed that contract, it did not have permission to use the lakebed upon which it sought to develop its wind farm, it did not have a single one of the numerous permits that would be required from various levels of government, and it did not have any experience bringing a wind facility into operation. As URS concludes, given the early stage of the Claimant's Project, and the minimum development and construction time it would require, not to mention the risks it was likely to encounter, it is not reasonable to conclude that the Claimant would be able to bring its Project into operation within the timelines required by the FIT Contract. In sum, what the Claimant had were the hopes and dreams common amongst those in the industry; what it did not have was a project that was viable within the contractual constraints to which it had agreed.

508. Moreover, even assuming that this project could have been built in the time required, it still had no value on the valuation date because of its riskiness and high capital costs. In order to prove otherwise, the Claimant relies upon the valuation produced by Deloitte. However, as shown in the report of BRG, that valuation is replete with speculation, unjustified assumptions and errors which produce an inflated calculation of damages. A properly done damages analysis results in a negative net present value for the investment as of the valuation date.

509. For these reasons, the measures in question cannot be considered to have caused the Claimant's losses and the Claimant is not entitled to recover any damages even if the Tribunal finds a breach of the NAFTA. Even the Claimant's sunk costs are not recoverable because they would have been lost even if the challenged measures had never been adopted.

510. In the alternative, if the Tribunal believes some award of damages is justifiable, then because of the pre-construction status of the Claimant's investment, any such award must be limited to the Claimant's sunk costs. As shown below, the Claimant has failed to adequately prove the quantum of its sunk costs.

II. The Standard of Compensation under NAFTA Chapter 11

511. Other than with respect to Article 1110, NAFTA Chapter 11 does not have an express provision that deals with the standard of compensation for breaches. As a result, tribunals have relied on Article 1135: "Final Award" for guidance and on principles of international law. Article 1135 allows a tribunal to award either money damages or restitution of property.¹⁰⁷⁷ At international law, an award of money damages should repair the wrongful conduct by returning the Claimant to the position it would have been absent that wrongful conduct. As the Permanent Court of International Justice ("PCIJ") explained in *Chorzow*, damages should "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."¹⁰⁷⁸

¹⁰⁷⁷ NAFTA Article 1135, ¶ 1(a)-(b).

¹⁰⁷⁸ **CL-034**, *Case Concerning the Factory at Chorzow*, (*Germany v. Poland Republic*) (1928), 17 P.C.I.J., Ser. A No. 17, 3, 13 September 1928 ("*Chorzow*"), p. 47.

512. While there is a rule for expropriatory breaches in the NAFTA, in essence, it simply codifies the standard of restitution. In particular, Article 1110(2) of the NAFTA provides that the compensation for an alleged breach of Article 1110:

shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

513. Because an expropriation requires the substantial deprivation of the entire investment, Article 1110(2) makes clear that restitution requires compensation equal to the fair market value of the entire investment. The fair market value of the investment may also be the appropriate standard for a non-expropriatory breach, but only if that breach directly caused total loss of the investment.¹⁰⁷⁹

514. As is made clear in Article 1110(2), in the case of an expropriation, the compensation should equal the fair market value on the date immediately before the expropriation took place or became known. The same principle applies with respect to breaches of other articles in Chapter 11. The value of the investment should be established as of the date of the breach, because that is the value that was lost when the State adopted the measure in question. In other words, that is the specific loss for which the State is responsible.

515. The Claimant argues that it should be permitted to choose between a valuation as of the expropriation date and as of the date of the award, based on whichever valuation is higher.¹⁰⁸⁰ The Claimant is wrong. The Claimant points to no NAFTA award that adopts such an unbalanced and biased rule. Moreover, the Claimant offers no justification for its approach in the circumstances applicable here. The Claimant had a conceptual idea about building the first large freshwater offshore wind farm in the world. It was not built or in operation at the time of the alleged breach, and indeed, even if development had continued, it would not have been in operation today. Accordingly, there will be no issue of actual losses between the date of the breach and the date of the award. Moreover, this is not a case where the State has taken control

¹⁰⁷⁹ **RL-024**, *Feldman – Award*, ¶ 194.

¹⁰⁸⁰ Claimant's Memorial, ¶¶ 658-660.

of an operating investment, and therefore stands to unjustly enrich itself if the investment were to increase in value because of market conditions, prices or other circumstances.

516. Ultimately, however, in the context of this case, this legal issue is not relevant. Unlike the cases cited by the Claimant, the Project in this case never came into operation and never made any money, and it did not increase in value at any point after the allegedly wrongful measures. As such, the appropriate date for this Tribunal to use as the valuation date of the alleged harm is the date the Claimant alleges the harm crystallized, May 4, 2012.

III. The Claimant Bears the Burden of Proving that the Alleged Breaches of NAFTA Caused it Actual Specific Losses

517. For any alleged breach of NAFTA, whether it is Article 1102, 1103, 1105 or 1110, the burden is on the Claimant to show that the alleged breach caused it an actual and specific loss. Specifically, Articles 1116(1) and 1117(1) require that the Claimant demonstrate that it “has incurred loss or damage, by reason of, or arising out of” a breach of NAFTA.¹⁰⁸¹ As explained by several NAFTA tribunals, this language requires a “sufficient causal link”¹⁰⁸² or an “adequate[] connect[ion]”¹⁰⁸³ between the alleged breach of NAFTA and the loss sustained by the investor.

518. The tribunal in *Biwater Gauff v. Tanzania* explained that causation in international investment law “comprises a number of different elements, including, *inter alia*; (1) a sufficient link between the wrongful act and the damage in question; and (2) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote”.¹⁰⁸⁴ Similarly, the Commentary to Article 31 of the ILC’s Articles describes the requirement of causation as follows:

[R]eference may be made to losses ‘attributable [to the wrongful act] as a proximate cause’, or to damage which is ‘too indirect, remote, and uncertain to be

¹⁰⁸¹ NAFTA, Articles 1116 and 1117.

¹⁰⁸² **RL-047**, *S.D. Myers Inc. v. Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 140 (“*S.D. Myers – Second Partial Award*”); See also **RL-010**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008 (“*Biwater – Award*”), ¶ 779: (“Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].”).

¹⁰⁸³ **RL-024**, *Feldman – Award*, ¶ 194.

¹⁰⁸⁴ **RL-010**, *Biwater – Award*, ¶ 785; **CL-044**, *Duke Energy – Award*, ¶ 468.

appraised', or to 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. Thus causality in fact is a necessary but not a sufficient condition of reparation. [...] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.¹⁰⁸⁵

519. In accordance with these principles, international arbitral tribunals have refused to award damages in situations where the investment had already failed by the time of the impugned measures. For example, in the *Biwater* arbitration, the tribunal concluded that there was no factual link between the damage claimed and the breach of the investment treaty at issue because the claimant's investment had lost all of its value before the date of the breach. In that case, financial projections showed that the investment would suffer significant operating losses going forward.¹⁰⁸⁶ As a result, the tribunal held that none of the breaches of the treaty by Tanzania "in fact caused the loss and damage in question, or broke the chain of causation that was already in place."¹⁰⁸⁷

520. Similarly, in *ELSI*, the ICJ concluded there were no damages to be awarded because the company was worthless before the allegedly wrongful act by the host State. In that case, the company had failed because it was under-capitalized, losing money, and debt-ridden. Further, the company had lost the confidence of its investors who had made it clear they did not want to finance it further. The Court therefore concluded that the "underlying cause [of ELSI's demise] was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition."¹⁰⁸⁸

521. In short, investment treaties such as the NAFTA are not tools to be used by claimants to recover money related to the failure of their businesses due to factors unrelated to the alleged breach of the NAFTA.¹⁰⁸⁹

¹⁰⁸⁵ **RL-029**, *ILC Articles - Commentary*, Article 31, pp. 204-205 (citations omitted).

¹⁰⁸⁶ **RL-010**, *Biwater – Award*, ¶¶ 789-790.

¹⁰⁸⁷ **RL-010**, *Biwater – Award*, ¶ 798.

¹⁰⁸⁸ **RL-021**, *Elettronica Sicula S.p.A. (US v. Italy)* [1989] I.C.J. Rep., 20 July 1989, ¶ 101.

¹⁰⁸⁹ **CL-091**, *Waste Management II – Award*, ¶ 114; *See also* **RL-034**, *Emilio Maffezini v. Spain* (ICSID Case No. ARB/97/7) Award on the Merits, 13 November 2000, ¶ 64; *See also* **RL-015**, *CMS Gas Transmission Company*

IV. The Claimant Has Failed to Prove that any of the Challenged Measures Caused Its Actual Losses

522. The Claimant has alleged that it suffered somewhere between \$357.5 to \$568.5 million, without interest, in damages as a result of Canada's breaches of Articles 1102, 1105 and 1110, depending on numerous factors upon which the Claimant offers no definitive position, despite its burden to do so.¹⁰⁹⁰ Further, despite alleging a breach of Article 1103, it has not even attempted to quantify any losses associated with that alleged breach.¹⁰⁹¹ Its claims for damages should be dismissed for failure to meet its burden to prove quantum alone.

523. The Claimant also fails to link any of its alleged harm to any specific breach of the NAFTA. It is not enough for the Claimant to simply identify alleged breaches and then to identify some massive range of alleged losses. NAFTA, and international law, requires more than this. When the proper approach to the consideration of damages is applied, it is clear that the Claimant has not proven that the losses it claims were caused by any of the alleged breaches.

A. The Claimant Has Failed to Prove that It Suffered Damages as a Result of the Alleged Breaches of Articles 1102 and 1103

524. The Claimant's calculation of its alleged damages is based entirely upon the counterfactual scenario that but for the alleged imposition of the deferral and the failure to lift it by May 4, 2012, the Claimant would have been able to bring its Project into Commercial Operation and realize profits as a result.¹⁰⁹² However, the Claimant's allegations of breaches of Articles 1102 and 1103 have no link whatsoever to this alleged harm.

525. The Claimant alleges that Canada breached Article 1102 "by keeping TransCanada whole following the cancellation of its project, but refusing to accord the same treatment to Windstream."¹⁰⁹³ It alleges that 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 [its

v. *The Argentine Republic* (ICSID Case No. ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 29 ("*CMS – Jurisdiction*").

¹⁰⁹⁰ Claimant's Memorial, ¶ 691 (g).

¹⁰⁹¹ Claimant's Memorial, ¶ 665; CER-Deloitte (Taylor & Low), ¶ 1.34.

¹⁰⁹² CER-Deloitte, ¶¶ 1.40, 1.27-1.37.

¹⁰⁹³ Claimant's Memorial, ¶ 664.

offshore wind] Project.”¹⁰⁹⁴ However, the Claimant has failed to demonstrate a causal link between the alleged harm it suffered and the treatment afforded to TransCanada and Samsung. Simply put, even if the Government of Ontario had not settled its dispute with TransCanada, or directed the OPA to enter into a power purchase agreement with Samsung (i.e. even if the wrongful conduct was removed), nothing would have changed for the Claimant. It still would not have been able to proceed with the development of its project on May 4, 2012.

526. Further, the Claimant has not pointed to a single piece of evidence in support of its allegation that Ontario's settlement of a dispute with TransCanada in any way caused Ontario to refuse to do the same for Windstream. And nor has the Claimant offered any evidence to prove that it would have received a FIT Contract for a solar project absent Samsung signing a PPA with the OPA pursuant to the GEIA. There is simply no link between the treatment afforded to TransCanada and Samsung and any alleged harm suffered by the Claimant.

B. The Claimant Has Failed to Prove that It Suffered Damages as a Result of the Alleged Breach of Articles 1105 and 1110

527. The Claimant alleges that the decision by Ontario to defer offshore wind development on February 11, 2011 breached Canada's obligations under Articles 1105 and 1110. According to the Claimant, damages crystallized on May 4, 2012 when “the project became worthless because Windstream was no longer able to develop it within the time frames set out in the FIT Contract.”¹⁰⁹⁵

528. As has been shown above, Ontario's decision did not breach Articles 1105 and 1110. However, in the alternative, even if it did, it did not cause the Claimant any damages. By the time this decision was made, it was impossible to cause damage to the Claimant for a simple reason: the Claimant's Project already had no market value since it was a foregone conclusion that the project would not be able to reach Commercial Operation within the time frames outlined in the FIT Contract.¹⁰⁹⁶ A project that could not be built prior to the OPA having an unfettered right to terminate the FIT Contract has no value. Further, even if the Claimant had

¹⁰⁹⁴ Claimant's Memorial, ¶ 665.

¹⁰⁹⁵ Claimant's Memorial, ¶¶ 428-475, 677.

¹⁰⁹⁶ RER-BRG, ¶¶ 21, 47-49, 162, 245.

been able to convince investors otherwise, the Project still had no value on May 4, 2012 (or February 11, 2011 for that matter) because of its riskiness and its high costs.

1. The Project Had No Value on the Valuation Date Because It Could Not Be Constructed Within the Time Frames Required by the Claimant's FIT Contract

(a) The Claimant's Construction Schedule Is Inappropriately Simplistic

529. The Claimant has alleged that “but for” the Government of Ontario's failure to lift the deferral on offshore wind development by May 4, 2012, it would have brought the Project into Commercial Operation within the timelines specified in the FIT Contract.¹⁰⁹⁷ Not counting the duration of any Force Majeure event, the Claimant had five years (60 months) to bring the project into Commercial Operation.¹⁰⁹⁸ If it failed to do so, then it would be subject to a reduction in the Term of its Contract, and if that failure persisted for an additional 18 months, then its FIT Contract was subject to termination by the OPA.¹⁰⁹⁹

530. In order to support its claim that it would have been able to develop the project within the timelines required by the FIT Contract, the Claimant relies upon a project schedule created using MS Excel, rather than a schedule prepared by one of its experts in proper project development software.¹¹⁰⁰ The Claimant's schedule is of a “preliminary and simplistic nature”¹¹⁰¹ and as URS explains, it is “surprising [...] that Windstream has chosen to use a simple tool such as Microsoft Excel to prepare the Schedule.”¹¹⁰²

531. As URS notes, the project schedule provided by the Claimant poses considerable problems. First, the order of activities does not relate to an expected development schedule for an offshore wind project; as such, the “schedule appears to underestimate the risks of certain activities in

¹⁰⁹⁷ Claimant's Memorial, Part XX.

¹⁰⁹⁸ **C-0347**, E-mail from Nancy Baines to Ian Baines et al. (Aug. 19, 2010); **C-0349**, Letter from JoAnne Butler to Windstream Wolfe Island Shoals (Aug. 18, 2010); **C-0348**, FIT Contract Cover Page; **C-0243**, Schedule 2: Special Terms and Conditions Wind (Off-shore) Facilities (May 4, 2010).

¹⁰⁹⁹ **R-0092**, FIT Contract, v. 1.3, s. 9.1(j).

¹¹⁰⁰ **C-0711**, Windstream Wolfe Island Shoals Inc., Spreadsheet, Wolfe Island Shoals Wind Farm: Overall Project Development Schedule Highlights (Detailed - COD May 2017) (Aug. 1, 2014).

¹¹⁰¹ RER-URS, ¶ 300.

¹¹⁰² RER-URS, ¶ 299.

development and their influence on ability to secure financing to enable the Project to progress to its next stage".¹¹⁰³ Second, the use of an excel spreadsheet contributes to the incorrect sequencing of activities.¹¹⁰⁴ Third, the schedule does not provide for any contingency to take into account any delays in the project, nor does it take into account adequate time to construct and establish the foundation manufacturing facility.¹¹⁰⁵

(b) The Claimant's Own Expert Reports Contradict Its Construction Schedule

532. The unreliable nature of the Claimant's Project schedule is further shown by the fact that the timelines allotted for many of the activities are inconsistent with the opinions offered by the Claimant's own experts in this arbitration.

533. The only expert report submitted by the Claimant which expressly concludes that the "project would have achieved Commercial Operation by the deadlines set out in the FIT Contract"¹¹⁰⁶ is from Mr. Bucci, who is from the same accounting firm that the Claimant hired to value its losses, Deloitte.¹¹⁰⁷ However, Mr. Bucci's conclusion is based on information provided by the Claimant without any independent critical analysis of the Project schedule or its risks, nor does it take into account the opinion of Windstream's own experts.¹¹⁰⁸ In fact, the reports from the technical experts submitted by the Claimant do not support the timelines in the Claimant's schedule.

534. For example, while the Claimant's schedule allows for 2.25 years to obtain its permitting, the CER-Powell Report assumes permitting would have taken approximately three years.¹¹⁰⁹ Further, while the Weeks Marine Report estimates one foundation installation every six days,

¹¹⁰³ RER-URS, ¶ 301(a).

¹¹⁰⁴ RER-URS, ¶ 301(b).

¹¹⁰⁵ RER-URS, ¶ 301(c).

¹¹⁰⁶ Claimant's Memorial, ¶ 672(f); CER-Deloitte (Bucci), pp. 6-8.

¹¹⁰⁷ Canada further notes that the report of Mr. Bucci refers to the Project as a public-private partnership. This is incorrect.

¹¹⁰⁸ RER-URS, ¶¶ 356-357.

¹¹⁰⁹ RER-URS, ¶ 302 (a).

totaling over 25 months for installation ($130 \times 6 = 780 \text{days}/31$), the Claimant's schedule allows only 18 months for foundation manufacture and installation.¹¹¹⁰

535. These adjustments alone add months of activities to the Windstream schedule. When the relevant adjustments are made to the Claimant's proposed schedule purely to take into account the advice of Windstream's own experts and, including as necessary to take into account periods where construction could not occur because of adverse weather conditions, the result is that the Claimant's Project would not have reached Commercial Operation until late November 2018:¹¹¹¹

Milestone	Windstream Schedule Date	Revised Schedule Date
Restart of Project	May 2012	May 03, 2012
REA Application Granted	Nov 2014	April, 2015
Financial Closure/OPA issuance of Notice to Proceed	Nov 2014	May 14, 2015
Start of Construction Activities	Nov 2014	May 15, 2015
Commercial Operation Date	April 2017	November 26, 2018

536. Accordingly, even just adjusting the schedule to account for the periods of time proposed by only two of the Claimant's experts, results in a Commercial Operation date that is more than two years following the MCOB required by the Claimant's FIT Contract of October 13, 2016 (as adjusted to exclude the assumed duration of the Force Majeure event) and six months following the Default Date of April 12, 2018.¹¹¹² As URS concludes:

The revised schedule indicates that using the activity durations provided to Windstream by their own advisors, Windstream could not have achieved Commercial Operation within the terms of the FIT Contract.¹¹¹³

¹¹¹⁰ RER-URS, ¶ 302 (b).

¹¹¹¹ RER-URS, Table 6.2 – Summary of Schedule Milestone Dates.

¹¹¹² RER-URS, ¶¶ 304-309 and Figure 6.1: Summary of Windstream revised schedule.

¹¹¹³ RER-URS, ¶ 307. URS also notes that “if permitting does take 3 years, as suggested by Powell, the REA Approval would have been obtained in April 2015, leaving only one year for construction. URS believe that the Project could not have secured finance under these circumstances.” RER-URS, ¶ 308.

(c) The Claimant's Construction Schedule Is Unreasonably Optimistic

537. Even with the corrections to the Claimant's schedule to make it at least consistent with the Claimant's own expert reports, it is still unreasonably optimistic. On the valuation date, the Claimant's Project was in the very early stages of development. Given the timelines in the FIT Contract, URS notes that it would have expected the Claimant to have already begun "initial feasibility studies, stakeholder consultation, and technical studies [in order to] maximize the opportunities for successfully reaching the Commercial Operation Date in the FIT Contract."¹¹¹⁴ The Claimant had done none of these things.

538. In light of its early stage of development, the Claimant's Project was subject to "considerable risks."¹¹¹⁵ These risks existed at all stages of the project. In particular, the Project faced significant permitting risks with respect to both its offshore and onshore works (the latter of which is completely ignored by the Claimant).¹¹¹⁶ Even though some of these risks threatened the viability of the Project altogether (i.e. the shipping and navigation,¹¹¹⁷ fish and fish habitat,¹¹¹⁸ migratory birds,¹¹¹⁹ and release of chemical contaminants into the Lake risks¹¹²⁰), they have not been adequately accounted for by the Claimant. URS concludes that the Claimant's assertion that permitting would have been achieved in approximately three years fails to give "sufficient consideration to several unique features specific to this Project that need to be considered, [and] nor does it fully consider permits that are required at the Federal level."¹¹²¹

539. The Claimant's Project also faced design risks.¹¹²² In particular, URS has identified risks associated with the use of the GBS Foundations with respect to the lakebed conditions¹¹²³ as well as the onshore facilities where they would have to be fabricated and prepared for deployment.¹¹²⁴

¹¹¹⁴ RER-URS, ¶ 59.

¹¹¹⁵ RER-URS, ¶¶ 3, 160.

¹¹¹⁶ RER-URS, ¶¶ 74 (a) and (b), 94-165.

¹¹¹⁷ RER-URS, ¶¶ 94-108.

¹¹¹⁸ RER-URS, ¶¶ 118-128.

¹¹¹⁹ RER-URS, ¶¶ 129-135.

¹¹²⁰ RER-URS, ¶¶ 154-158.

¹¹²¹ RER-URS, ¶ 75.

¹¹²² RER-URS, ¶¶ 166-230.

540. Finally, the Claimant's Project also faced significant construction risks.¹¹²⁵ As URS states:

Within the traditional power industry, construction risks are usually well understood and managed; however, this is not the case for offshore wind farms where the market has grown quickly resulting in contractors moving up a steep learning curve in Europe, and even more so in North America where no project has as yet started construction. Construction risks could have had a severe impact on both construction schedule and costs, thus influencing the decision of investors and lenders to participate in the Project.¹¹²⁶

541. In particular, constructions risks associated with weather, the limited availability of suitable specialized vessels operating in Lake Ontario due to access restrictions, wind and wave conditions and ice formation could have had a direct impact on project schedule.¹¹²⁷

542. In its schedule, the Claimant fails to take any of these risks into account. The reason why is clear – even the Claimant recognizes that any significant delay would have rendered the project a failure. In fact, Mr. Baines himself noted, in August 2010, that “the project schedule is very tight with little room for delay.”¹¹²⁸ However, assuming that not a single risk will manifest when developing a huge, “first-of-a-kind” project is simply not reasonable.¹¹²⁹ This is even more true when it comes to offshore wind projects. As URS concludes, “offshore wind farm projects are inherently high risk” and many projects do not even make it past the development phase because of both foreseen and unforeseen risks.¹¹³⁰

¹¹²³ RER-URS, ¶¶ 175-185.

¹¹²⁴ RER-URS, ¶¶ 186-198.

¹¹²⁵ RER-URS, ¶¶ 253-292.

¹¹²⁶ RER-URS, ¶ 69.

¹¹²⁷ RER-URS has also identified other construction risk such as the preparation of onshore facilities, cabling, the recommended approach of using semi-floating GBS foundations, and lake bed conditions. See RER-URS, ¶¶ 282-292.

¹¹²⁸ **R-0138**, Windstream Energy LLC, Report to the Board of Directors, Windstream Energy LLC Wolfe Island Shoals Wind Project, Eight Month Work Schedule and Budget (Aug. 30, 2010), p. 8.

¹¹²⁹ RER-URS, ¶¶ 3, 6.

¹¹³⁰ *Ibid.*

(d) The Project Would Likely Not Have Reached Commercial Operation Prior to July 2020

543. The failure of the Claimant to take into account any project development and construction risks leads it to propose an unrealistic project schedule. Many of the above-identified risks have the potential to impact the project schedule and in the end, the MCOD of the project.¹¹³¹ Accordingly, many of the development and construction activities in the Claimant's schedule are unrealistically short. As URS concludes, once development and construction risks are taken into account, it becomes evident that the Claimant's Project, as designed, "could not have reached Commercial Operation within the time frames required under the FIT Contract."¹¹³²

544. In URS's opinion, given the above described risk associated with project development and construction, a conservative estimate of the time required for the development stage of the project is 39 months, and a construction stage of at least 59 months.¹¹³³ Factoring in a start date of May 3, 2012, and accounting for weather conditions which would likely render construction impossible in certain periods, URS estimates that the earliest reasonable date that the Claimant's Project would have come into Commercial Operation would have been July 9, 2020.¹¹³⁴

Milestone	Windstream Schedule Date	URS Proposed Schedule Date
Restart of Project	May 2012	May 03, 2012
REA Application Granted	Nov 2014	April, 2015
Financial Closure/OPA issuance of Notice to Proceed	Nov 2014	August 14, 2015
Start of Construction Activities	Nov 2014	September 15, 2015
Commercial Operation Date	April 2017	July 09, 2020

¹¹³¹ RER-URS, ¶ 310.

¹¹³² RER-URS, ¶ 11.

¹¹³³ RER-URS, ¶ 4(a).

¹¹³⁴ RER-URS, ¶¶ 4(a), 350-357, Table 6-2 : Summary of Schedule Milestone Dates, Figure 6-2 : Summary of URS Proposed Schedule.

545. As URS notes:

The minimum time required for the development and construction phases means that the Project could not achieve the Commercial Operation Date specified in the Claimant's FIT Contract (October 13, 2016). URS concludes that Commercial Operation would be at least 45 months after that date, which would likely have deterred both investors and lenders from participating in the Project at all.¹¹³⁵

546. The failure of the Project to reach Commercial Operation until this time means the Project would also have been at least 27 months past the Default Date in the Claimant's FIT Contract.¹¹³⁶

As such, even absent the deferral on offshore wind, the Claimant's Project could not have reached Commercial Operation within the timelines required under the FIT Contract.

547. As BRG concludes, such a result means "WWIS would have had no value to a third party investor on the date of harm or Valuation Date, even if the Deferral had been lifted by that date."¹¹³⁷ Indeed, even the Claimant's own experts have noted that if the Project's FIT Contract could be terminated by the OPA before the Claimant could bring it into Commercial Operation, the Project would be valueless.¹¹³⁸

2. The Project Had No Value on the Valuation Date Because of Its Riskiness and High Costs

548. Even if this Tribunal were to ignore the fact that the Claimant's Project could not have been constructed in the timelines required, and was valueless as of the date of Ontario's deferral decision and the valuation date for that reason alone, the Claimant's Project was so risky and so expensive that it was valueless for other reasons as well. Indeed, the Claimant's valuation is replete with errors and flawed speculative assumptions that together result in a positive valuation of the Claimant's investment.¹¹³⁹ However, once these errors are corrected, and the speculative assumptions removed, then as BRG concludes, on the valuation date the Project had a net negative value.¹¹⁴⁰ This is not surprising. As BRG concludes, "[f]irst-of-a-kind projects face high

¹¹³⁵ RER-URS, ¶ 5(a).

¹¹³⁶ RER-URS, ¶ 5(b).

¹¹³⁷ RER-BRG, ¶¶ 23, 29, 165.

¹¹³⁸ CER-Powell, ¶ 115.

¹¹³⁹ RER-BRG, ¶¶ 24-40, 59, 117, 169.

¹¹⁴⁰ RER-BRG, ¶¶ 23, 50-58, Figure 3: Combined Results.

levels of risk and WWIS has not progressed far enough in its development to merit consideration as an attractive acquisition target.”¹¹⁴¹

(a) Deloitte Relies on an Inappropriate Construction Start Date

549. In order to complete its valuation, Deloitte relied on an outdated and unrealistic construction timeline created by the Claimant that commences in October 2010.¹¹⁴² In doing so, Deloitte has failed to account for delays that had already disrupted the project prior to the alleged breach, i.e. the Force Majeure event that was unrelated to the deferral. As BRG notes, given that such delays had already occurred prior to the valuation date and are not alleged to breach the NAFTA, they must be included in a proper counter-factual scenario.¹¹⁴³ As a result, the appropriate counter-factual recognizes that development activities could not have restarted until those Force Majeure events terminated – i.e. until the Claimant’s application for AOR status was processed. The most optimistic assumption is that Force Majeure would have lifted on May 3, 2012, the day before the Valuation Date. Adjusting the valuation to reflect this date as the restart of development results in a reduction of the damages by approximately \$35 million.¹¹⁴⁴

(b) Deloitte Incorrectly Assumes the Project Faced No Development and Construction Risk

550. In valuing damages, Deloitte assumes that the Project did not face any development and construction risk.¹¹⁴⁵ Indeed, Deloitte’s analysis assumes that all environmental and other associated approvals are received, that financing is secured, including the commitment required from equity investors, that the OPA issues a NTP and that the Claimant’s proposed Project timeline of October 28, 2010 is achieved, such that the Project would reach Commercial Operation as of May 4, 2015.¹¹⁴⁶

¹¹⁴¹ RER-BRG, ¶¶ 53-58.

¹¹⁴² CER-Deloitte (Low & Taylor), ¶ 4.16 (e); RER-BRG, ¶¶ 25, 61; RER-URS, ¶ 365.

¹¹⁴³ RER-BRG, ¶¶ 25-28, 44, 52, 59(a), 67, 70-71, 85.

¹¹⁴⁴ RER-BRG, Figure 3: Combined Results; ¶ 171.

¹¹⁴⁵ CER-Deloitte (Low & Taylor), ¶ 4.16; RER-BRG, ¶¶ 26, 27, 71, 172.

¹¹⁴⁶ CER-Deloitte (Low & Taylor), ¶ 4.16.

551. However, as BRG notes, such assumptions are unrealistic and inappropriate.¹¹⁴⁷ In particular, they are speculative and lack basis in fact – none of these project milestones were actually achieved by the Claimant, nor were they on their way to being achieved.¹¹⁴⁸ The fact is that, as BRG notes, “all development projects – including FIT projects – face risk.”¹¹⁴⁹ The numerous risks faced by the Claimant’s proposed project have been described in detail above and in the URS report and need not be repeated here.

552. The effect of such unreasonable assumptions is a distorted damages assessment that treats the Project as if it was already built and operating.¹¹⁵⁰ It was not. By failing to value WWIS as a development project, Deloitte has failed to use the proper proxy group to estimate the cost of equity. None of the companies used by Deloitte in its proxy group face significant development risks.¹¹⁵¹ As such, they are not comparable to WWIS, a small company with a single project and no operating assets.¹¹⁵² Despite this fact, Deloitte makes only a minor adjustment to account for the enormous development risk faced by the Project.¹¹⁵³ As BRG indicates, this is “wholly inadequate to account for all the risk faced by WWIS at its early stage of development”¹¹⁵⁴ and as a result, “Deloitte’s value could be as much as 4 to 25 times too high.”¹¹⁵⁵ Indeed, Deloitte’s valuation of WWIS is higher than the market value of many publicly traded wind power companies similar in size, geography and industry to WWIS, but with substantial operating assets in addition to development portfolios.¹¹⁵⁶ Consequently, Deloitte’s “value for WWIS is inconsistent with market realities”.¹¹⁵⁷

¹¹⁴⁷ RER-BRG, ¶¶ 27, 42-48, 52-56, 73.

¹¹⁴⁸ RER-BRG, ¶¶ 27 (a), 73, 197.

¹¹⁴⁹ RER-BRG, ¶¶ 27, 74.

¹¹⁵⁰ RER-BRG, ¶¶ 27 (c), 30, 34.

¹¹⁵¹ RER-BRG, ¶ 31(a).

¹¹⁵² RER-BRG, ¶¶ 31 (a), 30, 32, 160, 198.

¹¹⁵³ RER-BRG, ¶ 32.

¹¹⁵⁴ RER-BRG, ¶ 32. See also, ¶¶ 38, 54, 161, 196-197, 220, 223, 248.

¹¹⁵⁵ RER-BRG, ¶ 33.

¹¹⁵⁶ RER-BRG, ¶¶ 31, 36, 198, 153-161.

¹¹⁵⁷ RER-BRG, ¶ 38.

553. When a proper proxy group is identified, using comparable development companies that faced a similar level of development risk as WWIS, BRG calculates a new cost of equity which lowers the valuation of WWIS by \$245 million, to \$38 million, or 13.4% of Deloitte's valuation.¹¹⁵⁸ Additionally, an appropriately adjusted cost of debt to reflect the Claimant's own documents reduces Deloitte's valuation by \$46 million.¹¹⁵⁹

(c) Deloitte Ignores Binding Agreements Signed by the Claimant

554. In arriving at the costs that the Claimant would have needed to expend in order to develop the project, Deloitte fails to account for the binding Turbine Sales Agreement ("TSA") that the Claimant signed with Siemens.¹¹⁶⁰ In doing so, it also fails to take into account the Harmonized Sales Tax ("HST") which would have applied pursuant to the TSA.¹¹⁶¹ Additionally, Deloitte excludes [REDACTED], which is estimated by URS to cost approximately \$36 million.¹¹⁶² There is no justification for [REDACTED]. Replacing the capital costs used by Deloitte with the actual costs specified in the TSA increases the total Project capital cost by 17% and reduces the value of the project by \$126 million.¹¹⁶³

(d) Deloitte Makes Calculation Errors that Inflate the Value of the Project

555. Deloitte's analysis also makes a number of spreadsheet and calculation errors and omissions. For example, it fails to ascribe a cost to the decommissioning of the project.¹¹⁶⁴ It also does not account for Base Land Fees which must be paid for use of Crown land prior to

¹¹⁵⁸ RER-BRG, Figure 3: Combined Results; Figure 17: Combined Results of Adjustments; ¶¶ 203-213.

¹¹⁵⁹ RER-BRG, ¶¶ 225-228.

¹¹⁶⁰ RER-BRG, ¶¶ 39, 63, 131-135, 231.

¹¹⁶¹ RER-BRG, ¶¶ 56, 63, 134, 231.

¹¹⁶² RER-BRG, ¶¶ 136-138, 178.

¹¹⁶³ RER-BRG, ¶¶ 132; Figure 3; Figure 17.

¹¹⁶⁴ RER-BRG, ¶¶ 40, 56, 63, 145, 243.

Commercial Operation of the Project.¹¹⁶⁵ Correcting these errors and omissions reduces Deloitte's valuation by \$41 million.¹¹⁶⁶

(e) The Project Had A Negative Net Present Value on the Valuation Date

556. The combined impact of all the errors and unreasonable assumptions made by Deloitte is a reduction in value of the project of \$459 million.¹¹⁶⁷ Thus, the reality is that on the valuation date, this project had a negative net present value. The challenged measures of the Government of Ontario were not the cause of any loss to the Claimant – the Wolfe Island Shoals offshore wind farm was a failure long before any of them were adopted.

3. The Claimant's Conduct Was the Cause of Any Losses Crystallizing on the Valuation Date

557. The Claimant has chosen May 4, 2012 as the valuation date for its quantum of damages.¹¹⁶⁸ According to the Claimant, while the deferral 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 develop it within the time frames set out in the FIT Contract."¹¹⁶⁹ In particular, the Claimant alleges that it was on this date that "Ontario had definitively refused to fulfill its promise to ensure that the Project was 'frozen' and not 'cancelled'".¹¹⁷⁰ However, even accepting the Claimant's arguments that it did in fact occur an actual loss (and for the reasons above, the Tribunal should not do so) the Claimant has failed to appreciate that any alleged damages only crystallized on this date due to its own conduct.

558. As discussed above at paragraphs 270-276, following the announcement of the offshore wind deferral, a series of letters between the Claimant and the OPA outlined the various offers that were put on the table in order to protect the Claimant's FIT Contract while Ontario engaged

¹¹⁶⁵ C-0059, Ministry of Natural Resources, Windpower Site Release and Development Review – Crown Land, PL 4.10.04 (Jan. 28, 2008), pp. 12, 24; RER-BRG, ¶¶ 40, 64, 144.

¹¹⁶⁶ RER-BRG, Figure 3; Figure 17, ¶¶ 142-145.

¹¹⁶⁷ RER-BRG, Figure 3; Figure 7.

¹¹⁶⁸ Claimant's Memorial, ¶ 677.

¹¹⁶⁹ Claimant's Memorial, ¶ 677.

¹¹⁷⁰ Claimant's Memorial, ¶ 677.

in the necessary research and regulatory development.¹¹⁷¹ On March 18, 2011, the OPA wrote to Windstream offering a response to Windstream's "settlement" proposals.¹¹⁷² In doing so, the OPA indicated to the Claimant that it was [REDACTED]

559. As described above, the Claimant refused this offer.¹¹⁷⁵ As the OPA was offering it more time, the only reason any alleged damages crystallized on May 4, 2012 is because of the Claimant's choice. If the Claimant had accepted the OPA's offer, then, assuming its allegations of loss to be true, it still would not have incurred those alleged losses as of today. As a result, the Claimant should not be permitted to recover such alleged damages.

V. In the Alternative, the Claimant Would Be Entitled to No More than the Investment Value of the Enterprise

A. The Claimant Is Not Entitled to Recover Its Highly Speculative Lost Profits

560. In this case, if the Tribunal determines that the challenged measures did actually result in losses to the Claimant (i.e. if it determines that the project could have been built in the timeframes required and that it had some positive value despite its riskiness and expense) the

¹¹⁷¹ RWS-Cecchini, ¶ 18.

¹¹⁷² **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Mar. 18, 2011).

¹¹⁷³ **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (Mar. 18, 2011).

¹¹⁷⁴ **R-0250**, Letter from Perry Cecchini, Ontario Power Authority to Ian Baines, Windstream Energy Inc. (Jun. 24, 2011); **R-0251**, E-mail from Patricia Furtado, IESO to Ian Baines, Windstream Energy Inc. (Jun. 28, 2011).

¹¹⁷⁵ See ¶ 275 above.

only appropriate approach to quantify those losses is to determine the Claimant's investment costs.

561. As tribunals have consistently confirmed, where an investment is still in the pre-operational stage or has no history of profits, awarding any amount for future profits would require an impermissible degree of speculation.¹¹⁷⁶ For instance, in *Metalclad v. Mexico*, despite the fact that the investor had purchased, permitted, financed and constructed a waste disposal facility in Mexico whose operation was thwarted by a local governor's Ecological Decree, the tribunal ruled that since the landfill was never operational, the "fair market value is best arrived at [...] by reference to Metalclad's actual investment in the project".¹¹⁷⁷ In *Wena Hotels v. Egypt*, the company at issue had operated one of its hotels for less than 18 months and had not completed the construction of the other.¹¹⁷⁸ The tribunal awarded only the investment costs of the enterprise.¹¹⁷⁹ In *Vivendi v. Argentina*, the enterprise was not a going concern and had never turned a profit.¹¹⁸⁰ The tribunal in that case awarded investment value as the "closest proxy" for fair market value.¹¹⁸¹ In *Siemens v. Argentina*, the business was not a going concern, and the tribunal awarded only the investor's sunk costs.¹¹⁸² Finally, in *PSEG v. Turkey*, the tribunal recognized that the parties had never finalized the terms of the contract at issue. It further noted lost profits were normally reserved for compensation of investments that are substantially made and have a record of profits and that tribunals are "reluctant to award lost profits for a beginning industry and unperformed work".¹¹⁸³

¹¹⁷⁶ See, for example: **CL-062**, *Metalclad – Award*, ¶ 122; **CL-082**, *Siemens A.G. v. Argentine Republic* (ICSID No. ARB/02/8) Award, 6 February 2007, ¶¶ 355, 368-370; **CL-092**, *Wena Hotels Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award on Merits, 8 December 2000, ¶¶ 123-125.

¹¹⁷⁷ **CL-062**, *Metalclad – Award*, ¶¶ 121-122 (citing *Phelps Dodge Corp. v. Iran* (10 Iran-U.S. CTR 121) (1986); and *Biloune, et al. v. Ghana Investment Centre, et al.* 95 I.L.R. 183, 207-210, 228-229 (1993)).

¹¹⁷⁸ **CL-092**, *Wena – Award*, ¶ 124.

¹¹⁷⁹ **CL-092**, *Wena – Award*, ¶ 123.

¹¹⁸⁰ **CL-041**, *Vivendi – Award*, ¶ 8.3.5.

¹¹⁸¹ **CL-041**, *Vivendi – Award*, ¶ 8.3.13.

¹¹⁸² **CL-082**, *Siemens – Award*, ¶¶ 362-389.

¹¹⁸³ **CL-076**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 310-319.

562. Further even the authorities put forward by the Claimant do not support its position that it should be entitled to lost profits.¹¹⁸⁴ In all of the cases cited by the Claimant, either the disputing parties agreed it was the most appropriate method¹¹⁸⁵, or the projected cash flows were not speculative at all.¹¹⁸⁶ For example, in the case of *EDF v. Argentina*, the claimant was a “regulated utilities company with a predictable revenue stream”¹¹⁸⁷ that was already operating. Similarly, *Rurelec v. Bolivia* involved the expropriation of an energy company that was already producing energy at the time of the alleged breach,¹¹⁸⁸ as was the Claimant in *El Paso Energy v. Argentina*.¹¹⁸⁹ Further, while the Claimant relies on *Ioan Micula v. Romania* in support of its position, even this tribunal recognized that the “sufficient certainty standard” associated with using a discounted cash flow method to determine lost profits “is usually quite difficult to meet in the absence of a going concern and a proven record of profitability.”¹¹⁹⁰

¹¹⁸⁴ Claimant’s Memorial, ¶¶ 666-670.

¹¹⁸⁵ **CL-071**, *Occidental Petroleum*, ¶¶ 690, 708; **CL-055**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL PCA Case No. 2011-17) Award, 31 January 2014, ¶ 453, 604; **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, ¶ 1188 (“*EDF (Argentine) – Award*”); **CL-047**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, ¶¶ 711-712; **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, ¶¶ 1010, 1113; **CL-072**, *Oil Company Sapphire International Petroleum, Ltd. v. National Iranian Oil Company* (35 ILR (1967) 136), Award, 15 March 1963, pp. 187-189, 198; **CL-041**, *Vivendi – Award*, ¶¶ 8.3.4, 8.3.10; **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, ¶¶ 13-87.

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ **CL-046**, *EDF (Argentine) – Award*, ¶ 1188.

¹¹⁸⁸ **CL-055**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17) Award, 31 January 2014, ¶ 126.

¹¹⁸⁹ **CL-047**, *El Paso – Award*, ¶ 7.

¹¹⁹⁰ **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, ¶ 1010. In that case, the Tribunal found there was evidence of such experience. As the Tribunal noted at ¶ 1113: (“With respect to their alleged intention to build these facilities, the Claimants rely heavily on witness testimony. In fact, other than offers and quotes provided by third party suppliers, there is surprisingly little contemporaneous evidence of advance planning predating the revocation. There is not a single business plan, feasibility study, internal memo or budget documenting the Claimants’ intention to build these facilities. The construction of these plants thus seems to have been a desirable possibility for the Claimants, which they investigated with third party suppliers, but which never materialized into concrete plans.”) (emphasis added)). See also, **CL-041**, *Vivendi – Award*, ¶ 8.3.10: (“A claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first hand experience (its own or that of qualified experts) or corporate records which establish on the balance of probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of Treaty violation.”)

563. On May 4, 2012, the Windstream Wolfe Island Shoals project was an undeveloped project without a single permit. At the time of the alleged breach, the project remained a highly speculative and entirely conceptual endeavour. As made clear in the URS and BRG reports, the risks associated with the development of this project were significant, and it is unreasonable to conclude that it would be able to reach Commercial Operation in the time periods required by the FIT Contract. Contrary to what the Claimant asserts, the FIT Contract itself provided no guarantee that this project would be permitted, developed and reach operation.¹¹⁹¹ The Claimant had no right to any of the needed permits and approvals, and the failure to obtain a single one could have resulted in substantial costs or potentially the failure of the entire enterprise. As BRG notes, the real world evidence shows that many projects that were awarded FIT Contracts have faced delays. Indeed, BRG's analysis of the data shows that 39% of the 70 large-scale wind projects that were awarded FIT Contracts prior to 2014 have suffered significant delays.¹¹⁹² In terms of capacity, this equals 70% of FIT capacity being delayed.¹¹⁹³ That these delays occurred in the much less risky space of onshore wind development emphasizes the significant completion risks associated with this first-of-a-kind offshore project.

564. Further, as URS notes, there are numerous risks throughout the development and construction stages of the proposed project that would have potentially had high impacts on the costs to bring it into operation, even if they did not prevent the project's development altogether. As a result, many of the capital costs to bring this project into operation are quite uncertain, which could have significant impacts on any calculation of future profitability.

565. In light of the speculative nature of the project, its undeveloped status, its lack of permitting, the known development and construction risks, questions around whether it could attract necessary investors and financing, and the speculative cost profile, there is no reason why the Tribunal should vary from a well-established approach to damages in the circumstances of this particular case. Even with a FIT Contract, there was no guarantee that the Claimant's Project would actually come into Commercial Operation and begin making money. Yet, the Claimant asks the Tribunal to ignore these risks and assume instead that everything would have simply

¹¹⁹¹ RWS-Cecchini, ¶ 6; RER-BRG, ¶ 77; See above at ¶ 70.

¹¹⁹² RER-BRG, ¶ 77.

¹¹⁹³ RER-BRG, ¶ 77.

worked out for their project. There is no reason for the Tribunal to do so. Accordingly, should the Tribunal decide that the Claimant is entitled to some damages, those damages would be limited as a matter of law to no more than the sunk costs incurred by the Claimant up until the date of the alleged breach.

B. The Claimant Has Failed to Prove Its Claim for Its Investment Costs

566. The Claimant is asking this Tribunal to award it approximately \$15 million in sunk costs. As noted by BRG, the Claimant has provided insufficient substantiation to prove that the expenditures that make up this amount are legitimate sunk costs related to the Claimant's Project.¹¹⁹⁴ Messrs. Low and Taylor have provided a summary of the costs incurred by the Claimant to date.¹¹⁹⁵ However, the Claimant's experts fail to provide any information about the underlying evidence used to calculate the capitalized costs, accrued expenses, and management fees or to determine that they relate specifically to the Claimant's Project as opposed to the ten other onshore wind projects that the Claimant was seeking to develop. In fact, the report fails to cite to a single document at all – not even a single invoice for the various engineering studies it cites form part of the accrued expenses.¹¹⁹⁶

567. Further, \$6 million of the alleged sunk costs lost relate to the Letter of Credit that the Claimant submitted along with its FIT Application. However, that Letter of Credit would be returned to the Claimant if the Claimant exercised its right to terminate its FIT Contract in accordance with the Pre-NTP termination clauses. The Claimant would not have incurred any penalty if it had terminated its FIT Contract on May 4, 2012. In this regard, the Claimant is also claiming \$3.912 million in interest paid to maintain that Letter of Credit until today's date. However, if the Claimant's Project had lost all of its value by May 4, 2012, then there was no reason for it not to terminate its FIT Contract on that date, and thus, no reason for it to have continued to accrue interest charges. In fact, the Claimant appears to be including in its sunk costs many expenditures made following the deferral on offshore wind and the valuation date chosen by the Claimant. For example, the accrued expenses included in the Deloitte Report are

¹¹⁹⁴ RER-BRG, ¶¶ 139-140.

¹¹⁹⁵ CER-Deloitte (Low & Taylor), Schedule 3b.

¹¹⁹⁶ CER-Deloitte (Low & Taylor), Schedule 3b.

only for the period of January 1, 2014 to July 31, 2014.¹¹⁹⁷ Such losses cannot be included in any assessment of sunk costs.

VI. The Claimant Has Not Proven It Is Entitled to Pre-Judgement Interest

568. Under NAFTA, a tribunal has discretion to award “any applicable interest”. However, with the exception of Article 1110 claims, both NAFTA and the UNCITRAL Arbitration Rules are silent on the terms of such awards. The guiding principle under international law is that interest is only necessary to ensure full reparation, but that there is no automatic right to it.¹¹⁹⁸ As a result, the Claimant bears the burden of proving that the circumstances of this case justify an award of interest to ensure full reparation. The Claimant has failed to meet this burden. The Claimant fails to establish why, given the circumstances of the case, full reparations can only be met with an award of interest – indeed, the Claimant fails to mention a single fact at all.¹¹⁹⁹

569. To ensure that its assessment of alleged damages is complete, Canada asked its expert BRG to assess Deloitte’s calculation of pre-judgement interest which uses a 3.0% interest rate based on the Canadian bank prime interest rate compounded annually.¹²⁰⁰ BRG agrees that if pre-judgement interest is found to be appropriate in this case, this would be a reasonable rate to use and that the compounding approach should apply.¹²⁰¹

THE CLAIMANT’S ALLEGATIONS REGARDING THE DELETION OF EMAILS FROM THE PREMIER’S OFFICE AND THE MINISTRY OF ENERGY SHOULD NOT BE CONSIDERED BY THE TRIBUNAL

570. The Claimant has asked the Tribunal to draw an adverse inference as a result of Canada’s alleged failure to produce relevant and material documents from the Premier’s Office.¹²⁰² As an initial matter, the Claimant’s request is primarily based on information relating to testimony or statements before the Ontario legislature or a legislative committee. Canada will shortly file a motion with the Tribunal explaining why this information is protected by parliamentary privilege

¹¹⁹⁷ CER-Deloitte (Low & Taylor), Schedule 3b.

¹¹⁹⁸ **RL-029**, *ILC Articles - Commentary*, Article 38(1), p. 235.

¹¹⁹⁹ Claimant’s Memorial, ¶¶ 684-690.

¹²⁰⁰ CER-Deloitte, ¶ 1.43.

¹²⁰¹ RER-BRG, ¶¶ 141-142.

¹²⁰² Claimant’s Memorial, ¶¶ 366-381.

and therefore, cannot be relied upon by the Claimant in this arbitration. Not only is the Claimant precluded from relying on the protected information, Canada will show that this information must be stricken from the record. In the interest of completeness, and without waiving any claim of privilege, Canada explains below why the Claimant's request for an adverse inference, including on the basis of this information, is also groundless.

571. Article 9(5) of the IBA Rules provides guidance as to the circumstances in which an adverse inference may be drawn by a tribunal. Contrary to the Claimant's assertion, even when these circumstances are met, it remains in the Tribunal's discretion to take an adverse inference. Indeed, Article 9(5) of the IBA Rules states 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".¹²⁰³ In practice, tribunals are cautious in their approach to adverse inferences, only applying them in compelling circumstances and as a last resort.¹²⁰⁴

572. The practice of international tribunals establishes that a tribunal's discretion to draw an adverse inference arises only when certain requirements have been met.¹²⁰⁵ In particular, the Tribunal must be satisfied that (1) the documents in question are relevant and material to the dispute, (2) that the requested documents are at the disposal of that party, (3) that the claimant makes a *prima facie* case, and (4) that the party is given the time and opportunity to produce the documents in question.¹²⁰⁶ Once these factors are met, "explanations provided by a party as reasons for not producing the requested documents should be weighed by the tribunal and taken into account before drawing any adverse inference."¹²⁰⁷ Finally, an adverse inference is only appropriate if the tribunal is unable to base its decision on other documents and grounds.¹²⁰⁸

¹²⁰³ Claimant's Memorial, ¶ 379 (emphasis added).

¹²⁰⁴ **RL-032**, Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals* (Kluwer Law International, 1996), pp. 319-322 ("Kazazi").

¹²⁰⁵ **RL-032**, Kazazi, pp. 320-322 (citing, *Mohsen Asgari Nazari v. The Government of the Islamic Republic of Iran*, Award No. 559-221-1 (Aug. 24, 1994), at ¶¶ 23-24; Howard M. Holtzmann, "Fact-Finding By the Iran-United States Claims Tribunal", in *Fact-Finding by International Tribunals* (R. Lillich ed. 1991) at pp. 101-133; 127).

¹²⁰⁶ **RL-032**, Kazazi, pp. 320-322.

¹²⁰⁷ *Ibid.*

¹²⁰⁸ *Ibid.*

When these factors are applied, there is no reason for this Tribunal to take an adverse inference in this arbitration.

573. First, according to the Claimant, this request is based on the assertion that “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”.¹²⁰⁹ This is simply incorrect. As Canada explained in its letters of November 18, 2014,¹²¹⁰ November 28, 2014¹²¹¹ and January 7, 2015,¹²¹² Canada has produced numerous documents from the Premier’s Office, including documents of the Premier’s Office staff members identified by the Claimant and the Minister of Energy’s Chief of Staff. In fact, a total of 80 documents from Canada’s document productions were from the email accounts of Premier’s Office staff involved in the Energy portfolio and Craig MacLennan, the Minister of Energy’s Chief of Staff at the time. Of these documents, 26 documents were from the email account of Mr. MacLennan and 54 other documents were from the Premier’s Office staff accounts (some of which also included Mr. MacLennan’s e-mails).

574. Second, as was demonstrated throughout Canada’s Counter-Memorial and in the Witness Statement of John Wilkinson, documents from the Premier’s Office are of limited relevance and materiality to this arbitration. The decision to implement a deferral on offshore wind was made by the Minister of Environment, not the Premier’s Office.¹²¹³ Any documents that would have resided solely in the Premier’s Office are, therefore, less likely to be relevant and material to the issues in this arbitration. In this context, requiring Canada to restore backup tapes would be an extremely costly, time-consuming and complicated process for uncertain and likely very limited gain.¹²¹⁴ Given the limited role of Premier’s Office and that the culture within the Premier’s

¹²⁰⁹ Claimant’s Memorial, ¶ 366.

¹²¹⁰ Canada’s Letter to the Tribunal (Nov. 18, 2014).

¹²¹¹ Canada’s Letter to the Tribunal (Nov. 28, 2014).

¹²¹² Canada’s Letter to the Tribunal (Jan. 7, 2015).

¹²¹³ RWS-Wilkinson, ¶¶ 4, 18-19.

¹²¹⁴ The Claimant has mischaracterized Canada’s explanation with respect to back up tapes. As Canada stated in its letter to the Tribunal dated November 18, 2014: (“[t]he only way for the Government of Ontario to determine for sure what information is kept on the disaster relief tapes is to restore them, which would be an extremely costly, time-consuming and complicated process for uncertain and likely very limited gain”).

Office was predominantly verbal, as is typical for high-level government deliberations,¹²¹⁵ there are simply no more documents for Canada to produce in this regard. As such, Canada has met its document production obligations.¹²¹⁶

575. Finally, the Tribunal has before it satisfactory evidence to base its decision in light of the fact that the decision to implement a deferral on offshore wind was taken by the Minister of Environment, not the Premier's Office. Indeed, it has the testimony of the Minister himself, who will be available for cross-examination.

576. In summary, there are no grounds that would justify the Tribunal exercising its discretion and drawing an adverse inference in this case. While the Claimant may be disappointed that the documents in this arbitration did not yield the evidence to support its theory of a political conspiracy, this does not provide sufficient grounds for an adverse inference that Canada has failed to disclose relevant documents. As Canada has maintained since the beginning of this arbitration, the Claimant's allegations of impropriety are meritless. Canada cannot be penalized for not producing evidence that does not exist.

COSTS

577. Pursuant to Article 1135 of NAFTA, and Articles 40 to 43 of the 2010 UNCITRAL Arbitration Rules, Canada requests that the Tribunal award it costs related to this arbitration and its legal representation.

578. Articles 40 to 43 codify the principle that the costs of UNCITRAL arbitration are to be borne by the unsuccessful party. This is a rule that has been followed by a number of recent

¹²¹⁵ **C-0656**, A Special Investigation Report, Ann Cavoukian, Information and Privacy Commissioner (Ontario), *Deleting Accountability: Records Management Practices of Political Staff* (Jun. 5, 2013) ("*IPC Report*"), p. 29.

¹²¹⁶ Moreover, the Claimant argues that this Tribunal is obliged to infer that documents once existed, that they were destroyed and that they were prejudicial to Canada's position. It relies primarily on *Special Investigation: Deleting Accountability – Record Management Practices of Political Staff*, a report by the Information and Privacy Commissioner of Ontario and the testimony by Government officials at Standing Committee on Justice Policy, which arose in the context of a complaint alleging that the former Chief of Staff to the Minister of Energy had improperly deleted all emails pertaining to the cancellation and relocation of the Oakville and Mississauga gas plants. In doing so, it fails to provide any basis for concluding that the deletion of emails relating to the gas plants are related to the Premier's Office's emails on offshore wind policy or Windstream's Project. Essentially, the Claimant is requesting that the Tribunal simply assume emails relevant to offshore wind and Windstream were deleted along with emails concerning the gas plants cancellation and that such emails were detrimental to Canada's case (See Claimant's Memorial, ¶ 366).

NAFTA tribunals. For example, after ruling that Canada had prevailed in the recent *Chemtura* arbitration, the tribunal held that it “finds it fair that the Claimant bear the entire costs of the arbitration,” a total sum of USD \$688,219.¹²¹⁷ The Tribunal further found it “appropriate and just that the Claimant bear one half of the fees and costs expended by the Respondent in connection with this arbitration”, which are a total amount of \$2,889,233.80.¹²¹⁸

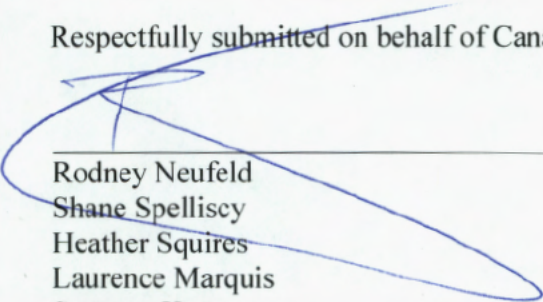
579. Canada requests that the Tribunal order the Claimant to pay the entire cost of the arbitration and to indemnify Canada for its legal fees and costs. Should the Tribunal decide that costs are appropriate, Canada respectfully requests the opportunity to submit a more detailed submission on costs to more fully address all relevant considerations.

CONCLUSION AND PRAYER FOR RELIEF

580. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

January 20, 2015

Respectfully submitted on behalf of Canada,



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¹²¹⁷ CL-037, *Chemtura – Award*, ¶ 272.

¹²¹⁸ *Ibid.*, ¶ 273.