IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

WINDSTREAM ENERGY LLC

v.

GOVERNMENT OF CANADA

(PCA CASE NO. 2013-22)

SUBMISSION OF MEXICO PURSUANT TO NAFTA ARTICLE 1128

1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA.

2. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties. Mexico has previously addressed the interpretation of provisions of NAFTA Chapter Eleven in its submissions in other disputes, and Mexico re-affirms those prior submissions.

3. Mexico takes no position on the facts of this dispute.

I. ARTICLE 1105 (MINIMUM STANDARD OF TREATMENT

4. The NAFTA Parties have repeatedly made submissions to common effect on the proper interpretation and application of NAFTA Article 1105, both in their own submissions in cases where they are the disputing Party, and in their Article 1128 submissions in cases where one of the other Parties is the disputing Party.

5. Mexico does not intend to reiterate here the totality of its views on the proper interpretation of Article 1105. It will focus instead on the contested points of interpretation that appear to be central to this proceeding.

6. For the sake of convenience and continuity, Mexico reproduces here and reaffirms paragraphs 18-20 of its Article 1128 submission in *Mercer International Inc. v. Government of Canada*:[1]

[1] Filed on May 8, 2015.

"18. Mexico agrees with Canada's submissions on the principles governing claims under Article 1105(1) as stated in paragraphs 454-470 of the Counter-Memorial and paragraphs 359-366 of the Rejoinder, including:

- The threshold for a violation of the minimum standard of treatment is high;
- The burden is on the claimant to establish the existence of an obligation under customary international law that meets the requirements of State practice and *opinio juris*; and
- Decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of proving customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.

19. Mexico also agrees with and endorses paragraphs 5-10 of the United States Article 1128 Submission in *Mesa*, reciting here the pertinent parts of paragraphs 6 and 9, which are directly relevant to the contested issues of interpretation in this proceeding:

> 6. ... the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. Article 1105 thus reflects a standard that develops from State practice and *opinio juris*, rather than an autonomous, treaty-based standard. Although States may decide, expressly by treaty, to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment. Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 1105. While there may be overlap in the substantive protections both types of treaty provisions ensure, a claimant submitting a claim under an agreement such as NAFTA, in which fair and equitable treatment is defined by the customary international minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.
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> ...
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> 8. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the

state of regulation in a particular sector. Regulatory action violates "fair and equitable treatment" under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or constitutes manifest arbitrariness falling below international standards.

9. The burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party." Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule. Determining a breach of the minimum standard of treatment "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 borders." [Footnotes omitted].

20. Mexico also agrees with Canada that Article 1105(1) does not provide a blanket prohibition on discrimination against foreign investors or their investments. Nationality-based discrimination falls under the purview of NAFTA Articles 1102 and 1103, and not Article 1105."

7. Mexico expressly agrees with and endorses the following submissions in Canada's Rejoinder in this proceeding:[2]

200. … State practice cannot be demonstrated solely through the decisions of past arbitral tribunals. Only States can engage in relevant actions which, if followed out of *opinio juris* and in concert with enough other States, coalesce into binding custom. …

202. … none of the awards cited by the Claimant, NAFTA or otherwise, undertakes the requisite examination of State practice and *opinio juris* necessary to prove that the customary international law minimum standard of treatment of aliens has the same substantive content as the autonomous fair and equitable treatment standard. In any event, as discussed below, such awards do not establish the existence of a rule of customary international law that guarantees the protection of "commitments reasonably relied upon by an investor", prohibits arbitrary and grossly unfair treatment including that "taken for a motive other than [its] stated rationale", or prohibits treatment with discriminatory effect.

[2] No inference should be drawn from Mexico's failure to expressly agree with any other submission in Canada's pleadings.

> 216. … the threshold for establishing a breach of the customary international law minimum standard of treatment under Article 1105(1) is high, requiring evidence of egregious conduct, such as serious malfeasance, manifestly arbitrary behaviour or denial of justice. …
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> 220. In assessing whether Article 1105(1) has been breached, NAFTA tribunals have accorded a high level of deference to domestic authorities in governing affairs within their own borders. As stated 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." The approach of the *S.D. Myers* Tribunal was expressly endorsed in *GAMI v. Mexico* and *Cargill*, and the *Chemtura* Tribunal similarly held that "the role of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies." Furthermore, as held by the Tribunal in *Mobil*, nothing in Article 1105 prevents a government from changing the regulatory environment, even if those changes result in significant additional burdens on the 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." [Footnotes omitted.]

II. ARTICLE 1110 (EXPROPRIATION & COMPENSATION)

8. Mexico does not intend to reiterate here the totality of its views on the proper interpretation of Article 1110. It will focus instead on the contested points of interpretation that appear to be central to this proceeding.

9. Mexico submits that a breach of Article 1110 based on indirect expropriation requires, at a minimum, a finding that a measure or series of measures attributable to the host State resulted in the effectively permanent, substantially complete deprivation of the economic benefit of an "investment", as defined in Article 1139, that is (or was) owned or controlled by an investor of another Party.

10. Measures that adversely affect the value or financial viability of an investment are not equivalent to expropriation unless they rise to the level of an effective taking by rendering the investment economically inutile. Measures otherwise resulting in the diminution in value or reduction in earnings of an investment do not amount to indirect expropriation.

11. An "investment" cannot exist in the absence of *vested* legal rights comprising an asset described in Article 1139. *Contingent* contractual rights cannot amount to an investment.

12. The existence (or non-existence) of investor's "distinct, reasonable, investment-backed expectations" is at most a factor to consider in determining whether a measure or series of measures have risen to the level of an indirect expropriation. A host State's failure to satisfy such expectations does not amount to an indirect expropriation. Put simply, Article 1110 requires measures equivalent to expropriation of an "investment of an investor of another Party", not non-fulfillment or frustration of an investors' expectations, be they distinct, reasonable, legitimate or otherwise.

13. *Bona fide* regulatory action taken in the public interest that adversely affects the value and/or viability of an investment of an investor of another Party will not ordinarily amount to an indirect expropriation.

All of which is respectfully submitted,

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Carlos Véjar Borrego
General Counsel

January 12, 2016