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

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA'S AMENDED RESPONSE TO THE NOTICE OF ARBITRATION

26 April 2013
Amended 5 December 2013

Department of Foreign Affairs,
Trade and Development
Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

1. Pursuant to the agreement of the disputing parties to apply the 2010 UNCITRAL Arbitration Rules, except to the extent modified by the provisions of Chapter 11 of the *North American Free Trade Agreement* ("NAFTA"), Canada provides this Response to the Notice of Arbitration filed by Windstream Energy LLC ("the Claimant").

I. PRELIMINARY STATEMENT

2. On January 28, 2013, the Windstream Energy LLC ("the Claimant") filed a Notice of Arbitration against Canada pursuant to Articles 1116, 1117 and 1120 of Chapter 11 of NAFTA. The Claimant brings this claim on its own behalf and on behalf of its alleged investment, Windstream Wolfe Island Shoals, Inc. ("WWIS"). It alleges that they have suffered damages of $475,230,000 as a result of measures adopted by the Government of Ontario relating to their proposed offshore wind energy facility in Lake Ontario. For the reasons explained in detail below, the Claimant's allegations are without merit and should be dismissed.

3. In 2009, WWIS submitted an application to the Ontario Power Authority ("OPA") for a Feed-in-Tariff contract ("FIT Contract") with respect to its proposed 100-turbine offshore wind energy generation facility in Lake Ontario, one of the Great Lakes. At the time that WWIS made its proposal, there did not exist a single freshwater offshore wind energy generation project anywhere in the world. Today, only one such facility exists, a small 10-turbine pilot project in Sweden that began operations in 2010.

4. As a result, there remains a significant amount of uncertainty regarding the effects of such projects on human health, safety and the environment. Because of this uncertainty, Ontario has yet to develop a comprehensive regulatory framework for the approval of offshore wind energy projects. In particular, requirements related to the construction, operation and decommissioning of such projects have never been fully developed.

5. The Claimant was aware of the undeveloped state of this regulatory environment when it established WWIS in 2007, when WWIS applied for a FIT Contract in 2009, and when WWIS signed its FIT Contract in 2010. Indeed, when WWIS was offered a FIT Contract by the OPA, the OPA expressly informed WWIS that it was up to WWIS to manage the regulatory risk related to whether and when the Government of Ontario would complete the development of the regulatory processes that would enable WWIS to proceed with its project.

6. The Claimant and WWIS chose to assume that risk and invest. Now the Claimant alleges that a February 11, 2011 decision by Ontario to take a cautious approach and develop a comprehensive regulatory framework before allowing any offshore wind energy facilities to be built, is a breach of Canada's obligations under Articles 1102, 1103, 1105 and 1110 of NAFTA. It is not.

7. Ontario's February 2011 decision did not discriminate against the Claimant or WWIS in violation of either Article 1102 or 1103. The decision applied to all offshore wind projects in Ontario. Ontario's February 2011 decision also did not violate Article 1105. The deferral was not contrary to any principle of customary international law that forms part of the minimum standard of treatment of aliens. Rather it was squarely within the legitimate policymaking power of the Government of Ontario to regulate in the public interest. Finally, Ontario's February 2011 decision did not breach Article 1110. Contrary to the Claimant's allegations, Ontario's decision to proceed cautiously was a *bona fide* policy choice taken in the public interest. Moreover, the decision did not substantially deprive either the Claimant or WWIS of the value of any investments in Ontario. Accordingly, the Claimant's allegations are entirely without merit. Indeed, they are nothing more than an inappropriate attempt by the Claimant to shift the regulatory and business risks associated with the development of WWIS' proposed project to the Government of Canada. The claims should be dismissed.

II. NAME AND ADDRESS OF THE RESPONDENT

8. The Respondent is the Government of Canada. Canada's address for service of documents in connection with this proceeding is:

Department of Foreign Affairs, Trade and Development
Trade Law Bureau
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CANADA

III. FACTUAL BACKGROUND

A. Ontario's Efforts to Modernize and Restructure Electricity Generation

9. In the early 1990s, it became clear that Ontario's old state-owned, vertically integrated electricity utility, Ontario Hydro, could no longer efficiently forecast, generate, transmit and distribute electricity throughout the Province. In 2002, the Government of Ontario attempted to establish a competitive wholesale electricity market. It hoped that a liberalized wholesale electricity market would help promote investment in electricity generation in Ontario. However, a mere nine months later, after the price of electricity spiked due to a particularly hot summer and private investment in new generation failed to materialize, the Government of Ontario intervened to temporarily freeze electricity prices.

10. Following the 2003 Provincial election, the new Government of Ontario recognized that it would soon face electricity shortfalls and thus had to increase electricity supply in the Province. In fact, between 1996 and 2003, Ontario's generation capacity had fallen by 6%, while electricity demand had grown by 8.5%.[1] In March 2003, the Independent Electricity System Operator ("IESO"), an independent entity responsible for the day-to-day operation of the electrical system in Ontario, estimated that "in the order of 15,000 MW" of new or refurbished generation would be needed "in fifteen years or so."[2]

11. This need for increased supply was critical not only because of continually increasing demand, but also because the new Government planned to improve air quality and lower Ontario's carbon emissions by eliminating coal-fired electricity generation by the end of 2014. At the time, coal-fired generation accounted for approximately 25% of the electricity generated in the Province. Ontario was also facing the end-of-life refurbishment of large, state-owned nuclear electricity generating assets. Thus, in addition to adding new capacity, additional sources of generation would soon be required to make up for the loss of electricity generated by coal-fired and nuclear plants.

[1] Ontario's Long-Term Energy Plan: "Building Our Clean Energy Future" (2010), p. 5 (**Tab 1**).

B. Ontario's Efforts to Procure Renewable Energy Generation Capacity

12. Beginning in 2003, the Government of Ontario began to explore the use of alternative and renewable sources of electricity generation, such as solar (photovoltaic), wind, biomass, biogas and hydro-electric. As a first step, Ontario enacted the *Electricity Restructuring Act, 2004* ("ERA").[3] The ERA was designed to encourage the creation of new electricity supply and capacity, promote energy conservation and establish stable prices for electricity that reflected its true cost. To do so, the ERA amended the *Electricity Act, 1998* to create an independent corporation, the OPA,[4] that would be responsible for the "procurement of electricity supply and capacity,"[5] including supply and capacity from clean and renewable energy sources.[6] The OPA's role is not to create, administer or enforce the health, safety and environmental regulations relating to electricity generation. That role belongs solely to the relevant government ministries.

13. Between 2003 and 2008, the Government of Ontario and the OPA (after it was established in 2004) ran a number of electricity supply and generation procurement programs directed at obtaining the desired use of alternative and renewable energy sources. This included the Renewable Energy Supply programs in 2004, 2005, and 2008 which sought relatively small volumes of renewable electricity generated from eligible sources (including, hydro, wind, solar, and biomass). It also included the Renewable Energy Standard Offer Program introduced by the OPA in 2006 to appeal to a broader range of facilities and energy producers.

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[2] Keynote Speech By Dave Goulding, President and CEO, Independent Electricity Market Operator Presented at Toronto Board of Trade Power Breakfast (Mar. 27, 2003), p. 12 (**Tab 2**); Independent Electricity Market Operator News Release: "IMO Releases Annual 10-Year Outlook" (Mar. 31, 2003) (**Tab 3**).

[3] *Electricity Restructuring Act,* S.O. 2004, c. 23 (**Tab 6**).

[4] *Electricity Act*, S.O. 1998, s. 25.1(1): ("A corporation without share capital to be known in English as the Ontario Power Authority…is hereby established.") (**Tab 7**). While the Minister of Energy has the authority to appoint certain members of the OPA's Board of Directors, *Ibid*, s. 25.4(2), to approve its business plan, *Ibid*, s. 25.22, to issue directives with respect to such goals to be achieved by the OPA such as increasing generation capacity from renewable energy sources, *Ibid*, s. 25.30(2), the OPA has independent legal personality, *Ibid* s. 25.2(4), is not an agent of the Crown, *Ibid* s. 25.3, and acts independently and on its own behalf when entering into specific procurement contracts. *Ibid* s. 25.32.

[5] *Ibid*, s. 25.2(5)(b)-(c).

[6] *Ibid*, s. 25.32.

14. However, these initiatives failed to generate the amount of new investment in renewable energy that was required. Accordingly, in 2009 the Government of Ontario began the development of the largest renewable electricity initiative in Canada. This critical initiative had several components, including as its centrepiece, the *Green Energy and Green Economy Act, 2009* ("GEGEA").[7]

15. The GEGEA amended the *Electricity Act, 1998* to authorize the Ontario Minister of Energy to direct the OPA to develop a Feed-in-Tariff Program ("FIT Program").[8] On September 24, 2009, the Minister exercised the authority granted to him under the newly amended *Electricity Act, 1998*, calling for:

> a feed-in tariff ("FIT") program that is designed to procure energy from a wide range of renewable energy sources. The development of this program is a key element of meeting the objectives of the *Green Energy and Green Economy Act, 2009* ... and is critical to Ontario's success in becoming a leading renewable energy jurisdiction.[9]

16. The OPA began taking applications for the FIT Program on October 1, 2009. In order to implement the FIT Program, the OPA developed the FIT Rules, Standard Definitions and the FIT Contract. Together, these documents set out the terms and conditions of participation in the FIT Program, including eligibility requirements, application requirements, contract conditions, and general rules on pricing.

17. The announcement of the FIT Program generated significant interest from renewable energy investors around the world, notwithstanding the risks associated with this nascent industry. The 60-day launch period for large FIT projects ran from October 1 until November 30, 2009. During this period, the OPA received a total of 454 applications for projects that would generate over 500 kW. Of these, the OPA received 5 applications for biogas, 9 applications for biomass, 6 applications for landfill gas, 165 applications for solar PV, 79 applications for waterpower and 186 applications for onshore wind projects. Offshore wind

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[7] Green Energy and Green Economy Act, S.O. 2009, c. 12 (**Tab 8**).

[8] *Electricity Act*, 2009, s. 25.35 (**Tab 7**).

[9] Letter from George Smitherman, Minister of Energy and Infrastructure to Colin Anderson, Chief Executive Officer, Ontario Power Authority (Sep. 24, 2009) (**Tab 9**).

projects accounted for the fewest number of applications, with only 4 applications submitted. In response to these initial applications, the OPA offered 187 FIT Contracts for a total of almost 2,500 MW of potential generation capacity.[10]

C. Ontario's Efforts to Ensure that Renewable Energy Projects are Safe and Environmentally Sound

18. While renewable energy projects cause less pollution than coal-fired power plants, they must still comply with health, safety and environmental regulations with respect to their development and operation. The Government of Ontario consistently communicated this to applicants to the FIT Program. So did the OPA. In the same vein, both the Government of Ontario and the OPA also clarified that an award of a FIT Contract by the OPA was not an authorization from the Ontario Government to proceed with a project. Indeed, as noted above, while the OPA was responsible for procuring electricity supply, it had no authority with respect to the development or implementation of the health, safety and environmental regulations that apply to a renewable electricity generation project in Ontario. A project proponent still had to ensure that it obtained the numerous Provincial, Federal and municipal regulatory approvals, permits and licenses required for its particular renewable energy project.

19. The relevant regulatory processes for renewable generation projects at the Provincial level are found primarily in the Ministry of Environment's ("MOE") *Environmental Protection Act* ("EPA"), the *Renewable Energy Approvals under Part V.0.1 of the Act* regulation ("REA Regulation"), as well as the Ministry of Natural Resources' ("MNR") Approval and Permitting Requirements Document ("APRD"). In addition, other potential permitting requirements administered by other Provincial Ministries may also apply. At the Federal level, permits and authorizations could also be required under, among others, the *Fisheries Act*, the *Species at Risk Act*, and the *Navigable Waters Protection Act*. Finally, at the municipal level, approvals such as building and construction permits and zoning amendments may also be required.

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[10] Ontario Power Authority News Release: "Ontario Announces 184 Large-Scale Renewable Energy Projects" (Apr. 8, 2010) (**Tab 10**). Note that in addition to the 184 contracts cited in this press release, three additional contracts were executed approximately five months later, due to delays in allocation of grid capacity. The total of 187 contracts cited above accounts for these three additional contracts.

20. Different forms of renewable electricity generation involve different health, safety and environmental concerns. Accordingly, the type of information that needs to be submitted to regulatory authorities for evaluation varies. At the time of the FIT Program launch, there was greater experience around onshore wind, rooftop and ground mounted solar PV, biogas and biomass projects. Consequently, regulators knew what type of information needed to be submitted and evaluated to determine that a project did not pose significant threats to health, safety or the environment. The information requirements for such projects are set out with some specificity in both the REA Regulation and the APRD.

D. The Uncertainty Associated with Offshore Wind Energy Facilities in Ontario

21. In comparison to other renewable energy projects, at the time of the FIT Program's launch (and still today), there was no practice and no specific regulatory or scientific expertise with offshore wind facilities in Ontario's lakes. In fact, at the time the FIT Program was launched, there was not a single freshwater offshore wind facility operating in the world. Further, since that time, only one small pilot project has come into operation, with a total of 10 wind turbines in Lake Vänern, Sweden. And although the Swedish company has wanted to expand its pilot to 30 turbines since 2011, the Swedish Environmental Protection Agency has opposed this expansion.

22. As a result of its lack of experience and the uncertainty in the existing science, the Government of Ontario has moved slowly with respect to offshore wind energy facilities. For example, in November 2006, MNR decided to defer consideration of offshore wind power development to gain a better scientific understanding of its impacts on the Great Lakes—Lakes which provide more than 80% of Ontarians with drinking water, and support Ontario's fishing and tourism industries.[11]

23. This deferral lasted until January 17, 2008, when the then Minister of Natural Resources announced that MNR "was lifting the deferral and would process the applications received, while being prepared to accept new applications for both onshore and offshore development."[12] The lifting of the deferral meant that new applications for access to offshore Crown land would be

[11] Government of Ontario, Ontario's Great Lakes Strategy 2012, pp. 8, 9 (**Tab 11**).

[12] Ontario News Release: "Ontario Lays Foundation For Offshore Wind Power" (Jan. 17, 2008) (**Tab 12**).

reviewed by MNR. However, site access was no guarantee that a project would receive the permits and authorizations required to proceed to development. It did not give a proponent the right to build projects on a site or even complete any exploratory work or testing. Rather, obtaining such site access would only have meant that a proponent could proceed to apply for the other needed regulatory approvals.

24. Thus, while applications could be made under the FIT Program for offshore wind energy projects and FIT Contracts could be entered into with the OPA for such projects, any company doing so should have been aware that a comprehensive regulatory framework had yet to be developed. The criteria that governmental authorities would use to assess all of the relevant risks to health, safety and the environment were evolving and had yet to be fully established.

25. For example, like other renewable energy projects, offshore wind facilities were subject to MOE's REA Regulation, MNR's APRD policy, and other potential permitting requirements from other Ministries. In addition to the standard reports and assessments that had to be prepared in order to obtain the various approvals and permits from these Ministries, offshore wind facility developers were also required to submit additional documents, studies and information. These included an offshore wind facility report (under the REA Regulation) and a coastal engineering study (under the APRD). However, at the time, and still today, the scientific research required to inform the regulatory review of those reports and studies has not been completed.

26. On June 25, 2010, MOE posted a policy proposal on the Environmental Registry for public comment that outlined an approach for developing the necessary regulatory requirements and guidance in respect of offshore wind facilities.[13] Among other things, the draft policy proposed a 5 km shoreline exclusion zone for offshore wind projects, and the discussion paper attached to the draft policy outlined what reports and assessments offshore wind proponents would need to complete as part of an application for a REA. The paper also noted that additional guidance documents were being developed, including Cultural Heritage Guidance for Offshore Renewable

[13] See Ontario Policy Proposal Notice: Renewable Energy Approval Requirements for Off-shore Wind Facilities – An Overview of the Proposed Approach (Jun. 25, 2010) (**Tab 4**); Ontario Ministry of the Environment Discussion Paper, "Off-shore Wind Facilities Renewable Energy Approval Requirements" (Jun. 25, 2010) (**Tab 5**).

Energy Projects, Offshore Wind Noise Guidelines, Coastal Engineering Study Guidance and a Crown Land Renewable Energy Policy Review.

27. On August 18, 2010, MNR posted a complementary policy to MOE's posting on the Environmental Registry. The MNR policy, entitled "Offshore Wind Power: Consideration of Additional Areas to be Removed from Future Development,"[14] sought feedback on where, when and how Crown land should be made available to offshore wind developers.

28. In total, over 2,000 comments were received on the two postings, most of which opposed the development of offshore wind power in Ontario. MNR also held engagement sessions with industry, Aboriginal communities and other stakeholders on the proposal during 2010.

29. It was into this thicket of developing policy and regulatory uncertainty that the Claimant knowingly and willingly plunged.

E. WWIS' Proposed Offshore Wolfe Island Shoals Project

30. In 2007, in the middle of MNR's original deferral of consideration of applications for access to Crown land for offshore wind facilities, the Claimant and WWIS were incorporated. In February 2008, shortly after MNR lifted that deferral, but before the introduction of the GEGEA and the creation of the FIT Program, WWIS submitted Crown land applications to develop an offshore wind facility (the "WWIS Project"). The proposed WWIS Project was a massive endeavour. WWIS proposed to construct approximately 100 wind turbines, capable of generating 300MW of electricity, in Lake Ontario near Wolfe Island, south of the City of Kingston.

31. On November 29, 2009, during the launch of the FIT Program, the Claimant, through various entities, applied for a number of FIT Contracts – ten for onshore wind projects in Central and Northern Ontario, and one for the offshore WWIS Project in Lake Ontario. WWIS' FIT application was one of only four received by the OPA for offshore wind energy projects between October 1 and November 30, 2009. Moreover, the generating capacity of the project proposed by WWIS was approximately 10 times as large as the three other proposed offshore wind energy

[14] Ontario Policy Proposal Notice: Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (Aug. 18, 2010) (**Tab 16**).

projects combined. The facility also involved the proposed installation of 10 times the number of turbines as the world's only freshwater offshore wind facility that has since been developed on Lake Vänern, Sweden.

32. The OPA offered WWIS a FIT Contract on May 4, 2010 for its proposed 300 MW offshore wind facility. This was the only FIT Contract offered to an offshore wind facility. Pursuant to the FIT Rules, the contract offer to WWIS was open for a period of 10 business days. This standard offer contract included a requirement that WWIS bring the project into operation four years after the contract date.[15] If it failed to do so, there were serious financial consequences. Moreover, if its failure to do so persisted for 18 months, the OPA had the right to terminate the FIT Contract and to retain the deposits made by WWIS as well as pursue other damages.[16] The offered FIT Contract also allowed WWIS to declare *force majeure* in the event of an "inability to obtain…any permit, certificate, Impact Assessment, license or approval of any Governmental Authority…required to perform or comply with any obligation under [the Contract]."[17]

33. As described above, the regulatory process for offshore wind projects was not fully developed at the time that the OPA made this contract offer to WWIS. As such, when WWIS received the offer, it met with the OPA on May 13, 2010 to discuss whether the OPA would be willing to vary the terms of the contract to reflect the existing regulatory uncertainty.

34. The following day, OPA Director of Contract Management Michael Killeavy emailed WWIS representative Ian Baines, saying:

> we can all appreciate the challenges that you face in developing an offshore wind energy facility. That being said, we are not prepared to change any of the terms of the FIT Contract that has been offered to you. The FIT Program is a standard offer program. Windstream Energy Inc. ("Windstream") will have to determine whether or not it wants to accept the offered contract…. The OPA is not in a position to advise Windstream on how it ought to

[15] Ontario Power Authority, Standard FIT Contract, v. 1.3.0, Exhibit A (Type 8: Wind (Offshore) Facilities) (Mar. 9, 2010) (**Tab 13**).

[16] *Ibid*, s. 9.1(j), 9.2(a), 9.2(d)(ii) and 9.5.

[17] *Ibid*, s. 10.3(i).

> manage the regulatory risk associated with offshore wind energy projects.[18]
> (emphasis added)

35. Despite its initial reluctance, the OPA eventually granted WWIS until June 2, 2010 to accept the offered FIT Contract. At WWIS' request, the OPA ultimately granted a few additional extensions, adjusting the deadline to sign the contract into August 2010.

36. On August 12, 2010 the OPA indicated that it would, at WWIS' request, issue WWIS a revised FIT Contract with a special term that extended the milestone date for commercial operation by a year from the standard offer – i.e. from four to five years from the contract date. WWIS executed its FIT Contract on August 20, 2010. WWIS did so despite the overall uncertainty with respect to the regulatory framework for offshore wind facilities and at a time when MOE and MNR proposals for policies which could restrict the development of offshore wind facilities and directly affect WWIS remained open for public comment.

37. In the autumn of 2010, WWIS submitted an application to MNR to allow it to reconfigure its application area so that it would be outside of the proposed 5 km exclusion zone. It also applied for wind testing permits. On November 22, 2010, in response to both, MNR explained that any consideration of such applications could only take place following the decision on the policy proposal that was under consideration.

38. By December 2010, the Claimant and WWIS apparently realized that Ontario would be proceeding far more cautiously with respect to the development of offshore wind energy than they had gambled when WWIS signed its FIT Contract a few months earlier. As a result, on December 10, 2010 WWIS claimed a *force majeure* event under its FIT Contract related to its inability to obtain the required regulatory approvals. The OPA granted WWIS *force majeure* status, with the event set as having commenced on November 22, 2010.

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[18] E-mail from Michael Killeavy, Ontario Power Authority to Ian Baines, WWIS (May 14, 2010) (**Tab 14**).

F. Public and Scientific Concerns Lead to a Decision to Defer Offshore Wind Developments until a Comprehensive Regulatory Framework Can be Established

39. During the public consultation process on the policy proposals posted by both MOE and MNR, it became increasingly clear that concern was growing among members of the public about the health, safety and environmental effects of developing and operating offshore wind energy projects in the Great Lakes. As mentioned above, the Great Lakes are an integral part of the lives of Ontarians, and moreover, supply 80% of Ontarians with their drinking water. As also noted, offshore wind energy projects in freshwater were untested in Ontario, and throughout the world. As such, there remained a need for technical and environmental studies in order to inform the regulatory review of these projects.

40. By February 2011, the Government of Ontario had decided that because of the uncertainty with respect to the impacts of freshwater offshore wind power, it could not responsibly allow any such project to proceed at that time. It concluded, in particular, that further scientific studies were necessary to inform the development of the required comprehensive regulatory framework. Accordingly, on February 11, 2011, the Government announced that "Ontario is not proceeding with proposed offshore wind projects while further scientific research is conducted. No Renewable Energy Approvals for offshore have been issued and no offshore projects will proceed at this time. Applications for offshore wind projects in the Feed-in-Tariff program will no longer be accepted and current applications will be suspended."[19] This was exactly the type of regulatory risk that the Claimant and WWIS knowingly accepted when WWIS signed its FIT Contract.

41. As a result, WWIS' project has been on hold since February 2011. Its FIT Contract has not been cancelled. WWIS' rights under the Contract have not been lost. The contract remains in *force majeure* status while the necessary scientific research is completed to inform the future regulatory framework. The Government of Ontario has already begun to complete the necessary

[19] Ontario Ministry of the Environment News Release: "Ontario Rules Out Offshore Wind Projects" (Feb. 11, 2011) (**Tab 15**); Ontario Policy Decision Notice: Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (Feb. 11, 2011) (**Tab 17**); Ontario Policy Decision Notice: Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (**Tab 18**).

scientific studies. For example, MNR has initiated some supporting science and research, including the release of a coastal engineering and fisheries reports in mid-2012.

IV. THE CLAIMANT HAS NOT ESTABLISHED THAT THIS TRIBUNAL HAS JURISDICTION TO HEAR ITS CLAIM

42. Pursuant to NAFTA Articles 1101, 1116 and 1117, the Claimant bears the burden of demonstrating that the Tribunal has jurisdiction over its claim. In particular, the Claimant must show that it has standing to bring the claim, that it and WWIS have suffered damages, and that the challenged measures are attributable to Canada. In this respect, the Claimant alleges that it is a limited liability company organized under the laws of Delaware, U.S.A. that owns and controls WWIS, a Canadian enterprise, and that it and WWIS have suffered $475,230,000 in damages as a result of certain measures of the Government of Ontario and/or the OPA. The Claimant has not yet produced any evidence to support these allegations. Further, the Claimant has yet to establish that any of the actions of the OPA related to the FIT Contract offered to the Claimant are attributable to Canada. Accordingly, Canada reserves the right to object to the jurisdiction of the Tribunal.

V. CANADA HAS NOT BREACHED CHAPTER 11 OF NAFTA

43. The Claimant has alleged that the decision of Ontario to proceed cautiously and defer the development of offshore wind energy projects until a comprehensive regulatory framework is developed breaches Articles 1102, 1103, 1105, 1110, and 1503(2) of NAFTA. These claims are entirely without merit. The Claimant chose to invest in a highly speculative venture for which the necessary regulatory framework was in a state of flux. The Claimant and its alleged investment, WWIS, were well-aware of the risks before WWIS signed the FIT Contract. The non-discriminatory decision of Ontario to defer the development of offshore wind energy projects was made because of legitimate concerns regarding the potential health, safety and environmental effects of this fledgling industry. Such a decision does not violate the obligations in Chapter 11 of NAFTA.

A. Canada Has Not Breached NAFTA Articles 1102 and 1103

44. In its Notice of Arbitration, the Claimant alleges that certain Ontario measures violate its rights under Articles 1102(2) and 1103(2).[20] Article 1102(2) states:

> Each Party shall accord to investments of investors of another Party treatment no less favourable 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.

45. Article 1103(2) states:

> 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 investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

46. In order to establish a breach of Articles 1102(2) or 1103(2), the Claimant must prove that Canada discriminated against its investments because of its nationality, and in particular, that (1) Canada accorded treatment to its investments, and to the investments of domestic investors (under Art. 1102) or the investments of other Parties or non-Parties (under Art. 1103); (2) such treatment was accorded "in like circumstances"; and (3) the treatment accorded to the Claimant's investment was "less favourable" than that accorded to the investments of those other investors. The Claimant's allegations fail to meet these requirements.

47. The decision of the Government of Ontario to defer the development of the regulatory framework for the assessment of offshore wind energy projects applied equally to every offshore wind energy project proposed in Ontario, whether it had made an application to the FIT Program or not. The Claimant's NOA ignores this fact and seeks to prove discrimination by comparing the treatment accorded to WWIS' project with treatment accorded in different circumstances to completely different types of projects.

48. First, it pleads that other renewable energy investments, including those of Samsung C & T Corp., received more favourable treatment because those projects were not delayed by a decision

[20] Notice of Arbitration, ¶ 47.

to defer their development until the applicable regulatory review processes could be fully developed. However, none of these proposed comparators involved offshore wind energy projects. Second, the Claimant pleads that its investment was discriminated against because "the Government of Ontario ...arranged to relocate two gas generation facilities and to pay compensation to the Canadian investors that own them..." but did not do so for it.[21] Put simply, the treatment of natural gas plants is neither relevant nor comparable to the regulation of offshore wind energy projects, let alone unapproved and unconstructed ones. Neither the investments of Samsung C & T Corp. nor the gas plant owners were accorded treatment in like circumstances to the treatment accorded to the Claimant's investments.

B. Canada has Not Breached NAFTA Article 1105

49. Article 1105(1) provides:

> 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.

50. The NAFTA Free Trade Commission's binding Note of Interpretation confirms that Article 1105(1) refers to the minimum standard of treatment under customary international law.[22] A claimant alleging a breach of Article 1105(1) bears the burden of first demonstrating the existence of a rule of customary international law that forms part of the minimum standard of treatment of aliens. A claimant must then demonstrate that the impugned measure has breached this rule of customary international law.

51. In this case, the Claimant alleges that the decision of Ontario to delay the development of offshore wind facilities until a comprehensive regulatory framework for the assessment of such projects is established, and the Government's treatment of WWIS after that deferral was announced, violate the "principle of fair and equitable treatment."[23] In particular, it alleges that

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[21] Notice of Arbitration, ¶ 46.

[22] NAFTA Free Trade Commission, "Note of Interpretation of Certain Chapter 11 Provisions", (Jul. 31, 2001), Available at: http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp; See also NAFTA Article 1131(2) which provides the Note of Interpretation is binding on tribunals constituted under NAFTA Chapter 11.

[23] Notice of Arbitration, ¶ 44.

the identified measures were "arbitrary, irrational and discriminatory", "unfair" and that they "violated the legitimate expectations" of the Claimant and WWIS.[24] However, contrary to the Claimant's apparent position, Article 1105 does not require Canada adhere to the autonomous "principle of fair and equitable treatment." Rather, it requires that Canada accord treatment in accordance with customary international law. None of the measures challenged by the Claimant fall below accepted international standards and breach of Article 1105.

52. First, Ontario's decision to defer development of offshore wind energy facilities until a comprehensive regulatory framework for their review is established is consistent with the minimum standard of treatment required by Article 1105. Ontario adopted a cautious approach in the face of uncertainty with respect to the potential health, safety and environmental consequences of freshwater offshore wind development in the Great Lakes. Article 1105 does not give a mandate to second-guess such legitimate exercises of regulatory authority. To the contrary, international law affords governments a high measure of deference with respect to such decision-making.

53. Moreover, such an approach could hardly have come as a surprise to the Claimant or WWIS. In deciding to invest in an offshore wind project, the Claimant knowingly entered a complex and unsettled regulatory environment. Indeed, prior to signing its FIT Contract, WWIS was expressly warned by the OPA that WWIS bore the regulatory risks associated with an investment of this sort. Article 1105 is not an insurance policy meant to protect against losses caused by investors making risky business decisions.

54. Second, Ontario's treatment of WWIS after the February 2011 decision to defer the development of offshore wind energy projects is also consistent with the minimum standard of treatment required by Article 1105. The Claimant alleges that Ontario has failed to comply with its "promises" that no penalties would be incurred by the Claimant or WWIS as a result of Ontario's February 2011 decision and that the WWIS project would not be cancelled.[25] However, even if the alleged promises were made, the observance of such promises is not

[24] Notice of Arbitration, ¶ 43.

[25] Notice of Arbitration, ¶¶ 31, 43.

required by the customary international law minimum standard of treatment. Moreover, viewing the circumstances objectively, it would not have been reasonable for the Claimant or WWIS to rely upon these alleged representations to make further investments. Further, as a matter of fact, Ontario has not acted in a manner that is contrary to these alleged promises. No penalties have been applied to either the Claimant or WWIS, and the WWIS project has never been terminated.

55. The Claimant also alleges that Ontario's decision not to accept any of WWIS' alternative project proposals violates Article 1105.[26] This claim is also meritless. There is no duty in customary international law for a government to take affirmative steps to mitigate an investor's alleged losses arising from reasonable and non-discriminatory changes to regulatory policy.

C. Canada Has Not Breached NAFTA Article 1110

56. Article 1110 states in relevant part:

> (1) No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation.

57. In order to establish a breach of Article 1110 resulting from a change in regulatory policy, the Claimant must prove that it had an investment capable of being expropriated, that Canada expropriated that investment by taking a measure that substantially deprived the Claimant of its investment, and that the expropriation did not comply with the conditions in Article 1110(a)-(d).

58. Ontario's February 2011 decision to defer the development of offshore wind energy projects until a comprehensive regulatory approvals process is established did not substantially deprive the Claimant of any investment. First, the current deferral is not intended to be

[26] Notice of Arbitration, ¶¶ 33, 43.

permanent. Second, the Claimant has retained its interest in WWIS and WWIS has retained its FIT Contract. The Claimant is in no worse a position than when it began its investment in 2007, a time when the development of offshore wind projects had also been deferred.

59. The Claimant's allegation that the Government of Ontario expropriated WWIS' interest in the FIT Contract also cannot succeed because that interest is not an investment capable of being expropriated. The FIT Contract was expressly contingent on regulatory approvals which were – and remain – highly uncertain. As such, it was not capable of conveying "a reasonably-to-be-expected economic benefit" capable of being expropriated.

60. Finally, even if the Tribunal were to find that the deferral had the effect of substantially depriving the Claimant of its investment in WWIS or WWIS of its FIT Contract, the deferral cannot be "tantamount to expropriation" because it was a bona fide, non-discriminatory governmental decision implemented in the public interest. Article 1110 does not prohibit such legitimate governmental decision making.

D. Canada Has Not Breached NAFTA Article 1503(2)

61. Article 1503(2) provides:

> Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

62. The Claimant alleges that to the extent that the OPA can be considered a state enterprise under Article 1505, Canada has breached its obligations under Article 1503(2) to ensure, through regulatory control, administrative supervision or the application of other measures, that wherever the OPA exercises delegated regulatory, administrative or other governmental authority, it acts in a manner consistent with Canada's Chapter 11 obligations.

63. The Claimant's arguments are without merit. Canada has not violated its obligation to ensure, through regulatory control, administrative supervision or the application of other measures, that state enterprises act in a manner not inconsistent with Chapter 11 in their exercise of delegated regulatory, administrative or other governmental authority. Accordingly, Canada has not breached Article 1503(2).

VI. THE CLAIMANT'S DAMAGE CLAIMS ARE UNSUSTAINABLE

64. A claimant must establish a sufficient causal link between the alleged breaches of NAFTA and the damages that it claims. The Claimant here has not even attempted to meet its burden or establish the facts necessary to prove the damages it claims. The Claimant provides no foundation for the assertion that the alleged breaches of NAFTA caused it or WWIS damages of $475,230,000.

65. Moreover, the Claimant cannot show that Ontario's measures were the proximate cause of the damages that it now claims it and WWIS suffered. The WWIS project was in the pre-construction phase. At the relevant time, WWIS had not obtained the regulatory approvals required to begin the necessary testing and assessment of its proposed site related to obtaining an REA, let alone the construction of its proposed project. In fact, WWIS has not, to date, commenced the process set out under the REA Regulation to be eligible to apply for the required REA. There is also no evidence that the WWIS obtained any of the federal or other approvals that would be necessary for the development and operation of it proposed offshore wind energy facility.

66. There are no guarantees that, even if allowed to proceed with its applications for the relevant authorizations and approvals, WWIS would receive the approvals and permits it needs. There are also no guarantees that the project could be constructed in the timelines required under the FIT Contract, and thus, no guarantees that WWIS would not find itself in breach of its FIT Contract which could then be terminated by the OPA. Furthermore, in light of the novelty and magnitude of the proposed project, there are no guarantees that it could be constructed economically such that WWIS and the Claimant would be able to generate any profits, even under the rates provided for in the FIT Program.

67. Finally, in the circumstances of this case, the Claimant should not be permitted to recover its and WWIS' actual expenditures. Some of those expenditures seem to have been made after the alleged breach, and thus cannot be recovered in this proceeding. With respect to those expenditures made before the Government of Ontario's February 2011 decision, the Claimant chose to make those investments with full knowledge of the risky nature of its business proposal. It should not now be permitted to use NAFTA Chapter 11 to retroactively insulate itself against the risks that it willing accepted in making its investments.

VII. RESPONSE TO RELIEF SOUGHT

68. For the reasons outlined above, Canada respectfully requests that:

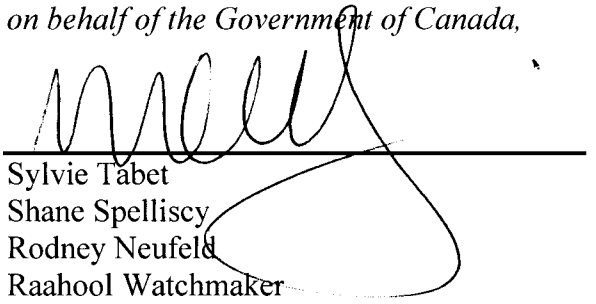
(a) The Tribunal dismiss the Claimant's claims in their entirety; and

(b) Pursuant to NAFTA Article 1135(1) and Article 42 of the 2010 UNCITRAL Arbitration Rules, the Tribunal require the Claimant to bear all costs of the arbitration, including Canada's costs of legal assistance and representation; and

(c) The Tribunal grant any other relief it deems appropriate.

April 26, 2013
Amended December 5, 2013

Respectfully submitted
on behalf of the Government of Canada,



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