

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

MESA POWER GROUP, LLC

Investor

v.

GOVERNMENT OF CANADA

Respondent

WITNESS STATEMENT OF

COLE ROBERTSON

November 19, 2013

I. BACKGROUND

1. My legal name is Lee Allison Robertson III. I am generally known as Cole Robertson.¹
2. I am the Vice President of Finance for Mesa Power Group, LLC. In this capacity I am responsible for the day to day operations of the company, as well as overseeing company financing, and analytical, accounting, financial reporting and tax activities. I make this statement based on this knowledge arising from my responsibilities for day to day operations of Mesa Power Group.
3. My address is 8117 Preston Road, Suite 260, Dallas, Texas, United States of America.
4. I have been with Mesa since June of 2008 and have been involved in the development of Mesa's wind generation in North America since that time. Prior to joining Mesa I worked for Ernst & Young in their Assurance and Advisory Business Services' asset management practice.
5. In addition to my responsibilities in running the day to day operations of Mesa Power Group, I also served as an officer and board member of the American Wind Alliance, which was originally a joint venture between Mesa and GE Global Development and Strategic Initiatives. It is now controlled entirely by Mesa and its affiliates.
6. I hold a Bachelor's degree in Business Administration in accounting and a Masters of Science degree in finance both from Texas A&M University. I am a licensed Certified Public Accountant in the State of Texas.
 - i. *Decision to Invest in Canada and Involvement in FIT Program*
7. Mesa Power Group, LLC is a privately held company that was created in 2007 by T. Boone Pickens to develop and finance wind and other renewable energy power projects. Mesa's move into renewable energy, in particular wind energy, was a strategic decision to diversify its business activities from oil and gas. This was the primary purpose for the creation of the Mesa Group of companies. Numerous governments were enacting renewable energy programs and Mesa was eager to participate and assist with transitions to cleaner and more sustainable energy practises. Mesa had the corporate know how and experience in operating within various regulatory systems.

█ [REDACTED]

8. Mesa believed that the Province of Ontario presented an excellent opportunity for investment in renewable energy. The passage of the *Green Energy and Economy Act* in the spring of 2009, and the subsequent announcement of the FIT Program in September 2009, confirmed for us that Ontario was serious about becoming a renewable energy consumer.
9. Another important assurance was the expectation that the process for awarding renewable energy Power Purchase Agreements (PPAs), through the FIT Program and Ontario's regulatory regime, would be conducted fairly and consistently.
10. Mesa had the experience, financial capability, and a guaranteed turbine supply to meet the criteria for a renewable energy PPA in the FIT Program.
11. We engaged local staff with on the ground knowledge, expertise, and experience specific to the local markets we sought to operate in. We retained the services of a highly experienced, Ontario based, wind power developer, Chuck Edey. Chuck was a former president of the Canadian Wind Energy Association and had extensive experience with wind power developments in Ontario.
12. When we selected our wind project sites in Ontario, we took a number of factors into consideration. Primarily, our team looked for locations which had an abundant and reliable supply of wind and access to available transmission.
13. We carried out analyses of wind climate and energy production of the proposed wind farms. Through extensive analysis relying upon more than three years of valid wind data, Mesa was able to provide ten year average net energy production for Leader's proposed projects. These sites were nearby some of the largest existing wind facilities in operation in the Province of Ontario that had already obtained contracts through the earlier RES Program. The conclusion was that the sites Mesa identified presented very significant wind resources and met the demands of the FIT application process.
14. Our analysis of the selected projects for a renewable energy PPA under the FIT Program showed that the projects would be economical as designed.
15. Under the FIT Program, a factor was the length of time that a proponent had a site under lease. We ensured we had early lease agreements. Early lease agreements assisted us with the FIT ranking criteria and also ensured that we could become operational at the earliest possible date, because we had leases in place. Our developers managed the process and the acquisition of relevant permits and easements. They also performed the site studies.
16. Mesa had the financial and practical capability to proceed with the wind projects. One of the four criteria upon which FIT applicants were scored was whether they had guaranteed access to wind turbines. Mesa met this requirement. It had an agreement

for supply of wind turbines, the Master Turbine Sales Agreement, with General Electric Company (GE), and had paid USD \$153 million as a payment on this [REDACTED] investment.

17. The FIT Program had detailed minimum domestic content levels, which were required for an application to proceed. These minimum domestic content requirements affected the choices of components, suppliers, and technologies for our wind power projects under the FIT Program. Mesa had to shift its resources and work with suppliers to ensure the projects would meet Ontario's domestic content requirements.
18. Mesa had operations in the United States, including its supply chain. This supply chain, which had been carefully sourced and integrated into our business network, had to be disrupted in order to meet the FIT Program's Ontario minimum domestic content requirements. Making matters worse, the FIT Program did not clearly set out exactly how those requirements could be satisfied.
19. To meet the FIT Program's minimum domestic content requirements, Mesa spent money, time, and effort ensuring its agreement with GE met the required domestic content levels. At the time of the FIT applications, Mesa was going to use the GE 1.6 MW turbine, the only GE turbine we believed could successfully meet the Ontario domestic content requirements.
20. The Ontario minimum domestic content requirements would have reduced the profitability of our projects. Without Ontario minimum domestic content requirements we would have been able to rely on our established suppliers, utilize more efficient inputs for our project, require less capital to construct our projects and earn greater profits, including lower operating costs.²

II. PREPARATION OF FIT APPLICATIONS

21. Through its local developers, Mesa submitted FIT applications for the TTD Wind Project and the Arran Project during the FIT launch period.³ Mesa later submitted two sets of FIT applications for the North Bruce Project and the Summerhill Project.⁴ In total, Mesa submitted FIT applications for four wind energy projects in Ontario. All of the projects were located in the Bruce Region.

² CER- Independent Valuator's Report of Low and Taylor of Deloitte, para. 1.20.

³ See OPA FIT application submitted for Twenty Two Degree Wind Energy Project, November 25, 2009 (*Investor's Schedule of Exhibits at C0364*) and OPA FIT Application submitted for Arran Wind Project, November 25, 2009 (*Investor's Schedule of Exhibits at C0365*)

⁴ Summerhill Wind Energy I, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C0362*); Summerhill Wind Energy II, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C0363*); North Bruce Wind Energy I, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C0360*); North Bruce Wind Energy II, FIT Application, May 29, 2010 (*Investor's Schedule of Exhibits at C0361*)

22. At the time Mesa chose its four projects, Mesa was aware that a transmission line was being constructed to connect the Bruce Region to Milton. This was an influential factor in choosing the project sites, as it meant that there would be increased transmission available at the project locations for TTD and Arran. Given that there is a limited amount of transmission capacity, it was important to select projects in locations with existing or planned transmission infrastructure.
23. When the FIT Rules were released, Mesa recognized that it was important to submit the projects during the “Launch Period”, to maximize the likelihood that Mesa’s projects would receive FIT contracts.
24. Mesa expected that if it had the technical abilities, and successfully met the FIT Program requirements, it would succeed in obtaining contracts. It appreciated that it was making an application in a provincial regulatory competition. Its application was carefully prepared to comply with the FIT Rules.
25. Mesa believed that to ensure a competitive application, it needed to follow the letter and spirit of the FIT Rules, have proposed sites with strong wind capacity, be ready to commence generation as early as possible, and already have secured a supply of turbines as required by the FIT Program. Mesa met all of these objectives.

III. SUBSEQUENT INVOLVEMENT WITH FIT PROCESS

26. In March 2010, Mesa submitted its additional FIT Applications for the North Bruce and Summerhill projects. These projects were “greenfield” development, meaning that they were projects that Mesa owned itself and was developing from scratch, and not projects that were already under development such as the TTD and Arran Projects that we purchased from Wind Power developers. The Summerhill and North Bruce projects were not “launch period” applications, and were therefore to be ranked based on the time the applications were submitted in contrast to the criteria used to judge earlier FIT applications.
27. The Summerhill project was adjacent to TTD, and North Bruce was adjacent to Arran. Their proximity to our existing projects allowed us to rely on the scientific data we had already gathered.⁵ Together they added an additional 300MW to our already proposed projects. The addition of these two projects represented Mesa’s commitment to establishing wind power projects in Ontario. The North Bruce project was slated to connect to the same connection point as the Arran project, leading to a reduced cost in making in operational.

⁵ CER- Independent Valuator’s Report of Low and Taylor of Deloitte, para. 2.18.

IV. THE GREEN ENERGY INVESTMENT AGREEMENT

28. In January 2010, Mesa learned that the FIT Program was not the only renewable energy initiative Ontario was pursuing. The *Green Energy Investment Agreement (GEIA)* revealed that the FIT Program was not the only means to acquire transmission capacity and a PPA for renewable energy in Ontario.
29. It was not until the commencement of this arbitration, however, that Mesa began to fully appreciate the extent to which the *GEIA* prejudiced its application for obtaining a FIT contract and the extent to which the Korean Consortium used its leverage with Ontario in a competitive way against Mesa. When announced, the terms of the *GEIA*, were secret.
30. Mesa was approached in the summer of 2010 by representatives of Samsung C&T and its joint venture partner, Pattern, who were interested in purchasing our Ontario wind projects. Initially, they were interested in TTD and Arran and offered a price that was substantially below the market value of these developments.
31. The Samsung and Pattern representatives told us that if we did not accept the offer, they would be able to compete against us and target the connection points for which Mesa applied, precluding us from being awarded contracts. At the time, Mesa had no reason to suspect that this would be the case and that it was just bluster from competitors seeking renewable power PPAs in Ontario. We expected that the FIT Program, as set out in the rules, would be administered by the Government of Ontario and the OPA as a fair, even handed, and impartial process.
32. The effect of reserving transmission capacity under the *GEIA* by members and parties of the Korean Consortium was that the Korean Consortium was able to purchase lower ranked projects, which were otherwise undeserving of PPAs. Mesa chose not to be bought out by the Korean Consortium despite its expressed interest to do so.
33. I have also had the opportunity to review the declaration of Zohrab Mawani, who was working for Samsung at this time.⁶ Mr. Mawani identified that Samsung was in competition with Mesa, just like they were competing with every company trying to obtain a renewable energy PPA in Ontario. I agree with his statement. All companies, such as Samsung, NextEra, Pattern, and Mesa, were competing in the same market to obtain transmission access and renewable energy PPAs. There was only a limited amount of transmission capacity for renewable energy in a certain area. Mesa

⁶ Declaration of Zohrab Mawani, para. 10 (*Investor's Schedule of Exhibits at C0406*)

competed with all those in the Bruce region, and apparently those in the West of London region as well.

V. CONTRACT OPPORTUNITY DELAYED BY LACK OF ECONOMIC CONNECTION TEST

34. Mesa also expected the FIT Program to unfold in a manner that corresponded to the FIT Rules. As the FIT process advanced, it did not proceed in that manner. It deviated from the FIT rules, and the representations made by the OPA.
35. Mesa knew it would require an Economic Connection Test (ECT) to receive the FIT contracts it applied for. In the letters Mesa received from the OPA on April 8, 2010, it was indicated that the ECT for the Bruce Region would occur in the summer of 2010.⁷ Mesa had no reason to believe that an ECT would not take place.
- a) First, the FIT Rules provided for one to take place every six months.⁸
 - b) Second, the OPA made various representations that the ECT would take place.
36. These representations continued at least until February 2011.
37. On May 19, 2010, Mesa attended a webinar hosted by the Ministry of Energy, which discussed the process for the ECT that was scheduled for the summer of 2010.⁹ The presentation confirmed Mesa's understanding of the ECT process that was set out in the FIT Rules.
38. When the first set of FIT rankings was released in December 2010, we had some concern with the list, as we believed Mesa's projects should have been ranked higher. That was based on the OPA's published criteria for how the rankings would be done. We expected to be awarded contracts in the next round, and continued spending large amounts of money to ensure our projects would be shovel ready and economical to implement. We also made some significant developments with the permitting process for each of the projects.

VI. JUNE 3, 2011 MINISTERIAL DIRECTION, RULE CHANGES, AND FALLOUT FOR MESA

39. After the first set of rankings, there was an unexpected announcement by the OPA. In accordance with a Direction issued by Energy Minister Brad Duguid on June 3, 2011 there would be a five day period from June 6 11 where projects could apply to change their connection points. This required significant consultation and work. We were very

⁷ Letter from JoAnne Butler (OPA) to Chuck, Edey (Leader Resources), April 8, 2010 (*Investor's Schedule of Exhibits at C0182*)

⁸ Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.1, September 30, 2009, section 5.4 (*Investor's Schedule of Exhibits at C0258*)

⁹ Ontario Power Authority presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010 (*Investor's Schedule of Exhibits at C0138*)

surprised that such an undertaking would be made at the last minute, providing us with only three days notice before the five day period began. There had been no indication that such a significant change would be coming, and that we would have such a short period of time to meet it.

40. The most surprising result of the Direction and connection point change was that NextEra connected its projects to the Bruce Region by the 500 kV Bruce to Longwood transmission line. My understanding was that that transmission line was reserved to provide backup transmission to the Bruce Nuclear facility and that renewable energy projects would not be permitted to connect to that line.
41. Before the June 3, 2011 Direction, Mesa had asked if it could connect to the Bruce to Longwood line but was told – No.
42. Being next in line in the rankings, Mesa still expected that it would be awarded a contract when the next rankings were released. Just before the June Direction, in May 2011, my colleague Mark Ward was told that NextEra was going to knock Mesa out of the queue. Mark was told this by Richard Brown, a former account representative at General Electric, whom he had known for years.
43. Richard told Mark, in a text message, that he had spoken to a NextEra representative who told him that *“FPL is going to build a transmission line in Ontario and knock Mesa out of the queue.”* The term FPL refers to Florida Power and Light, a subsidiary of NextEra.
44. Mesa understood the FIT rules would not permit this to happen.
45. Nonetheless, Mesa wrote to the OPA outlining concerns, specifically over the ranking process. But the OPA did not disclose that it was secretly facilitating NextEra’s change of its connection point to the Bruce Region. Any knowledge of NextEra’s secret dealings with Ontario would have been shocking.

VII. MESA’S ATTEMPTS TO ENGAGE WITH THE OPA AND MINISTRY OF ENERGY

46. Mesa wrote to the OPA on May 20, 2011. On June 17, 2011, Mesa wrote to the OPA again as the response from Mr. Cronkwright had not answered questions about ranking criteria. On June 21, 2011, Mesa was informed that the Ministry of Energy and the Premier’s Office *“supports sitting down with the OPA as soon as possible to ensure that no mistakes were made (in advance of award contracts).”* Mesa was appreciative of this opportunity and was eager to clarify matters before contracts were awarded.
47. However, Mesa was disappointed to then learn that a meeting would not take place.

48. On June 22, 2011, Mr. Cronkwright informed Mesa that it could not have access to the OPA while it was preparing to award contracts. He mentioned that "*the OPA is not accepting meetings from proponents in the Bruce or West of London Region in connection with this process.*"
49. On July 4, 2011 FIT Contracts were awarded. Mesa was not awarded a contract.
50. Our calculations of the rankings were very different from the base of the calculations set by the Government of Ontario. Since we were so concerned by what was a patent mathematical error, we tried to contact the government. Mesa went so far as to engage lobbyists to assist with this process. Nevertheless, the Ministry of Energy and the OPA still refused to tell us how they came to the calculations. The only information we were provided was that the calculations were right. This was not in our view what we would have expected to find in a country with fairness and due process like Canada.
51. Once contract offers were announced, we drafted a letter expressing Mesa's frustration with the process. The letter was sent to Mr. Colin Andersen at the OPA, Minister Mitchell, Minister Papatello¹⁰, Minister Duguid¹¹, and Premier McGuinty¹². In these letters, my colleague Mr. Ward requested a meeting with each of the ministers and Premier McGuinty to discuss the projects in the context of the FIT Program PPA contracts awarded and Mesa's current and future investments in Ontario.
52. Four days later, on July 8, 2011 Mesa was informed that it would not be given a meeting with Minister Duguid. On July 14 we learned that the OPA would not meet with us either. At this point, no other means or mechanism was proposed by which Mesa's concerns might be examined, or its case be heard.
53. To this day, Mesa has never received letters or other information regarding the status of the TTD project or the Arran project – Mesa's two highest ranked FIT projects in the province. On July 4, 2011, our developer received two letters from the OPA indicating that the Summerhill and North Bruce projects had not received contract offers as there was insufficient transmission capacity available for them.¹³

¹⁰ Letter from Mark Ward (Mesa) to Minister Sandra Papatello (Ministry of Economic Development and Trade), July 4, 2011 (*Investor's Schedule of Exhibits at C0169*)

¹¹ Letter from Mark Ward (Mesa) to Minister Brad Duguid (Ministry of Energy), July 4, 2011 (*Investor's Schedule of Exhibits at C0177*)

¹² Letter from Mark Ward (Mesa) to Premier Dalton McGuinty, July 4, 2011 (*Investor's Schedule of Exhibits at C0025*)

¹³ Letter from JoAnne Butler (OPA) to Chuck Edey (Summerhill Wind Project), July 4, 2011 (*Investor's Schedule of Exhibits at C0076*); Letter from JoAnne Butler (OPA) to Chuck Edey (North Bruce Wind Project), July 4, 2011 (*Investor's Schedule of Exhibits at C0086*)

VIII. WHAT ACTUALLY TRANSPIRED

54. Mesa now knows:
- a. The Korean Consortium was given preferential access to transmission capacity that Mesa did not know was set aside by the *GEIA*;
 - b. The ECT was continuously delayed so that Samsung and Pattern could choose their respective and preferred connection points. Had the ECT been run on schedule, before NextEra was able to poach transmission capacity in Bruce, Mesa would have been awarded a FIT contract under the FIT Rules;
 - c. The ECT process was formally abandoned on April 28, 2011,¹⁴ with no notice to Mesa, and no suggestion that the representations about the ECT could no longer be relied on;
 - d. NextEra was directly engaged with the OPA and in meetings with the Ministry of Energy and with the Minister;
 - e. NextEra had advanced knowledge of the connection point change window, and intended to poach Mesa's transmission capacity in the Bruce Region;
 - f. In addition to the four NextEra projects that bumped out Mesa, two more of its enabler requested projects, Bluewater and Jericho, jumped into the queue during the connection point change window period, despite not having selected connection points.
55. Mesa did not know that the FIT Program was not Ontario's primary renewable energy initiative, and that the terms of the *GEIA* provided for advantages to the Korean Consortium.
56. Mesa, which played by the rules, and did what was requested of it in the FIT application process in order to be competitive for a FIT contract, now knows that while we were waiting for processes in the lead up to contracts being awarded, NextEra was directly engaged in discussions with the OPA.
57. What Mesa did not know, and has only discovered through this arbitration process, is that the FIT Program was not carried out fairly or reasonably. While Mesa expended effort and cost to ensure its application was fully compliant with the FIT Rules, to be impartially assessed by the OPA, there were other events unfolding without Mesa's knowledge. These other events were surprising and not conducted in a manner I expected a governmental regulatory program to be pursued in a place like Ontario, Canada.

¹⁴ Email from Kristen Jenkins to Craig MacLennan, April 29, 2011 (*Investor's Schedule of Exhibits at C0165*); Draft ECT Communications Roll-out, April 28, 2011 (*Investor's Schedule of Exhibits at C0116*)

58. Had Mesa known all of this in advance of it submitting its application, it would have never made one in the first place. Mesa assumed that from the beginning the FIT Rules were being fairly administered in the process and that officials were treating us fairly and reasonably, and administering the FIT Program as would be expected.
59. Mesa knew that after it was awarded FIT contracts our projects would need to undergo environmental risk assessments and eventually require approvals.
60. The FIT Program made provision to ensure that a successful FIT proponent would have to successfully complete all necessary government regulatory environmental assessment procedures and would have to address the concerns of aboriginal persons. The need to fully and properly address environmental regulatory concerns is a regular part of the process for approving a wind power facility as was the need to address concerns of First Nations. We were prepared to address such issues as part of the ordinary process to complete our wind power facility.
61. In 2010, when we made our applications, we were not aware that Samsung, KEPCO and their joint venture partners, were able to obtain significantly better treatment from Ontario officials with respect to environmental regulatory approvals. We also were not aware that under the *GEIA*, Ontario was actually facilitating First Nations consultations for the Korean Consortium.
62. The terms of the *GEIA* established close proximity for regulators and Korean Consortium members and their partners where they could work out environmental regulatory issues privately and in advance, including any necessary mitigation matters to address the concerns of regulators. This private process had the effect of significantly reducing the risk of an adverse consideration being made by government environmental regulators. In addition, by conveying information to a proponent at an early stage, this also ensured that a maximum of planning and budgeting flexibility could be achieved by the members of the Korean Consortium and their partners. We were never provided with treatment of this nature and if we had, it would have significantly decreased the operational risks of our wind power projects.
63. Obtaining a PPA under the FIT Program presented fewer risks than we would normally find in a usual, private sector power generation contract. The fact that the Government of Ontario was issuing a renewable energy PPA as a FIT contract meant that there was little concern about the credit worthiness of a receivable for the power produced that would be sold into the Ontario grid. A power producer could be confident that it would receive payment for the power that its wind project produced, given the guarantee of the Government of Ontario and the OPA. With this risk alleviated, the most significant remaining concern about project success was the risk that the PPA could be terminated for cause.

64. I am also now aware that the *GEIA* had provisions to remove the termination for cause provisions in PPAs entered into by the Korean Consortium members, and their joint venture partners. During the Ontario provincial election, on August 2, 2011, the Government of Ontario agreed to provide the same treatment to all persons who were awarded a PPA under the FIT Program.
65. With this waiver of termination rights, the government had removed a significant operational risk to the project. In essence, if a proponent builds its facility, and obtained the necessary environmental approvals, and if the wind continued to blow, then it would be guaranteed a 20 year stream of revenues for the energy it produced. These factors significantly decreased the risk profile for a PPA under the FIT Program.
66. I have now had the opportunity to review the terms of the *GEIA*, which provided significantly better treatment to Samsung, KEPCO, and their joint venture partners than the treatment that we received in Ontario with respect to obtaining PPAs for renewable energy. One of the provisions of the *GEIA* is Section 3.4, which permitted the members of the Korean Consortium to be able to increase the size of their renewable energy projects up to a maximum of 2,500 MW. We were certainly not treated as favourable as this. Without doubt, Mesa would have given reasonable notice to the Government of Ontario to increase the size of its wind power projects in Ontario by an additional ten percent, as given to the Korean Consortium by Section 3.4 of the *GEIA*.

IX. LOSS FROM NOT RECEIVING CONTRACTS

67. Mesa has suffered injury, harm, and loss as a result of its participation in the FIT Program and not receiving FIT contracts.
68. Mesa reasonably expected, and was entitled to reasonable expect, that it would be awarded FIT contracts for all four projects. It was not awarded those contracts, and lost all future income associated with them.
69. As a result of not receiving FIT contracts, Mesa had to forfeit its \$153 million turbine payment with GE.
70. Additionally, Mesa incurred substantial additional costs when it had to re structure its Turbine Supply Agreement with GE to meet the FIT Program's domestic content requirements.
71. I make this witness statement in support of the Investor's Memorial and for no other or improper purpose.

Dated: November 19, 2013

A handwritten signature in blue ink, reading "L.A. (Cole) Robertson III". The signature is written in a cursive style and is underlined with a single horizontal line.

LEE ALLISON (COLE) ROBERTSON III