AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA AND THE UNCITRAL ARBITRATION RULES, 1976

between

MESA POWER GROUP, LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 4

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

I. PROCEDURAL BACKGROUND

1. On 10 June 2013, the Claimant submitted a "Request for Particulars" asking the Tribunal to direct the Respondent to provide certain information (the "Request for Particulars"). On the same day, the Respondent requested the Tribunal to grant it until 19 June 2013 to offer its comments on the Request for Particulars. In its response of 11 June 2013, the Claimant agreed with this date for the Respondent to comply with the Request for Particulars, but not merely to comment on such request. On 13 June 2013, the Tribunal invited the Respondent to file its comments on the Request for Particulars by 19 June 2013.

2. On 11 June 2013, in accordance with the calendar prescribed in Annex A to Procedural Order No. 3 ("PO 3"), the Parties submitted their objections to each others' document production requests. The objections were submitted in the form of the Redfern Schedule attached as Appendix A to Procedural Order No. 1 ("PO 1").

3. On the same day, the Respondent submitted two requests, one concerning electronic production and the other concerning the Claimant's designation of information as "Confidential" / "Restricted Access". In its letter to the Parties of 13 June 2013, the Tribunal invited the Claimant to respond to these requests by 19 June 2013.

4. On 19 June 2013, the Respondent submitted its comments on the Request for Particulars. Similarly, the Claimant submitted its comments on the Respondent's requests concerning designation of information and electronic production. Further, the Claimant submitted a new request, asking the Tribunal to postpone the time limits for its Memorial on the Merits and for subsequent pleadings by a period of 14 days.

5. On 21 June 2013, the Tribunal informed the Parties that no further submissions were required on the Request for Particulars or the Respondent's requests concerning designation of information or electronic production. Further, the Tribunal invited the Respondent's comments on the Claimant's request for extension of the time limits by 26 June 2013.

6. On 25 June 2013, the Respondent agreed to the extension sought by the Claimant, stating that in addition to extending the dates for the pleadings identified by the Claimant, the dates for the Notification for Amicus and Non-Disputing Party Submissions, the Amici and Non-Disputing Party Submissions, and the Parties' Observations on the Amici and Non-Disputing Party Submissions also needed to be extended by two weeks.

7. By letter of 27 June 2013, the Tribunal took note of the Parties' agreement to postpone the filing of the subsequent pleadings and other submissions and provided a revised schedule.

8. In its letters of 8 and 11 July 2013, the Tribunal informed the Parties that due to unforeseeable and unavoidable circumstances, its decision on document production would be issued a few days after 9 July 2013, which was the date provided in Annex

A to PO 3. The Tribunal also mentioned that it would consider corresponding extensions for production, if necessary.

9. As can be seen from the procedural background just restated, the Tribunal must now decide the Request for Particulars (II); the document production requests (III); the Respondent's request for electronic production (IV); and the Respondent's request concerning designation of information as "Confidential" / "Restricted Access" (V).

II. THE REQUEST FOR PARTICULARS

A. The Claimant's Position

10. In its letter of 10 June 2013, the Claimant noted that so far the Respondent had only provided an "Outline of Potential Issues" that it intended to raise in the present dispute and had declined to fully plead its defense on jurisdiction and merits. In these circumstances, the Tribunal should order the Respondent to provide "factual particulars" (along with documents, communications and files) relating to the Respondent's submissions on jurisdiction and on the merits.

B. The Respondent's Position

11. In its response of 19 June 2013, the Respondent submitted that "the Claimant's request is unjustified, inappropriate and unnecessary" and should be rejected. The only justification advanced for the request was that the Respondent had "declined" to fully establish its defense on jurisdiction and merits. According to the Respondent, this was incorrect. It had not so "declined", but was merely complying with the schedule established by the Tribunal. As reflected in that schedule, the Respondent would fully plead its defense in its Counter-Memorial on 6 February 2014 (under the revised schedule, now 20 February 2014).

12. The Respondent further submitted that granting the Request for Particulars would unnecessarily affect the procedural steps set out in PO 1 and confirmed in PO 3, by requiring the Respondent to file now all its factual and legal submissions, including exhibits, that would otherwise form the basis of its Counter-Memorial. The Claimant had offered no reason why the Tribunal should amend the schedule in this manner. In fact, the Tribunal has already denied three similar requests.

C. Analysis

13. The Tribunal understands that the Request for Particulars seeks an order that the Respondent now plead all allegations of fact and provide all documentary evidence in connection with certain elements of jurisdiction (nationality, qualifying investment and status as investor), attribution, and merits (claims based on Articles 1102, 1103, 1105, 1106 of the NAFTA). Ordinarily, the allegations and evidence in question would

be included in the Respondent's Counter-Memorial, which is due on 20 February 2014. Thus, the Claimant seeks, in effect, a modification of the calendar.

14. The Tribunal recalls that the calendar setting forth the procedural steps to be followed in the present arbitration was established in PO 1, which contemplated two scenarios depending on whether the Tribunal bifurcated the proceedings or not. In PO 3, as the Tribunal decided not to continue the bifurcation, the Tribunal issued a new calendar. Doing so, it retained the procedural steps provided in PO 1 but amended the timeline for completion. PO 3 was issued in March 2013 and has been in operation since then. Indeed, the current document production phase proceeds in accordance with PO 3.

15. The Tribunal further recalls that the Claimant has already made similar requests seeking the modification of the procedural sequence on earlier occasions.[1] These requests have not succeeded. In particular, in PO 3, the Tribunal denied a similar request made by the Claimant as the Tribunal "[saw] no reason to depart from the sequence adopted in [PO 1]."

16. The Claimant now once again seeks to amend the procedural sequence adopted and confirmed earlier on the ground that the Respondent has not fully pleaded its defense on jurisdiction and the merits. The Tribunal finds itself unable to grant this request. In particular, the Claimant has failed to allege, let alone demonstrate, any compelling reason to revisit the sequence previously adopted. It has not alleged any circumstance requiring a change in the procedure. The only reason advanced by the Claimant is that the Respondent has not yet crystallised its case on jurisdiction and merits, something which the Claimant has been aware of since PO 1.

17. For the sake of completeness, the Tribunal further notes that Article 21(3) of the 1976 UNCITRAL Arbitration Rules, applicable in this arbitration, provides that "a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence…". Thus, the Respondent is not required to raise any objection to jurisdiction it may have prior to its "statement of defence", which, in this arbitration, is the Respondent's Counter-Memorial due on 20 February 2014.

18. Accordingly, the Tribunal denies the Request for Particulars.

[1]The Claimant's letter of 17 July 2012 , at the Procedural Hearing of 12 October 2012, and during the conference call of 28 February 2013.

III. DOCUMENT PRODUCTION REQUESTS

19. As mentioned above, the Parties' respective document production requests were submitted on 11 June 2013 in the form of Redfern Schedules.

A. Applicable Standards

20. Pursuant to paragraph 8 of PO1, the procedural rules governing this arbitration consist of (i) Section B of Chapter 11 of the NAFTA; (ii) the 1976 UNCITRAL Arbitration Rules; (iii) the Procedural Orders issued by the Tribunal; and (iv) the 2010 IBA Rules, to the extent the Tribunal chooses to seek guidance from them:

> "8. APPLICABLE PROCEDURAL LAW
>
> 8.1 The procedure in this arbitration shall be governed by the 1976 UNCITRAL Arbitration Rules except as modified by the provisions of Section B of Chapter 11 of the NAFTA (per Article 1120(2) of the NAFTA).
>
> 8.2 If these provisions and rules do not address a specific procedural issue, the Tribunal shall, after consultation with the Parties, determine the applicable procedure. In addition, the Tribunal may seek guidance from, but shall not be bound by, the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration."

21. These procedural rules are addressed in turn below.

i. Section B of Chapter 11 of the NAFTA

22. The Tribunal recalls that the substantive obligations of the three NAFTA States are set out in section A of Chapter 11. Section B sets out the procedural framework governing an arbitration between a NAFTA State and an investor of another NAFTA State. Section B does not contain any relevant provisions on the production of documents in a NAFTA arbitration.

ii. 1976 UNCITRAL Arbitration Rules

23. Article 15(1) of the UNCITRAL Rules provides the Tribunal with broad discretion in respect of the conduct of the arbitration, subject to it complying with fundamental procedural guarantees:

> "1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
>
> [...]"

24. Article 24(3) of the UNCITRAL Rules provides that the Tribunal may order the production of documents:

> "[…]
>
> 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal shall determine."

25. Further, Article 25(6) of the UNCITRAL Rules states that the Tribunal has the power to assess the evidence:

> " [...]
>
> 6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

iii. Procedural Orders issued by the Tribunal

26. Paragraph 12 of PO 1 provides the following rules on the production of documents:

> "12. DOCUMENT PRODUCTION
>
> 12.1 At the request of a Party filed within the time limit specified by the Tribunal for this purpose, the Tribunal may order the other Party to disclose to the requesting Party documents or limited categories of documents within its possession, custody or control. Such a request for production shall identify each document or category of documents sought with a sufficient degree of precision and establish its relevance and materiality to the dispute. The Tribunal will, in its discretion, rule upon the disclosure of the documents or categories of documents having regard to the legitimate interests of the other Party and all of the surrounding circumstances.
>
> 12.2 Documents shall be disclosed in response to such a request in electronic format only by sending via post or courier by the date fixed by the Tribunal for such disclosure, a CD-ROM, USB key or other similar media containing the documents in electronic format with each individual document clearly labelled with a unique identifying number The media should also contain an Index of the documents contained. In addition, the Respondent will provide the Claimant with paper copies of the electronic documents it produces.
>
> 12.3 Documents so disclosed shall not be considered to be part of the record unless and until one of the Parties subsequently submits them in evidence to the Tribunal. In

such a case, Section 11 above applies to the production by the requesting Party of documents or categories of documents communicated by the other Party.

12.4 In addition, the Tribunal may of its own motion order a Party to produce documents at any time.

12.5 Requests for document disclosure shall take the form of a so-called "Redfern Schedule" as attached (Annex A).

12.6 Each Party may withhold from disclosure documents which it considers not subject to production based on specific grounds of privilege as set out in Article 9 of the 2010 IBA Rules."

iv. 2010 IBA Rules

27. Finally, Article 9 of the 2010 IBA Rules provides, *inter alia*:

"1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(c) unreasonable burden to produce the requested evidence;

(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

   (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;

   (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;

   (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

   (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

   (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection."

28. On the basis of the rules cited above, the standards that have guided the Tribunal's reasoning are the following:

a. The request for production must identify each document or specific category of documents sought with precision (paragraph 12.1 of PO 1). Otherwise, the other Party may not be able to trace a document and the Tribunal may possibly be unable to rule on its production. To assess whether a document or category of documents has been identified with "precision", the Tribunal will, in particular, take into consideration whether the requesting Party has limited its request as to timing and subject matter.

b. The request for production must establish the relevance and materiality of each document or of each specific category of documents sought (paragraph 12.1 of PO 1) in such a way that the other Party and the Tribunal are able to refer to allegations of facts in the submissions filed by the Parties to date or factual allegations to be made in future submissions, provided that such factual allegations are made or at least summarized in the request for production of

documents. In other words, the requesting Party must make it clear with reasonable particularity what facts/allegations each document (or category of documents) is intended to establish.

c. For the sake of clarity, the Tribunal emphasizes that in ruling on the requests for document production, it has made determinations on the *prima facie* relevance and materiality of the requested documents, having regard to the allegations of fact made by the Parties in the submissions filed to date or the factual allegations they intend to make in future submissions, summarized in the request for production of documents. This determination is without prejudice to the Tribunal's later assessment of the definitive relevance and/or materiality of the requested documents and underlying facts.

d. The Tribunal will only order the production of documents or categories of documents if the requesting Party shows that it is more likely than not that the documents exist and are within the possession, custody or control of the other Party, and that they are not in the possession, custody or control of the requesting Party.

e. Where appropriate, the Tribunal has also weighed the request for production against the legitimate interests of the other Party, including any unreasonable burden likely to be caused to such Party, taking into account all the surrounding circumstances.

B. Analysis

29. The Tribunal's decision with respect to each document production request is stated in the completed version of the Redfern Schedules that are attached as Annexes A (Claimant's Request for Documents) and B (Respondent's Request for Documents) hereto. These Annexes form an integral part of the present Procedural Order. The documents must be produced by 9 August 2013, i.e. three days later than provided in Annex A to PO 3 to take account of the date of issuance of this Order.

30. The Tribunal emphasizes that it has not provided a response to each and every specific objection raised by the Parties in their respective Redfern Schedule, as it would be both repetitive and unnecessary. The Tribunal's decisions stated in the Redfern Schedule address what the Tribunal views as the most important reason for its decision. That said, even if not explicitly addressed in the Tribunal's decision in the Redfern Schedule, it goes without saying that the Tribunal has considered all of the Parties' arguments and objections.

31. In addition, the Tribunal has also taken into account the following general considerations whenever relevant, without necessarily setting them out expressly in the decisions in the Redfern Schedule.

i. Terms used in the Redfern Schedules

32. Both Parties have defined certain terms for use in their Redfern Schedules. With the exception of the terms "Government Entities" and "Claimant", neither Party has questioned the other's definitions. Accordingly, the Tribunal has proceeded on the basis that these definitions have been accepted by the Parties. The Tribunal's understanding of the terms "Government Entities" and "Claimant", on which the Parties diverge, is addressed below.

ii. Possession, Custody, Control

33. Whenever the Tribunal has ordered the production of a document, it has done so upon the understanding that the relevant Party has possession, custody or control of such document.

34. The Tribunal has noted that the Claimant often requests documents from "Government Entities" (a term defined in the Claimant's Request of 17 April 2013 and later modified by the Claimant in its Reply to Objections of 11 June 2013). The Respondent has objected to such requests on the basis that the term "Government Entities" as defined by the Claimant includes entities such as the Ontario Power Authority ("OPA"), Hydro One and IESO, which have their own distinct legal personality. According to the Respondent, as a matter of domestic law, it has no power to compel such entities to produce documents or otherwise participate in this arbitration. In response, the Claimant has submitted that the Respondent's objection is "spurious", citing Article 105 of the NAFTA in support. Further, in the case of the OPA, the Respondent has itself acknowledged that it is a governmental agency.

35. Along similar lines, in its definition of "Claimant", the Respondent has included Leader Resources Services Corporation, which allegedly developed the projects at issue in the present arbitration. It has argued that "having appointed Leader Resources to manage its FIT applications, the Claimant should not be allowed to prevent the disclosure of relevant and material documents in Leader Resources' possession." The Claimant has replied that "Leader Resources Services Corporation is not a party to this dispute and that [the Respondent] has not provided any reason why the Claimant would have [Leader's] documents".

36. In essence, both Parties' have requested documents that are allegedly in the possession, custody or control of third parties, because of the relationship between such third parties and the Parties to this dispute. A similar question arose before the NAFTA Tribunal in *Vito G. Gallo v. Government of Canada*.[2] There, the tribunal observed:

> "The arbitral Tribunal considers that […] in addition to entities which may be controlled by a party, there may be entities or persons with whom a party has a relationship which is relevant

[2] *Vito G. Gallo v. Government of Canada,* UNCITRAL, Procedural Order No. 2 [Amended] dated 10 February 2009.

> for the purposes of this arbitral procee[d]ing. The duty of production extends to the entities controlled by each party. Furthermore, good faith also imposes a duty of best efforts to obtain documents that are in the possession of entities or persons with whom or with which the party the subject of the request has a relevant relationship."[3]

37. This approach was later followed by the NAFTA tribunal in *Clayton*,[4] which made the following observation:

> "As regards request No. 11 [concerning communications with third parties], the Tribunal accepts that such documents may not be in the possession, custody or control of the Respondent. However, the Tribunal wishes to clarify that, for a party to claim that documents are not in its control, it must have made "best efforts" to obtain documents that are in the possession of persons or entities with whom or which the party has a relevant relationship. This is consistent with the approach adopted by the Tribunal in Vito G. Gallo v. Government of Canada…"[5]

38. The Tribunal finds the approach taken by these NAFTA tribunals reasonable and in line with the duty of good faith in procedural matters. It has thus adopted it when deciding on the pending document requests. While the Parties themselves are to produce all responsive documents that are in their possession, custody or control, they should also use their best efforts to produce responsive documents which may be in the possession, custody or control of third parties with which the disputing Parties have a relationship. This means that the Claimant is to use its best efforts to produce responsive documents from Leader Resources Corporation. It further means that the Respondent is to produce all documents in the possession, custody, or control of all the "Government Entities" as per the modified definition of the Claimant, with the exclusion of the OPA, Hydro One and the IESO. For these latter entities, the Respondent is to use its best efforts to produce responsive documents.

iii. Notice of Intent justifying a document production request

39. In response to several document production requests advanced by the Claimant, the Respondent has taken the position that "the NOI predates the submission of the Claim to Arbitration. It is not an official pleading and cannot, by itself, justify a document request." The Claimant has opposed this position, contending that "[t]he very purpose of the NOI is to provide notice of issues to enable meaningful consultation under NAFTA Article 1118."

40. As mentioned in paragraph 28 above, a request for production of documents should be made in a manner that the Tribunal is able to understand the relevance and

[3] Id, ¶8.
[4] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, Procedural Order No. 8 dated 25 November 2009.
[5] Id, ¶1(h).

materiality of the requested documents by reference to the fact allegations made in the submissions to date or allegations likely to be made in future submissions, provided that such allegations are at least summarized in the request. In specifying the relevance and materiality standard in this manner, the Tribunal wishes to avoid adopting too formalistic a view that may excessively restrict disclosure of documents, taking especially into consideration that, according to the schedule in this arbitration, the document production phase takes place prior to the first full memorials. In this context, it appears unnecessarily formalistic to deny a request for the sole reason that it refers to the NOI. What does matter is that the Tribunal is in a position to understand what fact the requested document is meant to prove.

IV. THE RESPONDENT'S REQUEST FOR ELECTRONIC PRODUCTION

A. The Respondent's Position

41. On 11 June 2013, the Respondent requested the Tribunal to amend paragraph 12.2 of PO 1 to eliminate the need for the Respondent to provide paper copies of all documents produced to the Claimant during this proceeding. In support, it explained that it had upgraded its document production software, as a result of which each document now had to be manually selected and printed. The documents could no longer be printed in sets. According to the Respondent, this new technical restriction "place[d] an unforeseen and enormous burden" on it.

42. The Respondent also submitted that by ordering an exclusively electronic production of documents, the Tribunal would "ensur[e] a streamlining of the proceedings, a reduction of the unnecessary volume of paper and an increased efficiency in the case." Should the Tribunal retain paper production, the Respondent requested an order from the Tribunal allowing it additional time to produce paper copies and requiring the Claimant to bear all costs associated with the printing of the copies.

B. The Claimant's Position

43. In its response of 19 June 2013, the Claimant objected to the Respondent's request. It submitted that paper production was necessary "to ensure the accuracy, authenticity, and reliability of the documentary evidence adduced in the arbitration". The Claimant noted that in other NAFTA arbitrations, discrepancies between the electronic and the paper versions of documents produced by the Respondent had increased the time and cost of document review. According to the Claimant, allowing documents to be produced only electronically would significantly exacerbate the time and cost involved.

44. The Claimant further submitted that if paper production proved to be a burden, the Respondent could retain the services of a litigation data management company. The Respondent had engaged such companies in the past, and could do so again. The Claimant suggested some companies that the Respondent could approach for this purpose. Finally, the Claimant submitted that any costs arising from paper production

should be dealt with in a costs order after the Tribunal's determination of the Claimant’s claim.

C. Analysis

45. The Tribunal recalls that at the procedural hearing held on 12 October 2012, the Respondent made a specific request for exclusively electronic production of documents. The Claimant opposed this position. In paragraph 12.2 of PO 1, the Tribunal allowed only electronic production of documents to the Respondent and provided for paper and electronic production to the Claimant. In other words, the Tribunal has already denied the Respondent's request for electronic documents only.

46. The Respondent now seeks an amendment of PO 1 doing away with paper production to the Claimant as a result of changes in its document production software which, the Respondent alleges, have made paper production substantially more onerous. By contrast, the Claimant insists on paper production, pointing to the fact that, in other arbitrations, there were often discrepancies between the printed and the electronic versions of the Respondent’s production.

47. In the Tribunal’s view, the Respondent has not alleged changed circumstances that would justify an amendment to the solution previously adopted. Indeed, to the Tribunal, changes in the Respondent’s document production software – a matter that is entirely within the Respondent's control – are not sufficient grounds to modify PO1.

48. The Tribunal therefore denies the Respondent’s request for exclusive electronic production of documents to the Claimant. If the Respondent needs more time for the production of the paper version of documents ordered, it may apply to the Tribunal for a reasonable extension of its time for production. Finally, in the ordinary way, any issues as to costs incurred by reason of the Claimant's insistence on the production of both versions of each document will be addressed in the course of the Tribunal's deliberations on costs.

V. THE RESPONDENT’S REQUEST CONCERNING DESIGNATION OF INFORMATION

49. In its letter of 11 June 2013, the Respondent requested the Tribunal to order the Claimant to review its confidentiality designations, and to confirm in writing those which it maintains and those which it withdraws. More specifically, according to the Respondent, the Claimant: (i) inappropriately designated information as "Confidential" in its Answer on Canada's Preliminary Objections on Jurisdiction ("Claimant’s Answer"); (ii) inappropriately designated information as "Restricted Access" in the transcript of the procedural hearing; and (iii) continued to inappropriately designate entire documents as "Confidential" when filed (particularly referencing the Articles of Incorporation produced by the Claimant, and the Claimant’s Objections to Document Production).

50. In its response of 19 June 2013 in connection with item (ii), the Claimant agreed that the redacted information in the transcript of the procedural hearing be designated "Confidential" in lieu of "Restricted Access". Similarly, in connection with item (iii), the Claimant agreed to produce unredacted copies of the Articles of Incorporation requested by the Respondent. It also agreed to withdraw the designation of its Objections to the Respondent's document production requests as "Confidential". In contrast, the Claimant did not change its position with respect to item (i).

51. In the circumstances, the only issue left for the Tribunal's decision is item (i). The Parties' positions on this issue and the Tribunal's analysis follow.

A. The Respondent's Position

52. In its letter of 11 June 2013, the Respondent challenged the designation as "Confidential" of four pieces of information in the Claimant's Answer. According to the Respondent, none of the four designations meet the criteria established in the Confidentiality Order of 21 November 2012 ("the Confidentiality Order"). The Respondent therefore requests the Tribunal to allow public disclosure of this information.

53. According to the Respondent, the first designation made by the Claimant (the text of footnote 54 in the Claimant's Answer) disclosed nothing more than the existence of the Green Energy Investment Agreement ("the Agreement"), and the fact that the Claimant had attached the Agreement as an exhibit. While the content of the Agreement is confidential, its existence is not. The text in footnote 54 did not provide any information on the substantive terms of the Agreement and therefore could not be considered as "Confidential" under the Confidentiality Order.

54. Similarly, the Claimant's second designation (in paragraph 72 of its Answer) merely described Pattern Energy as a "partner" of Samsung, a fact that had been disclosed by Pattern itself. Further, the fact that Pattern Energy had obtained contracts pursuant to the Agreement rather than through Ontario's FIT Program, had also been disclosed by Pattern.

55. The third designation by the Claimant (the text of footnote 55 in the Claimant's Answer), referred to a communication between Pattern Energy and the Ontario Power Authority. Again, while the content of the communication may be confidential, the footnote itself did not disclose the substance of the communication, and, as such, could not be considered confidential.

56. Finally, the fourth designation (in paragraph 77 of the Claimant's Answer) referred to the scheduling of a meeting more than two years ago. According to the Respondent, the mere request for, or scheduling of, a meeting is not confidential under the Confidentiality Order. Moreover, the subject of the meetings (NextEra's plans regarding transmission connections) had been publicly disclosed.

B. The Claimant’s Position

57. In its letter of 19 June 2013, the Claimant objected to the Respondent’s request stating that the Respondent should not be allowed to "needlessly share secret business information and materials with the public" and that "[a]ll four … redactions relate to information that was designated confidential by a third party, and the [Claimant] is not in a position to override the confidentiality designations assigned to those documents."

58. Further, the Claimant submitted that, as the Respondent was in the possession of all of the documents referenced as "Confidential" there was no restriction on the Respondent itself disclosing those documents. As a result, the Claimant asked the Tribunal to deny the Respondent's request and to order the latter to disclose and produce all the relevant documents that fall within the Claimant’s "Confidentiality" designations.

C. Analysis

59. The Confidentiality Order, which was issued with the consent of the Parties, sets out detailed provisions on confidentiality in the present arbitration. The Parties are at liberty to designate portions of their submissions as "Confidential", to require submissions of the other disputing Party to be designated "Confidential", and to approach the Tribunal in case of a disagreement on the designation of information as "Confidential."

60. Article1(b) of the Confidentiality Order defines "confidential information" as follows:

> “i. business confidential information;
>
> ii. business confidential information relating to a third party;
>
> iii. information otherwise protected from disclosure under the applicable domestic law of the disputing State party; and
>
> iv. confidential information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated as confidential information by those third parties.”

61. Article 1(c) of the Order then defines "business confidential information" as:

> “i. trade secrets;
>
> ii. financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;

> iii. information the disclosure of which could result in material financial loss or gain to the disputing party to which it relates; and
>
> iv. information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates."

62. In determining a disagreement between the Parties as to the designation of information as "Confidential", the Tribunal must apply the terms of the Confidentiality Order. Of course, in applying the Confidentiality Order, the Tribunal should not adopt a formalistic approach; it should rather consider on a case-by-case basis whether the nature of the information at issue is such that it falls within the scope of the Order.

63. In the present instance, the justification advanced by the Claimant for designating the impugned information as "Confidential" is that the information was designated as such by a third party and that the Claimant is not in a position to challenge such designation. The Tribunal finds this position difficult to accept.

64. First, the Claimant has not shown why such designation by a third party should have an effect in this arbitration. Here, the Tribunal is concerned with designations by the Parties themselves. Second and more importantly, the Claimant has not shown that the information at issue falls within the ambit of Articles 1(b) and 1(c) of the Confidentiality Order. Indeed, it appears that the facts sought to be designated as confidential are publicly known facts (the existence of the Agreement and the fact that Pattern is a partner of Samsung) or are far from meeting the requirements of Article 1(c) of the Confidentiality Order (the existence of a communication (third designation), and the request for, or scheduling of, a meeting (fourth designation)).

65. On this basis, the Tribunal determines that the impugned information in the Claimant's Answer shall not be treated as "Confidential."

66. The Tribunal is aware of the Claimant's request that "in the spirit of full disclosure" the Respondent should itself produce all relevant documents referenced in the four impugned portions of the Claimant's Answer. The Tribunal finds that this request is belated. It should have been made on the date provided in the calendar for the Claimant's document production requests, i.e. on 17 April 2013. The Tribunal finds itself unable to grant this belated request, especially when the Claimant has provided no reasons explaining the delay.

VI. ORDER

67. For the reasons set out above, the Tribunal:

i. Denies the Request for Particulars;

ii. In respect of the Parties' document production requests:

a. Decides each document production request as stated in the last column of the completed version of the Redfern Schedules that are attached as Annexes A (Claimant's Request for Documents) and B (Respondent's Request for Documents) hereto. These Annexes form an integral part of the present Procedural Order;

b. As a consequence, and in accordance with Annex A to PO 3 and the Tribunal's letters of 8 and 11 July 2013, each Party shall produce all the documents ordered to be produced on or before 9 August 2013. These documents shall be communicated to counsel; they shall not be communicated to the Tribunal at this stage;

c. Each Party shall provide an index of the documents produced with a reference to the respective document production request. Each Party shall also state whether (i) it has produced all responsive documents in its possession, custody or control, (ii) whether responsive documents had previously been submitted as evidence, or (iii) whether no such documents exist;

d. The documents produced shall not be considered part of the record, unless and until one of the Parties submits them as exhibits with their forthcoming submissions;

iii. Denies the Respondent's request for exclusively electronic production of the documents to the Claimant. If the Respondent requires additional time for the production of the paper version of the documents ordered, it may apply to the Tribunal for a reasonable extension (in respect of the paper production only);

iv. Determines that the information contained in the text of footnotes 54 and 55 and paragraphs 72 and 77 in the Claimant's Answer shall not be designated as "Confidential";

v. Denies the Claimant's request for the production of documents referred to in the footnotes and paragraphs mentioned in sub-paragraph (iv) above;

vi. Reserves all questions of costs for subsequent determination.

Seat of arbitration: Miami, Florida, U.S.A

12 July 2013

For the Arbitral Tribunal:

Prof. Gabrielle Kaufmann-Kohler
President of the Arbitral Tribunal