IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 2013 UNCITRAL ARBITRATION RULES

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

MEMORIAL OF THE CLAIMANT WINDSTREAM ENERGY LLC

February 18, 2022

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD South Tower
Toronto, Ontario
Canada M5K 1N2

John Terry
Rachael Saab
Emily Sherkey
Jake Babad

Counsel for the Claimant, Windstream Energy LLC

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PART ONE – INTRODUCTION

A. Overview

1. In 2009 and 2010, the Government of the Province of Ontario, Canada, made extensive efforts to attract foreign investment in renewable energy projects, including offshore wind energy facilities. It did so in the wake of a deep financial crisis and election commitments to contribute to meeting carbon emissions reduction targets by decommissioning coal-fired power plants. The Ontario Government declared it was "open for business" and wanted to "turbocharge" renewable energy investment.

2. In that context, the Ontario Government, through its state enterprise, entered into a feed-in-tariff contract with the Claimant, Windstream Energy LLC (the **"FIT Contract"**), in 2010. The FIT Contract required that Windstream develop and bring into commercial operation a 300 megawatt (**"MW"**) offshore wind energy facility in Lake Ontario, one of the Great Lakes of North America. This was the largest renewable energy facility contracted at that time. In exchange, the FIT Contract guaranteed that all the electricity the facility produced would be purchased, at a fixed, indexed price, for a twenty-year period.

3. Later, the Ontario Government's political calculus on offshore wind changed, and it determined that it wanted to "kill" offshore wind in Ontario and implement a moratorium on its development. However, there was consensus within the Ontario Government that Windstream's project should not be "killed", but rather that Windstream should be "kept whole", that the FIT Contract should be "maintained" and that the project should be "on hold". That is because, unlike the other offshore wind projects that existed at the time, Windstream was party to the FIT Contract.

4. To reflect this reality, the Ontario Government explicitly promised to Windstream that the FIT Contract would be "frozen" for the duration of the moratorium.

5. Ontario did not keep its promise, and the moratorium made it impossible to build the Project within the timelines set out in the FIT Contract. Windstream commenced an arbitration under the NAFTA arguing that Ontario's broken promises had rendered its investment essentially worthless (the ***"Windstream I"*** proceedings). In the arbitration, Canada insisted that

Windstream's project was indeed frozen, and could proceed when the moratorium was lifted. The tribunal agreed that Ontario had treated Windstream unfairly and inequitably but disagreed that the full value of Windstream's investment had been expropriated and rendered worthless by Ontario's conduct. After all, it reasoned, the FIT Contract had not been cancelled, and – consistent with Canada's representations at the hearing – could still be reactivated and renegotiated.

6. Encouraged by the tribunal's decision and Canada's representations that the Project had a future, Windstream emerged from the NAFTA proceedings with the expectation that the Project would proceed. While courting substantial third-party interest in investing in the Project, Windstream worked to advance the Project and attempted to engage the Government of Ontario and the Independent Electricity System Operator (the **"IESO",** the state enterprise responsible for operating the electricity market and energy system in Ontario) in discussions about the path forward. The Ontario Government ignored those requests – and its promise in 2011 to "freeze" the FIT Contract – and allowed the IESO to terminate the FIT Contract in February 2020.

7. In this proceeding, Windstream seeks the full value of its investment, which has now been destroyed – not just damaged – as a result of the Ontario Government's actions (and inaction) after the *Windstream I* Award, including:

a) its failure to complete in a timely manner the work it considered necessary in order to lift the moratorium, in order to ensure that the moratorium would not further prejudice WWIS by causing further delays to the Project. Indeed, the Ontario Government has not conducted any of the studies that were the stated pretense of the application of the moratorium, and does not appear to be taking any steps to lift the moratorium;

b) its decision to continue to apply the moratorium to WWIS, despite knowing that its continued application as against WWIS would create the conditions that would allow the IESO to terminate the FIT Contract (in direct contradiction with its promise to protect the Project from the effects of the moratorium); and

c) its failure to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be "deferred", "frozen" and "on hold."

8. ***Windstream's investments in Canada.*** In August 2010, Windstream, through its Canadian wholly-owned subsidiary Windstream Wolfe Island Shoals Inc. (**"WWIS"**), entered into a power purchase agreement under the Ontario Power Authority's (the **"OPA"**) feed-in-tariff program (the **"FIT Program"**). The FIT Contract required that WWIS develop and bring the Project into commercial operation. It also required that the OPA purchase the electricity generated by the Project at a fixed contract price of $190[1] per MW/hour, indexed annually, over a 20-year term. Because it provided a guaranteed revenue stream over a 20-year period with a credit-worthy counterparty, the FIT Contract was an extremely valuable asset. This was especially so because the OPA granted very few FIT contracts. Windstream is the only proponent to have been granted a FIT contract to develop an offshore wind project in Ontario.[2]

9. The Project is an offshore wind generation facility that Windstream proposed to build in the Wolfe Island Shoals area in eastern Lake Ontario, near Kingston, Ontario. At 297 MW, it was the largest FIT contract awarded at the time, representing 20% of the energy generation capacity of the windpower projects selected by the OPA to receive FIT contracts. Windstream is a Delaware company dedicated to the development of renewable energy projects. Its investors are a New York City-based investment group with extensive experience developing and operating energy projects in both onshore and offshore environments.[3]

10. Windstream invested in Ontario and, through WWIS, entered into the FIT Contract in reliance of a number of representations and commitments made by the Ontario Government that it would support investment in renewable energy generally, and offshore wind and the Project in particular. This was, after all, the very purpose of the FIT Program – to encourage investors to develop renewable energy projects in Ontario.

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[1] All currency is in Canadian dollars unless otherwise specified.

[2] CWS-Roeper, ¶ 22.

[3] CWS-Mars; CWS-Ziegler.

11. Windstream carried out the substantial development work required for the Project to proceed in accordance with its contractual obligations, including obtaining approval for the Project to be connected to Ontario's electrical transmission grid, arranging for the completion of studies by specialist consultants to carry out wind resource and energy yield testing, electrical design, lake bottom investigation and financial feasibility analyses, and conducting a process to retain the consultants required to carry out permitting work, turbine foundation and substructure design analysis and geotechnical work.

12. ***Ontario's reversal on offshore wind.*** By late 2010, the Ontario Government's priorities changed. In late 2010 and early 2011, high-level political staff had determined that the political environment no longer favoured offshore wind and looked for various ways to constrain its development. This culminated in a January 2011 direction by the Chief of Staff to then-Premier Dalton McGuinty to "kill all the Projects except the Kingston one" – Windstream's Project.[4] The Government had determined that it would not "kill" the Project because, in the words of the Secretary of Cabinet and Head of the Public Service, it would have been "embarrassing" for the Government not to honour WWIS's FIT Contract.[5]

13. In February 2011, with no notice to or consultation with Windstream or the renewable energy industry, the Ontario Government announced that it was placing a moratorium on the further development of offshore wind projects. It purported to justify the moratorium on the ground that further scientific research was needed before offshore wind development could proceed in an environmentally sound manner. As the tribunal in *Windstream I* found, Ontario's decision was also motivated by a changing political environment that no longer favoured offshore wind development.[6]

14. ***Ontario's promise to keep Windstream whole***. Following the announcement of the moratorium, Ontario made a series of promises to Windstream, consistent with its determination

[4] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) (January 7, 2011).

[5] **C-0904**, Handwritten Notes of Ken Cain (MNR) (January 7, 2011).

[6] **C-2040**, Award, ¶ 178.

in January 2011 that, while it would "kill" any other offshore projects, Windstream's Project would be insulated from the effects of the moratorium. Specifically, Ontario promised:

a) that the Project was frozen rather than cancelled;

b) that Windstream would be kept whole through the province negotiating an acceptable solution to ensure that Windstream was "happy" with the process;

c) that the government would allow the Project to continue; and

d) that the OPA would enter into discussions with Windstream that would include, among other things, constraining the OPA's right to terminate the FIT Contract if the Project was delayed by more than two years.[7]

15. This last issue was particularly important to Windstream, because, although its FIT Contract was under *force majeure*, the contract's terms allowed the OPA to terminate the FIT Contract if the Project was delayed by more than two years. This meant that WWIS stood to lose its contract altogether if it was prevented by the moratorium from bringing the Project into commercial operation by May 4, 2017, two years after the FIT Contract's May 4, 2015 Milestone Commercial Operation Date (**"MCOD"**).

16. ***The NAFTA Proceedings.*** But Ontario did not keep its promise. The moratorium made it impossible to build the Project within the timelines set out in the FIT Contract. Ontario took no steps to fulfil its promise to shield Windstream from the effects of the moratorium on the Project, including constraining the OPA's ability under the FIT Contract to terminate the contract for delay.

17. On January 28, 2013, Windstream brought an arbitration claim against the Government of Canada pursuant to Chapter 11 of the NAFTA. Windstream alleged that by imposing the moratorium and failing to insulate WWIS from its effects, as promised, Canada breached its

[7] **C-2040**, Award, ¶ 185; Claimant's Memorial in *Windstream I* dated August 19, 2014 ("Memorial - *Windstream I*"), ¶ 12.

obligations under the NAFTA, including Articles 1110 (expropriation), 1105 (fair and equitable treatment), 1102 (national treatment) and 1103 (most-favored-nation treatment).[8]

18. In the arbitration, Windstream took the position that WWIS, the Project and the FIT Contract were substantially worthless because, at that time, there was no longer any hope that the Project could achieve commercial operation by May 4, 2017, *i.e.*, the Project could not achieve its MCOD before triggering the OPA's right to terminate the FIT Contract.[9] Canada denied this, maintaining that the FIT Contract was "frozen" or "on hold" and that the Project would be permitted to continue when the moratorium was lifted.[10]

19. ***The Tribunal found that Canada breached the NAFTA, but did not award the full value of Windstream's investment due to the FIT Contract.*** The tribunal found that the Government's conduct vis-à-vis Windstream following the imposition of the moratorium was unfair and inequitable within the meaning of Article 1105(1) of the NAFTA.[11] Ontario did "relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium," as it had not conducted the research studies,[12] and "[m]ost importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium."[13]

20. The tribunal found that there had been no expropriation under Article 1110 as Windstream had not been substantially deprived of its investment.[14] Rather, they found that Windstream's "FIT Contract [was] still formally in force and ha[d] not been unilaterally terminated by the Government of Ontario." While the Project could no longer be completed by

[8] Notice of Arbitration, ¶ 36.

[9] **C-2040**, Award, ¶ 288. See Claimant's Reply in *Windstream I* dated June 22, 2015 ("Reply - *Windstream I*"), ¶ 407, 473

[10] **C-2040**, Award, ¶¶ 216-218. See Respondent's Counter-Memorial in *Windstream I* dated January 20, 2015 ("Counter-Memorial - *Windstream I*"), ¶¶ 21, 260, 265, 266, 268, 353, 486-487.

[11] **C-2040**, Award, ¶ 379.

[12] **C-2040**, Award, ¶ 378.

[13] **C-2040**, Award, ¶¶ 378-379.

[14] **C-2040**, Award, ¶ 291.

May 4, 2017, "it continue[d] to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium." The tribunal declined to award damages based on the full value of Windstream's investment on the basis that the FIT Contract had not been cancelled, opting instead to award damages based on the damage to Windstream's unexpropriated investment.[15]

21. In light of the findings by the *Windstream I* tribunal and Canada's representations in the proceeding that the Project was indeed "frozen" and could be re-activated when the moratorium ended, Windstream expected that the Project would proceed. As a result, following the *Windstream I* arbitration, Windstream took a number of steps to advance the Project, including engaging in negotiations with interested third parties to develop the Project after the moratorium was lifted. Windstream also made every effort to meet with the relevant ministries and the IESO about the Project's future and how the FIT Contract could be renegotiated so that it implemented the promise to "freeze" the FIT Contract for the duration of the moratorium.

22. ***The cancellation of the FIT Contract.*** Notwithstanding Canada's many representations in the *Windstream I* proceedings that the Project was "frozen" and could proceed once the moratorium was lifted, Ontario took no steps to fulfil its promises from February 2011, including renegotiating the FIT Contract to, among other things, constrain the OPA's (now the IESO's) ability to terminate the FIT Contract. Instead, intent on letting the IESO exercise its termination right, it ignored Windstream's many attempts to discuss the future of the Project and adopted an explicit policy that it would not intervene in the IESO's negotiations with Windstream.

23. On February 20, 2018, the IESO sent Windstream a letter informing it of its decision to terminate the FIT Contract.[16] When asked by Windstream for the basis for the decision, the IESO cited, among other things, (1) the extensive delays to the Project, (2) the lack of clarity as to whether the *force majeure* event would be resolved, (3) the fact that WWIS had not been able to gain site access or commence certain regulatory approval processes (which required resolution of the moratorium), (4) that the Ontario Government had not yet established regulatory guidelines

[15] **C-2040**, Award, ¶ 290 [emphasis added].

[16] CWS-N. Baines, ¶ 60; **C-2289,** Letter from Lyle, Michael (IESO) to Baines, Nancy (WWIS) (February 20, 2018), Exhibit M to the affidavit of Michael Lyle (IESO) (1 June 2018).

(and therefore timelines) for offshore wind, and (5) the Ontario Government's long term energy needs.[17]

24. Although the Government of Ontario could have directed the IESO to take steps to implement its promises through its formal control powers [redacted], it did not do so. [redacted][18]

25. ***Ontario's conduct breaches the NAFTA.*** Canada violated the NAFTA by (1) unlawfully expropriating Windstream's investments, in violation of Article 1110, and (2) violating the fair and equitable treatment standard, in violation of Article 1105. But for the actions of the Government of Ontario, the IESO should never have had the ability to terminate the FIT Contract. Ontario created the conditions that triggered the IESO's termination right under Section 10.1(g) of the FIT Contract. In particular:

a) the Ontario Government failed after the *Windstream I* Award to complete in a timely manner the work it considered necessary in order to lift the moratorium, in order to ensure that the Moratorium would not further prejudice WWIS by causing further delays to the Project. Indeed, the Ontario Government has not conducted any of the studies that were the stated pretense of the application of the moratorium, and does not appear to be taking any steps to lift the moratorium;

b) the Ontario Government continued after the *Windstream I* Award to apply the moratorium to WWIS, despite knowing that its continued application as against WWIS would create the conditions that would allow the IESO to terminate the

[17] CWS-N. Baines, ¶ 60; **C-2289,** Letter from Lyle, Michael (IESO) to Baines, Nancy (WWIS) (February 20, 2018), Exhibit M to the affidavit of Michael Lyle (IESO) (1 June 2018).

[18] CWS-Killeavy, ¶ 29; **C-1961**, Letter from Colin Anderson (OPA) to Alex Pourbaix (TransCanada) re Southwest GTA Clean Energy Supply Contract (the "Contract") between TransCanada Energy Ltd. And Ontario Power Authority (the "OPA") dated October 9, 2009 (October 7, 2010).; CWS-Smitherman-2, ¶ 14.

FIT Contract (in direct contradiction with its promise to protect the Project from the effects of the moratorium); and

c) the Ontario Government failed after the *Windstream I* Award to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be "deferred", "frozen" and "on hold."

d) the IESO, a state enterprise exercising delegated governmental authority, failed to renegotiate and amend the FIT Contract to ensure that the Project would be "deferred", "frozen" and "on hold" for the duration of the moratorium, contrary to the Ontario Government's promise to Windstream and WWIS, and instead terminated the FIT Contract.

26. The termination right under Section 10.1(g) would not have become available to the IESO had the moratorium not applied to the Project, had the Ontario Government directed the IESO not to exercise the termination right due to any delay caused by the moratorium, or had the Ontario Government directed the IESO to amend the FIT Contract to ensure it was otherwise "frozen" from the effects of the moratorium.

27. Now that the FIT Contract has been terminated, there is no longer any possibility for the Project to move forward or for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period, as set out in the FIT Contract. Windstream has lost the full value of its investments in WWIS, the Project and the FIT Contract. Windstream has not been compensated for this loss. The *Windstream I* tribunal only awarded Windstream compensation for the *damage to* the investment occasioned by Canada's failure to accord Windstream fair and equitable treatment, and not the full value of its investment. The tribunal in *Windstream I* acknowledged that the Project could have additional value if the FIT Contract were renegotiated in accordance with Ontario's promises. However, Ontario did nothing after the Award to make good on its word. As a result, Ontario's actions have substantially deprived Windstream of its investments. Canada's actions constitute an unlawful expropriation of Windstream's investments, in breach of Article 1110 of NAFTA.

28. The Ontario Government's conduct was unfair, inequitable, arbitrary, discriminatory, and in breach of representations reasonably relied on by Windstream's investments. The Ontario Government had the power to direct the IESO to amend the FIT Contract to implement the promise to freeze and/or not to terminate the FIT Contract based on delays caused by the Government, namely the moratorium. This was recognized by the *Windstream I* tribunal, which found that the "failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA," to resolve the legal and contractual limbo it created was a breach of the FET standard.[19] Despite its ability to direct the IESO not to terminate or to renegotiate Windstream's Contract, and the *Windstream I* tribunal's findings that its previous failure to provide directions to the OPA had breached the FET standard, the Ontario Government refused to take any action that would meet its commitments to Windstream.

29. The Ontario Government's failure to take any action is discriminatory because it is contrary to the actions it has taken in respect of other investments in the energy sector by other proponents. The Ontario Government has on numerous occasions directed the IESO (or its predecessor, the OPA) to take a particular action to effect a representation it has made to a contractual counterparty to IESO.

30. Ontario's conduct since *Windstream I* has fallen below the required FET standard. Windstream has suffered a loss as a result—the termination of the FIT Contract and the destruction of its investment. As the tribunal stated, this was not compensated by the Award in *Windstream I*.

31. ***Canada is liable to compensate Windstream.*** Windstream is entitled to damages arising from these breaches of NAFTA based on the fair market value of the Project as of the date of the breaches or the date of the award, whichever is higher, assuming the breaches had never occurred.

32. Most of the Project's value was generated by the FIT Contract, which guaranteed Windstream a revenue stream once the Project became operational. Indeed, one of the stated

[19] **C-2040**, Award, ¶ 380.

goals of Ontario's new renewable energy legislation was to provide investors with revenue certainty, and the FIT Contract accomplished that objective.

33. Windstream has submitted extensive evidence, both in the *Windstream I* proceedings and in this arbitration, that establishes that the Project would have become operational had Ontario not impeded Windstream's efforts to develop it, and that Windstream would have therefore earned the revenues guaranteed to it under the FIT Contract. Windstream's evidence, provided in respect of *Windstream I* and updated for these proceedings to reflect the advancements since the *Windstream I* proceedings that have seen expanding offshore wind development and an increasingly strong investment market in North America and around the globe, establishes that:

a) its investors had the track record to attract the equity and debt financing necessary to bring the Project to commercial operation;

b) the Project was technically feasible;

c) the Project did not face significant regulatory risk;

d) there was no material impediment to the Project receiving all required permits and approvals;

e) absent the moratorium, the Project would have been built and operational within the time frames provided for in the FIT Contract; and

f) the Project's future cash flows can be calculated with a high degree of certainty.

34. The fair market value of Windstream's investments is most appropriately determined using a Discounted Cash Flow methodology, which is the most reliable method for determining the value of Windstream's investment but for Canada's conduct (and is the method used in the market to value offshore wind projects that have the revenue clarity that the Project possessed by virtue of the FIT Contract). In the opinion of Secretariat, Windstream's quantum experts, Windstream's losses arising from Canada's NAFTA breaches are between $291.4 million and $333 million as of the date of the cancellation of the FIT Contract. This

amount can be updated in due course to the date of the tribunal's award.[20] Windstream is entitled to damages in this range (as updated), plus interest and its costs of the arbitration.

B. Materials Submitted by Windstream

35. In support of this Memorial, and in addition to the materials submitted by Windstream in support of the first NAFTA proceedings (which are all incorporated as exhibits to this proceeding), Windstream has submitted witness statements from:

a) ***Ms. Nancy Baines***: Ms. Baines is the Director, Administration of Windstream Energy Inc. Ms. Baines provides evidence about the Ontario Government's conduct in the wake of the tribunal's Award in *Windstream I*, Windstream's work on the Project subsequent to the Award and its unsuccessful attempts to get the Ministry of Energy and the IESO to meet with it to discuss the FIT Contract and the path forward for the Project, as well as the IESO's decision to terminate the FIT Contract.

b) ***Mr. Ian Baines***: Mr. Baines is the President of WWIS. Mr. Baines provides evidence about the expansion of offshore wind in North America since 2015, Windstream's attempts to move the Project forward after the *Windstream I* Award, and the Government's continued mistreatment of Windstream.[21]

c) ***Mr. David Mars***: Mr. Mars is the co-founder and President of Windstream. Mr. Mars provides evidence about his discussions with potential partners who expressed strong interest in investing in the Project after the *Windstream I* proceedings.[22]

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[20] These losses are based on a design of the Project that met Ontario's proposal that turbines be located at least five kilometres from shore. However, as the documents produced in this arbitration reveal, that setback requirement was never adopted and was not based on a scientific rationale. Assuming that the requirement had never been adopted, or that a less stringent one had been adopted, Windstream's damages would be greater than the above amount: CER-Deloitte (Taylor, Low), pp. 3-4.

[21] CWS-I. Baines-3.

[22] CWS-Mars-3.

d) ***Mr. William Ziegler***: Mr. Ziegler is the majority investor in Windstream, and Chairman of its Board of Directors. Mr. Ziegler provides evidence in support of Mr. Mars' witness statement.[23]

e) ***Mr. George Smitherman***: the former Minister of Energy and Infrastructure from June 20, 2008 to November 9, 2009, Mr. Smitherman addresses [redacted] the OPA (the predecessor to the IESO) in his experience as Minister of Energy and Infrastructure.[24]

f) ***Mr. Michael Killeavy***: the former Director, Contract Management, at the IESO from January 2015 to February 2018. Mr. Killeavy, who held the same position at the OPA during the implementation of the FIT program, provides evidence about [redacted] his experience regarding the Ministry's ability to direct the IESO to take or refrain from taking steps like the cancellation of Windstream's FIT Contract.[25]

g) ***Mr. Chris Benedetti***: Mr. Benedetti is a principal at Sussex Strategy Group, a leading Canadian public affairs consulting firm, who acted as government relations consultant for Windstream. Mr. Benedetti provides evidence about his attempts, on behalf of Windstream, to communicate with the Ministry of Energy and Infrastructure to arrange a meeting to facilitate discussions about moving the Project forward after the Award in *Windstream I*.[26]

36. Windstream has also submitted expert reports from:

a) ***Sarah Powell***: Ms. Powell is a partner with the law firm of Davies Ward Phillips & Vineberg LLP, who specializes in environmental and energy law and is

[23] CWS-Ziegler-3.

[24] CWS-Smitherman-2.

[25] CWS-Killeavy.

[26] CWS-Benedetti-3.

certified by the Law Society of Ontario as a Specialist in Environmental Law. Ms. Powell's report provides evidence on the IESO's formal and informal tools to amend a FIT Contract, the Ford Government's approach to wind projects, and Windstream's expected path through the regulatory approvals process.[27]

b) ***Chris Millburn and Edward Tobis of Secretariat***: Messrs. Millburn and Tobis are Certified Public Accountants and Certified Business Valuators with over 35 years of combined experience in business valuations, damage quantification, financial litigation, and corporate finance-related matters. Their report quantifies Windstream's losses resulting from Canada's breaches of NAFTA.[28]

c) ***Pierre Antoine Tetard***: Mr. Tetard is a professional economist with over 15 years' experience in the energy industry (with over 14 years of experience specifically in renewable energy, and the last seven years focused on offshore wind). Mr. Tetard now leads the emerging markets team at Blue Float Energy, a renewable energy firm focused on offshore wind. As a co-author of the Secretariat report, Mr. Tetard addresses the financeability of the Project but for the moratorium and cancellation of the FIT Contract.[29]

d) ***4C Offshore***: 4C Offshore is a leading provider of market consulting services to the offshore wind industry. Its report provides an assessment of the Project's cost and information about four freshwater offshore wind farm projects in Europe.[30]

e) ***Jason Chee-Aloy of Power Advisory LLC***: Mr. Chee-Aloy is Managing Director of Power Advisory, a consulting firm with a focus on the electricity sector and extensive experience in Ontario's renewable generation market. Its report analyses the bases provided by the IESO for cancelling Windstream's FIT

[27] CER-Powell-3.

[28] CER-Secretariat.

[29] CER-Secretariat.

[30] CER-4C Offshore-3.

Contract, including the IESO's assessment of Ontario's energy capacity requirements.[31]

f) ***Wood Group and Ian Irvine***: Wood Group is a leading independent multi-disciplinary renewable energy consultancy, which has an extensive track record acting as a technical advisor for 200 GW of renewable energy projects. Mr. Irvine, an engineer with over 30 years' experience in the renewable energy industry, is the former principal of Wood Group's predecessor, SgurrEnergy. Their report updates the SgurrEnergy Report from the first NAFTA proceedings on the technical feasibility of constructing and operating the Project. As part of this work, Wood Group considered updated reports by OCC|COWI and Weeks Marine. COWI developed the offshore construction plan, foundation conceptual design and installation strategy. Weeks Marine, an internationally recognized offshore contractor, supported the offshore construction plan.[32]

In addition to providing an opinion on the technical feasibility of constructing and operating the project, Mr. Irvine provides a report on the selection of a suitable wind turbine generator to take advantage of advancements in wind turbine technology since the proceedings in *Windstream I*. He also analyzes data from various sources (including the reports from 4C, Wood Group, and OCC|COWI, as well as Mr. Irvine's extensive experience in the renewable energy industry) to provide an assessment of the capital and development expenditures for the Project.

g) ***W.F. Baird & Associates Coastal Engineers***: Baird is an engineering consulting firm specializing in coastal projects and with expertise in in-water projects in Lake Ontario. Its report updates its previous report, submitted in *Windstream I*, on

[31] CER-PowerAdvisory-2.

[32] CER-SgurrEnergy-3.

the technical and permitting feasibility of the Project in connection with the aquatic environment aspects of the Project.[33]

h) ***Aercoustics Engineering****:* Aercoustics Engineering Limited is an engineering consulting firm which specializes in the areas of acoustics, noise, and vibrations. Its report updates previous noise modelling and propagation studies completed in respect of *Windstream I*.[34]

i) ***WSP***: WSP is an engineering, management and regulatory consulting firm with extensive experience in renewable energy projects in Canada. Its report updates a detailed, comprehensive permitting and approval schedule for the Project that considers regulatory changes since the *Windstream I* Award.[35]

PART TWO – THE FACTS

I. ORGANIZATION OF THE FACTS

37. Windstream's claim arises from, and relies upon, the findings of the tribunal in *Windstream I.* An understanding of the factual background that led to *Windstream I* and the tribunal's findings in that case is therefore necessary for a proper understanding of the issues and measures that are now before this tribunal.

38. The facts section of this Memorial is organized as follows:

a) Parts II to IV describe the growth and expansion of offshore wind electricity generation since 2016, the Project that is the subject of this arbitration (the Windstream Wolfe Island Shoals Project), and the entities of the Ontario government that adopted the measures that gave rise to this dispute.

[33] CER-Baird-3.

[34] CER-Aercoustics.

[35] CER-WSP-2.

b) Parts V to X summarize the events that led to the *Windstream I* arbitration. In setting out this part of the factual background, Windstream relies on the factual findings of the *Windstream I* tribunal.

c) Part XI summarizes the liability and damages findings of the *Windstream I* tribunal.

d) Parts XII to XX address the facts that have occurred since the *Windstream I* Award and the measures that are at issue in this arbitration.

II. OFFSHORE WIND HAS GROWN SIGNIFICANTLY SINCE 2016, PARTICULARLY IN NORTH AMERICA

39. Since the decision in *Windstream I*, the offshore wind energy sector has experienced significant growth, particularly in North America, in part due to advancements in technology that have increased the efficiency and cost-effectiveness of offshore windpower. Further, major offshore wind developments in freshwater environments provide proof-of-concept for projects such as WWIS, which in fact benefit from more benign conditions than saltwater offshore projects. These developments further reinforce the conclusion that the Project was viable and valuable.

A. The Global Growth and Expansion of Offshore Wind

40. Offshore wind energy is a rapidly growing global industry that creates electricity from wind turbines installed in coastal waters on either rigid or floating substructures anchored to the seabed or lake bottom.[36] Offshore wind has proven itself to be an affordable, scalable, zero-carbon energy source. Its ability to assist in achieving carbon neutrality has contributed to its increasing popularity around the world.[37]

[36] CWS-I. Baines-3, ¶ 10; **C-2136,** Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. ix.,

[37] CWS-I. Baines-3; **C-2136,** Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. xii.

41. The following photograph depicts offshore wind turbines at the Block Island Wind Farm off the coast of Rhode Island, United States:[38]

42. Offshore wind energy took its first steps in the 1990s and has been growing in scale ever since. This growth has only accelerated in recent years. The worldwide offshore wind market tripled in size from 2016 to 2020 alone (from 2.2 GW to 6.1 GW).[39]

43. Offshore wind is now a mature industry, but its global expansion is only just beginning. Given that more than 70% of the planet is covered by sea, and wind speeds are considerably stronger offshore than onshore, there is significant room for continued growth.[40] The Global Wind Energy Council predicts that the compound annual growth rate for offshore wind in the next five years will be 31.5%. New installations are likely to quadruple by 2025 from 6.1 GW in 2020 to 23.9 GW in 2025.[41]

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[38] https://www.windfarmtours.us/

[39] CWS-I. Baines-3, ¶ 9; **C-2336,** GWEC Global Wind Report – Annual Market Update (2021), p. 47.

[40] **C-2275,** GWEC Global Offshore Wind Report (2020), p. 5.

[41] CWS-I. Baines-3, ¶ 11; **C-2336,** GWEC Global Wind Report – Annual Market Update (2021), p. 70.

44. The growth of offshore wind over the last decade has benefitted from technological advancements and declining costs. Most of this growth has been in the UK, Germany, mainland China, Denmark, Belgium and the Netherlands. The offshore market is also taking off in Asia and North America.[42] According to an April 2021 study by Rystad Energy, capital and operational expenditure for offshore wind between 2020 and 2030 is estimated to be USD $810 billion.[43] While Europe is expected to remain the dominant player in offshore wind, spending in North and South America is predicted to grow significantly, and is projected to hit approximately USD $70 billion during the same time period.[44]

B. The Growth and Expansion of Offshore Wind in North America

45. There has been significant expansion of offshore wind development in the United States over the last decade, and that growth is expected to continue to climb exponentially in the coming years.

46. Several proposed offshore wind projects are planned in Canada. For example, the NaiKun Project is a 400 MW proposed project in the Hecate Strait, British Columbia. There are also five projects planned for Newfound and Labrador, Nova Scotia, Prince Edward Island and New Brunswick, totaling over 3,200 MW.[45]

47. Several North American projects have recently been completed or are in development. North America's first commercial offshore wind facility, the Block Island Wind Farm located off the coast of Rhode Island, became operational in December 2016.[46] A 12 MW pilot project in Virginia was completed in June 2020 and was the first offshore wind project to be installed in

[42] CWS-Baines-3, ¶ 10; **C-2275,** GWEC Global Offshore Wind Report (2020), p. 32.

[43] CER-Powell-3, ¶ 168; **C-2365,** Press Release by Rystad Energy entitled "An expenditure splash of $810 billion is expected for the offshore wind industry this decade" (April 29, 2021).

[44] CER-Powell-3, ¶ 168; **C-2365,** Press Release by Rystad Energy entitled "An expenditure splash of $810 billion is expected for the offshore wind industry this decade" (April 29, 2021).

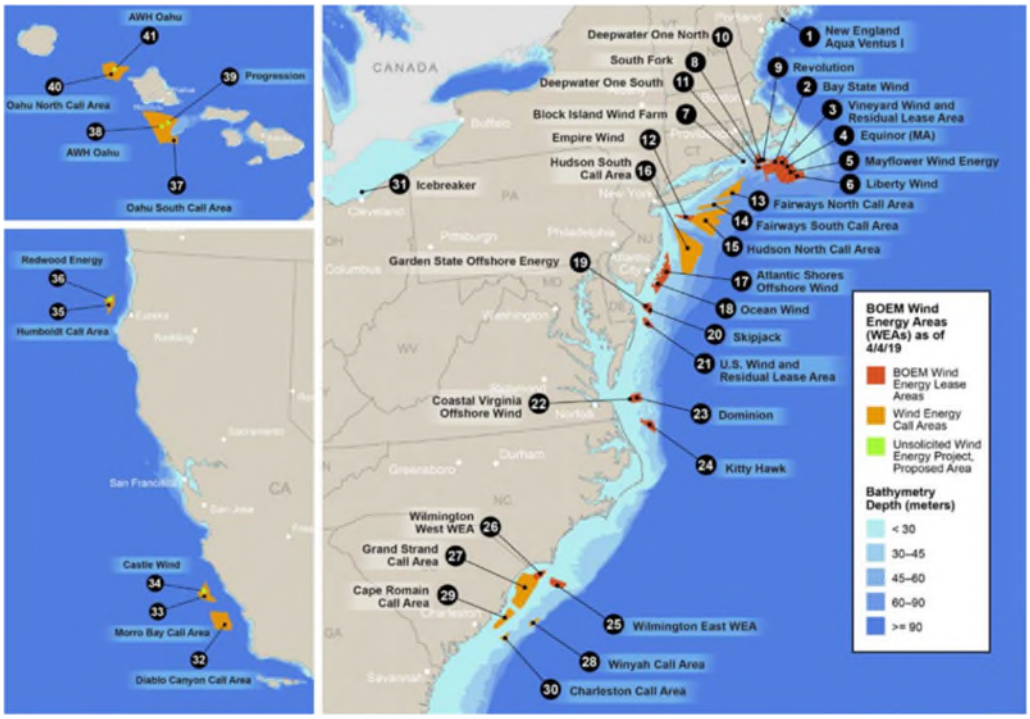
[45] CER-Powell-3, ¶ 173.

[46] CWS-I. Baines-3, ¶ 12; **C-2275,** GWEC Global Offshore Wind Report (2020), p. 20.

federal waters.[47] Many more offshore wind projects are in development, with fifteen projects expected to be built in the United States by 2026.[48]

48. According to the United States Department of Energy, offshore wind is expected to be "the next big thing" for the U.S. as the U.S. has a "robust" offshore wind pipeline: "28 projects, totaling 28,735 megawatts (MW) of potential installed capacity, are now in the works. Near-term activity is concentrated in the North Atlantic, but other projects are at various stages of development across the country, including the Great Lakes, the West Coast and Hawaii."[49]

49. The following diagram depicts the United States' offshore wind pipeline activity as of March 2019:[50]



[47] CWS-I. Baines-3, ¶ 13; **C-2275,** GWEC Global Offshore Wind Report (2020), p. 21.

[48] CWS-I. Baines-3, ¶ 13; **C-2275,** GWEC Global Offshore Wind Report (2020), pp. 10-11, 71.

[49] CWS-I. Baines-3, ¶ 15; **C-2111,** Report (US Office of Energy Efficiency and Renewable Energy) "4 Emerging Trends in U.S. Offshore Wind Technologies" (August 9, 2017).

[50] CWS-I. Baines-3, ¶ 38; **C-2136**, Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. x. See also **C-2323**, NREL Transforming Energy 2019 Offshore Wind Technology Data Update (October 2020), pp. 9, 12, 13.

50. This growth is not expected to slow down. According to the U.S. Department of State, "[t]here are no indications that turbine growth is slowing or has reached a limit for offshore wind."[51]

51. On March 29, 2021, the Biden Administration announced that it was seeking to jumpstart offshore wind energy projects to create jobs and has committed to generating 30 GW of offshore wind in the U.S. by 2023.[52] In May 2021, President Biden announced a major offshore wind plan that includes deploying 30,000 MW or 30 GW of offshore wind turbines in coastal waters by 2030 and 110 GW by 2050.[53] For the Biden administration, offshore wind is seen as both an enormous opportunity to address the threats of climate change and also to create millions of jobs to fuel America's economic recovery.[54]

52. The growth of offshore wind development has also utilized improved technological advances and rapid cost declines. According to the U.S. Department of Energy, these proposed projects "are incorporating the latest innovations in offshore wind technology," including larger turbines that capture more energy more efficiently, while also taking advantage of the "rapid cost decline" that the offshore wind industry has experienced in recent years. It is expected that this "cost reduction trend will continue globally and will be realized in the United States as the market emerges."[55]

53. There are two developments specific to offshore wind in the Great Lakes. First is the continued progression of the Icebreaker Wind Project, a proposed 20.7 MW demonstration offshore wind farm to be located in Lake Erie, roughly 8 miles north of Cleveland, Ohio. If approved, Icebreaker will be the first offshore wind project in the Great Lakes and the first

[51] CWS-I. Baines-3, ¶ 16; **C-2136**, Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. xii.

[52] CWS-I. Baines-3, ¶ 17; **C-2356**, News Release (White House), FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (March 29, 2021).

[53] CER-Powell-3, ¶ 170.

[54] CER-Powell-3, ¶ 170.

[55] CWS-I. Baines-3, ¶ 16; **C-2136**, Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. 57.

freshwater wind project in North America. The project received the necessary regulatory approvals in 2020, although one approval is currently before the Ohio courts.[56] Construction is planned to begin in Summer 2022 and commercial operation is expected by the end of 2022.[57]

54. Second, in February 2021, the New York State Energy Research and Development Authority launched a study on the feasibility of developing offshore wind in the Great Lakes adjacent to the state, namely Lake Erie and Lake Ontario. The study explores the "paths forward for Great Lakes Wind to help New York achieve its ambitious Clean Energy Standard."[58]

III. THE WOLFE ISLAND SHOALS PROJECT

55. The Wolfe Island Shoals Project (the "**Project**") was an offshore wind energy generation project, capable of generating approximately 300 MW of electricity, owned by Windstream's Canadian subsidiary, WWIS. The Project is located in in Lake Ontario (one of the Great Lakes) near Wolfe Island, south of the City of Kingston, adjacent to the onshore Wolfe Island Wind Farm.[59]

56. The Project would have been connected to Ontario's electricity grid at Lennox Transmission Station, a major node on the provincial grid through a submarine cable. WWIS had received conditional approval to connect the Project to Ontario's power grid, subject to the completion of certain standard conditions.[60]

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[56] CER-Powell-3, ¶ 171; **C-2380**, "Condo owners' appeal could be last legal hurdle for offshore wind in Great Lakes" – Energy News Network (July 20, 2021).

[57] CER-Powell-3, ¶ 171; **C-2431**, Website (LEEDCo), The Project: Ice Breaker Wind (February 2022).

[58] CER-Powell-3, ¶, 172; **C-2421**, Great Lakes Wind Feasibility Study – NYSERDA (2022).

[59] **C-2040**, Award, ¶ 118; **C-0551**, Report (Ortech), Draft Project Description for Wolfe Island Shoals Offshore Wind Farm (September 26, 2011); **C-0354,** Presentation, Windstream Wolfe Island Shoals Wind Farm (September 2010).

[60] **C-2040**, Award, ¶ 140; **C-0383**, Report (Hydro One), Customer Impact Assessment, Wolfe Island Shoals GS 300 MW Wind Turbine Generator Generation Connection (November 8, 2010); **C-0381**, System Impact Assessment Report (IESO), Wolfe Island Shoals Wind Generation Station, Connection Assessment & Approval Process (Final Report) (November 8, 2010).

57. As set out in more detail below, in 2010, WWIS entered into a power purchase agreement under the OPA's FIT Program. The FIT Contract required the OPA to purchase all electricity generated by the Project at a rate of $190 per MW hour for a 20-year term, with full escalation for inflation until the Project's commercial operation date, and escalation for up to a maximum of 20% in total for the 20 years starting from the date of the Project's commercial operation.[61] In accordance with the FIT Contract, Windstream was required to develop and build the Project, and bring it into commercial operation.

58. If built, the Project would have resulted in an $850 million investment in Ontario that was projected to add 1,900 full-time jobs in Ontario during the construction period, and a further 175 jobs while the Project was in operation.[62] It would have provided an annual energy yield of [redacted] gigawatt hours.[63]

[61] **C-2040**, Award, ¶ 137; **C-0251,** Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

[62] **C-0413**, Letter from Baines, Ian (WEI) to The Honourable Dalton McGuinty, Premier (December 15, 2010); **C-0412,** Presentation, Wolfe Island Shoals Project, Windstream Energy, Employment and Income Impacts in Ontario (December 14, 2010), pp. 6-7; **C-0560,** Draft Report (Ortech), Wolfe Island Shoals Offshore Wind Project Specific Benefits (November 17, 2011), p. 4; **C-0415,** Report (Aecom Canada Ltd.), Windstream Energy - Potential Employment and Income Impacts in Ontario from the Wolfe Island Shoals Project (December 17, 2010).

[63] **C-0670**, Report, (GL Garrad Hassan), Wolfe Island Shoals Wind Farm Preliminary Energy Assessment (September 30, 2013), p. 15; CER-SgurrEnergy, p. 61; CER-Wood, p. 40.

IV. THE PARTIES

A. Windstream and its Enterprise WWIS

1. Windstream

59. Windstream Energy LLC, defined above as Windstream, is a Delaware, United States limited liability company dedicated to the development of renewable energy. Windstream, previously named Ontario Clean Power LLC, was founded in 2007 by a New York City-based investment group with extensive experience developing and operating energy projects in both onshore and offshore environments.[64]

60. Windstream is managed by its managing director White Owl Capital Partners LLC ("**White Owl**"), a private equity firm based in New York City. Mr. David Mars and Mr. William Ziegler are the principals of White Owl.[65] Under a Limited Liability Company Agreement entered into in November 2007, White Owl [redacted][66]

2. Windstream Wolfe Island Shoals Inc.

61. Windstream Wolfe Island Shoals Inc., defined above as WWIS, is a subsidiary of Windstream.[67] It was incorporated in Ontario under the name Ontario Clean Power Foymount Inc. on October 18, 2007 as a special purpose company to develop and operate the Project.[68] WWIS is the vehicle through which Windstream owns the Project. Windstream directly owns

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[64] **C-2040**, Award, ¶ 2; **C-0030**, Delaware Certificate of Formation of Ontario Clean Power LLC (October 15, 2007); **C-0032,** Certificate of Incorporation, Ontario Clean Power Foymount Inc. (October 18, 2007); **C-0031**, Articles of Amendment, Ontario Clean Power Foymount Inc. (October 18, 2007); **C-0098**, Delaware Certificate of Amendment of Certificate of Formation of Ontario Clean Power LLC (November 20, 2008); Award ¶ 1; **C-0682**, Delaware Corporate Search, Windstream Energy LLC (March 26, 2014).

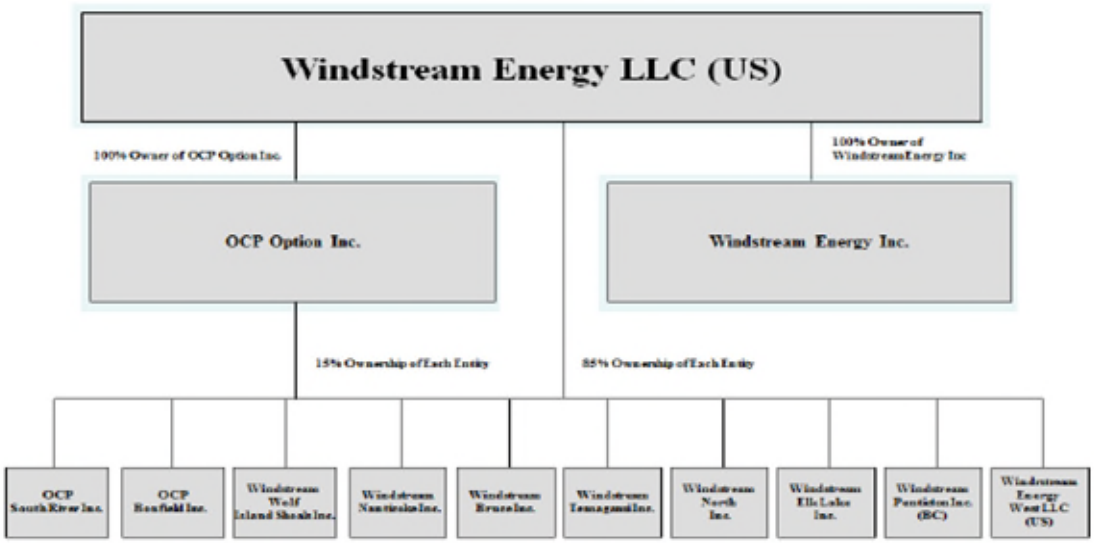
[65] **C-2040**, Award, ¶ 2.

[66] CWS-Mars, ¶ 10; **C-0040**, Limited Liability Company Agreement of Ontario Clean Power LLC, (November 2, 2007); **C-0179**, Second Amended Restated Limited Liability Company Agreement of Windstream Energy LLC (January 14, 2010).

[67] **C-2040**, Award, ¶ 2; CWS-Mars ¶ 34; **C-0035**, Initial Return/Notice of Change, Ontario Ministry of Consumer and Business Services Receipt Only, Windstream Wolfe Island Shoals Inc. (WWIS) (October 18, 2007).

[68] CWS-Mars, ¶ 34; CWS-Baines, ¶¶ 29-30; **C-0037**, Windstream Wolfe Island Shoals Inc. (WWIS) Corporation Summary (October 18, 2007); **C-0150**, Certificate of Status, Windstream Wolfe Island Shoals Inc. (WWIS) (November 19, 2009).

85% of the shares of WWIS.[69] It indirectly owns the remaining 15% of the shares of WWIS through OCP Option Inc., which is a wholly owned subsidiary of Windstream.[70] Below is an organizational chart of the Windstream family of companies:



62. WWIS is the counterparty to the FIT Contract and is the holder of all rights under that contract.[71]

3. Windstream and WWIS' Extensive Experience Developing and Financing Energy Projects

63. ***Extensive Experience of Windstream's Investors***. The principal investors in Windstream – William Ziegler, Steven Webster and Kenneth H. Hannan, Jr. – are a group of American high net-worth individuals who have been business and investment partners for over 25 years. They have extensive experience in the oil & gas, offshore drilling, shipping, real estate, banking and private equity industries:[72]

[69] CWS-Mars, ¶ 34; **C-0176**, Shareholders' Register, Windstream Wolfe Island Shoals Inc. (January 1, 2010).

[70] CWS-Mars, ¶ 34; **C-0175,** Shareholders' Register, OCP Option Inc. (January 1, 2010); **C-0176**, Shareholders' Register, Windstream Wolfe Island Shoals Inc. (January 1, 2010).

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

[72] CWS-Mars, ¶ 15.

a) ***William Ziegler:*** Mr. Ziegler is the [redacted]% [redacted] of Windstream, and the Chairman of its Board of Directors. He has been investing in the energy sector for over 30 years.[73] In addition to Windstream, Mr. Ziegler has been a major investor in and served as Chairman of the Board of Directors of several other companies, including a company that operates natural gas pipelines in Northern Ohio, an oil and gas exploration and extraction company that operates in New York State, and a natural gas gathering and transportation services company that operates in the Appalachian Basin.[74]

b) ***Steven Webster:*** Mr. Webster owns [redacted]% of Windstream and since 2005 has been the Co-Managing Partner and Co-CEO of a private equity firm with over US$5 billion under management. Throughout his business career, Mr. Webster has been active in venture capital and investment activities in various industries, including energy.[75]

c) ***Kenneth H. Hannan, Jr.*:** Mr. Hannan (together with his associate, Francis Stafilopatis) holds [redacted], a company that Mr. Hannan controls together with his partners.[76] He has significant experience in infrastructure projects, including as President of Colonial Navigation, an established shipping company with a diversified fleet of twelve tankers and ten supramax vessels. Colonial has a global presence and since inception has purchased, built, operated and sold in excess of 100 vessels.[77]

64. These individuals are not just investors. They are also entrepreneurs and operators. They have built many companies from the ground up; companies that involve a highly specialized and

[73] CWS-Mars, ¶ 14; **C-0689**, Windstream Energy LLC Investor Schedule A (April 7, 2014).

[74] CWS-Ziegler, ¶¶ 1, 7.

[75] CWS-Mars, ¶¶ 17-18.

[76] CWS-Mars, ¶ 16; **C-0689**, Windstream Energy LLC Investor Schedule A (April 7, 2014); CWS-Ziegler-3 ¶ 3.

[77] CWS-Mars, ¶ 16; CWS-Ziegler, ¶ 9.

skilled workforce and operate in the energy industry in dozens of jurisdictions around the world in challenging regulatory environments. Because of the nature of the energy industry, the companies in which the investors in Windstream have invested are often engaged in developing challenging projects with unique regulatory requirements.[78]

65. Further details about Windstream's major investors can be found in Mr. Mars' and Mr. Ziegler's witness statements in respect of *Windstream I*. In particular, Mr. Ziegler's witness statement from *Windstream I* includes a table setting out in detail each of the major projects that the investors in Windstream have successfully commercialized,[79] including four of the most technologically advanced Ultra Deepwater Drillships, two Ultra Deepwater Semi-Submersible Drill Rigs, and three retrofit/refurbishments at a cost of USD [redacted].[80]

66. Based on this experience, the investors in Windstream had a high degree of confidence that the management and financial resources of the investor group could bring the Project to commercial operation. Indeed, the group had worked together for decades and had financed and built numerous offshore marine vessels and companies that had substantially higher risk profiles and higher costs than WWIS. This expertise, acquired over decades, would have been directly brought to bear on the Project.[81]

67. Messrs. Ziegler and Mars brought the group of investors together in mid-2009 and 2010 because, in light of the Ontario Government's very public commitment to renewable energy development including offshore wind, they believed that there were substantial opportunities in Ontario for wind energy development.[82]

[78] CWS-Ziegler-2, ¶¶ 15-16; CWS-Mars, ¶¶ 15-22, Appendix A.

[79] CWS-Ziegler-2, ¶ 18.

[80] CWS-Ziegler-2, ¶ 18.

[81] CWS-Ziegler-2, ¶ 17.

[82] CWS-Mars, ¶ 15.

68. ***Extensive Experience of WWIS's President***. The activities of Windstream and its subsidiaries in Ontario are led by Ian Baines, an Ontario-based engineer with extensive experience developing wind energy projects.[83]

69. In 1990, Mr. Baines founded Controltech Engineering Inc. (**"Controltech"**), an engineering company focused on designing, developing and building renewable energy projects in Ontario. In 2000, Mr. Baines together with other investors formed a company called Canadian Renewable Energy Corporation (**"CREC"**). CREC was involved in the developmental stages of a number of renewable energy projects, including the Wolfe Island wind project and the Melancthon wind project, both of which were subsequently completed by other companies into two of Ontario's largest onshore wind projects.[84] Through Controltech, Mr. Baines was retained to obtain the necessary approvals and perform other work on the onshore Wolfe Island Wind Facility. The Wolfe Island Wind Project began commercial operation in 2009, with a nameplate capacity of 197.8 MW, and is currently the second largest wind energy project in Canada, measured by MW.[85]

B. The Province of Ontario and Its Relevant Ministries and Agencies

1. The Province of Ontario

70. The Province of Ontario is one of Canada's ten provinces, and its most populous. Its population accounts for nearly 40% of the population of Canada. Three of North America's Great Lakes – Lake Ontario, Lake Erie and Lake Huron – and the St. Lawrence Seaway form the southern and western borders of the area of Ontario known informally as Southern Ontario, which is home to 94% of the province's population.

71. Several of Ontario's major cities are located along the northern shore of Lake Ontario. These include the Greater Toronto and Hamilton area in the west and Kingston in the east.

[83] CWS-Baines, ¶¶ 1, 3-6.

[84] CWS-Roeper, ¶ 3.

[85] CWS-Baines, ¶ 23.

2. Premier of Ontario, Executive Counsel, and Premier's Office

72. The Premier of Ontario is the Province of Ontario's head of government.[86] The Premier presides over the Executive Council of Ontario, informally known as the Cabinet of Ontario. The Executive Council is comprised of all the cabinet ministers who are the heads of a ministry. The Premier is also an elected member of the Legislature of Ontario.

73. The current Premier of Ontario is Doug Ford, who assumed office June 29, 2018. He is a member of the Progressive Conservative Party of Ontario. Kathleen Wynne was his predecessor. She had assumed office on February 11, 2013 following the resignation of former Premier Dalton McGuinty. Premier McGuinty was in office from October 23, 2003 to February 11, 2013. He and Premier Wynne are both members of the Ontario Liberal Party.

74. The Premier's Office consists of appointed advisors who serve at the pleasure of the Premier. The Premier's advisors are not members of the civil service and are frequently referred to as "political staff." They answer to the Premier's Chief of Staff and advise the Premier on a range of matters including energy policy and stakeholder relations.

3. Ministry of Energy

75. The Ministry of Energy[87] (**"MEI"**) is responsible for developing Ontario's electricity generation, transmission and other energy-related facilities. It is an organ of the Ontario Government. The MEI is constituted by the *Ministry of Energy Act*, which grants the Minister of Energy extensive authority to, among other things, direct Ontario's energy policy and review energy matters on a continuing basis with regard to both short-term and long-term goals and the energy needs of the Province of Ontario.

76. The MEI is directed by the Minister of Energy, who is an elected member of the Legislature of Ontario and is appointed by the Lieutenant Governor of Ontario, acting on advice

[86] The Premier is the *de facto* head of the Government of Ontario. Under the *Constitution Act, 1867*, the Lieutenant Governor in Council is the head of the Government of Ontario; however, in practice, the Lieutenant Governor in Council is apolitical and does not participate in the day-to-day governance of the province.

[87] Between 2007 and 2010, the Ministry was known as the Ministry of Energy and Infrastructure. It is now known as the Ministry of Energy. We refer to the Ministry by the acronym "MEI" for ease of reference, since that is the acronym that was used by the *Windstream I* tribunal.

from the Premier of Ontario. As a formal matter, the Minister of Energy serves at the pleasure of the Lieutenant Governor (as do other Ministers). Practically speaking, the Minister serves at the pleasure of the Premier. The Minister is accountable to the Legislature of Ontario. The Deputy Minister of Energy is generally appointed from the civil service. The Deputy Minister directs all the activities of the Ministry. He or she reports both to the Minister and to the Secretary of the Cabinet, who is the head of the civil service.

77. MEI was given special responsibility through the *Green Energy and Green Economy Act, 2009* (the **"GEGEA"**) and its amendments to the *Electricity Act, 1998* to expand Ontario's reliance on renewable energy. In particular, the GEGEA amended the *Electricity Act* in 2009 to empower the Minister of Energy to direct the OPA (now the IESO) to, among other things, procure electricity supply from renewable sources and develop a feed-in-tariff program for electricity produced by renewable sources.[88]

4. Ontario Power Authority and Independent Electricity System Operator

78. As set out above, the OPA was the counterparty to WWIS' FIT Contract. On January 1, 2015, the OPA amalgamated with the IESO and was continued as the IESO. Concurrent with the amalgamation, the OPA's mandate became part of the mandate of the IESO. The IESO therefore became the counterparty to WWIS' FIT Contract.

79. The IESO is a corporation without share capital established under the *Electricity Act*. The IESO is governed by a board of directors that oversees its business and affairs. The Board of Directors is appointed by the Minister of Energy and serves at the pleasure of the Minister. Although the IESO has a Board of Directors appointed by the Minister of Energy, the Minister exercises formal control over the IESO by way of mandatory directives issued under the *Electricity Act* and also exercises informal control in other ways. This is set out in more detail in section XVIII(C) (i.e. 18 (c)) below.

80. The IESO is responsible for forecasting electricity demand, planning for electricity generation and engaging in activities to ensure an adequate supply of electricity in Ontario. This

[88] *Green Energy Act, 2009*, S.O. 2009, c. 12

includes procuring electricity, including entering into long-term power purchase agreements with private sector developers.[89]

5. Ministry of Natural Resources

81. The Ministry of Northern Development, Mines, Natural Resources, and Forestry[90] (**"MNR"**) is an organ of the Ontario Government. It is the portfolio of the Ontario Cabinet responsible for developing resource management policies, managing Ontario parks, forest fire, flood and drought protection and generating geographic information about the province. MNR is responsible for the *Public Lands Act*, and managing, selling and disposing of Crown lands in Ontario.

82. MNR is directed by the Minister of Natural Resources, who is an elected member of the Legislature of Ontario and is appointed by the Lieutenant Governor of Ontario, acting on advice from the Premier of Ontario. The Minister serves at the pleasure of the Lieutenant Governor (and in practice to the Premier), and the Minister is accountable to the Legislature of Ontario.

6. Ministry of the Environment

83. The Ministry of the Environment, Conservation and Parks[91] (**"MOE"**) is another organ of the Government of Ontario. MOE is the portfolio of the Ontario Cabinet responsible for managing and protecting the natural environment in Ontario, including developing environmental standards and regulations, managing the environmental approvals process, and enforcing compliance with environmental laws. MOE is responsible for administering the *Environmental Assessment Act*, the *Environmental Bill of Rights*, the *Environmental Protection Act, 2008*, and the *Ontario Water Resources Act* (among others). MOE is constituted by the *Ministry of the Environment Act*.

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[89] CWS-Killeavy, ¶ 13; *Electricity Act,*1998, c. 15, s. 5.

[90] In July 2014, the Ministry of Natural Resources was renamed the Ministry of Natural Resources and Forestry. Its responsibilities did not change. In June 2021, the Ministry merged with the Ministry of Northern Development and Mines to form the Ministry of Northern Development, Mines, Natural Resources and Forestry.

[91] In 2014, the Ministry of the Environment's name was changed to the Ministry of the Environment and Climate Change after the addition of climate change was added to the ministry's portfolio. In 2018, the Ministry's name was again changed to Ministry of the Environment, Conservation and Parks.

84. MOE is directed by the Minister of the Environment, Conservation and Parks, who is an elected member of the Legislature of Ontario and is appointed by the Lieutenant Governor of Ontario, acting on advice from the Premier of Ontario. The Minister serves at the pleasure of the Lieutenant Governor (and in practice to the Premier), and the Minister is accountable to the Legislature of Ontario.

85. The Minister is empowered under the *Environmental Protection Act* to "issue, amend or revoke policies in respect of renewable energy approvals" in Ontario.

V. 2003-2010: ONTARIO PROMOTES DEVELOPMENT OF RENEWABLE ENERGY, INCLUDING OFFSHORE WIND PROJECTS

86. As set out at paragraph 38 above, the factual summary set forth from Parts V to Part X of this Memorial provides the background of the events leading to the *Windstream I* arbitration to provide context for this arbitration. This factual summary is based chiefly on the factual findings made by the *Windstream I* tribunal.

87. This section describes the regulatory framework governing renewable energy in Ontario after 2009 and the circumstances under which WWIS and the OPA entered into the FIT Contract. Paragraphs 86 to 95 of the *Windstream I* tribunal's Award summarize relevant events that took place prior to the enactment of the GEGEA in 2009.

88. In *Windstream I*, one of the key issues between the parties was the extent to which there was regulatory uncertainty in Ontario relating to offshore wind development at the time Windstream invested in Ontario and caused WWIS to execute the FIT Contract. The *Windstream I* tribunal found that "the regulatory framework continued to envisage the development of offshore wind" though "additional and more detailed regulations governing offshore wind specifically" were in fact never developed.[92]

[92] **C-2040**, Award, ¶ 379.

A. 2009: Ontario Enacts the *Green Energy Act* to Solicit Renewable Energy Investment, Including Offshore Wind Projects

89. On February 20, 2009, the Ontario Government announced a proposal to enact the GEGEA. The Ontario Government described the proposal as "sweeping new legislation to attract new investment, create new green economy jobs and better protect the climate."[93]

90. The GEGEA sought to provide a "standard, streamlined, open and fair" project procurement process. It created three key mechanisms:

a) The FIT Program, which was intended to provide standard program rules, contracts and pricing for specified renewable energy sources in order to increase investor confidence in renewable energy projects;

b) a "right to connect" to the electricity grid for renewable projects; and

c) a streamlined approvals process for renewable energy projects, which combined the previous amalgam of municipal and provincial permits into a single new "renewable energy approval" (the **"REA"**).[94]

91. On the same date as the announcement of the proposal, February 20, 2009, the Deputy Premier, Minister George Smitherman, explained before the Toronto Board of Trade that the GEGEA meant that Ontario would "offer an attractive price for renewable power, including wind – onshore and offshore … and we'll guarantee the price for decades."[95]

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[93] **C-2040**, Award ¶ 94; **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009); C-0115, News Release, Smitherman, George (MEI), Ontario's Bold New Plan for a Green Economy (February 23, 2009).

[94] **C-2040**, Award, ¶ 96; CER-Powell-2, ¶¶ 14, 25-26; **C-0131**, Regulation Proposal Notice (MOE), Proposed Ministry of the Environment Regulations to Implement the Green Energy and Green Economy Act, 2009 (August 27, 2009); CWS-Baines ¶ 44; **C-0113**, Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) (February 23, 2009).

[95] **C-2040**, Award, ¶ 94; **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

92. On February 21, 2009, the Toronto Star newspaper published an interview with Minister Smitherman in which he stated that there were "wonderful opportunities for offshore wind" and the Government had been "making sure we'll move those proposals along."[96]

93. On February 23, 2009, Minister Smitherman gave a speech at the Legislative Assembly of Ontario in which he stated that the GEGEA "would make Ontario the 'destination of choice' for green power developers, would 'incent proponents large and small to develop projects by offering an attractive price for renewable energy' and would provide 'the certainty that creates an attractive investment climate."[97] He also stated that GEGEA "would coordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process with a service guarantee,"[98] adding that "so long as necessary documentation is successfully completed, permits would be issued within a six-month service window."[99]

94. On May 14, 2009, the GEGEA was approved.[100]

B. 2009: Ontario Implements the *Green Energy Act* by Establishing the FIT Program, REA Regulations and New MNR Policies

95. ***The FIT Program.*** The GEGEA authorized the MEI to direct the OPA to develop the FIT Program. On September 24, 2009, the MEI exercised its authority and the OPA began taking applications for the FIT Program on October 1, 2009.[101]

96. The launch of the FIT Program and the GEGEA was accompanied by a press release, also published on September 24, 2009, which stated that "Ontario's new regulations provide a stable

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[96] **C-2040**, Award, ¶ 95; **C-0111**, Article, Hamilton, Tyler (Toronto Star), Province to fast-track wind turbine projects (February 21, 2009), p. 2.

[97] **C-2040**, Award, ¶ 95; **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009).

[98] **C-2040**, Award, ¶ 95; **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

[99] **C-2040**, Award, ¶ 95; **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009), p. 2.

[100] **C-2040**, Award, ¶ 96; **C-0123**, The Green Energy Act and Green Economy Act (2009).

[101] **C-2040**, Award, ¶ 97; **C-0141**, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009).

investment environment where companies know what the rules are – giving them confidence to invest in Ontario, hire workers, and produce and sell renewable energy."[102]

97. The OPA developed the FIT Rules, Standard Definitions and a standard FIT Contract, together setting out the terms and conditions for participating in the FIT Program.[103]

98. The FIT Program established a 20-year fixed premium price to be paid by the OPA for energy from renewable sources, including onshore and offshore wind, hydroelectric, solar, biogas, biomass and landfill gas. The FIT Contract was a standard long-term fixed-price contract that provided standard terms and conditions applicable to all FIT projects, as well as terms and conditions specific to different types of renewable energy fuels under the FIT Program.[104]

99. The goal of the FIT Program was to ensure that project "proponents could use their FIT contracts to secure long term limited resource debt financing to fund the planning and construction of their projects."[105]

100. ***REA Process and New MNR Policies All Expressly Contemplated Offshore Wind Projects***. Two key regulatory documents related to the FIT Program were the Renewable Energy Approval Regulation (**"REA Regulation"**) and the Approval and Permitting Requirements Document for Renewable Energy Projects (**"APRD"**).[106]

101. The REA Regulation was a notable component of the GEGEA. This was a single streamlined approvals process with a six-month service guarantee. This streamlined process allowed developers to submit a single application to satisfy all provincial and municipal

[102] **C-2040**, Award, ¶ 97; **C-0143**, Article, Green Energy Rules Make Ontario a North American Leader (September 24, 2009).

[103] **C-2040**, Award, ¶ 98.

[104] **C-2040**, Award, ¶ 99.

[105] **C-2040**, Award, ¶ 99.

[106] **C-2040**, Award, ¶ 103.

regulatory requirements for the development of renewable energy projects, instead of the patchwork of approval processes under the pre-REA regime.[107]

102. The REA Regulation, or Ontario Regulation 359/09 (Renewable Energy Approvals under Part V.0.1 of the EPA), took effect September 24, 2009.[108]

103. On September 24, 2009, the same day the FIT Program was launched, the OPA issued a press release announcing the adoption of the REA Regulation and stating that the REA "[i]s coordinated with other provincial approvals to ensure a streamlined approach, providing a six-month service guarantee per project."[109]

104. The REA Regulation established the environmental approval requirements for wind, solar, thermal and anaerobic digestion energy facilities, setting out specific requirements for all types of wind facilities, including offshore wind projects. The REA Regulation classified offshore wind power projects as "Class 5 facility" wind projects, which are expressly subject to the REA Regulation.[110]

105. ***The FIT Application Process for Offshore Wind Proponents***. The initial FIT application period was opened by the OPA from October 1, 2009 to November 30, 2009. The FIT application process was identical for onshore and offshore wind projects.[111]

106. According to the GEGEA, an offshore wind project proponent had to meet four requirements: (i) obtain a FIT contract; (ii) obtain access to Crown land; (iii) obtain a REA; and (iv) obtain a grid-connection approval from the IESO (at the time, prior to the 2015

[107] CER-Powell, ¶ 25.

[108] CER-Powell, ¶ 27.

[109] **C-2040**, Award, ¶ 97; **C-0137**, Ontario Makes It Easier, Faster to Grow Green Energy (September 24, 2009).

[110] **C-2040**, Award, ¶ 103; **C-0103**, Environmental Protection Act, Ontario Regulation 359/09, s. 6, p. 14.

[111] **C-2040**, Award, ¶ 105.

amalgamation with the OPA, the IESO was the entity that monitored the operation of Ontario's power system and ensured its reliability).[112]

107. In terms of the requirement to obtain access to Crown land, in Ontario, all lakebeds (with one exception that is not relevant) are Crown land. Offshore wind proponents had to apply for the "release" of the applicable sections of Crown land for wind testing and project construction and operation. The process of applying for permission to test or build on Crown land was called the Site Release process, and a project proponent obtaining Site Release was referred to as an Applicant of Record (**"AOR"**).[113]

108. In a letter addressed to the Canadian Wind Energy Association dated November 24, 2009, the Assistant Deputy Minister from the MNR, Ms. Rosalyn Lawrence, stated that "[e]xisting Crown land applicants who apply to FIT during the launch period, and who are awarded contracts by the OPA, will be given the highest priority to the Crown land sites applied for. This means that these applications will take precedence over all others for this site, and will receive priority attention from MNR."[114]

VI. 2007-2010: WINDSTREAM INVESTS IN THE PROJECT BASED ON ONTARIO'S COMMITMENT TO OFFSHORE WIND AND THE PROJECT

A. 2007-2008: In Reliance on Ontario's Commitment to Renewable Energy and Offshore Wind, Windstream Begins Investing in the Project

109. Windstream's investors sought to invest in alternate energy-sector opportunities to counterbalance their oil and gas portfolio and decided to focus on wind energy developments because of the economics, proven technology, and the many similarities that existed between exploration/development of oil and gas projects and wind energy projects.[115]

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[112] **C-2040**, Award, ¶ 106.

[113] **C-2040**, Award, ¶ 107; CER-Powell-1, ¶¶ 32-33.

[114] **C-2040**, Award, ¶ 109; **C-158**, Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) (24 November 2009) [emphasis added].

[115] Memorial - *Windstream I*, ¶¶ 145-146; CWS-Mars, ¶¶ 23-24.

110. Windstream was founded in October 2007 in light of Ontario's attractiveness as a destination for wind energy investment.[116] Windstream's investors identified sites that would be potentially attractive options for a wind energy project. They were looking for projects with high wind speeds, strong/available grid access and ability to obtain a significant land position. The potential for development of both onshore and offshore wind projects appeared to be very good. They identified a number of sites that included the waters off Wolfe Island in Lake Ontario.[117]

111. In April 2008, the OPA received a document addressing the future of offshore wind in Ontario from wind energy consultant Helimax Inc. Helimax had identified 64 offshore sites that were considered to have potential for wind project development in the Ontario Great Lakes region and had performed a technical assessment of those sites. The site of the Project was "[o]ne of the nine locations identified [by Helimax] as being most favourable for offshore wind development."[118]

112. Starting in 2008, after the deferral on offshore wind was lifted and the province communicated that it was "open for business" for offshore wind development, Windstream began to invest in resource evaluation, engineering and technical reviews relating to the Project.[119]

113. On February 8, 2008, WWIS submitted to the MNR Crown land applications for AOR status with respect to portions of the lake bottom required to construct a 300 MW offshore wind project in the Wolfe Island Shoals area.[120] At the same time, in order to ensure it could move

[116] CWS-Mars, ¶¶ 27-34.

[117] CWS-Mars, ¶ 38.

[118] **C-2040**, Award, ¶ 119; **C-0072**, Report (Helimax), Analysis of Future Offshore Wind Farm Development (April 30, 2008), pp. 29-30.

[119] **C-2040**, Award, ¶ 117.

[120] **C-2040**, Award, ¶ 118. At the time, WWIS was operating under its predecessor name Ontario Clean Power Foymount Inc. CWS-Baines ¶ 38; CWS-Mars ¶¶ 42-43; **C-0129**, Chart (WEI), Land Status (July 21, 2009); **C-0068**, Windpower Application for Crown Land, OCP Foymount Inc. (February 19, 2008); **C-0069**, Windpower Application for Crown Land, OCP Foymount Inc. (February 19, 2008); **C-0067**, Windpower Application for Crown Land, OCP South River Inc. (February 19, 2008); **C-0074**, Letter from Keyes, Jennifer (MNR) to Baines, Ian (OCP) (May 12, 2008); **C-0082**, Letter from Keyes, Jennifer (MNR) to Baines, Ian (OCP) (July 2, 2008); **C-0202**, Letter from Hayward, Neil (MNR) to Baines, Ian (WWIS) (April 7, 2010); **C-0151**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-214 (November 20, 2009); **C-0152**, Application Status/Fact

ahead quickly once access to Crown land was granted, Windstream submitted System Impact Assessment Applications to the IESO and undertook other preparatory work regarding the Project (*e.g.*, carrying out wind modelling, initiating discussions with wind turbine manufacturers, etc.).[121]

B. 2009: WWIS Applies for a FIT Contract

114. On September 24, 2009, the day the FIT Program was launched, the MNR wrote to WWIS and acknowledged its Crown land applications. Minister Cansfield informed WWIS that "in order to maintain priority position within MNR's site release process, [WWIS] must submit an application to the FIT Program within the FIT launch application process."[122]

115. On November 27, 2009, Windstream, through WWIS and other subsidiaries, applied to the OPA for a FIT contract in respect of the Project. The Project was based on a subset of the grid cells for which Windstream had requested AOR status. For the Project's application, Windstream posted with WWIS's application a $3 million letter of credit, as required by the FIT Program rules.[123]

116. From 2009 until spring 2012, Windstream performed work to advance the Project, including wind resource/energy yield testing, the preparation of designs relating to the Project's

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Sheet (MNR), Windpower on Crown Land, Application# WP-2008-215 (November 20, 2009); **C-0153**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-292 (November 20, 2009); **C-0154**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-293 (November 20, 2009); **C-0155**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-294 (November 20, 2009); **C-0156**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-295 (November 20, 2009); **C-0157**, Application Status/Fact Sheet (MNR), Windpower on Crown Land, Application# WP-2008-296 (November 20, 2009).

[121] Award, ¶ 118; CWS-Mars, ¶ 44.

[122] **C-2040**, Award, ¶ 121; **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009).

[123] **C-2040**, Award, ¶ 123; CWS-Mars, ¶ 53; CWS-Baines, ¶ 70; C-0162, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Windstream Wolfe Island Shoals Inc. (WWIS) (November 27, 2009); C-0178, FIT Security Provision Agreement (January 14, 2010). Windstream also applied for ten other FIT contracts for onshore wind facilities.

electrical system, a lake bottom investigation, financial assessments and the organization of specialized consultants.[124]

C. Key Terms of the FIT Contract

117. The FIT Contract required the OPA to purchase all electricity generated by the Project at a rate of $190 per MW/hour, with full escalation for inflation until the project's commercial operation date, and escalation for inflation up to a maximum of 20% in total thereafter, for 20 years starting from the date of the Project's commercial operation.[125]

118. The FIT Contract required that WWIS bring the Project into commercial operation by its MCOD, which was specified to be May 4, 2014. Section 2.5 of the FIT Contract provided:

> 2.5 Milestone Date for Commercial Operation
>
> [WWIS] acknowledges that time is of the essence to the OPA with respect to attaining Commercial Operation of the Contract Facility by the Milestone Date for Commercial Operation set out in Exhibit A [May 4, 2014]. The Parties agree that Commercial Operation shall be achieved in a timely manner and by the Milestone Date for Commercial Operation. [WWIS] acknowledges that even if the Contract Facility has not achieved Commercial Operation by the Milestone Date for Commercial Operation, the Term shall nevertheless expire on the day before the twentieth or fortieth anniversary (as applicable) of the Milestone Date for Commercial Operation, pursuant to Section 8.1.[126]

While the FIT Contract required that the Project be brought to commercial operation by May 4, 2014, it also contemplated that the Project could be brought into commercial operation within 18 months after that date, although that would reduce the term of the Contract.[127]

119. Under the terms of the FIT Contract, Commercial Operation occurred when the following principal conditions were met:

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[124] **C-2040**, Award, ¶ 124; Memorial - *Windstream I*, ¶¶ 302-315.

[125] **C-2040**, Award, ¶ 137; **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010).

[126] **C-2040**, Award, ¶ 100; **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), p. 9.

[127] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), section 9.1(j), p. 28.

a) the Contract Facility has been completed in all material respects;

b) the Connection Point of the Contract Facility is that set out in the FIT Contract Cover page [in this case the Lennox Connection Point]; and

c) the Contract Facility has been constructed, connected, commissioned and synchronized to the IESO-Controlled Grid such that 90% of the contract capacity is available to deliver electricity to the grid.[128]

120. Construction of the Project could not begin until the OPA issued a Notice to Proceed under Section 2.4 of the FIT Contract.[129] The preconditions for issuance of a Notice to Proceed included that:

a) WWIS had received a REA and any other equivalent environmental and site plan approvals necessary for construction to commence;[130] and

b) WWIS submit a financing plan including signed commitment letters from sources of financing representing at least 50% of the expected development costs, stating their agreement in principle to provide the necessary financing. [131]

121. In addition to the $3 million it posted as security when it applied for the FIT Contract (referred to in the FIT Contract as the **"Initial Security"**), WWIS would be required to post an additional $3 million as security upon signing the FIT Contract (the **"Incremental**

[128] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.6(a)(iv), pp. 9-10.

[129] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(b)(i)-(iv), p. 8.

[130] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(b), p. 8.

[131] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(b), p. 8.

NTP Security"). The total would be refunded after the Project achieved its Commercial Operation Date.[132]

122. If it executed the FIT Contract, WWIS would be bound to achieve the MCOD of May 4, 2014. If it failed to do so, as of 18 months after the MCOD (*i.e.* November 4, 2015), the OPA would be entitled to terminate the FIT Contract, retain the $3 million Incremental NTP Security, and sue Windstream for damages.[133]

123. Prior to the issuance of a Notice to Proceed, WWIS could only terminate the FIT Contract by forfeiting the $6 million in security it had provided.[134] Although the FIT Contract initially also allowed the OPA to terminate the FIT Contract prior to the issuance of a Notice to Proceed upon refunding the security and compensating WWIS for a portion of its pre-construction development costs, that right was subsequently waived by the OPA.[135]

124. The FIT Contract allowed WWIS to invoke *force majeure* if it was encountering difficulties in meeting its obligations under the Contract, including achieving its MCOD, due to factors outside its control. In the event of *force majeure*, WWIS would be excused and relieved from its obligation to achieve commercial operation by the MCOD for the duration of the *force majeure* status.[136]

125. However, pursuant to Section 10.1 of the Contract, if one or more events of *force majeure* delayed commercial operation for an aggregate of more than 24 months after the original MCOD, both the OPA and WWIS would be entitled to unilaterally terminate the FIT

[132] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 5.1, p. 19.

[133] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 9.2(d)(ii), p. 29.

[134] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(a)(ii), p. 8.

[135] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 2.4(a), pp. 7-8; **C-0549**, Waiver Agreement OPA and WWIS re Pre-NTP Termination Right (August 29, 2011); **C-0575**, Email from Baines, Ian (WEI) to Vellone, John (BLG) et al (December 19, 2011).

[136] **C-2040**, Award, ¶ 102.

Contract.[137] Similarly, both parties could unilaterally terminate a FIT Contract if one or more events of *force majeure* prevented WWIS from complying with its obligations for more than an aggregate of 36 months in any 60-month period during the term of the FIT Contract.[138]

D. 2010: WWIS Enters the FIT Contract After Receiving Encouragement from Ontario

126. On April 8, 2010, the OPA advised WWIS that it had approved WWIS' FIT application and it would be offered a FIT Contract for the Project.[139] The Project was the only offshore wind project to be awarded a FIT Contract.[140]

127. On May 4, 2010, the OPA offered WWIS a FIT Contract.[141] To accept the Contract, WWIS had to provide a $6 million letter of credit to replace the $3 million letter of credit paid to secure WWIS's application.[142]

128. Pursuant to the FIT Rules, the offer to WWIS was open for a period of ten business days, *i.e.*, until May 18, 2010.[143] However, the OPA granted several extensions to the deadline to sign the contract, with the last one expiring on August 12, 2010.[144] Between May 4, 2010 and August 12, 2010, Windstream met with government representatives on multiple occasions to address specific issues, including the required setback for offshore wind projects.[145]

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[137] **C-2040,** Award, ¶ 102.

[138] **C-2040**, Award, ¶ 102.

[139] **C-2040**, Award, ¶ 125; **C-0205**, Article, Ontario Becoming North American Green Energy Leader (April 8, 2010); **C-0207**, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (April 8, 2010); CWS-Roeper, ¶ 22.

[140] CWS-Roeper, ¶ 22.

[141] **C-2040**, Award, ¶ 126; **C-0246**, Letter from Butler, Joanne (OPA) to Baines, Nancy (WWIS) (May 4, 2010).

[142] **C-2040**, Award, ¶ 126; **C-0692**, Standby Letter of Credit (RBS) (April 14, 2014).

[143] **C-2040**, Award, ¶ 126.

[144] **C-2040**, Award, ¶¶ 126-127.

[145] **C-2040**, Award, ¶¶ 126-136; **C-0791**, MOE Fact Sheet Entitled "Wind Facilities" (September 24, 2009).

129. On June 25, 2010, MOE posted for public consultation its proposed rules for the development of offshore projects, including a proposal that there be a five-kilometer setback or exclusion zone from the shoreline to any offshore wind projects.[146]

130. WWIS determined that the Project could be reconfigured to meet the requirement.[147] WWIS informed the MEI and the MNR that it "believe[d] that [it] could work within the proposed 5 km set-back guidelines"[148] and sent a proposal to the Government suggesting that it "release its applications for parts of the lakebed … that were within five kilometers of Wolfe Island in exchange for other lakebed lands further offshore."[149]

131. On July 5, 2010, Windstream attended a meeting with senior staff from the MNR and the MEI where it asked for clarifications with respect to the timing of receiving AOR status and requested an extension from four to five years of the MCOD specified in the FIT Contract.[150] Mr. Paul Ungerman, the MEI's representative, committed to following up on the issues Windstream had identified regarding the Project.[151]

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[146] **C-2040**, Award, ¶ 131; CWS-Roeper, ¶ 31; **C-0296**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Off-Shore Wind Facilities - An Overview of the Proposed Approach (June 25, 2010); **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010).

[147] **C-0326**, Email from Nowlan, James (MNR) to Boysen, Eric (MNR) (August 3, 2010); **C-0294**, Briefing Document (WEI), Wolfe Island Shoals (Off-Shore Wind Project) Working with a 5km Set-Back (June 24, 2010); **C-0292**, Email from Baines, Ian (WEI) to Baines, Nancy (WEI) (June 23, 2010); **C-0307**, Presentation, Wolfe Island Shoals (WIS) Wind Farm, Impact of Proposed 5 km Setback (July 2010); **C-0297**, Presentation, (WWIS), Wolfe Island Shoals Off-Shore Wind Project, Working with a 5km Set-Back (June 25, 2010); **C-0310**, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010); CWS-Baines ¶ 84; **C-0568**, Map (Ortech), 5km Setback Turbines (December 1, 2011).

[148] **C-2040**, Award, ¶ 133; **C-0302**, Email from Baines, Ian (WEI) to Cain, Ken (MNR) (June 26, 2010).

[149] **C-2040**, Award, ¶ 133; CWS-Roeper, ¶ 36; **C-0330**, Email from Baines, Ian (WEI) to Boysen, Eric (MNR) (August 5, 2010); **C-0331**, Spreadsheet (WEI), 5km Setback Required (July 22, 2010); C-0332, Map (Ortech), Wolfe Island Shoals Wind Farm (July 21, 2010).

[150] **C-2040**, Award, ¶ 134; CWS-Baines, ¶ 86; CWS-Roeper-1, ¶ 35; CWS-Benedetti, ¶¶ 18-19; **C-0308** Memorandum from Ortech Power to WEI (July 6, 2010).

[151] **C-2040**, Award, ¶ 134; **C-0308**, Memorandum from ORTECH Power to WEI (July 6, 2010); CWS-Benedetti, ¶¶ 18-21; C-0309, Email from Benedetti, Chris (Sussex Strategy) to Baines, Ian (WEI) et al. (July 6, 2010); CWS-Baines, ¶ 86.

132. On July 7, 2010, a further meeting with Mr. Ungerman was held. Windstream was told that "MEI representatives [would] speak to OPA representatives about extending the commercial operation date under the FIT Contract, and … [would] support Windstream in its discussions with the MNR on the process and methodology for the 'land swap.'" [152]

133. On August 5, 2010, WWIS sent to MNR a proposed layout and description of the grid cells required for the Project to be built outside the five-kilometer exclusion zone.[153]

134. On August 9, 2010, with the approval of the MEI and the Premier's Office, the MNR sent Windstream a letter confirming its willingness to discuss a reconfiguration of the Project site after the conclusion of the five-kilometer setback policy proposal and promising to move "as quickly as possible through the remainder of the application review process in order that [WWIS] may obtain Applicant of Record status in a timely manner."[154]

135. Three days later, on August 12, 2010, the OPA confirmed to Windstream that it would issue a revised FIT Contract with a special term that extended the MCOD by a year from the standard offer, *i.e.*, from four to five years from the contract date.[155]

136. On August 18, 2010, the OPA provided WWIS with a revised contract and granted WWIS three additional business days to sign the contract.[156]

137. On August 20, 2010, WWIS executed the FIT Contract and substituted the $3 million letter of credit deposited when it applied for the FIT Contract with a letter of credit in the amount of $6 million.[157]

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[152] **C-2040**, Award, ¶ 134; CWS-Baines, ¶ 87; CWS-Mars, ¶ 69; CWS-Benedetti, ¶¶ 23-24; **C-0312**, Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) (July 7, 2010).

[153] **C-2040**, Award, ¶ 135; CWS-Roeper, ¶ 36; CWS-I. Baines, ¶ 90; **C-0330**, Email from Baines, Ian (WEI) to Boysen, Eric (MNR) (August 5, 2010).

[154] **C-2040**, Award, ¶ 135; **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

[155] **C-2040**, Award, ¶ 136; **C-0343**, Email from Cecchini, Perry (OPA) to Chamberlain, Adam (BLG) et al. (August 12, 2010).

[156] **C-2040**, Award, ¶ 136; **C-0349**, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (August 18, 2010).

138. Regardless of the extensions of the deadline to sign the contract, its date remained the date of the original offer, May 4, 2010. Accordingly, the FIT Contract required WWIS to bring the Project into commercial operation by its MCOD of May 4, 2015.[158]

VII. 2010: WWIS IS FORCED TO DECLARE *FORCE MAJEURE* DUE TO DELAYS CAUSED BY ONTARIO

139. In reliance on the rights and obligations created by the FIT Contract, WWIS carried out extensive work to bring the Project into commercial operation in accordance with the requirements of the FIT Contract. This work included:[159]

(a) conducting engineering, economic and environmental analyses and feasibility studies;

(b) acquiring wind data from the adjacent onshore wind facility on Wolfe Island;

(c) installing a meteorological mast tower and SODAR unit to measure the wind resource near the project site;

(d) conducting detailed wind resource/energy yield analyses;

(e) signing a Turbine Supply Agreement with turbine manufacturer Siemens;

(f) seeking and obtaining from the IESO conditional approval to connect the Facility to Ontario's electricity grid;

(g) taking steps to secure the relevant rights to build the Project on the lakebed, which is located on Crown land;

(h) taking available steps to secure the relevant permitting for the Project.

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[157] **C-2040**, Award, ¶ 137; CWS-Mars, ¶ 73; **C-0247**, Resolution of the Directors (WWIS), Authorization of Feed-in Tariff Contract (May 4, 2010).

[158] **C-2040**, Award, ¶ 137; **C-0245**, OPA Fit Contract, Schedule 1, General Terms and Conditions, s. 2.5 (May 4, 2010).

[159] **C-2040**, Award, ¶ 123; Memorial - *Windstream I*, ¶¶ 302-315.

140. Beginning in September 2010, one month after WWIS had executed the FIT Contract and been assured that its application for AOR status would be cleared through the application process as quickly as possible, Windstream and its representatives began meeting with representatives of the relevant ministries to discuss gaining access to Crown land. Obtaining AOR status was necessary in order for Windstream to move forward with wind testing and detailed technical studies at the site.

141. However, as found by the *Windstream I* tribunal, "following the signing of the FIT Contract on 20 August 2010, the position of the Government of Ontario grew gradually more ambiguous towards the development of offshore wind."[160] The Government's position towards offshore wind started changing in the fall of 2010, after it received public comments to its June 25, 2010 proposal for rules relating to offshore wind projects (as described at paragraph 129 above; namely, the setback proposal).[161] As Windstream took a number of steps to move the Project forward in 2010, it began to meet with obstacles at the relevant ministries:

a) On September 9, 2010, WWIS's project manager, Ortech, met with MNR officials "to discuss the technical studies that Ortech needed to carry out while MNR and MOE were considering the issues raised" in the proposed offshore rules posted on June 25, 2010.[162] At this meeting, Ortech was informed that setting up an offshore wind measurement mast required a temporary land use permit, "which could not be granted until WWIS was given Applicant of Record status under the site release process."[163] Ortech was also told that the site release process and

[160] **C-2040**, Award, ¶ 366.

[161] **C-2040**, Award, ¶ 366.

[162] **C-2040**, Award ¶ 139; CWS-Baines, ¶ 95; **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010); CWS-Roeper-1, ¶ 42.

[163] **C-2040**, Award, ¶ 139; CWS-Baines, ¶ 95; **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010); CWS-Roeper-1, ¶ 42.

approval of applications for AOR status were on hold pending the determination of the appropriate setbacks.[164]

b) On September 30, 2010, Mr. Baines wrote to the MNR and requested that WWIS "be allowed to erect a temporary wind monitoring mast to carry out wind speed testing."[165] Wind testing was an important step before Windstream's application for AOR status could proceed.

c) On October 7, 2010, WWIS formally applied to the MNR for the "swap" of the Crown land grid cells and reiterated its request to obtain AOR status.[166]

d) On November 22, 2010, the MNR informed WWIS that the Government's offshore wind power policy review was "still outstanding" and that it was "not yet able to consider advancing the [Project] through the Applicant of Record process, nor implement the potential exchange of grid cells."[167]

142. Despite the assurances WWIS had received, as set out above, that its application would be processed as soon as possible, by December 2010, MNR had still not processed WWIS' application for AOR status nor had MOE finalized the setback requirement that would apply to offshore wind projects.

143. On December 10, 2010, WWIS claimed a *force majeure* event under its FIT Contract, effective November 22, 2010, "on account of the lack of regulatory assistance from MNR and MOE."[168] In its *force majeure* notice, WWIS indicated that "it was unable to advance further work towards the milestone dates in the FIT Contract without being able to carry out wind

[164] **C-0357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010); CWS-Roeper-1, ¶ 43.

[165] **C-2040**, Award, ¶ 139; **C-0366**, Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) (September 30, 2010).

[166] **C-2040**, Award, ¶ 139; **C-0371**, Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) (October 7, 2010).

[167] **C-2040**, Award, ¶ 141; **C-0388**, Email from Cain, KEN (MNR) to Roeper, Uwe (Ortech) (November 22, 2010).

[168] **C-2040**, Award, ¶ 142; **C-0408**, Form of Notice of Force Majeure, OPA and WWIS (December 10, 2010) FIT Contract, OPA and WWIS (December 10, 2010), Exhibit "A", ¶ 3.

testing, further defining of the project area, and related studies, all of which required that AOR status be granted."[169]

144. The *force majeure* event meant that the MCOD would be extended for its duration, but either Party could still terminate the FIT Contract if the Project did not reach commercial operation within two years of the original MCOD, *i.e.*, by May 4, 2017.[170] Section 10.1(g) of the FIT Contract provides:

> 10.1(g). If, by reason of one or more events of Force Majeure, the Commercial Operation Date is delayed by such event(s) of Force Majeure for an aggregate of more than 24 months after the original Milestone Date for Commercial Operation (prior to any extension pursuant to Section 10.1(f)), then notwithstanding anything in this Agreement to the contrary, either Party may terminate this Agreement upon notice to the other Party and without any costs or payments of any kind to either Party, and all Completion and Performance Security shall be returned or refunded (as applicable) to the Supplier forthwith.[171]

145. WWIS had to maintain the $6 million security deposit posted at the signature of the FIT Contract during the *force majeure* period.[172]

146. WWIS's rights were not frozen in time as in typical cases of *force majeure*. WWIS's obligations and rights under the FIT Contract continued to depend on the MNR and the MOE engaging in the approval process in accordance with the Ontario government's representations and commitments.

147. The OPA accepted the *force majeure* notice on September 9, 2011, effective November 22, 2010.[173]

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[169] **C-2040**, Award, ¶ 142; **C-0408**, Form of Notice of Force Majeure, OPA and WWIS (December 10, 2010) FIT Contract, OPA and WWIS (December 10, 2010), Exhibit "A", ¶ 3.

[170] **C-2040,** Award, ¶ 142.

[171] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), ¶ 32.

[172] **C-2040**, Award, ¶ 142.

[173] **C-2040**, Award, ¶ 142.

VIII. FEBRUARY 2011: ONTARIO IMPOSES A MORATORIUM ON OFFSHORE WIND DEVELOPMENT DUE, IN PART, TO POLITICAL MOTIVATIONS

148. On February 11, 2011, the Government of Ontario abruptly reversed its policy commitment to offshore wind by imposing a moratorium on its development. Ontario published a press release announcing that it "is not proceeding with any development of offshore wind projects while further scientific research is conducted."[174] It stated 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.
>
> […]
>
> **This is a policy decision of the government of Ontario. The Feed-in Tariff program managed by the OPA will adhere to its direction**. Offshore windpower will not proceed until further science, regulatory work and co-ordination with U.S. partners is complete.[175]

149. The MOE and the MNR posted decision notices to the same effect. These decision notices stated that for the duration of the moratorium, MOE would not accept REA applications for any offshore wind projects and MNR would not process any Crown land applications for offshore wind development.[176]

150. During *Windstream I*, Canada argued that the decision to impose the moratorium was made by the Minister of the Environment due to concerns about the impacts on drinking water. This was rejected by the *Windstream I* tribunal.[177] The tribunal found that the Government's "evolving position" was driven in part by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind

[174] **C-2040**, Award, ¶ 147; **C-0485**, Article, Ontario Rules Out Offshore Wind Projects (February 11, 2011).

[175] **C-0485**, Article, Ontario Rules Out Offshore Wind Projects (February 11, 2011) [**emphasis added**].

[176] **C-2040**, Award, ¶¶ 148, 372; **C-0725**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry Number: 011-0089) (February 2, 2011); **C-0482**, Decision on Policy (MNR), Offshore Wind Power: Consideration of Additional Areas to be Removed from Future Development (February 11, 2011).

[177] **C-2040**, Award, ¶ 369-370.

projects. However, the tribunal further found that "the decision to impose the moratorium was not only driven by the lack of science. The impact of offshore wind on electricity costs in Ontario, as well as the upcoming provincial elections in November 2011, also appear to have influenced the decision, and the latter in particular in light of the public opposition to offshore wind that had emerged during the relevant period in many parts of rural Ontario."[178]

151. The *Windstream I* tribunal outlined the chronology of the events that led to the moratorium to support that conclusion:

a) On January 6, 2011, the representatives of MNR, MEI, MOE and the Premier's Office held an energy issues meeting. At that meeting, MEI made a presentation stating that, while there was "significant potential for offshore wind development in the Great Lakes," extensive offshore wind development could have a "substantial impact" on electricity costs for Ontario consumers given the prices paid for output, and that the responses to the June 25, 2010 posting had indicated that there were significant concerns relating to the development of offshore wind power.[179]

b) MEI's presentation outlined [redacted] for proceeding with the development of offshore wind: [redacted] MEI [redacted] and identified the next steps to be taken to pursue this option.[180]

[178] **C-2040**, Award, ¶ 376-377.

[179] **C-2040**, Award, ¶ 368; **C-0430**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 6, 2011).

[180] **C-2040**, Award, ¶ 368; **C-0430**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 6, 2011).

c) The next day, January 7, 2011, the Minister of the Environment received a briefing memorandum from his senior policy adviser which updated the Minister on the energy issues meeting that had taken place earlier during the day. The memorandum noted that the "[d]irection from that meeting was to proceed with [redacted]."[181]

d) On January 24, 2011, an inter-ministerial meeting attended by the Ministers of Energy, the Environment and Natural Resources took place where the [redacted] were further discussed. The *Windstream I* tribunal found that a decision was taken at that meeting to impose a moratorium on all offshore wind development.[182]

152. As part of the disclosure process, Windstream learned that, on January 11, 2011, upon reviewing a draft communications plan regarding the approach to offshore wind projects, Premier McGuinty's Chief of Staff, Chris Morley, wrote to others in the Premier's office and MEI staff and directed that the approach must change and that development of offshore wind projects (except Windstream's Project) must instead be "killed." He wrote:

> Sorry, folks. This isn't good enough. <u>The purpose of this release is to kill all the projects except the Kingston one</u> [Windstream's Project], not suck and blow. <u>Please turn this around so it kills the projects, not sounds like we're in favour of offshore wind</u>.[183]

153. In response to this direction, the Minister of Energy's Director of Communications advised MEI political staff that "[i]f that's what he wants, then I think we have to change the policy."[184]This, as it turns out, is exactly what Ontario decided to do.

[181] **C-2040**, Award, ¶ 369; **C-0900**, Memorandum (Confidential Advice to the Minister) from Lucas, Brenda (ENE) to Minister Wilkinson (ENE) (January 6, 2011).

[182] **C-2040**, Award, ¶ 369.

[183] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) et al (January 11, 2011) [<u>emphasis added</u>].

[184] **C-0912**, Email from MacLennan, Craig (MEI) to Johnston, Alicia (MEI) (January 11, 2011).

IX. ONTARIO PROMISES TO "FREEZE" WWIS FROM THE IMPACTS OF THE MORATORIUM

154. On February 11, 2011, just before issuing the press release announcing the moratorium decision, officials from MEI, MOE, MNR and the OPA held a conference call with Windstream to inform Windstream of the decision to impose the moratorium.[185]

155. As found by the *Windstream I* tribunal, the transcript and audio recording of the call show that the decision came as a surprise to Windstream, whose representatives indicated that they had been expecting an announcement on the setbacks.[186]

156. On that call, the Government officials "confirmed that the Project was not terminated and that it could go forward once the science studies had been completed."[187] When Mr. Baines stated "what I am hearing very clearly is the project has been terminated by the government," the representative from the OPA stated in unequivocal terms, "[n]o you are not hearing that."[188]

157. The MEI's Policy Director, Andrew Mitchell, acknowledged that the Project was unique in that it had a FIT contract, and, because of that, the MEI had asked the OPA to negotiate new arrangements with Windstream respecting *force majeure* and security deposits. He stated that MEI would attempt to create a solution that would be acceptable to Windstream.[189]

158. As reflected in the transcript of that call, MEI officials (Chief of Staff and Policy Director) made the following promises to Windstream:

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[185] **C-2040**, Award ¶ 146; Award, ¶ 146; **C-0483**, Audio Recording of Call (February 11, 2011); **C-0484**, Transcript of Audio Recording of Telephone Conference Call (February 11, 2011).

[186] **C-2040**, Award, ¶ 371; **C-0484**, Transcript of Audio Recording of Telephone Conference Call (February 11, 2011), pp. 5-6. (Mr. Baines states that "[t]his comes as I'll be honest as a terrible shock to us and to our investor, I invited David Mars from New York to be on the line because we had every reason to believe that we would be hearing that the set-back announcement would be resolved and we could move forward and what I'm hearing is the exact opposite so it is quite a shock…").

[187] **C-2040**, Award, ¶ 371 [emphasis added].

[188] **C-2040**, Award, ¶ 371; **C-0484**, Transcript of Audio Recording of Telephone Conference Call (February 11, 2011), p. 6.

[189] **C-2040**, Award, ¶ 146; **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, p. 3; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

a) the Project would be "**deferred**"; "**frozen**"; or put "**on hold** until such time as the province can establish a regulation under the Ministry of the Environment under REA pertaining to offshore wind;"

b) the OPA would negotiate with Windstream to "**ensure** that the requirements embedded in the FIT contract **reflect this situation** and that there's no penalties or anything that would be incurred by Windstream;"

c) MEI had "asked that the OPA" negotiate with Windstream a number of aspects of the FIT Contract, "including the force majeure provisions, the two-year force majeure termination clause associated with those provisions and the security deposited;" and

d) MEI and the OPA would "attempt to create a solution that [would] be acceptable" to Windstream.[190]

159. When asked when the moratorium would be lifted, the Senior Policy Advisor to the Minister of the Environment could not specify a timeframe. She could say only that it would be "years."[191] It was therefore important to Windstream that any negotiated solution reflect that the moratorium did not have a defined term.[192]

160. The moratorium remains in effect to this day.

161. The Government's assurances that the Project would still proceed were consistent with public statements made by the Minister of Energy, who was quoted in the Toronto Star newspaper as saying that WWIS' contract would be extended so that it would not be adversely affected by the moratorium:

> And only one offshore contract in Kingston with Windstream has been accepted out of the almost 1,300 approved contracts, Duguid said.

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[190] **C-2040**, Award, ¶ 146; **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, p. 3; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011 [**emphasis added**].

[191] **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, p. 8; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

[192] CWS-Mars-2, ¶ 46.

"That one project contract won't be cancelled, it'll be extended until the science is done," Duguid said.[193]

X. 2011-2012: ONTARIO FAILS TO FULFILL THE PROMISE TO "FREEZE" WWIS FROM THE IMPACTS OF THE MORATORIUM

162. At the time the moratorium was announced, WWIS's FIT Contract was under *force majeure* and the OPA could terminate the FIT Contract if WWIS failed to bring the Project into commercial operation by May 4, 2017. This meant that while Ontario took the time to conduct the scientific studies that were the stated rationale for the moratorium, WWIS's ultimate deadline to bring the Project into commercial operation by May 4, 2017 continued to apply.

163. Contrary to the commitments made on the February 11, 2011 phone call, MEI did not ensure that the OPA amended the FIT Contract to insulate Windstream from the effects of the moratorium. As set out below, the OPA refused to amend the FIT Contract to ensure that it would remain under *force majeure*, and not subject to termination by the OPA, while the moratorium remained in effect.

164. ***Windstream's First Proposal***. [redacted][195]

[193] **C-0498**, Article, Talaga, Tanya (Toronto Star), Ontario Scraps Offshore Wind Power Plant (February 12, 2011) [emphasis added].

[194] **C-2040**, Award, ¶ 150; **R-0223**, Letter from Adam Chamberlain, (BLG) to Perry Cecchini and Michael Killeavy, (OPA) (February 23, 2011), p. 3.

[195] Although the letters were marked without prejudice, Canada filed them in the first arbitration and therefore they are available to this tribunal. Award, ¶ 150; **R-0223**, Letter from Adam Chamberlain, (BLG) to Perry Cecchini and Michael Killeavy, (OPA) (February 23, 2011), p. 3.

165. On March 18, 2011, the OPA rejected Windstream's requests [redacted][196]

166. The OPA repeated its position in a further letter dated June 24, 2011, in response to letters from Windstream expressing concerns about the OPA's approach to the negotiations.[197]

167. [redacted] Thus, the offer was inconsistent with the commitments Windstream had received from MEI that the FIT Contract would be frozen for the duration of the moratorium and that the Project would be permitted to continue after the moratorium was lifted.

168. ***Windstream's Second Proposal***. On July 5, 2011, Windstream provided a detailed second proposal in which it stated that it [redacted][198] As Windstream's counsel explained in his response to the OPA's counsel:

[196] **C-2040**, Award, ¶ 151; **R-0226**, Letter from Michael Killeavy, (OPA) to Adam Chamberlain (BLG) (March 18, 2011).

[197] **C-2040,** Award, ¶ 153; **R-0247**, Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) (June 7, 2011); **R-0248**, Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) June 13, 2011); **R-0250**, Letter from Cecchini, Perry (OPA) to Baines, Ian (WEI) (June 24, 2011).

[198] **C-2040**, Award, ¶ 154; **R-0254**, Letter from Chamberlain, Alan (BLG) to Clark, Ron (Aird & Berlis) (July 5, 2011), pp. 2-4.

[redacted][199]

169. The OPA responded to Windstream's second proposal on October 12, 2011 – about 100 days after the second proposal was sent.[200] It did not respond to any of the detailed comments made in Windstream's second proposal. [redacted] The OPA's response to Windstream's July 5, 2011 letter, in its entirety, was:

[199] **R-0254**, Letter from Chamberlain, Alan (BLG) to Clark, Ron (Aird & Berlis) (July 5, 2011), pp. 3-4 [**emphasis added**].

[200] **R-0264**, Email from Lalla, Geetu (Aird & Berlis) to Chamberlain, Adam (BLG) (October 12, 2011).

> The OPA has reviewed the content of the July 5 letter and has instructed me to communicate to you that the views of the OPA as set out in its letter of March 18 and June 14 remain unchanged.
>
> Should you have any questions or concerns with respect to the foregoing, please do not hesitate to contact me.[201]

170. In the months that followed, Windstream renewed its efforts to have the Project proceed as a pilot project and its requests for a reconfiguration of its Crown land application and for approval to proceed with testing activities on the Project site. These efforts did not produce any results.[202]

171. On December 20, 2013, Windstream requested that WWIS's $6 million letter of credit be refunded or returned while the moratorium remained in effect.[203]

172. On January 10, 2014, the OPA refused to return WWIS's letter of credit or waive its right to unilaterally terminate WWIS's FIT Contract if the Project had not achieved commercial operation by May 4, 2017.[204]

XI. 2013-2016: WINDSTREAM COMMENCES A NAFTA PROCEEDING AGAINST CANADA AND THE TRIBUNAL FINDS THAT ONTARIO TREATED WINDSTREAM'S INVESTMENTS UNFAIRLY AND INEQUITABLY

173. On January 28, 2013, Windstream brought an arbitration claim against the Government of Canada pursuant to Chapter 11 of the NAFTA. Windstream alleged that by imposing the moratorium and failing to insulate WWIS from its effects, as promised, Canada breached its

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[201] **C-2040**, Award, ¶ 155; **R-0264**, Email from Lalla, Geetu (Aird & Berlis) to Chamberlain, Adam (BLG) (October 12, 2011); **R-0264**, Letter from Clark, Ron (Aird & Berlis) to Chamberlain, Adam (BLG) (October 12, 2011).

[202] **C-2040,** Award, ¶ 158.

[203] **C-0680**, Letter from Killeavy, Michael (OPA) to Chamberlain, Adam (BLG) (January 10, 2014).

[204] **C-2040**, Award, ¶ 160; **C-0680**, Letter from Killeavy, Michael (OPA) to Chamberlain, Adam (BLG) (January 10, 2014).

obligations under the NAFTA, including Articles 1110 (expropriation), 1105 (fair and equitable treatment), 1102 (national treatment) and 1103 (most-favored-nation treatment).[205]

174. The members of the Arbitral Tribunal, Dr. Veijo Heiskanen (President), Mr. Doak R. Bishop, and Dr. Bernando Cremades, were appointed in 2013.[206]

175. In the arbitration, it was Windstream's position that WWIS, the Project, and the FIT Contract were substantially worthless. This is because, in its submission, there was no longer any hope that the Project could achieve commercial operation by May 4, 2017, *i.e.*, the Project could not achieve MCOD before triggering the OPA's right to terminate the FIT Contract. As a result, the Project was no longer financeable and consequently had become substantially worthless.[207]

176. Canada took the position that the FIT Contract was "frozen" or "on hold" and that the Project would be permitted to continue when the moratorium was lifted.[208] It made numerous representations in the arbitration to that effect. For example, in its Counter-Memorial, Canada made the following statement:

> 486. The Claimant asserts that the Tribunal should ignore these facts and conclude that its Project has been cancelled. In particular, it argues that the deferral [i.e. the moratorium] has caused such "drastic" delays in the Project that it has "crystallize[d] into an effect cancellation of the Project – a *de facto* cancellation, if not a formal one." This assertion misrepresents the current status of the Project. […].
>
> 487. **The Claimant has been repeatedly informed that the project is on hold until the regulatory rules and requirements for offshore wind projects are developed.** This is in contrast to all other offshore wind projects. Rather than being "essentially quashed or cancelled" like one other FIT application and a number of other Crown land applications, **the Claimant's Project was "deferred," "frozen," or "kept alive."** […]. **The fact is that the Claimant's**

[205] Notice of Arbitration, ¶ 36.

[206] **C-2040**, Award, p. 1.

[207] **C-2040**, Award, ¶ 288. See Reply - *Windstream I*, ¶ 407, 473.

[208] **C-2040**, Award, ¶¶ 216-218. See Counter-Memorial - *Windstream I*, ¶¶ 21, 260, 265, 266, 268, 353, 486-487.

Project was merely "frozen" and <u>can continue to be developed</u> once the necessary science, rules and policies for offshore wind are in place.[209]

177. The arbitration was heard over two weeks in February 2016. In September 2016, the arbitral tribunal rendered the Award finding the Government of Canada liable to Windstream for breaching its obligation to afford fair and equitable treatment to Windstream's investments. However, the tribunal declined to find that there was an expropriation because the FIT Contract "[was] still formally in force" and could be "re-activate[d]" and "renegotiate[d]" to adjust its terms to the moratorium. Because of this, the tribunal declined to award Windstream damages for the full value of its investments. [210]

178. Specifically, the *Windstream I* tribunal made the following key findings on liability and damages:

179. ***Breach of FET***. Windstream argued that Canada breached Article 1105 by imposing the moratorium on the development of offshore wind and by failing to respect its promise to ensure that the moratorium would not penalize Windstream.[211] The tribunal found that the imposition of the moratorium itself was not a breach of Article 1105 but the failure to insulate Windstream from its effects was a breach.

180. The tribunal found that "the Government's conduct vis-à-vis Windstream during the period following the imposition of the moratorium was unfair and inequitable within the meaning of Article 1105(1) of the NAFTA."[212] The tribunal found that Ontario did "relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium," as it had not conducted the research studies,[213]

[209] Counter-Memorial - *Windstream I*, ¶¶ 21, 260, 265, 266, 268, 353, 486-487.

[210] **C-2040**, Award, ¶ 290.

[211] **C-2040**, Award, ¶ 363.

[212] **C-2040**, Award, ¶ 379.

[213] **C-2040**, Award, ¶ 378.

and "[m]ost importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium":[214]

> While the regulatory framework continued to envisage the development of offshore wind, additional and more detailed regulations governing offshore wind specifically were never developed. The Government let the OPA conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the Government and not by the OPA, **and without providing any direction to the OPA for the negotiations although it had the authority to do so under the GEGEA** (a power it had exercised when it introduced the FIT Program). As a result, as the negotiations between the OPA and Windstream failed to produce results, by May 2012 the Project had reached a point at which it was no longer financeable. Nonetheless, **the Government failed to clarify the situation**, either by promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract, or by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy and terminating Windstream's FIT Contract in accordance with the applicable law.[215]

181. As a result, the "failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and development of the Project created by the moratorium, constitutes a breach of Article 1105."[216]

182. The tribunal expressly rejected Canada's argument that the resulting regulatory and contractual limbo "was a result of [Windstream's] own failure to negotiate a reasonable settlement with the OPA." Rather, "it was the Government of Ontario that imposed the moratorium, not the OPA."[217]

183. The tribunal determined that it was "unable to find that the Government of Ontario's decision to impose a moratorium on offshore wind development, or the process that led to it,

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[214] **C-2040**, Award, ¶¶ 378-379.

[215] **C-2040**, Award, ¶ 379 [**emphasis added**].

[216] **C-2040**, Award, ¶ 380.

[217] **C-2040**, Award, ¶ 380.

were in themselves wrongful."[218] While it noted that Ontario's conduct during the period leading up to the moratorium "could have been more transparent" and that "Windstream was kept in the dark as to the evolving policy position of the Government while Windstream continued to invest in the Project", the tribunal found that the Government's "evolving position" was at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects.[219]

184. The tribunal also found that the decision to impose the moratorium was not only driven by the lack of science but also the impact of offshore wind on electricity costs in Ontario and the upcoming provincial elections in November 2011, particularly in light of the public opposition to offshore wind that had emerged.[220] However, the tribunal was unable to find that "these concerns were the predominant reason for the moratorium" or that the decision to impose the moratorium amounted to a breach of Article 1105 "just because the Government failed to communicate these other concerns when imposing the moratorium."[221]

185. ***No Expropriation***. The tribunal found that there had been no expropriation under Article 1110 as Windstream "has not been substantially deprived of its investment."[222] The tribunal came to that conclusion based on two reasons.

186. First, the tribunal found that Windstream's "FIT Contract [was] still formally in force and ha[d] not been unilaterally terminated by the Government of Ontario." Consequently, while the Project could no longer be completed by May 4, 2017, "it continue[d] to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium." [emphasis added.][223]

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[218] **C-2040**, Award, ¶ 376.

[219] **C-2040**, Award, ¶ 376.

[220] **C-2040**, Award, ¶ 377.

[221] **C-2040**, Award, ¶ 377.

[222] **C-2040**, Award, ¶ 291.

[223] **C-2040**, Award, ¶ 290 [emphasis added].

187. Second, Windstream's $6 million security deposit "[was] still in place and ha[d] not been taken or rendered otherwise worthless as a result of any action taken by the Government of Ontario." The tribunal found that the value of this asset was still available to Windstream and had not been taken.[224]

188. ***Damages***. Having found a breach of Article 1105 of the NAFTA, the tribunal then had to determine what relief Windstream was entitled to as a result of that breach. The tribunal recognized that the purpose of the compensation to be awarded was to make Windstream "whole," "keeping in mind the Tribunal's determination that [Windstream] has not lost the entire value of its investment as the FIT Contract is still formally in force (albeit under an extended force majeure) and, accordingly, as the CAD 6 million letter of credit is still available to [Windstream] and has not been lost or taken by the Government."[225]

189. As a result, the tribunal found that the compensation awarded must "reflect [Windstream's] loss (damage to the investment) rather than the full value of the investment. This latter would be relevant only if [Windstream] has lost the entirety of its investment as a result of an expropriation, which is not the case here."[226]

190. In determining the quantum for Windstream's loss, *i.e.*, the damage to the investment rather than the full value of the investment, the tribunal held that it had to first determine the appropriate method of valuation, taking into account the development stage of the Project.[227] The tribunal found that while Windstream had a FIT Contract and a grid connection, it did not yet have site control or complete the permitting process and so was considered an early-stage project. Accordingly, the DCF method was not an appropriate method of valuation.[228] Rather, the

[224] **C-2040**, Award, ¶ 290.

[225] **C-2040**, Award, ¶ 473 [emphasis added].

[226] **C-2040**, Award, ¶ 473 [emphasis added].

[227] **C-2040**, Award, ¶ 474.

[228] **C-2040**, Award, ¶ 475.

tribunal determined that the damage suffered was best determined on the basis of the comparable transactions methodology.[229]

191. Applying this methodology, based on the value of other early stage offshore wind projects at the time identified by Canada's experts, the tribunal determined that the value of the Project at the date of the Award would have been between EUR 18 million and EUR 24 million.[230] The tribunal found that EUR 21 million, the mid-point of that range, was an appropriate valuation of the Project as of the date of the Award (27 September 2016).[231]

192. However, the tribunal further found that Windstream "is not entitled to compensation for the full value of its investment: [Windstream] has not lost the letter of credit, which is still in place, and the FIT Contract is still in force and could, in theory, be still revived and renegotiated if the Parties so agreed." The tribunal adjusted the valuation downwards by CAD $6 million to reflect the value of the letter of credit.[232] The tribunal did not make any further adjustments to reflect the fact that the FIT Contract was still formally in place because, factually, the parties had not renegotiated its terms. Therefore, "as of the date of this award, the FIT Contract [could not] be considered to have any value."[233]

193. The tribunal expressly noted that "[it was] another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option [was] still open to them."[234]

194. As a result, the tribunal determined that the damage to Windstream's investment, and the amount of compensation it was entitled to, was CAD $25,182,900 (EUR 21 million valuation less the CAD $6 million letter of credit).

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[229] **C-2040**, Award, ¶ 476.

[230] **C-2040**, Award, ¶ 479-480.

[231] **C-2040**, Award, ¶ 482, 484.

[232] **C-2040**, Award, ¶ 483 [emphasis added].

[233] **C-2040**, Award, ¶ 483.

[234] **C-2040**, Award, ¶ 483.

195. The findings of the *Windstream I* tribunal are final and binding, and are *res judicata* in this proceeding. Windstream is not seeking to re-litigate any of the issues that were determined by that tribunal, nor is it open to Canada to do so.

XII. FOLLOWING THE AWARD, ONTARIO ANNOUNCES THAT OFFSHORE WIND RESEARCH NEEDED TO LIFT THE MORATORIUM IS BEING FINALIZED AND THE PROJECT MAY STILL PROCEED

196. As set out at paragraphs 148 to 150 above, Ontario's justification for the moratorium was the need to conduct further scientific research.[235] Ontario's February 11, 2011 press release announcing the moratorium stated that it "[was] not proceeding with any development of offshore wind projects while further scientific research is conducted."[236]

197. During the *Windstream I* arbitration, Canada vehemently argued that the moratorium was not indefinite, that Ontario was following through on its stated intention of undertaking the scientific research, and that therefore the Project was only "on hold."[237] In its submissions, Canada did not characterize the February 11, 2011 decision as a "moratorium" and only referred to it as the "deferral." For example, Canada made the following submissions:

a) Canada argued that there could be no expropriation because the moratorium "is a temporary measure" and "is intended to last only as long as necessary to conduct the scientific research and develop and implement an adequately informed framework for offshore wind projects in Ontario."[238]

b) Canada argued that "[T]he Government of Ontario continue[d] to complete the work required to develop regulatory rules and requirements for offshore wind facilities, demonstrating that the deferral is a temporary measure",

[235] **C-2040,** Award, ¶ 147; **C-0485**, News Release (MOE), Ontario Rules Out Offshore Wind Projects (February 11, 2011).

[236] **C-2040**, Award, ¶ 147; **C-0485**, News Release (MOE), Ontario Rules Out Offshore Wind Projects (February 11, 2011).

[237] Counter-Memorial - *Windstream I*, ¶¶ 277-295, 482-489.

[238] Counter-Memorial - *Windstream I*, ¶¶ 482-483.

> notwithstanding an admission from Canada's counsel that Ontario was not, in fact, proceeding with any research in the near term.[239]

198. The *Windstream I* tribunal found that while the Government of Ontario did conduct some studies, it "on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium."[240] However, Canada's evidence and submissions in the arbitration was clear that the Government of Ontario intended to continue conducting research with an aim of lifting the temporary "deferral", as Canada called it.

199. Following the *Windstream I* Award, the Government of Ontario continued to communicate that message to the public and announced on multiple occasions that the research required to lift the moratorium was being "finalized." Consistent with the *Windstream I* tribunal's findings that the FIT Contract remained in force, Ontario recognized that the Project would still proceed once that happened.

200. On October 17, 2016, during a parliamentary session and debate, the Premier of Ontario, Kathleen Wynne, was asked about the *Windstream I* Award. She responded to this question by confirming that Ontario was "finalizing" the research related to offshore wind development:[241]

> But just on the issue around Windstream and the tribunal decision, I can confirm that Ontario has been advised of the tribunal's decision. […]. Mr. Speaker, we're looking at the decision and we understand that Canada is doing the same in order to determine if there are next steps to be taken. We're taking a cautious and responsible approach to offshore wind to allow for the development of research and coordination. **That's why there's a moratorium on offshore wind development, and the Minister of the Environment is finalizing research on the issue**, including decommission requirements and noise over water. Those are issues that need to be resolved before we go forward.

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[239] Counter-Memorial - *Windstream I*, ¶ 485; **C-2461,** Day 1 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 15, 2016), p. 210 l. 24 – p. 211, l. 2.

[240] **C-2040,** Award, ¶ 378.

[241] CWS-N. Baines, ¶ 21, **C-2471**, Excerpt from the Ontario Legislative Assembly Official Report of Debates (Hansard), 41st Parl, 2nd Sess, No 15 (17 October 2016), Exhibit 78 to the Affidavit of David Mars (WWIS) (June 2, 2017).

> […]
>
> The Leader of the Opposition does not in fact acknowledge that there is a lot more we have to do to reduce greenhouse gas emissions in this province, and that the shutting down of the coal-fired plants was the single largest initiative that has been accomplished and completed in North America.
>
> **We are going to continue to work with the renewable industry** – tens of thousands of jobs have been created – **and we will continue to make sure that we have a clean electricity grid in Ontario**.[242]

201. At the same parliamentary session and debate, the Minister of Energy, Glenn Thibeault, made an almost identical statement in response to a further question about the *Windstream I* Award: "The decision to place a moratorium on offshore wind is one our government still believes is correct, and that's why we're going to continue to take a cautious approach to offshore wind, which includes finalizing research to make sure that we are protective of both human health and the environment."[243]

202. A few days later, on October 26, 2016, at another parliamentary session, Minister Thibeault was again asked about the *Windstream I* Award. In response, he stated: "[w]e still believe that our decision to put the moratorium on offshore wind is a correct one. That's why we're continuing to move forward with that cautious approach to offshore wind, which includes finalizing that research to make sure that we are protective of both human health and the environment. […] [W]e're making sure that we finalize all of that research because we're going to continue to prudently rely on that available scientific research."[244]

203. In early December of 2016, Minister Thibeault continued to publicly announce the Government of Ontario's intention to proceed with the research needed to lift the moratorium. He stated that MOE "[was] reviewing the moratorium on offshore wind power projects, and

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[242] CWS-N. Baines, ¶ 21; **C-2471,** Excerpt from the Ontario Legislative Assembly Official Report of Debates (Hansard), 41st Parl, 2nd Sess, No 15 (17 October 2016), Exhibit 78 to the Affidavit of David Mars (WWIS) (June 2, 2017) [**emphasis added**].

[243] CWS-N. Baines, ¶ 23; **C-2471**, Excerpt from the Ontario Legislative Assembly Official Report of Debates (Hansard), 41st Parl, 2nd Sess, No 15 (17 October 2016), Exhibit 78 to the Affidavit of David Mars (WWIS) (June 2, 2017) [emphasis added].

[244] CWS-N. Baines, ¶ 23; **C-2045,** Legislative Assembly of Ontario – Official Report of Debates (Hansard) Standing Committee on Estimates (26 October 2016), p. E-159 [emphasis added].

[was] studying the decommissioning costs of projects, as well as how the noise could carry over water" and that work would be done "soon."[245]

204. When asked if the Ontario Government could let Windstream's Project be built, Minister Thibeault answered "Yes."[246] As explained by Ms. Baines, Windstream was "very reassured" by that statement by Minister Thibeault. It reflected a shared understanding that following the *Windstream I* Award, the FIT Contract was in force and the Project could be built.[247]

205. In December 2016, MOE publicly released two of its studies related to offshore wind.[248] This continued to signal to Windstream that Ontario was progressing with the offshore wind research.

XIII. WINDSTREAM MAKES EFFORTS TO MOVE THE PROJECT FORWARD

206. In light of the findings by the *Windstream I* tribunal (that the FIT Contract was in force could be renegotiated so that the Project would not be negatively impacted by the moratorium), Windstream expected that the Project would proceed. As explained by Nancy Baines, this expectation was created by both the tribunal's findings and also by the Government of Canada's representations in the arbitration, set out above, that the Project was only "frozen" and "on hold" and could proceed once the moratorium was lifted.[249]

[245] CWS-N. Baines, ¶ 24; **C-2471**, Article, Energy Minister Says all Options Still Being Considered in Offshore Wind Power Case (6 December 2016), Exhibit 79 to the Affidavit of David Mars (WWIS) (June 2, 2017) [emphasis added].

[246] CWS-N. Baines, ¶ 24; **C-2471**, Article, Energy Minister Says all Options Still Being Considered in Offshore Wind Power Case (6 December 2016), Exhibit 79 to the Affidavit of David Mars (WWIS) (June 2, 2017).

[247] CWS-N. Baines, ¶ 25; **C-2471**, Article, Energy Minister Says all Options Still Being Considered in Offshore Wind Power Case (6 December 2016), Exhibit 79 to the Affidavit of David Mars (WWIS) (June 2, 2017).

[248] **C-2471,** Email from Sarah Paul (MOECC) to David Mars (WEI) (December 23, 2016), Exhibit 80 to the Affidavit of David Mars (WWIS) (June 2, 2017).

[249] CWS-N. Baines, ¶ 17, 20.

207. Ms. Baines also explains that this expectation was fueled by the public statements by the Government of Ontario, set out in the section above, indicating that offshore wind research was being finalized and that the moratorium could be lifted in due course.[250]

208. As a result, following the *Windstream I* arbitration, Windstream took a number of steps with respect to the Project. First, Windstream attempted to move the Project forward to the extent it could. These attempts are detailed in this section. Second, Windstream engaged in negotiations with third parties to develop the Project after the moratorium was lifted. This is detailed below in Section XIV of this Memorial. Third, Windstream made every effort to meet with the relevant ministries and the IESO about the Project's future and how the FIT Contract could be renegotiated so that it implements the promise to "freeze" the FIT Contract for the duration of the moratorium. These attempts are detailed below in Section XV of this Memorial.

A. Windstream Provides its Third Submission to MOE Pursuant to the REA Regulations

209. After the Government of Ontario announced the moratorium on offshore wind in February 2011, it did not amend the regulatory framework to adjust it to that new reality. The regulatory framework continued to envisage and apply to the development of offshore wind projects. This was recognized by the *Windstream I* tribunal who found that "the regulatory framework continued to envisage the development of offshore wind".[251] Presently, the REA Regulation continues to apply to offshore wind projects.[252]

210. In light of the *Windstream I* tribunal's findings regarding the status of the FIT Contract and the Project, Windstream wanted to ensure that it took all steps necessary to keep moving the Project forward. In other words, Windstream wanted to ensure that it fulfilled all of its obligations to bring the Project into commercial operation, to the extent it could. As explained by Ian Baines, since the REA Regulation continued to apply to offshore wind projects, he wanted to

[250] CWS-N. Baines, ¶ 18.

[251] **C-2040,** Award, ¶ 379; CWS-I. Baines-3 ¶ 32.

[252] CER-Powell-3, ¶¶ 89-91.

ensure that Windstream was in full compliance with its requirements and that, as the proponent, Windstream had taken all necessary steps to get an approval issued.[253]

211. As such, on February 15, 2017, WWIS submitted an updated REA submission to MOE. This submission contained a cover letter, an updated project description report and a status report. As stated in the cover letter, this submission "is in keeping with [WWIS's] continuing commitment to fulfill [its] obligations under the FIT contract and bring the project into commercial operation."[254]

212. As explained by Mr. Baines, this submission contained the significant volume of work undertaken over the preceding years:

> These studies set out the considerable amount of work done to move the Project forward during the previous seven years. Windstream had employed a number of world class engineering and environmental firms to complete the various technical steps required under the REA process. Their reports included the results of studies that specifically looked at issues that the Ontario Government had identified as requiring additional study in order to remove the moratorium. For example, there were extensive studies related to wind resource measurement, grid connection, geophysical and geotechnical conditions, coastal processes, waves, ice, shipping, navigation, noise, sediments, drinking water, underwater cables, birds, bats, fish, electromagnetic fields, and cultural heritage.[255]

213. In the cover letter, Windstream made three requests: (1) the cessation of the moratorium, (2) the confirmation of the proposed 5 km setback, and (3) the provision of an Aboriginal Consultation List, which was required under the REA's guidelines and which had been provided by MOE to all other wind projects.[256]

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[253] CWS-I. Baines-3, ¶ 33.

[254] CWS-I. Baines-3, ¶ 34; **C-2073**, Letter from Windstream Energy to Ministry of Environment and Climate Change "Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130-602" (February 15, 2017).

[255] CWS-I. Baines-3, ¶ 35.

[256] CWS-I. Baines-3, ¶ 37; **C-2073**, Letter from Windstream Energy to Ministry of Environment and Climate Change "Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130-602" (February 15, 2017).

214. This was Windstream's third REA submission to MOE. Windstream had not received a response to its previous two submissions. Under the REA requirements, MOE was required to respond. MOE had two options: it could grant the approval or provide comments on what was needed to proceed. As the REA was not amended to reflect the moratorium, there was no discretion to do anything else, including continuing to ignore Windstream's submission.[257]

215. Windstream did not receive a prompt response to this submission. As such, Windstream sent follow up letters on April 21, 2017, June 13, 2017 and August 10, 2017.[258]

216. Finally, more than six months later, on August 25, 2017, the MOE sent a responding letter. The letter stated (in its entirety):

> As you are aware, in February 2011 Ontario made a decision not to proceed with any development of offshore wind projects until the necessary scientific research was completed and an adequately informed policy framework developed. […] However, at this point in time Ontario has not developed an offshore wind policy framework on approval requirements, nor has it developed a process for obtaining Crown land site access under the *Public Lands Act*.
>
> As a result, I am not in a position to confirm whether or not the 5km setback that was previously proposed in 2010 will be adopted as part of the offshore wind policy framework nor am I able to confirm whether or when Ontario will be revisiting the February 2011 decision.[259]

217. MOE did provide the requested Aboriginal Consultation List pursuant to the REA Regulation. MOE noted that it was going to write to these communities to "advise them that they [had] been identified as potentially having aboriginal or treaty rights that may be adversely impacted or may otherwise be interested in the negative environmental effects of [the Project]."[260] MOE did not take the position that the list should not be provided, or these

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[257] CWS-I. Baines-3, ¶ 36; *Environmental Protection Act*, RSO 1990, c E.19, s. 47.5.

[258] CWS-I. Baines-3, ¶ 38; **C-2477**, Letter from Baines, Ian (WWIS) to Goyette, Dolly (MOE) (June 13, 2017), Exhibit D to the Affidavit of Michael Lyle (June 1, 2018); **C-2477**, Letter from Baines, Ian (WWIS) to Goyette, Dolly (MOE) (August 10, 2017), Exhibit D to the Affidavit of Michael Lyle (June 1, 2018).

[259] CWS-I. Baines-3, ¶ 39; **C-2474**, Letter from Goyette, Dolly (MOE) to Baines, Ian (WWIS) (August 25, 2017), Exhibit 3 to the Affidavit of David Mars (October 23, 2018).

[260] **C-2474**, Letter from Goyette, Dolly (MOE) to Baines, Ian (WWIS) (August 25, 2017), Exhibit 3 to the Affidavit of David Mars (October 23, 2018).

communities should not be consulted, on the basis that the Project had no future. On the contrary, MOE intended to reach out to these communities because they could be impacted by the Project.

B. Windstream Undertakes Additional Geophysical and Bathymetric Surveys of the Lakebed

218. In 2017, Windstream sought to take advantage of improved technology to re-examine the data from the lake bottom where the Project would have been located.[261]

219. In 2010, Canadian Seabed Research ("CSR") had conducted a preliminary site investigation. This included a regional bathymetry and geophysical survey of the turbine area. In 2017, Windstream sought to use more advanced software and hardware to interpret this original data. It re-engaged CSR to do so.[262]

C. Windstream Submits an Application Pursuant to the Emerging Renewable Power Program Application, which Recognizes the Project's Potential

220. In January 2018, Canada's Minister of Natural Resources announced the launch of a $200 million expression of interest for the Emerging Renewable Power Program ("**ERRP**") to expand renewable energy sources available to provinces as they work to reduce emissions from their electricity sectors while establishing new green industries in Canada.[263] The press release stated:

> The funding, which is part of the Government's investment of $21.9 billion over 11 years to support green infrastructure under the Pan-Canadian Framework on Clean Growth and Climate Change, will help drive Canada's efforts to build a clean economy by expanding commercially viable, investment-ready, renewable power technologies, such as tidal, geothermal, and offshore wind."[264]

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[261] CWS-I. Baines-3, ¶ 41; CER-Wood s. 8.2.

[262] CWS-I. Baines-3, ¶ 42-43; CER-Wood s. 8.2; **C-2143**, CSR 2017 Geological Assessment Report Project Number 1714 (February 27, 2018).

[263] CWS-I. Baines-3, ¶ 44; **C-2138**, Natural Resources Canada News Release entitled "Canada Supports Next Wave of Emerging Renewable Power" (January 18, 2018).

[264] CWS-I. Baines-3, ¶ 45; **C-2138,** Natural Resources Canada News Release entitled "Canada Supports Next Wave of Emerging Renewable Power" (January 18, 2018) [emphasis added].

221. On April 20, 2018, WWIS submitted an application under the ERPP for the Project.[265]

222. On July 13, 2018, Natural Resources Canada responded to WWIS' application and advised WWIS that while its "proposal scored well," the Project was not recommended to be funded under Phase 1 of the ERPP.[266] However, Natural Resources Canada sought to maintain the Project Application on a Phase 2 project list among other projects that could be considered for funding in the coming fiscal years.[267]

223. On July 16, 2018, WWIS responded and provided its agreement to be added to the Phase 2 list of projects for consideration for future funding.[268]

XIV. WINDSTREAM ENGAGES IN NEGOTIATIONS WITH POTENTIAL PARTNERS WHO WERE INTERESTED IN THE PROJECT

224. Following the release of the *Windstream I* Award, Windstream was approached by a number of third parties who were interested in partnering with Windstream to develop the Project after the moratorium was lifted. As explained by David Mars, these parties shared Windstream's understanding that following the Award, the Project and the FIT Contract had a future and substantial potential value. They were interested in acquiring an interest in the Project because of that potential value.[269]

225. During the course of 2016 and 2017, Windstream engaged in many meetings with potential developers regarding their interest in the Project. These third parties expressed strong

[265] CWS-I. Baines-3, ¶ 47; **C-2149**, Cover letter from Windstream Energy to Natural Resources Canada "Re Windstream Wolfe Island Shoals Inc. Project Application Form for the Wolfe Island Shoals Offshore Wind Farm" with attached supporting documentation: (a) ERPP Project Application Form ("PAF") Section 7 Support Documents (b) ERPP PAF Section 7 Support Documents (Appendix A2-3); (c) ERPP PAF Section 7 Support Documents (Appendix A2-4) (April 20, 2018).

[266] CWS-I. Baines-3, ¶ 48.

[267] CWS-I. Baines-3, ¶ 48.

[268] CWS-I. Baines-3, ¶ 49.

[269] CWS-Mars-3, ¶ 7.

interest in investing in the Project and included many leading developers of offshore wind projects globally and in North America:[270]

a) [redacted]

b) [redacted]

c) [redacted]

d) [redacted]

e) [redacted]

f) [redacted]

g) [redacted][271]

[270] CWS-Mars-3, ¶ 10.

226. As explained by Mr. Mars, "these developers expressed significant interest in the Project." They were impressed with the wind resource in the Wolfe Island Shoals area, the comparative ease of constructing the Project (compared to other projects located in more difficult aquatic environments) and the revenue regime guaranteed by the FIT Contract.[272]

227. Over the course of 2016 and 2017, Windstream and its financial advisor, KeyBanc Capital Markets Inc. (**"KeyBanc"**), had many meetings with these interested parties. They signed non-disclosure agreements and engaged in due diligence analysis. While Windstream did not reach the stage of negotiations to begin discussing specific financial terms, early in these discussions, Mr. Mars informed these parties that any transaction would involve an investment in the hundreds of millions of dollars. With that understanding of value, these potential parties continued to show interest in the Project and conduct their due diligence.[273]

228. Windstream and KeyBanc's discussions and meetings with these developers and third parties is summarized below and set out in more detail in the Third Witness Statement of David Mars:

a) Following the publication of the *Windstream I* tribunal's Award, a number of parties proactively reached out to Windstream and expressed interest in learning more about the Project. In particular:

i) in October 2016, [redacted] reached out to Windstream stating that it had [redacted]."[274]

ii) also in October 2016, [redacted] sent Windstream an email congratulating it on the successful result in the arbitration and stated "[redacted]

[271] CWS-Mars-3, ¶ 10(a)-(g).

[272] CWS-Mars-3, ¶ 11.

[273] CWS-Mars-3, ¶ 14.

[274] CWS-Mars-3, ¶ 13(a).

[redacted][275]

iii) in November 2016, [redacted] emailed Windstream to congratulate it on the successful arbitration result and asked for a meeting. That meeting took place in December. [redacted][276]

b) In May 2017, Windstream met with [redacted] and [redacted] All of these parties expressed interest in the Project and learning more about the potential opportunity.[277]

In particular, [redacted] expressed to Windstream that it was "[redacted].[278] Windstream met with [redacted] again in June, who wanted to "[redacted][279]

c) In June and July, Windstream and KeyBanc continued to meet with interested parties. In addition to the meeting with [redacted] discussed above, Windstream also met again with [redacted] and with [redacted]

[275] CWS-Mars-3, ¶ 13(b).

[276] CWS-Mars-3, ¶ 13(c).

[277] CWS-Mars-3, ¶ 13(f)-(i).

[278] CWS-Mars-3, ¶ 13(f).

[279] CWS-Mars-3, ¶ 13(h).

[redacted][280]

d) By June 2017, a number of interested parties had signed non-disclosure agreements in order to conduct due diligence on the Project. These parties included [redacted], and [redacted].[281]

e) In July 2017, Windstream launched a data room so that potential investors could review information related to the Project and conduct their due diligence. A number of potential partners who signed NDAs were given access to the data room, including [redacted] and [redacted].[282]

f) In August and September, Windstream met again with [redacted].[283]

g) Windstream also continued to meet with [redacted].[284] In October of 2017, [redacted] asked Windstream [redacted]

[280] CWS-Mars-3, ¶ 13(k)-(l).

[281] CWS-Mars-3, ¶ 13(i).

[282] CWS-Mars-3, ¶ 13(m).

[283] CWS-Mars-3, ¶ 13(n).

[284] CWS-Mars-3, ¶ 13(o).

[redacted]

[redacted]"[285]

229. As explained by Mr. Mars, it was clear that there was a lot of interest in the Project, but that most of these parties required clarity regarding the moratorium before they would pay a significant upfront purchase price or substantially invest in the Project. However, they were ready to move forward once they received that clarity.[286] As explained by Mr. Mars:

> The significant interest in the Project confirmed our view that it had a lot of value. If we could resolve the uncertainty created by the moratorium, we could unlock that value with a highly financeable and feasible project.[287]

230. However, by late 2017, Windstream was not receiving the clarity it required from the Government of Ontario to advance these discussions. As set out further below, the Government of Ontario had not advanced the research it said was required to lift the moratorium and was refusing to meet with Windstream to discuss the path forward for the Project. In light of this lack of movement, Mr. Mars no longer felt it was appropriate to continue with these discussions with potential partners. As such, Windstream made the decision to stop the negotiations.[288]

XV. THE ONTARIO GOVERNMENT REFUSES TO MEET WITH WINDSTREAM TO DISCUSS THE FIT CONTRACT AND REFUSES TO DIRECT THE IESO TO NEGOTIATE WITH WINDSTREAM

231. As explained in the witness statement of Nancy Baines, in light of the *Windstream I* tribunal's findings that the FIT Contract was "in force" and able to be "renegotiate[d]" "to adjust its terms to the moratorium,"[289] as promised by the Ontario Government, Windstream expected that there was a path forward for the Project. Windstream expected that the Ontario Government

[285] CWS-Mars-3, ¶ 13(o).

[286] CWS-Mars-3, ¶ 15.

[287] CWS-Mars-3, ¶ 16.

[288] CWS-Mars-3, ¶ 17.

[289] **C-2040,** Award, ¶ 290.

would, at the very least, agree to speak to Windstream in good faith about what was needed to renegotiate the FIT Contract accordingly.[290]

232. As Ms. Baines states:

> […] [T]he award made us optimistic about the future of the Project. The tribunal recognized the unfair treatment to which we had been subjected and also recognized that the FIT Contract was in force and could still be renegotiated so that the Project was not negatively impacted by the moratorium, as promised to Windstream by the Ontario Government […].
>
> In light of these findings, we expected that the Government of Ontario would speak to us, in good faith, about the FIT Contract and about what was needed to fulfil their promise that the Project would be frozen from the effects of the moratorium. We did not expect that the Government of Ontario would maintain the conduct that was already found to be a breach of its international obligations, *i.e.*, that it would continue to maintain the "legal and contractual limbo" it had put us in and to refuse to direct the OPA to meaningfully engage with us on the terms of the FIT Contract.
>
> This expectation was created not only by the tribunal's findings, but also by the Government of Canada's submissions and arguments in the Windstream I arbitration. Canada consistently maintained and represented throughout the arbitration that the Project was "frozen" and could proceed once the moratorium was lifted. If that was the case, as Canada represented and as the tribunal recognized, then the Project had a path forward. We therefore felt optimistic about the future of the Project.[291]

233. Accordingly, following the *Windstream I* Award, Windstream attempted to meet with MEI to discuss the path forward for the Project, including renegotiating the FIT Contract to adjust it to the terms of the moratorium consistent with the findings of the *Windstream I* tribunal.[292] However, The Ontario Government refused to engage. The Ontario Government declined to even meet with Windstream, much less take any steps to ensure that the Project was "frozen" as it promised Windstream and as Canada represented in the *Windstream I* arbitration. On the contrary, MEI informed Windstream that it made the decision "not to intervene" on this

[290] CWS-N. Baines, ¶ 16.

[291] CWS-N. Baines, ¶ 15-17.

[292] CWS-N. Baines, ¶ 27.

matter at all.[293] In so doing, MEI did not just fail to act; it made an intentional decision not to renegotiate the FIT Contract or to take any steps to implement its prior promises and representations.

234. The following section summarizes Windstream's unsuccessful attempts to meet with MEI and its unsuccessful discussions with the IESO to renegotiate the FIT Contract after the tribunal's Award in *Windstream I*.

A. MEI Refuses to Meet with Windstream and Refuses to Discuss the Path Forward for the Project

235. Throughout the fall of 2016, Windstream made several attempts to engage with MEI which were aimed at advancing the Project, including through having MEI direct the IESO to renegotiate the FIT Contract, in accordance with its broad formal directive powers [redacted][294] MEI would not even entertain that meeting.

236. Between October 6, 2016 and November 9, 2016, Windstream's Government Relations' consultant, Chris Benedetti, attempted to arrange a meeting between MEI and Windstream to facilitate discussions aimed at advancing the Project. However, as Mr. Benedetti explains in his witness statement, MEI was not willing to engage in any such discussions:

a) On October 6, 2016, Mr. Benedetti spoke with MEI's Chief of Staff, Andrew Teliszewsky, and advised him that Windstream wanted to meet with MEI officials. Mr. Teliszewsky stated that any discussions with Windstream should take place between the parties' legal counsel.

b) On October 13, 2016, Mr. Benedetti met with the Minister of Energy, who advised Mr. Benedetti that he was not willing to talk to Windstream at that point.

[293] CWS- N. Baines, ¶ 68; **C-2253,** Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).

[294] CWS-Killeavy, ¶ 20; CWS-Smitherman-2, ¶ 7.

c) On October 16, 2016, Mr. Benedetti spoke again with Mr. Teliszewsky about a meeting with Windstream. Mr. Teliszewsky stated that MEI's lawyers were still digesting the implications of the *Windstream I* Award.

d) On November 9, 2016, Mr. Benedetti met with Mr. Teliszewsky and again raised the subject of a meeting with Windstream. Mr. Teliszewsky informed him that MEI had been advised by counsel not to engage with Windstream.[295]

237. On November 28, 2016, Windstream sent the Minister of Energy a letter requesting a meeting with MEI to discuss "next steps with our offshore wind project."[296] Windstream set out the tribunal's finding that the "FIT contract remain[ed] in force" and the Ontario Government's recent statements that offshore wind research was being "finalized." Windstream asked to meet to discuss the impact of the delays caused by the moratorium and the revised timing on the Project. In particular, the letter stated:[297]

> Given that the research identified in the February 11, 2011 decision notice is being finalized, we assume that the research will be released soon. As the holder of the only Feed-in-Tariff contract for an offshore wind facility, we have requested an update on the anticipated timing of the release of the finalized research as well as the updated policy framework referred to in the decision notice. We would like to discuss the impact of the delays and the revised timing that will result.
>
> In the meantime, we look forward to working with the IESO regarding the FIT Contract's terms to ensure that they reflect the anticipated timing for the lifting of the moratorium. We remain committed to making this project a success, working cooperatively with the Government of Ontario and the IESO.

[295] CWS-Benedetti-2, ¶ 5.

[296] CWS-N. Baines, ¶ 31; **C-2049**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) (November 28, 2016).

[297] CWS-N. Baines, ¶ 31; **C-2049**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) (November 28, 2016).

238. On December 6, 2016, the Minister of Energy responded to Windstream's letter and declined to meet with Windstream. He instead directed Windstream to meet with the IESO as the counterparty to the FIT Contract.[298]

239. On December 15, 2016, Windstream sent a further letter to the Ministry of Energy and again requested to meet to discuss the path forward for the Project. Windstream emphasized that the "ongoing moratorium is not within the sphere of the IESO's responsibility or power to resolve" and as such a meeting with a meeting along with the IESO would not be productive in achieving a resolution, "which is why we wrote to your office."[299]

240. Windstream further wrote that "[i]t is for the Government of Ontario, including where necessary by way of directing the IESO (which is in your powers as Minister of Energy) to resolve the situation that has prevailed due to the actions of the Government of Ontario such that we may either move forward with the project or negotiate a reasonable resolution."[300]

241. On February 21, 2017, the Minister of Energy sent Windstream a brief responding letter stating again that he would not meet with Windstream and Windstream should meet with the IESO.[301]

242. MEI's refusal to intervene and to direct the IESO as appropriate is inconsistent with its treatment of other FIT contract holders. The Minister of Energy has on several occasions directed the IESO to grant FIT contract relief to FIT contract holders subject to delays caused by the Government of Ontario. For example:

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[298] CWS-N. Baines, ¶ 32; **C-2471**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016), Exhibit 83 to the Affidavit of David Mars (June 2, 2017).

[299] CWS-N. Baines, ¶ 33; **C-2055**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) re Response to Ministry of Energy Letter of December 6, 2016 (December 15, 2016) [emphasis added].

[300] CWS-Nancy Baines, ¶ 33; **C-2055**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) re Response to Ministry of Energy Letter of December 6, 2016 (December 15, 2016) [emphasis added].

[301] CWS-N. Baines, ¶ 34; **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).

a) On January 28, 2011, the Deputy Minister of Energy asked the OPA to extend the MCOD as provided for in existing FIT Contracts by 365 delays to account for permitting delays caused by MOE.[302]

b) On June 12, 2013, "[i]n acknowledgement of the unique and significant land control challenges facing Aboriginal FIT projects on reserve lands," the Minister of Energy directed the OPA to offer a four-year extension to the MCOD for existing Large FIT Contracts for Aboriginal Participation Projects where the generating facilities are located entirely on reserve lands.[303]

This direction was aimed at a specific class of FIT Contracts, but in practicality, there was only one project that fell within the scope of this direction, the Henvy Inlet Project.[304] A similar direction to a class of FIT Contracts, offshore wind projects, could have been issued and would have similarly only impacted one project, Windstream's Project.

c) On June 26, 2013, "[i]n acknowledgment of the unique regulatory approval requirements required for waterpower FIT projects," the Minister of Energy directed the OPA to offer a three-year extension to the MCOD for existing FIT contracts for waterpower projects.[305]

243. In each of those examples, the IESO complied with those directives and granted the extensions. Yet, with respect to Windstream, MEI would not even agree to have a meeting with

[302] **C-1966**, Letter from David Lindsay (MEI) to Colin Andersen (OPA) re Extension for FIT and microFIT Contracts (January 28, 2011); **C-1967**, Printout from OPA website entitled "One-year extension of Milestone Date for Commercial Operation available for FIT contract holders" (February 9, 2011).

[303] CWS-Killeavy, ¶ 59; **C-2471**, Letter from Bob Chiarelli (MEI) to Colin Andersen (OPA) (June 12, 2013), Exhibit 8 to the Affidavit of David Mars (June 2, 2017).

[304] CWS-Killeavy, ¶ 59.

[305] CWS-Killeavy, ¶ 17(e); **C-2471**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 26, 2013), Exhibit 9 to the Affidavit of David Mars (June 2, 2017); **C-2471**, New Hydroelectric Project Direction Extends FIT Contracts for Waterpower Projects – OPA (June 26, 2013), Exhibit 10 to the Affidavit of David Mars (June 2, 2017).

Windstream, much less take the necessary action required to allow the Project to proceed and to ensure the promises made by the Government of Ontario were fulfilled.

244. In finding a breach of the FET standard, the tribunal held that part of the wrongful conduct was that "the Government [of Ontario] let the OPA conduct the negotiations with Windstream even [though] the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so."[306] Windstream did not expect the Government to continue the very conduct that was already found to breach the NAFTA. Yet, based on MEI's responding letters refusing to meet with Windstream, that seemed to be exactly what it was doing.

B. The IESO Refuses to Renegotiate the FIT Contract

245. On December 2, 2016, Windstream sent the IESO a letter asking to meet to discuss the status of the Project and the FIT Contract.[307]

246. On December 10, 2016, Windstream sent a follow up letter and asked for a response.[308] On December 13, 2016, the IESO sent Windstream a letter and agreed to meet.[309] The parties arranged to meet on January 12, 2017.[310]

247. At that January 12th meeting, Windstream informed the IESO that it was prepared to build the Project. As set out above, Section 10.1(g) of the FIT Contract gave the IESO the ability to terminate the contract as of May 4, 2017 if the Project had not reached commercial operation

[306] **C-2040,** Award, ¶ 379 [emphasis added].

[307] CWS-N. Baines, ¶ 35; **C-2050,** Letter from David Mars (WEI) to Michael Killeavy (IESO) re Windstream Wolfe Island Shoals (December 2, 2016) with attached Letter to the IESO from Windstream Energy re Follow-up on Letter of December 2, 2016 Regarding Windstream Wolfe Island Shoals Offshore Wind Project - Feed-In Tariff Contract F-000681-WIN-130-602 (December 2, 2016).

[308] CWS-N. Baines, ¶ 36; **C-2052**, Letter from David Mars (WEI) to Michael Killeavy (IESO) re Windstream Wolfe Island Shoals (December 10, 2016) with attached Letter to the IESO from Windstream Energy re Feed-In Tariff Contract F-000681-WIN-130-602 (December 2, 2016).

[309] CWS-N. Baines, ¶ 37; **C-2057,** Letter from David Mars (WEI) to Michael Killeavy (IESO) re Windstream Wolfe Island Shoals Offshore Wind Project – Feed-In Tariff Contract F-000681-WIN-130-602 (December 22, 2016).

[310] CWS-N. Baines, ¶ 37; **C-2057,** Letter from David Mars (WEI) to Michael Killeavy (IESO) re Windstream Wolfe Island Shoals Offshore Wind Project – Feed-In Tariff Contract F-000681-WIN-130-602 (December 22, 2016).

by that date. At first, the IESO's personnel in that meeting were steadfast in their position that the IESO would not extend MCOD or waive its rights under Section 10.1(g).[311]

248. When asked about the Ontario Government's promise to "freeze" the FIT Contract, the IESO responded that "freeze" did not mean a perpetual *force majeure*, which the IESO was not willing to give. Windstream's legal counsel asked if the IESO would consider a contract amendment, given that Windstream was in a class by itself as the only offshore wind project with a FIT Contract. The IESO agreed to consider the matters discussed and get back to Windstream.[312]

249. On February 9, 2017, the IESO sent Windstream a letter in which it stated that it would not renegotiate the terms of the FIT Contract. The letter stated as follows:

> At the [January 12, 2017] meeting you requested that the IESO consider amending the FIT Contract to extend the Milestone Date for Commercial Operation until the Ontario Ministry of Environment and Climate Change completes its research pertaining to off-shore wind farms.
>
> We have considered this request and confirm that the IESO:
>
> 1. is not prepared to amend the FIT Contract to provide an extension to the Milestone Date for Commercial Operation or the date that would be an event of default under Section 9.1(j);
>
> 2. will not waive any of its rights under the FIT Contract, including its right to terminate the FIT Contract pursuant to Section 10.1(g); and
>
> 3. has not made a decision whether to exercise its termination right under Section 10.1(g) should the right arise.[313]

250. As explained by Ms. Baines, Windstream was disappointed by this letter. Windstream felt there was never a serious attempt by the IESO to meaningfully engage in a discussion on

[311] CWS-N. Baines, ¶ 39; **C-2067**, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

[312] CWS-N. Baines, ¶ 41; **C-2067**, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

[313] **C-2471**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (February 9, 2017), Exhibit 82 to the Affidavit of David Mars (June 2, 2017).

how the FIT Contract could be renegotiated in light of the promises made by the Ontario Government to Windstream. [314]

251. As set out above, notwithstanding its promise to freeze Windstream from the effects of the moratorium, MEI refused to intervene or assist Windstream in its negotiations with the IESO.

252. The IESO's refusal to renegotiate the FIT Contract to extend the MCOD in light of the promises made by the Ontario Government is inconsistent with how the IESO has treated other feed-in-tariff contract holders. The IESO has offered extensions for other projects that have faced delays in reaching their milestone commercial operation dates. For example, Windlectric Inc. was awarded a feed-in-tariff contract to develop a 75 MW onshore wind project called the Amherst Island Wind Project on February 24, 2011.[315] The deadline for Windlectric to bring its project to commercial operation was three years following that date, *i.e.*, February 24, 2014.[316] The Amherst Island Wind Project did not begin construction until January 2017.[317] Clearly, Windlectric either received an extension from the IESO or the IESO agreed not to exercise its termination rights due to delay.

XVI. IN 2018, A NEW ONTARIO GOVERNMENT IS ELECTED WITH A PLATFORM TO "GET RID OF ALL WIND TURBINES"

253. In 2011, when the FIT Contract was concluded, the Ontario Government strongly supported, and actively courted, investment in renewable energy. But for the moratorium, the Project would have been built and commercially operable by May 4, 2015, which was still during a period of government support for such renewable energy projects.

254. The new provincial government under Premier Doug Ford asserts that renewable energy generation is to blame for rising electricity prices in Ontario. It has taken a number of steps to

[314] CWS-N. Baines, ¶ 44.

[315] **C-2471,** Chart showing FIT Contracts Offered on February 24, 2011 (IESO Website), Exhibit 38 to the Affidavit of David Mars (June 2, 2017).

[316] **C-2471,** Exhibit A to the Feed-in Tariff Contracts for Onshore Wind Projects (IESO Website), Exhibit 39 to the Affidavit of David Mars (June 2, 2017).

[317] **C-2471**, White Pines Wind Project (WPD) (3 March 2017), Exhibit 85 to the Affidavit of David Mars (June 2, 2017).

impede the development of renewable energy projects, including cancelling a large number of renewable energy contracts. It was under the authority of this Government that the IESO ultimately terminated the FIT Contract.

255. ***The Ford administration's stance on renewable energy and wind projects***. In her Expert Report dated February 18, 2022, Ms. Powell, a senior Ontario lawyer who is a leading expert on the regulatory aspects of renewable energy projects, summarizes the current government's stance on renewable energy and wind projects. As Ms. Powell explains, "[t]he current Ontario government campaigned in 2018 on a platform that highlighted its opposition to renewable energy projects, in particular, wind projects."[318]

256. Less than a week after taking office, the Ford administration took action to implement that opposition. On July 13, 2018, MEI issued a directive ordering the IESO to "immediately take all steps necessary to wind down all FIT 2, 3, 4 and 5 Contracts where the IESO has not issued a [Notice to Proceed]" and this resulted in the cancellation of 758 renewable energy contracts (the **"July Directive"**).[319]

257. Premier Doug Ford is reported as stating that he is "proud" of his decision to tear up hundreds of renewable energy contracts, stating that "we cancelled those terrible, terrible, terrible wind turbines."[320] Premier Ford went further and stated that "if we had the chance to get rid of all the wind mills we would."[321]

258. As explained by Ms. Powell, the Ford Administration's critique of renewable energy (and in particular wind projects) is based on the alleged costs to ratepayers and local opposition to

[318] CER-Powell-3, ¶ 83.

[319] CER-Powell-3, ¶ 83; **C-2162,** Order in Council and Directive of the Minister of Energy, Northern Development and Mines to the IESO entitled "Wind Down of Feed-in Tariff and Large Renewable Procurement Contracts" (July 13, 2018).

[320] **C-2248,** "Doug Ford 'proud' of decision to tear up hundreds of green energy contracts" – Global News (November 21, 2019).

[321] **C-2248,** "Doug Ford 'proud' of decision to tear up hundreds of green energy contracts" – Global News (November 21, 2019).

these projects.[322] As Ms. Powell states, the Ontario Government has not focused its critiques of renewable energy on the environmental impacts of these projects, which was the alleged basis for the imposition of the moratorium.[323]

259. ***The Ford Administration's Impact on Energy Legislation and the Regulatory Framework***. As explained by Ms. Powell, despite the well-documented opposition of the current Ontario Government to wind projects, little has changed to the regulatory framework. For example, the portion of the *Environmental Protection Act* which deals with renewable energy and the issuance of REAs has not been amended since 2010.[324]

260. Ontario Regulation 359/09, which deals with REAs issued under the relevant portion of the *Environmental Protection Act* for renewable energy projects, has only been amended twice since 2018: first, to add eligibility requirements that enhance municipal authority over renewable energy projects; and second, to add eligibility requirements related to electricity demand and prohibit the issuance of REAs for large wind projects if their contracts were cancelled by the IESO. This latter amendment, according to Ms. Powell, was clearly intended to prevent the issuance of a REA to a project that was cancelled under the July Directive.[325]

261. However, Section 6 of O. Reg. 359/09, which defines the class of "wind facilities" eligible for a REA, still includes offshore wind projects. As such, as Ms. Powell explains, the regulatory framework to permit offshore wind projects remains substantially the same under this new Ford Government and has not changed. In other words, notwithstanding the moratorium and the election of this anti-wind government, offshore wind projects are still "wind facilities" eligible to obtain a REA.[326]

[322] CER-Powell-3, ¶ 85.

[323] CER-Powell-3, ¶ 85.

[324] CER-Powell-3, ¶ 90.

[325] CER-Powell-3, ¶ 91.

[326] CER-Powell-3, ¶ 92.

262. As a result, as Ms. Powell concludes, the Ford administration has not eliminated the possibility or ability for new wind projects to be built in the province.[327] As Ms. Powell states:

> Given Premier Ford's strong public opposition to wind projects in particular, it is perhaps surprising that more drastic measures have not been taken to prevent new wind projects from being built in the province. As a result of the various changes I have described above, it is my opinion that the Regulatory Framework has largely remained intact under Premier Ford. Therefore in my opinion, but for the Moratorium, an offshore wind project, such as the Project, would be permitted under the current Ontario government in the same manner described in my 2014 Report and 2015 Supplementary Report.[328]

XVII. THE IESO TERMINATES THE FIT CONTRACT AFTER THE ONTARIO GOVERNMENT FAILS TO DIRECT IT NOT TO DO SO

A. The IESO Informs Windstream of its Decision to Terminate the FIT Contract

263. As set out above, the termination right under Section 10.1(g) was to arise on May 4, 2017 if the Project had not achieved commercial operation by that date.

264. As that date approached, Windstream was in a difficult position. As set out above, the IESO refused to renegotiate the FIT Contract and MEI refused to intervene or assist Windstream, despite the fact that it had promised to "freeze" the FIT Contract from the impacts of the moratorium and Canada had represented to the *Windstream I* tribunal that this was the status of the Project. Windstream needed to take steps to ensure its rights under the FIT Contract were not lost.

265. On March 27, 2017, WWIS commenced an application before the Ontario courts seeking an injunction restraining the IESO from exercising its termination right after May 4, 2017 (the **"Ontario Application"**). In particular, WWIS sought a declaration that the IESO may not rely on the moratorium, or other delays solely caused by the Government of Ontario, to exercise its termination rights under the FIT Contract.[329]

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[327] CER-Powell-3, ¶ 94.

[328] CER-Powell-3, ¶ 98.

[329] CWS-N. Baines, ¶ 46; **C-2471,** Notice of Application to the Ontario Superior Court of Justice (WWIS) (March 27, 2017).

266. The opportunity to develop the Project in accordance with the FIT Contract is worth hundreds of millions of dollars to Windstream. It was therefore crucial that Windstream take all steps to ensure that its rights were not lost by virtue of a wrongful termination. Preventing the IESO from exercising its termination right by relying on delays caused solely by the Ontario Government would leave the FIT Contract in place such that the development of the Project could continue as contemplated in the FIT Contract once the moratorium was lifted.

267. The application was not going to be heard and determined prior to May 4, 2017. As such, the IESO and WWIS agreed that the IESO would not exercise its termination rights under the FIT Contract pending the determination of the application. The IESO reserved the right to terminate the FIT Contract if circumstances changed upon 30 days' notice.[330]

268. Between March 27, 2017 and October 10, 2017, the parties exchanged affidavits, document productions and conducted cross-examinations.[331]

269. During the cross-examination of the IESO's witnesses, [redacted]

270. [redacted]

Indeed, other than Windstream, the IESO has only terminated one other contract pursuant to its

[330] CWS-N. Baines, ¶ 47; **C-2083,** Email from Melanie Ouanounou (Goodmans LLP) to Sherkey, Emily (Torys LLP) re WWIS/IESO (April 28, 2017).

[331] CWS-N. Baines, ¶ 48(a)-(i).

[332] CWS-N. Baines, ¶ 49.

[333] CWS-N. Baines, ¶ 50.

Section 10.1(g) right: Horizon Wind's FIT contract for its Big Thunder Beta wind energy project in Thunder Bay, Ontario.[334]

271. On or about November 1, 2017, the IESO and WWIS agreed to adjourn the Ontario application while the IESO undertook that process to decide whether to terminate the FIT Contract pursuant to Section 10.1(g) (the **"Adjournment Agreement"**).[335] The Adjournment Agreement provided, among other things, that:

a) in making its determination about whether to exercise its termination right, the IESO could request information from WWIS and WWIS was to provide such information within 14 days (if WWIS required more than 14 days, the IESO's deadline for making its decision would be extended on a day-to-day basis);

b) WWIS was entitled to send whatever information it saw fit to the IESO for consideration while the IESO made its determination about whether or not to exercise the termination right; and

c) if the IESO determined that the FIT Contract should be terminated, the termination will not be effective until the date that is 30 days after the date on which a decision in the application was rendered.[336]

272. Between November 10, 2017 and February 6, 2018, WWIS and the IESO exchanged correspondence and had discussions regarding the information Windstream was to provide to the IESO. Windstream provided to the IESO an extensive amount of information, including a significant volume of data and information about the Project, Windstream's communications

[334] **C-0705**, Article (CBC News), Ontario Power Authority cancels contract with Horizon Wind (July 25, 2014).

[335] CWS-N. Baines, ¶ 51; **C-2482**, Adjournment Agreement between WWIS and IESO (November 1, 2017), Schedule H to Costs Submissions of the IESO (July 24, 2020).

[336] CWS-N. Baines, ¶ 52; **C-2482**, Adjournment Agreement between WWIS and IESO (November 1, 2017), Schedule H to Costs Submissions of the IESO (July 24, 2020).

with the Government of Ontario regarding the moratorium, and the Government of Ontario's promise to freeze the FIT Contract from the effects of the moratorium.[337]

273. In addition to providing that information, Windstream also provided the IESO with a new offer. Windstream proposed that the IESO and WWIS enter into an agreement whereby WWIS would:

a) allow the IESO to exercise whatever rights it had under section 10.1(g) of the FIT Contract if the FIT Contract remained under *force majeure* as a result of the *force majeure* event and the moratorium for the period beginning on November 22, 2010 and ending ten years after the date the IESO accepted WWIS' offer;

b) not exercise whatever rights it had under section 10.1(g) of the FIT Contract during the ten-year period described above; and

c) leave in place its fully-cash collateralized $6 million Completion and Performance Security in accordance with the terms of the FIT Contract.[338]

274. In the past, the IESO had shown reluctance or a refusal to grant a "perpetual" *force majeure* extension. This offer sought to accommodate that concern by providing a fixed end

[337] CWS-N. Baines, ¶ 53-57; **C-2125**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) re Feed-in Tariff Contract #F-000681-WIN-130-602 (the "FIT Contract") between the Independent Electricity System Operator (the "IESO") and Windstream Wolfe Island Shoals Inc. (the "Supplier") dated May 4, 2010 (November 10, 2017); **C-2477**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (November 29, 2017), Exhibit D to the Affidavit of Michael Lyle (IESO) (June 1, 2018**); C-2477**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (December 15, 2017), Exhibit C to the Affidavit of Michael Lyle (IESO) (June 1, 2018); Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (December 22, 2017), Exhibit D to the Affidavit of Michael Lyle (1 June 2018); **C-2477,** Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (January 8, 2018), Exhibit E to the Affidavit of Michael Lyle (June 1, 2020); **C-2477,** Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (January 23, 2018), Exhibit F to the Affidavit of Michael Lyle (June 1 2020); **C-2477,** Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (January 25, 2018), Exhibit G to the Affidavit of Michael Lyle (June 1, 2020); **C-2474**, Letter from Nancy Baines (WWIS) to Michael Killeavy (January 30, 2018), Exhibit 16 to the Supplementary Affidavit of David Mars (WWIS) (October 23, 2018); **C-2477,** Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (January 31, 2018), Exhibit H to the Affidavit of Michael Lyle (June 1, 2020); **C-2477,** Email from Nancy Baines (WWIS) to Cindy Roks (IESO) attaching letter from Nancy Baines (WWIS) to Michael Killeavy (IESO), Exhibit I to the Affidavit of Michael Lyle (June 1, 2020).

[338] CWS-N. Baines ¶ 55; **C-2477**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (November 29, 2017), Exhibit D to the Affidavit of Michael Lyle (IESO) (June 1, 2018).

point, while still preserving WWIS' right to develop the Project when the moratorium was lifted. The IESO never responded to this offer by Windstream.[339]

275. Instead, on February 20, 2018, the IESO sent Windstream a letter informing it of its decision to terminate the FIT Contract (the **"Termination Decision"**).[340]

276. In response to a request from Windstream,[341] on March 2, 2018, the IESO cited the following as its basis for terminating the FIT Contract:

a) the "factual circumstances surrounding the FIT Program and its objectives, as well as the FIT Contract itself", including: (1) the extensive delays to the Project; (2) the lack of clarity as to whether the *force majeure* event would be resolved; (3) the fact that WWIS had not been able to gain site access or commence certain regulatory approval processes (which first required resolution of the moratorium); and (4) that the Ontario Government had not yet established regulatory guidelines (and therefore timelines) for offshore wind.

b) the evidence and documentary productions obtained the course of the Ontario Application;

c) the Ontario Government's 2017 Long-Term Energy Plan;

d) Directions from the Minister of Energy dated June 12, 2013 and September 27, 2016,

e) a letter from MEI to the IESO dated February 2, 2018, which confirmed that Ontario had not, among other things, "developed an offshore wind policy

[339] CWS-N. Baines, ¶ 57.

[340] CWS-N. Baines, ¶ 60; **C-2477**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS) (February 20, 2018), Exhibit M to the Affidavit of Michael Lyle (IESO) (1 June 2018).

[341] **C-2477**, Letter from Baines, Nancy (WWIS) to Lyle, Michael (IESO) (February 23, 2018), Exhibit N to the Affidavit of Michael Lyle (June 1, 2020).

framework on approval requirements" and was "not in a position to confirm whether or when Ontario [would be] revisiting" the moratorium.[342]

f) information received from WWIS through correspondence during late 2017 and early 2018.[343]

277. Pursuant to the Adjournment Agreement, the Termination Decision did not take immediate effect. Rather, since Windstream had re-initiated the Ontario Application, the termination decision was not effective pending the resolution of that application.[344]

278. On April 20, 2018, Windstream re-initiated the Ontario Application and sought a declaration restraining the IESO from exercising the termination right due to delays caused unilaterally by the Government of Ontario.[345] The parties exchanged further affidavits and expert reports as part of that process.[346]

279. On January 15, 2020, Windstream informed the IESO of its decision to discontinue the Ontario Application in order to pursue this NAFTA claim against the Government of Canada.[347]

280. On February 18, 2020, the IESO sent a responding letter stating that, in light of the abandonment of the Ontario Application and pursuant to the terms of the Adjournment Agreement, the FIT Contract was terminated as of that date.[348]

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[342] **C-2477**, Letter from Michael Lyle (IESO) to Nancy Baines (March 2, 2018), Exhibit O to the Affidavit of Michael Lyle (June 1, 2020).

[343] CWS-N. Baines, ¶ 61; **C-2477**, Letter from Ministry of the Environment and Climate Change (Environmental Assessment and Permissions Division) to the IESO (February 2, 2018), Exhibit O to the Affidavit of Michael Lyle (June 1, 2020).

[344] CWS-N. Baines, ¶ 62; **C-2482**, Adjournment Agreement between WWIS and IESO (November 1, 2017), Schedule H to Costs Submissions of the IESO (July 24, 2020).

[345] CWS-N. Baines, ¶ 63; **C-2148,** Email from Nick Kennedy (Torys LLP) to Melanie Ouanounou (Goodmans LLP) re Adjournment Agreement with attached supporting documentation: (a) Blackline draft Amended Notice of Application; (b) draft Amended Notice of Application; (c) Windstream Schedule for Application (April 20, 2018).

[346] CWS-N. Baines, ¶ 64(a)-(c).

[347] CWS-N. Baines, ¶ 71; **C-2482**, Letter from John Terry (Torys LLP) to Alan Mark (Goodmans LLP) attaching Notice of Abandonment (15 January 2019), Schedule J to Costs Submissions of the IESO (July 24, 2020).

281. Shortly after, on February 20, 2020, the IESO directed that Windstream's bank cancel the $6 million letter of credit that Windstream had posted in 2010 to secure its obligations under the FIT Contract.[349] That amount has since been returned to Windstream.

B. The Ontario Government Decided "Not to Intervene" in the IESO's Decision to Terminate the FIT Contract

282. As set out above, MEI refused to meet with Windstream to discuss the renegotiation of the FIT Contract and refused to direct or otherwise intervene in the IESO's negotiations with Windstream.

283. After the IESO made the decision to terminate the FIT Contract, the MEI continued to refuse to intervene, despite requests from Windstream to do so.

284. On November 26, 2019, Windstream wrote the Ministry of Energy and asked that he exercise his powers "both formal and informal, to direct the IESO to take certain steps," namely to:

a) direct the IESO to withdraw its letter of February 20, 2018 purporting to terminate the FIT Contract;

b) direct the IESO not to exercise any of its termination rights under the FIT Contract for reasons relating to the moratorium or pre-moratorium delays caused by the Government of Ontario; and

c) direct the IESO to take all necessary steps to ensure that the FIT Contract was "frozen" such that the Project could proceed as soon as the moratorium was lifted, as if the moratorium had not been imposed.[350]

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[348] CWS-N. Baines, ¶ 72; **C-2289**, Letter from Michael Lyle (IESO) to Nancy Baines re Feed-in Tariff Contract F-000681-WIN-130-602 between IESO and the Supplier dated May 4, 2010 - Notice of Termination pursuant to Section 10.1(g) (February 18, 2020).

[349] CWS-N. Baines, ¶ 73; **C-2291**, Letter from Daryl Yahoda (IESO) to Bank of Montreal Global Trade Operations re Irrevocable Standby letter of Credit No. BMT0494154OS (February 20, 2020).

[350] CWS-N. Baines, ¶ 66; **C-2249,** Letter from David Mars (WEI) to Greg Rickford (MEI) re Windstream Wolfe Island Shoals offshore wind energy facility (November 26, 2019).

285. In that letter, Windstream emphasized that MEI and the IESO's conduct was contrary to the commitments made by MEI to Windstream, as no steps had been taken to "to ensure that the FIT Contract remain[ed] 'frozen' for the duration of the Moratorium", which at that point was in its ninth year.[351]

286. On December 10, 2019, the Minister of Energy sent Windstream a responding letter. In that letter, he made clear that MEI decided not to take any steps with respect to the Project or the FIT Contract:

> **Ontario has decided not to intervene in this matter**, which is subject to ongoing litigation between Windstream and the IESO. We would suggest that it is more appropriate for you to engage with the IESO, given that the IESO is the administrator of the FIT program and counterparty to all FIT contracts, and your request relates to Windstream's individual FIT contract.[352]

287. The next day, on December 11, 2019, Windstream wrote to the IESO and asked that it reconsider the Termination Decision and that "it take all steps necessary to ensure that the FIT Contract is 'frozen' such that the Project may proceed as soon as the Moratorium is lifted."[353] Windstream never received a response to this letter.

288. Now that the FIT Contract has been terminated, there is no longer any possibility for the Project to move forward or to be built as planned. There is no longer any possibility for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period, as set out in the FIT Contract. As such, it is only as of February 20, 2020, when the Termination Decision took effect, that Windstream lost the full value of its investments in WWIS, the Project and the FIT Contract.

289. The witness statements of David Mars, Nancy Baines, and Ian Baines all set out Windstream's disappointment with the Ontario Government's refusal to meet with Windstream

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[351] CWS-N. Baines, ¶ 67; **C-2249,** Letter from David Mars (WEI) to Greg Rickford (MEI) re Windstream Wolfe Island Shoals offshore wind energy facility (November 26, 2019).

[352] CWS-N. Baines, ¶ 68; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019) [**emphasis added**].

[353] CWS-N. Baines, ¶ 69; **C-2254**, Letter from David Mars (WEI) to Peter Gregg (IESO) re Windstream Wolfe Island Shoals offshore wind energy facility (December 11, 2019).

and its refusal to intervene in the IESO's negotiations with Windstream and ultimate termination decision.

290. As Mr. Mars stated, it came "as a shock to us that the Ministry of Energy would not even agree to have a meeting with us to discuss a potential path forward and a way to implement the promises made by Ontario and the representations made by Canada. In my business, I deal with a lot of different governments and counterparties. I have never before witnessed such disrespectful behaviour, let alone by a government as reputable as Canada and Ontario. We have only conducted ourselves respectfully with government officials, seeking to find a solution to build this promising and valuable Project."[354]

291. As explained by Ms. Baines, "I expected that, in light of the tribunal's findings in Windstream I, the Government of Ontario would at least show some good faith behaviour and meet with us. It is the Government of Ontario that promised to freeze the Project from the impact of the moratorium, which engendered our expectation that there was an opportunity to repair the harm done and to find a path forward for the Project. I was therefore shocked and disappointed when MEI would not even show us the respect of having a meeting and discussing what options existed to implement the promises they made to us."[355]

292. As explained by Mr. Baines:

> In light of Canada's representations [in the arbitration that the Project was only 'frozen' and 'on hold' and could proceed once the moratorium was lifted] and the findings of the tribunal, it was my expectation that the Ontario Government would at the very least meet with us to discuss a possible path forward for the Project and what steps could be taken to implement the promises made to us. I did not expect Ontario to continue to maintain the course of conduct that had led to the original finding of wrongdoing by the tribunal in *Windstream I*.
>
> My expectation, however, was wrong. The Ministry of Energy, the same entity that had promised to 'freeze' the Project from the effects of the moratorium, would not even meet with us.

[354] CWS-Mars-3, ¶ 21.

[355] CWS-N. Baines, ¶ 75; **C-2249,** Letter from David Mars (WEI) to Greg Rickford (MEI) re Windstream Wolfe Island Shoals offshore wind energy facility (November 26, 2019).

[…]

> I am disappointed about that lost opportunity and frustrated by the manner in which the Government of Ontario has treated us. We sought to build a sustainable project for our community as part of the Government of Ontario's promotion of green energy alternatives. The Project did not end because we engaged in any wrongdoing or failed to fulfill any of our contractual obligations. Instead, the Project ended because of the conduct of the Government of Ontario. In light of this and our good faith efforts to meet with the Government of Ontario to determine the future for the Project, I was extremely disappointed when the Ontario Government would not even agree to meet with us. In view of the history of the parties and the tribunal's decision in Windstream I, this was completely disrespectful. As a result of the Ontario Government's refusal to engage, the IESO ultimately decided to terminate the FIT Contract.[356]

XVIII. THE ONTARIO GOVERNMENT CREATED THE CONDITIONS THAT GAVE RISE TO THE TERMINATION OF THE FIT CONTRACT

293. The Ontario Government created the conditions that gave rise to the termination of the FIT Contract. In particular:

a) the Ontario Government failed, following the *Windstream I* Award, to complete in a timely manner the work it considered necessary in order to lift the moratorium, in order to ensure that the moratorium would not further prejudice WWIS by causing further delays to the Project. Indeed, the Ontario Government has not conducted any of the studies that were the stated pretense of the application of the moratorium, and does not appear to be taking any steps to lift the moratorium;

b) the Ontario Government continued to apply the moratorium to WWIS, following the *Windstream I* Award, despite knowing that its continued application as against WWIS would create the conditions that would allow the IESO to terminate the FIT Contract (in direct contradiction with its promise to protect the Project from the effects of the moratorium); and

[356] CWS-I. Baines-3, ¶ 52-55.

c) the Ontario Government failed, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be "deferred", "frozen" and "on hold."

294. These conditions gave the IESO (a state enterprise exercising delegated governmental authority) the ability to terminate the FIT Contract pursuant to section 10.1(g), which it did effective February 2020. That right would not have become available had the Ontario Government not taken the actions set out above and described in more detail below.

A. The Ontario Government is Not Conducting Any Studies or Taking Steps to Lift the Moratorium

295. As set out at paragraphs 148 to 150 above, Ontario justified the moratorium on the basis it needed to conduct further scientific research.[357] Throughout the *Windstream I* arbitration, the Government of Canada emphasized that Ontario was conducting this research and that the moratorium (or the "deferral", as Canada called it) was only temporary.[358] Following the *Windstream I* Award, the Government of Ontario continued to publicly represent that the moratorium was temporary and announced on multiple occasions that the research required to lift the moratorium was being "finalized."

296. Despite those announcements and Ontario's prior commitment to conducting that research, the Government of Ontario has stopped conducting that research and does not appear to have taken any steps to lift the moratorium on offshore wind.

297. In February 2017, the Government of Ontario stated that more research was needed in order to lift the moratorium on offshore wind.[359] However, it has not commissioned any further studies. Instead, MOE announced that Ontario would follow the impact of North America's first

[357] **C-2040,** Award ¶ 147; **C-0485,** News Release (MOE), Ontario Rules Out Offshore Wind Projects (February 11, 2011).

[358] **C-2461,** Day 1 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 15, 2016) (Confidential), p. 202, l. 6 – p. 203, l. 6.

[359] **C-2072,** "Ontario signals offshore wind moratorium will continue for years" – Chat News Today (February 13, 2017).

offshore wind pilot project in Lake Erie, a project authorized by the State of Ohio. MOE stated that this would allow it "to have a better grasp of any potential environmental and health challenged posed by the freshwater offshore wind developments" and that "the moratorium [would] not be lifted until research findings [were] understood and concerns surrounding offshore wind projects [were] addressed."[360]

298. Internal correspondence from MNR and MOE that Windstream obtained through Freedom of Information requests indicates that the Government of Ontario is not conducting any further research and that there is no political will to lift the moratorium to allow offshore wind development in the province. This is not surprising, given the current Government of Ontario's stance against renewable energy projects and the FIT Program.[361]

299. In an email dated September 8, 2016, MNR provided edits to a messaging statement from MOE to use as a response to the question: "what research have you done into offshore." MOE's stated preference was "not to mention future decisions or reg development <u>to avoid speculation on the possibility of offshore development in Ontario.</u>"[362] MNR's proposed edits to the messaging statement also removed any indication that that Ontario was conducting further research or would proceed with offshore wind development in Ontario. MNR proposed to strike the following language from the messaging statement:

> The province is meeting its short term renewable energy targets and will not proceed with windpower projects development in Ontario until there is sufficient scientific evidence demonstrating that they will not have adverse effects to humans or the local environment but will continue to monitor the latest developments and research in other jurisdictions.[363]

300. In an internal MNR email dated May 16, 2019, MNR staff provided comments on Ontario's plan for offshore wind. The MNR staff stated that "<u>[g]iven the new govt messages on wind power I don't think it's about doing more studies anymore</u>. Maybe back to what they've

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[360] **C-2072,** "Ontario signals offshore wind moratorium will continue for years" – Chat News Today (February 13, 2017).

[361] CER-Powell-3 ¶ 83.

[362] **C-2037,** Email from Kate Jordan to Mark Rabbior "Re: offshore" (September 08, 2016) [<u>emphasis added</u>].

[363] **C-2037,** Email from Kate Jordan to Mark Rabbior "Re: offshore" (September 08, 2016).

stated re demonstrate need first. …and whatever else is on news release. Generic re power messages. Given all those contracts cancelled."[364]

301. There can be no credible basis for refusing to advance the research that was the pretense for the application of the moratorium more than a decade ago. Five government-commissioned studies have been completed since 2011 assessing offshore wind's impacts on fish, other environmental impacts, sound and decommissioning requirements. Two studies were made public in December 2016. It is not clear what further studies are needed. The studies largely found that while there were still some unknowns about offshore wind in freshwater environments, impacts were likely to be minimal.[365] Further, as set out in Section II above, the volume of offshore wind projects in the world – and particularly North America – has significantly risen in the last few years alone. There is significant data and research to address any remaining questions the Government may have.

302. The only reasonable inference to be drawn is that Ontario has no intention to advance the scientific research that was the basis for the "temporary" application of the moratorium, or accordingly to lift the moratorium itself.

B. The Ontario Government Continued to Apply the Moratorium against WWIS and the IESO used the Delays Caused by the Moratorium as a Basis to Terminate the Contract

303. ***The Ontario Government continued to apply the moratorium.*** After the tribunal's findings in *Windstream I* that (1) the Ontario Government's failure to intervene and provide any direction to the OPA on the application of the moratorium to the Project; and (2) that the FIT Contract was "in force" and able to be "renegotiate[d]" "to adjust its terms to the moratorium,"[366] Windstream expected that the Ontario Government would, at the very least,

[364] **C-2219,** Email to Pauline Desroches from Kevin Edwards – "Re: For Approval Revised: Proposed Project List & Information Requirements and Time Management Regulations under the Impact Assessment Act" (May 16, 2019) [emphasis added].

[365] **C-2027,** "Ontario signals offshore wind moratorium will continue for years" – Chat News Today (February 13, 2017).

[366] **C-2040,** Award, ¶ 290.

agree to speak to Windstream in good faith about what was needed to renegotiate the FIT Contract after the tribunal's decision.[367]

304. Instead, the Ontario Government had no intention to lift the moratorium and did nothing to prevent its continued application to the Project, which (as explained in further detail below) became the precondition for the termination of the FIT Contract in February 2020. The Ontario Government's intention to continue the moratorium indefinitely became clear in an August 25, 2017 letter responding to Windstream's request for information on when the moratorium would be lifted, MOE stated that it was not in a position "to confirm whether or when Ontario [would] be revisiting the February 2011 decision.[368]

305. The moratorium remains in effect today.

306. ***The IESO used the moratorium as a basis for terminating the FIT Contract.*** Having received no direction from the Ontario Government that would give effect to its promised to insulate the Project from the effects of the moratorium, the IESO then used Windstream's inability to advance the Project due to the Government's delays as the basis for terminating the FIT Contract.

307. [redacted]

308. The Termination Decision was made based on the recommendation of Michael Killeavy, then the Director of Contract Management at the IESO. [redacted]

[367] CWS-N. Baines, ¶ 27.

[368] CWS-I. Baines-3, ¶ 39; **C-2474**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017), Exhibit 3 to the Affidavit of David Mars (October 23, 2018) [emphasis added].

[redacted]

309. [redacted][370]

310. [redacted][371]

311. [redacted][372]

[369] **C-2477**, Affidavit of Michael Lyle (IESO) (June 1, 2018) ¶ 28; **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

[370] **C-2477**, Affidavit of Michael Lyle (IESO) (June 1, 2018) ¶ 28; **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

[371] **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018); **C-2477**, Letter from Ministry of the Environment and Climate Change (Environmental Assessment and Permissions Division) to the IESO (February 2, 2018), Exhibit O to the Affidavit of Michael Lyle (June 1, 2020).

[372] **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

[redacted][373]

312. [redacted][374]

313. [redacted]

314. [redacted][375]

315. The Government of Ontario's future intentions regarding sourcing new electricity supply is outlined in its Long-Term Energy Plan. A new Long-Term Energy Plan was released on October 26, 2017. In that plan, the Government of Ontario stated that it intended to "move away from relying on long-term electricity contracts" and focus instead on more market-based

[373] **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

[374] **C-2476,** Expert Report by Power Advisory LLC (October 17, 2018), p. 1, Exhibit 1 to the Affidavit of Jason Chee-Aloy (19 October 2018).

[375] **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

approaches to electricity contracting, such as Incremental Capacity Auctions.[376] [redacted].[377]

316. [redacted] But for the moratorium, the Project would have been completed and in commercial operation by May 2015, well before the 2017 Long-Term Energy Plan was ever released.

317. Government policies on electricity procurement are constantly changing. When Windstream signed the FIT Contract, the policy in place was one that was heavily focused on procuring electricity resources using long-term contracts, *i.e.*, the FIT Program. For a short-period of time, per the 2017 Long-Term Energy Plan, that policy changed to focus instead on market-based approaches to electricity contracts. However, that policy once again changed and the Government is increasingly focused on procurement through long-term contracts.[378]

318. In 2018, as part of the Ontario Application, Windstream retained Jason Chee-Aloy of Power Advisory LLC to provide an expert report responding to the IESO's analysis supporting the Termination Decision. In addressing this second factor, Power Advisory predicted that this shift to "market-based approaches" would be short-lived and would not be successful in procuring all of Ontario's supply needs for required electricity resources and Ontario will revert back to the use of contracts to procure additional resources.[379]

319. Power Advisory has updated this report. It has explained that this prediction has, in hindsight, proven to be accurate. As Power Advisory explains, the IESO's latest supply need

[376] **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

[377] **C-2477,** Memorandum Re Section 10.1(g) Analysis — FIT Contract ID# F-000681-WIN-130-602 (Off-Shore Wind Project) from Michael Killeavy (IESO) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

[378] CER-Power Advisory-2, p. 9.

[379] **C-2476**, Expert Report by Power Advisory LLC (October 17, 2018), p. 14, Exhibit 1 to the Affidavit of Jason Chee-Aloy (19 October 2018).

forecast, set out in the 2021 Annual Planning Outlook, predicts an increased need for energy supply. This supply need forecast is greater than the IESO's 2020 Annual Planning Outlook, the Government of Ontario's 2017 Long-Term Energy Plan, and the IESO's 2016 Ontario Planning Outlook.[380] As a result, the IESO has moved away from incremental capacity auctions and reverted to the use of long-term contracts.[381]

320. [redacted]

321. [redacted].[382]

322. [redacted][383]

323. As explained in the 2018 Power Advisory report, the PSPG Analysis' reliability is questionable, particularly because it relied on the IESO's planned shift towards "market-based

[380] CER-Power Advisory-2, pp. 17-19.

[381] CER-Power Advisory-2, p. 9.

[382] **C-2477**, Affidavit of Michael Lyle (June 1, 2018), ¶ 42; **C-2477**, Letter from Michael Killeavy (OPA) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (IESO) (1 June 2018).

[383] **C-2477**, Affidavit of Michael Lyle (June 1, 2018), ¶ 43; **C-2477**, Letter from Michael Killeavy (OPA) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (IESO) (1 June 2018).

approaches" to electricity procurement as a basis for terminating the FIT Contract.[384] As Power Advisory explained in 2018, and confirmed in a report prepared for these proceedings, that plan was not likely effective to procure the resources required to meet Ontario's capacity needs.[385] This was confirmed by Mr. Killeavy, the individual at Contract Management responsible for the termination recommendation, who also provided an affidavit in the Ontario Application.[386]

324. In his affidavit in the Ontario Application, Mr. Killeavy testified that he relied on the PSPG Analysis in recommending that the IESO exercise the termination right. However, after reviewing the 2018 Power Advisory Report, it "became clear to [him]" that the analysis was flawed. Mr. Killeavy stated in that affidavit that "if [he] had understood the flaws in the PSPG Analysis as [he] now do[es] at the time [he] made [his recommendation], [he did] not believe that [he] would have recommended that the IESO exercise the Termination Right."[387]

325. In any event, this factor, too, relies upon delays caused by the moratorium. The PSPG Analysis was based on comparing the Project to the 2017 Long Term Energy Plan. However, the Project would have been built and commercially operable by May 2015 but for the moratorium. The impacts and benefits to Ontario's electricity grid and ratepayers from the Project were part of the IESO's earlier Long Term Energy Plan and policies. As set out above at paragraphs 315 to 320, these policies were only available as a justification for the cancellation of the FIT Contract because the moratorium had already significantly delayed (and would ultimately prevent) the commercial operation of the Project.

326. The IESO's reliance on the price of electricity under the FIT Contract was surprising to Windstream, as the fixed feed-in-tariff price for electricity was fixed by the OPA, who presumably only did so after careful consideration and analysis.[388] In particular, in an OPA

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[384] **C-2476**, Expert Report by Power Advisory LLC (October 17, 2018), p. 5, Exhibit 1 to the Affidavit of Jason Chee-Aloy (19 October 2018).

[385] **C-2476**, Expert Report by Power Advisory LLC (October 17, 2018), p. 9, Exhibit 1 to the Affidavit of Jason Chee-Aloy (19 October 2018); CER-Power Advisory-2, p. 8.

[386] **C-2475**, Affidavit of Michael Killeavy (October 18, 2018).

[387] **C-2475**, Affidavit of Michael Killeavy (October 18, 2018).

[388] **C-2474**, Supplementary Affidavit of David Mars (October 23, 2018), ¶ 12.

presentation explaining the pricing assumptions in the feed-in-tariff contracts, the OPA explained that the contract prices, including the prices for offshore wind projects, were "designed to provide participants and associated industries with a high measure of price stability and program sustainability," "aim to favour the most cost efficient projects in order to manage customer rate impacts," and "allow the proponent to recover project costs and earn a reasonable rate of return on investment."[389]

327. That OPA presentation also explained that the FIT contract prices were designed to balance several objectives. It explains that:

> FIT Price Schedule [is] designed to balance several objectives:
>
> -To promote broad participation in the program
>
> - Including different technologies, project sizes, and proponents (e.g., Aboriginal and community based)
>
> -To provide price stability necessary to promote the investment objectives of the proposed Green Energy Act
>
> -To encourage efficient project development
>
> - Striking a balance of **enabling project development while not overpaying for projects**.[390]

328. In the *Windstream I* arbitration, WWIS retained Jim MacDougall, a former manager at the OPA, to prepare a report regarding some of the considerations and assumptions that went into the design of the FIT Program, including electricity prices. Mr. MacDougall's report contains similar conclusions to that set out in the OPA presentation. He explained that the "FIT Price Schedule [including prices for electricity generated by offshore wind projects] is designed to balance multiple objectives including promoting broad participation in the program, providing price stability and certainty to investors, and to encourage efficient project development."[391]

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[389] **C-2474**, Proposed Feed-in Tariff Price Schedule Stakeholder Engagement – Session 4 (April 7, 2009), Exhibit 1 to the Supplementary Affidavit of David Mars (23 October 2018).

[390] **C-2474**, Proposed Feed-in Tariff Price Schedule Stakeholder Engagement – Session 4 (April 7, 2009), Exhibit 1 to the Supplementary Affidavit of David Mars (23 October 2018).

[391] CER-Compass, p. 5.

329. [redacted][392][redacted]

[redacted][393]

330. Notwithstanding its promise to Windstream that it would insulate the Project from the moratorium's effects – and the clear findings of the tribunal in *Windstream I* that its failure to intervene and direct the OPA to take steps that would give effect to that promise breached the FET standard – the Ontario Government did nothing to prevent the IESO from terminating the FIT Contract. To the contrary, the Government's continued application of the moratorium to the Project was explicitly cited by IESO as a basis for terminating the FIT Contract.

331. The IESO's ability to terminate the FIT Contract only arose because of the moratorium imposed by the Ontario Government and the Ontario Government's delays in setting the policy framework applicable to offshore wind projects. Had these delays not occurred, the Section 10.1(g) termination right would not have arisen. Indeed, the reasons underlying the IESO's Termination Decision are all based on factors attributable to or created by the delay caused by

[392] **C-2477**, Letter from Michael Killeavy (OPA) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (IESO) (1 June 2018).

[393] **C-2477**, Letter from Michael Killeavy (OPA) to Michael Lyle (IESO) (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (IESO) (1 June 2018) [**emphasis added**].

the moratorium. Notwithstanding the promise it made to Windstream that it would be insulated from the effects of the moratorium, the Ontario Government continued to apply the moratorium against Windstream and never directed the IESO to take the actions required to implement its promises.

C. The Government of Ontario Had the Authority to Direct the IESO to Not Exercise its Termination Right and to Take the Steps Necessary to Ensure the FIT Contract was "Frozen" and Failed to Do So

332. As set at paragraphs 154 to 159 above, the Ontario Government (through MEI) promised Windstream that the FIT Contract would be "frozen" or insulated from the effects of the moratorium. Windstream was assured that the moratorium would not mean the termination of the Project. This was consistent with Canada's representations during the *Windstream I* arbitration that the Project was only "on hold" and "frozen" and could resume once the temporary moratorium (or, as it called it, the "deferral") was lifted. The *Windstream I* tribunal found that the FIT Contract was still in force and could be renegotiated to implement those promises.[394]

333. The tribunal in *Windstream I* also found that the Ontario Government's failure to intervene in the OPA's negotiations with Windstream surrounding the application of the moratorium to the Project breached the FET standard. The Ontario Government had breached the standard by "let[ting] the OPA conduct the negotiations with Windstream even [though] the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so."[395]

334. Despite its promises to Windstream and the clear rulings from the tribunal that (1) the FIT Contract was still in force and open to be renegotiated; and (2) the Ontario Government had breached the FET standard by failing to provide any directions to the OPA in its negotiations surrounding the Project, the Ontario Government did nothing to prevent the termination of the FIT Contract or require the IESO to renegotiate its terms in a manner consistent with its promises. To the contrary, MEI refused:

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[394] **C-2040**, Award, ¶ 483.

[395] **C-2040**, Award, ¶ 379 [emphasis added].

a) to meet with Windstream to discuss the renegotiation of the FIT Contract or a path forward for the Project;

b) to direct the IESO to negotiate the FIT Contract in a way that implemented its promise; and

c) to direct the IESO not to exercise its termination right due to delays caused by the moratorium and the actions of the Ontario Government.

335. The Ontario Government's inaction was deliberate. As communicated by MEI to Windstream in its December 10, 2019 letter, "Ontario ha[d] decided not to intervene in this matter."[396] In making the deliberate decision not to act, Ontario created the conditions that led to the termination of the FIT Contract. Indeed, the IESO relied upon the lack of direction from the Government of Ontario in making the Termination Decision, as set out at paragraphs 329 to 331 above.

336. The Ontario Government had the power to direct the IESO to amend the FIT Contract to implement the promise to freeze and/or not to terminate the FIT Contract based on delays caused by the Ontario Government, namely the moratorium. This was recognized by the *Windstream I* tribunal, which found that the "failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA," to resolve the legal and contractual limbo it created was a breach of the FET standard.[397]

337. [redacted]

[396] CWS-N. Baines, ¶ 69; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).

[397] **C-2040**, Award, ¶ 380.

[redacted]

338. By failing to use its powers to direct the IESO not to terminate the FIT Contract and to renegotiate its terms to reflect the Government's promises, the Ministry of Energy and the Government of Ontario created the conditions that allowed the IESO to terminate the FIT Contract.

339. ***Ontario Could have Formally Directed the IESO to freeze the FIT Contract***. MEI exercises legal and formal control over the IESO. It could have used this formal power to direct the IESO to "freeze" the FIT Contract by renegotiating it to extend the MCOD for the duration of the moratorium and/or not to terminate the FIT Contract due to *force majeure* caused by the moratorium.

340. Pursuant to Section 25.32 of the *Electricity Act*, the Minister of Energy is empowered to issue directives to the IESO to take certain actions related to a broad range of electricity procurement issues. The IESO is obliged to follow these directives.[399]

341. These formal directives can relate to broader planning and resource initiatives. However, as explained by Mr. Killeavy (the former Director, Contract Management at the IESO) in his Witness Statement and in the Expert Report of Sarah Powell, these directives can also require the IESO to take particular actions with respect to certain contracts, proponents and/or projects, including extending the MCOD of a particular contract.[400] As Ms. Powell explains, pursuant to Section 25.32 of the *Electricity Act*, "the Minister of Energy can direct the IESO to undertake 'any other initiative or activity' that relates to the entering into of contracts for the procurement

[398] CWS-Killeavy, ¶ 29- 34; CWS-Smitherman, ¶ 12.

[399] **C-0003**, *Electricity Act*, 1998, S.O. 1998, c. 15; CER-Powell-3, ¶ 31; CWS-Killeavy, ¶ 16. See also **C-2477**, Affidavit of Perry Cecchini (June 5, 2017), ¶ 20.

[400] CER-Powell-3, ¶ 49; CWS-Killeavy, ¶ 17.

of electricity, such as amending the MCOD of a particular FIT contract." The IESO has no ability to refuse to do what it is asked to do (or refrain from doing) in that directive.[401]

342. The Minister of Energy has previously issued directives to the IESO to:

a) enter into negotiations with TransCanada for a contract for a gas-fired power plant to be located at the Lennox Generating Station;[402]

b) negotiate and enter into a contract with Ontario Power Generation for the procurement of electricity from advanced biomass from one converted unit at the Thunder Bay Generating Station;[403]

c) offer a four-year extension to the MCOD for existing Large FIT Contracts for Aboriginal Participation Projects where the generating facilities are located entirely on reserve lands;[404]

d) offer a three-year extension to the MCOD for existing FIT contracts for waterpower projects;[405]

e) extend timelines for completion of certain projects under the now terminated Conservation First Framework (an electricity conservation and demand management procurement initiative);[406]

[401] CER-Powell-3, ¶ 47.

[402] CWS-Killeavy, ¶ 17(b); **C-0632**, Letter from Bentley, Chris (MEI) to Andersen, Colin (OPA) (December 13, 2012).

[403] CWS-Killeavy, ¶ 17(c); **C-0693**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (May 1, 2014).

[404] CWS-Killeavy, ¶ 17(d); **C-2471**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 12, 2013), Exhibit 8 to the Affidavit of David Mars (2 June 2017).

[405] CWS-Killeavy, ¶ 17(e); **C-2471**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 26, 2013), Exhibit 9 to the Affidavit of David Mars (2 June 2017); **C-2471**, OPA: New hydroelectric project direction extends FIT Contracts for waterpower projects (June 26, 2013), Exhibit 10 to the Affidavit of David Mars (2 June 2017).

[406] CWS-Killeavy, ¶ 17(f); **C-2373**, Order in Council and Directive of the Minister of Energy, Northern Development and Mines to the IESO (June 10, 2021).

f) enter into contract negotiations with ITC on its Lake Erie Connector project which would establish a new 1000 MW underwater transmission intertie between Ontario and Pennsylvania;[407]

g) enter into contract negotiations with NRStor Inc. and Six Nations of the Grand River Development Corp. to explore a ten-year agreement for their proposed 250 MW Oneida Battery Storage facility;[408]

h) enter into discussions with Atlantic Power on options for a new five-year contract for the Calstock biomass generating facility to support a longer-term transition plan for the forestry sector; and[409]

i) draft a contract for the Oneida Battery Park Project.[410]

343. In addition to directing the IESO to enter into contracts and/or to amend the MCOD of specific contracts, the Minister of Energy has formally directed the IESO to terminate contracts for the procurement of electricity. For example, on July 13, 2018, the Minister of Energy directed the IESO to take all necessary steps to wind down certain FIT and Large Renewable Procurement Contracts.[411] This directive ended the FIT Program and ultimately resulted in the cancellation of 758 renewable energy procurement contracts.[412] Indeed, in the *Windstream I* proceedings, Canada's witness Perry Cecchini, then-Manager of the FIT Program at the OPA, acknowledged that the OPA "always complies with the Minister's direction", and did so in June

[407] CWS-Killeavy, ¶ 17(g); **C-2367**, MC-994-2021-352 Minister of Energy Letter to T. Young re next phase of ENDM project assessment framework and contract negotiations with Proponent (May 13, 2021).

[408] CWS-Killeavy, ¶ 17(h); **C-2349**, MC-994-2021-146 Letter from Greg Rickford (MEI) to Terry Young (IESO) re Oneida Battery Park Project (February 22, 2021).

[409] CWS-Killeavy, ¶ 17(i); **C-2349**, MC-994-2021-146 Letter from Greg Rickford (MEI) to Terry Young (IESO) re Oneida Battery Park Project (February 22, 2021).

[410] CER-Powell-3, ¶ 49(d).

[411] CWS-Killeavy, ¶ 17(j); CER-Powell-3, ¶ 48 **C-2162**, Order in Council and Directive of the Minister of Energy, Northern Development and Mines to the IESO entitled "Wind Down of Feed-in Tariff and Large Renewable Procurement Contracts" (July 13, 2018).

[412] CER-Powell-3, ¶ 48.

2013 when the MEI directed the OPA to offer a four-year extension to MCOD in respect of existing large aboriginal participation projects.[413]

344. It is clear that the Minister of Energy could have used their formal directive power to direct the IESO to amend the MCOD of the FIT Contract to reflect the promise to freeze. Alternatively, the Minister could have directed the IESO not to terminate the FIT Contract based on delays caused by the moratorium and the Government of Ontario. In this case, the directive could have been specific to WWIS or could have been a directive applicable to an entire class of FIT Contracts (*i.e.*, all offshore wind projects). Since WWIS is the only FIT supplier in the offshore wind class, a class-wide directive would have only applied to WWIS.[414]

345. [redacted][415]

346. [redacted]

[413] **C-2463**, Day 3- Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 17, 2016) (CONFIDENTIAL), pp. 173-174.

[414] CWS-Killeavy, ¶ 58. The IESO has issued this type of directive before. The Minister of Energy issued a formal directive requiring the IESO to offer a four-year extension to the MCOD for existing Large FIT Contracts for Aboriginal Participation Projects where the generating facilities are located entirely on reserve lands. Only one project fell in the scope of that directive: the Henvey Inlet Wind Power Project. See CWS-Killeavy, ¶ 59.

[415] CWS-Killeavy, ¶ 11(b).

347. ***MEI is accountable for the IESO's performance.*** As explained by Mr. Smitherman (the Minister of Energy and Infrastructure from June 20, 2008 to November 9, 2009), "the Ministry of Energy is responsible and accountable for the IESO's performance. It is therefore heavily involved in the IESO's affairs."[416] The significant integration of the two entities, and the Ministry of Energy's control over the IESO, is clear from the following:

a) The Minister of Energy is responsible for appointing the board members of the IESO, who manage and supervise the management of the IESO's business and affairs.[417] In its 2020 Annual Report, the IESO stated that "the Province of Ontario controls the IESO by virtue of its ability to appoint the IESO's Board of Directors."[418]

b) Each fiscal year, the Minister of Energy must approve the IESO's business plans. As such, the Minister of Energy has the ability to direct the IESO to allocate resources to particular initiatives.[419]

c) A Memorandum of Understanding between Ontario (as represented by the Ministry of Energy) and the IESO describes the respective roles and responsibilities of the Minister and the IESO. The MOU provides that, among other things, the Minister of Energy is accountable to:

> i) the Legislative Assembly for the IESO's fulfillment of its statutory mandate and its compliance with applicable legislation and adherence to applicable Minister's directives and directions.
>
> ii) Cabinet for the IESO's performance, the IESO's compliance with applicable legislation and directives from the Government of Ontario, and the implementation of the Long-Term Energy Plan.[420]

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[416] CWS-Smitherman, ¶ 6.

[417] CWS-Smitherman, ¶ 9(a); **C-0003**, *Electricity Act*, 1998, S.O. 1998, c. 15, s. 24(1).

[418] CER-Powell-3, ¶ 34; **C-2266**, IESO 2020 Annual Report, p. 23.

[419] CER-Powell-3, ¶ 53.

348. As explained by Mr. Smitherman, in order for the Minister of Energy to fulfill these responsibilities, the IESO and the Ministry of Energy must work very closely together. Mr. Smitherman testified that, when he was Minister of Energy, he was on the phone with the Chair of the OPA constantly ("at least a few times a week"), and that, in his experience serving in multiple cabinet-level positions in different ministries, this level of communication and integration was unparalleled to other ministries and agencies.[421]

349. [redacted][422] [redacted]"[423]

350. [redacted][425] [redacted]

[420] CWS-Smitherman, ¶ 9(c); **C-2021**, Memorandum of Understanding between Her Majesty the Queen in Right of the Province of Ontario as Represented by the Minister of Energy and the IESO - 2016.

[421] CWS-Smitherman, ¶ 11.

[422] CWS-Killeavy, ¶ 1.

[423] CWS-Killeavy, ¶ 19.

[424] CWS-Killeavy, ¶ 20.

[425] CWS-Killeavy, ¶ 20.

[redacted]”[426]

351. [redacted]

[redacted][427]

352. The IESO recognizes that MEI exerts influence over the IESO's decisions outside of formal channels. In the Ontario Application, the IESO filed affidavit evidence from its former Manager of Renewable Energy Contracts, Perry Cecchini. In his affidavit, Mr. Cecchini stated that "[i]n addition to formal directions or directives from the Minister of Energy, there is also an ongoing consultation process between the Minister of Energy and the IESO/OPA on issues which overlap the mandates of both the Ministry and the IESO/OPA. In this context, the Minister of Energy has, from time to time, made certain informal "requests" of the OPA/IESO. As these are not formal directions or directives, the IESO/OPA is not obliged to conform to these requests, but endeavor to do so where the request is consistent with our mandate."[428]

353. [redacted]

a) **TransCanada.** The OPA and TransCanada Energy Ltd. ("**TransCanada**") were parties to a power purchase agreement related to a gas-fired electricity plant. Due to local opposition to the project, TransCanada was unable to obtain the necessary

[426] CWS-Killeavy, ¶ 21.

[427] CWS-Smitherman, ¶ 13.

[428] **C-2477**, Affidavit of Perry Cecchini (June 5, 2017), ¶ 23.

permits to begin construction and declared *force majeure* under the contract.[429] The Government decided for political reasons to cancel the project and terminate the contract. However, the Government also promised TransCanada that it would be "kept whole." The OPA was not part of that promise between the Government of Ontario and the proponent.[430]

The OPA and TransCanada negotiated a resolution that implemented this promise. The OPA did so at the request of the Government, even though it had contractual rights to terminate the contract and to limit its obligation to pay any lost profits to TransCanada.[431] The OPA did not agree with the Ontario Government's commitment to TransCanada in light of its contractual rights; it informed the Auditor General of Ontario that it had not been consulted in the Ontario Government's promise to keep TransCanada "whole", and if it had been so consulted, it would have advised against it.[432] Nevertheless, the OPA complied with the Government's instructions and negotiated a resolution with TransCanada that implemented the promises made by the Government, without a formal directive.

Notably, the Ontario Government not only asked the OPA to negotiate with TransCanada to reach a resolution that implemented the commitments it made to TransCanada: it also instructed the OPA on how to conduct those negotiations. The OPA provided a counterproposal to TransCanada that TransCanada found unacceptable. After TransCanada complained to the Ontario Government, the Government "instruct[ed]" the OPA to submit a higher proposal. The OPA

[429] CWS-Killeavy, ¶ 26; **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), pp. 5, 9.

[430] CWS-Killeavy, ¶ 34; **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 9.

[431] CWS-Killeavy, ¶ 33; **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 9.

[432] CWS-Killeavy, ¶ 34; **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 15.

complied with this request, even though it believed that its original counterproposal was "fair value."[433]

b) **Greenfield South**. The OPA and Eastern Power Ltd. were parties to a power purchase agreement related to a gas-fired facility called the Greenfield South Power Plant. For political reasons, the Ontario Government decided that the plant could not go forward in its current location and informed the proponent that a new contract for a plant in a new location would be negotiated.[434]

At the request of the Government, and without a formal directive, the OPA negotiated the termination of the contract and the terms of a new contract, with compensation to the proponent.[435] In his testimony before the Standing Committee on Justice and Policy of the Ontario Legislature, OPA Chairman Jim Hinds was asked why the OPA went ahead and relocated the plant when it had no legal obligation to do so (*i.e.*, because there was no formal directive from the Ontario Government). His response was that the OPA "generally implements the policy of the government of the day in respect of electricity".[436]

c) **Bruce Power**. When Mr. Smitherman was Minister of Energy, Ontario experienced a surplus of power. As a result, Bruce Power was asked to dial back the amount of power it was producing at its nuclear generating station. [redacted]

[433] CWS-Killeavy, ¶ 37.

[434] CWS-Killeavy, ¶ 44.

[435] CWS-Killeavy, ¶ 43.

[436] CWS-Killeavy, ¶ 44; **C-0655**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee of Justice Policy, pp. JP-581 to JP-582.

[redacted][437]

d) **2011 One-Year Extension to FIT Contracts**. On February 9, 2011, the OPA announced that it would offer to amend all FIT contracts to extend the MCOD by up to one year.[438] The OPA made this offer because the Ministry of Energy requested that it do so, although no formal directive was issued.[439]

e) **Domestic Content Comfort Letters for Lenders**. Certain early versions of FIT contracts had domestic content requirements that required a certain percentage of the services performed and goods supplied to originate from Ontario. The determination of whether this requirement was met was only made after commercial operation was declared. This concerned lenders because they did not have certainty until after construction was completed. MEI was concerned that this would impose barriers to financing FIT projects and therefore asked the OPA to reduce this uncertainty. As a result of this request, the OPA created a process whereby it would provide feedback on a domestic content plan earlier in the process and provide a non-binding reliance letter confirming if that plan was compliant with the domestic content requirements.[440] No formal directive was issued but the OPA still complied with MEI's request.

354. These examples make clear that the Ontario Government – through MEI – had the power to direct the IESO to renegotiate WWIS' FIT Contract to implement the promise to freeze and/or to direct the IESO not to terminate the FIT Contract due to delays caused by the moratorium. It made the deliberate decision not to exercise that power, and thus created the conditions upon which the IESO terminated the FIT Contract.

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[437] CWS-Smitherman, ¶ 14(a).

[438] **C-0475**, FAQs on FIT COD Extension (February 9, 2011).

[439] CWS-Killeavy, ¶ 49; **C-1966**, Letter from David Lindsay (MEI) to Colin Andersen (OPA) re Extension for FIT and microFIT Contracts (January 28, 2011).

[440] CWS-Killeavy, ¶ 55; **C-1966**, Letter from David Lindsay (MEI) to Colin Andersen (OPA) re Extension for FIT and microFIT Contracts (January 28, 2011).

355. [redacted][441]

356. In her expert report, Ms. Powell agrees, concluding:

> …it is my opinion that Ontario had both formal and informal tools available to it, through [MEI] and the Minister of Energy, to direct the IESO to amend the key contractual milestone dates (including the MCOD) in the FIT Contract. In my view, such an amendment could have been achieved through any one of a Minister's Directive, targeted legislative action, unilateral action or negotiation with the IESO and Windstream.
>
> Moreover, Ontario has previously inserted itself in the IESO's contractual relationships and has both acted unilaterally and directed the IESO to amend, cancel and even move energy projects. Directing the IESO to amend the FIT Contract, whether formally or informally, would not have been exceptional.[442]

357. The TransCanada example is a notable one, as it is virtually identical to Windstream's situation. In that case, Ontario had discussions and made commitments to a proponent. Ontario was not the contractual counterparty. Yet, the Ontario Government asked the OPA to negotiate with the proponent to implement the promises it made. Even though the OPA did not agree with the promises made by the Government and would have instead insisted on its strict contractual rights, it complied with the requests made by the Ontario Government, including a request that it submit a higher proposal that the OPA did not believe was fair value.

358. Unlike in TransCanada, in this case, the Ontario Government decided not to make good on the promises it made to Windstream. Instead, it decided to do nothing, and openly adopted a policy of non-intervention that created the conditions for the termination of the FIT Contract.[443] As noted by Mr. Cecchini in his affidavit in the Ontario application process, the TransCanada case "stands in contrast to the facts of [Windstream], where there was no similar decision by the Government of Ontario requiring the OPA to amend its FIT Contract with Windstream in any

[441] CWS-Killeavy, ¶ 56.

[442] CER-Powell-3, ¶ 65-66.

[443] See ¶ 286 above.

particular way or requiring the OPA to suspend the Fit Contract for the entire duration of the Moratorium."[444]

XIX. ONTARIO'S ELECTRICITY CAPACITY NEEDS: THE PROJECT WOULD HAVE BEEN BENEFICIAL TO ONTARIO

359. Contrary to the IESO's stated basis for terminating the FIT Contract, the IESO expects that Ontario will need to produce more power to meet its capacity needs. The Project would therefore have been beneficial to Ontario.

360. As set out above, Windstream retained Mr. Chee-Aloy of Power Advisory to update the report he prepared for the Ontario Application considering (1) the IESO's stated bases for terminating the FIT Contract, and (2) Ontario's forecasted energy needs.

361. In the report submitted for the Ontario Application (dated October 17, 2018), Power Advisory concluded that the IESO's basis for terminating the FIT Contract was not justified, for the following reasons:

a) The IESO had not explained why the delays in the Project warranted the termination of the FIT Contract (*i.e.*, what harm, if any, would result if the FIT Contract was allowed to remain in place);[445]

b) The IESO's purported preference for incremental capacity auctions over long-term contracts was not reasonable as it was not likely to meet all of Ontario's long-term energy needs, and would not be an effective strategy for procuring energy resources;[446]

c) The IESO's "market-based" justifications, including the price of energy under the FIT Contract, was not reasonable as the price was established by the OPA, and

[444] **C-2477**, Affidavit of Perry Cecchini (June 5, 2017), ¶ 134.

[445] **C-2476**, Expert Report by Power Advisory LLC (October 17, 2018), p. 1, Exhibit 1 to the Affidavit of Jason Chee-Aloy (19 October 2018).

[446] **C-2476**, Expert Report by Power Advisory LLC (October 17, 2018), p. 2, Exhibit 1 to the Affidavit of Jason Chee-Aloy (19 October 2018).

that while renegotiating was possible that option had not been explored by the IESO.[447]

362. Power Advisory's report in the Ontario Application also assessed the most recent Ontario electricity supply forecasts available, which were included within the IESO's 2016 Ontario Planning Outlook and the 2017 Ontario Government's Long-Term Energy Plan. The forecasts presented in those indicated that an electricity supply shortfall was projected to emerge in the early to mid-2020s (approximately 2023).[448]

363. In its 2022 report, Power Advisory concludes that recent events since the report it tendered in the Ontario Application reinforce its conclusions that the IESO's analysis did not provide an adequate basis for terminating the Windstream FIT contract. There are two key factors underlying this conclusion:

a) the IESO was not successful in implementing Incremental Capacity Auctions and has since reverted back to using long-term contracts to meet Ontario's supply needs to address the forecasted electricity supply shortfall; therefore, the IESO's rationale regarding the use of "market-based approaches" was clearly flawed; and

b) the IESO has overestimated the level of surplus baseload generation within Ontario. This is due to a generator retiring post expiry of their contract, generation projects cancelled resulting from termination of their contracts, and the risk of certain gas-fired generators retiring post expiry of their contracts. Therefore, the IESO overestimated the impacts that the Project would have on surplus baseload generation.[449]

364. Recent events also reinforce Power Advisory's conclusion that Ontario's energy capacity needs will increase in the coming years. At its Technical Conference held with stakeholders on

[447] **C-2476**, Expert Report by Power Advisory LLC (October 17, 2018), p. 2, Exhibit 1 to the Affidavit of Jason Chee-Aloy (19 October 2018).

[448] CER-Power Advisory-2, p. 7.

[449] CER- Power Advisory-2, p. 2.

September 13, 2018, the IESO acknowledged that some uncertainties could have a "large" impact on available supply "in the coming years", including the potential shutdown of powerplants by generation owners and limited information about the availability of generators with expired contracts. Still, Power Advisory concludes that the IESO's current projections likely underestimate Ontario's electricity supply needs, due to future supply-side and demand-side changes that have the potential to increase the electricity supply shortfall, and therefore increase the supply needs in Ontario to meet this shortfall.[450]

365. The IESO's latest supply need forecast, set out in the IESO's 2021 Annual Planning Outlook, confirms that the IESO is anticipating further capacity needs beyond those identified in its previous forecasts. The supply need forecast is greater than the IESO's previous Annual Planning Outlook (released in 2020), its Annual Planning Outlook from 2016, and the Government of Ontario's 2017 Long-Term Energy Plan (upon which the IESO relied in justifying its decision to terminate the FIT Contract).[451]

366. Power Advisory believes that the 2021 forecast still underestimates Ontario's electricity supply needs. This is because there are supply-side risks of generators (namely, gas-fired generators) retiring after their contracts expire, coupled with increasing demand for electricity due to the potential for Ontario-wide electrification. Power Advisory concludes that electrification will result in higher than forecasted electricity demand. As a result, there will be an increase in Ontario's electricity shortfall, increasing its supply needs. The Project would have assisted in meeting this demand.[452]

XX. THE PROJECT WAS AND IS TECHNICALLY FEASIBLE AND, BUT FOR THE CONDUCT OF ONTARIO, WOULD HAVE BEEN BUILT AND OPERATIONAL BY THE DEADLINES SET OUT IN THE FIT CONTRACT

367. In connection with *Windstream I,* Windstream retained a series of experts who assessed the Project's technical, regulatory and financial viability and determined that (i) the Project was

[450] CER- Power Advisory-2, pp. 3-4.

[451] CER- Power Advisory-2, p. 3.

[452] CER- Power Advisory-2, p. 3.

feasible; and (ii) it could have been brought to commercial operation by the deadlines set out in the FIT contract had the moratorium not occurred. The experts made the following conclusions:

a) The Project did not face regulatory uncertainty;[453]

b) Windstream would have received Applicant of Record status;[454]

c) Windstream had the capability to complete the Project;[455]

d) There were favourable wind resources at the Project Site;[456]

e) The Wolfe Island Shoals area was appropriate for Project development;[457]

f) The proposed designs, installation strategies and implementation plans were feasible;[458]

g) There were no material impediments to the Project obtaining REA or other permits;[459] and

h) The Project was financeable.[460]

368. These conclusions were correct at the time of *Windstream I* and remain correct today. In support of this arbitration, Windstream has requisitioned new expert reports to reaffirm the Project's feasibility by considering scientific advancements in offshore wind generation and

[453] Memorial - *Windstream I*, ¶ 428; CER-Powell, ¶¶ 95, 100, 106-107.

[454] Memorial - *Windstream I*, ¶ 437; CER-Powell, ¶¶ 95, 100, 107.

[455] Memorial - *Windstream I*, ¶ 443; CER-SgurrEnergy, pp. 98, 47.

[456] Memorial - *Windstream I*, ¶ 445; CER-SgurrEnergy, pp. 61-62.

[457] Memorial - *Windstream I*, ¶ 446; CER-SgurrEnergy, p. 67.

[458] Memorial - *Windstream I*, ¶¶ 444, 447-450; CER-SgurrEnergy, pp. 50, 91, 93, 109, 118.

[459] Memorial - *Windstream I*, ¶¶ 453-468. See also CER-Ortech (REA Summary); CER-Baird; CER-Kerlinger; CER-Reynolds; CER-HGC.

[460] Memorial - *Windstream I*, ¶ 470; CER-Deloitte (Bucci), pp. 6-8; CER-Powell, ¶ 19; CER-Compass, p. 7.

regulatory changes since *Windstream I*. The experts have found no reason to alter the original conclusions set out above, which were accepted by the tribunal in *Windstream I*.[461]

369. The updated findings are summarized in a report prepared by Wood (formerly SgurrEnergy).[462] Wood is a leading multi-disciplinary engineering consultant that specializes in renewable energy. It has acted as a technical advisor to several offshore wind projects with innovative technical aspects, including projects that have used new turbine technology, new manufacturing and supply models, and new operation and maintenance strategies.[463]

370. Wood concludes, after having reviewed the updated expert reports, that the Project could have been constructed and brought into operation.[464]

371. Wood has also prepared an updated schedule (the **"Project Schedule"**) to incorporate the technical and regulatory changes described above.[465] The Project Schedule assumes the Project would have recommenced by February 18, 2020 and concludes that the Project would have been completed by December 20, 2024. Wood has benchmarked the timelines to those used for construction tasks in comparable American and European offshore wind projects and therefore concludes that they are achievable.[466]

372. The Project Schedule is comprehensive and incorporates the following work to be undertaken by Windstream:

a) Permitting and regulatory activities;

b) Environmental, geotechnical and wind resource surveys;

c) Financial and commercial obligations;

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[461] **C-2040**, Award.

[462] CER-Wood.

[463] CER-Wood, p. 18.

[464] CER-Wood, pp. 32-33.

[465] CER-Wood, Appendix B.

[466] CER-Wood, p. 53.

d) Engineering development and design;

e) Equipment procurement and fabrication; and

f) Installation and commissioning.[467]

373. Wood concludes that Windstream has managed the Project prudently and would have met the deadlines in the Project Schedule. As Wood explains, "Despite the restrictions imposed, Windstream has made considerable progress in advancing the design of the Project…Windstream would have been well-placed to continue the development of the Project through the final design, contract negotiations, and financial close of the Project" in keeping with the Project Schedule.[468]

374. Innovations in offshore wind since *Windstream I* have resulted in an even greater likelihood that the Project would have been completed successfully. Wood explains that decreased costs of developing offshore wind projects since *Windstream I* have resulted in the announcement and development of many new offshore wind farms around the world.[469] Advancements in wind turbine technology which allow wind farms to provide a more efficient energy yield have also promoted the promulgation of offshore wind globally.[470] The successful design and construction of these wind farms confirm that the Project as planned by Windstream was feasible, and indeed could have been completed with lower costs than initially reported by the experts in *Windstream I*.[471]

[467] CER-Wood, p. 53.

[468] CER-Wood, p. 53.

[469] CER-Wood, p. 20.

[470] CER-Wood, p. 20.

[471] CER-Wood, p. 43.

375. Wood has identified three similar wind projects that are particularly relevant to the Project and have aided their evaluation:

a) offshore wind farms in the Baltic Sea, which has sufficiently low salinity that it is comparable to a lake environment like Lake Ontario;[472]

b) existing and in-development wind farms on Lake Vänern in Sweden, which has similar icing conditions to Lake Ontario;[473] and

c) the Wolfe Island Onshore Wind Farm, located 5km northeast of the Project site, whose proximity makes it a useful source of data and experience.[474]

376. Having considered these and other real-world wind farms, Wood concludes that the Project is not only technically feasible, but has many attractive qualities for a wind project, including:[475]

a) a strong and consistent wind resource at the Project Site;

b) limited competition due to reduced capacity for bringing renewable energy from onshore wind farms to load centers;

c) proximity to a major transmission access point, allowing a strong connection to the energy grid; and

d) a significant energy yield.[476]

377. The following subsections explain in greater detail the updated conclusions from the new expert assessments.

[472] CER-Wood, p. 23.

[473] CER-Wood, p. 24.

[474] CER-Wood, p. 27.

[475] CER-Wood, p. 20.

[476] CER-Wood, p. 20.

A. The Project Remains Technically Feasible

378. Technological advancements in wind turbine generator ("**WTG**") design since *Windstream I* would have allowed Windstream to achieve an equal or greater energy yield than previously reported by using nearly half of the turbines previously planned for the Project (described below). Accordingly, Windstream has prepared a revised layout for the Project site to reflect the reduced number of total turbines:[477]

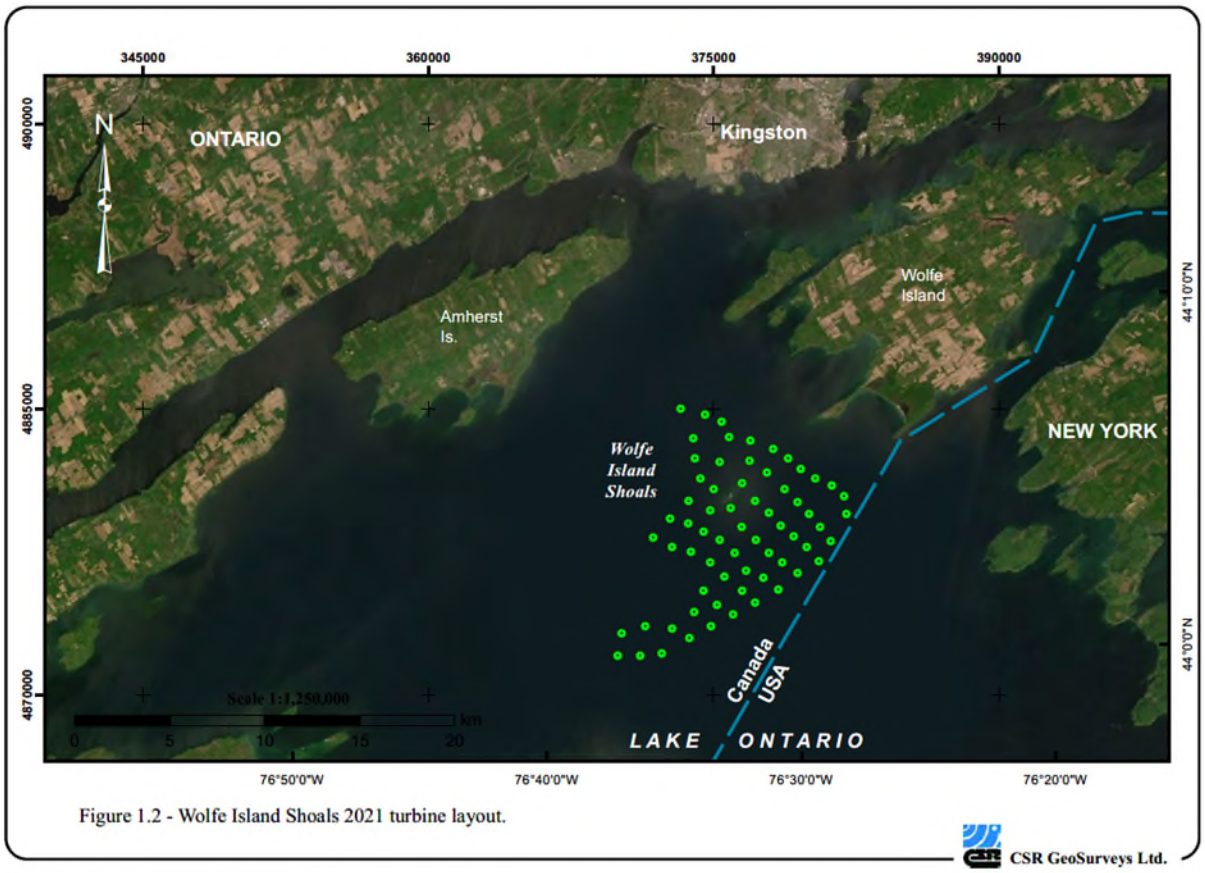

Figure 1.2 - Wolfe Island Shoals 2021 turbine layout.

The experts retained by Windstream have, where necessary, incorporated the new WTG model and layout into their analyses. As explained in greater detail below, while the new WTG model has improved the efficiency of the Project's energy yield, the new layout and WTGs has not changed the Project's feasibility or the timing of its completion.

[477] CER-Wood, pp. 46-47.

379. **New Siemens turbines are suitable and would reduce costs.** Windstream commissioned Ian Irvine (formerly of SgurrEnergy), an engineer and founder of SgurrEnergy who has over 30 years of experience in the renewable energy industry, to review and select WTGs to be used in the Project from the models that would have been available had the Project restarted in 2020.[478] After considering European and North American projects with similar characteristics to the Project, Mr. Irvine determined that the Siemens Gamesa 4.5MW-145 was the ideal turbine based on wind conditions at the Project site.[479] As discussed below, this model remains compatible with the foundations selected for the Project and with Windstream's installation plans.[480]

380. By using the Siemens Gamesa 4.5MW-145 WTGs, the Project could achieve an energy output comparable to that described in *Windstream I* with 66 total turbines instead of the 113 turbines originally planned. By using fewer turbines, Windstream could significantly reduce the costs of construction and operation for the Project.[481]

381. **The Project's estimated Energy Yield remains viable.** Wood performed an updated independent energy yield assessment to account for the new WTG models and the new layout and projected that the Project would generate an annual energy yield of 1159.9 gigawatt hours. This estimate meets or exceeds the estimates provided by SgurrEnergy for the previous WTG model and layout as described in *Windstream I*.[482] As SgurrEnergy initially reported, these yields compare favourably to those of existing onshore wind energy projects.[483]

382. **Gravity-based foundations remain suitable for the Project.** Windstream retained COWI to update its expert opinion regarding the foundations to be used in the Project for *Windstream I*. COWI determined, after reviewing the metocean environment, water depth and

[478] CER-Two Dogs (Wind Turbine Selection Report), s. 2.1.

[479] CER-Wood, p. 44; CER-Two Dogs (Wind Turbine Selection Report), s. 8.

[480] CER-Wood, p. 45.

[481] CER-Wood, p. 43.

[482] CER-Wood, pp. 41-42; Memorial (*Windstream I*), ¶ 445; CER-SgurrEnergy, pp. 61-62.

[483] CER-SgurrEnergy, pp. 61-62.

geologic conditions for the new layout, and the new WTG model selection, that semi-floating gravity-based foundations (GBFs) remain suitable for the Project. Furthermore, there is a readily available supply of raw materials and an existing supply chain needed to construct the GBFs in accordance with the Project Schedule.[484]

383. COWI's conclusions are based in part on the fact that approximately 40 offshore wind projects in various stages of development around the world have implemented, or will implement, GBFs.[485] COWI has also relied on a new geophysical investigation of the Project Site prepared for Windstream by CSR GeoSurveys Ltd.[486] Having reviewed CSR's analysis of sediment sequences at the wind turbine locations,[487] COWI has confirmed that the GBFs are the most economical foundation type for the conditions at the Project site and that, where necessary, surficial sediment could be removed to accommodate the GBFs.[488]

384. **Ice does not pose a material risk to the Project.** As described in greater detail below, coastal engineering firm WF Baird (**"Baird"**) and its subcontractors considered the new WTG model and layout and analyzed risks posed by icing conditions on Lake Ontario. Baird determined that these risks were manageable and could be reduced as the Project developed.[489] COWI concurs that icing conditions on Lake Ontario do not pose a risk to the GBFs.[490]

385. **The proposed means and methods of installing the WTGs and GBFs remain viable.** Weeks Marine (**"Weeks"**) has prepared an updated version of its Construction Methodology from *Windstream I* that provides means and methods for installing the GBFs and new model WTGs in the revised layout.[491] Wood has reviewed Weeks' report and confirmed that the

[484] CER-Wood, p. 50.

[485] CER-COWI (Wind Turbine Gravity Base Foundation Design), s. 4.3.

[486] CER-COWI (Wind Turbine Gravity Base Foundation Design), s. 5.3.

[487] CER-Wood, pp. 46-47.

[488] CER-COWI (Wind Turbine Gravity Base Foundation Design), ss. 4.2, 5.3.

[489] CER-Wood, pp. 48-49; CER-Baird-3, s. 6.2.

[490] CER-COWI (Wind Turbine Gravity Base Foundation Design), s. 4.2.

[491] CER-Weeks-2.

proposed means and methods are viable and account for known geotechnical, bathymetric and weather data.[492]

386. Weeks is a 102-year-old privately owned company with extensive experience in the construction of marine facilities. Its inventory of marine construction vehicles is one of the largest in the world. Since *Windstream I,* Weeks has continued to support the planning and development of offshore wind projects on the U.S. east coast, including the successful installation of the Block Island Offshore Wind Foundations for Deepwater Wind (now Orsted) off the coast of Rhode Island.[493]

387. Weeks' report has identified the vessels that would have been used to deliver and install the WTG components and the GBFs, including its jack-up barge RD MacDonald.[494] These vessels are compatible with the new WTG model.

388. **Operations and Maintenance are unchanged from *Windstream I*.** According to Wood, the operations and maintenance of the Project remain viable and have not changed from the summary provided by SgurrEnergy in *Windstream I.*[495]

B. The Project would not have faced regulatory impediments

1. The Project would have achieved REA and other permits within three years.

389. Windstream has retained two experts, WSP, an industry leader in wind energy with over 30 years of experience,[496] and Sarah Powell, a partner at Davies Ward Phillips & Vineberg LLP who has practiced environmental law for over 25 years,[497] to update their findings from *Windstream I* regarding the regulatory landscape for the Project.

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[492] CER-Wood, p. 51.

[493]CER-Weeks-2, s. 1.2.

[494] CER-Weeks-2, s. 6.0.

[495] CER-Wood, p. 56; CER-SgurrEnergy, pp. 3-5.

[496] CER-WSP-2, s. 2.1.

[497] CER-Powell-3, ¶ 2.

390. Having considered regulatory changes since *Windstream I*, both WSP and Ms. Powell have confirmed that the Project would have achieved REA and other necessary permits within three years.[498]

391. Ms. Powell's analysis is based on the following factors:

a) there have been no changes to the regulatory framework for Ontario's permitting, development and operation of renewable energy projects since *Windstream I*, and this regulatory framework minimizes regulatory risk by implementing a streamlined approvals process to develop wind energy projects;

b) the MECP consistently met the REA completeness review and six-month service standards in all material respects;

c) provincial and federal regulators have extensive experience with offshore developments in the Great Lakes and could have provided general guidance on the development of offshore wind energy projects in Ontario;

d) the Ontario Land Tribunal upheld the vast majority of large onshore wind project REAs that were appealed, and these projects are now operating;

e) wind energy developers in Ontario have extensive experience developing strategic partnerships with Indigenous communities, which reduces project risk. As described below, WSP's permitting plans include enhanced consultation activities between Windstream and Indigenous communities.[499]

392. WSP has updated the comprehensive permitting and approval schedule it prepared for *Windstream I*.[500] Wood has reviewed WSP's report and confirms that WSP has accounted for

[498] CER-WSP-2, Executive Summary, p. v; CER-Powell-3, ¶ 3.

[499] CER-Powell-3, ¶ 132 (e).

[500] CER-WSP-2.

regulatory and permitting changes since 2015. Wood has incorporated WSP's timelines into the Project Schedule.[501]

393. WSP notes that the development timeframe of three years is consistent with other large REA projects in Ontario. WSP's timelines are based on its extensive experience planning and obtaining REAs for renewable energy projects, including onshore wind projects in Ontario. It has incorporated in its plan statutory, published service standards and common timelines encountered in its renewable energy work.[502] WSP's permitting plan includes not only the studies required under the REA Regulation, but also those expected to be required to complete an Offshore Wind Facility Report pursuant to MOE's "DRAFT Complete Submission Requirements Checklist for Off-shore Wind Projects."[503]

394. WSP has also included in its plan sufficient time for enhanced consultation and engagement activities with Indigenous communities that may be impacted by the Project.[504] The purpose of enhanced consultation and engagement activities is to create positive working relationships with Indigenous communities that would extend through the life of the Project. The Project Schedule is designed to accommodate a potential decision from the Director for the MECP that Indigenous consultation activities beyond the REA regulatory requirements are required.[505]

395. Ms. Powell confirms that the Project could have completed the regulatory approvals process within approximately three years, and that this timeline is generally consistent with the development timeframes of other large wind energy projects in the province.[506]

396. WSP's timelines are based on the following findings regarding permitting:

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[501] CER-Wood, p. 54.

[502] CER-WSP-3, Executive Summary, Conclusions.

[503] CER-WSP-2, s. 3.2.2.

[504] CER-WSP-2, s. 3.2.1.

[505] CER-WSP-2, s. 3.2.1.

[506] CER-Powell-3, ¶ 167.

a) ***It is unlikely that the Impact Assessment Act would apply to the Project, but WSP has nonetheless accounted for a screening.*** Because the Project is not situated on federal lands and would not be financed by federal authorities, it is unlikely that the federal *Impact Assessment Act* (the "**IAA**"), which replaced the *Canadian Environmental Assessment Act* in 2019, would apply to the Project. However, for completeness, WSP has accounted for a review by federal authorities for adverse environmental effects pursuant to sections 82 through 91 of the IAA. The time needed to conduct this review is included in the Project Schedule.[507]

b) ***There are no material concerns with respect to radar and communications.*** Through the use of Geographical Information Systems mapping, WSP has reaffirmed its original finding that the Project would not materially interfere with aeronautical infrastructure, weather radar or communications links. These conclusions consider updates to aeronautical and radar infrastructure since *Windstream I*. WSP has also confirmed that the Project would not interfere with United States airports, wind farms or consultation zones as required by the United States Federal Aviation Administration.[508]

c) ***New provisions in the Fisheries Act since Windstream I do not pose a schedule risk for the Project.*** WSP has assumed, for the purposes of constructing its timelines, that authorization from the Department of Fisheries and Oceans would be required pursuant to the *Fisheries Act*. The Project Schedule incorporates additional permitting activities required by new provisions of the *Fisheries Act* enacted since *Windstream I* that were designed to further protect fish and fish habitats and to incorporate Indigenous traditional knowledge and restoration processes into decision-making.[509]

[507] CER-WSP-2, s. 3.3.

[508] CER-WSP-2, s. 3.4.

[509] CER-WSP-2, s. 3.5.

WSP expects that the Project will have no issues obtaining the necessary *Fisheries Act* permits. The construction of the Third Crossing of the Cataraqui River Bridge in the same area as the Project involved comparable, if not greater, impacts to sensitive fish habitats and nonetheless succeeded in obtaining *Fisheries Act* authorization.[510]

d) ***Species at Risk Act permits do not pose a risk to the Project Schedule.*** Baird has reaffirmed its finding from *Windstream I* that it is unlikely that listed species under the *Species at Risk Act* (the "**SARA**") are present in the Project site.[511] It is therefore unlikely that SARA permits will be required. However, in the event SARA permits are required, WSP confirms that the work required to obtain these permits could be done concurrently with the REA application, and therefore SARA permits pose no risk to the Project Schedule.[512]

e) ***The Project Schedule includes time to obtain a permit under the Conservation Authorities Act.*** Because the landing area for the submarine cable that would connect the Project to the provincial electrical system is located in an area regulated by the Cataraqui Conservation, the Project would require a permit under the *Conservation Authorities Act* (the "**CAA**"). WSP has incorporated adequate time to obtain this permit in the Project Schedule.[513] WSP does not anticipate any problems for the Project obtaining CAA permits. The Third Crossing Bridge, referred to above, involved greater permitting complexity and successfully obtained authorization.[514]

f) ***Endangered species do not pose a risk to the Project Schedule.*** Baird confirms that none of the species that have been added to the list of species at risk in

[510] CER-WSP-2, s. 3.5.

[511] CER-WSP-2, s. 3.6.

[512] CER-WSP-2, s. 3.6.

[513] CER-WSP-2, s. 3.7.

[514] CER-WSP-2, s. 3.7.

Ontario under the *Endangered Species Act* (the "**ESA**") since *Windstream I* are expected to have suitable habitats in the Project Area.[515] Nonetheless, WSP concludes that if ESA permits were required, there is adequate time in the Project Schedule to obtain them.[516]

g) ***Crown Land Site Release and Work Permits do not pose a risk to the Project Schedule.*** Crown Land Site Release and Work Permits requirements have not changed since *Windstream I*, and are still incorporated in the Project Schedule.[517]

2. There are no new material impediments with respect to the physical coast processes or aquatic resources of Lake Ontario

397. Baird has updated and reaffirmed its findings from *Windstream I* that nothing in the physical coast processes or aquatic resources of Lake Ontario would impede the Project from obtaining regulatory approval, and that the Project is feasible from a metocean perspective.[518] Baird is a leading authority on coastal processes and engineering on the Great Lakes.[519] Its conclusion is based on the following findings:

a) ***The Project does not pose a risk to drinking water.*** Studies of lakebed sediment disturbance since *Windstream I* have reaffirmed Baird's conclusion that the sediment disturbance caused by the Project would not threaten drinking water safety. Indeed, since *Windstream I*, comparable in-water projects have advanced to construction without concerns being raised about drinking water safety.[520]

b) ***Shipping and navigation risks are acceptable.*** The new WTG model and layout do not pose a serious threat to shipping and navigation. The proposed navigation

[515] CER-WSP-2, s. 3.8.

[516] CER-WSP-2, s. 3.8.

[517] CER-WSP-2, s. 3.9.

[518] CER-Baird-3, Executive Summary.

[519] CER-Baird-3, s.2.1.1.

[520] CER-Baird-3, s. 4.

allowance for the Project is consistent with safe practices on the Great Lakes-St. Lawrence Seaway and international guidance.[521] Baird explains that potential navigational risks would be mitigated by "marking and lighting the turbines in accordance with regulations, providing AIS transponders to selected WTGs, providing aviation obstruction lighting, and implementing WTG rotor breaking systems to allow access by marine search and rescue (SAR) helicopters."[522]

c) ***Waves, coastal processes and ice conditions are well understood.*** Baird's review of reports completed since *Windstream I* confirms its conclusions that wind, wave, scour and ice conditions are well understood for the Project site and do not pose a serious risk to Project.[523] Indeed, the latest assessments of ice conditions prepared for Baird's report suggest that the ice design loads for the GBFs identified by Baird in its 2012 report are likely conservative and could be reduced with further analysis.[524]

d) ***Underwater noise effects are likely not significant.*** Baird commissioned SLR Consulting Canada Ltd. to conduct an additional technical study of underwater noise related to the Project. The study provided no reason to change Baird's conclusion from *Windstream I* that there are no significant underwater noise concerns. The Project noise is comparable to, or less than, that of some commercial vessels using the existing shipping lanes. Any effects on fish caused by noise would only occur temporarily during construction of the Project and only in the immediate vicinity of the construction.[525]

[521] CER-Baird-3, s. 5.

[522] CER-Baird-3, s. 5.

[523] CER-Baird-3, s. 6.

[524] CER-Baird-3, s. 6.

[525] CER-Baird-3, s. 8.

3. The Project would not exceed MECP sound level limits

398. Windstream engaged Aercoustics to reaffirm its conclusion from *Windstream I* that the Project would fall below sound level limits established by the MECP in light of the new WTG model and layout, and new scientific research on long distance sound propagation over water.[526] At Windstream's request, Aercoustics also considered the cumulative noise impacts of other nearby wind energy projects despite the fact that the Project site is not close enough to existing noise receptors to require this analysis under the MECP noise regulations.[527]

399. Aercoustics concluded that the noise impact of the Project would be well below the MECP sound level limit of 40 dBA, would have a negligible contribution to the cumulative sound impacts and that cumulative levels would not exceed the MECP's 40 dBA sound level limits.[528]

400. ***The Project remains feasible.*** The experts who have assessed the Project's technical, regulatory and financial viability and confirmed that (i) the Project remains feasible and (ii) it could have been brought to commercial operation by the deadlines set out in the FIT contract had the moratorium not occurred and the FIT contract not been cancelled. As the tribunal in *Windstream I* found, the conclusions were correct in 2016, and remain accurate today.

PART THREE – THE TRIBUNAL HAS JURISDICTION OVER WINDSTREAM'S CLAIMS

401. The jurisdictional requirements under NAFTA Chapter 11 are satisfied in this case; the Tribunal has jurisdiction over the parties and subject-matter of the dispute, and the measures complained of are attributable to Canada.

402. The Windstream I tribunal accepted jurisdiction over Windstream's claims against Canada under Chapter 11 of the NAFTA. The investor and the investments in this arbitration are

[526] CER-Aercoustics-2, p. 3.

[527] CER-Aercoustics-2, pp. 7-8.

[528] CER-Aercoustics-2, p. 10.

the same. There should therefore be no dispute that the Tribunal has jurisdiction over the parties and subject-matter of the dispute.

403. At the end of this section, Windstream briefly addresses the objections to jurisdiction that Canada identified briefly in paragraphs 5, 6, 18 and 19 of Canada's Response to the Notice of Arbitration. As these arguments are not made in response to any detailed jurisdictional objection by Canada, Windstream will provide its complete position on these issues in its Reply, to the extent that Canada pursues them.

I. THE TRIBUNAL HAS JURISDICTION OVER THE PARTIES TO THE DISPUTE

404. The Tribunal has jurisdiction over both Windstream and Canada, the parties to this proceeding.

405. Under Article 1116 of the NAFTA, an Investor of a Party may make a claim on its own behalf for loss or damage arising out of a breach of Section A of Chapter 11 by another Party. Under Article 1117, that Investor may make such a claim on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly.

406. Article 1139 defines an "investor" of a Party to include an enterprise of a NAFTA Party that seeks to make, is making or has made an investment. Article 201 defines enterprise as any "entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association," and an enterprise of a Party as "an enterprise constituted or organized under the law of a Party."

407. Windstream is a limited liability corporation constituted under the laws of the State of Delaware in the United States and is therefore an enterprise of the United States within the meaning of Article 201 of the NAFTA. As set out below, Windstream has made investments in Canada. Windstream is therefore an "investor" of the United States within the meaning of Articles 1116(1) and 1139 of the NAFTA.

408. WWIS is a corporation incorporated under the laws of Ontario, Canada. It is therefore an enterprise of Canada within the meaning of Article 201 of NAFTA. Windstream owns 100% of

WWIS, 85% directly and 15% indirectly through its wholly owned subsidiary, OCP Option Inc. WWIS therefore qualifies as an enterprise owned or controlled, directly or indirectly, by Windstream within the meaning of Article 1117(1) of the NAFTA.

409. As a Party to NAFTA, Canada is subject to the Tribunal's jurisdiction pursuant to Articles 1116, 1117 and 1122 of NAFTA, which provide Canada's affirmative consent to arbitration.

410. Thus, the Tribunal has jurisdiction over both parties to this arbitration.

II. THE TRIBUNAL HAS JURISDICTION OVER THE SUBJECT-MATTER OF THE DISPUTE

411. As noted above, Articles 1116 and 1117 of the NAFTA permit investor claims pertaining to loss or damage arising out of a breach of Section A of Chapter 11.

412. Section A imposes obligations on Canada with respect to "investors of another Party" and "investments of investors of another Party in the territory of the Party." Under Article 1101, Chapter Eleven applies to measures adopted or maintained by a Party relating to investors of another Party and to their investments in the territory of the Party adopting or maintaining the measure.

413. Article 1139 further defines an "investment" as, in relevant part:

> (a) an enterprise;
>
> (b) an equity security of an enterprise; […]
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> > (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or
> >
> > (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise […]

414. Windstream has the following investments in Canada: WWIS, the Project and the FIT Contract.

415. ***WWIS is an Investment.*** As an enterprise of Canada wholly owned by Windstream, WWIS is an investment of Windstream in Canada. In *Windstream I*, Canada admitted that WWIS is an investment of Windstream.[529] WWIS therefore meets the definition of "investment of an investor of another Party" within the meaning of Article 1101.

416. ***The Project is an Investment***. WWIS engaged in developing the Project with the expectation that doing so would result in an economic benefit to WWIS, and by extension to its parent, Windstream. Further, the Project is an "interest arising from the commitment of capital." Thus, the Project is an "investment" of WWIS in Canada.

417. The Project includes all of the following which are the result of a commitment of capital by Windstream, via WWIS:

a) the FIT Contract;

b) the $6 million letter of credit;

c) all of WWIS' work product in connection with the development of the Project, including all of its studies to define the wind resource and determine the Project's feasibility;

d) all of the data that WWIS has collected or acquired in connection with the Project, including wind resource data and meteorological data;

e) the meteorological tower;

f) WWIS's turbine supply agreement with Siemens; and

g) land leases concluded in connection with the Project.

[529] Counter-Memorial - *Windstream I*, ¶ 474.

418. In *Windstream I*, Canada did not dispute that the Project is an investment of Windstream within the meaning of the NAFTA. It has similarly not raised any such issue in its Response to the Notice of Arbitration in this proceeding.

419. ***The FIT Contract is an Investment.*** The FIT Contract is WWIS's most important property right and asset. It would have constituted WWIS's most significant source of revenue[530] had the Project proceeded as planned. It is therefore an investment of Windstream's, held indirectly through WWIS.

420. As noted above, the definition of "investment" in Article 1139 includes "property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" and an "interest arising from the commitment of capital or other resources," such as "contracts involving the presence of an investor's property in the territory of the Party" or "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise." As such, the definition of "investment" in Article 1139 clearly includes contractual rights and is satisfied by the FIT Contract. Windstream committed capital to acquire the FIT Contract (including the $6 million in security) and did so with the expectation or for the purpose of economic benefit and for other business purposes.

421. Professor Newcombe and Dr. Paradell have defined investment as follows:

> Normally an investment consists of a bundle of rights, both tangible and intangible. These might include leases of property, licenses and permits, contracts, inventory and other assets. As a consequence, investors have a legitimate expectation that these acquired rights will be protected and treated in accordance with state representations upon which the investor has relied.[531]

422. The expression "property, tangible or intangible" has a broad connotation and includes intangible rights such as contractual rights, as recognized by numerous tribunals.[532] Windstream

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[530] CER-Powell ¶ 111.

[531] **CL-109**, Newcombe A. & Paradell L., *"Standards of Treatment" in Law and Practice of Investment Treaties* (Kluwer Law International, 2009), p. 283.

[532] **CL-125**, *Khan Resources Inc. v. Mongolia*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 ("*Khan Resources*") ¶¶ 302-08; **CL-092**, Wena Hotels Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/98/4) Award, 8 December 2000 ("*Wena Hotels*") ¶ 98; **CL-119**, *British Caribbean Bank Ltd. (Turks & Caicos) v. The Government*

also submitted expert evidence in *Windstream I* from Ms. Powell that demonstrated that the FIT Contract is in and of itself intangible personal property under Ontario law. Under Ontario law, the FIT Contract is a valuable asset and constitutes intangible personal property which could be the subject matter of a security interest and which would be transferable on bankruptcy to the trustee-in-bankruptcy of WWIS.[533] The FIT Contract may be the subject of a change of control.[534] It may also be mortgaged, charged or otherwise encumbered to the benefit of a secured creditor.[535]

423. As the tribunal in *Feldman* noted, the term "investment" is defined in Article 1139 in "exceedingly broad terms." It covers "almost every type of financial interest, direct or indirect, except certain claims to money."[536] Tribunals in several NAFTA cases have confirmed that contracts may qualify as investments within the meaning of Article 1139,[537] subject to the limits set out under paragraphs (i) and (j) to the definition of investment.[538]

424. Similarly, the tribunal in *PSEG Global v. Turkey* found that a concession contract was itself an investment because it was a valid contract under Turkish law.[539]

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of Belize, PCA Case No. 2010-18, Award, 19 December 2014 ¶ 200; **CL-082**, *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Award, February 6, 2007 ("*Siemens*") ¶ 267; **CL-061**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case) Award, 31 March 2010 ("*Merrill & Ring*") ¶¶ 140-142, 149; **CL-083**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award on the Merits, 20 May 1992 ("*Southern Pacific*") ¶¶ 32-33; **CL-043**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2) Award, 31 October 2012 ("*Deutsche Bank v Sri Lanka*") ¶ 506; **CL-097**, Dolzer R. & Schreuer C., *Principles of International Investment Law, Second Ed.* (Oxford University Press, 2012), pp. 125-130. "Property" is also given a broad interpretation under the laws of Ontario and Canada applicable in Ontario and includes contractual rights, data and work product: CER-Powell ¶¶ 130-131.

[533] CER-Powell, ¶ 130.

[534] CER-Powell, ¶ 118.

[535] CER-Powell, ¶¶ 126-29.

[536] **RL-024**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman*") ¶ 96; **CL-061**, *Merrill & Ring*, Award ¶ 139.

[537] **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev*") ¶ 80; **CL-061**, *Merrill & Ring*, Award, ¶ 139.

[538] **CL-061**, *Merrill & Ring* ¶ 139.

[539] **CL-076**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007 ("*PSEG Global*") ¶¶ 89, 90, 102, 104.

425. Therefore, the FIT Contract is also an investment within the meaning of Article 1139 of the NAFTA.

III. THE MEASURES AT ISSUE ARE ATTRIBUTABLE TO CANADA

A. The Acts and Omissions Complained of Are Measures Under Article 1101 of NAFTA

426. Article 1101 of NAFTA provides that it applies to "measures adopted or maintained by a Party" relating to investors of another Party and investments of investors of another Party.[540]

427. Article 201 of NAFTA defines "measure" as including "any law, regulation, procedure, requirement or practice." The definition is "broad and non-exhaustive."[541] It encompasses both acts and omissions.[542] As explained by the Tribunal in *Eureko v. Poland*, "[i]t is obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions."[543] A single measure may give rise to different types of claims and remedies under NAFTA.[544]

428. The measures at issue in this case are:

a) the Ontario Government's failure, following the *Windstream I* Award, to complete in a timely manner the work it considered necessary in order to lift the moratorium;

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[540] **C-0001**, *North American Free Trade Agreement* (NAFTA) - Chapter 11 - Investment (1994), Article 1101.

[541] **CL-030**, *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 July 2006 ¶ 148; see also **CL-005**, *Canada's Statement on Implementation of the North American Free Trade Agreement*, Can. Gaz. Part IC(1) (January 1994), p. 80.

[542] **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006 ("*Saluka*, Partial Award") ¶ 459; **CL-049**, *Eureko B.V. v. Republic of Poland* (Ad Hoc Arbitration) Partial Award, 19 August 2005 ("*Eureko*, Partial Award") ¶ 186; **CL-028**, *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL) Award on Compensation and Costs, 30 June 1990, p. 211.

[543] **CL-049**, *Eureko*, Partial Award ¶ 186.

[544] **CL-089**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Arbitral Award, 2 June 2000 ("*Waste Management I*") ¶ 27(a).

b) the Ontario Government's continued application of the moratorium to WWIS, following the *Windstream I* Award, despite its knowledge that the continued application of the moratorium to WWIS would create the conditions necessary to allow the IESO to terminate the FIT Contract;

c) the Ontario Government's failure, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract;

d) the Ontario Government's failure, following the *Windstream I* Award, to direct the IESO to amend the FIT Contract to ensure that the Project would be "deferred", "frozen" and "on hold" for the duration of the moratorium.

e) the decision of the IESO, a state enterprise exercising delegated governmental authority, to terminate the FIT Contract; and

f) the failure of the IESO, following the *Windstream I* Award, to amend the FIT Contract to ensure that the Project would be "deferred", "frozen" and "on hold" for the duration of the moratorium, contrary to the Ontario Government's promise to Windstream and WWIS.

429. These actions and omissions (collectively, the "**Measures**") fall within the scope of the definition of a "measure" under the NAFTA.

B. The Measures Complained of are Attributable to Canada

1. The Actions and Omissions of the Government of Ontario are Attributable to Canada

430. The first four measures described above relate to actions and omissions by the Government of Ontario (collectively, the "**Ontario Measures**"). Canada is responsible for the acts and omissions of the Ontario Government, which was the basis of its liability in the *Windstream I* Award.

431. As the tribunal stated in the *Windstream I* Award: "[t]here is no dispute between the Parties as to the Tribunal's jurisdiction to hear a claim on whether the acts of an organ of the Government of Ontario such as the MNR, the MOE, the MEI and the Premier's Office are in

breach of Chapter 11 of NAFTA."[545] There should likewise be no dispute amongst the parties in this proceeding that the Ontario Measures are attributable to Canada, as they are measures taken by organs of the Government of Ontario.

2. The Actions and Omissions of the IESO are Attributable to Canada

432. The *Windstream I* tribunal did not need to decide whether the acts of the IESO's predecessor, the OPA, were attributable to Canada, because it found that the acts of the Ontario Government organs were sufficient to find liability. The same is true here. As a result, the tribunal need not make any findings that the fifth and six measures – taken by the IESO (and collectively referred to hereafter as the "**IESO Measures**") – are attributable to Canada in order to find Canada liable for breaches of the NAFTA.

433. But in any event, the IESO Measures are also attributable to Canada, because the IESO is a state enterprise exercising delegated governmental authority.

434. Under Article 1503(2) of the NAFTA, a Party is liable for the acts or omissions of a state enterprise if the challenged acts or omissions were done in the exercise of governmental authority that was delegated to the state enterprise by the Party. 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. [Emphasis added.]

435. Article 1503(2) means that Canada cannot "avoid its obligations by delegating its authority to bodies outside the core government."[546]

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[545] **C-2040,** Award, ¶ 219.

[546] **CL-087**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002 ¶ 17.

436. ***The IESO is a state enterprise***. A "state enterprise" is defined in Article 201 of the NAFTA as "an enterprise that is owned, or controlled through ownership interests, by a Party." The term is also defined in almost identical terms in Article 1505: "For the purposes of this Chapter: state enterprise means an enterprise owned, or controlled through ownership interests, by a Party." There was no dispute between the parties in the *Windstream I* case that the OPA is a state enterprise.[547] The IESO, the OPA's successor, is clearly a state enterprise.

437. ***The IESO Measures are an exercise of delegated governmental authority***. The Government of Ontario promised that Windstream would be frozen from the effects of the moratorium and that the IESO, then the OPA, would take the steps necessary to ensure this promise was fulfilled.[548] This was a promise made by the Ministry of Energy's Chief of Staff to Windstream. The IESO's continued failure to fulfill that commitment after the *Windstream I* tribunal's Award and to instead terminate the FIT Contract due to the moratorium and delays caused by the Ontario Government is a failure to implement that Ministerial-level commitment. In other words, it is a failure to exercise delegated governmental authority.

438. In *Mesa Power v. Canada*, the tribunal found that the OPA was exercising delegated governmental authority when, among other things, it administered the FIT Program and awarded FIT contracts to proponents. In so finding, the tribunal noted that the *Electricity Act* empowered the OPA to enter into contracts relating to the procurement of electricity supply and capacity in or outside Ontario.[549] As such, these actions were done in the exercise of regulatory, administrative or other governmental authority.

439. Similarly, in this case, the IESO's treatment of WWIS's FIT Contract occurred pursuant to its governmental authority to administer the FIT Program and related contracts and the specific measures at issue resulted from its failure to implement the Ministerial-level

[547] **C-2040,** Award ¶¶ 224, 228.

[548] See ¶¶ 154-158 above.

[549] **CL-148**, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL (PCA Case No. 2012-17), Award, 24 March 2016 ("*Mesa Power*") ¶¶ 368-375.

commitment to Windstream. Like the tribunal's conclusion in *Mesa Power*, these were all actions done in the exercise of regulatory, administrative or other governmental authority.

IV. BRIEF COMMENT ON CANADA'S "LEGACY INVESTMENT" AND "RES JUDICATA" ARGUMENTS

440. This section provides brief comments on the "legacy investment" and "res judicata" arguments that Canada identified in its Response to the Notice of Arbitration. Canada has not yet formally raised these arguments as jurisdictional defences, nor has it articulated them to any degree of detail that would make possible a detailed response. Therefore, Windstream merely provides brief comment on these issues in this section and reserves its rights to provide its full position on these issues in due course, to the extent that Canada raises them.

A. Windstream Has a "Legacy investment" Under the CUSMA

441. At paragraph 5 of its Response to the Notice of Arbitration, Canada states that "Canada's consent to arbitration is conditional upon Windstream having a 'legacy investment' as defined in CUSMA Annex 14-C.6, a matter that has yet to be established."[550]

442. Each of Windstream's investments in Canada (WWIS, the Project and the FIT Contract) is a "legacy investment" within the meaning of Annex 14-C.6.

443. For context, on July 1, 2020, the Canada-United States-Mexico Agreement or CUSMA entered into force, replacing the NAFTA. The CUSMA does not include an investor-state arbitration mechanism for disputes arising in connection with the investments of U.S. investors in Canada (or those of Canadian investors in the United States).

444. However, Annex 14-C of the CUSMA provides that arbitration pursuant to Chapter 11 of the NAFTA remains available to such investors where they have "legacy investments," provided that they commence the arbitration proceeding within three years of the NAFTA termination (*i.e.*, by July 1, 2023). "Legacy investments" are defined as investments that were made between

[550] Contrary to the statement at footnote 8 of Canada's Response to the Notice of Arbitration, Windstream's Notice of Arbitration invokes both NAFTA Chapter 11 and Annex 14-C of the CUSMA.

the NAFTA's entry into force (on January 1, 1994) and its termination (July 1, 2020), and that were still in existence when the CUSMA entered into force on July 1, 2020.

445. The relevant provisions of Annex 14-C read as follows:

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment of NAFTA 1994) and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994; […].
>
> […]
>
> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.
>
> 4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referred in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.
>
> […]
>
> 6. For the purposes of this Annex: (a) ***"legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement***. [Emphasis added.]

446. Windstream's investments were established or acquired after the NAFTA came into force and were in existence on the date of entry into force of the CUSMA. Windstream therefore has "legacy investments" within the meaning of Annex 14-C.6. As a result, Canada consented to arbitrate Windstream's claims, by application of Annex 14-C.1 of the CUSMA.

B. The measures at issue post-date the Windstream I Award, and therefore are not res judicata

447. In the Response to the Notice of Arbitration, Canada asserts that this arbitration is a relitigation of the "facts and issues that were already before the Windstream 1 Tribunal" and the Tribunal lacks jurisdiction on the basis of the doctrine of *res judicata*.[551]

448. The Measures all arose ***after*** the *Windstream I* arbitration. As such, the Measures were not at issue in and were never determined by the *Windstream I* tribunal. There can therefore be no *res judicata*. Indeed, Windstream is relying on the findings of the *Windstream I* tribunal, and it will not be open to Canada to reargue any of the many factual and legal issues that have been decided against it.

PART FOUR – CANADA IS LIABLE FOR BREACHES OF THE NAFTA

449. Canada violated the NAFTA by:

(a) unlawfully expropriating Windstream's investments in violation of Article 1110; and

(b) failing to accord to Windstream's investments treatment in accordance with international law, including fair and equitable treatment, in breach of Article 1105(1).

I. CANADA HAS UNLAWFULLY EXPROPRIATED WINDSTREAM'S INVESTMENTS IN VIOLATION OF ARTICLE 1110 OF THE NAFTA

A. Article 1110 of the NAFTA

450. Article 1110 of the NAFTA prohibits the NAFTA Parties from expropriating the investments of investors without compensation. It 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;

[551] Government of Canada's Response to Notice of Arbitration (January 22, 2021), ¶ 18.

> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6. […]

451. Article 1110 prohibits both direct and indirect expropriation that is not accompanied by compensation. A direct expropriation occurs where the host state takes legal title of the investment or expropriated asset/right. An indirect expropriation occurs where the measures attributable to the state have the effect of substantially depriving the investor of the economic value of its investments.[552]

452. As set out by the *Windstream I* tribunal, there are two steps to determining whether an indirect expropriation has occurred. The first step involves determining, as a factual matter, whether an effective or *de facto* taking of property that is attributable to the State has taken place, even if there has been no formal transfer of title and even if the host State has not obtained any economic benefit. If so, the second step is to determine whether that taking is lawful, and what the appropriate form and level of relief should be.[553]

453. With respect to the first step, in order to determine whether an effective taking has taken place, the question is whether the investor has been substantially deprived of the value of its investment.[554] This question focuses on the *effect* of the measure on the investor, and not the state's intent. As noted by the *Windstream I* tribunal, this is a test that has been applied by

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[552] **CL-068**, *National Grid plc v. The Argentine Republic* (UNCITRAL) Award, 3 November 2008 ¶¶ 144-153; **CL-058**, *Ronald S. Lauder v The Czech Republic* (UNCITRAL) Final Award, 3 September 2001, ¶ 200; **CL-059**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/01), Decision on Liability, 3 October 2006, ¶ 188. Numerous tribunals have confirmed that expropriation may occur not only with respect to property rights, but also where the host state interferes with the investor's contractual rights. This principle dates back to the Chorzów Factory Case and has been applied in a large number of investment treaty cases: **CL-034**, *Case Concerning the Factory at Chorzów* (Germany v. Poland), 1928 P.C.I.J (ser. A) No. 17 (September 13, 1928), p. 44 ("*Chorzów Factory*"). See also **CL-144**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, (April 4, 2016) ("*Crystallex*"), fn 941; **CL-083**, *Southern Pacific*, Award on the Merits, ¶ 164; **CL-043**, *Deutsche Bank v Sri Lanka*, Award, ¶ 506; **CL-092**, *Wena Hotels*, Award, ¶ 98; **CL-041**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007, ("*Vivendi II*") ¶¶ 7.5.4, 7.5.22-7.6.2; **CL-049**, *Eureko*, Partial Award, ¶¶ 238-243; **CL-039**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶¶ 173, 270-271, 591.

[553] **C-2040**, Award, ¶ 284.

[554] **C-2040,** Award, ¶ 285.

numerous investment arbitration tribunals, including NAFTA tribunals.[555] The NAFTA tribunal in *Metalclad v. Mexico* described the test as follows (and was cited by the tribunal in *Windstream I* affirmatively for this point):

> [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host state [(*i.e.*, direct expropriation], but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[556]

454. The NAFTA tribunal in *S.D. Myers v. Canada* similarly found that state action that deprives an investor of the economic benefits of its investment amounts to expropriation.[557]

455. Tribunals have found that a substantial deprivation amounting to expropriation occurs where:

a) the investment is no longer capable of generating a commercial return;[558]

b) the investor has lost, in whole or in significant part, the use or reasonably-to-be expected economic benefit of the investment;[559]

c) the most economically optimal use of the investment has been rendered useless;[560] or

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[555] Award, ¶ 285. See also **CL-029**, *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012 ("*Burlington Resources*"), ¶¶ 396-398, 401; CL-023, ADM ¶ 240; **CL-071**, *Occidental Exploration and Production Company v. The Republic of Ecuador* (UNCITRAL, LCIA Case No. UN3467) Final Award, 1 July 2004 ("*Occidental v Ecuador*") ¶¶ 87-88; **CL-041**, *Vivendi II* ¶ 7.5.20.

[556] **C-2040**, Award, ¶ 287; **CL-062**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2001 ("*Metalclad*") ¶ 103.

[557] **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000 ("*S.D. Myers*"), ¶ 283.

[558] **CL-029**, *Burlington Resources*, ¶ 398.

[559] **CL-062**, *Metalclad* ¶ 103; **CL-023**, *Archer Daniels Midland Company and Tate & Lyle Ingredients, Inc. v. Mexico* (ICSID Case No. ARB(AF)/97/1), Award, 21 November 2007 ("*ADM*"), ¶ 240; **CL-041**, *Vivendi II* ¶¶ 7.5.11-7.5.16.

d) the investment's economic value has been neutralized or destroyed, as if the rights related thereto had ceased to exist.[561]

B. Windstream's Investments Have Been Indirectly Expropriated as a Result of the Measures

456. As a result of the Measures, as defined and described at paragraphs 428 to 429 above, the Ontario Government has indirectly expropriated Windstream's investments. Windstream has been substantially deprived of the value of its investments.

457. The *Windstream I* tribunal found that there was no expropriation because the FIT Contract was still "formally in force and [had] not been unilaterally terminated by the Government of Ontario" and the letter of credit remained in place.[562] The opposite is now true: the FIT Contract has been unilaterally terminated as a consequence of the conduct of the Ontario Government, and all the value remaining in Windstream's investments has been taken.[563]

458. The Measures that caused the expropriation of Windstream's investments, as described in detail at paragraphs 293 to 358 above, can be summarized as follows:

a) the Ontario Government failed, following the *Windstream I* Award, to complete in a timely manner the work it considered necessary in order to lift the moratorium, in order to ensure that the moratorium would not further prejudice WWIS by causing further delays to the Project. Indeed, the Ontario Government has not conducted the studies that were the stated pretense for applying the moratorium, and does not appear to be taking any steps to conduct those studies or lift the moratorium.

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[560] **CL-062,** *ADM*, ¶ 246.

[561] **CL-084**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003 ("*Tecmed*") ¶ 115; **CL-048**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("***Electrabel***"), ¶ 6.62; **CL-039**, *CME*, ¶ 604.

[562] **C-2040**, Award, ¶ 290.

[563] CWS-N. Baines, ¶ 72; **C-2289**, Letter from Michael Lyle (IESO) to Nancy Baines re Feed-in Tariff Contract F-000681-WIN-130-602 between IESO and the Supplier dated May 4, 2010 - Notice of Termination pursuant to Section 10.1(g) (February 18, 2020).

b) the Ontario Government continued to apply the moratorium to WWIS, following the *Windstream I* Award, despite knowing that its continued application as against WWIS would create the conditions that would allow the IESO to terminate the FIT Contract (in direct contradiction with its promise to protect the Project from the effects of the moratorium).

c) the Ontario Government failed, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be "deferred", "frozen" and "on hold."

459. The IESO's termination right, and the resulting Termination Decision, arose only because of the actions of the Ontario Government. Indeed, the IESO relied upon the lack of direction from the Government of Ontario in making the Termination Decision. The Ontario Government and the IESO failed to insulate the Project and the FIT Contract from the moratorium and related delays and resolve the "legal and contractual limbo" that the tribunal in *Windstream I* found the Ontario Government's actions had created. Instead, the Ontario Government sought to use the moratorium delays as a pretext to terminate a project it no longer wanted, particularly after the election of a new government in 2018 that had an anti-wind energy platform. The Ontario Government made clear that its inaction following the *Windstream I* Award, including its refusal to meet with Windstream, was a deliberate choice. As described at paragraph 286 above, it told Windstream that it "decided not to intervene" with respect to the Termination Decision.

460. The Ontario Government promised that the FIT Contract would be "frozen" and the Project would be "on hold" for the duration of the moratorium so that it could "continue" after the moratorium was lifted.[564] This was consistent with the Ontario Government's internal correspondence, which recognized that Windstream would be "kept whole."[565] This is also what Canada represented to the tribunal in *Windstream I*. As part of its defence to Windstream's claim in the *Windstream I* proceeding, Canada insisted throughout the arbitration that the FIT Contract

[564] **C-0484,** Transcription of Audio Recording Telephone Conference Call (February 11, 2011); **C-0483**, Audio Recording of Telephone Conference Call (February 11, 2011); Memorial (*Windstream I*), ¶¶ 261-262; Award, ¶ 217.

[565] Memorial - *Windstream I*, ¶ 360.

was "frozen" and "on hold" and that the Project would be permitted to continue when the temporary "deferral" (*i.e.*, the moratorium) was lifted.[566]

461. But the Ontario Government took no steps to implement this promise, even after the *Windstream I* tribunal found that its conduct had violated the NAFTA. Instead, the Ontario Government continued the very same course of conduct already found to violate international law. The Ontario Government refused to even meet with Windstream to discuss the Project.[567] The Ontario Government instead told Windstream to deal with the IESO, the counterparty to the FIT Contract, and then refused to direct the IESO to do anything (indeed, it explicitly indicated that it had determined that it would not intervene), even though it had the power to do so and had promised to do so.[568]

462. Now that the FIT Contract has been terminated, there is no longer any possibility for the Project to move forward or for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period, as set out in the FIT Contract. Windstream has lost the full value of its investment in WWIS, the Project, and the FIT Contract. Windstream has not been compensated for this loss. The *Windstream I* tribunal only awarded Windstream compensation for the *damage* to the investment, and not the full value of its investment.[569] As a result, the Measures have substantially deprived Windstream of its investments and amount to an unlawful expropriation of Windstream's investments, in breach of Article 1110 of the NAFTA.

C. The Expropriation of Windstream's Investments was Unlawful

463. As found by the *Windstream I* tribunal, once it has been determined that an expropriation has taken place, the second step in the analysis is to determine whether the taking is lawful.[570]

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[566] Counter-Memorial - *Windstream I*, ¶¶ 21, 260, 265, 266, 268, 353, 486-487.

[567] CWS-I. Baines-3, ¶ 17. CWS-N. Baines, ¶¶ 27-34; **C-2976**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).

[568] CWS-N. Baines, ¶ 68; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).

[569] **C-2040**, Award, ¶ 473.

[570] **C-2040**, Award, ¶ 284.

The *Windstream I* tribunal did not carry out this second step because it found that there was no taking, as the FIT Contract remained in force and the security deposit remained in place.

464. An expropriation is an unlawful breach of Article 1110 unless it meets the following criteria: (1) it is for a public purpose; (2) it was conducted on a non-discriminatory basis; (3) it was conducted in accordance with due process of law and Article 1105(1); and (4) compensation was paid in accordance with Articles 1110(2) to (6). All four of those requirements must be met for an expropriation to be lawful. None of these requirements are met here.

465. ***Canada has not paid any compensation***. This fourth requirement of the test clearly has not been fulfilled. This fact alone is sufficient to render the expropriation unlawful. An expropriation will only be lawful under Article 1110 if it is accompanied by payment of compensation in accordance with Articles 1110(2) to (6). This is true even if the expropriation is for a public purpose, not discriminatory and completed in accordance with due process. As such, the tribunal does not need to consider the other factors in order to find an unlawful expropriation.

466. To render an expropriation lawful, compensation must be equivalent to the fair market value of the expropriated investment as of the date of the expropriation. Compensation is to be made without delay and fully realizable. Ontario did not pay any compensation to Windstream following the termination of the FIT Contract.

467. Importantly, the compensation Canada is to pay is the fair market value of the investment as at the date of the expropriation, in this case, February 18, 2020. That value was never determined by the *Windstream I* tribunal, nor could it have been. The fair market value of the Project has increased over time. As explained by Windstream's damages experts, Secretariat, the Project was worth more in 2020 than it was worth in 2016, in part because of the continuing expansion and maturity of the offshore wind energy market and improving technologies (those developments are described in more detail above at paragraphs 39 to 58). As explained in more detail below, the fair market value as at the expropriation date is between $291.4 million – $333 million. Canada has not paid this amount to Windstream.

468. The continuing value of the Project after the tribunal's Award in *Windstream I* is reinforced by the discussions that Windstream had with several large and respected prospective

partners in 2017 (set out in more detail at paragraphs 224 to 229 above). As Mr. Mars explains, the strong interest in the Project from leading offshore wind industry participants demonstrates that the Project had significant value prior to the termination of the FIT Contract.[571]

469. ***Expropriation not for a public purpose***. An expropriation must be for a public purpose to be lawful. As stated by the International Law Commission:

> [T]he power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this raison d'être is plainly absent, the measure of expropriation is "arbitrary" and therefore involves the international responsibility of the state.[572]

470. There was no public purpose to the Ontario Government's continued failure, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract or to direct the IESO to amend the FIT Contract to ensure the Project would be "frozen", as promised. There was also no public purpose to the Ontario Government's failure to complete the scientific studies it considered necessary in order to lift the moratorium, so as to ensure the moratorium did not further prejudice WWIS or to continue to apply the moratorium to WWIS when it knew that this would create the conditions necessary to allow the IESO to terminate the FIT Contract.

471. The only plausible explanation for this state of affairs is that the Ontario Government decided that it no longer wanted the Project, consistent with its anti-wind energy agenda. That is not a legitimate public purpose within the meaning of Article 1110.[573]

472. ***Expropriation not completed in accordance with due process***. For an expropriatory measure to be in accordance with due process, it must comply both with international standards of due process and with the law of the host state.[574]

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[571] CWS-Mars-3, ¶ 8.

[572] **CL-008**, International Law Commission, *Documents of the Eleventh Session: Report of the Commission to the General Assembly on State Responsibility*, Fourth Report by F.V. Garcia Amador, UN Doc. A/CN.4/119 (1959).

[573] **CL-139**, *Bank Melli Iran and Bank Saderat Iran v Bahrain*, PCA Case No. 2017-25, Award (November 9, 2021), ¶ 691.

[574] **CL-158**, Newcombe A. & Paradell L., *"Standards of Treatment" in Law and Practice of Investment Treaties* (Kluwer Law International, 2009), p. 376.

473. For example, in *Metalclad*, the tribunal found that the Government of Mexico's unjustified delay in granting a permit, as well as the adoption of an Ecological Decree, amounted to an unlawful expropriation, partly because it was in breach of the requirement of due process and the absence of "a timely, orderly or substantive basis" for the denial of the required construction permit.[575]

474. As the *Windstream I* tribunal found, the Ontario Government "did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium. While the regulatory framework continued to envisage the development of offshore wind, additional and more detailed regulations governing offshore wind specifically were never developed."[576] In other words, even though Ontario imposed a moratorium on offshore wind development, it never amended the regulations to reflect this reality. The REA Regulation and Wind Policy 4.10.04 continue to apply to offshore wind projects. Indeed, as Ms. Powell explains, despite its public anti-wind energy stance, the Ontario Government has taken no steps to remove offshore wind regulations or to make any other changes to the renewable energy approval process to reflect its rhetoric.[577] The Ontario Government's failure to apply its own regulations, and continued failure to address this legal limbo, demonstrates a lack of due process contrary to Canada's obligations under Article 1110.

475. ***The expropriation was discriminatory.*** For the reasons discussed in more detail below (in respect of Canada's breach of its obligations under NAFTA Article 1105(1) to accord Windstream's investment fair and equitable treatment), the taking of Windstream's investment was discriminatory. As set out in more detail at paragraphs 353 to 358 to , Ontario's refusal to (1) intervene to prevent the IESO from terminating the FIT Contract, or (2) require the IESO to renegotiate it, stands in contrast to the actions it has taken to direct the IESO in order to keep other energy providers "whole" and safeguard the value of their investment.[578]

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[575] **CL-062**, *Metalclad*, Award, ¶¶ 107, 109.

[576] **C-2040**, Award, ¶ 379.

[577] CER-Powell-3, ¶ 92.

[578] **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), pp. 9-10.

II. CANADA FAILED TO GRANT WINDSTREAM'S INVESTMENTS FAIR AND EQUITABLE TREATMENT IN BREACH OF CANADA'S OBLIGATIONS UNDER NAFTA ARTICLE 1105(1)

476. In addition to causing the expropriation of Windstream's investments, the Measures also breached Canada's obligations to accord to Windstream's investments treatment in accordance with international law, including fair and equitable treatment under NAFTA Article 1105(1).

A. NAFTA Article 1105(1)

477. Article 1105(1) provides that "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." The NAFTA Free Trade Commission in its 2001 *Note of Interpretation* stated that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[579]

478. The leading authority with respect to the content of the minimum standard of treatment of fair and equitable treatment under Article 1105 is the decision in *Waste Management II*:[580]

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

[579] **CL-010**, NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions (31 July 2001).

[580] **CL-091**, *Waste Management Inc. v. United Mexican States* ("Number 2") (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, ("*Waste Management II*"), ¶ 98 [emphasis added]. See also **CL-148**, *Mesa Power,* Award ¶ 501; **CL-142**, *Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, ("*Bilcon*"), ¶ 433; **CL-064**, *Mobil Investments Canada and Murphy Oil Corporation v Government of Canada* (ICSID Case No: ARB(AF)/07/4), Decision on Liability and Principles of Quantum, 22 May 2012 ("*Mobil***")**, ¶ 141; **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, ¶ 283.

> Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case. [Emphasis added]

479. The tribunal in *Merrill & Ring* expressed the standard protected under Article 1105(1) as follows:

> [T]he standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness. Of course, the concepts of fairness, equity and reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair.
>
> […] against the backdrop of the evolution of the minimum standard of treatment discussed above, the Tribunal is satisfied that fair and equitable treatment has become part of customary international law."[581]

480. The tribunal in *Mobil Investments Canada Inc. v. Canada* articulated the standard of protection under Article 1105(1) as follows:

> (1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;
>
> (2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.
>
> (3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of
>
> > (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and
> >
> > (ii) were, by reference to an objective standard, reasonably relied on by the investor, and
> >
> > (iii) were subsequently repudiated by the NAFTA host State.[582]

[581] **CL-061**, *Merrill & Ring*, Award ¶¶ 210-211.

[582] **CL-064**, *Mobil*, Decision on Liability and Principles of Quantum, ¶ 152; see also **CL-085**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013 ("*TECO*") ¶ 454.

481. The state's conduct need not be outrageous or amount to bad faith to breach the Article 1105 standard. As noted by the NAFTA tribunal in *Mondev*, "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or egregious. In particular, a state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[583]

482. In *Windstream I*, after hearing extensive submissions from the parties on the interpretation of Article 1105(1), the tribunal rejected Canada's argument that the minimum standard of treatment does not include fair and equitable treatment and requires proving a breach of a customary international law standard, such as denial of justice or breach of full protection and security.[584] The tribunal relied on the approach of other NAFTA tribunals, citing the statement in *Pope & Talbot v. Canada* that:

> The [FTC] Interpretation concluded that Article 1105 prescribes the customary international law minimum standard of treatment as the minimum standard of treatment to be afforded to investments of investors of other Parties. The Interpretation does not require that the concepts of 'fair and equitable treatment' and 'full protection and security' be ignored, but rather that they be considered as part of the minimum standard of treatment that it prescribes. Parenthetically, any other construction of the Interpretation whereby the fairness elements were treated as having no effect, would be to suggest that the Commission required the word 'including' in Article 1105(1) to be read as 'excluding.' Such an approach only has to be stated to be rejected. Therefore, the Interpretation requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law.[585]

The *Windstream I* tribunal also relied on the *Mondev* decision, which reached an almost identical conclusion.[586]

483. According to the *Windstream I* tribunal, the determination of whether the Respondent's conduct is "unfair" or "inequitable" in accordance with the minimum standard of treatment under customary international law, "is best done, not in the abstract, but in the context of the facts of

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[583] **CL-066**, *Mondev,* Award, ¶ 116; **CL-142**, *Bilcon*, ¶ 444.

[584] **C-2040**, Award, ¶¶ 311, 356-357.

[585] Memorial - *Windstream I*, ¶ 359; **CL-074**, *Pope & Talbot Inc. v. The Government of Canada*, Award in Respect of Damages, 31 May 2002, ¶ 53.

[586] **C-2040**, Award, ¶ 360; **CL-066,** *Mondev*, ¶ 118, 122.

this particular case. […] In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts."[587]

B. The Measures Breached Article 1105(1)

484. In this case, the unfair and inequitable nature of the Measures can be best understood by considering the composite effect they have had on Windstream's investments.

485. The Ontario Government promised Windstream that the FIT Contract would be "frozen" or insulated from the effects of the moratorium. Windstream was promised and assured that the moratorium would not mean the termination of the Project.[588] This was consistent with Canada's representations during the *Windstream I* arbitration that the Project was only "on hold" and "frozen" and could resume once scientific studies had been conducted and the temporary moratorium (or, as it called it, the "deferral") was lifted.[589]

486. The *Windstream I* tribunal found that the FIT Contract was still in force and could be renegotiated to implement those promises.[590] The *Windstream I* tribunal also found that the Ontario Government's failure to intervene in the OPA's negotiations with Windstream surrounding the application of the moratorium to the Project breached the FET standard by "let[ting] the OPA conduct the negotiations with Windstream even [though] the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so."[591] In light of the tribunal's findings and Canada's representations, it was reasonable for Windstream to anticipate that the Ontario Government would operate transparently, in good faith, and would seek to uphold its promises and representations after the Award in *Windstream I.*

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[587] **C-2040**, Award, ¶ 358, 362.

[588] **C-0484,** Transcription of Audio Recording Telephone Conference Call (February 11, 2011); **C-0483**, Audio Recording of Telephone Conference Call (February 11, 2011); Memorial - *Windstream I*, ¶¶ 261-262; Award, ¶ 217.

[589] Counter-Memorial -*Windstream I*, ¶¶ 21, 260, 265, 266, 268, 353, 486-487.

[590] **C-2040**, Award, ¶ 290.

[591] **C-2040**, Award, ¶ 379 [emphasis added].

487. Despite its promises to Windstream and the tribunal's determination that:

a) the FIT Contract was still in force and open to be renegotiated; and

b) the Ontario Government had breached the FET standard by failing to provide any directions to the OPA in its negotiations surrounding the Project,

the Ontario Government did nothing to prevent the termination of the FIT Contract or require the IESO (the OPA's successor) to renegotiate the FIT Contract's terms in a manner consistent with the Ontario Government's promises. To the contrary, MEI refused to meet with Windstream to discuss the renegotiation of the FIT Contract or a path forward for the Project and refused to direct the IESO to negotiate the FIT Contract in a way that implemented its promise not to exercise its termination right due to delays caused by the moratorium and the actions of the Ontario Government. The Government has also failed to conduct the scientific studies which were the purported premise of the moratorium, which remains in effect to this day.

488. The Ontario Government's inaction was deliberate; indeed, it told Windstream in a December 10, 2019 letter that it "ha[d] decided not to intervene in this matter."[592] In making the deliberate decision not to act, Ontario created the conditions that led to the termination of the FIT Contract. The IESO in turn relied upon the lack of direction from the Government of Ontario in making the Termination Decision, as set out at paragraphs 329 to 331 above.

489. The Government's conduct was unfair, inequitable, arbitrary, discriminatory, and in breach of representations reasonably relied on by Windstream's investments. The Ontario Government had the power to direct the IESO to amend the FIT Contract to implement the promise to freeze and/or not to terminate the FIT Contract based on delays caused by the Government, namely the moratorium. This was recognized by the *Windstream I* tribunal, which found that the "failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA," to resolve the legal and contractual limbo it created was a breach of the FET standard.[593] Despite its ability to direct the IESO not to

[592] CWS-N. Baines, ¶ 68; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).

[593] **C-2040**, Award, ¶ 380.

terminate or to renegotiate Windstream's Contract (as it has done on multiple occasions with respect to other power purchase agreements, set out at paragraphs 353 to 358 above), and the *Windstream I* tribunal's findings that its previous failure to provide directions to the OPA had breached the FET standard, the Ontario Government refused to take any action that would make good on its promises to Windstream.

490. The Ontario Government's failure to take any action is discriminatory because it is contrary to the actions it has taken in respect of other investments in the energy sector by other proponents. [redacted]

491. While the Ontario Government made good on its promises to TCE (and ensured that the OPA implemented its instructions that TCE be kept "whole"), it made no efforts to meet its commitments to Windstream after the Award in *Windstream I.* Instead, notwithstanding the *Windstream I* tribunal's findings that the Ontario Government's conduct breached the FET standard by failing to take any measures (including by directing the OPA) to resolve the legal and contractual limbo it had created for Windstream, the Ontario Government adopted an explicit policy of refusing to take any steps to prevent the IESO from acting as it eventually did.[595] The termination of the FIT Contract – and Windstream's loss of its investment – is the direct result of that deliberate and unfair inaction.

[594] CWS-Killeavy, ¶¶ 29-35.

[595] **C-2040**, Award, ¶ 379; CWS-N. Baines, ¶ 68; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).

492. As a result, Canada, through the actions of the Ontario Government which are attributable to it, failed to accord to Windstream's investments treatment in accordance with international law, including fair and equitable treatment, contrary to Article 1105(1) of the NAFTA.

III. BUT FOR THE ACTIONS OF THE GOVERNMENT OF ONTARIO, WINDSTREAM WOULD HAVE BROUGHT THE PROJECT TO COMMERCIAL OPERATION ON TIME

493. The Ontario Government's conduct, including the maintenance of the moratorium after the *Windstream I* Award, its failure to conduct scientific studies it claimed were necessary, and its failure to freeze the FIT Contract, caused the termination of the FIT Contract and the destruction of Windstream's investment. The experts who assessed the Project's technical, regulatory and financial viability confirmed that the Project was feasible and, but for the actions of Ontario described above, could have been brought to commercial operation by the deadlines set out in the FIT Contract. As described in more detail in Part Two, Section XX of this Memorial, the experts have considered the potential risks and determined that said risks would not have impeded Windstream's ability to complete the Project:

a) ***The project was technically feasible***. Wood confirms that Windstream could have brought the Project to operation. The Project's development would have benefitted from advancements in wind turbine technology since *Windstream I*, which not only would have provided useful guidance for the construction and operation of the Project, but would have allowed the Project to achieve an equal or greater energy yield than previously reported by using nearly half of the turbines previously planned for the Project.[596]

b) ***Windstream's means and methods were appropriate for the Project site***. Windstream's development plan was sufficiently detailed and would have implemented wind turbines and foundations that (i) would have been appropriate

[596] CER-Wood, pp. 3, 43.

for the Project site conditions,[597] (ii) could have been installed using viable means and methods identified by Windstream and its experts,[598] and (iii) would have achieved a viable energy yield.[599] Wood concluded that Windstream's ability to operate and maintain the Project remains viable in light of the changes to the Project since *Windstream I*.[600]

c) ***The Project would not have faced regulatory impediments.*** WSP and Ms. Powell agree that the Project would have received its REA and other necessary permits within three years.[601] This timeframe is consistent with other large REA projects in Ontario.[602] The permitting timelines prepared by WSP and incorporated in Wood's Project Schedule are conservative, including time for the possibility of additional permitting requirements that WSP opines would not likely be required (for example, the Project Schedule allows time for an IAA assessment despite the fact that the IAA likely does not apply to the Project).[603] The Project Schedule also incorporates time for enhanced consultation activities with Indigenous communities that might be impacted by the Project.[604] Baird has updated its findings from *Windstream I* and confirmed that there are no new material impediments with respect to the physical coast processes or aquatic resources of Lake Ontario.[605] Aercoustics has similarly updated its previous findings and confirmed that the Project would not have exceeded MECP sound level limits.[606]

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[597] CER-Wood, p. 43; CER-Two Dogs (Wind Turbine Selection Report), s. 8; CER-COWI (Wind Turbine Gravity Base Foundation Design), ss. 4.2, 5.3.

[598] CER-Wood, p. 51; CER-Weeks-2, p. 22.

[599] CER-Wood, p. 40.

[600] CER-Wood, pp. 58-59; CER-SgurrEnergy, p. 5.

[601] CER-WSP-2, Executive Summary, s. 5.; CER-Powell-3, para 131.

[602] CER-WSP-2, s. 5.

[603] CER-WSP-2, Executive Summary (viii-ix).

[604] CER-WSP-2, s. 3.2.1.

[605] CER-Baird-3, Executive Summary (iii).

[606] CER-Aercoustics-2, p. 3.

These reports confirm that Windstream would not have missed the deadlines in the FIT Contract due to regulatory issues.

d) ***Windstream was capable of completing the Project.*** In connection with *Windstream I,* SgurrEnergy concluded that Windstream had the experience to move the Project through the design and development phase into the final design and implementation phase.[607] Wood has reaffirmed this finding and concludes that Windstream "has made substantial progress in various aspects of the Project and would have continued various development and detailed design activities but for the Provincial moratorium on offshore wind and cancellation of the FIT Contract."[608] Wood adds that Windstream's use of proven technology and installation methodologies, in connection with the favourable conditions at the Project site, support the finding that Windstream was capable of completing the Project.[609]

494. Wood ultimately concludes that the termination of the FIT Contract and the moratorium caused of the destruction of Windstream's investment:

> [F]urther development phase work would have proceeded in the ordinary course but for the termination of the FIT Contract and Government-imposed moratorium, and, supported by the extensive studies conducted to date, would have proceeded onto as detailed design, and financial close phases of the Project.[610]

495. As mentioned above, and explained in more detail below, Windstream has not been compensated for the destruction of its investment in *Windstream I.*

PART FIVE – DAMAGES AND INTEREST

496. Windstream is entitled to full reparation for the losses it suffered as a result of Canada's violations of the NAFTA and international law, in the form of monetary compensation sufficient

[607] CER-SgurrEnergy, p. 47.

[608] CER-Wood, p. 58.

[609] CER-Wood, p. 59.

[610] CER-Wood, p. 59.

to wipe out the consequences of the NAFTA breaches.[611] Windstream has incurred damages as a result of the Measures, described in more detail at paragraphs 293 to 358 above:

a) the Ontario Government's failure, following the *Windstream I* Award, to complete in a timely manner the work it considered necessary in order to lift the moratorium, so as to ensure that the moratorium would not further prejudice WWIS by causing further delays to the Project;

b) the Ontario Government's continued application of the moratorium to WWIS, following the *Windstream I* Award, despite its knowledge that the continued application of the moratorium to WWIS would create the conditions necessary to allow the IESO to terminate the FIT Contract;

c) the Ontario Government's failure, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract;

d) the Ontario Government's failure, following the *Windstream I* Award, to direct the IESO to amend the FIT Contract to ensure that the Project would be "deferred", "frozen" and "on hold";

e) the decision of the IESO, a state enterprise exercising delegated governmental authority, to terminate the FIT Contract;

f) the failure of the IESO, following the *Windstream I* Award, to amend the FIT Contract to ensure that the Project would be "deferred", "frozen" and "on hold", contrary to the Ontario Government's promise to Windstream and WWIS.

497. The tribunal in *Windstream I* did not award damages for the Measures, which relate to the cancellation of Windstream's FIT Contract several years after the tribunal's Award was issued. Instead, the Windstream I tribunal only awarded Windstream compensation for the damage *to* its investment occasioned by Canada's failure to accord Windstream fair and equitable treatment. It

[611] **CL-009,** International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 31 ("*Draft Articles*").

did not award Windstream damages for the full value of its investment. Indeed, in assessing the damage to Windstream's investment, the tribunal noted that the FIT Contract could still be renegotiated and the Project reactivated.[612]

498. Now that the FIT Contract has been terminated, there is no longer any possibility for the Project to move forward or for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period, as set out in the FIT Contract. Windstream has lost the full value of its investments in WWIS, the Project and the FIT Contract. Windstream has not been compensated for this loss.

499. The appropriate method for calculating Windstream's damages in this case is to determine the FMV of Windstream's investment but for the breaches of the NAFTA. The fair market value of Windstream's investments is most appropriately determined using a Discounted Cash Flow ("**DCF**") methodology, which is the most reliable method for determining the value of Windstream's investment but for Canada's conduct. In the opinion of Secretariat, Windstream's quantum experts, Windstream's losses arising from Canada's NAFTA breaches are between $291.4 million and $333 million as of the date of the cancellation of the FIT Contract. This amount can be updated in due course to the date of the tribunal's award. Windstream is entitled to damages in this range (as updated), plus interest and its costs of the arbitration.

I. WINDSTREAM IS ENTITLED TO DAMAGES FOR CANADA'S NAFTA VIOLATIONS

500. Canada has breached its NAFTA obligations under Articles 1105, 1110, and 1503. These breaches have caused direct and substantial harm to Windstream for which it seeks compensation in this arbitration. Windstream is entitled under NAFTA to be made whole for the economic losses that flow from these breaches.

501. Windstream seeks full reparation for the losses it suffered as a result of Canada's violations of the NAFTA and international law, in the form of monetary compensation sufficient to wipe out the consequences of the NAFTA breaches.[613]

[612] **C-2040,** Award, ¶ 483.

502. Windstream's claim for damages is explained and quantified in the accompanying report submitted by Chris Millburn and Edward Tobis of Secretariat and Pierre-Antoine Tetard (the "Secretariat Report"). Messrs. Millburn and Tobis are professional accountants and Chartered Business Valuators with over 35 years' combined experience in business valuations, damage quantification, financial litigation, and corporate finance-related matters.[614] Mr. Tetard is a professional economist with over 15 years' professional experience in the energy industry, with the majority of that time spent specializing in financing and building offshore wind projects. Most recently, Mr. Tetard's work as an investor and developer in offshore wind projects has largely focused on project and company valuations, including the investability and bankability of those projects.[615]

503. The Secretariat Report calculates the economic losses suffered by Windstream, as of the date of the breach plus pre- and post-award interest.[616] The Secretariat Report quantifies the damage caused by the NAFTA breaches to between CAD $291.4 million and $333 million as of February 18, 2020 (the date of the cancellation of the FIT Contract), plus applicable interest, costs and taxes.[617] This calculation is net of the CAD $25 million Windstream received pursuant to the *Windstream I* Award as compensation for Canada's failure, before the *Windstream I* Award, to afford fair and equitable treatment to Windstream.[618]

504. In the following sections, Windstream will address: (a) the applicable standard for the assessment of compensation; (b) the application of the full reparation standard to unlawful expropriation and other Treaty breaches; (c) the appropriate valuation date; (d) Windstream's entitlement to compensation for the particular NAFTA breaches; (e) consideration of the FMV; (f) the appropriate valuation methodology; and (g) the quantum of Windstream's losses.

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[613] **CL-009,** *Draft Articles*, Art. 31.

[614] CER-Secretariat, section 1.14-1.20.

[615] CER-Secretariat, sections 1.21-1.25.

[616] CER-Secretariat, sections 9.1-9.6, 10.1. Windstream is entitled to the FMV of its investment as of the date of the breach or as of the date of the award, whichever is highest. Secretariat can update its report at a later date to reflect this alternative valuation date.

[617] CER-Secretariat, sections 10.1-10.3.

[618] CER-Secretariat, sections 4.26, 5.4(ii).

A. The Applicable Standard for Determining Damages is Full Reparation

505. Article 1135 of the NAFTA provides that where a tribunal renders a final award against one of the state Parties, it may "only" award separately or in combination,

a) monetary damages and any applicable interest; or

b) restitution of property (with a monetary proxy amount plus applicable interest in the event the respondent Party elects not to provide restitution), in addition to costs.

506. Because the NAFTA does not describe a standard for the determination of the compensation owed to Windstream, this tribunal should be guided by the principle of "full reparation" under customary international law.

507. It is a widely accepted principle of international law that a State must afford "full reparation for the injury caused by [its] internationally wrongful act."[619] Reparation may take the form of restitution, compensation or satisfaction, either individually or in combination.[620]

508. The Permanent Court of International Justice (PCIJ) formulated the relevant customary international law standard in the *Chorzów Factory* case:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed…[621]

509. The *Chorzów Factory* principle of "full reparation" has been adopted by a number of international tribunals awarding damages, including the *Windstream I* Award, and is authoritative in the context of the NAFTA. The *S.D. Myers* tribunal, for instance, observed that "[t]he principle of international law stated in the *Chorzów Factory (Indemnity)* case is still

[619] **CL-009,** *Draft Articles,* Art. 31(1).

[620] **CL-009,** *Draft Articles,* Art. 34.

[621] **CL-034,** *Chorzów Factory*, ¶ 125.

recognized as authoritative on the matter of general principle", and that damages "should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation."[622]

510. Similarly, in *Metalclad*, the tribunal endorsed *Chorzów Factory* and explained that an award "should, as far as is possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the *status quo ante*)."[623] The tribunal in *Vivendi II* has stated:

> Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.[624]

511. The obligation to provide full reparation is also reflected in Article 31 of the International Law Commission's Draft Articles:

> Article 31 Reparation
>
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[625]

512. Articles 35 and 36 of the Draft Articles provide that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed," that the State "is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made

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[622] **CL-081,** *S.D. Myers,* Partial Award, 13 November 2000, ¶ 311, 315 ("*S.D. Myers*").

[623] **CL-062,** *Metalclad,* Award, ¶ 122; **CL-152,** *William Ralph Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v. Government of Canada* (PCA Case No. 2009-04) Award on Damages, 10 January 2019, ¶ 114.

[624] **CL-041,** *Vivendi II,* Award (Aug. 20, 2007), ¶ 8.2.7.

[625] **CL-009,** *Draft Articles,* Art. 31. See also, **CL-071,** *Occidental v Ecuador,* Award, ¶ 793.

good by restitution," and that that "compensation shall cover any financially assessable damage including loss of profits."[626]

513. Accordingly, a monetary award must put Windstream in the economic position that it would have been in had the internationally wrongful act not occurred at all.[627]

B. Damages for Unlawful Expropriation Are Calculated According to the *Chorzów Factory* Standard

514. The only compensation standard provided in the NAFTA is for a *lawful* expropriation.[628] As set out at paragraph 463 to 475 above, this is not a case involving a lawful expropriation. The NAFTA is silent on the standard of compensation for *unlawful* expropriation and breaches of other provisions of the Treaty. The only difference relevant to this case between the NAFTA standard for *lawful* expropriation and the customary international law standard is the date of valuation, which is discussed below.

515. Tribunals have consistently applied the *Chorzów Factory* standard to *unlawful* expropriations, if a treaty is silent on the method for calculating the amount of compensation for *unlawful* expropriation – limiting the application of the compensation for expropriation provision of an investment treaty to *lawful* expropriations only.[629]

C. The Appropriate Valuation Date is the Higher of the Date of the Award or the Date of Expropriation

516. Article 1110(2) provides a fixed valuation date for *lawful* expropriation calculated "immediately before the expropriation took place." The tribunal in *Houben* held that, where a

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[626] **CL-009,** *Draft Articles*, Arts. 35-36.

[627] **CL-034,** *Chorzów Factory*, pp. 46-47; **CL-144,** *Crystallex*, Award, ¶¶ 847–849; **CL-073,** *Petrobart Limited v. Kyrgyz Republic* (SCC Case No 126/2003) Arbitral Award, 29 March 2005, pp. 78-79.

[628] **C-0001,** NAFTA Article 1110(2).

[629] See, *e.g.*, **CL-021**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16) Award of the Tribunal, 2 October 2006 ¶¶ 481-484; **CL-082**, *Siemens*, Award, 6 February 2007 ¶¶ 349-352; **CL-079**, *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/070) Award, 30 June 2009 ("*Saipem*") ¶ 201; **CL-093**, *Yukos Universal Limited (Isle of Man) v. the Russian Federation* (PCA Case No. AA 227) Final Award, 18 July 2014 ("*Yukos*") ¶¶ 1765-1766; **CL-146,** *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (Jan. 12, 2016), ¶¶ 219-220 ("*Houben*").

treaty provides that the amount of compensation for expropriation should be calculated on the basis of the investment value on the eve of the expropriation, that standard should be interpreted to mean that it applies to *lawful* expropriation, not *unlawful* expropriations.[630]

517. In the case of an unlawful expropriation, the claimant may select between the higher of the expropriation date or the date of the award. As stated in the Journal of Damages in International Arbitration, "the current state of the law appears reasonably clear: where they have been victims of unlawful state action, claimants are entitled to select either the date of expropriation or the date of award as the date of valuation."[631] This approach has been followed by numerous international tribunals, mindful of the fact that "what must be repaired is the actual harm done, as opposed to the value of the asset when taken."[632]

518. The tribunal in *Siemens v. Argentina* explained:

> "The key difference between compensation under the Draft Articles and the Factory at Chorzów case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act' as opposed to compensation 'equivalent to the value of the expropriated investment' under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages."[633]

519. In this case, the valuation date for the NAFTA breaches must take into account the full measure of harm done to Windstream's investment. As set out above at paragraph 467, this

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[630] **CL-146,** *Houben,* Award ¶ 219-220.

[631] **CL-157,** L. Floriane and G. Recena Costa, *Valuation Date in Investment Arbitration: A Fundamental Examination of Chorzów's Principles*, (2019) Vol 3(2) The Journal of Damages in International Arbitration, p. 34.

[632] **CL-149,** *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Award, 16 September 2015 ¶ 377; See also, **CL-093,** *Yukos,* Final Award, ¶¶ 1763-9; **CL-122,** *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18) Award, 3 March 2010, ¶ 514; **CL-141,** *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, ¶ 764; **CL-047,** *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No.ARB/03/15) Award, 31 October 2011 ("*El Paso Energy*") ¶ 706; **CL-147,** *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, (ICSID Case Nos ARB/08/1 and ARB/09/20) Award, 16 May 2012, ¶ 307.

[633] **CL-151**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No ARB/02/8) Award, 17 January 2007, ¶ 352.

means that Windstream must be compensated for the taking of its investments in February 2020 (for which the tribunal in *Windstream I* did not, and could not, have provided compensation to Windstream).[634] While Secretariat uses the date of the expropriation for the purposes of valuing Windstream's losses arising from the NAFTA breaches (February 18, 2020), it can update its report in Reply based on factors known at the time to include an alternative valuation that, as closely as possible, reflects the value of the Project as of the date of award.

D. Windstream is Entitled to Damages for Canada's Breaches of NAFTA

520. Windstream is entitled to damages in a quantum sufficient to eliminate the consequences of Canada's breaches of Articles 1105, 1110, and 1503. Windstream has incurred damages in relation to both WWIS itself and WWIS' rights under the FIT Contract – both of which are investments of Windstream as defined in Section C of Chapter 11 – as a result of the Measures.

521. The Measures, which had not yet taken place as of the date of the *Windstream I* Award, amount to an unlawful expropriation of Windstream's investments, contrary to Articles 1110 and 1503(2) of the NAFTA. Thus, Windstream is entitled to be put in a position it would have been in had the above unlawful expropriation not taken place, either as at February 2020, date of expropriation, or at the date of the award, whichever is higher.

522. The measures described above also amount to a failure to accord Windstream's investments in Canada treatment in accordance with international law, including fair and equitable treatment and full protection and security, contrary to Articles 1105(1) and 1503(2) of the NAFTA. Thus, Windstream is entitled to damages that put it in the position it would have been in, after the *Windstream I* Award, or at the date of the award, whichever is higher. As stated above, the amount of damages of approximately CAD $25 million awarded to Windstream in the *Windstream I* Award have been deducted from Secretariat's calculation.

523. Additionally, with respect to measures of the IESO that are inconsistent with Canada's obligations under Chapter 11, Canada has breached its obligations in Article 1503(2).

[634] As set out above at paragraph 497, the Tribunal in *Windstream I* did not find an expropriation and awarded Windstream only the damage to its investment, valued as of the date of that Award (September 27, 2016) (**C-2040,** Award, ¶ 473).

Accordingly, Windstream is entitled to damages that put it in the position it would have been but for the IESO exercising governmental authority inconsistent with Canada's obligations under Chapter 11, as at the date of the award.

524. While Windstream bears the burden of establishing the quantum of damages that would satisfy the full reparation standard, the tribunal should be guided by the decision in *Charles Lemire v. Ukraine* that "[o]nce causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."[635]

E. Compensation Must be Equal to the FMV

525. The appropriate method for calculating Windstream's damages in this case is to determine the FMV of Windstream's investment but for the breaches of the NAFTA.

526. The commentary to Article 36 of the Draft Articles states that "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost."[636] The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment also provide that compensation for expropriation "will be deemed 'adequate' if it is based on the fair market value of the taken asset."[637]

527. International tribunals have consistently applied the FMV standard in cases involving both breaches of the fair and equitable treatment standard[638] and unlawful expropriation.[639]

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[635] **CL-123,** *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 28 March 2011, ¶ 246.

[636] **CL-009,** *Draft Articles*, Art. 36, Commentary ¶ 22; see also, **CL-156,** J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), pp. 225-226.

[637] **CL-020,** World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, (1992) Vol (2) ICSID Review–Foreign Investment Law Journal 297, p. 303.

[638] See, *e.g.*, **CL-040,** *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) Award, 12 May 2005 ¶ 410; **CL-025,** *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006 ¶ 424; **CL-145,** *Enron Corporation and Ponderosa Assets LP v. Argentine Republic* (ICSID Case No ARB/01/3) Award, 22 May 2007 ¶¶ 359-363; **CL-150,** *Sempra Energy International v. The Argentine Republic*

Therefore, the appropriate standard for calculating compensation in this case is the FMV of Windstream's investments, which ensures that the injured party is restored to the situation it would have been but for the internationally wrongful acts.[640]

F. DCF is the Appropriate Methodology to Assess the FMV

528. The relevant method for the assessment of the FMV of the investments depends on the circumstances and characteristics of each individual case. The tribunal in *Crystallex v. Venezuela*, explained as follows:

> Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case …[641]

529. As Secretariat explains, the most appropriate method to determine the value Windstream's investment would have had but for the illegal conduct is by applying the DCF method.[642]

530. The DCF method is a forward-looking method for determining the FMV of an income-producing asset. It does so by estimating the cash flow which the asset would be expected to generate over the course of its life, and then discounting that cash flow by a factor which reflects the time value of money and the risk associated with such cash flow.[643] In other words, it is an

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(ICSID Case No. ARB/02/16) Award, 28 September 2007 ¶¶ 403-404; **CL-047,** *El Paso Energy*, Award, ¶¶ 702-703.

[639] See, *e.g.*, **CL-062,** *Metalclad,* Award, ¶ 118; **CL-143,** *CME Czech Republic BV v. Czech Republic* (UNCITRAL) Final Award, 14 March 2003 ¶¶ 496-499; **CL-140,** *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe* (ICSID Case No. ARB/05/6) Award, 22 April 2009 ¶ 124.

[640] **CL-144,** *Crystallex* Award, ¶ 850; **CL-121,** *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014 ("*Gold Reserve*") ¶ 681; **CL-041,** *Vivendi II,* Award, 20 August 2007 ¶ 8.2.10.

[641] **CL-144,** *Crystallex,* Award, ¶ 886.

[642] CER-Secretariat, s. 2.22, s. 5.25.

[643] CER-Secretariat, s. 5.25-5.32; **CL-159,** P. D. Friedland and E Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies,* (1991) 6 ICSID Rev. – Foreign Investment Law Journal. 400 at pp. 405-407.

income-based approach that projects the anticipated future net cash flows that a company would have generated for equity-holders in the absence of wrongful government conduct. According to the DCF method, net cash flows are determined by first setting out the flow of benefits the claimants would have reasonably been expected to earn in a hypothetical world but for the breach (subtracting any cash flow earned by the investors in the actual world where the breaches took place).[644]

531. The DCF method is regarded in the business community as the most appropriate method of valuing an incoming-producing asset, as it recognizes that the economic value of the asset to its owner is a function of the income the asset is expected to generate in the future, while also factoring in the risks associated with the asset's future income (through the inclusion of the "probability risk adjustment" discussed in greater detail below).[645] As explained by Mr. Tetard in the Secretariat Report, market participants favour the use of a DCF methodology for valuing offshore wind projects where (as here) a reliable forecast can be made, because it is the only approach that is able to capture the specificities of each project. [646]

532. The DCF method has been applied in arbitration relating to development-stage projects, where there is sufficient evidence that the project would have been more likely than not to become operational absent the state's illegal conduct,[647] or there is a proven track record of profitability by the investor or others in similar circumstances,[648] and also in cases where the state has recognized the project's potential profitability.[649]

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[644] **CL-071,** *Occidental v Ecuador*, Award, ¶ 708.

[645] **CL-159,** P. D. Friedland and E Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, (1991) 6 ICSID Rev. – Foreign Investment Law Journal. 400, pp. 405-407.

[646] CER-Secretariat, s. 5.25.

[647] **CL-072,** *Oil Company Sapphire International Petroleum, Ltd. v. National Iranian Oil Company* (35 ILR(1967) 136) Award, 15 March 1963 ("*Oil Company Sapphire*") p. 198.

[648] **CL-041,** *Vivendi II*, Award, 20 August 2007 ¶¶ 8.3.4., 8.3.10.

[649] **CL-072,** *Oil Company Sapphire International*, Award, p. 189. See, generally, See, *e.g.*, **CL-159,** P. D. Friedland and E Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, (1991) 6 ICSID Rev. - Foreign Investment Law Journal. 400 pp. 407-408; **CL-161,** W. C. Lieblich, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, (1990) Vol 7(1) Journal of International Arbitration 37, p. 1; **CL-121,** *Gold Reserve*, Award, ¶ 831.

533. The Tribunal should be guided by the full reparation standard of *Chorzów Factory* which notes that "future prospects," "probable profit" and future "financial results" are factors material to the valuation.[650] The DCF method is best able to capture these principles because, as businesspeople recognize, it acknowledges that the economic value of an investment is tied to the income that the asset could have been expected to generate but for the internationally wrongful conduct.[651]

534. ***The DCF method is the appropriate method for quantifying Windstream's losses.*** As explained below, the Secretariat Report notes that the DCF method is the most appropriate and reliable approach for quantifying Windstream's losses, particularly given that Windstream has foregone alternative investment opportunities.[652] In Secretariat's opinion, the DCF method is the most appropriate and reliable approach for quantifying Windstream's losses for the following reasons:

a) The Project's expected future cash flows can be reliably forecast, given: (1) the revenue clarity provided by the FIT Contract over a 20-year period and onsite wind measurements,[653] and (2) available actual capital and operating cost data for similar wind power generation projects globally (which, as Secretariat notes, have significantly increased since the first NAFTA proceedings).[654]

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[650] **CL-034,** *Chorzów Factory*, pp. 50-51.

[651] **CL-171,** P. D. Friedland and E Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, (1991) 6 ICSID Rev. – Foreign Investment Law Journal. 400, pp. 405-407, including, for example, *Himpuran Cal. Enerfy Limited v. PT (Persero) Perushan Listruik Negara*, cited in, **CL-155**, Gotanda, *Recovering Lost Profits in International Contract Disputes*, 36 Georgetown Journal of International Law 61 (2004).

[652] CER-Secretariat, s. 2.22; See also, **CL-160,** Ripinsky S. & Williams K., *Damages in International Investment Law* (BIICL, 2008) p. 291; **CL-052,** *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3) Award, 16 June 2010 ¶ 13-87. See also **CL-072,** *Oil Company Sapphire*, Award, pp. 187-88.

[653] In Mr. Tetard's experience, the only situation when an offshore wind project would not be valued using a DCF methodology is when no information is available to evaluate the potential cash flow generated by a project, such as in situations where a project has not yet achieved revenue clarity through a PPA or similar type of arrangement: CER-Secretariat, ss. 5.28, 5.31.

[654] CER-Secretariat, ss. 5.31, A1.1.

b) While Windstream's technical experts have concluded that the Project is technically feasible and would have likely advanced but for the moratorium and cancellation of the FIT Contract, any risks of the Project advancing to the commercial operation stage and executing on its operating plan over its expected operating life can be appropriately reflected in the cash flows themselves, in the risk-adjusted discount rate applied to discount future expected project cash flows to a present value as of the Valuation Date, and through a probability risk adjustment.[655]

c) The DCF methodology best reflects the price that would be negotiated by prudent and arms' length notional buyers and sellers because it is the primary approach that market participants employ when valuing an asset such as the Project.[656] Unlike other valuation approaches, the DCF method is able to capture the specific features of the project being valued, including (in this case):

(1) the price at which every unit of power produced is sold in the market; (2) the amount of power units generated for a given period; (3) The project schedule; (4) the distance to the grid connection point; (5) the appropriate project design, having regard to its geographic location; (6) the project's logistics; (7) the specific technologies used; and (8) the construction and operation strategies.[657]

Because comparable transactions cannot capture the specifics of a project, market participants generally only use them to confirm the reasonableness of the DCF approach.[658]

535. As set out in Part II, Section XX above, the evidence that Windstream has adduced in this arbitration proves that "but for" the moratorium and the cancellation of the FIT Contract, the

[655] CER-Secretariat, s. 2.22(i).

[656] CER-Secretariat, s. 2.22(ii).

[657] CER-Secretariat, s. 5.26.

[658] CER-Secretariat, s. 2.22, 5. 26.

Project would more likely than not have achieved commercial operation and generated the revenues guaranteed to it under the FIT Contract. Windstream has established that:

a) the Project did not face significant regulatory risk and the regulatory environment was sufficiently developed for WWIS to proceed with the Project;[659]

b) but for the moratorium, the Project would have received tenure to the Crown land necessary to develop and build the Project;[660]

c) the Project was and is technically feasible;[661]

d) but for the moratorium, the Project was likely to obtain a Renewable Energy Approval and other permitting;[662]

e) but for the moratorium, the Project would have been financeable;[663] and

f) but for the moratorium and the Ontario Government's failure to make good on its promise to insulate Windstream from its effects, the Project would have achieved commercial operation by the deadlines set out in the FIT Contract.[664]

536. Thus, WWIS' cash flows from the Project are capable of being determined with a reasonable degree of certainty and are not speculative.

537. Windstream's investors' track record of successfully developing, financing and building large-scale energy projects in both onshore and offshore environments further supports the conclusion that, but for the moratorium (and Ontario's failure to keep Windstream whole) the

[659] CER-Powell-3, ¶ 130-131.

[660] CER-Powell-3, ¶ 152 (fn. 194).

[661] CER-Wood, p. 3.

[662] CER-Baird-3, p. ii-iii, CER-Wood, s. 10.3, CER-WSP-3, p. 34.

[663] CER-Secretariat, s. 6.65-6.77.

[664] CER-Wood, pp. 58-59.

Project would more likely than not have reached commercial operation and generated revenues in accordance with the FIT Contract.[665]

538. Accordingly, the DCF method provides the most reliable and accurate measure of Windstream's losses resulting from Canada's breaches of Articles 1110, 1105(1) and 1102 of NAFTA.

539. ***Other approaches to determine the FMV are less accurate.*** In this case, other approaches to determining the FMV of the Project (including a comparable transactions approach) are less accurate than the DCF approach. As noted in the Secretariat Report, whereas a DCF methodology reflects the unique characteristics of a given offshore wind project, a comparable transaction approach (and other market approaches) can only provide a rough approximation of the value of an offshore wind project based on the value of sufficiently similar projects (if sufficiently similar projects are identified).[666] In Mr. Tetard's experience, the only situation when an offshore wind project would not be valued using a DCF methodology in the market is when no information is available to evaluate the potential cash flow generated by a project, for example where a project has not yet achieved revenue clarity through a power purchase agreement. This does not apply to the Project, which had revenue clarity through the FIT Contract.[667]

540. In any event, Secretariat also conducted a comparables analysis (described in more detail below), which broadly confirms its determination of the FMV as of February 18, 2020 using the DCF method. Using sufficiently comparable transactions, the Secretariat Report concludes that the FMV of the Project is between $284.7 million and $299.1 million, which is broadly consistent with the FMV determined using the DCF method (between $291.4 million and $333 million).

[665] CER-Deloitte (Bucci), pp. 6-8; CWS-Mars ¶ 77-82; CWS-Ziegler, ¶ 13; CWS-Ziegler-2, ¶ 1-2; CWS-Ziegler-3, ¶ 3; CWS-Mars-3, ¶ 6.

[666] CER-Secretariat, s. 5.26.

[667] CER-Secretariat, s. 5.28.

541. A comparable approach to value was also adopted by the *Windstream I* Award to compensate Windstream for Canada's failure to accord it fair and equitable treatment in its imposition of a moratorium on offshore wind. The tribunal did not award damages for the Measures addressed in this proceeding, which relate to the cancellation of Windstream's FIT Contract after the Award was issued. Indeed, in assessing the damage to Windstream's investment using the comparables approach, the tribunal noted that the FIT Contract could still be renegotiated and the Project reactivated. Secretariat's calculation reflects the FMV of the investments that Windstream has lost due to the Measures (*i.e.*, the FMV as of February 18, 2020, less the $25.2 million awarded for damage to Windstream's investment in the *Windstream I* proceedings).[668]

542. As explained in the Secretariat Report (and summarized below), the *Windstream I* Award does not capture the FMV of the Project as of the cancellation of the FIT Contract. The comparable transactions that the Secretariat Report considers in its analysis are different than those relied on in the *Windstream I* Award, resulting in a more accurate FMV as of the appropriate valuation date in this arbitration (the date of the cancellation of the FIT Contract or the award, whichever is higher).

G. Quantum of Windstream's Losses

543. ***Valuation date.*** As set out above, Windstream's damages may be valued as of (a) the date of the unlawful act, or (b) the time of the award, whichever is higher. The FIT Contract was cancelled as of February 18, 2020. Thus, Windstream submits that the appropriate valuation date is either February 18, 2020 or the date of the award, whichever is higher. Secretariat has calculated Windstream's losses as at February 18, 2020, and can provide an updated valuation to more closely approximate a valuation as at the date of the award in a subsequent update to its report.

[668] **C-2040,** Award, ¶ 483.

544. ***Windstream's losses.*** In Secretariat's opinion, Windstream's losses resulting from Canada's breaches of Articles 1105, 1110, and 1503 are as follows:

	Income Approach	
	Transaction Structuring	***Risk Adjustment***
FMV of the Project at February 18, 2020, but for the Alleged Breaches (Equity Value)	**$ 293.4**	**$ 330.7**
Less: NAFTA 1 Award	(25.2)	(25.2)
Less: Return of Letter of Credit	(6.0)	(6.0)
Claimants' damages before pre-award interest	**262.2**	**299.6**
Add: Pre-Award Interest	29.2	33.4
Claimants' damages including pre-award interest	**$ 291.4**	**$ 333.0**

545. As explained in the Secretariat Report, the key parameters and inputs that comprise Secretariat's DCF analysis are:

a) *Project Schedule*: The Secretariat Report relies on the detailed project schedule developed by Wood, which outlines the key activities required for the Project to be successfully implemented. Wood concludes that, absent Canada's breaches of the NAFTA, the Project would have re-commenced its development on February 18, 2020, with the first 36 months of the implementation schedule comprised of obtaining the requisite permits. Accordingly, Wood concludes that the Project would have reached Financial Close on February 20, 2023.[669] Wood also concluded that it would have taken 58 months from a re-commencement date of February 18, 2020 until the Project would reach Commercial Operation, at a Commercial Operation Date (COD) of December 20, 2024.[670] The Secretariat Report incorporates this project schedule into its analysis.[671]

b) *Revenue*: Secretariat calculated WWIS's projected revenues by applying the inflation-adjusted price under the FIT Contract for the first twenty years of the

[669] CER-Wood, Appendix B; CER-Secretariat, s. 2.19.

[670] CER-Wood, s. 10.2.

[671] CER-Secretariat, s. 6.5.

Project and projected market energy costs for the remaining ten years of the Project's estimated life[672] to an assumed energy production of 1,159.9 GWh/annum, based on 297 megawatts of Project capacity and a net capacity factor of 44.6%. The net capacity factor determined by Wood in a study commissioned by WWIS is consistent with other wind resource analyses conducted by Windstream's consultants, and includes time for maintenance and downtime.[673]

c) *Capital costs*: Secretariat determined capital costs under the rubrics of planning and development expenditures, or DEVEX (including costs relating to studies, stakeholder engagement, site investigation, technical advisory, legal fees, and other advisory fees required to reach financial close) and construction expenditure, or CAPEX (costs related to the procurement, delivery, installation, and commissioning of all components required for the Project (wind turbines, foundations, electric cables, project management and others) to reach COD).[674] Secretariat relied on detailed capital cost reports prepared by 4C Offshore and Ian Irvine to determine the DEVEX and CAPEX for the Project.[675]

4C Offshore are a United Kingdom-based leading provider of market information and market consulting services to the offshore wind industry. 4C Offshore tracks information concerning over 1,000 offshore wind projects in development globally. 4C Offshore developed an estimate of the Project's capital costs on the basis of comparable projects where actual costs incurred are available.

Mr. Irvine, an engineer with over 30 years' experience in the renewable energy sector, utilizes the capital cost benchmarking analysis performed by 4C as well as

[672] CER-Secretariat, s. 6.9. Mr. Tetard and Wood agreed that the Project likely would not be decommissioned at the end of the 20 year FIT Contract and would likely operate for at least an additional 10 years: CER-Secretariat, s. 6.16-6.17; CER-Wood, p. 60.

[673] CER-Secretariat, s. 6.10.

[674] CER-Secretariat, s. 6.22.

[675] CER-Secretariat, s. 6.22-6.31; CER-4C Offshore; CER-Deloitte (Taylor and Low), s. 4.25-4.30.

market sounding information to develop CAPEX and DEVEX estimates for the Project. Together, 4C and Mr. Irvine's reports include the following DEVEX parameters: (1) preliminary desktop studies including a preliminary environmental impact assessment and preliminary designs and associated infrastructure; (2) site investigation including geophysical surveys, geotechnical surveys, and assessment of the wind resource; (3) technical advisory costs associated with engineering design studies and contractor procurement; (4) permitting and environmental studies; and (5) legal expenses.[676] In addition, the following CAPEX parameters are assessed in Mr. Irvine's report: (1) gravity based foundations; (2) wind turbine generators; (3) offshore high voltage substation; (4) array and export cables; (5) installation costs; (6) onshore interconnection; (7) insurance; (8) management costs; and (8) contingency.[677]

In inputting capital costs into its DCF model, Secretariat used the median of the range developed by Mr. Irvine for each category of costs.[678]

d) *Operating costs*: Secretariat determined operating costs based on ongoing repair and maintenance costs, insurance, base land rent fees, annual wind rent fees owed to the MNR, and other fixed expenses.[679] Secretariat calculated the operations and maintenance costs using the operating cost estimates outlined in Mr. Irvine's CAPEX/OPEX estimates.[680]

e) *Decomissioning costs*: The Secretariat Report also accounts for any costs associated with decommissioning the Project at the end of its life. While it does not necessarily accept that these estimates are accurate, Secretariat has adopted an

[676] CER-Secretariat, s. 6.23.

[677] CER-Secretariat, s. 6.28.

[678] CER-Secretariat, ss. 6.25, 6.29.

[679] CER-Secretariat, ss. 6.32-6.43.

[680] CER-Secretariat, ss. 6.40-6.41.

approach to decommissioning costs that is largely consistent with the approach taken by Canada's experts in the *Windstream I* arbitration.

Consistent with the reports prepared by Aecom Canada Ltd / URS on behalf of Canada in NAFTA 1, and adopted by Canada's damages expert in the *Windstream I* arbitration, Berkeley Research Group, the Secretariat Report assumes a decommissioning cost of $271,500 per day for 260 days (in October 2014 prices), and inflates this amount into 2054 dollars, which is when the decommissioning costs would be incurred after the 30-year life of the Project. In keeping with the URS Report, the Secretariat Report assumes that all decommissioning costs including labour, vessel hire, processing and storage of materials, with the exception of the specialized vessel to remove the wind turbine generators, towers, and gravity-based foundations, would be covered by the scrap value of the Project at decommisioning. The Secretariat Report accepts the URS Report's estimated rate for renting the specialized removal vessel of $271,500 per day for 260 days. This results in total decommissioning costs of $141.1 million when reflected in 2054 dollars.[681] Secretariat assumes that Windstream would have funded the decommissioning liability in the last three years of the FIT Contract, at which point the Project would have been generating sufficient and stable cash flows to provide for the decommissioning costs. This approach is also consistent with the approach of Canada's experts in NAFTA1.[682]

f) *Taxes:* Secretariat prepared DCF analysis on an after-tax basis and deducted the corporate income taxes that the Project would have been required to pay in Canada from its cash flows.[683]

g) *Working capital*: The Secretariat Report estimates the change in working capital (*i.e.*, the difference between non-cash current assets (accounts receivable) and

[681] CER-Secretariat, s. 6.51.

[682] CER-Secretariat, s. 6.51-6.53.

[683] CER-Secretariat, s. 6.54.

non-debt current liabilities (accounts payable)) on an annual basis by estimating the lag in receivables and payables over the life of the Project. In Mr. Tetard's experience, the Project would have also required an O&M Reserve Account equal to three-months of expected O&M costs. This account would have needed to have been fully funded at the time of COD. As a result, the Secretariat Report adjusts the cash flows to account for changes in the balance of the fund.[684]

h) *Financing:* Mr. Tetard conducted market research to determine the probable financing arrangements for the Project. Based on his research, the Secretariat Report determines that the following financing arrangements would have been arranged in 2020: (a) a minimum equity requirement of 20% of the total Project construction and development cost (equity funding of $257.9 million with $1,031.7 million funded through debt for a total project construction and development cost of $1,289.6 million); (b) interest chargeable based on the on a spread or margin on the 3-month Canadian Dollar Offer Rate (1.75% at the initiation of the lending arrangement, with an increase of 0.20% for every five years of operations); (c) upfront fee of 1.25% on the total amount of debt raised; (d) commitment fee of 0.70% on the undrawn portion of the debt during the construction phase; and (e) letter of credit costs of 1.75% annually on the amount of unspent CAPEX during the construction period. These terms are consistent with Mr. Tetard's knowledge of financing of renewable energy projects and market research. It is also consistent with the contemporaneous financing assumptions of KeyBanc, the financial advisor that Windstream retained to negotiate a potential sale of the Project, in 2017.[685]

i) *Risk adjustment*: Secretariat discounted annual cash flows after tax to equity over the life of the Project to a single Net Present Value as of the Valuation Date. The Secretariat Report employs a discount rate that reflects i) the time value of money; and ii) the risk of realizing the forecasted cash flows (assuming the

[684] CER-Secretariat, s. 6.64.

[685] CER-Secretariat, ss. 6.71-6.73, 6.77.

project will reach Financial Close). The Secretariat Report also accounts for permitting, environmental, financing and construction execution risk by applying a risk adjustment factor of 55-60%, based on projects identified from 4C's database of offshore wind energy projects that Secretariat identified as comparable to the Project. Secretariat made this determination by identifying projects based on: (1) geography; (2) the date at which the Project received revenue clarity (projects which had a PPA or other revenue mechanism in place between January 1, 2010 and February 18, 2017 were identified as comparators); and (3) permitting (projects which did not have permits at the time the PPA was obtained were identified as comparators).[686]

j) *Foreign exchange translation*: As many of the standard and reported costs are stated in foreign currencies, Mr. Irvine translated the foreign currency capital cost estimates into 2020 Canadian dollars. Secretariat has applied inflation to those figures as necessary.[687]

546. The resulting fair market valuation of damages using the DCF method is between $291.4 million and $333 million.

547. As established in Power Advisory's report delivered in *Windstream I*, these amounts are significantly less than the $1.3 to $2.1 billion in economic benefits Ontario has realized from cancelling the Project.[688]

H. Market Approach and other Valuation Methodologies

548. Although, in its view, the DCF methodology results in the most accurate estimate of the value of the Project, Secretariat has also undertaken additional market-based valuation methodologies. These calculations confirm the reasonableness of the DCF calculation contained in the Secretariat Report.

[686] CER-Secretariat, ss. 6.93-6.107.

[687] CER-Secretariat, ss. 6.2-6.27, 6.40-6.41.

[688] CER-Power Advisory, p. 24.

549. ***Comparable Projects Approach.*** Secretariat also conducted a market approach which determined value by identifying transactions proximate to the Valuation Date for suitably comparable projects.[689] Using project data from 4C, Secretariat identified ten sufficiently comparable projects, having regard to (1) the date of the transaction; (2) the development stage of the project; (3) revenue clarity; and (4) the availability of reliable information on the project.[690] In order to obtain a benchmark range of value for the Project as at the Valuation Date, Secretariat then calculated the price paid per megawatt acquired for each comparable project, which serves as a proxy for the value per megawatt for the Project.[691] It then and multiplied the Project's 297 MW capacity by the range of transaction multiples derived from the comparable transactions.[692]

550. The Secretariat Report notes that because every project is unique, none of the ten comparable projects identified were perfectly analogous to the Project. For example, nearly all of the comparable projects identified had a PPA price that was significantly lower than provided in Windstream's FIT Contract.[693] This suggests that the Project would have a higher value than the comparables selected, and is a key reason why market participants favour a DCF methodology as the primary means for determining value in the renewable energy sector: as set out above, the DCF approach can take account of the specific pricing provided for in the project's PPA.[694]

551. Nevertheless, while the DCF approach remains the primary methodology employed to determine the value of a project, market participants often consider value benchmarks obtained from comparable transactions informative in negotiating the purchase or sale of an offshore wind project.[695] Indeed, a review of transactions relating to comparable projects confirmed the

[689] CER-Secretariat, s. 7.5.

[690] CER-Secretariat, s. 7.5-7.6.

[691] CER-Secretariat, s. 7.6.

[692] CER-Secretariat, s. 7.14.

[693] CER-Secretariat, s. 7.10.

[694] CER-Secretariat, s. 5.26, A2.25.

[695] CER-Secretariat, s. 7.13.

reasonability of the DCF analysis, resulting in a Project valuation of $284.7 million to $299.1 million (which is broadly consistent with the FMV determined through a DCF approach, $291.4 million to $333 million).

552. ***Offshore lease wind transactions.*** The Secretariat Report also calculates the value of the leased land on a per acre basis using lease transactions for other offshore wind projects. As Secretariat notes, the Project would have commanded a significantly higher value than these lease transactions because it was significantly more advanced and the Project already had a FIT Contract in place (and therefore had revenue clarity). These transactions provide a floor to the value of the Project at the valuation date – at a minimum, the Claimant would have been able to lease the Project area for rates similar to transactions based on the lease value of the Project.[696] This approach results in a Project value of $68 million, more than $42 million more than awarded by the tribunal in the *Windstream I* proceedings.

553. ***Transactions in Onshore Wind Projects in Ontario.*** While noting the differences between offshore and onshore projects (including different technologies, lower wind speeds in the onshore environment, and lower power purchase agreement prices for onshore projects compared to Windstream's FIT Contract), Secretariat reviews onshore wind transactions in Ontario to assess "the order of magnitude for the value" ascribed by market participants to the wind energy projects in Ontario in the three-year period prior to the Valuation Date.[697] Secretariat identified three transactions that took place in 2019 involving wind energy projects located in Ontario to develop an Enterprise Value per MW, which it applied to the Project's 297 MW. This calculation would imply a value closer to $1.9 billion for the Project. Secretariat concludes that this approach demonstrates that their FMV conclusions under the DCF approach (from $291.4 million to $333 million) and the comparable transactions approach (from $284.7 million to $299.1 million) are lower than the implied value of the Project based on more advanced onshore windfarms in Ontario.[698]

[696] CER-Secretariat, s. 7.19.

[697] CER-Secretariat, s. 7.25.

[698] CER-Secretariat, s. 7.25-7.31.

554. ***Public Company Trading Multiples Methodology.*** The Secretariat Report also calculates the value of the Project through a public company trading multiples methodology. Under this method, valuation metrics are derived from the share prices of publicly traded companies that hold similar assets to the Project.[699] Using the S&P Capital IQ database to identify public companies which matched shared certain criteria, Secretariat identified seven companies similar to the Project and calculated the average Enterprise Value per MW of the comparable companies, plus a 30% acquisition premium paid to reflect the additional consideration that an investor would pay to own a controlling interest in the company.[700] Applying the Enterprise Value per MW to the Project's 297 MW capacity yields a value between $438.5 million and $545.9 million for the Project at the Valuation Date.

555. As with its review of Ontario onshore projects, Secretariat does not believe that this approach provides an estimate of the FMV of the Project at the Valuation Date. Instead, it concludes that this analysis demonstrates that its FMV conclusions under the DCF and comparable transactions approaches are reasonable and are not overstated. [701]

I. Interest

556. Windstream is entitled to interest, compounded annually, applied pre- and post- award, including on costs.

557. It is an accepted legal principle that, absent treaty terms to the contrary, tribunals may include an award of interest in a Claimant's favour.[702] The purpose of an award of interest is "to compensate the damage resulting from the fact that, during the period of non-payment by the

[699] CER-Secretariat, s. 7.32.

[700] CER-Secretariat, ss. 7.33-7.44.

[701] CER-Secretariat, s. 7.45.

[702] **CL-041**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) ¶ 9.2.1; see also **CL-009,** Draft Articles, Art. 38(1) ("Interest on any principal sum … shall be payable when necessary to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result").

debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive."[703]

558. In the context of *lawful* expropriation, Article 1110(4) of the NAFTA provides that compensation must include interest at a commercially reasonable rate. The Article provides: "If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment."[704] It is even "more appropriate" for a tribunal to order interest on compensation for *wrongful* expropriation.[705] In the context of expropriation, interest has invariably been calculated from the date of the taking.[706]

559. In applying the *Chorzów Factory* standard of full reparation, it is appropriate for the tribunal to award compound rather than simple interest.[707] Compound interest reflects the additional sum that an investor would have earned if the money had been reinvested each year at the prevailing rate of interest.[708]

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[703] **CL-041**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) ¶ 9.2.3. See also **CL-009,** Draft Articles, Art. 38(1) ("Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.")

[704] **C-0001**, NAFTA, Article 1110(4).

[705] **CL-041**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) ¶ 9.2.2.

[706] **CL-093**, *Yukos Universal Limited (Isle of Man) v. the Russian Federation* (PCA Case No. AA 227) Final Award, 18 July 2014 ¶ 1669.

[707] **CL-071**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11) Award, 5 October 2012 ¶ 834 describes compound rates as "the norm" in recent ICSID cases; see also **CL-041**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) ¶ 9.2.4 ("To the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule"); **CL-047,** *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011 ¶ 746 ("The Tribunal shares the view expressed by these awards that compound interest reflects economic reality and will therefore better ensure full reparation of the Claimant's damage.").

[708] **CL-092**, *Wena Hotels*, Award, ¶ 129; **CL-042**, *Compañiá del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1) Final Award, 17 February 2000 ¶ 104; **CL-093**, *Yukos*, Final Award, ¶ 1689.

560. Simple interest provides inappropriate reparation because it "fail[s] to account accurately for the time value of money until the date of payment."[709] Compound interest, in contrast, is consistent with the *Chorzów* principle of full reparation because it more often reflects the actual damages suffered.[710] Contrary to simple interest, compound interest ensures that the amount of compensation reflects the additional sum that an investor would have earned if the money had been reinvested each year at generally prevailing rated of interest.

561. Tribunals that have awarded compound interest have predominantly ordered the annual compounding of interest.[711] Tribunals have also generally granted interest "until the date of full payment of the award."[712] In practice, this "automatically turns pre-award interest into post-award" interest.[713]

562. Secretariat has determined that the appropriate rate of interest is the Canadian Three-Month Interbank Rate plus 2%, compounded annually. This is a common and widely accepted reference point for financing or investment decisions in Canada.[714]

PART SIX – RELIEF REQUESTED

563. For the reasons set out above, Windstream requests:

a) a declaration that Canada has unlawfully expropriated Windstream's investments in WWIS, the Project and the FIT Contract, contrary to Article 1110 of NAFTA;

b) a declaration that Canada has failed to accord Windstream's investments fair and equitable treatment in accordance with international law, contrary to Article 1105 of NAFTA;

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[709] **CL-046**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, 11 June 2012 ¶ 1337.

[710] **CL-041**, *Vivendi II*, Award, ¶¶ 8.3.20, 9.2.4, 9.2.6,9.2.8.

[711] **CL-093**, *Yukos*, Final Award, ¶ 1671.

[712] **CL-093**, *Yukos*, Final Award, ¶ 1672.

[713] **CL-110**, Ripinsky S. & Williams K., *Damages in International Investment Law* (BIICL, 2008), p. 387.

[714] CER-Secretariat, ss. 2.17(iii), 9.3.

c) alternatively, a declaration that Canada has failed to ensure through regulatory control, administrative supervision or the application of other measures, that its state enterprise, the IESO, acts in a manner consistent with Canada's obligations under Chapter 11 of NAFTA;

d) damages in the range of between $291.4 million and $333 million, to be updated as at the time of the hearing, or alternatively between $284.7 million and $299.1 million, to be updated as at the time of the hearing;

e) pre-and post-award interest at a rate to be fixed by the Tribunal;

f) all legal fees and costs associated with this arbitration; and

g) such other relief as the Tribunal considers appropriate.

DATED: February 18, 2022

Respectfully submitted on behalf of Windstream Energy LLC,

Torys LLP

Counsel for the Claimant, Windstream Energy LLC