

**IN THE MATTER OF AN ARBITRATION UNDER
ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT (“CUSMA”),
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (“NAFTA”),
AND THE 2013 UNCITRAL ARBITRATION RULES**

-between-

**WINDSTREAM ENERGY LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”)**

Government of Canada’s Rejoinder Memorial

Witness Statement of Andrew Teliszewsky

October 23, 2023

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CANADA

1. My name is Andrew Teliszewsky. My address is [REDACTED]
2. From February 2013 to January 2018, I served as the Chief of Staff to the Minister of Energy of Ontario. From February 2013 to June 13, 2016, Robert Chiarelli was the Minister of Energy. In June 2016, following a Cabinet shuffle, Glenn Thibeault became the Minister of Energy.
3. In my role of Chief of Staff to the Minister of Energy, I was responsible for executing the policy direction of the Minister of Energy, as per the mandate received from the Premier of Ontario and related directions from Cabinet. In this role, I was responsible for the management of political staff within the Minister's Office and coordinating and liaising with the Deputy Minister's Office to move forward on the Government's agenda as it relates to energy and electricity planning for the Province of Ontario.
4. In this statement, I set out my recollections of: the FIT Program and the nature of the Ministry's interactions with the Ontario Power Authority (later the Independent Electricity System Operator or "IESO", as successor) with respect to the FIT Program; the context of renewable energy procurement in 2016; and my limited interaction with Windstream representatives in the period following the Ministry's receipt of the *Windstream I* Award.

Education and Background

5. I hold a Bachelor of Science in Biology from McMaster University and a Master in Public Administration (Innovation, Science & Environmental Policy) from Carleton University.
6. From May 2006 to December 2010, I worked in various positions of increasing responsibility within the Office of the Premier of Ontario and the Liberal Caucus Service Bureau.
7. From January 2011 to October 2011, I was the Executive Director of the Office of the Ontario Minister of Infrastructure. I then became the Chief of Staff in the Ontario Ministry of Infrastructure and Ontario Ministry of Transportation, where I remained until February 2013.

The FIT Program

8. The FIT Program was a standard offer procurement program. The applicable FIT Rules dictated who was eligible to be offered a standard form FIT Contract and how available transmission capacity was allocated.
9. FIT Contracts were different from renewable procurement program contracts in other jurisdictions in that they were awarded before the permitting process. It was the responsibility of each FIT applicant to decide whether it was able to comply with the terms of the FIT Contract, including the requirement to meet its Milestone Date for Commercial Operation. The risks associated with

accepting a FIT Contract were borne entirely by the FIT applicant and FIT applicants, such as the Claimant, were aware of this both at the time of applying for and entering into a FIT Contract. While many FIT Contract suppliers were successful in achieving commercial operation, others were not.

10. Despite these known features of the FIT Program and FIT Contract, the dominant communications narrative from suppliers became that failure to commercialize was the Government's problem rather than a risk assumed by FIT Contract suppliers. There was a sense among suppliers generally that once a FIT Contract was awarded, it was a "golden ticket" – whereas in fact there was no guarantee that the pre-requisites for a Notice to Proceed would be met by suppliers, or that a given project would reach commercial operation.
11. I am aware that the Claimant in this arbitration alleges that the Ministry of Energy exercises significant control over the IESO. While it is true that the Ministry has legislative powers to issue directives to the IESO in relation to certain issues and that the IESO must comply with these directives, in my time at the Ministry this was typically used for relatively high-level policymaking as opposed to specific contractual issues regarding individual FIT Contracts. This was done to ensure suppliers were aware that their FIT Contract was with the IESO, not the Ministry, and that as the FIT Contract counterparty, the IESO was the decision-making authority with respect to the management of individual FIT Program contracts.
12. While I am aware that the Ministry has, at times, conveyed its views to the IESO with respect to certain power purchase agreements, these instances would have occurred largely through the lens of high-level policy imperatives, such as supporting Indigenous-led projects. In my capacity as Chief of Staff at the Ministry of Energy, I often reminded proponents of the design of the FIT Program, which was a standard offer program with regulatory, development and construction risk to be born by the supplier.

Renewable Energy Procurement in Ontario

13. I am aware that the Claimant has alleged that Ontario's lack of intervention in the WWIS-IESO FIT Contract was arbitrary because of Ontario's energy needs. Here I set out the history and context of Ontario's renewable energy procurement profile in 2016.

14. While I was not with the Ministry of Energy at the time, I was aware of the *Green Energy and Green Economy Act, 2009*, and the launch of the FIT Program in 2009.¹ I was also aware of the unexpected and overwhelming uptake of the FIT Program.
15. In 2010, the Ministry of Energy published its 2010 Long-Term Energy Plan (“2010 LTEP”), which reassessed Ontario’s energy needs and reduced its procurement of renewable energy by introducing a target amount of renewable energy capacity.² The 2010 LTEP formed part of the background for the Minister of Energy’s decision, in June 2013, to curtail the FIT Program.
16. In June 2013, Minister Chiarelli issued a direction to the OPA (now the IESO) concerning the FIT Program. In addition to other changes, the Minister directed the OPA to “not procure any additional MW under the FIT Program for Large FIT projects” and to “begin to develop a competitive process for procurement of large renewable energy capacity.”³
17. On December 2, 2013, Ontario released its 2013 Ontario’s Long-Term Energy Plan (“2013 LTEP”), which set procurement targets for renewables in 2014 and 2015.⁴ On December 16, 2013, Minister Chiarelli directed the OPA to “design and develop” a “new competitive process for large (generally over 500kW) renewable energy projects” based on the principles of the 2013 LTEP.⁵ This became known as the “LRP” – the “Large Renewable Procurement” process. The first round of the LRP (LRP I) was initiated in 2014 and resulted in the award of contracts to successful proponents in March 2016.
18. On April 5, 2016, Minister Chiarelli issued a direction to the IESO regarding future renewable energy procurements, which foresaw a second round of LRP process (LRP II).⁶ As noted above, Mr. Thibeault became the Minister of Energy in June 2016. One of his early decisions as Minister was to reverse the April 5, 2016 direction and cancel the planned LRP II.⁷

¹ I have reviewed and agree with the description of the GEGEA and the FIT Program set out at paragraphs 4-16 of the Witness Statement of Sue Lo, 20 January 2015, submitted in the *Windstream I* NAFTA proceedings.

² **C-0387**, Ontario’s Long-Term Energy Plan, 22 November 2010.

³ **C-0661**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA), 12 June 2013.

⁴ **R-0606**, Ontario’s Long-Term Energy Plan, 1 December 2013.

⁵ **R-0769**, Letter from Bob Chiarelli (MOE) to Colin Anderson (OPA) Re: Moving Forward with Large Renewable Energy Projects, 16 December 2013.

⁶ **C-2028**, IESO Ministerial Directive entitled “Future Renewable Energy Procurements”, 5 April 2016.

⁷ **R-0770**, Directive from the Minister regarding LRP II RFQ Process and EFWSOP Cancellation, 27 September 2016 (web version, accessed on December 7, 2022); **R-0772**, Letter from Glenn Thibeault (MEI) to Bruce Campbell (IESO) Re: Directive from Minister, 27 September 2016.

19. There were several reasons for this decision. First, the IESO had recently advised that Ontario was in a strong electricity supply position. On September 1, 2016 the IESO had provided the Minister with the “Ontario Planning Outlook”.⁸ As noted by the Minister at the time, the Ontario Planning Outlook indicated that “Ontario will benefit from a robust supply of energy over the coming decade to meet projected demand”.⁹ Second, there were initiatives on the demand side to enhance conservation efforts on the part of all energy consumers. The Ministry had launched “Conservation First” a multi-pillared strategy to drive load curtailment from consumers through efficiency measures (as simple as weather stripping in residential homes to incentives to fund more efficient boilers or chillers at industrial facilities across Ontario). It was often cited that conservation was the “lowest cost resource” (i.e. reducing demand tended to cost less than building new supply). Third, cost containment for electricity prices was front of mind.

20. In late September 2016, we received the *Windstream I* Award. On October 17, 2016, Minister Thibeault was asked a question about the *Windstream I* Award in the Ontario Legislature. He stated that:

We were advised last week of the tribunal’s decision. The tribunal dismissed the majority of claims, with the final \$25-million award being significantly less than the up to \$568 million in damages sought by Windstream.

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.¹⁰

21. My recollection of the moratorium on offshore wind development (which fell under the purview of the Minister of the Environment and Climate Change) was that additional work was required before the moratorium could be lifted. I am aware that the Claimant has challenged Canada’s statement that Ontario had no need to conduct further research with respect to offshore wind as a result of Ontario’s energy supply needs. Based on my recollection, the Ministry did not see a pressing need to move forward with additional generating resources at the time because, as I mentioned, the IESO

⁸ C-2035, IESO Ontario Planning Outlook – A technical report on the electricity system, 1 September 2016.

⁹ R-0770, Directive from the Minister regarding LRP II RFQ Process and EFWSOP Cancellation, 27 September 2016 (web version, accessed on December 7, 2022).

¹⁰ C-2041, Official Report of Debates (Hansard) Transcripts – English, Legislative Assembly of Ontario, 17 October 2016, p. 723.

had advised that Ontario was in a strong energy position and the LRP renewables procurement was being curtailed.

Interactions with Windstream Representatives After the *Windstream I* Award

22. I would have received a confidential copy of the *Windstream I* Award in late September 2016. The release of the Award would have been on the agenda of regular briefings with the Minister and Ministry staff, along with many other items.
23. I understand that certain emails from me have been put on the record in this NAFTA proceeding in support of the Claimant's argument that Ontario acted unfairly toward Windstream. The Claimant has taken those emails out of context. On October 5, 2016, I wrote to various Government officials in the Premier's Office and attached the still-confidential version of the *Windstream I* Award.¹¹ I noted that I had been contacted by a lobbyist for Windstream, and that I recommended to my colleagues that political staff not engage directly with Windstream at that time because interaction directly with a proponent (or their emissary) recently engaged in a legal dispute without the benefit of legal counsel (from both sides) in attendance would not have been a wise course of action. It was my intention to shield political decision makers (both staff and elected officials) from appearing to circumvent the contractual process, including the appropriate dialogue between any proponent and their official counterparty, in this case the IESO. Instead, I referred the lobbyist to IESO legal counsel. As I noted in the email, Windstream had a FIT Contract with the IESO and any issues with respect to the contract would be dealt with as between the two contracting parties. This was consistent with the overall approach the Ministry took to FIT contractual issues during my time as Chief of Staff, as discussed above.
24. In the emails relied on by the Claimant, I refer to a potential huddle in the next couple of weeks, but I do not recall this event ever happening. Instead, I recall more general briefings within the Ministry of Energy at which the Award was discussed as part of a long list of other items relevant to the Energy sector. I also recall the Award being discussed as an information or awareness piece, not as an item requiring particular Ministerial decision. This was in direct contrast to other energy issues during my time at the Ministry. For example, in 2013 WTO Appellate Body released its decision in the *Canada-Renewable Energy* case, where the FIT Program had been challenged. That decision required Ontario to take certain legislative and regulatory changes in 2014 with respect to the FIT Program's domestic content requirement going forward in order to bring Ontario into

¹¹ C-2642, Email from Andrew Teliszewsky to Andrew Beven re Decision: *Windstream Energy LLC v. Government of Canada*, 5 October 2016.

compliance. In contrast, when the *Windstream I* Award was issued there was nothing further required of the Ministry of Energy.

25. I am aware that the Claimant has taken issue with Ontario's refusal to meet with Windstream following the Award. During my time at the Ontario Ministry of Energy, I had regular meetings with Chris Benedetti, of Sussex Strategy Group. Mr. Benedetti and I often met, as he represented many proponents in the energy sector, not just Windstream.
26. During a meeting with Mr. Benedetti around October or November 2016,¹² he raised the issue of Windstream with me. To be clear however, this would not have been a meeting specifically about Windstream. Rather, Mr. Benedetti would come to me with a list of topics he was advocating and advancing at any given point, Windstream being one of them.
27. I was wary of discussing Windstream at the time given that we had recently finished the NAFTA dispute, the set-aside deadline had not yet passed, and the Claimant had an open contractual issue with the IESO. This was also the direction the Minister's office had received from legal counsel. In my view, any concerns with respect to Windstream's FIT Contract should have been discussed with the IESO as contractual counterparty and with legal counsel present. I would have been quite blunt in communicating that message to Mr. Benedetti.
28. I was also consistent in relaying this message to others who inquired with the Minister's Office about the Award. For example, at the end of February 2017, in the context of press inquiries relating to Windstream's court filing to enforce the *Windstream I* Award, I repeated to colleagues that any questions concerning the FIT Contract should be referred to the IESO as the contractual counterparty.¹³ It is my understanding that Windstream did meet with the IESO and in the end, following further litigation in Ontario courts initiated by the Claimant, the IESO ultimately terminated the FIT Contract.

Andrew T. Teliszewsky

Andrew Teliszewsky
October 23, 2023

¹² Second Witness Statement of Chris Benedetti, ¶ 5.

¹³ C-2693, Email from Andrew Teliszewsky to Colin Nikolaichuk re: NAFTA/Windstream, 21 February 2017.