

PCA Case No. 2021-26

**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 -

**THE GOVERNMENT OF CANADA**

**(the "Respondent", and together with the Claimant, the "disputing parties")**

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**PROCEDURAL ORDER NO. 5**

**Oral Hearing**

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**The Arbitral Tribunal**

*Ms Wendy Miles KC (Presiding Arbitrator)*

*Prof. John Gotanda*

*Rt. Hon. Beverly McLachlin*

**Administering Authority**

*Permanent Court of Arbitration*

**Tribunal Secretary**

*Mr José Luis Aragón Cardiel*

**6 December 2023  
(updated on 10 January 2024)**

## I. BACKGROUND

1. On 21 December 2021, the Tribunal issued Procedural Order No. 1, containing the rules of procedure of the arbitration, including for the conduct of hearings. Section 17.1 of Procedural Order No. 1 provides that a pre-hearing conference shall be held to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing.
2. On 3 November 2022, the Tribunal issued Procedural Order No. 3, whereby it established the Procedural Calendar of the arbitration (the “**Procedural Calendar**”). As set out in the Procedural Calendar, the Tribunal reserved the period between 5 February and 16 February 2024 (excluding the intervening weekend) to hold a hearing in Toronto, Ontario (the “**Oral Hearing**”).
3. On 21 November 2023, the Tribunal provided the disputing parties with a draft of this order and invited them to provide comments on the draft. The disputing parties submitted their comments on Friday, 1 December 2023.
4. On 6 December 2023, having taken note of the disputing parties’ agreement on the terms of Procedural Order No. 5, the Tribunal vacated the pre-hearing conference originally scheduled for 7 December 2023.
5. Pursuant to Section 17.4 of Procedural Order No. 1, after hearing the position of each disputing party, the Tribunal issues this Procedural Order convening the Oral Hearing, establishing its place, time, agenda, format, and all other technical and ancillary aspects. This Procedural Order incorporates the disputing parties’ points of agreement, and where agreement was not reached, the Tribunal’s decision.

## II. DURATION, DATE AND LOCATION OF THE HEARING

6. In accordance with the Procedural Calendar, the Oral Hearing shall be held in person at the facilities of Arbitration Place in Toronto, Ontario between 5 February and 9 February 2024.
7. The duration of the Oral Hearing shall be 5 days.
8. The schedule for the Oral Hearing shall be as set out in **Annex 1**.
9. Except as otherwise indicated in the hearing schedule, the Oral Hearing shall take place from 9:00 a.m. to 5:00 p.m. each day. Each day there shall be a one-hour lunch break, as well as two fifteen-minute coffee breaks during the morning and afternoon sessions, at times to be determined by the Tribunal.

10. The Tribunal, in consultation with the disputing parties, may make modifications to the schedule as it deems appropriate, provided that the disputing parties' rights are duly respected.
11. The members of the Tribunal may intervene or put forward questions to the Parties or the witnesses at any time they consider appropriate.

### **III. ALLOCATION OF TIME**

12. The Oral Hearing will be ordered sequentially as set out in **Annex 1**.
13. The principle of equal time as between the disputing parties shall be observed in the conduct of the Oral Hearing. Each side shall be allocated a total time, including opening and closing statements, of 13 hours and 45 minutes. The remaining time (1 hour per hearing day) shall be reserved for housekeeping matters and Tribunal questions.
14. The disputing parties agree on the use of the chess clock method of time keeping. Each disputing party shall be free to spend its allocated time in the manner it sees fit, so long as the total amount of time allotted to that party and the order of witnesses and experts as set out in **Annex 1** are maintained, and subject to the following:
  - (i) Each disputing party shall be allocated a maximum of 2 hours and 30 minutes to make its opening statement, and a maximum of 2 hours for its closing statement. Each disputing party may at its discretion reserve time out of its closing statement allocation for rebuttal statements.
  - (ii) In accordance with Section 11.10 (b) of Procedural Order No. 1, although direct examination will be given in the form of witness statements and expert reports, the disputing party presenting the witness may conduct a brief direct examination for the purpose of introducing the witness, including to confirm and/or correct that witness's written statement, and addressing matters that have arisen after the witness statement was given, if any. Accordingly, the direct examination of a fact witness shall be limited to a maximum of 5 minutes.
  - (iii) In accordance with Section 12.5 of Procedural Order No. 1, at the request of the disputing party presenting the expert, an expert may provide a brief presentation on their report(s) prior to cross-examination. The expert shall not be permitted to introduce new evidence during this presentation, subject to the ability to address matters that have arisen after the

report was given, if any. Accordingly, the direct examination of an expert witness shall be limited to a maximum of 30 minutes.

- (iv) Time spent on direct and re-direct examination shall be counted towards the time of the disputing party presenting the witness or expert. Time spent on cross-examination shall be counted towards the time of the disputing party conducting the cross-examination.
  - (v) Time spent on questions from the Tribunal, answers to those questions, and procedural interventions by the Tribunal shall not be counted against a disputing party's time. Time spent dealing with objections from a disputing party shall also not be counted against that party's time, subject to the control of the Tribunal.
  - (vi) Time used for housekeeping matters or to resolve technical difficulties shall not be counted against the disputing parties' time.
15. The PCA shall keep a record of time and circulate it to the disputing parties at the end of each hearing day.

#### **IV. PARTICIPANTS**

16. The disputing parties shall provide the PCA with a list of hearing attendees in the format suggested by **Annex 2**, listing each participant's name, affiliation, e-mail address, and whether the participant is privy to restricted access information via e-mail to the PCA and Arbitration Place no later than **Friday, 12 January 2024**. Should there be any changes to the list, the disputing parties will inform the PCA and Arbitration Place as soon as practicable.

#### **V. HEARING BUNDLE**

17. By **Friday, 12 January 2024**, the disputing parties shall upload to the file-sharing platform established by the PCA for this case a hearing bundle in electronic form, which shall include all memorials, witness statements, expert reports, exhibits, legal authorities, and procedural orders together with a hyper-linked index.
18. The disputing parties shall also send by courier USB flash drive (or hard-drive) copies of the hearing bundle to the Tribunal at the addresses detailed in Section 3 of Procedural Order No. 1, and to the PCA at the address indicated at Section 23.2 of Procedural Order No. 1.

## **VI. EVIDENCE AND DEMONSTRATIVE EXHIBITS**

19. In accordance with Sections 10.7 and 18.1 of Procedural Order No. 1, no new evidence may be presented at the Oral Hearing except with leave of the Tribunal. Should the Tribunal grant leave to a disputing party to present new evidence in the course of the Oral Hearing, it will grant the other disputing party the opportunity to introduce new evidence to rebut it.
20. As further established in Section 10.8 of Procedural Order No. 1, demonstrative exhibits, such as charts, tabulations or PowerPoint slides, may be used by a disputing party during the Oral Hearing, provided that no new evidence is contained therein, directly or indirectly, and that the exhibit from which the referred information originates is clearly identified in each presentation. Each disputing party shall number its demonstrative exhibits consecutively.
21. The disputing parties shall provide electronic copies of any demonstrative exhibits to be displayed during the Oral Hearing both by e-mail and the PCA's file-sharing platform to all other participants (including the other side, the members of the Tribunal, the PCA, the court reporters, and further technical support personnel retained by the PCA) at least 30 minutes prior to their use during the Oral Hearing. In the case of slides meant for use during the disputing parties' opening and closing statements and the direct examination of experts, each disputing party shall provide one paper copy of the presentation in question to the opposing party, each member of the Tribunal, the PCA, and the court reporters.

## **VII. EXAMINATION OF WITNESSES**

22. Unless otherwise provided in this order, the examination of fact witnesses shall be governed by the rules set out in Sections 11.1 to 11.13 of Procedural Order No. 1, and the examination of expert witnesses shall be governed by the rules set out in Sections 12.1 to 12.6 of Procedural Order No. 1.
23. In accordance with Section 11.5 of Procedural Order No. 1, the disputing parties exchanged their respective lists of fact and expert witnesses to be called for cross-examination at the Oral Hearing on Wednesday, 22 November 2023.
24. During their direct testimony, fact witnesses shall not have access to any hard copy document other than unmarked copies of their witness statements. The disputing parties shall provide hard copies of these documents to their fact witnesses as may be necessary.

25. During their direct examination, expert witnesses shall not have access to any hard copy document other than an unmarked copy of their expert report together with accompanying annexes (to be provided by the disputing party offering the expert) and their PowerPoint presentations, if any. Experts may have direct access to a computer to operate any such PowerPoint presentations provided that such computer and any device connected to it contains no other files and is not connected to the internet. If so requested, the PCA will provide a computer for this purpose.
26. Before commencing the cross-examination of any fact or expert witness, the disputing parties shall upload a digital copy of that witness or expert's examination bundle, including an index identifying the document and exhibit reference corresponding to each tab in the bundle, to a dedicated folder in the file-sharing platform created for this case. The disputing parties shall then confirm the upload and send an electronic copy of the index of the bundle by e-mail to all hearing participants.
27. During the examination of fact and expert witnesses, the disputing party conducting the examination shall display the first page of any document on which it intends to question the witness and shall briefly describe the exhibit in order to orient the witness before questioning them on any other page or section of the document.
28. It is not permitted for counsel to communicate with fact or expert witnesses during their examination by any means other than communication on the record, including during any breaks during the testimony.
29. If the Tribunal considers it appropriate, it may require experts to provide evidence concurrently (hot-tubbing).
30. To ensure the efficient conduct of the Oral Hearing, the disputing parties shall ensure that their fact and expert witnesses will be available for examination at least one day before and after their expected time for examination.

#### **VIII. TRANSPARENCY AND RECORDS OF HEARINGS**

31. In accordance with paragraph 16.2 of Procedural Order No. 1, the Oral Hearing shall be open to the public via a livestream hosted by the PCA on its website. Those wishing to access the live stream shall be requested to register in advance with the PCA. The PCA will restrict the livestream from public access when necessary to protect confidential information.

32. The hearing room will not be open to the public. In accordance with Section 14 of Procedural Order No. 1, non-disputing NAFTA Parties may be present in the hearing room throughout the Oral Hearing, including during confidential sessions.
33. The Oral Hearing shall be recorded in both audio and video and transcribed, and the hearing transcripts shall be made publicly available on the PCA's website after the Oral Hearing, subject to redactions to remove confidential information. The Tribunal shall make the final determination regarding such redactions in accordance with the Confidentiality Agreement of 20 December 2021. The video and audio recordings shall be provided to the disputing parties and the Members of the Tribunal but will not be made available to the public.
34. LiveNote transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the disputing parties and the Tribunal in the hearing room. Further, rough transcripts shall be provided by e-mail to the members of the Tribunal and the disputing parties in the evening of each hearing day.

#### **IX. MODIFICATIONS OF THIS ORDER**

35. The Tribunal may modify this Order in its discretion, duly taking into account the disputing parties' rights, as circumstances require in order to protect the fairness and integrity of the Oral Hearing.

#### **X. POST-HEARING MATTERS**

36. In accordance with paragraph 18.4 and 18.6 of Procedural Order No. 1, at or before the Oral Hearing, the Tribunal shall decide, in consultation with the disputing parties, whether and when the disputing parties shall submit post-hearing submissions and replies to post-hearing submissions, as well as their format. In any event, such submissions shall not contain new evidence, documents, sources, declarations, or expert reports.
37. In accordance with paragraph 16.6 of Procedural Order No. 1, the need and schedule for correction of the transcript will be discussed at the conclusion of the Oral Hearing.
38. The Tribunal shall also consider whether and when the parties shall file submissions regarding costs.

**Dated: 6 December 2023 (updated on 10 January 2024)**

**Place of Arbitration: Toronto**

A handwritten signature in blue ink, appearing to read 'Wendy Miles', is written on a light-colored background. The signature is fluid and cursive, with a large loop at the end.

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Ms. Wendy Miles QC

(Presiding Arbitrator)

On behalf of the Tribunal

**Annex 1**

**Indicative Hearing Schedule (revised on 10 January 2024)**

<b>Monday, 5 February</b>	
A.M.	Windstream's Opening Statement
P.M.	Canada's Opening Statement
<b>Tuesday, 6 February</b>	
A.M.	Canada's Cross-Examination of Nancy Baines
	Canada's Cross-Examination of Michael Killeavy
P.M.	Windstream's Cross-Examination of Andrew Teliszewsky*
	Windstream's Cross-Examination of Michael Lyle*
<b>Wednesday, 7 February</b>	
A.M.	Canada's Cross-Examination of Mr. Tetard**
	Canada's Cross-Examination of Mr. Tobis and Mr. Milburn**
P.M.	Windstream's Cross-Examination of Jerome Guillet
<b>Thursday, 8 February</b>	
	[If cross-examinations of the above witnesses run long, the cross-examination of Mr. Guillet can extend into Thursday morning, otherwise the day will be available for questions from Tribunal and/or parties to prepare their closing statements]
<b>Friday, 9 February</b>	
A.M.	Windstream's Closing Statements
P.M.	Canada's Closing Statements
	Rebuttals (if any)

\* With respect to Canada's witnesses, the Claimant will advise if the order of appearance of the two witnesses changes.

\*\* With respect to the Claimant's experts, Canada will advise if the order of the appearance of the witnesses changes.

Annex 2

List of Hearing Participants

#	Affiliation	Role at Hearing (e.g. Counsel, Party, Representative, Fact Witness)	E-mail	Presence in Restricted Access Information Session (Y/N)	Same day delivery of Hearing Transcript
1.					
2.					