

**IN THE MATTER OF AN ARBITRATION  
UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT  
(CUSMA), 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

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**CLAIMANT'S FOURTH BOOK OF WITNESS STATEMENTS  
WINDSTREAM ENERGY LLC**

August 14, 2023

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# TAB 1

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
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**BETWEEN:**

WINDSTREAM ENERGY LLC

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**SECOND WITNESS STATEMENT OF NANCY BAINES**

1. I make this witness statement to respond to certain assertions in Canada’s Counter-Memorial. I have attempted not to repeat matters that are addressed in my first witness statement unless it is necessary to do so. This witness statement should be read together with my first witness statement. Capitalized terms not otherwise defined in this witness statement bear the meanings assigned to them in my first witness statement, dated February 15, 2022.

2. The facts and matters to which I testify in this witness statement are within my own knowledge and are true to the best of my knowledge. When my knowledge is based on a source, I have identified the source and believe it to be accurate.

**Windstream’s Expectation that the Project could Proceed**

3. In my first witness statement, I explained my belief following the *Windstream I* Award that the Project had a path forward. In its Counter-Memorial, Canada states that “the six years that have passed have witnessed no post-Award measure that could possibly have fed any reasonable

expectation that the Project could proceed.” Canada argues that “nothing has changed since the Award.”<sup>1</sup> I disagree with Canada’s suggestion that my expectation was not reasonably held.

4. As I explained in my first witness statement, after the *Windstream I* Award was released, we felt optimistic about the future of the Project.<sup>2</sup> This was for a few reasons. In particular:

- a) In the Award, 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.<sup>3</sup>
- b) During the *Windstream I* arbitration, Canada consistently represented that the Project was “frozen” and could proceed once the moratorium was lifted. If that was the case, then the Project had a path forward.<sup>4</sup> I did not expect Ontario to renege on those representations.
- c) More specifically, we expected that the Ontario government would speak to us, in good faith, about the FIT Contract to fulfil its promise to freeze the Project from the effects of the moratorium. We did not expect the government to continue the conduct that was already found to be a breach of its international obligations.<sup>5</sup>
- d) This expectation was further fueled by public statements by the Ontario government following the *Windstream I* Award, including that offshore wind research would soon be “finalized” and a statement by the Minister of Energy that the Ontario government could let the Project be built.<sup>6</sup>

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<sup>1</sup> Canada’s Counter-Memorial on the Merits, ¶¶ 4-5.

<sup>2</sup> CWS-N. Baines, ¶¶ 15-17.

<sup>3</sup> CWS-N. Baines, ¶ 15.

<sup>4</sup> CWS-N. Baines, ¶ 17. See **C-2040**, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (September 27, 2016), ¶¶ 216-218; *Windstream I* Canada’s Counter-Memorial, ¶¶ 21, 260, 265, 266, 268, 353, 486-487.

<sup>5</sup> CWS-N. Baines, ¶ 16.

<sup>6</sup> CWS-N. Baines, ¶¶ 18-25.

5. Additionally, the IESO did not return the \$6 million security credit that WWIS had provided. If the FIT Contract was effectively terminated and had no future, then I would have thought it would be returned to us.

6. My expectation that the Project could proceed following the *Windstream I* award was genuine. Following the Award, I engaged in many discussions with Mr. Baines and Mr. Mars about how the Project could proceed. We invested time and money to move the Project forward, as explained further in the Memorial on the Merits and described at paragraphs 10 to 28 below. We would not have done that if we did not believe that Project had a future. This expectation is also evidenced in correspondence that occurred following the release of the *Windstream I* Award. For example:

- a) On October 14, 2016, Mr. Baines responded to an inquiry about the Award and stated “the Tribunal found that the contract remained valid and in force. So Windstream is planning to move the project forward.”<sup>7</sup>
- b) On October 19, 2016, Mr. Baines sent an email to Andrew Roberts, who had provided an expert opinion in the *Windstream I* arbitration. We thanked him for his help and stated “[w]e look forward to proceeding now and actually building it.”<sup>8</sup>
- c) On November 21, 2016, Mr. Baines emailed other expert witnesses from *Windstream I* to thank them for their assistance in the arbitration. He wrote, “Now that this is behind us we are working to move the project forward to the next stage. Our contract remains in place and our investors are keen to see the project built.” He then asked them about their knowledge of a potential partner for the Project. As Mr. Baines explained, “[t]he benefit to a potential partner at this point is that they get a seat at the table as we figure out how to move forward. This is a real project with a long term contract and very good profit potential. It requires a few more months, or maybe even a year of dealing with Ontario in order to remove the

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<sup>7</sup> C-2645, Email from Tom Adams to Ian Baines (WWIS) re More media coverage (October 14, 2016). [emphasis added].

<sup>8</sup> C-2648, Email from Ian Baines (WEI) to Andrew Roberts (WSP) re NAFTA Award (October 19, 2016). [emphasis added].

impediments put in place. We are looking beyond the current situation to where we actually get it back on track.”<sup>9</sup>

- d) On December 7, 2016, Mr. Mars emailed Windstream’s investor group. He explains that “we have been actively progressing the project. We are in process with a number of activities including, but not limited to, pushing forward our environmental approval, negotiating with several multinational conglomerates to join us in the project and potentially bringing on a First Nations partner. All of which continue to further grow the value of the project.”<sup>10</sup>

7. While we planned to move the Project forward, I understood that in order to do so, we needed action from the Government of Ontario and the IESO. The moratorium needed to be lifted and the IESO needed to renegotiate our FIT Contract. I understood that it was possible these hurdles may not be overcome. In fact, I did not expect the IESO to renegotiate the FIT Contract unless it was directed to do so by MEI. Our past negotiations with the IESO gave me concern that the IESO, acting on its own, might not adjust the FIT Contract to account for the moratorium.

8. However, the *Windstream I* tribunal found that the Ontario government breached its international obligations by failing to direct the IESO in those past negotiations and found the FIT Contract could still be renegotiated to implement Ontario’s promises to us. Given this, and given Canada’s position in the arbitration that the FIT Contract was not terminated and was “frozen,” I believed that Ontario would not continue the conduct already found to be internationally wrongful. I do not believe that Canada was acting unilaterally in the arbitration; the witnesses were from the Government of Ontario Ministries and the Government of Ontario lawyers attended the hearing. As a result, I was hopeful and expected Ontario to meet with us about renegotiating the FIT Contract pending the duration of the moratorium (which was always represented to be a temporary measure).

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<sup>9</sup> C-2654, Email from Ian Baines (WEI) to Ian Irvine and Bill Follett (SgurrEnergy) re A request for input (November 21, 2016). [emphasis added].

<sup>10</sup> C-2658, Email from David Mars (WEI) to Ken Hannan et al. re Windstream Update: Confidential and Privileged (December 7, 2016).



9. However, that ultimately did not happen. Despite representing that the research required to lift the moratorium was being “finalized,”<sup>11</sup> it appears no steps have been taken to do the scientific research necessary to lift the moratorium. The Government of Ontario refused to meet with us to renegotiate the FIT Contract and refused to direct the IESO to implement its promise to freeze the FIT Contract from the effects of the moratorium. As a result, the FIT Contract was terminated, effective February 2020.

### **Windstream’s Efforts to Move the Project Forward**

10. Following the *Windstream I* Award, we attempted to meet with MEI and the IESO about renegotiating the FIT Contract to implement the promise to “freeze” the contract for the duration of the moratorium. Those details are outlined in my first witness statement. We also took steps to move the Project forward to the extent we could. In this section of my witness statement, I respond to assertions made by Canada in its Counter-Memorial with respect to these steps that we took to advance the Project.

### ***Windstream’s Lobbying Efforts***

11. In its Counter-Memorial, Canada makes numerous references to Windstream’s “lobbying efforts.”<sup>12</sup> Canada states that Windstream’s persistent efforts, including lobbying the Ontario government, “indicate that it was well aware of the status of its Project and the real and tangible likelihood that IESO would exercise its termination right.”<sup>13</sup>

12. As set out above, we believed that the Project could proceed following the *Windstream I* Award. We also understood that to do this, the Ontario Government needed to agree to direct the IESO to renegotiate the FIT Contract to adjust it to the terms of the moratorium. That is why we tried, on numerous occasions, to meet with the MEI to discuss this and the path forward for the Project.<sup>14</sup> However, dealings and negotiations with a government are a complex exercise. We retained a government relations firm, Navigator Ltd., to assist us in engaging with Ontario.<sup>15</sup> We

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<sup>11</sup> See CWS-N. Baines, ¶¶ 18-26.

<sup>12</sup> See Canada’s Counter-Memorial on the Merits, ¶¶ 8, 59, 61, 109, 186.

<sup>13</sup> See Canada’s Counter-Memorial on the Merits, ¶ 186.

<sup>14</sup> See CWS-N. Baines, ¶ 27.

<sup>15</sup> Jessica Georgakopoulos, Andrew Gallo, Randi Rahamim, and Lanny Cardow were all part of Navigator.

wanted to take all steps we could to obtain a successful result, and hiring experts who understand the complexities of approaching a government seemed to be a logical step.

13. As set out on Navigator's website, Navigator offers a full suite of government relations services across Canada. As they explain, "Having served prime ministers, premiers, cabinet ministers, and elected officeholders at every level of government and of all political stripes, we know what it is like to sit across the table from those advocating their position. This first-hand experience provides a unique vantage to better understand what motivates political decision-makers and how to align your issues and advocacy with their agenda."<sup>16</sup>

14. We retained Navigator in October 2016 as we were preparing for the release of the *Windstream I* Award. Navigator was retained to provide strategic communication counsel and media relations support to Windstream in relation to the release of the *Windstream I* Award.<sup>17</sup> We sought to use Navigator's expertise and resources to try to do whatever we could to motivate the government to do the right thing and to remedy the wrong had been done to us. The idea was that Navigator would assist us as we tried to move forward with the Ontario government and either renegotiate the FIT Contract with the IESO or otherwise reach a settlement of our dispute.

15. On October 12, 2016, Mr. Baines and I prepared a document summarizing the key facts for Navigator. As we set out in that document, "the Tribunal also found that the FIT contract remains valid. Windstream now intends to proceed with the development of the offshore wind project expeditiously."<sup>18</sup>

16. In and around July 2018, Windstream retained Rubicon Strategy Inc. to provide strategic advice and to deal with the Ontario government with respect to the FIT Contract.<sup>19</sup> At this point in time, the IESO had informed us of its decision to terminate the FIT Contract. Additionally, Doug Ford had just been elected as Premier of Ontario. In this context, we sought Rubicon's assistance,

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<sup>16</sup> Government relations – Navigator \_ When You Can't Afford to Lose@.

<sup>17</sup> **C-2646**, Navigator Limited and Windstream Energy LLC. Service Agreement (October 14, 2016).

<sup>18</sup> **C-2644**, Email from David Mars (WEI) to Randi Rahamim (NAV) re "FW: Key Points for Navigator" (October 13, 2016) with attached (a) WWIS – Offshore Win Project Key Facts (October 12, 2016); (b) Analysis entitled "Analysis of Benefits to Ontario of Cancelling the Wolfe Island Shoals FIT Power Purchase Agreement" (July 31, 2014).

<sup>19</sup> **C-2732**, Windstream Energy LLC and Rubicon Strategy Inc. General Service Agreement (July 12, 2018); **C-2832**, General Service Agreement between Windstream Energy LLC and Rubicon Strategy Inc. (July 12, 2018).

with its government relations expertise, to try to either obtain financial compensation for the cancellation of the FIT Contract or to obtain a revised contract with IESO to build a natural gas electrical generating facility.<sup>20</sup>

### ***Windstream's Updated REA Submission***

17. On February 15, 2017, WWIS submitted an updated REA submission to the Ministry of the Environment and Climate Change (“MOECC”). This attached a Project Description Report prepared by Ortech.<sup>21</sup> Canada’s Counter-Memorial makes several assertions about this submission.

18. First, Canada references the fact that two days before this, an article was published that indicated the moratorium would continue until more research was completed.<sup>22</sup> If Canada is suggesting that there was a temporal connection between that article and this REA submission, Canada is wrong. We had been preparing to provide this REA submission for months:

- a) On October 21, 2016, Mr. Baines reached out to Ortech and advised that he had “been asked to prepare letters and requests to follow up with the various agencies in order to move the project forward.”<sup>23</sup>
- b) On December 1, 2016, Ortech provided me with a quotation for support services during the initial development stages of the Project restart. Ortech estimated \$15,000 in fees for its initial services.<sup>24</sup> We would not have agreed to undertake this work, and pay these fees, if we were not serious about moving the Project forward.

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<sup>20</sup> **C-2734**, Email from David Mars (WEI) to Mike Coates and Kory Teneycke re Contract ready to go (July 18, 2018), Attachment - Windstream Energy LLC and Rubicon Strategy Inc. General Service Agreement (July 18, 2018).

<sup>21</sup> **C-2073**, Letter from Ian Baines (WWIS) to Ministry of Environment and Climate Change (MOECC) – “Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130-602” (February 15, 2017); **C-2074**, ORTECH Report: Project Description - Wolfe Island Shoals Offshore Wind Farm (February 15, 2017).

<sup>22</sup> Canada’s Counter-Memorial on the Merits, ¶¶ 73-74.

<sup>23</sup> **C-2651**, Email from Uwe Roeper from Ian Baines (WWIS) re Question (October 22, 2016).

<sup>24</sup> **C-2656**, Letter from Ciara DeJong to Nancy Baines re Wolfe Island Shoals Wind Farm Support Services ORTECH Reference No. 70802-1 (December 1, 2016); **C-2657**, Email from Ian Baines (WWIS) to Ciara DeJong (Ortech) re Project Description and REA restart proposal from ORTECH (December 5, 2016).

- c) On December 15, 2016, Ortech explained that the Project Description Report was Windstream's kick-off to the REA.<sup>25</sup> The next day, it provided a draft of the report.<sup>26</sup> Ortech provided a further draft on January 20, 2017.<sup>27</sup>

19. I am not sure what connection Canada is seeking to draw between the article and this REA submission. However, from my perspective, at the time that Ontario was announcing that the moratorium would be extended and that further studies are needed but have not been commissioned,<sup>28</sup> our REA submission demonstrated that we had done the work they advised was required and there was no good reason for further delay.

20. As I explained in an email to Navigator describing this submission, through this application, “we showed [Ontario] that the project is still alive, we have spent a lot of money and time following their rules and we are not going away. Secondly, and more importantly, we have put on file all the engineering and environmental work (they are tied) that showed that the project ha[d] no adverse environmental impact. We have answered all of the stated scientific uncertainties that the government relied upon. We have completed all of the studies that government said were needed. And we have done it while government sat on its hands and did nothing.”<sup>29</sup>

21. Second, as described in the updated REA submission, this was Windstream's third submission to Ontario. In its Counter-Memorial, Canada claims that the MOE has no record of those submissions, and none had been brought before the *Windstream I* tribunal's attention.<sup>30</sup>

22. Our records establish that these submissions were made to MNR (not MOE) as follows:

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<sup>25</sup> **C-2659**, Email from Ciara DeJong to Ian Baines and Nancy Baines re REA submission (December 15, 2016).

<sup>26</sup> **C-2660**, Email from Ciara DeJong (Ortech) to Ian Baines (WWIS) re Initial Draft of the Draft Project Description (December 16, 2016), Attachment - Ortech Report: Project Description - Wolfe Island Shoals Offshore Wind Farm (December 16, 2016).

<sup>27</sup> **C-2668**, Email from Hank Van Bakel (Ortech) to Ian Baines and Nancy Baines (WWIS) re draft WIS docs from ORTECH (January 20, 2017).

<sup>28</sup> **C-2072**, “Ontario signals offshore wind moratorium will continue for years” – Chat News Today (February 13, 2017).

<sup>29</sup> **C-2686**, Email from Nancy Baines (WWIS) to Randi Rahamim re Windstream Update (February 16, 2017).

<sup>30</sup> Canada's Counter-Memorial on the Merits, ¶ 75.

- a) On October 8, 2010, Ortech provided MNR a Draft Project Description in Support of Geophysical Investigations.<sup>31</sup>
- b) On January 27, 2012, Mr. Baines sent a letter to Mr. Kenneth Durst, a District Manager for MNR, following up on a previous proposal submitted in 2010 to obtain Applicant of Record for the Project's site location. He attached a draft project description for the Project.<sup>32</sup>

23. These are documents Ontario and Canada had in their possession during the *Windstream I* arbitration.

24. Third, in August 2017, six months after receiving our February 2017 REA submission, the MOE provided its response and provided the requested Aboriginal Consultation List pursuant to the REA Regulation.<sup>33</sup> In its Counter-Memorial, Canada states that Windstream did not take the steps it could have to advance its Project: “[t]he next steps for a proponent to advance a project would have been to consult with aboriginal communities, hold public meetings, publish drafts of the prescribed technical reports and seek the input of other regulatory agencies, both provincial and federal, in order to be eligible to apply to the MOE for a REA.”<sup>34</sup>

25. Windstream prepared a First Nation and Métis consultation process, which it submitted as part its application under the ERPP in April 2018.<sup>35</sup> Windstream's plan was to move ahead with the REA permitting process when the Government of Ontario lifted the moratorium, including preparing a more robust Aboriginal consultation plan.<sup>36</sup>

26. Following our receipt of the Aboriginal Consultation List from MOE, WWIS did not move ahead and begin the consultation process with the relevant aboriginal communities. We believed

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<sup>31</sup> C-2560, Email from Leah Deveaux (Ortech) to Eric Prevost re: Wolfe Island Shoals WF – Work plans (October 8, 2010).

<sup>32</sup> C-2576, Letter from Ian Baines (WWIS) to Kenneth Durst re Wolfe Island Off-Shore Wind Farm: Testing Project Description & Applicant of Record (January 27, 2012)).

<sup>33</sup> C-2474, Letter from Goyette, Dolly (MOE) to Baines, Ian (WWIS) (August 25, 2017).

<sup>34</sup> Canada's Counter-Memorial on the Merits, ¶ 79.

<sup>35</sup> See C-2149, Cover letter from Ian Baines (WWIS) to ERPP “Re Windstream Wolfe Island Shoals Inc. Project Application Form for the Wolfe Island Shoals Offshore Wind Farm”, pp. 27-33.

<sup>36</sup> See C-2149, Cover letter from Ian Baines (WWIS) to ERPP “Re Windstream Wolfe Island Shoals Inc. Project Application Form for the Wolfe Island Shoals Offshore Wind Farm”, p. 27.

it would be disrespectful to engage with First Nations while Ontario appeared to have not taken the steps it had previously indicated it would take to lift the moratorium. We received the list from MOE on August 25, 2017. By that time, the IESO had informed us that it would not renegotiate the terms of the FIT Contract<sup>37</sup> and MEI refused to meet with us and to direct the IESO with respect to renegotiating the FIT Contract. As a result, on March 27, 2017, we had commenced the Ontario Application. Until we received clarity about the Project, we did not believe that it was respectful to engage in discussions with the affected aboriginal communities.

27. Although we did not engage in discussions with First Nations, we still undertook effort and expense to advance the Project. For example, in the spring of 2017, we were waiting for a response from MOE to our February 15, 2017 REA submission. We asked Ortech to prepare an updated wind resource assessment, which it did.<sup>38</sup>

28. The work we did to advance the Project both before and after the moratorium was described in our November 29, 2017 letter to the IESO. As we stated in that letter, “WWIS has obtained reports from a number of pre-eminent engineering consultants, regarding, among other things, the feasibility, constructability and financeability of the Project. [...]. Combined with the significant pre-Moratorium work conducted by WWIS, these reports provide key information that will enable

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<sup>37</sup> See **C-2471**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (February 9, 2017), Exhibit 82 to the Affidavit of David Mars.

<sup>38</sup> See **C-2677**, Email from Hank Van Bakel to Ian Baines and Nancy Baines re ORTECH Question for Sgurr (February 7, 2017); **C-2697**, Email from Ian Baines to Hank Van Bakel re Budget for additional wind resource analysis (March 16, 2017); **C-2704**, Email from Hank Van Bakel to Ian Baines re “FW Budget for additional wind resources analysis” (May 4, 2017); **C-2711**, Email from Ian Baines (WWIS) to David Mars (WEI) and Nancy Baines re DRAFT next steps, Attachment - Letter from Ian Baines (WWIS) to David Mars (WEI) re next steps in engineering the WIS project DRAFT (June 15, 2017); **C-2710**, Email from Pat Evans (Ortech) to Ian Baines re Windstream Wolfe Island Shoals WRA (June 5, 2017), Attachment - Ortech Report entitled “Wind Resource Assessment (WRA) for Wolfe Island Shoals Offshore Wind Project – 2017” (June 5, 2017); **C-2712**, Email from Ian Baines to David Mars re Wind studies (June 16, 2017); **C-2713**, Email from Hank Van Bakel to Tyler G. Nielsen, David Mars et al. re Windstream Contract and WRA (June 30, 2017), Attachment - Ortech Report entitled “Wind Resource Assessment (WRA) for Wolfe Island Shoals Offshore Wind Project – 2017” (June 5, 2017).

the permitting and construction of the Project to move ahead expeditiously as soon as the Moratorium is lifted and the current Force Majeure event ends.”<sup>39</sup> The details of those reports are listed in that letter and I will not repeat them here.

Signed August 14, 2023 in Kingston, Ontario



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Nancy Baines

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<sup>39</sup> **C-2477**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (November 29, 2017), Exhibit D to the Affidavit of Michael Lyle.

# TAB 2



**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
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**BETWEEN:**

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**FOURTH WITNESS STATEMENT OF DAVID MARS**

1. In my third witness statement, dated February 16, 2022, I described the interest we received from a number of third parties who wanted to partner with Windstream to develop the Project after the moratorium was lifted. I explained the negotiations we had with these potential partners over the course of 2017. In this witness statement, I respond to certain assertions in Canada's Counter-Memorial with respect to my evidence. I have attempted not to repeat matters that are addressed in my third witness statement dated February 16, 2022, unless it is necessary to do so.

2. The facts and matters to which I testify in this witness statement are within my own knowledge and are true to the best of my knowledge. When the information I rely on is based on a source, I have identified that source and believe it to be accurate.

**A. My Belief about the Value of the Project Following the *Windstream I* Award**

3. In my third witness statement, I explained that in the spring of 2017, due to the interest Windstream was receiving from potential developers, I retained KeyBanc Capital Markets Inc. as Windstream's financial advisor and placement agent in connection with a possible transaction

involving the Project. We thought it would be great value and benefit to finding a partner as part of our efforts to move this Project forward.<sup>1</sup>

4. At paragraph 84 of its Counter-Memorial, Canada references my evidence and states that I engaged as many companies as I could in an effort to find an investor or partner for the Project, “[d]espite having testified during the *Windstream I* proceedings that the ‘entire investment of WWIS, the Project and the FIT Contract is now substantially worthless’ and that ‘no prudent equity or debt investor [...] would want to join this Project.’”<sup>2</sup>

5. In my third witness statement, I explained why my belief about the future of the Project following the *Windstream I* Award was consistent with my prior testimony. Canada makes the assertion that I was of the opinion that the Project was “worthless” and that no prudent equity or debt investor would invest in the Project, but fails to mention what I had said on this issue in my prior witness statement. In summary:<sup>3</sup>

- a) When we launched our first arbitration against Canada, we believed that the Project was effectively worthless as of May 2012. At that time, we only had five years to bring the Project into commercial operation, failing which IESO could terminate the FIT Contract. As we could not achieve commercial operation by that May 2017 termination date, we could not secure further investment and financing for the Project. My testimony in *Windstream I* highlighted by Canada was based on that viewpoint and understanding.
- b) However, the *Windstream I* tribunal did not agree with my view that this was the case. Instead, the tribunal found that the FIT Contract “[was] still formally in force” and that it remained open to Windstream and Ontario to “re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium.”<sup>4</sup>

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<sup>1</sup> CWS-Mars-3, ¶ 12.

<sup>2</sup> Canada’s Counter-Memorial on the Merits, ¶ 84.

<sup>3</sup> CWS-Mars-3, ¶¶ 4-6.

<sup>4</sup> C-2040, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (September 27, 2016) ¶ 290.

- c) Consistent with the *Windstream I* tribunal's findings, during the arbitration, the Government of Canada also represented that the Project was only "frozen" and could proceed once the moratorium was lifted, and that the moratorium was only a temporary measure.

6. Based on the Tribunal's findings, my view on the value of the Project shifted: I came to believe that there was a means through which to realize the true value of the Project. I had hoped that there was a path forward for the Project and that we would work with Ontario to renegotiate the FIT Contract to implement Ontario's promise to us to freeze us from the effects of the moratorium. If that happened, as the *Windstream I* tribunal recognized, then we would be able to develop the Project and obtain further investment and financing. The value of the Project if that happened was significantly more than what was awarded by the *Windstream I* tribunal.

7. At paragraph 85 of its Counter-Memorial, Canada states that it is not clear "how the Project's situation was any different at that point [September 2017] than it was in June 2015," when I testified that the FIT Contract was effectively worthless by May 2012. "After all, the FIT Contract had not been reactivated or renegotiated and the moratorium was still in place [...]"<sup>5</sup>

8. In June 2015, the *Windstream I* Award had not been released. That is the key point of difference between June 2015 and what happened after October 2016. The *Windstream I* Award did not agree that the full value of the FIT Contract was lost and accordingly did not grant us the relief we were seeking for that lost FIT Contract. Ultimately, the FIT Contract was not reactivated or renegotiated and was terminated, because Ontario refused to meet with us and refused to intervene in our negotiations with the IESO to implement the promises Ontario made to us. As a result, once the FIT Contract was terminated, the full value of the FIT Contract was ultimately lost. That, from my perspective, is the key change from what happened in June 2015 and February 2020, when the termination of the FIT Contract took effect.

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<sup>5</sup> Canada's Counter-Memorial on the Merits, ¶ 85.

**B. Canada's Mischaracterizations of KeyBanc's Process to Find a Potential Investor or Partner for the Project**

9. Canada's Counter-Memorial includes several incorrect statements and mischaracterizations regarding KeyBanc's process to find a potential investor or partner for the Project. In the paragraphs below, I respond to and correct these inaccuracies.

10. *KeyBanc's process was driven by genuine developer interest.* In its Counter-Memorial, Canada states that I "engaged with as many companies as [I] could in an effort to find an investor or a partner for the Project."<sup>6</sup> If Canada is suggesting that this process was one-sided and did not have genuine developer interest, that is incorrect.

11. First, Canada again ignores the evidence in my third witness statement. As I explain in that witness statement, following the release of the *Windstream I* Award, I was approached by and engaged in discussions with several parties who were interested in partnering with Windstream to develop the Project after the moratorium was lifted. Due to the interest Windstream was receiving, we decided to engage KeyBanc in the spring of 2017.<sup>7</sup> For example, in October and November 2016, representatives from [REDACTED], [REDACTED] and [REDACTED] all proactively reached out to us to discuss their interest in partnering with us to develop the Project. Similarly, I heard from [REDACTED] [REDACTED] and [REDACTED] in the spring of 2017.<sup>8</sup>

12. I did not solicit these companies; they approached us following the public release of the *Windstream I* award to express their genuine interest in the Project. Following this, in May 2017, KeyBanc and I arranged a number of meetings with these companies and other potential partners to determine their interest in the Project.<sup>9</sup>

13. Second, my goal was not to engage with as many companies as possible, as Canada suggests. Rather, KeyBanc arranged meetings with select partners that had expressed an interest in the Project and sought to learn more about the potential opportunity, such as [REDACTED], [REDACTED]

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<sup>6</sup> Canada's Counter-Memorial on the Merits, ¶ 84.

<sup>7</sup> CWS-Mars-3, ¶¶ 6, 12.

<sup>8</sup> CWS-Mars-3, ¶ 13.

<sup>9</sup> CWS-Mars-3, ¶ 13(g).

and [REDACTED].<sup>10</sup> KeyBanc also identified other potential partners who had the right background as internationally recognized operators and may have interest in an opportunity like the Project.

14. Third, KeyBanc is an investment bank that was engaged entirely on the contingency of completing a transaction. If a transaction was not completed, then they would not be compensated for the substantial work that went into running the process. KeyBanc would not waste time and resources on a process that it did not believe was meritorious or that it did not believe had a reasonable likelihood of resulting in a transaction.

15. ***KeyBanc’s process was not “half-hearted.”*** Canada inaccurately describes the process KeyBanc and I engaged in with potential partners as consisting of “half-hearted inquiries and meeting invites.”<sup>11</sup> This is just a further example of Canada making its own characterization of what happened while ignoring the evidence in my third witness statement.

16. First, our efforts to find a potential partner were not “half-hearted.” I would not have engaged the services of KeyBanc if I was not genuinely pursuing a possible transaction involving the Project. The efforts engaged in are already described in my third witness statement. We, including KeyBanc, allocated substantial time and resources to this process. We had many meetings with [REDACTED],<sup>12</sup> [REDACTED],<sup>13</sup> [REDACTED],<sup>14</sup> [REDACTED],<sup>15</sup> [REDACTED],<sup>16</sup> [REDACTED],<sup>17</sup> [REDACTED],<sup>18</sup> and [REDACTED].<sup>19</sup> KeyBanc sent NDAs to interested parties.<sup>20</sup> We launched a data room using the specialized Venue Data Room platform from RR Donnelly. We

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<sup>10</sup> CWS-Mars-3, ¶ 13(g).

<sup>11</sup> Canada’s Counter-Memorial on the Merits, ¶ 180.

<sup>12</sup> CWS-Mars-3, ¶ 13(c).

<sup>13</sup> CWS-Mars-3, ¶ 13(d).

<sup>14</sup> CWS-Mars-3, ¶ 13(e).

<sup>15</sup> CWS-Mars-3, ¶ 13(f).

<sup>16</sup> CWS-Mars-3, ¶ 13(g).

<sup>17</sup> CWS-Mars-3, ¶ 13(g).

<sup>18</sup> CWS-Mars-3, ¶ 13(g).

<sup>19</sup> CWS-Mars-3, ¶ 13(l).

<sup>20</sup> CWS-Mars-3, ¶ 13(i).

loaded over 30,000 pages of documents on the platform comprising close to 3GB of data.<sup>21</sup> This activity took place over the period of a year. None of it was “half-hearted”.

17. Second, I also do not believe that the interest of the potential partners in the Project was “half-hearted.” I have described the strong statements of interest these parties expressed to me in my third witness statement.<sup>22</sup> For example, ██████ told me that ██████ ██████ ██████.<sup>23</sup> I met with ██████ in ██████ on multiple occasions. ██████ continued to inform me that ██████ ██████.<sup>24</sup> I believed ██████’s interest to be sincere. For instance, in response to an email from Arindam Basu of Keybanc asking about my meeting with ██████ on May 9, 2017, I wrote: “I think ██████.”<sup>25</sup>

18. Third, the reputational risk to Windstream’s management, directors and investors in running a “half-hearted” process would be immeasurable. We are extremely seasoned entrepreneurs, investors and operators that have founded and sold firms with an aggregate value of more than CAD \$16.5 billion and currently have together over CAD \$500 million invested in controlling stakes in a range of energy and technology companies. I previously provided details about Windstream and its investors in my prior witness statements. We would not risk our reputation with these third party companies and the industry by running a process that we did not genuinely believe was credible.

19. The same is true for KeyBanc. They are a leading investment bank and are specialists in financing and selling energy businesses. They would not put their reputation on the line for a process that was “half-hearted” or in any way not genuinely run.

20. *The potential investors saw significant value in the Project.* In its Counter-Memorial, Canada asserts that “[a]s an early-stage project, with a moratorium in place, its potential partners

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<sup>21</sup> CWS-Mars-3, ¶ 13(m).

<sup>22</sup> CWS-Mars-3, ¶ 13.

<sup>23</sup> CWS-Mars-3, ¶ 13(f); C-2707, Email from ██████ to David Mars (WEI) re ██████ interest in Canadian opportunity (May 11, 2017).

<sup>24</sup> CWS-Mars-3, ¶ 13(h).

<sup>25</sup> C-2706, Email from David Mars (WEI) to Arindam Basu (KeyBanc) re ██████ (May 9, 2017).

recognized what Windstream would not, that there was no value in the Project at the time. Indeed, not a single valuation was put forward by any of these entities.”<sup>26</sup>

21. I strongly disagree with Canada’s assertion that these potential partners did not believe that there was value in the Project at the time. To the contrary, they expressed significant interest in the Project, underscoring its value. As set out in my third witness statement (again, ignored by Canada when it made the assertion I quote in paragraph 4 above):

- a) Between October 2016-May 2017, a number of leading developers of offshore wind projects reached out to us about their interest in the Project.<sup>27</sup> This demonstrated to me that they shared our understanding that the Project had a future and potential value (otherwise there would be no purpose for their investment). For example:

i) In October 2016, [REDACTED], a subsidiary of [REDACTED], reached out and indicated that they “[REDACTED]” [REDACTED] [REDACTED] [REDACTED].<sup>28</sup>

ii) In October 2016, [REDACTED] reached out and stated “[REDACTED]” [REDACTED] [REDACTED] [REDACTED].<sup>29</sup>

<sup>26</sup> Canada’s Counter-Memorial on the Merits, ¶ 180.

<sup>27</sup> See ¶ 11 above and CWS-Mars-3, ¶ 13.

<sup>28</sup> CWS-Mars-3, ¶ 13(a); C-2044, Email from Ian Baines (WEI) to [REDACTED] re [REDACTED] Introduction – Windstream Energy – Offshore Wind (October 25, 2016) (Confidential); C-2647, Email from [REDACTED] to Ian Baines (WEI) re [REDACTED] Introduction - WindStream Energy - Offshore Wind (October 17, 2016).

<sup>29</sup> CWS-Mars-3, ¶ 13(b); C-2043, Email from [REDACTED] to Ian Bains (WWIS) re Congrats (October 21, 2016) (Confidential); C-2709, Email from David Mars (WEI) to Daniel Brown (KeyBanc) re “FW: Congrats” (May 16, 2017).

iii) In a December 2016 meeting, [REDACTED]  
[REDACTED]  
[REDACTED].<sup>30</sup>

iv) From May-September 2017, [REDACTED]  
[REDACTED], as summarized at  
paragraph 17 above.<sup>31</sup>

v) In May 2017, [REDACTED] reached out asking to meet in person in [REDACTED],  
writing that [REDACTED]  
[REDACTED].<sup>32</sup>

b) In meetings with [REDACTED] in [REDACTED], [REDACTED]  
[REDACTED]  
[REDACTED].<sup>33</sup>

c) In my discussions with these potential partners, I told them we would need to see  
an investment in the hundreds of millions of dollars from them for any transaction  
to happen. These potential partners continued to show interest in the Project and to  
conduct due diligence on the Project.<sup>34</sup>

22. These companies clearly saw the significant value in the Project; they would not have  
invested the time to meet with us and to convey their interest in investing in the Project if they  
believed it was worthless; that would be commercially unreasonable. [REDACTED]  
[REDACTED]. However, as I explained in my third  
witness statement, most of the parties indicated that they required clarity regarding the moratorium

<sup>30</sup> CWS-Mars-3, ¶ 13(c).

<sup>31</sup> CWS-Mars-3, ¶ 13(f).

<sup>32</sup> C-2703, Email from David Mars (WEI) to [REDACTED] re [REDACTED]  
[REDACTED].

<sup>33</sup> CWS-Mars-3, ¶ 13(n).

<sup>34</sup> CWS-Mars-3, ¶ 14.



before they would substantially invest in the Project. That does not mean that the Project was worthless, just that the value would not be unlocked before that uncertainty was resolved.

23. I do not agree that it is appropriate to draw conclusions about the process from the fact that valuations had not been delivered by these entities. We had, quite simply, not reached that stage of negotiations. I was the one who ultimately made the decision to halt these discussions with these parties, as explained at paragraph 17 of my third witness statement. Even after I concluded the process, several of the potential partners continued to reach out to me to express interest in the Project.

24. *The executed NDAs.* In its Counter-Memorial, Canada seems to suggest that there was not strong interest in the Project as KeyBanc “manag[ed] to execute only five NDAs by July 2017 to be able to provide access to a newly opened data room with detailed documents.” Canada then acknowledges in the next paragraph that a total of seven companies executed NDAs and had been given access to the data room.<sup>35</sup>

25. I disagree with the suggestion that the existence of seven NDAs means there was not strong interest in the Project. The seven companies that signed NDAs are world class developers in the offshore industry:

a)

[REDACTED]

[REDACTED].<sup>36</sup>

b)

[REDACTED]

[REDACTED].<sup>37</sup>

<sup>35</sup> Canada’s Counter-Memorial on the Merits, ¶¶ 84-85. See also CWS-Mars-3, ¶ 13(m); C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential).

<sup>36</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3. See also C-2532, [REDACTED]; C-2788, Press Release entitled “[REDACTED]”; C-2816, Press Release entitled “[REDACTED]”.

<sup>37</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3.

- c) [REDACTED]
- d) [REDACTED]
- e) [REDACTED]
- f) [REDACTED]
- g) [REDACTED]

26. Seven of the leading developers of offshore wind projects globally and in North America expressed interest in investing in the Project and were serious enough to sign an NDA and conduct due diligence. These buyers have a combined total of more than 16.5 GW of operating and developing offshore wind projects, and nearly 16 GW of operating renewable assets.<sup>43</sup>

27. I expect we would have had more serious engagement with these potential buyers and others had I not chosen to put this process on pause, as I describe in paragraph 17 of my third witness statement.

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<sup>38</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3.

<sup>39</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3.

<sup>40</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3.

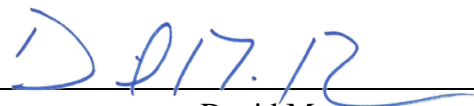
<sup>41</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3.

<sup>42</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3.

<sup>43</sup> See C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential), p. 3.

[Redacted text block]

Signed August 14, 2023 in New York, New York

  
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David Mars

44 [Redacted text block]