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**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

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

February 18, 2022



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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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WITNESS STATEMENT OF NANCY BAINES

1. I am the Director, Administration of Windstream Energy Inc., a subsidiary of Windstream Energy LLC (“Windstream”). Windstream Energy Inc. coordinates Windstream’s activities and investments in Ontario and provides services to Windstream Wolfe Island Shoals (“WWIS”), the entity that was developing and operating the Wolfe Island Shoals Wind Project (the “Project”).

2. In my role, I am a member of the executive management team and am responsible for the administrative, operational and organizational aspects of Windstream’s business. I oversee the accounting responsibilities and financial transactions for the business, and have a key role in project management, as well as government and public relations.

3. In my witness statement, I describe:

- a) my background;
- b) the tribunal’s findings in *Windstream I* that WWIS’ feed-in-tariff Contract (the “FIT Contract”) remained in force as of the date of the Award in that proceeding;

- c) Ontario's announcement that offshore wind research was being "finalized";
- d) Windstream's unsuccessful attempts to meet with the Ministry of Energy ("MEI") and the Independent Electricity System Operator ("IESO") to discuss the FIT Contract and the path forward for the Project;
- e) WWIS's application before the Ontario courts seeking to restrain the IESO from exercising its termination right under the FIT Contract;
- f) the IESO's decision to terminate the FIT Contract;
- g) WWIS's continuation of the Ontario application against the IESO related to the termination decision;
- h) Ontario's refusal to intervene and to direct the IESO not to terminate the FIT Contract; and
- i) WWIS's abandonment of the Ontario application and Windstream's commencement of the NAFTA arbitration.

4. 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.

A. My Background

5. I graduated with a Bachelor of Science, Honours, Degree in Biochemistry from Queen's University in 1976. In 1999, I completed the Strategic Marketing Management Program at Harvard University and in 2002, I completed the Advanced Program in Human Resources Management from the Joseph L. Rotman School of Management at the University of Toronto.

6. I have decades of experience as a senior executive of large companies managing, among other things, their business opportunities, strategic planning, sales, marketing, and regulatory affairs and government relations:¹

¹ Curriculum Vitae of Nancy Baines (February 2022), Appendix A.

- a) From 1976-1985, I was a Supervisor and then Group Leader of Product Development at Proctor & Gamble Inc., a multi-national consumer products market leader. In my role, I was responsible for the formulation and process design for a wide range of consumer products.
- b) From 1985-1987, I was Marketing Manager and Director of Marketing for a large Canadian franchised and corporate restaurant chain with 120 full-service restaurants and take-out facilities. In my role as Director of Marketing, among other things, I was responsible for market research, development and implementation of marketing strategies and tactics, and I reported to the President and CEO on the company's financial relationships with franchisees.
- c) From 1987-2002, I held a number of positions with a large multi-national private pharmaceutical company with more than 650 employees in Canada. From 1987-1988, I was the Manager of New Business Development and from 1988-1994, I was the Director of New Business Development and Public Affairs. In that role, I reported to the President and CEO and was responsible for identifying and evaluating new business opportunities. I also negotiated and concluded contracts with business partners. From 1994-2002, I was promoted to and held the position of Vice-President and General Manager of the company's Consumer Health Division. I led the marketing, sales, regulatory affairs, manufacturing, quality assurance and distribution teams with sales, profit and loss responsibility. In my role, I managed 85 employees and reported to the President and CEO.
- d) From 2002-2003, I was Vice President, Corporate Development for a publicly traded Canadian company. In my role, I reported to the President and was responsible for strategic planning, corporate budget development, assisting the IT team with enterprise resource planning system selection, business process design and organization development.
- e) From 2003-2008, I was Vice-President, Business Management for another publicly traded Canadian company with a global network of more than 5,600 employees. In my role, I reported to the President and was responsible for

executive-level global account management of all the company's North American development and commercial manufacturing clients. I led a team that included account and project management, government relations, finance, legal, sales and marketing resources.

7. In 2008, I decided to join Windstream Energy Inc. I felt my expertise and experience in managing the needs of complex businesses (including managing contracts, subject matter experts, and government relations) could add value to this new enterprise.

8. In addition to my role at Windstream, I am currently a board member and Chairman of the Governance & Compensation Committee at EmpowerPharm Inc., an early-stage pharmaceutical company, specializing in the research, development, manufacturing and commercialization of CBD medicines with novel formulations in its state-of-the-art GMP pharmaceutical facility. I have held that position since 2019.

B. *Windstream I* Tribunal's Findings That the FIT Contract Remained in Force

9. In January 2013, Windstream commenced an arbitration against the Government of Canada pursuant to the North American Free Trade Agreement ("NAFTA") (the "*Windstream I* arbitration"). The background of the events leading to that NAFTA arbitration are detailed in Award and in the prior witness statements filed by Windstream in that arbitration.

10. On September 27, 2016, the tribunal issued its Award in the *Windstream I* arbitration.² I am not a lawyer and am not purporting to express any opinion on what the tribunal found. However, the tribunal's specific findings relating to the status and future of the FIT Contract impacted Windstream's decision about how to proceed with the Project following the Award. I am giving this summary to provide the relevant context for what happened after the Award was released.

11. In that Award, the tribunal found that the Government's conduct vis-à-vis Windstream during the period following the imposition of the February 11, 2011 moratorium was unfair and inequitable within the meaning of Article 1105(1) of the NAFTA. In particular, the tribunal

² C-2040, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award ("*Windstream I* Award"), ¶ 290 (September 27, 2016).

found that the breach of the NAFTA included the Government of Ontario's failure to "address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium." The tribunal specifically pointed to the Government of Ontario's failure to provide directions to the Ontario Power Authority ("OPA") (the IESO's predecessor and counter-party to the FIT Contract) in its negotiations with Windstream to amend the FIT Contract to adjust its terms to the moratorium.³

12. During the *Windstream I* arbitration, Windstream argued, and it was our belief, that the Project had been effectively cancelled. This was because the Project could no longer be built before the OPA's termination right arose. However, the tribunal did not accept that argument. The tribunal did not agree with our position that the moratorium, and Ontario's failure to "freeze" WWIS and its FIT Contract from the effects of the moratorium as promised by the Ontario Government, expropriated Windstream's investment. This is because the tribunal found that the FIT Contract "[was] still formally in force" and it continued to remain open to Windstream and Ontario to "re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium."⁴

13. The tribunal repeated this finding in deciding the amount of damages to award to Windstream. The tribunal stated that the purpose of the compensation was to keep Windstream "whole," "keeping in mind the Tribunal's determination that [Windstream had] not lost the entire value of its investment as the FIT Contract [was] still formally in force" and "[had] not been lost or taken by the Government."⁵ The compensation was therefore required to "reflect [Windstream's] loss (damage to the investment) rather than the full value of the investment. This latter would be relevant only if [Windstream had] lost the entirety of its investment as a result of an expropriation, which is not the case here."⁶

14. The tribunal then determined the value of the Project based on a comparable transactions methodology as of the date of the Award, September 2016, and awarded Windstream that amount (less the \$6 million CAD letter of credit that was still in place). The tribunal did not

³ C-2040, Windstream I Award, ¶ 379.

⁴ C-2040, Windstream I Award, ¶¶ 290, 473, 483.

⁵ C-2040, Windstream I Award, ¶ 473.

⁶ C-2040, Windstream I Award, ¶ 473 [Emphasis added].

further adjust the compensation awarded for the damage to the investment to reflect the fact that the FIT Contract was still formally in place because, at that time, the terms of the Contract had not been renegotiated and thus the FIT Contract did not have any value. The tribunal stated that “[i]t is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the [A]ward, which option is still open to them.”⁷

15. The amount awarded, approximately \$25 million CAD, was significantly less than the amount we were seeking in the arbitration. However, the 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 (those promises are detailed in the *Windstream I* Award and the witness statements filed before the tribunal).

16. 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.

17. 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.⁸ 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.

⁷ C-2040, *Windstream I* Award, ¶ 483.

⁸ C-2040, *Windstream I* Award, ¶¶ 216-218. See also *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Counter Memorial of the Government of Canada, ¶¶ 21, 260, 265, 266, 268, 353, 486-487 (January 20, 2015).

C. Following the Award, Ontario Announces that Offshore Wind Research is Being “Finalized”

18. Our expectations were further fueled by public statements by the Government of Ontario immediately following the *Windstream I* Award indicating that offshore wind research was being finalized and there could be an end in sight for the moratorium.

19. Ontario’s justification for the moratorium was the need to conduct further scientific research.⁹ However, despite that justification, Ontario’s progress with offshore wind research was slow. The *Windstream I* tribunal found that the Government of Ontario “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.”¹⁰

20. However, following the *Windstream I* Award, Ontario seemed to be responsive to these findings and made almost immediate public statements confirming that offshore wind research was ongoing and would soon be “finalized.” In light of Canada’s representations in the arbitration that the Project was frozen and could proceed once the moratorium was lifted, and the tribunal’s findings that the FIT Contract was in force, we were following closely what the Government of Ontario was saying about the future of the moratorium.

21. On October 17, 2016, the then Premier of Ontario, Kathleen Wynne, was speaking before the Legislative Assembly of Ontario at the Second Session of the 41st Parliament. Premier Wynne was asked about the *Windstream I* Award. In response, the Premier she stated that Ontario was “finalizing” research related to offshore wind development and was going to continue to work with the renewable industry to ensure Ontario had a clean electricity grid:

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.

⁹ C-2040, *Windstream I* Award, ¶ 147.

¹⁰ C-2040, *Windstream I* Award, ¶ 378.

[...]

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.¹¹

22. At that same parliamentary session, in response to a further question about the *Windstream I* Award, Ontario's Minister of Energy, Glenn Thibeault, made similar confirmatory statements that offshore wind research was being finalized. He stated: "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."¹²

23. Minister Thibeault made a similar statement before the legislative assembly on October 26, 2016 when faced with a question regarding the *Windstream I* tribunal's Award. 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."¹³

24. In an article dated December 6, 2016 about the *Windstream I* Award, Minister Thibeault was quoted as stating that the Ministry of the Environment and Climate Change "is reviewing the moratorium on offshore wind power projects, and is studying the decommissioning costs of projects, as well as how the noise could carry over water" and that work should be done "soon."

¹¹ C-2041, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, (October 17, 2016).

¹² C-2041, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, (October 17, 2016).

¹³ C-2045, Official Report of Debates (Hansard) Transcript - English, Legislative Assembly of Ontario, Standing Committee on Estimates (October 26, 2016).

When asked if the Ontario Government could let Windstream's Project be built, he answered "Yes."¹⁴

25. We were aware of these public statements by the Ontario Government and they gave us comfort that the moratorium would be lifted in the near future. We were very reassured by Minister Thibeault's quote in the December 6th article that the Project could be built. To us, it showed a shared understanding of the impact of the *Windstream I* Tribunal's finding that the FIT Contract remained in force and reaffirmed Canada's representations in the proceedings to that effect.

26. Consistent with these statements that offshore wind research was progressing, on December 23, 2016, the Ministry of the Environment and Climate Change advised Windstream by email that two studies related to offshore wind (noise, decommissioning) undertaken by consultants retained by the Ministry were now in the public domain.¹⁵

D. Windstream's Unsuccessful Attempts to Meet with the Ministry of Energy and the IESO to Renegotiate the FIT Contract

27. Following the *Windstream I* tribunal's Award, we attempted to arrange discussions with the Ministry of Energy ("MEI") and the IESO to discuss the path forward for the Project, including renegotiating the FIT Contract to adjust it to the terms of the moratorium. As I noted above, we did not believe that the Government of Ontario would maintain the very conduct that was found to be a breach of its international obligations, particularly given the Government of Canada's representations in the arbitration that the Project could proceed once the moratorium was lifted. We expected that the Government of Ontario would, at the very least, have good faith discussions with us about the Project and about what could be done to fulfill the promises made to us that the Project would not be negatively impacted by the moratorium.

28. Unfortunately, our attempts were unsuccessful. To our disappointment, MEI would not even meet with us, despite multiple attempts to engage in good faith discussions. We were able

¹⁴ 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).

¹⁵ 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).

to meet with the IESO, but ultimately the IESO stated that it would not adjust any of the terms of the FIT Contract.

29. The history of our unsuccessful attempts to re-engage with MEI and the IESO on the terms of Windstream's FIT Contract are set out below.

30. ***Outreach to MEI.*** Between October 6, 2016 and November 9, 2016, Windstream's Government Relations' consultant, Chris Benedetti, attempted to meet and have discussions with MEI. A summary of his attempts is set out in his Second Witness Statement dated September 13, 2021.

31. On November 28, 2016, Windstream sent the Minister of Energy, Glenn Thibeault, a letter requesting a meeting with MEI to discuss "next steps with our offshore wind project."¹⁶ In that letter, Windstream set out the tribunal's finding that the "FIT Contract remains in force" and Premier Wynne and Minister Thibeault's recent statements that offshore wind research was being "finalized." The letter went on to state:

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.

We respectfully request a response to this letter by December 12, 2016.¹⁷

32. On December 6, 2016, Minister Thibeault sent Windstream a responding letter and advised that they would not meet with Windstream and that Windstream should instead meet with the IESO as the counterparty to the FIT Contract.¹⁸

¹⁶ 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).

¹⁷ 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).

33. On December 15, 2016, Windstream sent another letter to Minister Thibeault and made a further request for a meeting to discuss the path forward for the Project. The letter stated that “given that the ongoing moratorium is not within the sphere of the IESO’s responsibility or power to resolve, we do not believe that meeting with the IESO alone would be productive in achieving a resolution, which is why we wrote to your office.” Windstream noted 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.”¹⁹

34. On February 21, 2017, Minister Thibeault sent Windstream a responding letter and advised that they would not discuss matters related to individual FIT contracts, and that Windstream should instead contact the IESO.²⁰

35. ***Outreach to IESO.*** On December 2, 2016, Windstream sent the IESO a letter asking to meet to discuss the status of the Project and the FIT Contract.²¹

36. On December 10, 2016, Windstream sent a follow up letter noting that it had not heard back from the IESO and asking for a response to our enquiry.²²

37. On December 13, 2016, the IESO sent Windstream a letter agreeing to meet. On December 22, 2016, Windstream sent a responding letter and agreed to meet with the IESO on January 12, 2017.²³

¹⁸ **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).

¹⁹ **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).

²⁰ **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).

²¹ **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).

²² **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 10, 2016).

38. On January 12, 2017, Windstream met with the IESO. I attended that meeting, along with David Mars (co-founder, an officer and a director of Windstream) and legal counsel for Windstream. The attendees from the IESO were Cindy Roks (Contract Analyst, Contract Management), Michael Killeavy (Director, Contract Management), Perry Cecchini (Manager, RESOP & FIT, Contract Management), Michael Boll (Director Corporate/Commercial Law Group), and John Rattray (General Counsel, Secretary and Chief Reliability Compliance Officer).

39. As reflected in the meeting minutes, Mr. Killeavy asked Windstream whether it wanted to proceed with the Project. Mr. Mars stated unequivocally “Yes – we are prepared to build the Project.”²⁴ At first, the IESO’s personnel were steadfast in their position that the IESO would not extend the milestone dates in the Contract or waive its rights under Section 10.1(g) of the FIT Contract (which gave the IESO the right to terminate the Contract as of May 4, 2017 if the Project had not reached commercial operation by that date).²⁵

40. When Windstream’s legal counsel asked what the IESO intended would happen on May 4, 2017, Mr. Killeavy indicated that he did not know at this point and that no final decision had yet been made. Windstream’s counsel then asked about the Ontario Government’s promise to “freeze” the FIT Contract. Mr. Cecchini responded that “freeze” meant force majeure with “a couple of provisions” and did not mean perpetual *force majeure*, which the IESO was not willing to give.²⁶

41. Our legal counsel asked whether the IESO had an appetite to consider a contract amendment for Windstream, given that it is in a class by itself as the only offshore wind project that has a FIT Contract. She asked if specific contract amendments could be made that would meet Windstream’s goal of not having the Contract terminated, while also not setting a precedent for other projects or other contract holders. Our legal counsel asked that the IESO consider the

²³ 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).

²⁴ C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

²⁵ C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

²⁶ C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

matters discussed at the meeting and get back to Windstream. Mr. Killeavy agreed, but no timeframe was given for a response.²⁷

42. I recall leaving that meeting with the feeling that there was a potential path forward to renegotiate the FIT Contract and proceed with the Project after the moratorium was lifted. In particular, Mr. Killeavy was welcoming and seemed open to Windstream's proposals. I felt that the IESO would at the very least seriously consider the matter and engage in meaningful discussions with us.

43. However, on February 9, 2017, the IESO sent Windstream a letter that stated that it:

- a) would not waive any of its rights under the FIT Contract, including its rights to terminate the FIT Contract pursuant to sections 10.1(g) and 9.1(j); and
- b) had "not made a decision" whether to exercise its termination right under Section 10.1(g), should the right arise.²⁸

44. When I read this letter, I was disappointed. I felt the optimistic and productive tone from our January meeting had disappeared and that there was never a serious attempt by the IESO to meaningfully engage in a discussion on how the FIT Contract could be renegotiated in light of the promises made by the Ontario Government to Windstream. As set out above, notwithstanding its promise to freeze Windstream's Contract from the impact of the moratorium, the Minister of Energy refused to intervene or assist Windstream in dealing or negotiating with the IESO to amend the FIT Contract.

E. WWIS' Application Before the Ontario Courts to Restrain the IESO from Terminating the FIT Contract

45. In light of (i) the IESO's position, (ii) MEI's refusal to engage with Windstream or the IESO with respect to the FIT Contract, and (iii) the proximity to the IESO's May 4, 2017 termination date, we felt we needed to take steps to preserve and protect our rights.

²⁷ C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

²⁸ 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).

46. On March 27, 2017, WWIS commenced an application before the Ontario courts seeking an order restraining the IESO from exercising its termination right under the FIT Contract. WWIS sought a declaration that the IESO could not rely on the moratorium, or other delays unilaterally caused by the Government of Ontario, in exercising its termination right under the FIT Contract.²⁹

47. As the application would not be determined prior to May 4, 2017, the IESO agreed (through counsel) that it would not exercise its termination rights under the FIT Contract pending the resolution of the dispute, subject to the IESO's right to terminate if circumstances were to change upon 30-days notice.³⁰

48. As part of that application, the following materials were exchanged and the following steps were taken:

- a) On March 27, 2017, WWIS delivered a Notice of Application and Affidavit of David Mars (the affidavit was later sworn on June 2, 2017).³¹
- b) On June 5, 2017, the IESO delivered a responding affidavit of Perry Cecchini, a Manager of Contract Management at the IESO.³² In that affidavit, Mr. Cecchini stated “[t]he OPA [now IESO] received no direction from the Minister of Energy regarding potential amendments to Windstream’s FIT Contract. [...] The OPA determined its own interests and positions regarding appropriate amendments to Windstream’s FIT Contract without direction from the Minister of Energy.”³³
- c) On June 16, 2017, WWIS delivered a Reply Affidavit from Mr. Mars.³⁴

²⁹ C-2471, Notice of Application to the Ontario Superior Court of Justice (WWIS) (March 27, 2017); Affidavit of David Mars (June 2, 2017).

³⁰ C-2083, Email from Melanie Ouanounou (Goodmans LLP) to Sherkey, Emily (Torys LLP) re WWIS/IESO (April 28, 2017).

³¹ C-2471, Notice of Application to the Ontario Superior Court of Justice (WWIS) (March 27, 2017); Affidavit of David Mars (June 2, 2017).

³² C-2477, Affidavit of Perry Cecchini (IESO) (June 5, 2017).

³³ C-2477, Affidavit of Perry Cecchini (IESO), ¶ 132 (June 5, 2017).

³⁴ C-2473, Reply Affidavit of David Mars (WWIS) (June 16, 2017).

- d) On July 14 and 19, 2017, WWIS and the IESO exchanged document productions that were responsive to each party's document requests.
- e) On October 2, 2017, Mr. Mars swore a Supplementary Affidavit.³⁵
- f) On October 2, 2017, IESO's counsel cross-examined Ian Baines, President of Windstream Energy Inc. and a director of WWIS.³⁶
- g) On October 3, 2017, WWIS's counsel cross-examined Mr. Cecchini.³⁷
- h) On October 4, 2017, WWIS's counsel cross-examined Mr. Killeavy, who at the time was Director of Contract Management at the IESO.³⁸
- i) On October 10, 2017, IESO's counsel cross-examined Mr. Mars.³⁹

49. [REDACTED]

50. [REDACTED]

51. On or about November 1, 2017, we reached an agreement with the IESO to adjourn the application while the IESO [REDACTED] in

³⁵ C-2474, Supplementary Affidavit of David Mars (WWIS) (October 2, 2017).

³⁶ C-2478, Transcript of the Cross-Examination of Ian Baines (WWIS) (October 2, 2017).

³⁷ C-2479, Transcripts of the Cross-Examination of Perry Cecchini (IESO) (October 3, 2017).

³⁸ C-2480, Transcripts of the Cross-Examination of Michael Killeavy (IESO) (October 4, 2017).

³⁹ C-2481, Transcript of the Cross-Examination of David Mars (WWIS) (October 10, 2017).

⁴⁰ C-2479, Transcripts of the Cross-Examination of Perry Cecchini (IESO) (October 3, 2017); C-2480, Transcripts of the Cross-Examination of Michael Killeavy (IESO) (October 4, 2017).

order to decide whether to terminate the FIT Contract pursuant to Section 10.1(g) of the FIT Contract (the “Adjournment Agreement”).⁴¹

52. The Adjournment Agreement provided that the IESO could request information from WWIS, and WWIS was to provide that information within a specified timeframe. WWIS was also entitled to send information in its own discretion to the IESO for consideration.⁴² If the IESO decided to terminate the FIT Contract, Windstream could resume the application. If Windstream did so within 60 days of that decision, the IESO’s decision to terminate would not be effective pending the resolution of the application proceeding.⁴³

F. The IESO’s Decision to Terminate the FIT Contract

53. On November 10, 2017, the IESO sent Windstream a letter requesting that it provide the IESO with thirteen categories of requested information, which the IESO *might* consider in deciding whether or not to exercise its termination right.⁴⁴ This requested information included:

- a) a copy of any communications with the Government of Ontario regarding the status of the moratorium and the site release process;
- b) the anticipated hourly energy production profile based on measured wind data for the last ten years;
- c) the reasonably expected project schedule for the achievement of commercial operation following the conclusion of the current force majeure event; and
- d) any other information that WWIS considered relevant.

⁴¹ **C-2482**, Adjournment Agreement between WWIS and IESO (November 1, 2017), Schedule H to Costs Submissions of the IESO (July 24, 2020).

⁴² **C-2482**, Adjournment Agreement between WWIS and IESO (1 November 2017), Schedule H to Costs Submissions of the IESO (24 July 2020).

⁴³ **C-2482**, Adjournment Agreement between WWIS and IESO (1 November 2017), Schedule H to Costs Submissions of the IESO (24 July 2020).

⁴⁴ **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).

54. Windstream responded to this letter on November 29, 2017. That letter responded to each of the IESO's information requests and provided additional information.⁴⁵ The information provided with that letter was substantial: over 2,000 pages of information was included.

55. In addition to the information Windstream provided, Windstream also proposed that 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 current force majeure event and the moratorium for the period beginning on November 22, 2010 and ending on the date that is 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;
- c) leave in place its fully-cash collateralized \$6 million Completion and Performance Security in accordance with the terms of the FIT Contract.

56. Although the Ontario Government had promised to "freeze" the FIT Contract for the duration of the moratorium, during our meetings with the IESO and in its evidence in the Ontario application proceeding, the IESO communicated that it had reservations about what it called a "perpetual force majeure," *i.e.*, an extension of the FIT Contract's terms without a specified end point. We made the offer described above in an attempt to address those concerns.

57. Between December 15, 2017 and February 6, 2018, Windstream and the IESO exchanged further correspondence and had further discussions regarding additional information to be provided by Windstream to the IESO.⁴⁶ In those discussions and correspondence, the IESO did not respond to Windstream's offer.

⁴⁵ 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).

⁴⁶ 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); Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (January 8, 2018), Exhibit E to the Affidavit of Michael Lyle (June 1, 2020);

58. On January 26, 2018, the IESO sent a letter to the MOECC inquiring about the status of the moratorium.⁴⁷ On February 2, 2018, the MOECC responded to the IESO and stated that it was not in a position to confirm whether or when the Government of Ontario will revisit the moratorium decision.⁴⁸

59. On January 31, 2018, I provided the IESO with copies of a number of internal Ontario Government documents dated between January 11, 2011 to February 11, 2011 discussing the planned imposition of the moratorium and the Government of Ontario's plan to freeze the FIT Contract.⁴⁹

60. On February 20, 2018, the IESO sent me a letter informing Windstream of its decision to terminate the FIT Contract.⁵⁰

61. In response to a request from Windstream,⁵¹ on March 2, 2018, the IESO provided additional information about its decision to terminate the FIT Contract.⁵²

62. Pursuant to the Adjournment Agreement, as set out above, the termination did not take immediate effect. Rather, Windstream had 60 days to resume its application in the Ontario courts. If it did so, the termination decision would not be effective pending the resolution of that application.

Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (January 23, 2018), Exhibit F to the Affidavit of Michael Lyle (June 1 2020); 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); 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).

⁴⁷ **C-2477**, Letter from Michael Killeavy (IESO) to Dolly Goyette (MOE) (January 26, 2018), Exhibit J to the Affidavit of Michael Lyle (1 June 2018).

⁴⁸ **C-2477**, Letter from Dolly Goyette (MOE) to Michael Killeavy (IESO) (February 2, 2018), Exhibit K to the Affidavit of Michael Lyle (June 1, 2018).

⁴⁹ **C-2477**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (January 31, 2018), Exhibit H to the Affidavit of Michael Lyle (1 June 2020).

⁵⁰ **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)

⁵¹ **C-2477**, Letter from Baines, Nancy (WWIS) to Lyle, Michael (IESO) (23 February 2018), Exhibit N to the Affidavit of Michael Lyle (June 1, 2020).

⁵² **C-2477**, Letter from Michael Lyle (IESO) to Nancy Baines (March 2, 2018), Exhibit O to the Affidavit of Michael Lyle (June 1, 2020).

G. WWIS Resumes the Ontario Application Following the IESO's Notice of Termination

63. On April 20, 2018, Windstream advised the IESO that it was re-initiating the application against the IESO seeking a declaration restraining the IESO from exercising the termination right due to delays caused unilaterally by the Government of Ontario.⁵³

64. As part of that application, the following materials were exchanged and the following steps were taken:

- a) On June 1, 2018, the IESO delivered an affidavit from Michael Lyle, the Vice President of Legal Resources and Corporate Governance, General Counsel and Secretary at the IESO.⁵⁴
- b) On September 7, 2018, the IESO delivered supplementary productions.
- c) On October 19, 2018, Windstream delivered three additional affidavits:
 - i) A supplementary affidavit from Mr. Mars responding to the affidavit of Mr. Lyle.⁵⁵
 - ii) An expert report from Jason Chee-Aloy, Managing Director of Power Advisory LLC, commenting on the IESO's analysis relating to its decision to terminate the FIT Contract. His conclusion was that the IESO's analysis did not provide a reasonable basis for terminating the FIT Contract.⁵⁶
 - iii) An affidavit from Michael Killeavy, who was the Director, Contract Management at the IESO from January 2015 to February 2018. He was the person at the IESO who recommended to Mr. Lyle that the IESO exercise its termination right under the FIT Contract. In his affidavit, Mr. Killeavy explained that after reviewing Power Advisory's report, it became clear to him that the analysis he

⁵³ 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).

⁵⁴ C-2477, Affidavit of Michael Lyle (IESO) (June 1, 2018).

⁵⁵ C-2474, Supplementary Affidavit of David Mars (WWIS) (October 23, 2018).

⁵⁶ C-2476, Affidavit of Jason Chee-Aloy (Power Advisory) (October 19, 2018).

relied upon to make that decision was based on flawed and erroneous assumptions and if he had understood those flaws, he did not believe he would have recommended that the IESO exercise the termination right.⁵⁷

H. The Ontario Government Refused to Direct the IESO Not to Terminate the FIT Contract and Instead “Decided Not to Intervene”

65. As set out above, following the *Windstream I* Award, we attempted to engage MEI to meet with us to discuss the path forward for the Project. MEI refused to engage or have any discussions with us on this issue.

66. After the IESO informed us that they intended to terminate the FIT Contract, we attempted to re-engage MEI. On November 26, 2019, Windstream wrote to the Minister 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 is “frozen” such that the Project could proceed as soon as the moratorium was lifted, as if the moratorium had not been imposed.⁵⁸

67. In that letter, Windstream wrote “[c]ontrary to the commitments made by your predecessor, neither the OPA nor the IESO have taken any steps to ensure that the FIT Contract remains ‘frozen’ for the duration of the Moratorium, which is now in its ninth year. We are not aware of any directives from either your office or that of your predecessors that the IESO or the

⁵⁷ C-2475, Affidavit of Michael Killeavy (October 18, 2018).

⁵⁸ C-2249, Letter from David Mars (WEI) to Greg Rickford (MEI) re Windstream Wolfe Island Shoals offshore wind energy facility (November 26, 2019).

OPA take such steps. On the contrary, on February 20, 2018, the IESO wrote to WWIS purporting to terminate the FIT Contract, for reasons primarily related to the Moratorium.”⁵⁹

68. On December 10, 2019, the Minister of Energy sent Windstream a responding letter. It stated:

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.⁶⁰

69. In light of the Minister’s direction that Windstream engage with the IESO, on December 11, 2019, Windstream wrote to the IESO and asked that it “reconsider its decision to terminate the FIT Contract, 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.”⁶¹

70. Windstream never received a response to this letter.

I. WWIS Abandons the Application and the IESO’s Termination Decision Becomes Effective

71. On January 15, 2020, WWIS delivered to the IESO a letter attaching a Notice of Abandonment through which it discontinued the application before the Ontario courts.⁶² As explained in that letter, WWIS discontinued the application so that Windstream could pursue this claim against the Government of Canada under the NAFTA.⁶³

⁵⁹ C-2249, Letter from David Mars (WEI) to Greg Rickford (MEI) re Windstream Wolfe Island Shoals offshore wind energy facility (November 26, 2019).

⁶⁰ C-2253, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream’s letter dated November 26, 2019 (December 10, 2019).

⁶¹ C-2254, Letter from David Mars (WEI) to Peter Gregg (IESO) re Windstream Wolfe Island Shoals offshore wind energy facility (December 11, 2019).

⁶² 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).

⁶³ 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).

72. On February 18, 2020, the IESO sent me a letter stating that, in light of the abandonment of the application and the terms of the Adjournment Agreement, the FIT Contract was terminated as of February 18, 2020.⁶⁴

73. On February 20, 2020, the IESO directed Windstream's bank to cancel the \$6 million letter of credit that Windstream had posted in 2010 to secure its obligations under the FIT Contract.⁶⁵ That amount has since been returned to Windstream.

74. I was extremely disappointed by the termination of the FIT Contract and the conduct of the Government of Ontario. I spent over a decade of my life and my career dedicated to this Project. The only reason the Project is not proceeding is because of the Ontario Government's delays and mistreatment of Windstream.

75. 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.

⁶⁴ 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).

⁶⁵ 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).

76. I live in Kingston, Ontario overlooking the Wolfe Island Shoals onshore wind farm that my husband, Ian Baines, had developed. That wind farm is a source of pride to those that live here, and I am proud of Ian's contribution to Kingston by developing it. We felt that the same could be done with this offshore Project and – in addition to the frustration and loss that we have experienced as a result of the Government of Ontario's failure to fulfil its promise to Windstream – are disappointed by the loss of an excellent sustainable project and jobs for our community.

Signed February 15, 2022 in Kingston, Ontario



Nancy Baines

TAB 2

**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

THIRD WITNESS STATEMENT OF DAVID MARS

1. I am a private equity investor based in New York City, with more than seventeen years of experience investing in and managing companies at all stages of the project development process. I am a co-founder, an officer and a director of Windstream Energy LLC (“Windstream”) and its subsidiaries, including Windstream Energy Inc. and Windstream Wolfe Island Shoals Inc. (“WWIS”), among other companies. I am a partner in White Owl Capital Partners LLC, which is the managing director of Windstream. I am extensively involved in the management of each of these companies.

2. In relation to Windstream’s earlier NAFTA proceeding against the Government of Canada (the “*Windstream I* arbitration”), I provided two witness statements: one dated August 18, 2014 and the second dated June 17, 2015. In this witness statement, I have focused on facts that have occurred since my second witness statement was signed.

3. 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. Following the *Windstream I* Tribunal’s Award, Potential Partners and Investors Expressed Strong Interest in the FIT Contract and Project

4. When we launched our first arbitration against Canada, we believed that the Project was effectively worthless as of May 2012. That was because, as of that date, we had only five years to bring the Project into commercial operation, failing which the Ontario Power Authority (“OPA,” now the Independent Electricity System Operator or “IESO”) could terminate our FIT Contract entirely. In my first witness statement, I explained that we could not achieve commercial operation by that May 2017 termination date and why this meant that we would be unable to secure further investment and financing for the Project.

5. However, the *Windstream I* tribunal did not agree with us that this was, in fact, the case. The *Windstream I* tribunal found that the FIT Contract “[was] still formally in force” and that it continued to remain open to Windstream and Ontario to “re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium.”¹ In the arbitration, the Government of Canada also represented and stated on numerous occasions that the Project was only “frozen” and could proceed once the moratorium was lifted – a position that was consistent with what we had been told by the Province of Ontario since it announced the Moratorium.²

6. As a result, we expected that there was a path forward for the Project following the *Windstream I* arbitration, and that there was still a means by which to unlock the true value of the Project. We were not alone in that view. Following the release of the Award, I was approached by and engaged in discussions with a number of parties who were interested in partnering with Windstream to develop the Project after the moratorium was lifted. As I indicated in my witness statement dated June 17, 2015, while our core group of investors remained prepared to invest in the Project as needed to move it to financial close, we were

¹ C-2040, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (September 27, 2016) ¶ 290 (27 September 2016).

² *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Counter Memorial of the Government of Canada, ¶¶ 21, 260, 265, 266, 268, 353, 486-487 (20 January 2015).

prepared to consider a partnership with the right partner who could provide strategic benefits for the Project.

7. The strong interest that these parties expressed in the Project – many of which are leading players in the development of offshore wind in the United States and globally – was important to me for two reasons. First, these parties shared our understanding that the Project had a future and substantial potential value. They were interested in acquiring an interest in the Project (or acquiring the Project in its entirety) because of that potential value.

8. Second, my concern that the moratorium had irreversibly damaged the investment climate in Ontario, articulated in my first witness statement, did not prove to be the case. In my first witness statement, I set out my concern that the undefined moratorium and political “flip flopping” of the Ontario Government on offshore wind development would cause many of the companies that were prepared to bring manufacturing to the province to focus their efforts elsewhere, and that no prudent equity or debt investor would want to join the Project at this stage. However, based on the outreach and interest I received, that concern did not materialize after the Award issued in *Windstream I*. Leading players in the offshore wind industry expressed strong interest in the Project.

9. However, as I explain in more detail below, these parties indicated that they would require some resolution of the moratorium on offshore wind in Ontario in order to proceed. While the moratorium and actions of the Government of Ontario has caused some uncertainty, the outreach I received from interested parties with extensive experience in the offshore wind and renewable energy sector demonstrates that once the moratorium was lifted, there would be strong investment interest and the value underlying the Project could be achieved.

10. ***Summary of my dealings with potential partners and investors.*** As I describe in more detail below, several leading developers of offshore wind projects globally and in North America expressed interest in investing in the project, including:³

a) [REDACTED]

³ C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential).

- [Redacted]
- b)

[Redacted]
- c)

[Redacted]
- d)

[Redacted]
- e)

[Redacted]
- f)

[Redacted]
- g)

[Redacted]

11. Following the *Windstream I* Award, these developers expressed significant interest in the Project. In particular, they were impressed with the wind resource in the Wolfe Island Shoals area, the comparative ease of constructing the Project (compared, for instance, to other offshore wind projects which are located in much more difficult aquatic environments) and the revenue regime guaranteed by the FIT Contract.

2016.⁸ On that call, we discussed [REDACTED]
 [REDACTED]
 [REDACTED] expressed [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

- d) On March 7, 2017, Brent Cooper from COWI emailed Mr. Baines and me about our attendance at any upcoming offshore wind conferences. That same day, I responded and stated that “we are continuing to fight to build this project. The tribunal clearly ruled that our contract is valid and in full force.” I also told him what conferences I would be attending. Mr. Cooper asked me to meet with COWI’s VP for Business Development and Market Director for offshore wind at one of those upcoming conferences. That meeting was arranged and took place on May 8, 2017. At that meeting, we discussed the Project, the plan to move forward and the potential of working with the team at COWI.⁹
- e) On May 2, 2017, Bill Follett from Sgurr Energy (now Wood Group) emailed me and asked to meet to discuss “how we might work together in the future, progress on Wolfe Island.” I responded that same day that it would be good to meet; “[w]e are continuing to push forward with our project, so the timing is good.”¹⁰ On May 8, 2017, I met with Mr. Follett to discuss the plan to move forward with the Project. We discussed the falling costs of building an offshore wind project,

⁸ C-2047, Email from Ian Baines to [REDACTED] – Availability (November 26, 2016); C-2048, Calendar invitation for December 9, 2016 meeting with [REDACTED] and Windstream Energy (WEI) re Accepted: Telecom with [REDACTED] and Windstream Energy (December 9, 2016).

⁹ C-2078, Email exchanges between Cooper, Brent (COWI) Mars, David (WEI) Baines, Ian (WWIS) Ronberg, Jan (COWI) and Chapman, John (COWI) re COWI checking in (7 March – 8 May 2017).

¹⁰ C-2086, Email from Bill Follett (Sgurr Energy) to Mars, David (WEI) re New York Offshore Conference (May 2, 2017); C-2087, Email from David Mars (WEI) to Bill Follett (Sgurr Energy) re New York Offshore Conference (May 2, 2017).

advancements in doing so, and potentially expanding the Project to the U.S. On May 9, 2017, Mr. Follett sent a follow up email stating that “We do see good progress on the gravity foundation front, and as you well know turbines are getting bigger and costs coming down quickly.”¹¹

f) On May 9, 2017, I met with [REDACTED] At the meeting, [REDACTED] expressed to me that it was [REDACTED] [REDACTED]¹² At the conclusion of the meeting, I sent an email to Arindum Basu at KeyBanc explaining that the meeting with [REDACTED] went well and that “they seem to have true genuine interest.”¹³ On that same day, I also met with [REDACTED] and had a productive meeting about its potential interest in the Project.¹⁴

g) [REDACTED]
[REDACTED], KeyBanc and I arranged a number of meetings with potential partners to determine their interest in the Project. In particular, I met with [REDACTED] [REDACTED] and [REDACTED]¹⁵ They all expressed interest in the Project and learning more about the potential opportunity.

Following our meeting, [REDACTED] sent an email and conveyed its interest in hearing more about the Project, [REDACTED]
[REDACTED]¹⁶

¹¹ C-2029, Email from Bill Follett (SgurrEnergy) to David Mars (WEI) re Offshore Wind meeting (May 9, 2016).

¹² C-2092, Email exchange between [REDACTED] and David Mars (WEI) re [REDACTED] interest in Canadian opportunity (May 11, 2017) (Confidential).

¹³ C-2089, Email from David Mars (WEI) to Arindam Basu (Keybanc) re Offshore Conference (May 9, 2017) (Confidential).

¹⁴ C-2090, Email from Daniel Brown (KeyBanc) to David Mars (WEI) re Catch Up/AWEA Planning (May 10, 2017) (Confidential).

¹⁵ C-2093, Email from Daniel Brown (KeyBanc) to David Mars (WEI) re AWEA Update (May 19, 2017) (Confidential); C-2094, Meeting invitation, Windstream: [REDACTED] (May 23, 2017); C-2095, Meeting invitation, Windstream: [REDACTED] (May 24, 2017); C-2096, Email from Daniel Brown (Keybanc) to David Mars (WEI) re Next Steps (May 31, 2017) (Confidential).

¹⁶ C-2097, Email from [REDACTED] to David Mars (WEI) re Lake Ontario Offshore Wind Project (June 2, 2017) (Confidential).

- h) On June 2, 2017, I received a text message from [REDACTED] informing me that [REDACTED] [REDACTED]¹⁷ On June 6, 2017, I met with [REDACTED] again, who communicated to me at that meeting that [REDACTED]
- i) On June 9, 2017, KeyBanc provided me an update on its efforts. It had sent a non-disclosure agreement (“NDA”) to interested parties, which at that time were [REDACTED] and [REDACTED]¹⁸
- j) On June 26, 2017, KeyBanc provided me with a further update. In addition to the parties above, the NDA had been sent to [REDACTED] and [REDACTED] and had been signed by [REDACTED], and [REDACTED]. The only party that had declined further involvement was [REDACTED] [REDACTED]¹⁹
- k) On June 29, 2017, I met again with [REDACTED]²⁰ [REDACTED] [REDACTED]
- l) Also on June 29, 2017, KeyBanc met with [REDACTED]. KeyBanc proposed sending them further material and discussions to see if they might have a real interest.²¹
- m) On July 18, 2017, KeyBanc and I together launched a data room in which potential investors could review the information related to the Project. A number

¹⁷ C-2098, Text message from [REDACTED] to David Mars (WEI) (June 2, 2017) (Confidential).

¹⁸ C-2100, Email from Tyler Nielsen (KeyBanc) to David Mars (WEI) re Windstream Outreach (June 9, 2017) (Confidential).

¹⁹ C-2101, Email from Tyler Nielsen (KeyBanc) to David Mars (WEI) re Call Tuesday (June 26, 2017) (Confidential); C-2104, Email from Tyler Nielsen (KeyBanc) to David Mars (WEI) re Windstream Buyers (July 6, 2017) (Confidential).

²⁰ C-2103, Meeting invitation from David Mars (WEI) to Tyler Nielsen (KeyBanc)– Accepted [REDACTED]/Windstream Meeting (June 21, 2017).

²¹ C-2103, Email from Daniel Brown (KeyBanc) to David Mars (WEI) re [REDACTED] (June 29, 2017) (Confidential).

of potential partners who had signed NDAs were given access to the data room [REDACTED] and [REDACTED] were all given data room access).²²

n) On August 2, 2017 and September 22, 2017, I had a call and met with representatives from [REDACTED].²³ [REDACTED]
[REDACTED]
[REDACTED]

o) Throughout the summer and fall of 2017, [REDACTED] continued to express a strong interest in the Project. On September 19, 2017, [REDACTED]
[REDACTED]⁴ On October 9, 2017, [REDACTED] sent an email asking [REDACTED]
[REDACTED]
[REDACTED].²⁵

On October 26, 2017, I met with KeyBanc and [REDACTED] to discuss [REDACTED] interest in the Project. [REDACTED]
[REDACTED]
[REDACTED]
However, I understood that [REDACTED]
[REDACTED]

²² C-2122, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential); C-2108, Email from Tyler Nielsen (Keybanc) to David Mars (WEI) re Data Room Quotes (July 18, 2017) (Confidential); C-2071, Email from David Mars (WEI) to Daniel Brown (WEI) re 2017 WIS Data Room (February 7, 2017) (Confidential).

²³ C-2110, Meeting invitation, [REDACTED] Windstream Call (August 2, 2017).

²⁴ C-2118, Email from Daniel Brown (KeyBanc) to David Mars (WEI) re [REDACTED] (September 19, 2017) (Confidential).

²⁵ C-2123, Email from [REDACTED] to Daniel Brown (WEI) re Follow up questions/comments (October 9, 2017) (Redacted) (Confidential).

p) On October 18, 2017, KeyBanc received some inbound inquiries from [REDACTED] and [REDACTED]²⁶

14. Our negotiations with these potential partners did not advance to the stage of discussing what specific terms of a transaction would be. However, early in my discussions with these potential partners, I told them that we would need to see an investment in the hundreds of millions of dollars from them for any transaction to happen. I wanted to make sure that I conveyed to them our value expectation so that we only proceeded with parties that had a shared view on the potential value of the Project. These potential partners continued to show interest in the Project and to conduct due diligence on the Project.

15. It was clear that there was a lot of interest in the Project. However, most of these parties indicated that they required clarity regarding the moratorium before they would pay a significant upfront purchase price or substantially invest in the Project. Once they received that clarity, they were ready to move forward.

16. 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 the value of that highly financeable and feasible project. To that end, we continued to update our financing plan for the Project and continued to incur expenses to advance it.²⁷ In and around November 2017, KeyBanc prepared for us an indicative financing plan for the Project based on their knowledge and experience as an active participant in both the Ontario market and the onshore and offshore wind markets in North America.²⁸

17. Ultimately, I made the decision to halt these discussions with these parties. By late 2017, we were not seeing any movement from the Government of Ontario with respect to advancing the research required to lift the moratorium or to renegotiate the terms of the FIT Contract to “freeze” us from the effects of the moratorium, as promised by the government officials. Our efforts to meet with the Ministry of Energy to discuss the FIT Contract and Project are detailed

²⁶ C-2124, Email from Daniel Brown (KeyBanc) to David Mars (WEI) re [REDACTED] (October 18, 2017) with attached Management Discussion Analysis (MDA) 2016-2017 (Confidential).

²⁷ C-2082, Windstream Payouts (April 21, 2017-December 31, 2020).

²⁸ C-2141, WWIS ERPP EOI Form s3.2.3 – Economic Impact (February 11, 2018).

in the Witness Statement of Nancy Baines dated February 15, 2022. In summary, we attempted on numerous occasions to open a dialogue with the Ministry of Energy, but it refused to even have a single meeting with us. As a result, as the May 2017 termination date was approaching, in March of 2017, we commenced an application before the Ontario Courts to obtain certainty about the status of our FIT Contract and to stop the IESO from exercising its termination right based on the delays caused by the government-imposed moratorium. In the face of inaction by the Ontario Government and uncertainty regarding the IESO's termination rights, I no longer felt it was appropriate to continue discussions with potential partners. Still, several of these potential partners continued to reach out to me to express interest in, and seek updates on the status of, the Project into 2018.

B. Windstream's Frustration with its Treatment by the Government of Ontario

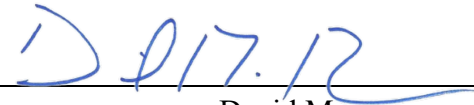
18. Windstream and its investors' dedication to building and operating this Project has never wavered. We have always believed that this was an excellent investment and a huge opportunity for ourselves and the Province of Ontario. We believed that Ontario felt the same way, since they strongly encouraged Windstream to invest in the Project and awarded WWIS the only FIT Contract for an offshore wind project. The details of the Province of Ontario's strong encouragement to get Windstream to invest in the Project are set out in my previous witness statements and the materials filed in the *Windstream I* arbitration.

19. Windstream's investors remained dedicated to progressing the Project even after the *Windstream I* Award. Although, as the Award in *Windstream I* made clear, we had been mistreated by the Government of Ontario, we expected there was a path forward for the Project. The Government of Ontario, through the Ministry of Energy, had promised us that our FIT Contract and Project would be insulated from the effects of the moratorium. The Government of Canada represented throughout the first arbitration that, consistent with that promise, the Project was indeed "frozen" and could proceed when the moratorium was lifted. It also consistently represented that the moratorium was only a temporary measure and would in fact be lifted. The tribunal found that the FIT Contract was still in force and could be renegotiated by the parties to reflect the promises and representations made to Windstream.

20. We took that to heart and believed that there was a real path forward for the Project. We were, after all, dealing with an investment in Canada, and believed that the Government of Ontario would honour its commitments to an investor who has only acted in good faith, particularly after an international tribunal found that its conduct had already violated Canada's international obligations.

21. It therefore 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 governments 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. In the face of the Award in *Windstream I*, I expected the government to rectify its conduct (and frankly, its own reputation). Yet, that is not the reaction we received. The government showed no interest in rectifying its mistreatment; it would not even meet with us. For the government to refuse to meet with us to discuss a potential solution in light of the tribunal's findings and their prior commitments to us was extremely frustrating and disappointing, particularly after the Tribunal's decision in *Windstream I*.

Signed February 16, 2022 in New York, New York



David Mars

TAB 3

**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

THIRD WITNESS STATEMENT OF IAN BAINES

1. I am the President of Windstream Energy Inc., a subsidiary of Windstream LLC (“Windstream”). Windstream Energy Inc. coordinates Windstream’s activities and investments in Ontario. I am also a director of Windstream Wolfe Island Shoals (“WWIS”).
2. I previously provided two witness statements in relation to Windstream’s earlier NAFTA proceeding against the Government of Canada (the “*Windstream I* arbitration”): one dated August 18, 2014 and the second dated June 17, 2015. In this witness statement, I focus on facts that have occurred since my second witness statement was signed.
3. In this witness statement, I address the following matters:
 - a) the expansion of offshore wind, particularly in North America, since 2015;
 - b) a summary of the offshore wind projects in the United States;
 - c) Windstream’s attempts to move the Project forward following the *Windstream I* arbitration; and

- d) my disappointment and frustration with the Government of Ontario's continued mistreatment of Windstream.

4. 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. Expansion of Offshore Wind Since 2015, Particularly in North America

5. When my last witness statements were signed in 2014 and 2015, most of the world's offshore wind projects were located in Europe, with most of those projects off the coasts of Great Britain. Since then, investment in and development of offshore wind projects has expanded globally. In particular, offshore wind development in North America has escalated significantly. There is now one operational offshore wind farm in the United States and a robust pipeline of projects in development. As set out further below, it is expected that more than 15 projects will be developed in North America in the next five years.

6. This section of my witness statement describes both the global expansion of offshore wind and the expansion of offshore wind specifically in North America.

7. **Global Expansion.** Offshore wind energy began in the 1990s. It has been growing since then, but that growth has escalated in the last number of years. According to the Global Wind Energy Council's 2020 Global Wind Report, offshore wind grew from being 1% of global wind installations by capacity in 2009 to over 10% in 2019.¹ There was 2 GW of offshore wind installed capacity in 2009, and nearly 30 GW in 2019.²

8. In 2019, 6.1 GW of new capacity was added globally, making 2019 the best year in history for the global offshore wind industry.³

9. According to the Global Wind Energy Council's 2021 Global Wind Report, the offshore wind market has grown from 2.2 GW in 2016 to 6.1 GW in 2020 and the expectation is that this global offshore wind market will continue to grow at an accelerated pace.⁴

¹ C-2275, GWEC Global Offshore Wind Report (2020), p. 5.

² C-2275, GWEC Global Offshore Wind Report (2020), p. 32.

³ C-2275, GWEC Global Offshore Wind Report (2020), p. 10.

10. This exponential growth over the last decade has been in part precipitated by technological advancements and declining costs.⁵ Most of this growth has been in the UK, Germany, mainland China, Denmark, Belgium and the Netherlands. However, the offshore market is also taking off in Asia and North America.⁶ Offshore wind has proven itself as an affordable, scalable, zero-carbon energy source.⁷

11. The Global Wind Energy Council predicts that the compound annual growth rate for offshore wind in the next five years is 31.5%. New installations are likely to quadruple by 2025 from 6.1 GW in 2020 to 23.9 GW in 2025. In total, more than 70 GW offshore is expected to be added worldwide between 2021-2025.⁸

12. ***North America Expansion.*** North America installed its first test offshore wind turbine off the coast of Maine in 2013 and connected its first commercial wind project to the grid in Rhode Island in December 2016 (the Block Island Wind Farm).⁹

13. There has been significant expansion of offshore wind development in the United States over the last few years. A 12 MW pilot project in Virginia was completed in June 2020 as the first offshore wind project to be installed in federal waters.¹⁰ Many more offshore projects are in development. According to the Global Wind Energy Council's 2020 Global Wind Report, the country's total offshore wind procurement targets increased from 9.1 GW in 2018 to 25.4 GW in 2019 after New York and New Jersey upgraded their offshore targets and more states released their offshore wind targets. As of June 2020, six states had selected nearly 6,300 MW of offshore wind projects through state-issued solicitations. The top four states by volume of solicitations are: New York (1,696 MW), Massachusetts (1,604 MW), Connecticut (1,108 MW) and New Jersey (1,100 MW).¹¹

⁴ C-2337, GWEC Global Wind Report 2021, p. 47.

⁵ C-2275, GWEC Global Offshore Wind Report (2020), p. 32.

⁶ C-2275, GWEC Global Offshore Wind Report (2020), p. 32.

⁷ C-2275, GWEC Global Offshore Wind Report (2020), p. 37.

⁸ C-2337, GWEC Global Wind Report 2021, pp. 69, 70.

⁹ C-2275, GWEC Global Offshore Wind Report (2020), p. 20.

¹⁰ C-2275, GWEC Global Offshore Wind Report (2020), p. 21.

¹¹ C-2275, GWEC Global Offshore Wind Report (2020), pp. 10, 71.

14. This expansion is expected to continue for the foreseeable future. In the United States, 15 offshore projects, totalling 10,603 MW, are expected to be built by 2026.¹² In total, 23 GW of offshore wind is predicted to be built in North America in this decade.¹³

15. On August 9, 2017, the United States Department of Energy published an article entitled “4 Emerging Trends in U.S. Offshore Wind Technologies.” The article made the following statements about offshore wind in the United States:¹⁴

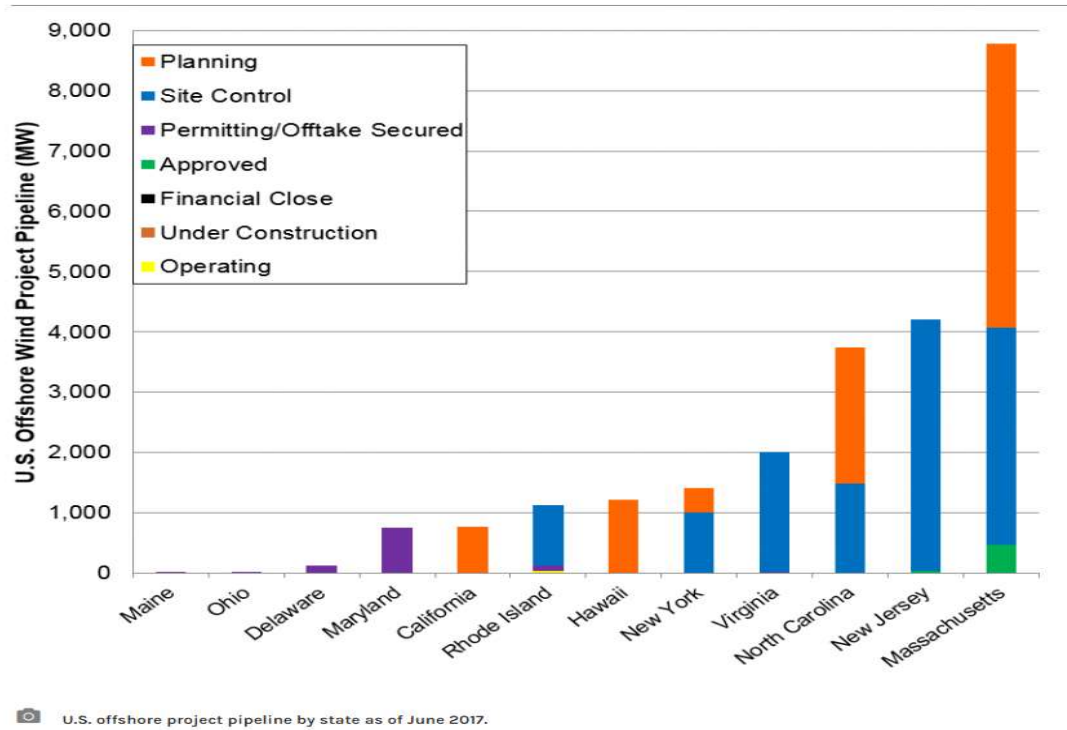
- a) “Is offshore wind the next big thing? It could be for the United States.”
- b) The first trend emerging “in this growing energy market” is a “robust U.S. offshore wind pipeline.”

“The United States is developing a robust pipeline of projects to ensure growth in the country’s nascent offshore wind market. As illustrated in the chart below, 28 projects, totalling 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.”

¹² C-2275, GWEC Global Offshore Wind Report (2020), pp. 11. 72.

¹³ C-2275, GWEC Global Offshore Wind Report (2020), p. 20.

¹⁴ C-2111, Report (US Office of Energy Efficiency and Renewable Energy) “4 Emerging Trends in U.S. Offshore Wind Technologies” (August 9, 2017).



- c) The second trend outlined by the Department of Energy is the “upscaling [of] wind turbines: bigger is better”:

“The proposed projects are incorporating the latest innovations in offshore wind technology. The global trend of increasing size and scale has manufacturers building larger turbines (now up to 9 MW and rotor diameters of 538 feet) on advanced foundation designs in water depths of more than 200 feet. This upscaling trend is driven by the need to minimize costs and maximize efficiency. Larger turbines are able to capture more energy, more efficiently per installation.”

16. Similar statements were made by the U.S. Department of Energy in its 2018 Offshore Wind Technologies Market Report. This Report also provides details about the U.S. offshore wind energy market and the offshore wind development and operational pipeline in the United States as of 2018. In particular:

- a) As at 2018, the U.S. offshore wind energy project development and operational pipeline grew to a potential generating capacity of 25,824 MW, which comprises one operating project (Block Island Wind Farm), eight projects that have reached

the permitting phase with either a construction or operations plan or a viable offtake mechanism for sale of electricity, 15 commercial lease areas in federal waters with exclusive site control, two unleased wind energy areas, and five projects (all Pacific-based) that have submitted unsolicited applications to the Bureau of Ocean Energy Management, the government agency that regulates energy development in federal waters. The pipeline has three projects located in state waters, including the operating Block Island Wind Farm, the Aqua Ventus I floating-wind project in Maine, and the Lake Erie Energy Development Corporation Icebreaker Wind project on Lake Erie.¹⁵

- b) Through technology innovation, turbine original equipment manufacturers have been able to limit the rise in turbine cost (\$/kilowatt) and manage the increase in mass (kilogram/kilowatt) to allow turbine growth to continue upward to at least 12 MW, if not 15 MW, in the next decade. “There are no indications that turbine growth is slowing or has reached a limit for offshore wind.”¹⁶
- c) “Offshore wind is among the renewable energy technologies that has experienced a rapid cost decline in recent years. It is commonly expected that this cost reduction trend will continue globally and will be realized in the United States as the market emerges.”¹⁷

17. On March 29, 2021, the Biden Administration announced that it was seeking to jumpstart offshore wind energy projects to create jobs. As part of this initiative, the Departments of Interior, Energy and Commerce committed to a shared goal of generating 30 GW of offshore wind in the U.S. by 2030.¹⁸

¹⁵ C-2136, Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. ix.

¹⁶ C-2136, Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. xii.

¹⁷ C-2136, Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. 57.

¹⁸ C-2356, News Release (White House), FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (March 29, 2021).

B. Offshore Wind Projects in the United States

18. In this section, I summarize the status of some of U.S. offshore projects.¹⁹ There are many projects in development that will be coming operational in the near future. This demonstrates that the future of offshore wind in the North American market is full of potential.

19. Block Island Wind Farm. The first commercial offshore wind farm in the United States, Block Island Wind Farm is a five-turbine, 30 MW windfarm and located approximately 4.8 km southeast of Block Island, Rhode Island. The project's final federal approval was granted in September 2014. The Project achieved financial closure in March 2015 and, in July 2015, it installed the first of five 400t steel foundation jackets for the turbines. Submarine cable installation works began in the first half of 2016, and wind turbine installation started in mid-2016. It became fully operational in December 2016.²⁰

20. Icebreaker Wind Farm. Icebreaker Wind is the first offshore wind facility to be built in the Great Lakes and the first freshwater wind farm in North America. The Icebreaker Wind Project is a 20.7 MW demonstration wind farm that will consist of six 3.45 MW turbines located eight miles north of Cleveland, Ohio. The Project became fully permitted in December 2020. Construction is planned for 2022 and it is expected the Project will become operational by 2023.²¹

21. Ocean Wind Farm. Ocean Wind Farm is New Jersey's first utility-scale offshore wind farm. It is a 1,100 MW wind farm and will be located approximately 15 miles off the coast of southern New Jersey. Construction is planned to start in the early 2020's, with the wind farm expected to become operational in late 2024.²²

22. Sunrise Wind Farm. Sunrise Wind Farm is an approximately 924 MW offshore wind farm that will be located in New York, approximately 30 miles off the coast of Montauk.

¹⁹ C-2323, NREL Transforming Energy 2019 Offshore Wind Technology Data Update (October 2020), p. 9.

²⁰ C-2058, Report (Power Technology), "Block Island Wind Farm Power Technology Projects" Rhode Island, USA (December 30, 2016).

²¹ C-2430, Website (LEEDCo), About Us (February 2022); C-2431, Website (LEEDCo), The Project: Ice Breaker Wind (February 2022).

²² C-2441, Website (Orsted), Ocean Wind 1 Project "The first offshore wind project in New Jersey delivering 1,100 MW of clean, reliable energy" (February 2022).

Construction is expected to begin in 2022 and the Project is expected to be fully operational by 2024.²³

23. Empire Wind Farm. Empire Wind Farm is an 816 MW offshore wind farm under development in New York. It will be situated in federal waters, approximately 32 km south of Long Island, east of the Rockaways and 22.5 km away from Jones Beach State Park. The first phase is the Project is expected to include 60 to 80 wind turbines. It is expected to become operational by 2024 or 2025.²⁴

24. Vineyard Wind Farm. Vineyard Wind is currently building the U.S.’s first utility-scale offshore wind energy project over 15 miles off the coast of Martha’s Vineyard, Massachusetts. The Project will consist of 62 wind turbines, each capable of generating 13 MW of electricity. The Project will generate 800 MW of electricity annually.²⁵ The Project is now fully permitted. Construction is expected to begin in 2022 and it is expected that it will be operational by 2023.²⁶

25. Park City Wind Farm. Park City Wind is an 804 MW offshore wind project to be constructed 37 km off the coast of Massachusetts.²⁷ It is expected to be operational some time in 2025.²⁸

26. Revolution Wind Farm. Revolution Wind is a 704 MW project to be located approximately 15 miles south of the Rhode Island coast, 32 miles southeast of the Connecticut coast and 12 miles southwest of Martha’s Vineyard, Massachusetts. Project survey work and permitting is underway and construction is expected to begin as early as 2023.²⁹

²³ C-2392, Website, About Sunrise Wind (Sunrise Wind) (February 2022); C-2335, The Long Island Advocate article entitled “Sunrise Wind expected to be up and running by 2024” (December 7, 2020).

²⁴ C-2326, Power Technology Project – “Empire Wind Project, Offshore New York” (October 15, 2020).

²⁵ C-2442, Vineyard Wind 1 article entitled “Nation’s first commercial-scale offshore wind project” (February 2022).

²⁶ C-2443, Vineyard Wind 1 article entitled “Permitting” (February 2022).

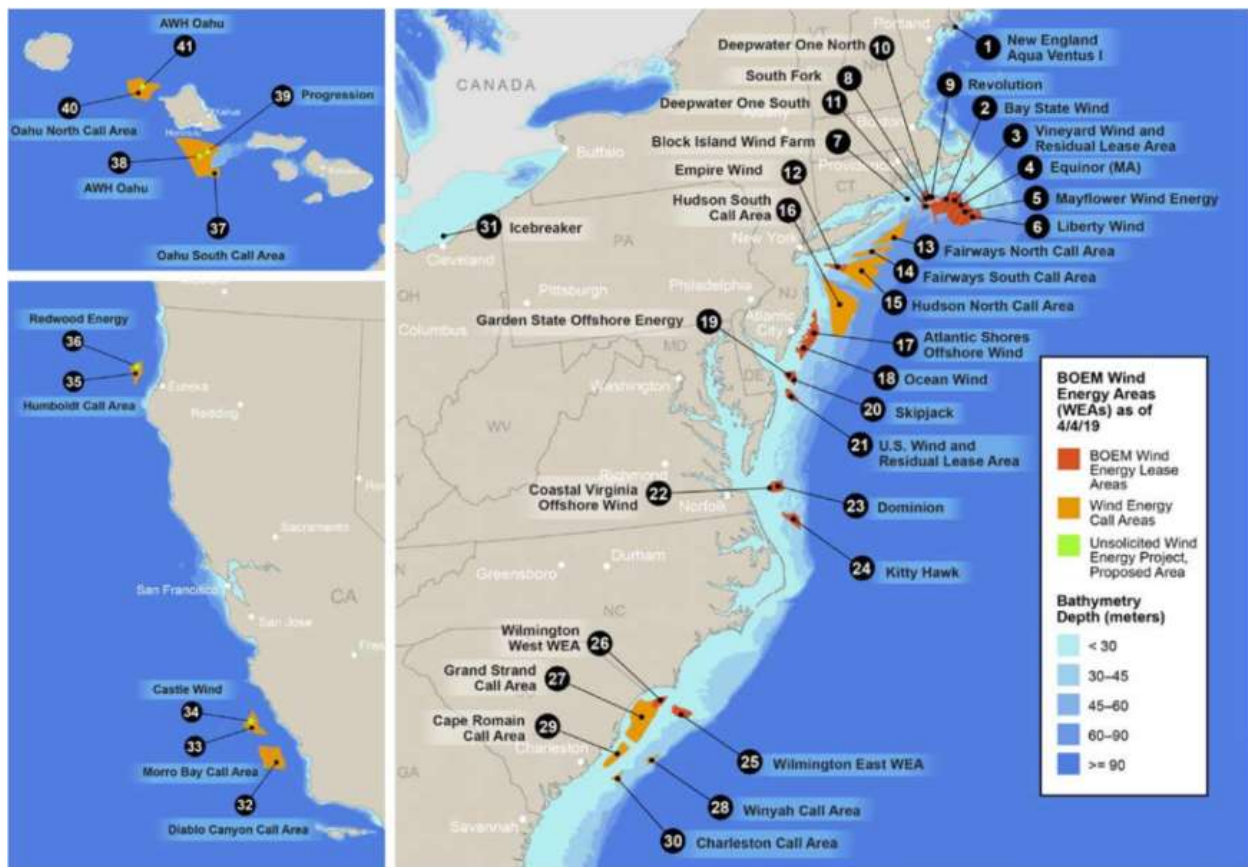
²⁷ C-2444, IBERDROLA Flagship Projects - Park City Wind Offshore Wind Farm in Connecticut (February 2022).

²⁸ C-2302, Department of Energy and Environmental Protection News Release entitled “DEEP-Selected Power Purchase Agreement for 804 MW Offshore Wind Project Filed with PURA” (May 21, 2020).

²⁹ C-2445, Website, Revolution Wind “Project at a glance” (February 2022).

27. South Fork Wind Farm. South Fork Wind is a 130 MW project to be located 35 miles east of Montauk Point. It is expected to be operational by the end of 2023.³⁰

28. The projects described above are a sampling of the wind farms being developed in the United States. The list is by no means comprehensive. There are many more projects under development, particularly on the U.S. Atlantic Coast, as seen in the following diagram which depicts U.S. offshore wind pipeline activity as of March 2019:³¹



C. Following the *Windstream I* Arbitration, Windstream Attempted to Move the Project Forward

29. As described in detail in the Witness Statement of Nancy Baines dated February 1, 2022, the *Windstream I* tribunal found that the FIT Contract “[was] still formally in force” and that it continued to remain open to Windstream and Ontario to “re-activate and, as appropriate,

³⁰ C-2458, Website (South Fork Wind), About Us (February 2022).

³¹ C-2136, Report (US DOE), 2018 Offshore Wind Technologies Market Report (2018), p. x.; C-2323, NREL Transforming Energy 2019 Offshore Wind Technology Data Update (October 2020), p. 9, 12, 13.

renegotiate the FIT Contract to adjust its terms to the moratorium.”³² After the Award was released, the Government of Ontario announced that it was finalizing the offshore wind research needed to lift the moratorium.

30. In her witness statement, Nancy explains that in light of the findings of the *Windstream I* tribunal, the representations made by Canada in the arbitration (that the Project was frozen and could proceed once the moratorium was lifted), and announcements by Ontario regarding the status of the offshore wind research, Windstream expected that the Project had a path forward.

31. As a result, following the *Windstream I* arbitration, we attempted to move the Project forward to the extent we could and to find out more information about when the moratorium was expected to be lifted. This section of my witness statement describes these efforts.

32. **2017 Renewable Energy Application to the MOECC.** After the Government of Ontario announced the moratorium on offshore wind in February 2011, it did not amend the regulatory framework to reflect that decision. The regulatory framework continues to envisage the development of offshore wind, as recognized by the *Windstream I* tribunal.³³ To the present day, the Renewable Energy Approval (“REA”) Regulation continues to apply to offshore wind projects.

33. In light of the *Windstream I* tribunal’s finding that the FIT Contract was still in force, we wanted to ensure that we took all steps necessary to keep the Project moving forward and to ensure that we fulfilled all of our obligations to bring the Project into commercial operation (to the extent possible). To that end, as the REA Regulation continued to apply to offshore wind projects, we wanted to ensure that we fully complied with the REA requirements and that we, as the proponent, had taken all necessary steps to get an approval issued.

34. On February 15, 2017, I submitted Windstream’s updated REA submission to the Ministry of the Environment and Climate Change (“MOECC”). This submission contained (i) a letter, (ii) an updated project description report, and (iii) a status report.³⁴ As I noted in the

³² C-2040, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (September 27, 2016), ¶ 290.

³³ C-2040, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (September 27, 2016), ¶ 379.

³⁴ 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-

covering letter, the submission was “in keeping with [Windstream’s] continuing commitment to fulfill its obligations under the FIT contract and bring the project into commercial operation.”³⁵

35. This submission contained many of the studies that Windstream had undertaken in the course of the *Windstream I* arbitration. 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.

36. This was our third submission to MOECC. We had not received a response to our previous two submissions. Under the REA requirements, MOECC needed to either grant the approval or provide comments on what was needed to proceed. As I noted above, the REA requirements were not amended to reflect the moratorium in place. As such, in my covering letter, I noted that we had not received a response to our previous submissions and “are asking specifically that the Ministry respond in writing to this, our third submission.”³⁶

37. In that letter, I requested the “cessation of the offshore wind moratorium” and “confirmation of the proposed 5 km setback.” I also requested the Aboriginal Consultation List

602” (February 15, 2017); **C-2075**, ORTECH Status Report: Summary of Engineering and Environmental Studies in Support of the Wolfe Island Shoals Offshore Wind Farm (15 February 2017); **C-2074**, ORTECH Report: Project Description - Wolfe Island Shoals Offshore Wind Farm (February 15, 2017).

³⁵ **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).

³⁶ **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).

from the Ministry, as required under the REA's guidelines and which had been provided by the Ministry on all other wind projects.³⁷

38. As we did not receive a response to this submission, WWIS sent follow up letters on April 21, 2017, June 13, 2017³⁸ and August 10, 2017.³⁹

39. On August 25, 2017, the MOECC sent me a responding letter. MOECC stated that:

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.⁴⁰

40. MOECC did provide the requested list for Aboriginal consultation pursuant to s. 14 of Ontario Regulation 359/09, "*Renewable Energy Approvals under Part V.0.1 of the Act*."⁴¹ MOECC 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] proposed project."⁴²

³⁷**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).

³⁸ **C-2477**, Letter from Ian Baines (WWIS) to Dolly Goyette (MOE) (June 13, 2017), Exhibit D to the Affidavit of Michael Lyle (June 1, 2018).

³⁹ **C-2477**, Letter from Ian Baines (WWIS) to Dolly Goyette (MOE) (August 10, 2017), Exhibit D to the Affidavit of Michael Lyle (June 1, 2018).

⁴⁰ **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).

⁴¹**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).

⁴²**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).

41. ***Further Geophysical and Bathymetric Surveys of the Lakebed.*** Another step we took following the *Windstream I* arbitration was that we sought to take advantage of improved technology to re-examine the data from the lake bottom.

42. A preliminary site investigation was conducted by Canadian Seabed Research (“CSR”) in 2011, which included a regional bathymetry and geophysical survey of the turbine area, as well as the export cable route of the Project. The geophysical survey included the acquisition of sidescan sonar, single channel seismic and magnetometer data.⁴³

43. In 2017, we sought to use more advanced software and hardware to interpret this original data. We retained CSR once again to process the 2010 geophysical data collected over the offshore wind farm site and to compile a geological assessment of the area. The assessment was to include the updated turbine locations as at that date.⁴⁴

44. ***Emerging Renewable Power Program Application.*** 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.⁴⁵

45. As stated in Canada’s press release, “[t]he 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.”⁴⁶ [Emphasis added].

⁴³ CER-SgurrEnergy, p. 44.

⁴⁴ C-2143, CSR 2017 Geological Assessment Report Project Number 1714 (February 27, 2018).

⁴⁵ C-2138, New Release (Natural Resources Canada), “Canada Supports Next Wave of Emerging Renewable Power” (January 18, 2018).

⁴⁶ C-2138, New Release (Natural Resources Canada), “Canada Supports Next Wave of Emerging Renewable Power” (January 18, 2018).

46. On February 11, 2018, WWIS submitted an Expression of Interest Application for the ERPP.⁴⁷

47. On April 20, 2018, WWIS submitted an application under the ERPP.⁴⁸

48. On July 13, 2018, Natural Resources Canada responded to our application and advised us that while our “proposal scored well,” our Project was not recommended to be funded under Phase 1 of the ERPP.⁴⁹ 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.⁵⁰

49. On July 16, 2018, Windstream responded and provided its agreement to be added to the Phase 2 list of projects for consideration for future funding.

D. My Disappointment and Frustration with the Ontario Government’s Continued Mistreatment of Windstream

50. In her witness statement dated February 15, 2022, Nancy outlines the events that took place following the *Windstream I* arbitration, including Windstream’s efforts to meet with the Ministry of Energy (“MEI”) to discuss the path forward for the Project, MEI’s refusal to meet with Windstream, and the events that led to the IESO’s termination of the FIT Contract in

⁴⁷ **C-2140**, Email from Nancy Baines (WWIS) to Emerging Renewable Power Program (ERPP) re ERPP Expression of Interest Application - #1 of 3 (February 11, 2018) with attached (a) WWIS EOI Form EN (February 11, 2018); (b) WWIS ERPP EOI Form Signature Page (February 11, 2018); **C-2141**, Email from Nancy Baines (WWIS) to Emerging Renewable Power Program (ERPP) re Windstream Wolfe Island Shoals - ERPP EOI Application -#2 of 3 (February 11, 2018) with attached (a) WWIS ERPP EOI Form s.2.4 – General Map (February 11, 2018); (b) WWIS ERPP EOI Form s.2.4 – Turbine Locations (February 11, 2018); (c) WWIS ERPP EOI Form s.2.8 – Financing Strategy (February 11, 2018); **C-2142**, Email from Nancy Baines (WWIS) to Emerging Renewable Power Program (ERPP) re ERPP Expression of Interest Application -#3 of 3 (February 11, 2018) with attached (a) WWIS ERPP EOI Form s.3.1 – Project Description (February 11, 2018); (b) WWIS ERPP EOI Form s.3.1 – Status Report (February 11, 2018); (c) WWIS ERPP EOI Form s.3.2.2 – Project Schedule (February 11, 2018); (d) WWIS ERPP EOI Form s.3.2.3 – Economic Impact (February 11, 2018).

⁴⁸ **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” 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).

⁴⁹ **C-2164**, Letter from Natural Resources Canada to Ian Baines (WWIS) Subject: ERPP-OW-16 Windstream Wolfe Island Shoals Offshore Wind Farm (July 13, 2018).

⁵⁰ **C-2164**, Letter from Natural Resources Canada to Ian Baines (WWIS) Subject: ERPP-OW-16 Windstream Wolfe Island Shoals Offshore Wind Farm (July 13, 2018).

February 2020. I agree with her description of the events that occurred and her characterization of Windstream's expectations, goals and frustrations.

51. I was incredibly frustrated and disappointed by our continued mistreatment by the Ontario Government. The *Windstream I* tribunal had found that the Ontario Government had violated its international obligations due to the way it treated us. In particular, it kept Windstream in a state of "legal and contractual limbo" by implementing the moratorium, failing to amend the regulatory framework, and then failing to fulfill the promise made by the Ministry of Energy to freeze our project from the effects of the moratorium. However, as I noted above, the tribunal also found that the FIT Contract was in force and could still be renegotiated. As noted in Nancy's witness statement, the Government of Canada made similar representations in the arbitration that the Project was only "frozen" and "on hold" and could proceed once the moratorium was lifted.

52. In light of Canada's representations 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*.


53. 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.

54. This Project has been my life and the focus of my career for the last thirteen years. I take a lot of pride in my work. I developed the Wolfe Island Shoals onshore wind farm in Kingston, Ontario and have experienced the satisfaction of seeing how strong, renewable energy projects can benefit a community. My neighbours and community members in Kingston are proud of that project and regularly ask me questions about it. It is a shame that the same outcome will never be realized for this offshore wind project that offered so much potential.

55. 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.

Signed February 15, 2022 in Kingston, Ontario



Ian Baines

TAB 4

**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

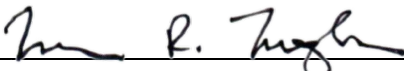
Respondent

THIRD WITNESS STATEMENT OF WILLIAM ZIEGLER

1. I am a private equity investor based in New York City, with over 40 years' experience investing in the energy and technology sectors. I am the majority investor in, and Chairman of the Board of Directors of, Windstream Energy LLC ("Windstream"), and its co-founder with my partner, Mr. David Mars. I am an officer and director of Windstream and its subsidiaries, including Windstream Energy Inc. and Windstream Wolfe Island Shoals Inc., among other companies. I am a partner in White Owl Capital Partners LLC, which is the managing director of Windstream.
2. In relation to Windstream's earlier NAFTA proceeding against the Government of Canada (the "Windstream I arbitration"), I provided two witness statements: one dated August 18, 2014, and one dated June 17, 2015. My background and experience are set out in more detail in my first witness statement dated August 18, 2014.
3. I have read the witness statements of Mr. Mars submitted the Windstream I arbitration and in this proceeding. I concur with the contents of his witness statements. In particular, I concur with the statement at paragraphs 79-82 of his witness statement dated June 17, 2015 (reiterated at paragraph 6 of his witness statement dated February 16, 2022), where

Mr. Mars indicates that the core group of investors in the Project (which includes myself, Steven Webster, and Kenneth Hannan and his associate, Francis Stafilopatis) were prepared to invest in the Project as needed to move the Project to financial close. This was true throughout the life of the Project, including after the issuance of the tribunal's award in the Windstream I arbitration. After the Windstream I arbitration, a number of potential partners expressed interest in investing in the Project and we pursued those expressions of interest to identify potential strategic partners. Those discussions are summarized in detail in Mr. Mars' February 16, 2022 witness statement. Throughout that process, we were only interested in the right partners for the Project; the core investors, including myself, remained prepared to invest in the Project to move it forward in the event that the moratorium was lifted and the Project allowed to proceed.

Signed February 16, 2022 in New York, New York



William Ziegler

TAB 5

**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

WITNESS STATEMENT OF MICHAEL KILLEAVY

1. I was the Director, Contract Management, at the Independent Electricity System Operator (the “IESO”) from January 2015 to February 2018. In that role, I was responsible for managing all of the IESO’s electricity generation contracts and energy support programs. Before that, I was Director, Contract Management, at the Ontario Power Authority (the “OPA”) – the predecessor to the IESO – where I exercised largely the same responsibilities.

2. I was Director, Contract Management at the OPA during the implementation of the Feed-in-Tariff program. As such, I managed the expansion of the OPA’s portfolio of electricity contracts from about 450 contracts in 2009 to over 20,000 contracts by the end of 2014.

3. I am currently a Commercial Director with Power Advisory LLC. In my role, I provide electricity sector consulting services. I advise clients on contractual and commercial matters, undertake due diligence for investors, prepare financial models for power projects, and advise clients on integrating contracts into markets in Ontario.

4. In this witness statement, I address:

- a) my role at the IESO when the IESO decided to terminate Windstream's FIT Contract;
- b) the significant level of control the Ministry of Energy exercises over the IESO; and
- c) my belief, based on my experience with the IESO, that the Ministry of Energy could have directed the IESO not to terminate and/or to amend Windstream's FIT Contract and the IESO would have complied.

5. The facts and matters to which I testify in this witness statement 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 true.

A. My Role at IESO when the IESO Decided to Terminate Windstream's FIT Contract

6. I was Director, Contract Management at the IESO when the IESO decided to terminate the feed-in tariff contract of Windstream Wolfe Island Shoals Inc. (the "FIT Contract" and "WWIS" respectively).

7. In that role, I recommended to Michael Lyle, the IESO's General Counsel, that the IESO exercise its right under section 10.1(g) of the FIT Contract (the "Termination Right") to terminate the FIT Contract. I made that recommendation in a memorandum dated February 16, 2018.¹

8. Four days later, on February 20, 2018, the IESO informed WWIS of its decision to terminate the FIT Contract (the "Termination Decision").²

9. WWIS commenced an application before the Ontario courts challenging the Termination Decision. In the context of that application, counsel for WWIS asked me to review a report prepared by Power Advisory LLC and to advise whether I would have recommended that the IESO exercise the Termination Right if I had reviewed the Power Advisory report at the time I

¹ C-2477, Memorandum (IESO) from Killeavy, Michael to Lyle, Michael re: Section 10(g) Analysis – FIR Contract ID # F-000681-WIN-130-602 (February 16, 2018).

² C-2477, Letter from Lyle, Michael (IESO) to Baines, Nancy (WWIS) (February 20, 2018), Exhibit M to the Affidavit of Michael Lyle (IESO) (June 1, 2018).

made my recommendation. After reviewing the report, I reached the conclusion that I do not believe I would have made the termination recommendation. I swore an affidavit in that application setting out my belief and the basis for my conclusion.³ That affidavit was true at the time I swore it and remains true today.

B. The Ministry of Energy Exercises Significant Control over the IESO

10. The Ontario Government, through the Ministry of Energy, exercises significant control over the IESO.

11. This control manifests in two key ways:

a) The Ministry of Energy has legislative powers to issue directives to the IESO in relation to certain types of issues. The IESO must comply with these directives. I refer to this type of control as the Ministry of Energy’s “formal” control powers over the IESO.

b) [REDACTED]

12. Each of these types of control is described in more detail below.

Formal control

13. The IESO is a Crown corporation and operates its business and affairs on a not-for-profit basis.⁴ Among its statutory objectives are the goals of engaging in activities in support of

³ C-2475, Affidavit of Michael Killeavy (October 18, 2018).

⁴ *Electricity Act*, 1998, S.O. 1998, c. 15, s. 5.

“ensuring adequate, reliable and secure electricity supply and resources in Ontario” and “activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources.”⁵ To achieve these and other objectives, the IESO was given the power to “enter into contracts for the procurement of [] electricity supply, capacity or storage.”⁶

14. As a Crown Corporation, while the IESO is legally independent from the organization of the Ontario Government, [REDACTED]

15. The OPA (now the IESO) is an agency of the Government of Ontario responsible for managing Ontario’s electricity supply and resources in order to meet Ontario’s medium and long-term needs. It is listed in the Ontario Government’s Agencies list as an agency of the Ministry of Energy.⁷ It was also described as an “agency” of the Ontario Government by a panel of the World Trade Organization in its decision related to a dispute between Japan and Canada over Ontario’s FIT program, as well as the WTO’s Appellate Body.⁸

16. The *Electricity Act, 1998* authorizes Ontario’s Minister of Energy to direct the IESO on certain matters to reflect government policy. In particular, Section 25.32 of the *Electricity Act, 1998*, S.O. 1998, c. 15., Sched. A provides that the Minister of Energy may, with the approval of the Lieutenant Governor in Council, issue directives that require the IESO to undertake any initiative or activity that relates to (a) electricity supply, capacity or storage, (b) changes in electricity demand, (c) measures related to the conservation of electricity or the management of electricity demand, or (d) transmission systems or any part of such systems, including the development of all or part of such systems. The IESO must comply with these directives.

17. The Minister of Energy has issued many such directives to the IESO over the last decade. These directives have related to a broad range of issues, including a direction that the IESO enter

⁵ *Electricity Act*, 1998, S.O. 1998, c. 15, s. 6.

⁶ *Electricity Act*, 1998, S.O. 1998, c. 15, s. 25.33(2).

⁷ **C-2440**, Government of Ontario- Agencies and current appointees: IESO (February 2022).

⁸ **C-1980**, World Trade Organization (WTO), Reports of the Panels: Canada – Certain Measures Affecting the Renewable Energy Sector, Canada – Measures Relating to the Feed-in-Tariff Program (December 19, 2012), para. 7.37; **C-1986** World Trade Organization (WTO), Reports of the Appellate Body – Canada – Certain Measures Affecting the Renewable Energy Generation Sector – Canada – Measures Relating to the Fee-in Tariff Program (May 6, 2013), paras. 4.6, 4.9.

into negotiations with specific parties regarding power purchase agreements and extend the milestone date for commercial operation (“MCO”) of certain FIT contracts. For example, the Minister of Energy directed the OPA/IESO to:

- a) establish the FIT Program;⁹
- b) enter into negotiations with TransCanada for a contract for a gas-fired power plant to be located at the Lennox Generating Station;¹⁰
- c) 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;¹¹
- d) offer a four-year extension to the MCO for existing Large FIT Contracts for Aboriginal Participation Projects where the generating facilities are located entirely on reserve lands;¹²
- e) offer a three-year extension to the MCO for existing FIT contracts for waterpower projects;¹³
- f) extend timelines for completion of certain projects under the now terminated Conservation First Framework (an electricity conservation and demand management procurement initiative);¹⁴
- g) enter into contract negotiations with ITC Investment Holdings Inc. on its Lake Erie Connector project which would establish a new 1000 MW underwater transmission intertie between Ontario and Pennsylvania;¹⁵

⁹ **C-0141**, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009).

¹⁰ **C-0632**, Letter from Bentley, Chris (MEI) to Andersen, Colin (OPA) (December 13, 2012).

¹¹ **C-0693**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (May 1, 2014).

¹² **C-2471**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 12, 2013), Exhibit 8 to the Affidavit of David Mars (June 2, 2017).

¹³ **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); Website (OPA), June 26, 2013: New Hydroelectric Project Direction Extends FIT Contract for Waterpower Projects (June 26, 2013).

¹⁴ **C-2373**, Order in Council and Directive of the Minister of Energy, Northern Development and Mines to the IESO (June 10, 2021).

- h) 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;¹⁶
- i) 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;¹⁷ and
- j) wind down certain FIT and Large Renewable Procurement Contracts.¹⁸

18. While the Minister of Energy's powers to control the IESO by way of formal directives pursuant to the *Electricity Act* are broad, and can include directives to negotiate or amend FIT contracts and other power purchase agreements, [REDACTED]

19. The IESO is the agency of the Ministry of Energy that enters into contracts and manages contractual relationships with energy providers. [REDACTED]

[REDACTED] Many of these contractual relationships and underlying energy projects involve policy or political issues that affect the Government of Ontario, and the Ministry acting on behalf of the Province has previously directed IESO to take actions in relation to these contractual relationships based on those policy or political considerations. For example (as described in more detail below), the Government of Ontario has sought to terminate certain projects due to electoral and other political issues. [REDACTED]

¹⁵ C-2368, MC-994-2021-352 Letter from Greg Rickford (MEI) to Terry Young (IESO) re next phase of ENDM project assessment framework and contract negotiations with Proponent (May 13, 2021).

¹⁶ C-2349, MC-994-2021-146 Letter from Greg Rickford (MEI) to Terry Young (IESO) re Oneida Battery Park Project (February 22, 2021).

¹⁷ C-2349, MC-994-2021-146 Letter from Greg Rickford (MEI) to Terry Young (IESO) re Oneida Battery Park Project (February 22, 2021).

¹⁸ 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).

[Redacted]

20. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] All of these examples are based on materials in the public domain.

25. **TransCanada.** On August 18, 2008, the Minister of Energy issued a formal directive and directed the OPA to competitively procure a combined-cycle gas-fired electricity plant with rated capacity of approximately 900 MW to be located in the Southwest Greater Toronto Area. In October 2009, the OPA announced that, as a result of its competitive procurement process, it had finalized a contract with the successful proponent, TransCanada Energy Ltd. (“TCE”).¹⁹

26. The OPA awarded a contract to TCE to build a combined-cycle gas-generation facility in Oakville and to begin commercial operations by February 8, 2014, for a period of 20 years. The contract between the OPA and TCE was executed on October 9, 2009. However, opposition from the Town of Oakville prevented TCE from obtaining necessary permits and approvals to begin construction. As a result, TCE declared *force majeure* under the contract.²⁰

27. On October 7, 2010, the Government of Ontario announced the decision to cancel the project and terminate TCE’s agreement with the OPA.²¹ This decision was made for political reasons. According to Kathleen Wynne, who later became the Premier of Ontario, the siting of the plant failed to take into account the views of the community.²²

28. TCE’s contract contained a provision that would have allowed the OPA to terminate the agreement if there were *force majeure* events that caused the plant’s commercial operation date of February 8, 2014 to be delayed by more than 24 months. Given Oakville’s strong opposition to the plant and the delays experienced, it would have been possible for the OPA to wait out this 24-month period and later terminate the agreement with no penalty and at no cost.²³

29. However, that is not the route the Government of Ontario chose. Instead, the Premier’s Office gave TCE assurances that if the Government cancelled the project, TCE “would be kept whole” (that is, the profit stream it was anticipating from the Oakville plant would be preserved).

¹⁹ C-0632, Letter from Bentley, Chris (MEI) to Andersen, Colin (OPA) (December 13, 2012).

²⁰ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), pp. 5, 9.

²¹ C-1960, Press Release (MOE) entitled “Oakville Power Plant Not Moving Forward” (October 7, 2010).

²² C-0652, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 30, 2013), ¶ JP-368.

²³ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 9.

That assurance was made on October 5, 2010. Two days later, the cancellation was announced.²⁴ That same day, October 7, 2010, the OPA sent TCE a letter providing its acknowledgment that TCE was “entitled to [its] reasonable damages from the OPA, including the anticipated financial value of the Contract.” That letter invited TCE to begin negotiations to reach a mutual agreement on the termination.²⁵

30. Ultimately, a resolution between the OPA and TCE was reached. On September 24, 2012, the Minister of Energy announced that the OPA had reached an agreement in principle with TCE. TCE would build and operate a new 900-MW gas-fired generation facility on the site of OPG’s Lennox Generating Station in Napanee.²⁶ This agreement in principle was set out in a memorandum of understanding between the Government of Ontario, TCE and the OPA.

31. Afterwards, on December 13, 2012, the Minister of Energy issued a formal directive directing the OPA to assume responsibility for the Crown, including the Ministry of Energy, for this initiative and to enter into negotiations for a contract with TCE at the Lennox Generating Station on terms consistent with the MOU dated September 24, 2012.²⁷

32. This example illustrates the strong level of control the MEI exercises over the OPA/IESO, for several reasons.

33. First, no formal ministerial direction was ever given to the OPA to repudiate or terminate this contract, or to negotiate with TCE a resolution that would ensure it was “kept whole.” The OPA did not have to comply and could have instead relied upon its contractual rights. In particular, as set out above, the OPA could have waited to terminate the contract without penalty after more than 24 months of delay due to *force majeure*. Additionally, the OPA could have invoked a clause in the contract that made it liable for reimbursing TCE for lost profits only in the event of a “discriminatory action,” and argued that the cancellation of the plant would not

²⁴ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 9.

²⁵ 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).

²⁶ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 17.

²⁷ C-0632, Letter from Bentley, Chris (MEI) to Andersen, Colin (OPA) (December 13, 2012).

have met the contract's narrow definition of such an action. In early 2010, the OPA obtained a legal opinion confirming that the cancellation would not meet this definition.²⁸

34. The OPA, however, did not insist on enforcing its strict contractual rights. Instead, it negotiated a resolution with TCE to implement the Government of Ontario's promise to make it "whole." It did so even though the Government of Ontario was not a counterparty to this contract and the OPA was not involved in any decision to make such a promise to TCE. In fact, the OPA informed the Auditor General of Ontario that it had not been consulted in the Ontario Government's promise to keep TCE whole and that had it been so consulted it would have advised the Government against making this commitment "because the OPA's contract with TCE had provisions protecting the OPA from such a liability" (*i.e.*, the two provisions noted above).²⁹

35. [REDACTED]

36. This was explained by JoAnne Butler, Vice President, Electricity Resources at the OPA, in her testimony before the Standing Committee on Justice and Policy of the Ontario Legislature during an investigation into the decision to cancel the gas plant. Ms. Butler stated that she wasn't "quite sure" what keeping TCE whole meant "because we weren't involved in the commitments, in the meetings that commitments were made to TransCanada. Our assumption was that they wanted the financial value of their contract." She agreed that this commitment put the OPA "in a very difficult bargaining position" but "it was our responsibility then to parlay that into another commercially reasonable deal."³⁰

²⁸ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 9.

²⁹ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 15.

³⁰ C-0645, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (March 19, 2013), p. JP-80.

37. Second, the Government of Ontario not only asked and expected the OPA to implement its promise to TCE, but it then instructed the OPA on how to conduct those negotiations. In my testimony before the Standing Committee, I explained that TCE was upset with a counterproposal made by the OPA during our negotiations as it didn't think there was enough financial value. TCE complained to the Government and the Government then "instruct[ed]" the OPA to submit a higher proposal. I testified that we at the OPA "were quite surprised" by this because we thought our original counterproposal was "fair value."³¹ I also testified that had it not been for this direction from the Government, the OPA would not have gone forward with a revised second counterproposal.³²

38. The Government of Ontario also dictated the timeline for the negotiations. [REDACTED]

[REDACTED]³³

39. Third, the OPA did not agree with the new location for TCE's plant in Napanee. The OPA informed the Auditor General of Ontario that "the Minister of Energy told the OPA to locate the new plant in Napanee. The OPA did not think that Napanee was the optimal location because it would result in higher costs to deliver gas from the Sarnia area to Napanee and to transmit the electricity to the Southwest GTA, where the power is needed."³⁴

40. [REDACTED]

41. **Greenfield South (Mississauga) Gas Plant Relocation.** In April 2005, Eastern Power Ltd. was awarded a contract with the OPA for a proposed 280-MW combined-cycle gas-fired

³¹ C-0654, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-449. See also OPA Board of Directors' Presentation dated May 18, 2011

³² C-0654, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), p. JP-449

³³ C-1962, Presentation (OPA), "M501GAC Fast Start – Gas Turbine Conversion" (December 31, 2010), p. 7.

³⁴ C-0671, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 17.

facility, the Greenfield South Power Plant, to be located in Mississauga and operated over a 20-year period. This was known as the Greenfield South contract.³⁵

42. On September 24, 2011, the Government of Ontario announced as an election campaign promise that the Greenfield plant in Mississauga would not go forward in its current location and that the Government would work with the developer to find a new location for the plant.³⁶ On October 24, 2011, the Minister of Energy requested that the OPA immediately start discussions with Greenfield.³⁷

43. [REDACTED]

[REDACTED]³⁸

44. 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”:³⁹

Mr. Victor Fedeli: MR. Hinds, we are now going to switch from Oakville entirely to Mississauga here, where, in this particular case, there was an intention to relocate.

On document 7 – although you don’t really need to follow it, I’ll just read a couple points from it – it talks about how the OPA received a letter from the Ministry of Energy talking about the government’s intention to relocate the plant.

³⁵ C-1985, Special Report (Office of the Auditor General of Ontario) entitled “Mississauga Power Plant Cancellation Costs” (April 2013), pp. 5-6.

³⁶ C-1985, Special Report (Office of the Auditor General of Ontario) entitled “Mississauga Power Plant Cancellation Costs” (April 2013), p. 13.

³⁷ C-1985, Special Report (Office of the Auditor General of Ontario) entitled “Mississauga Power Plant Cancellation Costs” (April 2013), p. 13.

³⁸ C-1972, Letter from Colin Andersen (OPA) to Greg Vogt (Greenfield South Power Corp.) (November 14, 2011).

³⁹ C-0655, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee of Justice Policy (June 4, 2013), pp. JP-581-JP-582.

Then it goes on to say: “The letter is not a directive under the Electricity Act, 1998 and as such, while it is a statement of the government’s intention to relocate the plant, it is not legally binding.”

I know Mr. Tabuns started to talk to you about this, but I want to spend a bit of time on this. Why did you do it then? Why did you go ahead and cancel and relocate the plant when you had no legal obligation to do such a thing?

Mr. Jim Hinds: Well, I think the OPA generally implements the policy of the government of the day in respect of electricity, so I think our bias is to try to be helpful in doing that.⁴⁰

45. Like TCE, the OPA negotiated a resolution with Greenfield South with respect to its power purchase agreement because it was asked to do so by the Government.

46. On July 9, 2012, the OPA and Greenfield South reached a final agreement. The OPA and Greenfield South agreed, among other things, to relocate the plant and the OPA agreed to reimburse Greenfield for all design, development, permitting and construction costs incurred to date.⁴¹

47. The next day, the Minister of Energy announced that the Greenfield South Generation Station would be relocated to OPG’s Lambton Generation Station site.⁴²

48. **2011 One-Year Extension to FIT Contracts.** On February 9, 2011, the OPA announced that it would offer to amend the contracts of all FIT counterparties who had not yet reached commercial operation so that these developers could extend their MCOD by up to one year. According to the OPA, this extension was offered in response to feedback from developers that they needed more time to prepare the material for its required regulatory approvals.⁴³

49. [REDACTED]

⁴⁰ C-0655, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee of Justice Policy (June 4, 2013), pp. JP-581-JP-582.

⁴¹ C-1985, Special Report (Office of the Auditor General of Ontario) entitled “Mississauga Power Plant Cancellation Costs” (April 2013), p. 14.

⁴² C-1985, Special Report (Office of the Auditor General of Ontario) entitled “Mississauga Power Plant Cancellation Costs” (April 2013), p. 14.

⁴³ C-0475, FAQs on FIT COD Extension (February 9, 2011).

50. At this time, the Ministry of Environment was backlogged with applications for Renewable Energy Approvals associated with FIT contracts. This resulted in considerable delays to projects, which often halted development activity. Section 10.3(j) of the FIT contracts provided for *force majeure* relief if a developer was unable to secure a necessary permit or approval, provided that the reasons were beyond its control. The Ministry of Energy became concerned about making case-by-case *force majeure* relief determinations and requested that the OPA grant a “blanket” one-year extension for all FIT contracts.

51. Although the Ministry of Environment did not issue a directive to the OPA on this issue, it did memorialize its request in a letter from the Deputy Minister to the OPA CEO on January 28, 2011.⁴⁴ In that letter, the Deputy Minister wrote that:

I understand that while there has been a very positive response to the Feed-in Tariff (FIT) Program, a number of applicants have experienced project delays that could jeopardize their ability to bring their projects on line in the time specified in their FIT Contract [...].

As a result, I request that, in place of a case-by-case approach to granting *force majeure* relief (whether pursuant to these contracts or otherwise) in relation to these delays, the [OPA] offer to extend the Milestone Date for Commercial Operation as provided for in existing FIT Contracts [...] by a period of up to 365 days for interested applicants.⁴⁵

52. Following this request, the OPA announced its decision to offer such an extension. On its website, it notes that in response to these delays, “the government is asking the OPA to offer extensions to developers to help them successful bring their projects into operation.”⁴⁶

53. **Domestic Content Comfort Letters for Lenders.** The FIT program consisted of five rounds of contract offers made over the years 2009 to 2017, inclusive. The first two rounds of FIT contracts had certain domestic content requirements for generation facilities constructed under those contracts. In other words, the FIT contracts required a certain percentage of the services performed and goods supplied to originate from Ontario.

⁴⁴ C-1966, Letter from David Lindsay (MEI) to Colin Andersen (OPA) re Extension for FIT and microFIT Contracts (January 28, 2011).

⁴⁵ C-1966, Letter from David Lindsay (MEI) to Colin Andersen (OPA) re Extension for FIT and microFIT Contracts (January 28, 2011).

⁴⁶ C-1967, Printout from OPA website entitled “One-year extension of Milestone Date for Commercial Operation available for FIT contract holders” (February 9, 2011).

54. The determination as to whether these projects complied with the domestic content covenant was made after commercial operation was declared, when a developer would submit a Domestic Content Report to the OPA. This process concerned lenders because the determination would only be made after construction was completed.

55. The Ministry of Energy was concerned that this uncertainty might frustrate the policy objectives of the FIT program because it imposed a barrier to financing FIT program projects. The Ministry therefore asked the OPA to come up with a process to reduce the uncertainty for lenders. As a result, in March 2010, the OPA announced that it would review and provide comments on a project's domestic content plan before the "Notice to Proceed" date, a change that would allow developers to get OPA's feedback prior to entering into supply agreements. The OPA agreed to provide developers with a non-binding reliance letter confirming that a project would meet the applicable domestic-content obligations under the FIT program.⁴⁷

C. The Ministry of Energy Could have Directed the IESO With Respect to WWIS' FIT Contract

56. Based on my experience at the IESO and the history of control (whether formal [REDACTED]) that the Ministry of Energy exerts over it, it is my belief that if the Ministry of Energy directed the IESO to amend WWIS' FIT Contract to insulate it from the effects of the moratorium and/or not to terminate the FIT Contract, the IESO would have complied.

57. *Directive to Amend the FIT Contract.* The IESO is the contractual counterparty to the FIT Contract, and so necessarily was the party engaged in discussions with WWIS. But, as I have explained above, [REDACTED]

[REDACTED]

[REDACTED]

58. [REDACTED]

[REDACTED] For example, a formal directive could have been issued directing the IESO to extend the milestone commercial operation date for all offshore wind projects with a FIT contract during the duration of the moratorium. This would have been a directive applicable to an entire class of FIT contracts (*i.e.*, all offshore wind projects), although the reality of the situation is that

⁴⁷ C-1953, Article (Stikeman Elliott) "OPA issues hundreds of FIT Contracts" (April 27, 2010).

Windstream was the only supplier in that class (as it was the only offshore wind developer with a FIT contract) and so the directive would have only applied to Windstream. The IESO would have been required to comply with any such directive.

59. The Ministry of Energy has previously issued formal directives relating to a class of contracts that in practice impact only one Project. For example, the Minister of Energy issued a formal directive requiring the IESO to offer a four-year extension to the MCOB for existing Large FIT Contracts for Aboriginal Participation Projects where the generating facilities are located entirely on reserve lands.⁴⁸ [REDACTED]

60. [REDACTED]

61. ***Directive Not to Terminate the FIT Contract.*** It is similarly my belief that if the Ministry of Energy directed or instructed the IESO to not terminate Windstream's FIT Contract, the IESO would have complied. [REDACTED]

62. Again, TCE is a clear example of this. The Government of Ontario asked the OPA to terminate TCE's contract and then negotiate a resolution to make it whole. Based on what the OPA told the Auditor General of Ontario, the OPA did not agree and would not have terminated the contract. Rather, the OPA would have instead relied upon its strict contractual rights,

⁴⁸ 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).

including by waiting for the 24-month *force majeure* period to pass after the MCOB and then terminating without penalty. However, it complied with the instructions of the Government.

63. While this was an example of an instruction *to terminate* a contract and then negotiate a resolution, I believe that it is equally applicable to the question here regarding an instruction *not to terminate* a contract. The principle is the same: the IESO will comply with the instructions from the Government of Ontario, whether issued through a formal directive [REDACTED]

Signed February 16, 2022 in Oakville, Ontario

A handwritten signature in black ink, appearing to read "Michael Killeavy", written in a cursive style. The signature is contained within a rectangular box.

Michael Killeavy

TAB 6

**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

SECOND WITNESS STATEMENT OF GEORGE SMITHERMAN

1. I was a Member of Provincial Parliament (“MPP”) for the Province of Ontario from June 3, 1999 to January 3, 2010. During my time as MPP, I served as Minister of Health and Long-Term Care from October 23, 2003 to June 20, 2008, Deputy Premier from September 22, 2006 to November 9, 2009, and Minister of Energy and Infrastructure from June 20, 2008 to November 9, 2009.
2. The facts and matters to which I testify in this witness statement 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 true.
3. I previously provided a witness statement, dated June 18, 2015, in relation to Windstream’s earlier NAFTA proceeding against the Government of Canada. In that witness statement, among other things, I addressed the Government of Canada’s position that the Ontario Power Authority (the “OPA”) (now, the Independent Electricity System Operator or the “IESO”) is independent from the Ontario Government. At paragraphs 66-72 of my witness statement, I

explained why this was not consistent with my experience as the Minister of Energy, *i.e.*, the Minister responsible for the OPA. In so doing, I explained how, as Minister, I exercised substantial control over the OPA through my statutory directive powers under the *Electricity Act, 1998*.

4. [REDACTED]

A. The Ministry of Energy and the OPA/IESO's Integrated Relationship

5. The OPA was created in 2004 as an agency of the Government of Ontario, specifically of the Ministry of Energy, and is responsible for managing Ontario's electricity supply and resources in order to meet its medium- and long-term needs.¹ In 2015, the OPA merged with the IESO to form one organization.

6. As set out in more detail below, in my experience, in order for the IESO and the Ministry of Energy to fulfill their respective responsibilities, there must be extensive communication and coordination between the Ministry and the IESO. Ultimately, the Ministry of Energy is responsible and accountable for the IESO's performance. It is therefore heavily involved in the IESO's affairs. This results in constant communication and coordination between the Minister of Energy and the senior management at the IESO. It is a close, integrated relationship.

7. [REDACTED]

8. At the end of the day, the IESO is administering the policies of the current Government, as an agency of the Ministry of Energy, and the Ministry of Energy is responsible for its performance. This heavily influences the dynamics of the relationship between the IESO and the

¹ **C-1980**, World Trade Organization (WTO), Reports of the Panels: Canada – Certain Measures Affecting the Renewable Energy Sector, Canada – Measures Relating to the Feed-in-Tariff Program (December 19, 2012), para. 7.37.

Ministry. The influence exerted by the Minister of Energy, through this integrative and communicative relationship, is further explained below in my witness statement.

9. First, the IESO is an extension of the Ministry of Energy and a mechanism through which the Ministry achieves its policy and political objectives. The IESO and the Ministry of Energy must work together, in an integrated manner, in order to fulfill their responsibilities. The Minister of Energy is ultimately responsible to the Ontario Government for the IESO's performance. This is established by a number of authorities, including:

- 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.²
- b) Pursuant to the *Electricity Act, 1998*, the IESO is a publicly funded entity whose business plans must be approved by the Minister of Energy.³
- c) There is also a Memorandum of Understanding signed by the Minister of Energy and the IESO's Chair (the "MOU"), which sets out the accountabilities, relationships, roles and responsibilities between the Ministry of Energy and the IESO. Pursuant to the MOU, the Minister is accountable to:⁴
 - 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.
- d) Pursuant to the MOU, the Chair of the IESO, on behalf of the Board of Directors, is accountable to the Minister of Energy for the supervision and governance of the

² *Electricity Act, 1998*, S.O. 1998, c. 15, s. 24(1).

³ *Electricity Act, 1998*, S.O. 1998, c. 15, s. 24(1).

⁴ **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.

IESO, among other things. The Chair is also accountable to the Minister for ensuring timely communications with the Minister regarding any issues that affect, or could reasonably be expected to affect, the Minister's responsibilities for the IESO or the operations of the IESO.⁵

10. Second, in order for the IESO and Minister of Energy to be able to fulfill these responsibilities, it is essential that the two entities coordinate. This requires integration and open and constant dialogue. In order to approve the IESO's business plans, ensure that the IESO is fulfilling its mandate, and set its own policy objectives, the Minister of Energy must work closely with the Chair and management of the IESO. The Ministry of Energy does not make important decisions impacting the IESO without the IESO's input, nor does the IESO make important decisions without the input of the Ministry of Energy. Those decisions are made on a collaborative basis through this ongoing dialogue.

11. This is not only a logical corollary of the IESO and Minister of Energy's responsibilities (summarized above) – it was an integral aspect of my personal experience as Minister of Energy. In my role as Minister of Energy, I was on the phone with the Chair of the OPA constantly; at least a few times a week. In my experience, the degree of communication and collaboration between the Ministry of Energy and the OPA was unparalleled to other Ministries and agencies. For example, when I was Minister of Health, I did not speak to the chairs of hospitals to nearly the same degree. Ultimately, however, the Minister of Energy is responsible for the performance of the IESO and that political accountability leads to a significant involvement [REDACTED] [REDACTED] – the IESO's affairs.

12. The following are some specific illustrative examples where I had ongoing dialogue and coordination with the OPA prior to making and implementing policy and political decisions that impacted its responsibilities:

- a) *The establishment of the Feed-in-Tariff program.* In establishing the FIT program, my team and I worked closely with the OPA before any formal Ministerial directive was ever issued. The formal statutory directive to implement

⁵ C-1937, Directives of the OPA from the Minister of Energy (March 1, 2005 -August 26, 2010).

the FIT program was issued on September 24, 2009, which required the OPA to develop a program that began offering contracts on October 1, 2009.⁶ The directive itself was not the start of the conversation between myself, as Minister of Energy, and the OPA. Rather, there was extensive collaboration that led up to that directive.

The OPA did not require a formal directive in order to begin advancing this policy initiative of the Ministry of Energy. It began to take steps to organize a program that required an expenditure of millions of dollars and was going to have significant public engagement and interest based on my ongoing communications with the OPA and without any formal directive to do so.

- b) ***Atikokan Coal Plant.*** The Atikokan Generating Station, owned by the Ontario Power Generation (“OPG”), began as a coal-fired generating station and opened in 1985. The plant was the most important employer and taxpayer in Atikokan, a small town located in Northern Ontario. In 2003, the Government of Ontario had committed to closing Ontario’s coal-fired power plants. Because of the importance of this plant to the local community, I decided that it should not just be shut down and should instead be transitioned to a biomass electricity generator. Ultimately, in August 2010, the OPA was formally directed by the Minister of Energy to negotiate a long-term energy supply contract to convert the Atikokan Generating Station from coal to biomass.⁷ However, the OPA was involved in discussions and dialogue regarding this important political decision from the beginning. This decision, and the subsequent formal direction, was not made in the absence of input from the OPA.
- c) ***York/Durham Incinerator.*** In the spring of 2009, York and Durham regions began an initiative to build a garbage incinerator in Ontario to burn garbage from the Durham and York regions in Ontario. This was a complicated and highly political decision. The decision to offer a contract and ultimately spend a

⁶ C-0141, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009).

⁷ C-1937, Directives of the OPA from the Minister of Energy (March 1, 2005-August 26, 2010).

significant amount of time and money to build a plant for a new form of energy generated strong public opinion. In December 2008, as Minister of Energy, I directed the OPA to purchase electricity from the proposed incinerator for 8 cents per kilowatt-hour.⁸ Again, this decision and the ensuing directive were not made by the Ministry without significant coordination with, and instructions to, the OPA. In making the decision to build this incinerator and in determining the appropriate price for the electricity, I was in constant dialogue and communication with the OPA prior to ever issuing any formal directive.

B. The Minister of Energy's Influence and Control Over the OPA

13. As Minister of Energy, I did not just maintain constant communication with the IESO and receive updates on its ongoing business plans and performance. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14. [REDACTED]

[REDACTED]

[REDACTED]

- a) *Bruce Power*. While I was Minister of Energy, one of the biggest challenges we experienced in the Ontario electricity system was having too much energy capacity. This could mean a surplus of power on a given day, during a given season, or more regularly. Because of this surplus of power, Bruce Power was asked to dial back on the amount of power it was producing at its nuclear generating station. Bruce Power came to me seeking my support for compensation for the power that it could produce but was being asked not to produce. While I understood that the oversupply situation was a challenge for the Ministry, [REDACTED]

[REDACTED]

[REDACTED]

⁸ C-1937, Directives of the OPA from the Minister of Energy (March 1, 2005 -August 26, 2010).

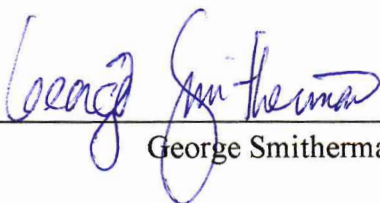
[REDACTED]

- b) *Algoma District.* Algoma District in Northern Ontario is the site of a series of privately-owned hydroelectric facilities. While I was Minister of Energy, I agreed with the operator of the facilities that having a stable and predictable framework for pricing was a favourable outcome and there should be a fixed-price contract for the renewable energy supply from these facilities. [REDACTED]

[REDACTED]

[REDACTED] That negotiation was successfully completed by the OPA.

Signed February 16, 2022 in Toronto, Ontario


George Smitherman

⁹ C-1957, CTV News Article entitled "Bruce Power got millions to not produce electricity" (September 21, 2010); C-1958, CTV News Article entitled "Gov't defends Bruce Power deal as 'flexible'" (September 22, 2010).

TAB 7

**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

SECOND WITNESS STATEMENT OF CHRIS BENEDETTI

1. I am a Managing Partner at Sussex Strategy Group, a leading Canadian public affairs consulting firm. I regularly advise clients on government relations, particularly in such areas as energy, environment, and infrastructure. I was previously retained by Windstream LLC to assist with its offshore wind energy project and FIT Contract (the “Project”).
2. I provided a witness statement (dated August 18, 2014) in connection with Windstream’s earlier NAFTA proceeding against the Government of Canada. My background, expertise, and involvement in Windstream’s offshore wind project is set out in more detail in that witness statement.
3. 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.

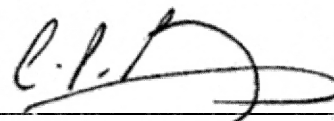
My Attempts on Behalf of Windstream to Communicate with MEI

4. Beginning in the fall of 2016, I communicated with the Ministry of Energy (“MEI”) to attempt to arrange a meeting with Windstream to facilitate discussions aimed at advancing the Project. However, MEI was not willing to engage in any discussions with Windstream.

5. The following is a summary of those attempts:

- a) On October 6, 2016, I spoke with Andrew Teliszewsky, MEI’s Chief of Staff and advised him that Windstream wanted to meet with MEI officials. He stated that any discussions with Windstream should take place between the parties’ legal counsel.
- b) On October 13, 2016, I met with the Minister of Energy, Glenn Thibeault, and again conveyed Windstream’s desire to meet with him and other MEI officials. Mr. Thibeault advised me that he was not willing to talk to Windstream at that point.
- c) On October 16, 2016, I spoke again with Mr. Teliszewsky and advised him that Windstream was still interested in meeting with MEI. He informed me that MEI’s lawyers were still digesting the implications of the Windstream NAFTA tribunal’s decision.
- d) On November 9, 2016, I met with Mr. Teliszewsky and again raised the subject of meeting with Windstream. Mr. Teliszewsky informed me that MEI had been advised by their counsel not to engage with Windstream.

Signed September 13, 2021 in Toronto, Ontario



Chris Benedetti