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IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 2010 UNCITRAL ARBITRATION RULES

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

REPLY MEMORIAL OF THE CLAIMANT, WINDSTREAM ENERGY LLC

June 22, 2015

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PART ONE. INTRODUCTION

A. Overview

1. This case is about an abrupt decision by the Ontario Government to impose an indefinite-term moratorium on the Claimant Windstream Energy LLC's offshore wind project. This decision was contrary to the Government's public support for renewable energy development, including offshore wind development, and assurances given to Windstream. It has destroyed the value of Windstream's investments in Ontario. This case is also about the failure of the Ontario Government to fulfill its express promise to Windstream to "freeze" the FIT Contract[1] so that the Project could "continue" after the moratorium.

2. In 2008 and 2009, the Ontario Government heavily solicited investment in offshore wind energy facilities in an unprecedented push to promote renewable energy generation and to stimulate the economy during the worst recession the Province had experienced in recent history. The Government declared itself "open for business" for offshore wind development. It repeatedly committed to providing "certainty" for investors in renewable energy projects, including offshore wind projects. The Government represented that it wanted to "turbocharge" investment in renewable energy projects.

3. In reliance on these representations, Windstream invested millions of dollars developing the Project. Through its enterprise, Windstream Wolfe Island Shoals Inc. ("**WWIS**"), it entered into a binding power purchase agreement – the FIT Contract – with the Ontario Power Authority ("**OPA**"), under which it was required to bring the Project into commercial operation by May 2015. WWIS' obligations under the FIT Contract are secured by a $6 million letter of credit.

4. By late 2010, the Ontario Government's priorities had changed. The economy had improved. Its efforts to attract investment in renewable energy projects had been more fruitful than anticipated. The Government was facing criticism over the cost of renewable energy power. In that context, the Government decided it no longer wanted the more expensive power generated from offshore wind facilities. For many months in late 2010 and early 2011, high-level political staff considered various ways to constrain offshore wind development. This culminated

[1] Capitalized terms not otherwise defined in this Reply Memorial bear the meanings assigned to them in Windstream's Memorial.

in a January 2011 direction from the Chief of Staff to former Premier Dalton McGuinty to establish a policy that would "kill all projects except the Kingston one" – Windstream's Project.[2] In response to that direction, the Ontario Government adopted an indefinite-term moratorium on offshore wind development.

5. The Government did not want to "kill" Windstream's Project because of WWIS' FIT Contract. In the words of the Secretary of Cabinet and Head of the Public Service, it would have been "embarrassing" for the Government not to honour WWIS' FIT Contract.[3] The Government therefore decided to apply the moratorium to the Project, but to keep WWIS "whole" and its FIT Contract "extended," "maintained" and "on hold" so that the Project would be "suspended" but could "continue" to be developed after the moratorium was lifted. There is no dispute among the parties that the Government promised to Windstream that the FIT Contract would be "frozen" and that the Project could continue after the moratorium was lifted.

6. The problem is that the Government did not fulfill this promise. Windstream's investments in WWIS, the FIT Contract and the Project are now worthless as a result. The Project no longer has any hope of being built within the timelines set out in the FIT Contract. The moratorium has made it impossible for WWIS to pursue development of the Project. Contrary to the Government's promise that the FIT Contract would be "frozen," the OPA has refused to remove a clause that allows it to terminate the FIT Contract on May 4, 2017, when the Project will inevitably have failed to achieve commercial operation by that date. In fact, the OPA has reserved that right, while retaining WWIS' $6 million in security. Under these conditions, the Project is no longer financeable[4] and therefore could not continue even if the moratorium were lifted. The FIT Contract – WWIS' most valuable asset – is now worthless.

[2] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) (January 11, 2011).

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

[4] And was no longer financeable as of May 2012.

B. The Themes in Canada's Counter-Memorial are not Supported by the Evidence

7. Canada's submission in this case focuses on six themes. Many of these themes – as described in Windstream's legal argument below – are not relevant to an assessment of whether Canada's actions have breached NAFTA. None of these themes are supported by the evidence.

8. Canada's first theme is that Windstream's investment in offshore wind development in Ontario was "highly speculative" and that Ontario was "not ready" to receive investment in an offshore wind project in 2010. This position is not supported by the facts. If Ontario was not ready to receive investment in an offshore wind project, it would not have solicited investment in offshore wind projects through the FIT Program. The FIT Program was developed by the OPA in 2009 at the direction of, and working "hand-in-hand" with, the Ministry of Energy. Under the FIT Program, the OPA explicitly solicited proposals from proponents to sell electricity generated by offshore wind projects. It entered into a FIT Contract with WWIS to purchase electricity generated by the Project.

9. Moreover, offshore wind as a renewable energy technology was not introduced into the FIT Program in a vacuum. The Government had, since 2008, been representing to investors that it was "open for business" for offshore wind development. At that time, it lifted a deferral it had placed on offshore wind development in 2006 after it concluded that the existing environmental assessment process was sufficient to address the environmental aspects of offshore wind projects.

10. In response to Canada's arguments that Ontario was "not ready" for offshore wind development when Windstream invested in the Project and caused WWIS to enter into the FIT Contract, Windstream has submitted a witness statement from George Smitherman with this Reply Memorial. Mr. Smitherman was the Minister of Energy and Infrastructure at the time the *Green Energy and Green Economy Act, 2009* (the "***Green Energy Act***")[5] and the FIT Program were developed and introduced. As Mr. Smitherman explains, there was high-level support in the

[5] For clarity, Windstream has maintained here the abbreviation it used in its Memorial. Canada used a different abbreviation in its Counter-Memorial: "GEGEA": see ¶ 7.

Ontario Government for the inclusion of offshore wind projects in the FIT Program. Through the *Green Energy Act* and the FIT Program, Ontario sought to create investor certainty and solicit investment in renewable energy projects, including offshore wind projects, to stimulate economic activity during the most severe recession Ontario had known in recent history. As Minister, Mr. Smitherman represented to investors that the Ontario Government would provide that certainty and intended for investors to rely on those representations, as Windstream did.

11. The second of Canada's themes is that the Ontario Government communicated to potential investors in offshore wind projects that there was a high degree of regulatory uncertainty for offshore wind projects in the Province in 2010. Canada's position appears to be that Windstream ought to have known about this uncertainty and, therefore, ought to have known that the Project risked being thwarted by a moratorium. Canada characterizes Windstream's decision to invest in the Project and the FIT Contract in these circumstances as a "high-risk gamble."

12. To the contrary, there was a regulatory process in place that applied to offshore wind projects at the time WWIS applied for, and entered into, the FIT Contract. That regulatory process was set out in the REA Regulation. The REA Regulation specified the requirements that each form of renewable energy technology – including offshore wind technology – would be required to meet to obtain environmental approval for a renewable energy project. The REA Regulation specified that offshore wind projects would be required to submit a special report, the Offshore Wind Facility Report. Through that report, proponents of an offshore wind project would be required to identify, on a project-specific basis, all potential negative environmental impacts which would result from the Project, and mitigation measures. Thus, unlike the more prescriptive requirements that applied to other technologies subject to the REA Regulation, such as onshore wind projects, the REA Regulation put the burden on the proponent of an offshore wind project to do the work necessary to identify all potential negative environmental impacts that would result from the project and all corresponding mitigation measures.

13. Like its inclusion in the FIT Program, the inclusion of offshore wind energy in the REA Regulation did not occur in a vacuum. Before the REA Regulation was adopted, the

environmental assessment process under previous legislation applied to offshore wind projects. When Ontario's Minister of Natural Resources lifted the earlier deferral on offshore wind development, she announced that her Ministry had determined that the existing environmental assessment process was sufficient to assess the environmental impacts of offshore wind projects on a site-specific basis.

14. Windstream did not, and could not, have anticipated based on the Ontario Government's public representations that the Project would be subject to an indefinite-term moratorium. Windstream's evidence is that it did not anticipate the moratorium, and indeed that it was "shocked" by it. The commercial reasonableness of Windstream's understanding of the regulatory environment that applied at the time is confirmed by the expert evidence of Sarah Powell, a prominent Ontario environmental lawyer. Canada has put forward no expert evidence to challenge Ms. Powell's evidence. Windstream's evidence, and Ms. Powell's, is supported by proposals submitted to Windstream shortly before the moratorium was announced by a number of pre-eminent Ontario environment consultants who proposed to complete the environmental assessment work for the Project. None of those proposals identified any risk that the Project might not be permitted to proceed through the regulatory approvals process.

15. Instead of independent expert evidence about what proponents of offshore wind projects reasonably understood based on what the Government was actually telling them, Canada relies on the evidence of Ministry of the Environment ("**MOE**") official Marcia Wallace. Dr. Wallace's evidence is replete with inaccuracies regarding the contents of documents in an effort to show that MOE communicated the alleged "underdeveloped regulatory framework" for offshore wind projects to proponents.[6] For example, Dr. Wallace asserts that the posting announcing the REA Regulation indicated that there would be special rules applicable to offshore wind projects (suggesting that the REA Regulation does not in fact set out those rules),[7]

[6] RWS-Wallace, ¶ 19.

[7] RWS-Wallace, ¶ 21; **R-0072**, Ministry of the Environment, "Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Economy Act, 2009" (EBR Registry No. 010-6516) (September 24, 2009).

when in fact the document states that there are special rules that apply to offshore wind projects (the Offshore Wind Facility Report set out in the REA Regulation).[8]

16. Ms. Powell confirms that she did not understand the documents as Dr. Wallace has characterized them, nor would have a reasonable project proponent.[9] Dr. Wallace's evidence is therefore unreliable and should be rejected. In any event, there is nothing in any of the documents on which Dr. Wallace relies that indicates that the Government was contemplating imposing an indefinite-term moratorium on offshore wind projects.

17. The third of Canada's themes is that project proponents with FIT contracts, like Windstream, should have had no expectation that the relevant regulatory agencies would process the required approvals expeditiously or work with FIT contract holders to get their projects built. Canada and its witnesses advance this position by relying on a number of caveats and qualifications in public documents.[10]

18. Windstream does not deny that it was responsible for obtaining all regulatory approvals. However, Minister Smitherman nevertheless promised that the relevant permits would be issued "in a timely way" and within a "six-month service guarantee." Windstream relied on those promises in deciding to enter into the FIT Contract and to be bound by its timelines. Mr. Smitherman explains that the Government intended for developers and financiers to rely on these promises. Canada's submission overlooks the goal of Ontario's push to (a) increase renewable energy generation in the Province, and (b) create investor certainty in order to attract investment to stimulate economic activity. Mr. Smitherman explains that the FIT Program was the key element of this policy.

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[8] **R-0072**, Ministry of the Environment, "Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Economy Act, 2009" (EBR Registry No. 010-6516) (September 24, 2009), p. 2.

[9] CER-Powell-2, ¶¶ 25, 27.

[10] For example, at paragraph 48 of its Counter-Memorial, Canada writes that FIT contract holders "still had to navigate through the regulatory approvals [that were] necessary," and at paragraph 59 of its Counter-Memorial, Canada asserts that recipients of FIT contracts "accept the risks of being unable to meet the milestone date for commercial operation ("**MCOD**") specified in its FIT Contract."

19. Canada's fourth theme is that applying the indefinite-term moratorium to Windstream's Project was and is necessary to protect the environment. This is also inconsistent with the evidence. The Project is already subject to detailed regulatory requirements designed to protect human health and the environment. Under the existing regulatory framework, the Project is required to complete a detailed environmental assessment process.

20. The indefinite-term moratorium effectively prevents Windstream from conducting the research that it is required to conduct under the existing regulatory framework to establish that the Project is environmentally sound. Windstream is thus prevented from obtaining approvals specific to its Project pending the Government conducting general and unspecified research. But there is no evidence that Government-funded research would identify any Project-related environmental impact that Project-specific research funded by Windstream would not. On the contrary, MOE has acknowledged that because of [redacted].[11] Thus, the moratorium prevents Windstream from doing research to show that the Project is environmentally sound, pending Government research which will have limited, if any, application to the Project.

21. Canada has submitted no expert evidence to explain why – and in what respects – the existing regulatory framework is supposedly so deficient as to require years of Government-funded research instead of the proponent-funded research that is contemplated under the existing framework. In contrast, Windstream has submitted substantial expert evidence from one of Ontario's most respected environmental lawyers (Ms. Powell),[12] Ontario's most prominent coastal engineering firm with unparalleled experience with Lake Ontario development (Baird),[13] and one of Ontario's most experienced renewable energy environmental consultants (WSP).[14]

[11] **C-0959**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 28, 2011), p. 2.

[12] CER-Powell; CER-Powell-2.

[13] CER-Baird; CER-Baird-2.

[14] CER-WSP.

Their evidence is that the existing regulatory framework applicable to the Project is robust and sufficient to ensure that the Project would not have immitigable negative environmental impacts.

22. Despite the claim that the moratorium was imposed because the Ontario Government believed further scientific research was required before offshore wind projects could proceed, no research commissioned after the moratorium has been completed. What little research the Government appears to have initiated [redacted] rather than a legitimate desire to eventually lift the moratorium. Indeed, just over one month after Windstream submitted its notice of arbitration, a senior staff member at the Ministry of Energy and Infrastructure ("**MEI**") circulated the following email widely among MEI, MOE and Ministry of Natural Resources ("**MNR**") staff:

[redacted]

23. As noted above and described in detail below, the evidence indicates that the moratorium was motivated by a desire to constrain offshore wind development, largely because of cost considerations, and also because of electoral politics. It was ultimately driven by the direction from the Premier's Chief of Staff to "kill" offshore wind projects.[16] The "scientific uncertainty" rationale for the moratorium appears to be an expedient pretext arrived at only after another policy for constraining offshore wind development was rejected because it would not "kill" all offshore wind projects. The stated rationale for the moratorium allows the Ontario Government to stall offshore wind development indefinitely by citing the need to conduct further research. In

[15] **C-1094**, Email from Block, Jennifer (ENERGY) to Cain, Ken (MNR) (March 6, 2013) [Emphasis added].

[16] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) (January 11, 2011).

the words of MEI staff, the moratorium allows Ontario to "buy time with research" because it considers that it does not "need offshore power."[17]

24. Canada's fifth theme is that the Project is not cancelled, but is merely "frozen," and that Windstream is to blame for the OPA's failure to protect Windstream from the effects of the moratorium. This too is inaccurate. By the time this arbitration is heard, five years will have passed since the moratorium was announced. There is not (nor has there ever been) an end in sight. Windstream's investments in Ontario – the Project, the FIT Contract and WWIS – became worthless in May 2012 when it became impossible for Windstream to bring the Project into commercial operation without triggering the OPA's termination rights under the FIT Contract. The Project is not "frozen" at all. It has been *de facto* cancelled by the severe delays to which the Ontario Government has subjected it.

25. Canada repeatedly asserts in its Counter-Memorial that the OPA offered Windstream the "opportunity to freeze its contract and remain protected from termination" and that it was Windstream that refused.[18] This assertion is not supported by the evidence. Canada omits the critical point that the OPA's best offer was to extend the FIT Contract's timelines for a maximum of five years, whatever the length of the moratorium. The OPA made this offer with the agreement and at the direction of high-level political staff from the Premier's Office and the Minister of Energy's Office. When Windstream pointed out that this was inconsistent with the promises the Government had made and was in any event inadequate given that the Government would not specify an end-date for the moratorium, the OPA failed to respond for many months. When it finally did respond, it was to say that it maintained its earlier position. The OPA later refused to return Windstream's $6 million in security, which it continues to retain. It also explicitly reserved all of its rights under the FIT Contract, including its termination rights.

26. At the time of writing this Reply Memorial, four years and four months have passed since the moratorium was announced. Because of the moratorium, WWIS has been prevented from moving forward with development of the Project. The Project no longer has any hope of

[17] **C-0376**, Handwritten Notes of Dilek Postacioglu (ENE) (November 1, 2010), p. 1.

[18] Canada's Counter-Memorial, ¶ 24.

achieving commercial operation within the timelines in the FIT Contract, which remains un-amended. The Ontario Government has not given any indication of whether the moratorium will ever be lifted at all, let alone when. Canada has not even given any indication of this in its Counter-Memorial. A five-year extension would not have done Windstream any good.

27. Canada's sixth theme is that "but for" the moratorium, the Project would not have been permitted, financed or built on time. Canada's submission is that the Project was "doomed to fail from the moment that the Claimant signed on the dotted line."[19] Yet in reaching that conclusion, it assumes that the Project would have been subject to regulatory delays from the Ontario Government that made it impossible for WWIS to achieve the timelines in the FIT Contract fixed by the Ontario Government. This position raises the spectre of bad faith. The Ontario Government actively solicited investment in offshore wind projects. It established the rules that allowed Windstream to apply for a FIT Contract. It created the timelines for bringing offshore wind projects into commercial operation. Those timelines were created in order to ensure that projects would be built expeditiously to achieve Ontario's renewable energy targets and to create jobs. The Ontario Government committed to processing regulatory approvals in a timely manner so that FIT contract holders could achieve those timelines. Through the OPA, it offered WWIS a FIT Contract and accepted $6 million in security from Windstream. It encouraged Windstream to enter into the FIT Contract by giving comfort that it would receive access to the lakebed for the Project "as quickly as possible." It also encouraged Windstream to enter into the FIT Contract by directing the OPA (over the OPA's protests) to give WWIS an additional year to bring the Project into commercial operation, by confirming that the Project had the support of the Ontario Government, including the Premier's Office, and by directing the OPA (again over the OPA's protests) to extend the deadlines by which Windstream was required to sign back the FIT Contract.

28. If Canada is right and the Ontario Government knew all along that the Project was "doomed to fail from the time the Claimant signed on the dotted line," the Ontario Government behaved in bad faith by encouraging Windstream to enter into the FIT Contract through WWIS,

[19] Canada's Counter-Memorial, ¶ 25.

by allowing the OPA to accept (and then retain) Windstream's $6 million in security and by allowing Windstream to invest in developing a Project that the Government supposedly knew was doomed because of the Government's own intentions to "kill" offshore wind development.

29. In any event, Canada's position is not supported by the evidence. Rather, the detailed and extensive expert evidence submitted by Windstream establishes that, contrary to Canada's position, the Project would more likely than not have been permitted, financed, and built within the timelines set out in the FIT Contract. Provided, that is, that Ontario lived up to its end of the bargain by processing and issuing the required approvals in good faith and in a timely way.

30. Contrary to Canada's assertions, Windstream was not a "high-risk gambler." Windstream relied in good faith on the Ontario Government's representations that it was "open for business" for offshore wind development and that it would provide "certainty" for investors. It caused WWIS to enter into the FIT Contract in reliance on the Government's representations and commitments. Windstream could not reasonably have anticipated that Ontario would abruptly reverse its support for offshore wind development by imposing the indefinite-term moratorium. It also could not have anticipated that Ontario would refuse to keep Windstream whole and would fail to fulfill its promises to ensure that the FIT Contract was truly "frozen" or "on hold" so that the Project could continue after the moratorium was lifted.

31. Windstream certainly could not have reasonably anticipated that the Ontario Government would impose a moratorium on offshore wind development for the purpose of "killing" offshore wind projects. As Windstream's co-founder David Mars explains, the one risk that Windstream did not consider when entering into the FIT Contract was counterparty risk.[20] Windstream did not anticipate that Ontario would reverse its support for offshore wind development. Its failure to do so does not make it a "high-risk gambler," but merely a prudent investor who was hoodwinked by a Government's promises that were later revoked.

[20] CWS-Mars-2, ¶ 63.

C. Canada's Breaches of NAFTA

32. Canada's conduct breached four core investor protections guaranteed to Windstream under NAFTA: protection from expropriation (Article 1110), fair and equitable treatment (Article 1105(1)), national treatment (Article 1102) and most-favored-nation treatment (Article 1103). Canada raises several unavailing defences to each of its breaches, none of which are supported by evidence or law.

33. Canada's first breach of NAFTA arises from its expropriation of Windstream's investments, contrary to Article 1110. Ontario's imposition of the indefinite-term moratorium has rendered Windstream's investments – WWIS, the Project, and the FIT Contract[21] – worthless. Canada admits that WWIS and the Project are investments capable of being expropriated, but challenges the status of the FIT Contract as an investment on the basis of an inaccurate interpretation of Windstream's position. Windstream's interest is not, as Canada suggests, a "business activity of generating revenue from the operation of a wind project in accordance with the FIT Contract", contingent on the project receiving approvals, but the executed and operating FIT Contract itself, pursuant to which WWIS has paid $6 million in security to the OPA. The FIT Contract, as "intangible property" and an "interest arising from the commitment of capital" is an "investment" under Article 1139. It is a property right capable of being expropriated under Ontario law.

34. In spite of the FIT Contract, Ontario imposed the indefinite-term moratorium and failed to insulate Windstream from the moratorium's effects. This rendered Windstream's investments in WWIS, the Project and the FIT Contract substantially worthless, an extreme result that could have been avoided but for Ontario's choice to "kill all the projects." Canada argues that Windstream's refusal to sacrifice its perpetual rights under the FIT Contract for a settlement that would limit the term of the *force majeure* provisions to five years, with no guarantee that the moratorium will be lifted in that period, renders Windstream's loss its own fault. Windstream cannot be faulted for declining to assume greater risk than it already had.

[21] See ¶¶ 488 to 502 of Windstream's Memorial.

35. Canada also asserts that the indefinite-term moratorium is temporary. This is irrelevant. Temporary measures can cause permanent loss, as is the case with Windstream's investments. There is no prospect that the investments' value can be recovered. Windstream has thus been substantially deprived of the value of its investments. This is the case regardless of whether the moratorium is lifted on some unspecified future date.

36. Canada invokes a "public purpose" exception to the protection from expropriation. It asserts that any regulatory measure of general application cannot amount to an indirect expropriation if the measure was adopted for a legitimate public purpose and in good faith. For the Tribunal to accept such a broad exception would gut the meaning of Article 1110 and must be rejected. Canada relies on ambiguous wording in one arbitral decision contradicted by the plain meaning of Article 1110 and the weight of jurisprudence.

37. The police powers doctrine, properly construed, also does not apply to this case for three reasons: (a) the indefinite-term moratorium was not adopted in good faith or for a legitimate public purpose, as the general scientific research allegedly required was merely a pretext for a decision motivated by political calculus; (b) "killing" Windstream's project was disproportionate to the stated rationale for the moratorium, the need to conduct the very same research that Windstream was required to conduct for its Project to be approved; and (c) the moratorium is contrary to the specific commitments Ontario made to Windstream and the legitimate expectations Ontario actively fostered by soliciting Windstream's investment in offshore wind.

38. In any event, Canada independently breached Article 1110 through Ontario's failure to fulfill its promise that the FIT Contract would be "frozen" and that the Project would be allowed to "continue" after the moratorium is lifted. Canada incorrectly argues that Ontario took all reasonable measures to accommodate Windstream. As set out above, this is not supported by the evidence.

39. Canada's second breach of NAFTA arises from its failure to grant Windstream's investment fair and equitable treatment, contrary to Article 1105(1). Canada argues that a breach of Article 1105(1) requires evidence of egregious conduct, such as serious malfeasance, manifestly arbitrary behaviour or denial of justice by the respondent NAFTA party. Several

NAFTA tribunals have rejected this precise argument from Canada. This Tribunal should do the same.

40. Canada breached Windstream's right to fair and equitable treatment by imposing the indefinite-term moratorium on Windstream's investments for at least four reasons. First, the moratorium is inconsistent with Windstream's legitimate expectations arising from the Ontario Government's commitments to process regulatory approvals with FIT Contracts in a timely manner and within a six-month "service guarantee" and to grant Crown land access in a timely manner. Second, the moratorium is arbitrary and grossly unfair, as it is unnecessary to achieve its stated environmental protection objective. Third, the moratorium is arbitrary and grossly unfair because it abruptly repudiated without reason the applicable regulatory framework for offshore wind development, upon which Windstream relied. Fourth, the moratorium is also arbitrary and grossly unfair because it was motivated by a desire to "kill" offshore wind development to save costs and because of electoral politics.

41. Canada further breached Windstream's right to fair and equitable treatment by failing to "freeze" the FIT Contract and allow the project to continue at a later date.

42. Canada's third breach of NAFTA arises from Ontario's treatment of Windstream's investments in a manner less favourable than that afforded to TransCanada, a Canadian company, in like circumstances. Ontario kept TransCanada "whole" after it made a political decision to cancel TransCanada's gas-fired power plant project, even though the project did not have all necessary permits, was under *force majeure* and risked triggering the OPA's *force majeure* termination right. In contrast, Ontario failed to fulfill its commitment to "freeze" the FIT Contract, did not keep Windstream "whole" and allowed the drastic delays caused by the moratorium to render Windstream's investments worthless. Canada's argument that the procurement exception in Article 1108 applies to render Article 1102 inapplicable in this context should be rejected. The failure to keep Windstream "whole" is not "procurement" within the meaning of the Article 1108 exception. Moreover, Canada's argument that TransCanada is not in like circumstances relies on a number of irrelevant distinctions that have no bearing on the status

of TransCanada as an appropriate comparator to Windstream with respect to the *de facto* cancellation of its Project.

43. Windstream relies on the arguments set out in its Memorial in support of its arguments that Canada also breached Article 1103 of NAFTA.

44. Contrary to the evidence of Canada's expert, BRG, that Windstream's investments had a negative net present value, Deloitte has established that "but for" the application of the indefinite-term moratorium to the Project, Windstream's investments had substantial value. Deloitte's valuation is based on the application of the discounted cash flow ("**DCF**") methodology. In Deloitte's opinion, that methodology is appropriate because the future revenues that would have been generated by the Project may be determined with a reasonable degree of certainty. Contrary to Canada's assertion that the DCF methodology is not appropriate because the Project faced future risks, Deloitte confirms that the future risks associated with the development and construction of the Project are reflected in Deloitte's selection of an appropriate discount rate. Had the Project been cancelled after it had already reached commercial operation, its value would have been substantially greater.

45. Canada's assertion that the risks faced by the Project were so great that Windstream's revenues from the Project are too "speculative" is contradicted by the substantial expert evidence submitted by Windstream in support of its Memorial and of this Reply Memorial. That evidence establishes that, "but for" the moratorium, the Project would more likely than not have achieved commercial operation within the time frames set out in the FIT Contract.

D. Windstream's Reply Materials

1. Reply Evidence Includes a Number of Documents Produced to Windstream After Windstream's Memorial was Submitted

46. In addition to replying to Canada's Counter-Memorial, Windstream has also included in this Reply Memorial a substantial number of new documents in support of its affirmative case. After filing its Memorial, Windstream received approximately 2,000 documents from MOE, MEI and MNR in response to requests it made in 2013 under Ontario's freedom of information

legislation. Through this process, Windstream received a substantial number of documents relevant to the arbitration that had not been previously disclosed. Those documents are included as exhibits to this Reply Memorial.

47. At the time of writing, three of Windstream's requests under Ontario's freedom of information legislation remain outstanding. Windstream reserves the right to request the Tribunal's permission to submit any additional documents it receives through that process as evidence in the arbitration, including through an additional submission. Section 8.3 of Procedural Order No. 1 permits the parties to apply to the Tribunal for leave to file documents received by a party after it files a submission. In Procedural Order No. 3, the Tribunal acknowledged that Windstream may receive additional relevant documents through Ontario's freedom of information legislation.

48. In addition, on May 8, 2015, just one month before Windstream's then deadline to file this Reply Memorial, Canada produced 727 additional documents to Windstream. Of those, nearly 500 were responsive to Windstream's document requests for which production was due by April 21, 2014. Canada provided no substantive explanation as to how these documents were located or why they were produced more than a year after Canada's deadline. It would only say that its "understanding is that these documents were recently discovered as part of other document collection processes in unrelated domestic litigation and pursuant to the Freedom of Information (FOI) process."[22]

49. Many of these documents are centrally relevant to this case. For example, among the documents produced on May 8, 2015 was the email referred to above from the former Premier's Chief of Staff directing the creation of a policy that would "kill all the projects" except Windstream's Project.[23]

50. This document is one of 228 documents that Canada produced on May 8, 2015 that were exchanged between Premier's Office staff and political staff at the MEI, MOE or MNR. These

[22] **C-1186**, Email from Neufeld, Rodney (Foreign, Affairs, Trade, and Development Canada) to Seers, Myriam (Torys) (June 5, 2015).

[23] **C-0914**, Email from Mitchell, Andrew (MEI) to Mullin, Sean (OPO) (January 11, 2011).

previously undisclosed documents demonstrate that Windstream was correct to take the position that Canada had not complied with its production obligations, particularly in respect of documents from the Premier's Office. Indeed, it is now clear beyond doubt that the following statement at paragraph 574 of Canada's Counter-Memorial is inaccurate:

> Given the limited role of Premier's Office and that the culture within the Premier's Office was predominantly verbal, as is typical for high-level government deliberations, there are simply no more documents for Canada to produce in this regard. As such, Canada has met its document production obligations.[24]

51. Relevant documents produced on May 8, 2015 also are included as exhibits to this Reply Memorial in support of Windstream's affirmative case.

52. Nevertheless, the Tribunal no longer has access to relevant documents exchanged among staff of the Premier's Office (and not copied to staff outside the Premier's Office), because those documents were deleted and are no longer available even through the restoration of disaster relief tapes.[25] The 228 documents produced by Canada exchanged among Premier's Office staff and political staff demonstrates that the alleged "predominantly verbal" culture within the Premier's Office did not preclude the creation of relevant documents, but that relevant documents were very likely destroyed. Windstream maintains its request that the Tribunal draw an adverse inference from the deletion of emails at the Premier's Office, as set out in paragraphs 366 to 381 of its Memorial.

53. In its Procedural Order No. 3, the Tribunal gave Windstream its permission to seek assistance from the competent Canadian court to compel the attendance of Sean Mullin, Premier McGuinty's Deputy Director of Policy, for questioning if he refused to appear voluntarily. After the Tribunal issued Procedural Order No. 3, Windstream made several attempts to secure

[24] Canada's Counter-Memorial, ¶ 574 [Emphasis added].

[25] **C-1185**, Email from Neufeld, Rodney (Foreign, Affairs, Trade, and Development Canada) to Seers, Myriam (Torys) (May 8, 2015).

Mr. Mullin's cooperation, all of which went unanswered.[26] On March 15, 2015, Windstream brought an application in the Ontario Superior Court of Justice for an order compelling Mr. Mullin to be examined for discovery.[27] Canada represented to the Tribunal that Mr. Mullin is "outside the control of Canada or Ontario."[28] Despite this, Mr. Mullin is represented in the application by the Ontario Ministry of the Attorney General.[29] As of the date of this Reply Memorial, the application remains pending.

2. Windstream's Reply Evidence

54. In support of its Reply Memorial, Windstream has submitted witness statements from:

(a) ***Mr. George Smitherman***: former Minister of Energy and Infrastructure from June 20, 2008 to November 9, 2009. Mr. Smitherman provides evidence about the enactment of the *Green Energy Act*, the Government's goal of creating investor certainty, the launch of the FIT program, the lifting of the 2006 deferral on offshore wind, and his control over the OPA. He responds to Canada's assertions that Ontario was "not ready" to receive investment in an offshore wind project through the FIT Program and to Canada's suggestion that investing in an offshore wind project through the FIT Program was a "high-risk gamble."[30]

(b) ***Mr. Ian Baines***: the President of WWIS. Mr. Baines provides evidence in response to the witness statements of Marcia Wallace, Doris Dumais and Rosalyn Lawrence, submitted with Canada's Counter-Memorial. He also responds to certain assertions in Canada's Counter-Memorial. He specifically responds to

[26] **C-1179**, Procedural Order No. 3, Windstream *v.* Government of Canada (January 21, 2015); **C-1180**, Letter from Terry, John (Torys) to Mullin, Sean (February 10, 2015); **C-1181**, Letter from Terry, John (Torys) to Mullin, Sean (March 9, 2015); **C-1182**, Email from Seers, Myriam (Torys) to Mullin, Sean (March 11, 2015).

[27] **C-1183**, Issued notice of application to the Ontario Superior Court of Justice for leave to examine Sean Mullin for discovery (March 19, 2015).

[28] **C-1178**, Letter from Neufeld, Rodney (Foreign Affairs, Trade, and Development Canada) to Dr. Heiskanen and Members of the Tribunal (*Windstream Energy LLC v. Government of Canada*) (November 18, 2014), p. 3.

[29] **C-1184**, Email from D'Angelo, Joseph (MAG) to Seers, Myriam (Torys) (March 24, 2015).

[30] CWS-Smitherman.

Canada's assertions that Windstream somehow should have known that the moratorium was forthcoming.[31]

(c) ***Mr. David Mars***: the co-founder and President of Windstream. Mr. Mars provides evidence in response to assertions in the witness statement of Perry Cecchini, and the expert reports of URS and Christopher Gancalves, submitted with Canada's Counter-Memorial. In particular, Mr. Mars responds to Canada's suggestion that entering into the FIT Contract was a "high-risk gamble."[32]

(d) ***Mr. William Ziegler***: the majority investor in Windstream, and Chairman of its Board of Directors. Mr. Ziegler provides evidence in response to assertions in the expert report of URS and to certain assertions in Canada's Counter-Memorial. Mr. Ziegler also responds to Canada's suggestion that entering into the FIT Contract was a "high-risk gamble." He provides detailed information about the offshore oil rig and marine vessel projects that he and the other investors in Windstream have developed, financed and built.[33]

(e) ***Mr. Uwe Roeper***: the President of Ortech Consulting Inc., a professional engineer who acted as project manager for the Project. Mr. Roeper provides evidence in response to the witness statements of Marcia Wallace, Doris Dumais and Rosalyn Lawrence, submitted with Canada's Counter-Memorial. He also responds to certain assertions in Canada's Counter-Memorial. He specifically responds to Canada's assertions that Windstream somehow should have known that the moratorium was forthcoming.[34]

55. Windstream has also submitted expert reports from:

[31] CWS-Baines-2.

[32] CWS-Mars-2.

[33] CWS-Ziegler-2.

[34] CWS-Roeper-2.

(a) ***Sarah Powell***: Ms. Powell is a partner with the law firm of Davies Ward Phillips & Vineberg LLP, who specializes in environmental and energy law and is certified by the Law Society of Upper Canada as a Certified Specialist in Environmental Law. Ms. Powell's supplementary report addresses material delivered by the Government of Canada since the filing of her report, including Canada's Counter-Memorial, the expert report of Christopher Goncalves of Berkeley Research Group ("**BRG**"), and the witness statements of Doris Dumais, Rosalyn Lawrence, Susan Lo, Marcia Wallace and John Wilkinson.[35]

(b) ***Richard Taylor and Robert Low of Deloitte LLP***: Messrs. Taylor and Low are Certified Public Accountants, Chartered Accountants and Certified Business Valuators. Mr. Taylor is a partner and Mr. Low is an Executive Advisor in Deloitte's Financial Advisory group. Their supplementary report updates their opinion as to the damages sustained by Windstream and responds to the BRG report.[36]

(c) ***Remo Bucci of Deloitte LLP***: Mr. Bucci is a licensed Professional Engineer who has been involved in infrastructure projects related to power and utilities. His supplementary report responds to assertions in the expert reports of URS and BRG, as well as statements in Canada's Counter-Memorial related to the financing of the Project.[37]

(d) ***4C Offshore***: 4C Offshore is a leading provider of market consulting services to the offshore wind industry. Its supplementary report provides updated information about the costs to develop the Project to respond to BRG's statements about anticipated project capital costs.[38]

[35] CER-Powell-2.

[36] CER-Deloitte (Taylor & Low)-2.

[37] CER-Deloitte (Bucci)-2.

[38] CER-4C Offshore-2.

(e) ***SgurrEnergy***: SgurrEnergy is a leading independent multi-disciplinary renewable energy consultancy, which has provided technical support, resource assessment, and project management to more than 110 gigawatts of offshore and onshore wind projects. Its supplementary report responds to the technical and schedule issues raised in the expert report of URS. In addition, the SgurrEnergy report sets out a detailed Project Schedule prepared in collaboration with Baird, WSP, COWI and Weeks Marine. In support of the SgurrEnergy report, COWI provides an update to its prior report for the design and fabrication of Gravity Based Foundations for the Project. Weeks Marine, an internationally recognized offshore contractor, provides a detailed response to the expert report of URS regarding the installation of the foundations.[39]

(f) ***W.F. Baird & Associates Coastal Engineers***: Baird is an engineering consulting firm specializing in coastal projects and with expertise in in-water projects in Lake Ontario. Its supplementary report responds to comments raised in the expert report of URS relating to lakebed sediments and drinking water protection, shipping and navigation, coastal processes, wind, wave and ice conditions, and the contention that the Project is a "*first of kind*" project.[40]

(g) ***WSP***: WSP is one of the world's leading professional services firms, and has deep expertise in conducting environmental assessments in Ontario and in jurisdictions around the world. It has substantial experience conducting REA and other permitting work for renewable energy projects in Ontario, as well as environmental assessments for offshore wind projects in Europe. WSP's report primarily responds to comments raised in the URS report concerning (i) general project development risks associated with renewable energy development, (ii) the

[39] CER-SgurrEnergy-2.

[40] CER-Baird-2.

REA process, (iii) radar interference, (iv) birds and bats, (v) noise, (vi) stakeholder consultation and (vii) project changes.[41]

(h) ***Aercoustics***: Aercoustics Engineering Ltd. is a premier provider of high quality consulting services in the science and engineering of acoustics, noise and vibration. Aercoustics' report is in response to Canada's assertion that Government-led research is necessary to address the noise that would emanate from the Project. Based on actual noise measurements taken near the Project site, Aercoustics concludes that noise from the Project would be well below established limits.[42]

(i) ***HGC Engineering***: HGC Engineering is one of North America's largest engineering consulting firms. It specializes exclusively in noise, vibration, and acoustics. Mr. Brian Howe sits on the Council of Canadian Academies' Wind Turbine Noise and Human Health Panel and prepared a literature review for Ontario's Ministry of the Environment related to low-frequency noise associated with wind turbines. Mr. Howe has submitted a letter commenting on the Aercoustics study in response to Canada's assertion that Government-led research is necessary to address the noise that would emanate from the Project.[43]

PART TWO. THE FACTS

I. Ontario Solicits Windstream's Investment in the Wolfe Island Shoals Offshore Wind Project

56. Ontario actively solicited Windstream's investment in at least three ways:

(a) By lifting the 2006 deferral on offshore wind development;

(b) By passing the *Green Energy Act, 2009* and launching the FIT program; and

[41] CER-WSP.

[42] CER-Aercoustics.

[43] CER-HGC-2.

(c) By creating the rules governing the award of FIT contracts, offering WWIS a FIT contract, and encouraging Windstream to enter into the contract.

A. 2008: Ontario Solicits Investment in Offshore Wind by Lifting 2006 Deferral on Offshore Wind Development

57. In its Counter-Memorial, Canada omits from its discussion of Ontario's "[e]arly renewable energy initiatives 2003-2008"[44] that the Ontario Government actively solicited investment in offshore wind projects beginning in January 2008. It also omits that Ontario had determined that the existing environmental assessment process applied to offshore wind projects and was sufficient to address site-specific concerns arising from offshore wind projects. All of this background undermines Canada's position that Ontario was "not ready" to receive investment in an offshore wind project.

1. Ontario Actively Promotes Itself as "Open for Business" for Offshore Wind Development

58. As set out in paragraphs 87 to 99 of Windstream's Memorial, throughout 2008, Minister of Natural Resources Donna Cansfield actively promoted Ontario as a place where foreign investors could invest in offshore wind development. Premier McGuinty also publicly supported offshore wind investment. Their public statements included that:

(a) Ontario was "open for business" for investment in offshore wind projects;[45]

(b) Ontario would "likely […] be placing turbines in the Great Lakes;"[46]

(c) Ontario had "substantial future offshore wind power potential in the Great Lakes – where the winds blow unobstructed";[47]

[44] Canada's Counter-Memorial, ¶¶ 36-42.

[45] **C-0765**, Article (Toronto Star), Company blown away by Ontario (June 20, 2008).

[46] **C-0767**, Speaking Notes for Donna Cansfield, Minister of Natural Resources (June 24, 2008), p. 6.

[47] **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making the Great Lakes Conference (April 23, 2008), p. 15.

(d) Offshore wind had "a crucial role to play in helping to reduce the impact of climate change";[48]

(e) Ontario was committed to developing offshore wind electricity generation as a "clean, renewable source of energy";[49]

(f) Offshore applications MNR had received to date would be processed, and new ones would be accepted;[50]

(g) Receiving Applicant of Record ("**AOR**") status for an offshore wind project would allow the project to pursue the approvals required to construct and operate an offshore wind power facility;[51]

(h) Proposed offshore wind facilities would be subject to the existing environmental assessment process;[52]

(i) Wind power could be harnessed offshore in a way that does not compromise ecosystems;[53] and

(j) Ontario supported an offshore wind project located close to Windstream's Project because "[t]he location is perfect, the timing is perfect, and it fits our renewable agenda."[54]

59. Since November 2007, MNR had contemplated the possibility of lifting the deferral that it imposed on offshore wind development in 2006. At that time, it noted that lifting the deferral would send "a very clear message that Ontario is open for business and supports the

[48] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

[49] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

[50] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

[51] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

[52] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

[53] **C-0056**, Article, Hamilton, Tyler (Toronto Star) Premier Reveals Support for Offshore Energy Plan (January 16, 2008), p. 1.

[54] **C-0765**, Article (Toronto Star), Company blown away by Ontario (June 20, 2008), p. 2.

development of offshore wind power which can contribute to building a strong economy and healthy environment."[55] Indeed, the Minister communicated to her staff that her position on renewable energy, including offshore wind power, was that "Ontario is open for business and supportive of [renewable energy] in the Province."[56] Mr. Smitherman explains that, in his view, MNR's decision to lift the 2006 deferral was a clear sign that the Ontario Government was ready to move ahead with the development of offshore wind projects.[57]

2. Relying on these Representations, Windstream Begins Investing Substantially in the Project

60. At paragraph 415 of its Counter-Memorial, Canada asserts that Windstream could not reasonably have relied on Minister Cansfield's lifting of the 2006-2008 deferral on offshore wind development because "the Claimant had already acquired its interest in its Project in October 2007, prior to Minister Cansfield making this statement." The investors in Windstream first began to explore investing in wind energy projects in Ontario in 2007 based on the Province's initiatives to procure renewable energy generation and to promote itself as a destination for renewable energy investment.[58] The Ontario Government's consistent and proactive efforts to attract renewable energy investment buttressed Windstream's view that Ontario provided an attractive climate for investing in renewable energy.[59] There was no shortage of investment opportunities available to the investors in Windstream at the time. They determined that Government initiatives had created significant potential for renewable energy investment in Ontario.[60]

61. However, the possibility of actually developing and building the Project only became a reality in January 2008, when MNR lifted the deferral and Minister Cansfield and Premier

[55] **C-0751**, Minister's Seeking Direction Briefing Note (MNR), Issue: Confirmation on Direction and Next Steps Associated with Lifting of Offshore Windpower Deferral on The Great Lakes (December 6, 2007), p. 3.

[56] **C-0750**, Email from Marinigh, Dan (MNR) to Keyes, Jennifer (MNR) (November 29, 2007).

[57] CWS-Smitherman, ¶ 62.

[58] CWS-Mars-2, ¶ 6; CWS-Mars, ¶¶ 25-32, 38-52, 55-66.

[59] CWS-Mars-2, ¶ 6.

[60] CWS-Ziegler-2, ¶ 6.

McGuinty announced the Government's support for offshore wind development.[61] It was bolstered when Minister Cansfield declared the Province "open for business" for offshore wind development in June 2008. Windstream relied on the Ontario Government's support for offshore wind development set out above in deciding to apply for AOR status regarding Crown land for the Project and in spending heavily on moving the Project forward throughout 2008.[62]

B. 2009: Ontario Solicits Investment in Offshore Wind Development Through the *Green Energy Act* and the FIT Program

62. Canada recognizes in its Counter-Memorial that one of the goals of the *Green Energy Act* was to make it "easier to bring renewable energy projects to life."[63] But it omits from its discussion that as part of its promotion of the *Green Energy Act*, Ontario actively solicited investment in renewable energy projects, including offshore wind projects. It also fails to give any context to the adoption of the *Green Energy Act* and the FIT Program. These initiatives were adopted to ensure that privately-funded renewable energy projects – including offshore wind projects – would be built and operational within a short timeframe. They were introduced at a time when Ontario urgently wanted to bring renewable energy generation into its power supply mix because it had committed to closing five coal-fired power plants and needed to create jobs in the wake of the 2007-2008 global financial crisis.

63. Without this context, Canada leaves the inaccurate impression that Ontario was indifferent as to whether projects that received FIT contracts achieved commercial operation.[64] This is contrary to the representations Ontario made to investors and – as Minister Smitherman explains – contrary to Ontario's intention in adopting the *Green Energy Act* and the FIT Program.

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[61] CWS-Mars-2, ¶ 7.

[62] CWS-Mars-2, ¶ 8; CWS-Mars, ¶¶ 43-50; CWS-Ziegler-2, ¶ 5.

[63] Canada's Counter-Memorial, ¶ 43; **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009), p. 1.

[64] Canada's Counter-Memorial, ¶¶ 12, 17, 23, 70, 431.

1. The Impetus for the *Green Energy Act* and the FIT Program was to Attract Investment and Get Renewable Energy Projects Built Quickly

64. Two factors motivated the Ontario Government's decision to adopt the *Green Energy Act*: the Government's commitment in 2003 to close Ontario's coal-fired power plants, and the need to attract investment and create jobs following the 2007-2008 global financial crisis. According to Mr. Smitherman, the Ontario Government's goal was to get renewable energy projects built expeditiously – this was necessary to achieve the Ontario Government's stimulus objectives and to fill the supply gap resulting from the closure of the coal-fired plants.[65]

a) Eliminating Ontario's Coal-Fired Power Plants

65. In 2003, Premier McGuinty committed to closing Ontario's five remaining coal-fired power plants by 2007.[66] At the time, these plants generated 15 percent of Ontario's electricity.[67] Premier McGuinty made this commitment because the Ontario Government was concerned about the health and environmental impacts of burning coal. The Ontario Government's plan, confirmed in Ontario's Long-Term Energy Plan, was to augment nuclear and hydroelectric power generation with new generation from gas-fired power plants and renewable energy.[68]

b) Creating Jobs and Stimulating Ontario's Economy

66. When Minister Smitherman assumed office as Minister of Energy and Infrastructure on June 20, 2008, Ontario was facing major economic difficulties and severe uncertainty as a result of the global financial crisis. At the time, Ontario's automotive industry (assembly and auto parts manufacturing) was at the risk of collapse, which would cause severe unemployment.[69]

67. It was in this context that the Government looked to MEI and renewable energy procurement for stimulus that would help promote economic growth and the creation of jobs in

[65] CWS-Smitherman, ¶ 56.

[66] CWS-Smitherman, ¶ 6; **C-1090**, Article (Toronto Star), Ontario coal-burning power plants to close this year (January 10, 2013).

[67] CWS-Smitherman, ¶ 6.

[68] CWS-Smitherman, ¶ 6.

[69] CWS-Smitherman, ¶ 7.

the Province, all while supporting the Government's promise to move Ontario off coal. The Government's job-growth strategy with renewable energy was two-fold: create manufacturing jobs in the Province, and create a deep pool of engineering, financing, legal and other expertise that would put Ontario at the forefront of renewable energy development in North America.[70]

c) Ontario's Prior Success With Renewable Energy

68. Ontario had success with renewable energy procurement in the past, which is why the Government was confident that the *Green Energy Act* could stimulate Ontario's economy. In 2004, the OPA launched the Renewable Energy Standard Offer Program. According to Minister Smitherman, this program was an "overwhelming success." Mr. Smitherman explains that the success of this program and assurances he received from the OPA indicated to him that the FIT Program would also be a success and that there was a high level of investor interest in it.[71] As a result, Minister Smitherman explains that Susan Lo's assertion at paragraph 16 of her witness statement, that the level of interest in renewable energy investment was unknown at the time Ontario introduced the FIT Program is simply not correct.[72]

2. Minister Smitherman Explicitly Commits to Providing Certainty to Investors in Renewable Energy Projects with FIT Contracts

69. Mr. Smitherman explains that the Ontario Government's overriding objective in introducing the *Green Energy Act* was to encourage investors to invest in renewable energy projects in Ontario by creating certainty for investors. This included encouraging investors to invest in offshore wind projects in Ontario.[73]

70. As Minister of Energy and Infrastructure, he emphasized this in his remarks to the Ontario Legislature when he introduced the *Green Energy Act*. An excerpt from those remarks is reproduced at paragraph 101 of Windstream's Memorial. He said that the *Green Energy Act*, if passed, would:

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[70] CWS-Smitherman, ¶ 10.

[71] CWS-Smitherman, ¶ 50.

[72] RWS-Lo, ¶ 16; CWS-Smitherman, ¶ 49.

[73] CWS-Smitherman, ¶ 14.

(a) "turbocharge the creation of renewable energy" in Ontario;

(b) make Ontario "the destination of choice for green power developers";

(c) "incent proponents, large and small, to develop projects";

(d) "create this incentive by offering an attractive price for renewable energy and the certainty that creates an attractive investment climate," including "certainty that governments would issue permits in a timely way";

(e) "ensure that new green power doesn't get tripped up in all kinds of red tape";

(f) ensure that "new renewable generation would be built and flowing into the system faster, complete with service-time guarantees on our processes";

(g) create "a feed-in-tariff that would offer an attractive price for renewable power, including wind, both offshore and onshore";

(h) "replace the snail's pace with a sense of urgency"; and

(i) "co-ordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process within a service guarantee," and that "permits would be issued within a six-month service window" provided that "all necessary documentation is successfully completed."[74]

71. As set out in paragraphs 103 and 104 of Windstream's Memorial, Minister Smitherman made many of the same commitments in a speech he gave to the Toronto Board of Trade announcing the *Green Energy Act*.[75] He also stated in an interview to the Toronto Star newspaper

[74] **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009), pp. 2-3 [Emphasis added]; **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009), p. 2.

[75] **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

that there were "wonderful opportunities for offshore wind" and they, the Government, were "making sure we'll move those proposals along."[76]

72. Mr. Smitherman explains that he intended for investors to rely on the commitments that he made in his public statements, including his commitment that the Government would work with renewable energy developers to get their projects built, and that the relevant permits would be issued within a six-month service guarantee.[77] He explains that these remarks were designed to attract investors to Ontario by assuring them that the Province would work with them to get renewable energy projects built expeditiously.[78]

73. The *Green Energy Act* was enacted on May 17, 2009. According to Mr. Smitherman, the rapid progress of the *Green Energy Act* through Ontario's Legislative Assembly was indicative that this legislation was the Ontario Government's priority. Its enactment signalled the Government's clear commitment to move ahead with the development of renewable energy in the Province, including offshore wind development.[79] Mr. Smitherman explains that the *Green Energy Act* was a government-wide initiative that had the support of all relevant ministries and the leadership of the government.[80] As a result, there was a high degree of coordination among the relevant ministries to make its objectives a reality.[81]

3. Ontario Solicits Investment in Offshore Wind Projects Through the FIT Program

74. Ontario had been "open for business" for offshore wind energy development since January 2008. However, it first formally solicited proposals from offshore wind developers for the OPA to purchase power from offshore wind facilities through the FIT Program in October

[76] **C-0111**, Article, Hamilton, Tyler (Toronto Star), Province to fast-track wind turbine projects (February 21, 2009), p. 2.

[77] CWS-Smitherman, ¶ 19.

[78] CWS-Smitherman, ¶ 21.

[79] CWS-Smitherman, ¶ 22.

[80] CWS-Smitherman, ¶ 27.

[81] CWS-Smitherman, ¶¶ 27-35.

2009.[82] According to Mr. Smitherman, the FIT Program was the "key element" for carrying out the objectives of the *Green Energy Act*.[83]

75. Minister Smitherman's direction in launching the FIT Program emphasizes that the FIT Program would be intended to "procure energy from a wide range of renewable energy sources." It stated that the objectives of the FIT Program were to: (a) "[i]ncrease capacity of renewable energy supply to ensure adequate generation and reduce emissions;" (b) "[i]ntroduce a simpler method to procure and develop generating capacity from renewable sources of energy;" (c) "[e]nable new green industries through new investment and job creation;" and (d) "[p]rovide incentives for investment in renewable energy technologies."[84]

76. At paragraph 48 of its Counter-Memorial, Canada notes that Minister Smitherman's direction "emphasized that, notwithstanding the obtaining of a FIT Contract, projects would still need to obtain regulatory approval" and proponents would have to "navigate through the regulatory approvals [that were] necessary." This is correct. However, the requirement to obtain regulatory approval did not detract from the overall objectives of the FIT Program set out above. Simply put, the Ontario Government wanted to encourage investors through the FIT Program to invest in renewable energy projects in Ontario.[85]

77. Indeed, the press release announcing the launch of the FIT Program and the *Green Energy Act* lauded the benefits of investing in Ontario: "Ontario's new regulations provide a stable investment environment where companies know what the rules are – giving them confidence to invest in Ontario, hire workers, and produce and sell renewable energy."[86] Another

[82] The introduction of the FIT Program is described at ¶¶ 108-115 of Windstream's Memorial.

[83] **C-0141**, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009), p. 1; CWS-Smitherman, ¶ 43.

[84] **C-0141**, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009), p. 1; CWS-Smitherman, ¶ 43.

[85] CWS-Smitherman, ¶¶ 45-46.

[86] **C-0143**, Article, Green Energy Rules Make Ontario a North American Leader (September 24, 2009), p. 1.

press release pointed out that "Ontario's FIT program will encourage billions of dollars in investment."[87]

4. Ontario Government Commits to Process Permits for Renewable Energy Projects Expeditiously

78. Canada appears to take the position that proponents of renewable energy projects with FIT contracts should not have expected the relevant ministries to work with them to get their projects built and permitted.[88]

79. ***Commitment to work with developers to get their projects built.*** Of course it is true that a FIT contract did not "guarantee" that a project would be built. However, Canada's submission overlooks the fact that the key reason for Ontario's adoption of the FIT Program and the *Green Energy Act* was to get renewable energy projects permitted and built as efficiently and expeditiously as possible. This was necessary to achieve the stimulus objectives of the *Green Energy Act*. According to Mr. Smitherman, this goal motivated the deadlines set out in the standard FIT contract.[89] The Ontario Government expected that developers would meet the timelines under their FIT contract, and the Government committed to doing its part to ensure that those timelines were met.[90] Thus, the Government did guarantee that a project with a FIT

[87] **C-0137**, Article (MOE), Ontario Makes it Easier, Faster to Grow Green Energy (September 24, 2009), p. 2 [Emphasis added].

[88] See for example Canada's Counter-Memorial, ¶¶ 7, 48, 59 and 70.

[89] Minister Smitherman emphasized the Government's commitment to ensure that regulatory approvals for renewable energy projects would be processed expeditiously in his remarks to the Ontario Legislative Assembly when he introduced the *Green Energy Act*. As set out above, Minister Smitherman explained that the Act would create the "[c]ertainty that governments would issue permits in a timely way," "ensure that new green power doesn't get tripped up in all kinds of red tape," ensure that "new renewable generation would be built and flowing into the system faster, complete with service-time guarantees on our processes," "replace the snail's pace with a sense of urgency," and "coordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process within a service guarantee", and that "permits would be issued within a six-month service window" provided that "all necessary documentation is successfully completed": **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009), pp. 2-3; **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009), p. 2.

[90] CWS-Smitherman, ¶ 55; **C-0786**, Handwritten Notes of Dan Marinigh (August 7, 2009).

contract could move through the regulatory process with the full support of the Ontario Government.[91]

80. ***Streamlined approvals process.*** One way the Ontario Government did this was by adopting a streamlined approvals process for renewable energy projects: the REA Regulation. The REA Regulation replaced the previous "patchwork" of approvals by including in a single process all provincial approvals required to permit a renewable energy project. According to Mr. Smitherman, this was another tool for creating investor certainty by creating a clear application and regulatory approvals process for developers.[92] When the FIT Program was adopted, there was broad coordination across the Ontario Government to "streamline" approvals and to ensure that project proponents received the necessary approvals as expeditiously as possible.[93]

81. Mr. Smitherman's evidence is supported by documents that Canada produced in this arbitration, which demonstrate that MEI, the OPA, MNR and MOE coordinated to establish processes that would allow proponents with FIT contracts to meet their FIT contract deadlines.[94]

82. ***Six-month service guarantee.*** A second important way the Ontario Government committed to do its part to ensure that proponents of projects with FIT contracts could meet their contractual deadlines was to implement a six-month service guarantee for the issuance of Renewable Energy Approvals. In her report, Ms. Powell explains that this guarantee was part of "Ontario's unprecedented political commitment to renewable energy development."[95] This

[91] CWS-Smitherman, ¶ 51.

[92] CWS-Smitherman, ¶ 34.

[93] **C-0789**, Email from Wallace, Marcia (ENE) to Parrott, Ian (ENE) et al (September 7, 2009); **C-0775**, Presentation (MEI), Renewable Energy Approval Process Decision Points, DM Briefing (DRAFT) (MEI's *Green Energy Act*) (January 9, 2009), slide 3; **C-0834**, Email from Abbas, Nuhaad (ENE) to Samah, Ranissah (CAB) (July 28, 2010); **C-0802**, Email from Perry, Kevin (ENE) to Abbas, Nuhaad (ENE) et al (March 24, 2010).

[94] Specifically, the OPA amended an earlier version of the FIT Rules to permit (i) proponents of projects on Crown land to apply for a FIT contract with only proof that they have applied for Crown land access (the earlier version of the rules required access to Crown land), and (ii) proponents to apply for a FIT contract before receiving a REA (the earlier version required that a proponent secure a REA before applying): **R-0483**, Ontario Power Authority, Presentation, "Proposed Feed-in Tariff Program – Revisions to Draft FIT Rules" (July 21, 2009), pp. 23-24.

[95] CER-Powell-2, ¶ 39.

service guarantee was taken into account when the milestone commercial operation date timelines for the FIT Program were fixed.[96]

83. Timely processing of applications for regulatory approval was crucial. This guarantee was adopted because project construction, the main components of the economic stimulus the Ontario Government hoped to achieve, would not occur until projects received a REA from MOE.[97] Minister Smitherman explains that the Ontario Government intended for developers and financiers to rely on its commitment to process REA applications within six months.[98]

84. The Ontario Government consistently guaranteed to proponents of renewable energy projects that MOE would issue decisions on REA applications within six months of receiving a complete application. For example:

(a) in his remarks to the Legislative Assembly when he introduced the *Green Energy Act*, Minister Smitherman stated that there would be a "service guarantee" and that "so long as all necessary documentation is successfully completed, permits would be issued within a six-month service window;"[99]

(b) in a posting on the Environmental Bill of Rights registry, MOE stated that it "has committed to a six-month service guarantee for reviewing and providing a decision on complete applications. The six-month service guarantee provides certainty to proponents, reduces proponents' opportunity costs, and reduces Ministry approval times;"[100]

[96] CWS-Smitherman, ¶ 55.

[97] CWS-Smitherman, ¶ 54; **C-0146**, OPA Feed-In Tariff Program, FIT Rules Version 1.1 (September 30, 2009), s. 6.4.

[98] CWS-Smitherman, ¶ 53.

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

[100] **C-0925**, Ministry of the Environment Information Notice, "Renewable Energy Approval (REA) Fees", (EBR Registry No. 011-1203) (January 14, 2011), pp. 1-2.

(c) in its press release announcing the adoption of the REA Regulation, the OPA explained that the REA "[i]s coordinated with other provincial approvals to ensure a streamlined approach, providing a six-month service guarantee per project;"[101] and

(d) in its Approvals and Permitting Requirements Document for Renewable Energy Projects, MNR states that "[t]he review of the complete submission and the issuance of most approvals and permits will be completed within the established service guarantee."[102]

85. At paragraph 61 of her witness statement, Doris Dumais of MOE attempts to minimize the significance of the six-month service guarantee. She states:

> When the [*Green Energy Act*] was enacted and the REA Regulation was established in 2009, both the Minister of Energy and MEI staff communicated that there would be a six-month service "guarantee" from the time of receiving to deciding on an application. However, it is important to underscore that this was a matter of policy only, as a service guarantee was never included in the statute or regulation. It was widely understood across industry that this service "guarantee" was operationalized as a service "standard" and is communicated as such by MOE. This means that while MOE makes best efforts to complete the technical review in six months, this timeframe is a target only and there is no legal requirement for the target to be met.

86. Ms. Dumais is correct that the six-month service guarantee was not a formal legal requirement.[103] But this has no bearing on whether developers reasonably relied on the guarantee.

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[101] **C-0137**, Article (MOE), Ontario Makes it Easier, Faster to Grow Green Energy (September 24, 2009), p. 4.

[102] **C-0132**, Presentation (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 2009), p. 7.

[103] The Ontario Divisional Court has held that the six-month service guarantee is not an enforceable right under Ontario law. However, in making this decision, the Court found that the doctrine of legitimate expectations does not give rise to any legal entitlement under Ontario administrative law; it merely confers participation rights. Thus, the fact that the six-month service guarantee is not formally enforceable under Ontario law has no bearing on whether investors, such as Windstream, reasonably relied on it. **R-0369**, *Big Thunder Windpark Inc. v. Her Majesty the Queen in Right of Ontario*, 2014 ONSC 3050 (Ont. Div. Ct) (May 16, 2014), ¶ 6.

Ms. Dumais cites no documents to support her assertions that it was "widely understood" across industry that the six-month timeframe was anything less than a "guarantee."

87. Ms. Powell, who acts for and advises the "industry" that Ms. Dumais describes, disagrees with Ms. Dumais and BRG's assertion "that it was not commercially reasonable for a developer to assume that the MOE's six-month service guarantee would be met."[104] Not only was it reasonable for developers to rely on the guarantee, in Ms. Powell's experience with six large onshore wind projects in Ontario (all over 160 megawatts), the MOE "has met the [six-month service guarantee] in all material respects."[105]

88. Ms. Dumais also fails to cite any documents to support her assertion that the guarantee was communicated as a "standard" rather than a "guarantee." There are numerous MOE documents that show that the six-month timeframe was in fact a service guarantee.[106] Ms. Dumais' statement to the contrary in her witness statement is contradicted by representations she made to the Association of Power Producers of Ontario in 2011:

> [APPrO]: What is your level of confidence in being able to turn around, within the promised six-month period, the bulk of the applications that will come your way in the next two years?

[104] CER-Powell-2, ¶ 38.

[105] CER-Powell-2, ¶ 52.

[106] **C-0851**, Renewable Energy Approvals Process (For wind, solar, biomass, and biogas projects) (September 22, 2010); **C-1027**, Presentation (MOE), Renewable Energy Approval Turnaround, Premier's Office/Cabinet Office (July 14, 2011), pp. 4-5; **C-1029**, Presentation (MOE), Feed-In Tariff Program, Director of Communications Branch Briefing (July 28, 2011); **C-1177**, News Release (MOE), Regulatory Approvals and Permits (January 5, 2015).

> [Ms. Dumais] I have no doubt that the Ministry will meet its six-month service guarantee for renewable energy projects, but understand that the size and complexity of a project also has a role to play in how long it takes to approve a project. Applicants, when doing their planning, should account for the six months and not underestimate the review time in their planning process so as to ensure that they do not run out of time in terms of meeting their commercial operating date commitments. We will work to expedite the reviews but not at the expense of limiting or undermining our review responsibilities.[107]

89. Similarly, in a presentation to an energy conference, Ms. Dumais stated that "[t]he REA process enhances coordination between the Ministry and other provincial agencies […] to provide a six-month service guarantee for proponents of renewable energy projects."[108] It is disingenuous for Ms. Dumais to now claim, because it suits Canada's arguments in this arbitration, that the six-month service guarantee was a "target only."

5. Relying on Ontario's Solicitation of Investment, Windstream Causes WWIS to Apply to the FIT Program

90. In 2009, Windstream relied on the Ontario Government's solicitation of investment in offshore wind development in continuing to invest in the Project and in applying to the FIT Program. Canada takes the position that Minister Smitherman's statements that the Government would provide "certainty" for renewable energy projects could somehow not be relied upon because "an objective investor at the time would have understood" that there were technology-specific requirements applicable to offshore wind projects that were not yet in place.[109] As discussed in paragraphs 208 to 211 below, nothing in the Ontario Government's public statements at the time suggested that the Project would not be permitted to proceed through the regulatory approvals process. None of that detracts from Windstream's reliance on the Government's heavy solicitation of investment in offshore wind development.

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[107] **R-0244**, Ihnatowycz, Roma (APPrO), "Ontario's Renewable Energy Approval system – How is it working?" (June 1, 2011), p. 5 [Emphasis added].

[108] **C-1067**, Presentation (Doris Dumais - MOE), Regulatory Approvals Process for Energy Projects in Ontario, Nishnawbe Aski Nation Energy Conference (February 1, 2012), p. 8.

[109] Canada's Counter-Memorial, ¶¶ 424-26.

91. ***Windstream continues to invest in the Project in reliance on the Government's solicitation of investment in offshore wind.*** Minister Smitherman's February 2009 speech promising "certainty" for investors unequivocally confirmed to Windstream everything it had believed since beginning to invest in Ontario in late 2007.[110] Windstream noted expressly that Minister Smitherman stressed that the Government's goal was to create certainty: "certainty that creates an attractive investment climate: certainty that power would be purchased at a fair price; certainty that wherever feasible, the power would be connected to the grid; certainty that government would issue permits in a timely way."[111]

92. Windstream also understood from subsequent statements by Minister Smitherman and other members of the Ontario Government that the Government wanted to create certainty for investors and attract investment in renewable energy development to create jobs. It was clear to Windstream that this was a priority for the Ontario Government.[112] These statements prompted Windstream to seek additional investment. In a memorandum to investors, Windstream noted among other things that the *Green Energy Act* "offered incentives and guarantees for renewable energy projects" and would "streamline the regulatory process and enable the rapid development of green energy projects across Ontario."[113]

93. Canada asserts at paragraphs 425 and 426 of its Counter-Memorial that an objective investor would have understood that Minister Smitherman's remarks about certainty did not apply to offshore wind projects because the "necessary documentation" for offshore wind projects was not yet clear. Windstream did not understand Minister Smitherman's remarks as communicating that requirements were not yet in place for offshore wind development. On the contrary, Windstream understood Minister Smitherman's remarks as an invitation for investors, including investors in offshore wind projects, to come to Ontario. Windstream relied on the

[110] CWS-Mars-2, ¶ 13.

[111] CWS-Mars-2, ¶ 12; **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

[112] CWS-Mars-2, ¶ 13.

[113] CWS-Mars-2, ¶ 14; CWS-Mars, ¶ 51; **C-0120**, Memorandum from Ziegler, William (WEI) et al to [redacted] (March 13, 2009).

commitments in Minister Smitherman's remarks in deciding to continue to invest in the Project.[114]

94. ***Windstream applies to the FIT Program in reliance on the Ontario Government's solicitation of investment in offshore wind development.*** The FIT Program was extremely attractive to Windstream because a FIT contract would provide a long-term agreement with the OPA, a stable, high quality credit-worthy counterparty and an attractive rate.[115] In Windstream's experience, obtaining a 20-year fixed price guaranteed FIT contract would eliminate a significant degree of risk that is common at the outset of project development because it provided a guaranteed revenue stream while project development was still at an early stage. This level of certainty for early-stage projects is extremely uncommon. From Windstream's perspective, obtaining a FIT contract removed the largest barriers to financing the Project. Further, a government contract with a fixed price provided very strong contractual collateral.[116]

95. Windstream did not understand that Ontario was "not ready" for offshore wind development in 2009. On the contrary, the inclusion of offshore wind energy in the FIT Program was a clear sign to Windstream that the Province was not only ready for investment in offshore wind projects, but in fact wanted to receive FIT contract applications from offshore wind developers. In Windstream's view, Ontario would not have solicited investment in offshore wind development through the FIT Program if it was "not ready" for offshore wind investment.[117]

96. When the OPA opened the FIT Contract application window in 2009, Windstream decided to apply for a FIT contract for the Project, putting $3 million in security at risk (in addition to the $7.45 million in security it posted for its proposed onshore wind projects). In making the decision to apply for the FIT Contract, Windstream relied on the following commitments made by the Ontario Government:

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[114] CWS-Mars-2, ¶ 13.

[115] CWS-Mars-2, ¶ 15; CWS-Ziegler-2, ¶ 7.

[116] CWS-Ziegler-2, ¶ 7.

[117] CWS-Mars-2, ¶ 16.

(a) Minister Cansfield's announcement that Ontario was "open for business" for offshore wind development;

(b) The numerous other speeches by members of the Ontario Government, including Minister Cansfield and Minister Smitherman, stressing that the Ontario Government wanted to attract investment in offshore wind projects;

(c) The positive investment climate created by the *Green Energy Act* and the FIT Program, including the Ontario Government's assurances that it wanted to create certainty for investors;

(d) The inclusion of offshore wind in the FIT Program;

(e) Minister Cansfield's September 24, 2009 letter encouraging Crown land applicants to apply to the FIT Program by informing them that "[i]n order to maintain priority position with MNR's site release process," they needed to "submit an application to the FIT program within the FIT program launch period;"[118] and

(f) The streamlined regulatory regime (described in additional detail in paragraphs 80 to 81 above).[119]

97. Without these commitments from the Ontario Government, Windstream would not have put $3 million at risk to apply to the FIT Program and continued to develop the Project.[120]

[118] **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009).

[119] CWS-Mars-2, ¶ 20; CWS-Ziegler-2, ¶ 8.

[120] CWS-Mars-2, ¶ 21; CWS-Ziegler-2, ¶ 8.

6. Ontario was "Ready" to Accept Investment in Offshore Wind Projects Through the FIT Program

98. A recurring theme in Canada's Counter-Memorial is that Ontario was "not ready" for offshore wind development when the FIT Program was launched.[121] As noted above, Windstream understood the exact opposite from the Government's public statements. In any event, the Tribunal should reject Canada's submission for four reasons.

99. ***First, inclusion of offshore wind projects in the FIT Program was meant to communicate readiness.*** The fact that offshore wind projects were included in the FIT Program, in and of itself, demonstrates that Ontario was "ready" for offshore wind development when it launched the FIT Program in 2009 and offered FIT contracts in 2010. At the direction of MEI, the OPA accepted applications to the FIT Program from offshore wind project proponents, including WWIS.[122] Those applications were accompanied by millions of dollars in security – in the case of WWIS, a $3 million letter of credit.[123] If a proponent accepted a FIT contract, it would have to provide substantially more security – in the case of WWIS, a $6 million letter of credit to replace the $3 million letter of credit securing WWIS' application.[124] The security would be forfeited if the proponent could not bring the offshore wind facility into commercial operation within the time frames specified in the FIT contract.[125]

100. As Mr. Smitherman explains, the inclusion of offshore wind in the FIT Program was intended to communicate to investors that Ontario was ready, willing and able to accept development of offshore wind projects within the parameters of the FIT Program.[126] The

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[121] Canada's Counter-Memorial, ¶¶ 8, 10, 113, 119, 133, 433.

[122] **C-0141**, Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) (September 24, 2009), p. 1; **C-1080**, Cross-Examination of Susan Lo, *Skypower et al v. Minister of Energy et al* (Court File No. 352/12) (August 10, 2012), pp. 110-111, 112-113; **C-1082**, Cross-Examination of Josephine Anne Cavanagh-Butler, *Skypower et al v. Minister of Energy et al* (Court File No. 352/12) (August 15, 2012), pp. 92-94.

[123] CWS-Baines, ¶ 70; **C-0162**, Standby Letter of Credit (RBS), Ontario Power Authority (OPA) and Windstream Wolfe Island Shoals Inc. (WWIS) (November 27, 2009); **C-0178**, FIT Security Provision Agreement (January 14, 2010); **C-0146**, OPA Feed-In Tariff Program, FIT Rules Version 1.1 (September 30, 2009), s. 6.1(b).

[124] **C-0692**, Standby Letter of Credit (RBS) and Ontario Power Authority (OPA) (April 14, 2014).

[125] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 9.2(d)(i).

[126] CWS-Smitherman, ¶ 60.

selection of a preferential FIT price for offshore wind projects was an acknowledgement of support for offshore wind development at the most senior levels of government.[127] With the agreement of Minister Smitherman, the OPA determined that a price of 19 cents per kilowatt hour was reasonable for offshore wind facilities.[128] Setting a price for offshore wind projects would allow the Province to effectively utilize a resource that the MNR had studied for years.[129]

101. If Ontario was "not ready" for offshore wind development, then it would not have, through the OPA, solicited investment in offshore wind projects via the FIT Program in the first place. It is not credible that the Ontario Government would direct the OPA to accept applications from developers of offshore wind projects accompanied by millions of dollars in security on application and on execution of a FIT contract if it was "not ready" for those projects. If Canada's arguments were accepted, they would demonstrate bad faith on the part of the Ontario Government. Effectively, the Ontario Government would have condoned the OPA accepting millions of dollars from proponents, including Windstream, at a time when it never intended to allow proponents to develop the offshore wind projects that were the subject of their applications within the mandatory timelines of the FIT Program. If Ontario was "not ready" for offshore wind development, then offshore wind would not have been included in the FIT Program in the first place.[130]

102. ***Second, the inclusion of offshore wind energy in the FIT Program was deliberate and broadly supported by the Government.*** As Mr. Smitherman explains, the decision to include offshore wind in the FIT Program received broad support in the Ontario Government.[131] Despite having ample opportunities, at no point did anyone in the Ontario Government raise with Minister Smitherman concerns about the safety and viability of offshore wind projects or

[127] CWS-Smitherman, ¶ 59.

[128] CWS-Smitherman, ¶ 42; **C-0121**, Presentation (OPA), Proposed Feed-In Tariff Schedule, Stakeholder Engagement - Session 4 (April 7, 2009), slide 40.

[129] CWS-Smitherman, ¶ 59.

[130] CWS-Smitherman, ¶ 60.

[131] CWS-Smitherman, ¶ 64.

Ontario's readiness for these projects.[132] Nor was Minister Smitherman advised that the regulatory risks for offshore wind projects were greater than for the other renewable energy technologies that were part of the FIT Program, especially since offshore wind projects would have a commercial operation date that was one year later than onshore wind projects.[133]

103. At the time the decision to include offshore wind projects in the FIT Program was made, there was a significant level of ongoing inter-ministerial conversations between staff at MEI, MOE and MNR.[134] This provided numerous opportunities for concerns about the development of offshore wind to be expressed and communicated to Minister Smitherman – and none were.[135]

104. ***Third, only renewable energy technologies, like offshore wind, for which Ontario was ready were included in the FIT Program.***[136] Certain types of renewable energy technologies, including certain types of solar technology, geothermal technology and small-scale micro wind technology were excluded from the FIT Program because the Government considered it was not prepared to receive investment in those technologies.[137] Only technologies that were anticipated to have widespread application in Ontario were included in the FIT Program.[138] This was consistent with the Ontario Government's objective of getting projects permitted and built as efficiently as possible.[139]

105. ***Fourth, Minister Cansfield's statements made shortly after the FIT Program launch show Ontario's readiness for offshore wind development.*** Minister of Natural Resources Donna Cansfield spoke at the Offshore Wind Energy in Coastal North America Conference in Toronto on October 21, 2009, just three weeks after the OPA began to accept applications for the FIT

[132] CWS-Smitherman, ¶ 64.

[133] CWS-Smitherman, ¶ 64.

[134] CWS-Smitherman, ¶ 64.

[135] CWS-Smitherman, ¶ 64.

[136] CWS-Smitherman, ¶ 42.

[137] CWS-Smitherman, ¶ 42.

[138] CWS-Smitherman, ¶ 41; **C-0121**, Presentation (OPA), Proposed Feed-In Tariff Schedule, Stakeholder Engagement - Session 4 (April 7, 2009), slide 8.

[139] CWS-Smitherman, ¶ 41.

Program.[140] As set out in paragraphs 125 to 128 of Windstream's Memorial, Minister Cansfield stressed that Ontario was ready and eager for offshore wind development in the Province. She stated with respect to the FIT Program, "[w]e know that when it comes to new investment, one of the most important factors for investors is certainty. When companies know exactly what the rules are it instills greater confidence to invest in Ontario, hire workers and produce self-renewable energy."[141] She emphasized: "Offshore windpower is included in the Feed-in-Tariff program at 19 cents per kilowatt hour. Ontario is the first jurisdiction in North America to set a price for offshore windpower, reflecting our strong support for exploring offshore potential."[142] If the Ontario Government were "not ready" for offshore wind development at the time, Minister Cansfield would not have expressed the Government's "strong support for exploring offshore wind potential" as part of the FIT Program.

106. Minister Cansfield also echoed her statements from 2008 that she had lifted the deferral on offshore wind development because the Government's research had "made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place."[143]

107. Canada attempts to minimize the significance of Minister Cansfield's remarks by asserting that "Minister Cansfield's statement referred not only to physical infrastructure, but to regulatory infrastructure, including Crown land site release policies."[144] Canada cites no evidence to support this bare assertion. Minister Cansfield was likely referring to the physical infrastructure associated with building offshore wind projects. The FIT Program's pricing

[140] **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009); **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008).

[141] **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009), p. 3; **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008).

[142] **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009), p. 4; **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008).

[143] **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008), p. 16.

[144] Canada's Counter-Memorial, ¶ 113.

structure and domestic content requirements were intended to foster development of the supply chain associated with the construction of offshore wind projects.[145]

108. It is unlikely that Minister Cansfield meant to suggest that there was insufficient regulatory infrastructure in place for offshore wind projects. With respect to the regulatory approval of offshore wind projects, she stated that "[a]nother benefit of the new Act [the *Green Energy Act*] is greater clarity up front around permits and processes. [The MNR] amended five statutes to remove barriers and to streamline processes for ministry permits and approvals needed for the construction and operation of renewable energy projects. We will, of course, continue to ensure the natural environment is protected, including habitat for fish and wildlife and species at risk."[146]

109. Canada's assertion that Minister Cansfield meant to explain that there was insufficient "regulatory infrastructure" for offshore wind projects is also contrary to MNR's determinations in 2008, when Minister Cansfield lifted the prior deferral on offshore wind applications. At that time, MNR determined that "the existing policy and Environmental Assessment processes are sufficient to address site-specific issues and concerns related to off-shore wind."[147] It would also be contrary to MNR's January 17, 2008 news release, stating that "[a]ll proposed [offshore wind] facilities must go through an environmental assessment."[148] Indeed, Minister Cansfield used the same language regarding "appropriate infrastructure" in remarks she made about the lifting of

[145] **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009), p. 4.

[146] **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009), p. 4.

[147] **C-0054**, Key Messages (MNR) (January 15, 2008), pp. 1-2; **C-0755**, Minister's Information Briefing Note (MNR), Issue: Supplementary Information for Minister's Appearance at Ontario Commercial Fisheries' Association Annual Meeting (January 15, 2008), pp. 2-3; **C-0757**, News Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008); **C-0057**, House Note (MNR), Issue: Lifting of the Offshore Wind Power Deferral (January 17, 2008), p. 1; **C-0754**, Presentation (MNR), Issues Management Plan, Offshore Wind Power - Lifting the Deferral (January 15, 2008), slides 2, 13.

[148] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

the deferral in 2008,[149] shortly after her Ministry had determined that the existing regulatory infrastructure applicable to offshore wind facilities was sufficient.

110. It is also unlikely that Minister Cansfield meant that the Crown land site release policy applicable to offshore wind projects created such regulatory uncertainty that offshore wind projects should not proceed through the FIT Program. On the contrary, Minister Cansfield stated that the MNR's review of its Crown land site release policy for renewable energy projects would be done over two phases "to first of all allow applications already in [MNR's] current system [like WWIS' applications] to continue under a streamlined site release process."[150]

C. 2010: Ontario Solicits Windstream's Investment in the Project

111. After having generally solicited investment in offshore wind projects through the FIT Program, the Ontario Government – through the OPA – specifically solicited Windstream's investment in the Project by offering WWIS the FIT Contract. The Ontario Government then specifically encouraged Windstream to cause WWIS to enter into the FIT Contract.

1. OPA Offers WWIS a FIT Contract for the Project

112. As set out in paragraphs 173 to 175 of Windstream's Memorial, on April 8, 2010, the OPA offered WWIS the FIT Contract for the Project. The Project, at 300 megawatts, was the largest project for which a FIT contract was offered among the 184 first-round FIT contract offers.[151] Thus, WWIS' Project was the largest project under the Ontario Government's initiative to attract investment in renewable energy and create "certainty" for investors.

113. Under the FIT Contract, the OPA would be required to purchase all electricity generated by the Project at a rate of $190 per megawatt-hour, with full escalation for inflation until the

[149] **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008), p. 16; **C-0763**, Remarks by The Honourable Donna Cansfield, Minister of Natural Resources at the Biomass and Energy for The Great Lakes Economy Conference, Queen's University, Kingston (June 8, 2008), p. 4.

[150] **C-0147**, Event Note (MNR), Offshore Wind Energy in Coastal North America and the Great Lakes Conference (October 21, 2009), p. 5.

[151] Windstream's Memorial, ¶ 175; **C-0207**, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (April 8, 2010).

Project's commercial operation date, and escalation for inflation up to a maximum of 20 percent in total thereafter, for 20 years starting from the date of the Project's commercial operation.[152]

114. WWIS would be required to bring the Project into commercial operation by May 4, 2014 – the Project's Milestone Date for Commercial Operation, or "**MCOD**."[153] However, WWIS would not be in default under the FIT Contract, and the Project could proceed, provided that the Project achieved commercial operation by the date that was 18 months after the MCOD, or November 4, 2016.[154]

115. WWIS would also be required to post $6 million in "Completion and Performance Security."[155] The OPA could retain the $6 million in security if WWIS were in default under the FIT Contract, including if WWIS failed to bring the Project into commercial operation by November 4, 2016.[156]

2. Ontario Government Creates the Rules under which the OPA Offered a FIT Contract to WWIS

116. Canada attempts to minimize the significance of the OPA having offered the FIT Contract to WWIS. It argues that "the OPA had no other choice but to offer [WWIS] a FIT Contract" because there was existing transmission capacity where Windstream proposed to connect the Project to the IESO-controlled grid.[157]

117. This argument fails to account for the broader legislative and regulatory context. The Ontario Government, through the OPA, created the rules under which the OPA offered a FIT

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

[153] **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010); **C-0197**, FIT Contract, Exhibits A - H (March 10, 2010), Exhibit A, s. 1.2(a).

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

[155] **C-0246**, Letter from Butler, Joanne (OPA) to Baines, Nancy (WWIS) (May 4, 2010).

[156] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 9.2(d)(i).

[157] Canada's Counter-Memorial, ¶ 11.

contract to WWIS that would require WWIS to build an offshore wind project and connect it to Ontario's electricity grid within four years.

118. If the Ontario Government and the OPA did not want the Project to be built, they had the choice not to offer a FIT Contract to WWIS. If Ontario was "not ready" for offshore wind development, it could and should have excluded offshore wind projects from the FIT Program. WWIS was awarded the FIT Contract because it, and the Project, satisfied the rules that the Ontario Government had created through the OPA. Thus, the Ontario Government clearly had a choice not to offer WWIS a FIT Contract for the Project.

3. Ontario Government and OPA Could Have Declined to Offer WWIS a FIT Contract if Ontario was "Not Ready" for Offshore Wind

119. In any event, Canada's argument that the OPA had "no choice" but to offer a FIT Contract to WWIS is contradicted by positions taken by the Ontario Government and the OPA in a legal proceeding in Ontario.

120. In 2012, proponents who had applied for, and been denied, FIT contracts for solar projects brought an application in the Ontario Superior Court of Justice for declarations that the OPA had acted unreasonably in failing to process the applications in accordance with the FIT Rules and for a declaration that MEI directions to the OPA were unfair, discriminatory and *ultra vires*.[158] In its legal argument in response to the application, MEI argued that "there was no guarantee that any applicant [to the FIT Program], even one who satisfied the eligibility criteria, would receive a contract offer."[159]

121. The OPA was more explicit in its own legal argument: "[the] OPA has the right not to offer a FIT contract to an eligible application even if connectivity was available."[160] Rather, "[i]t was always the intention of OPA to maintain sole discretion in the awarding of any contract.

[158] **C-1085**, Decision, *Skypower CL LP et al v. Minister of Energy* (*Ontario) et al* 2012 ONSC #4979, Divisional Court File No. 352/12 (September 10, 2012), ¶ 1.

[159] **C-1083**, Factum of the Respondent Ministry of Energy (Ontario), *Skypower et al v. Minister of Energy et al* (Court File No. 352/12) (August 22, 2012), ¶ 54.

[160] **C-1084**, Factum of the Respondent Ontario Power Authority, *Skypower et al v. Minister of Energy et al* (Court File No. 352/12) (August 22, 2012), ¶ 18 [Emphasis added].

OPA has reserved to itself the right to amend, suspend or cancel all or part of the FIT program including the [FIT] Rules and contract and to reject any applications."[161] Therefore, according to the positions MEI and the OPA have taken elsewhere, the OPA was under no obligation to offer WWIS a FIT Contract. It chose to do so.

4. Ontario Encourages Windstream to Enter into the FIT Contract

122. In section V.D. of its Counter-Memorial, Canada attempts to paint Windstream's decision to enter into the FIT Contract as a reckless decision to assume risk in the face of uncertainties. This is inconsistent with the evidence. MOE introduced a proposed regulatory amendment while the OPA's offer of a FIT Contract remained open to be accepted. In the face of that proposed amendment, the MEI and MNR, with the support of the Premier's Office, provided assurances to Windstream that it should nevertheless enter into the FIT Contract because the impacts of the proposed amendment on the Project would be managed. In doing so, they encouraged Windstream to enter into the FIT Contract, which it would not otherwise have done.

a) MOE Proposes Five-Kilometre Setback Requirement While the FIT Contract is Open for Acceptance by WWIS

123. In June 2010, after the OPA had offered the FIT Contract to WWIS but before Windstream had caused WWIS to sign it, MOE proposed an amendment to the REA Regulation.[162] This amendment, if passed, would require that offshore wind projects be located a minimum of five kilometres from shore. There was no such requirement under the REA Regulation.[163] The concept of a project's minimum distance from shore or from another specified location is known informally as a "setback."

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[161] **C-1084**, Factum of the Respondent Ontario Power Authority, *Skypower et al v. Minister of Energy et al* (Court File No. 352/12) (August 22, 2012), ¶ 72 [Emphasis added].

[162] **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010).

[163] The rationales for the proposed five-kilometre setback identified in the discussion paper included protecting drinking water intakes and ensuring that potential noise levels from a typical offshore wind facility were lower than 40 decibels at the closest onshore receptor. MOE's discussion paper stated with respect to drinking water: "A five-kilometre shoreline exclusion zone would establish a distance between drinking water intakes, both current and planned, and offshore wind facilities. Establishing a shoreline exclusion zone would also ensure that sediment dredging and other construction-related activities do not impact any drinking water intakes, given that the intakes are

124. At the time this proposed amendment was announced, there was no standardized setback for offshore wind projects. A MOE fact sheet regarding the REA Regulation specified that offshore wind projects were not subject to province-wide standard setbacks. Instead, the applicable setback from the closest occupied dwelling (a "receptor") would be determined on a site-specific basis based on the noise levels generated by the project. The onus was on the project's proponent to conduct noise studies to demonstrate that the noise generated by the project would be less than 40 decibels measured at the closest receptor.[164]

125. As described in paragraph 201 of Windstream's Memorial, although Windstream was sceptical about the scientific basis of the setback proposal, it determined that the Project could be reconfigured to meet the requirement and informed government officials that a five-kilometre setback would be workable for the Project.[165]

126. However, the proposed setback requirement had two important implications for the Project. First, MOE's consultations on and implementation of the regulatory amendment would cause delays to the Project. If the FIT Contract were not extended to account for these delays, WWIS risked not being able to bring the Project into commercial operation by its FIT Contract deadline of May 4, 2014. In that situation, WWIS could have to pay penalties to the OPA in order to preserve the 20-year term of the FIT Contract.[166]

127. Second, the Project's proposed location would have to be moved. Since MNR was no longer accepting new applications for access to Crown land for offshore wind projects, it would have to agree to reconfigure WWIS' Crown land applications to provide access to areas located more than five kilometres from shore.[167]

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generally located less than four kilometres from the shoreline.": **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010), p. 2.

[164] **C-0791**, MOE Fact Sheet Entitled "Wind Facilities" (September 24, 2009) [Emphasis added].

[165] Windstream's Memorial, ¶ 201.

[166] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 8.1(d).

[167] CWS-Baines, ¶ 85.

128. Therefore, Windstream was not prepared to cause WWIS to enter into the FIT Contract unless (a) it received an extension to its MCOD to account for the delay that would be caused by the proposed regulatory amendment,[168] and (b) MNR gave Windstream assurances that the Project could be moved to the proposed new location.[169]

129. The Ontario Government intervened to encourage Windstream to enter into the FIT Contract even though the setback had not been finalized. MEI directed the OPA to extend the Project's MCOD by one year. MNR, with the approval of the Premier's Office, provided Windstream with comfort that the Project could be moved to the proposed new location after the MOE confirmed that the REA Regulation would be amended to include the setback.

b) MEI Directs OPA to Extend the MCOD for the Project to Address Delays Caused by the Proposed Regulatory Amendment

130. Although the OPA was reluctant to do so, MEI directed the OPA to extend the MCOD for the Project by one year. This signalled to Windstream that the Ontario Government supported the Project and wanted it to proceed. If the Ontario Government did not support the Project, it would have had no reason to direct the OPA to grant WWIS an extension to the MCOD under the FIT Contract.

131. In mid-July 2010, Paul Ungerman, the Director of Policy in then-Minister of Energy and Infrastructure Brad Duguid's office, advised Windstream that the OPA would adjust the MCOD in the FIT Contract "to reflect that the clock will start counting down once the setback requirements are finalized."[170]

132. As Canada states at paragraph 220 of its Counter-Memorial, when Windstream requested this amendment directly from the OPA, the OPA initially declined to grant it.[171] However,

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[168] CWS-Baines, ¶¶ 86-92; CWS-Mars-2, ¶¶ 39-40; **C-0338**, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) (August 10, 2010).

[169] CWS-Baines, ¶ 85; CWS-Mars-2, ¶¶ 28-30.

[170] Canada omits this in its discussion of the MCOD extension in paragraphs 219 and 220 of its Counter-Memorial: **C-0317**, Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) et al (July 16, 2010).

[171] **C-0338**, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) (August 10, 2010).

Canada fails to mention that Windstream's government relations' representative immediately brought this to the attention of Mr. Ungerman, who stated that he had "dealt with it" and that it was "ok" but that they needed to "work on it today."[172] It also appears that the Premier's Office was involved in the decision to grant this extension.[173] Mr. Ungerman commented to Windstream's representative with respect to the OPA's initial refusal to grant an extension: "[f]eel free to get back to me with their response. Nothing is ever easy on this one."[174]

133. The following day, Ms. Butler of the OPA informed Windstream that the OPA had found a "mutually agreeable solution."[175] The solution was that the MCOD in the FIT Contract would be extended by one year, to May 4, 2015 instead of May 4, 2014.[176]

134. This one-year extension gave significant comfort to Windstream. Because it was obtained on Windstream's behalf by MEI, it assured Windstream that the Ontario Government supported the Project. Also, since the OPA offered a one-year extension rather than the contractual amendment Windstream had originally proposed, Windstream understood that the Ontario Government intended to conclude its policy review regarding the five-kilometre setback in short order. If this were not the case, MEI would have had no reason to intervene with the OPA to obtain a one-year extension for the FIT Contract. In addition, the one-year extension gave Windstream comfort that it would be able to bring the Project into commercial operation within the timing parameters of the FIT Contract.[177]

[172] **C-0338**, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) (August 10, 2010).

[173] **C-0836**, Email from Maskell, Lindsay (MNR) to Mullin, Sean (OPO) (August 2, 2010).

[174] **C-0340**, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) (August 10, 2010).

[175] **C-0341**, Email from Baines, Ian (WEI) to Mars, David (Collective Solution) (August 11, 2010).

[176] **C-0342**, Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) et al (August 12, 2010); **C-0343**, Email from Cecchini, Perry (OPA) to Chamberlain, Adam (BLG) et al (August 12, 2010).

[177] CWS-Mars-2, ¶ 37; CWS-Baines, ¶ 39.

135. Windstream relied on MEI's support of the Project, demonstrated by its intervention in procuring a one-year extension to the FIT Contract, in deciding to enter into the FIT Contract and put $6 million in security at risk.[178]

c) MNR, with the Approval of the Premier's Office and the Minister of Energy and Infrastructure's Office, Provides Comfort Regarding the Project Site

136. ***MNR provides comfort to Windstream regarding the Project site.*** After it learned that MOE proposed to implement a mandatory five-kilometre setback, Windstream raised with MNR the possibility of "swapping" the Crown land for which it had applied with other land further offshore.[179] This was necessary because MNR was no longer accepting new applications for access to Crown land for offshore wind projects. If MNR were not prepared to "swap" WWIS' Crown land applications, then it would have been more difficult for the Project to comply with the five-kilometre setback.[180]

137. In a letter dated August 9, 2010, MNR confirmed that it was prepared to discuss with Windstream the reconfiguration of WWIS' Crown land applications given the proposed five-kilometre setback and that WWIS had been offered a FIT contract. Those discussions would take place after the proposed five-kilometre setback had been finalized.[181]

138. MNR further emphasized that once the proposed setback and the reconfiguration of the Crown land applications had been finalized, the Project would be permitted to move through the remainder of the Crown land application process. MNR gave further comfort to Windstream that MNR would not cause regulatory delays:

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[178] CWS-Mars-2, ¶ 39.

[179] Windstream's Memorial, ¶ 198.

[180] CWS-Baines, ¶¶ 84-85.

[181] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

> I appreciate your need for certainty on this file, and we will move as quickly as possible through the remainder of the application review process in order that you may obtain Applicant of Record status in a timely manner.[182]

139. ***MEI and the Premier's Office approve the letter to Windstream.*** Before MNR sent this letter, Windstream's representative informed Richard Linley of the Minister of Natural Resource's Office that the purpose of the letter would be to "sell" the FIT Contract to Windstream's investors.[183] Mr. Linley sought and received approval of the letter from Mr. Mullin of the Premier's Office and from Mr. Ungerman and Mr. Mitchell of the Minister of Energy's office.[184]

140. Thus, as of August 9, 2010, the Premier's Office, the Minister of Energy and Infrastructure and the Minister of Natural Resources all supported the Project. They all wanted WWIS to enter into the FIT Contract. They supported MNR's efforts to give comfort to Windstream with respect to the reconfiguration of WWIS' Crown land applications.

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[182] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010), p. 2 [Emphasis added].

[183] **C-0328**, Email from Linley, Richard (MNR) to Benedetti, Chris (Sussex Strategy Group) (August 5, 2010).

[184] Sean Mullin of the Premier's Office approved the letter before it was sent to Windstream: **C-0838**, Email from Maskell Lindsay (MNR) to Linley, Richard (MNR) (August 4, 2010).

Mr. Mullin had provided input regarding the grid cell swap proposal the previous week: **C-0833**, Email from Maskell, Lindsay (MNR) to Mullin, Sean (OPO) (July 28, 2010).

[redacted]: **C-0832**, Email from Cain, Ken (MNR) to Lawrence, Rosalyn (MNR) et al (July 27, 2010).

[redacted] **C-0832**, Email from Cain, Ken (MNR) to Lawrence, Rosalyn (MNR) et al (July 27, 2010).

[redacted]: **C-0301**, Email from Richard, Linley (MNR) to Boysen, Eric (MNR) (June 25, 2010).

[redacted] **C-0832**, Email from Cain, Ken (MNR) to Lawrence, Rosalyn (MNR) et al (July 27, 2010).

[redacted]: **C-0835**, Email from Boysen, Eric (MNR) to Au, Dave (MNR) (July 30, 2010).

141. ***Windstream relies on MNR's letter in deciding to enter into the FIT Contract.*** MNR's letter gave Windstream significant comfort that the Ontario Government was committed to working with Windstream to accommodate any policy changes in order to make the Project a reality. The reconfiguration would occur after MOE's proposed regulatory amendment to establish the five-kilometre setback was finalized and after MNR's policy review regarding Crown land for offshore wind projects was complete.[185] However, Windstream had no reason to believe (and no way of knowing) that MOE and MNR would simply decide to cancel offshore wind development in the Province, rather than completing their policy reviews.[186]

142. The letter also gave Windstream significant comfort that AOR status for the Project site would be granted in a timely manner.[187] As noted above, the fact that MEI had procured for Windstream a one-year extension as a result of the introduction of the proposed five-kilometre setback indicated to Windstream that the one-year extension would be sufficient to address delays to the Project caused by the proposed regulatory amendment.[188] At the time WWIS executed the FIT Contract, the consultation period for MOE's proposed five-kilometre setback was due to close on August 23, 2010,[189] and MNR's policy review was due to close on October 4, 2010.[190] Windstream had no reason to believe that these policy reviews would not be concluded in an efficient and expeditious manner. It certainly had not received any indication that either of these policy reviews could result in the complete elimination of offshore wind development in the Province.[191]

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[185] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

[186] CWS-Mars-2, ¶ 30.

[187] CWS-Mars-2, ¶ 31.

[188] CWS-Mars-2, ¶ 32.

[189] **R-0421**, Ministry of the Environment, Preliminary Summary of EBR Comments (EBR Registry # 011-0089), p. 1. The comment period was extended to September 7, 2010.

[190] **C-0727**, Policy Decision Notice (MNR), Offshore Power: Consideration of Additional Areas to be Removed from Future Development (EBR Registry Number 011-0907) (August 18, 2010).

[191] CWS-Baines-2, ¶ 34.

143. Windstream relied on the commitments set out in this letter in authorizing WWIS to execute the FIT Contract.[192]

d) OPA, Supported by MEI, Extends Deadlines to Sign the FIT Contract

144. The Ontario Government's initial support for the Project is also evident from the fact that the OPA, with the support of MEI, extended Windstream's deadline to sign back the FIT Contract six times while the issues identified above were addressed.[193] MEI appears to have directed or influenced these decisions.[194] Windstream understood from these multiple extensions to its deadline to sign back the FIT Contract that the Ontario Government supported the Project.[195]

145. There would have been no reason for the extensions if the Government did not want the Project to proceed. If the Government was truly "not ready" for the Project, as Canada asserts, it could have let the OPA's FIT Contract offer lapse.

e) Ontario Government Represents that it Supports the Project

146. In addition, in a series of meetings held between April and August 2010, Windstream was repeatedly assured that the Project had the Ontario Government's support, including the support of the Premier's Office. These meetings are explained in detail in the witness statements of Mr. Baines, Mr. Mars and Mr. Roeper.[196]

147. For example, on April 19, 2010, Windstream met with staff from MOE, MNR, MEI and the MTC. Mr. Baines explains that, at that meeting, Windstream was assured that the Project had the Ontario Government's support, and that it had the highest priority for receiving AOR

[192] CWS-Mars-2, ¶ 28.

[193] CWS-Chamberlain, ¶¶ 9-23.

[194] **C-0831**, Email from Linley, Richard (MNR) to Maskell, Lindsay (MNR) (July 9, 2010); **C-0830**, Email from Evans, Paul (ENE) to Lo, Sue (ENE) (June 29, 2010).

[195] CWS-Mars-2, ¶ 39.

[196] CWS-Baines, ¶¶ 75- 92; CWS-Baines-2, ¶¶ 16-34; CWS-Roeper, ¶¶ 24-38; CWS-Mars, ¶¶ 67-77.

status.[197] Ms. Lawrence asserts that the evidence of Mr. Baines is inaccurate.[198] Yet she was not present at the meeting. Canada has not put forward any evidence from a witness who was actually at the meeting to contradict Mr. Baines' evidence.

148. Ms. Lawrence further asserts that this meeting was not a "kick off" meeting to determine what information the government would need to begin the permitting and development process for the project."[199] However, as Mr. Baines explains in his witness statement, Windstream approached this meeting on the basis that it would begin discussions concerning the permitting for the Project. Windstream had no way of knowing that the ministries had decided that this would be a "policy challenge / issues exchange meeting."[200]

149. Contrary to Ms. Lawrence's assertion that Windstream "could provide few details about the project" at the meeting, Windstream provided those present with information about wind speeds in the area, the number and size of turbines proposed, the maximum water depth, plans for underwater electric cabling and a description of the proposed turbine layout.[201]

150. On June 15, 2010, Windstream met with representatives of MNR, MOE and MEI. At that meeting, a MOE representative asked what was the "drop dead deadline for the project." At paragraph 23 of her witness statement, Ms. Dumais states that "it would not have been reasonable for a proponent to interpret a statement that guidelines are under development or an inquiry as to a project's "drop dead date" as a commitment that MOE would expedite the proponent's approval process or that we would approve their project."[202]

151. Windstream never claimed that MOE committed to approving the Project. However, Mr. Baines explains that he understood Mr. Mansour's comment as a commitment to help

[197] CWS-Baines, ¶ 76.

[198] RWS-Lawrence, ¶ 29.

[199] RWS-Lawrence, ¶ 30.

[200] RWS-Lawrence, ¶ 29.

[201] **C-0808**, Handwritten Notes of Kevin Perry (April 19, 2010); **C-0809**, Handwritten Notes of Ken Cain (MNR) (April 19, 2010).

[202] RWS-Dumais, ¶ 25.

Windstream move through the regulatory approvals process, especially since at the time the Project was stalled because of the proposed five-kilometre setback. Mr. Baines explains that he does not believe that MOE would have asked for the Project's "drop dead date" unless MOE was interested in helping to move the Project ahead.[203]

152. On July 7, 2010, Mr. Ungerman (the Senior Policy Advisor to the Minister of Energy) assured Windstream that the Ontario Government, including the Premier's Office, supported the FIT Program and that the Project in particular had the support of the Ontario Government.[204] Canada has not put forward any evidence to dispute what was said at this meeting. As Mr. Baines explains in his witness statement, this meeting sent "a positive and clear message to [Windstream's] board."[205]

153. Windstream relied on these expressions of support for the Project in deciding to cause WWIS to enter into the FIT Contract.[206]

5. Relying on Ontario's Support for the Project, Windstream Causes WWIS to Enter into FIT Contract

154. Windstream relied on the Ontario Government's assurances of support for the Project in causing WWIS to enter into the FIT Contract. In addition to the factors set out above, Windstream also relied on the streamlined approvals process with service guarantees for renewable energy that were promoted as one of the Ontario Government's green energy procurement efforts.[207] The regulatory framework that applied at the time is described in greater detail in paragraphs 200 to 207 below. Windstream specifically relied on the MOE's six-month service guarantee for processing REA applications for renewable energy projects, given the

[203] CWS-Baines-2, ¶ 27; CWS-Baines, ¶ 79.

[204] CWS-Baines, ¶ 87.

[205] CWS-Baines, ¶¶ 87-88; **C-0314**, Email from Ungerman, Paul (MEI) to Baines, Ian (WEI) (July 8, 2010).

[206] CWS-Mars-2, ¶ 39.

[207] CWS-Mars-2, ¶ 38.

timelines within which the Project would be required to achieve commercial operation under the terms of the FIT Contract.[208]

155. Windstream would not have caused WWIS to enter into the FIT Contract and post $6 million in security if the Ontario Government had not provided the assurances described above. Windstream believed that it was working together with the Ontario Government and its various agencies to achieve the Province's green energy goals of creating jobs and promoting economic development.[209]

6. WWIS Would Not Have Entered into the FIT Contract Had It Known the Moratorium Was Forthcoming

156. Canada's argument about the alleged regulatory uncertainty that the Project faced appears to be premised on the idea that Windstream somehow should have foreseen that Ontario was contemplating imposing a moratorium on offshore wind development. At the time WWIS applied for and then signed the FIT Contract, Windstream had no reason to believe that the Ontario Government was considering imposing a moratorium on offshore wind projects or banning them altogether.[210] On the contrary, Windstream's interactions with MEI, MOE, MNR, the OPA and the Premier's Office before WWIS signed the FIT Contract were all focused on moving the Project forward.[211]

157. Mr. Ziegler explains his surprise at Canada's statement that the Project was "doomed to fail from the moment the Claimant signed on the dotted line [because it] was simply not a project that could be built within the timelines required by the FIT Contract."[212] He states:

[208] CWS-Mars-2, ¶ 39.

[209] CWS-Mars-2, ¶ 40.

[210] CWS-Baines-2, ¶ 44.

[211] CWS-Baines-2, ¶ 45.

[212] Canada's Counter-Memorial, ¶ 25.

> This argument is shocking. I believe that we were entitled to assume that the Ontario Government would act in good faith in all of their dealings with us, especially given how aggressively it solicited our investment. I find it astounding that it would have solicited our investment, encouraged us to apply for a FIT contract, encouraged us to sign the FIT Contract and put large sums at risk, including the $6 million in security, for a project that Ontario, through Canada, now claims was "doomed to fail" from the outset.
>
> If my fellow investors and I had known that the Ontario Government would not follow through on its commitments and would act in such a cavalier manner towards our investment, it goes without saying that we would never have invested in Ontario.[213]

158. Mr. Mars explains that, as experienced developers, the investors in Windstream took into account all standard risks when deciding whether to invest in the Project. However, one risk they did not anticipate, and which he does not believe they could have anticipated, was counterparty risk. Windstream believed that the Ontario Government was serious about its commitment to increase investment in renewable energy in the Province, including offshore wind development.[214]

159. In Mr. Ziegler's words, he and his fellow investors were "badly misled by the Ontario Government."[215]

II. Investors in Windstream are Experienced Marine-Environment Project Developers with Investments and Operations around the World

160. Canada's Counter-Memorial is replete with characterizations of the investors in Windstream as "dreamers" or "gamblers."[216] As Mr. Ziegler explains, this characterization does not accurately reflect the status of the investors in Windstream as seasoned entrepreneurs, investors and operators of numerous businesses.[217] Over the last 30 years, the investments held

[213] CWS-Ziegler-2, ¶¶ 12-13. See also CWS-Baines, ¶ 47.

[214] CWS-Mars-2, ¶ 63.

[215] CWS-Ziegler-2, ¶ 11.

[216] See for example Canada's Counter-Memorial, ¶¶ 9-10, 506.

[217] CWS-Ziegler-2, ¶ 10.

by the investors in Windstream and the businesses they operate have created returns in the billions of dollars and significant levels of economic activity in the numerous jurisdictions where the investors operate.[218]

161. As Mr. Ziegler explains, the investors in Windstream are not just investors. They are also entrepreneurs and operators. They have built many of the companies described in paragraphs 54 to 56 of Windstream's Memorial[219] from the ground up. These companies involve a highly specialized and skilled workforce and operate in the energy industry in dozens of jurisdictions around the world in challenging regulatory environments.[220] Because of the nature of the energy industry, the companies in which the investors in Windstream invest are often engaged in developing challenging projects with unique regulatory requirements.[221]

162. Prior to the development of a novel or challenging project, the investors in Windstream have never first obtained a long-term, fixed rate contract from a high-quality and credit-worthy contractual counterparty like the OPA. They generally have few, if any, guarantees or assurances before engaging in these projects. Thus, the suggestion that the investors are "dreamers" or "gamblers" is inconsistent with the investors' depth of experience and expertise – and indeed, as Mr. Ziegler explains, that suggestion is offensive to him.[222]

163. In addition to the detailed list of investments that the investors in Windstream have around the world, set out in Appendix A to Mr. Mars' first witness statement, Mr. Ziegler's witness statement includes a table setting out in detail, with photographs, each of the major projects that the investors in Windstream have successfully commercialized.[223] These projects include four of the most technologically advanced Ultra Deepwater Drillships, two Ultra Deepwater Semi-Submersible Drill Rigs and three retrofit/refurbishments at a cost of USD [redacted]

[218] CWS-Ziegler-2, ¶ 10; see also CWS-Mars, ¶¶ 15-22, Appendix A.

[219] See also CWS-Mars, ¶¶ 15-22, Appendix A.

[220] CWS-Ziegler-2, ¶¶ 15-16.

[221] CWS-Ziegler-2, ¶¶ 15-16.

[222] CWS-Ziegler-2, ¶¶ 15-16.

[223] CWS-Ziegler-2, ¶ 18.

[redacted][224] They also include [redacted], at a combined cost of approximately USD [redacted] million.[225]

164. Based on this experience, the investors in Windstream had a high degree of confidence that the management and financial resources of the investor group could bring the Project to commercial operation. Indeed, the group had worked together for decades and had financed and built numerous offshore marine vessels and companies that had substantially higher risk profiles and higher costs than WWIS. This expertise, acquired over decades, would have been directly brought to bear on the Project.[226]

165. The suggestion that the investors in Windstream are mere "gamblers" or "dreamers" without the experience to bring the Project into commercial operation is without foundation in the evidence and should be disregarded by the Tribunal.

III. Windstream's Decision to Apply for, and Enter into, the FIT Contract was Commercially Reasonable

166. Contrary to Canada's assertions, Windstream's decisions to apply for and enter into the FIT contract were both commercially reasonable and were not a "high-risk gamble." The FIT Contract was a key threshold step for the Project, enabling Windstream to begin the process of seeking regulatory approvals. Windstream's choices were made in reliance on the well-established regulatory framework and repeated reassurances from the Ontario Government.

A. The FIT Contract was the Key Gating Step for the Project

167. Canada's assertion that Windstream's decision to cause WWIS to apply for and enter into the FIT Contract was a "gamble" is inconsistent with the Ontario Government's repeated statements that the FIT Program was designed to provide "certainty" for developers with respect to renewable energy projects and to mitigate risk.

[224] CWS-Ziegler-2, ¶ 18.

[225] CWS-Ziegler-2, ¶ 18.

[226] CWS-Ziegler-2, ¶ 17.

168. As Mr. Smitherman explains, it was necessary for the FIT Program to provide certainty for investors in order to attract investment and to get renewable energy projects built as expeditiously as possible.[227] The FIT Program did this by offering standard prices for electricity generated by renewable energy and long-term contracts with a stable, credit worthy counterparty to allow investors to recover development costs at a reasonable rate of return.[228]

169. The award of a FIT contract was the "key" step for the proponent of an offshore wind project – or indeed of any renewable energy project covered by the FIT Program – in the development of the project.[229] Ontario's renewable energy procurement program was designed so that proponents would first receive a FIT contract with a guaranteed long-term price.[230] Proponents could use this to attract the requisite financing to conduct environmental assessments and to construct their projects.[231] In other words, the Ontario Government intended that environmental assessments would only come after the award of a FIT contract.[232]

170. Further, as explained above, although the Ontario Government could not guarantee that a project awarded a FIT contract would become operational, it did guarantee that proponents who were awarded FIT contracts would be permitted to proceed through the REA process in a timely way. Thus, the award of a FIT Contract was a signal to investors that the Ontario Government would work with them to get their projects built.[233]

171. Mr. Baines explains in his witness statement that he understood from meetings with MNR staff that MEI's plan was to expand Ontario's renewable energy supply "through the FIT

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[227] CWS-Smitherman, ¶¶ 51, 56.

[228] **R-0064**, Proposed Feed-in Tariff Program Stakeholder Engagement - Session 1 (March 17, 2009), slides 26, 49; **C-0121**, Presentation (OPA), Proposed Feed-In Tariff Schedule, Stakeholder Engagement - Session 4 (April 7, 2009), slide 3.

[229] CWS-Smitherman, ¶ 58; **C-0851**, Renewable Energy Approvals Process (For wind, solar, biomass, and biogas projects) (September 22, 2010).

[230] CWS-Smitherman, ¶ 45.

[231] CWS-Smitherman, ¶ 45.

[232] CWS-Smitherman, ¶ 45. MEI staff recognized that projects with FIT contracts should be permitted to proceed through the REA process: "we can't be awarding FIT contracts on one hand, and not allowing REA […] on the other": **C-0864**, Email from Viswanathan, Samira (MEI) to Zaveri, Mirrun (MEI) (November 24, 2010).

[233] CWS-Smitherman, ¶ 45.

Program."[234] As a result, Ontario ministries would align their policies to support the FIT Program and FIT contract holders. For instance, Mr. Baines was informed that Crown land applicants with a FIT contract would be able to gain access to Crown land if required to develop their projects.[235] Mr. Mars explains that he understood the Ontario Government as encouraging investors with Crown land applications to apply for FIT Contracts.[236]

172. In Ms. Powell's opinion "[a] FIT contract would have been generally viewed by the regulated community as the key gating issue for any developer intending to build an offshore wind project because it would not have been economically viable without a FIT contract."[237] Further, "[a] FIT contract would have been generally viewed by the regulated community as the key 'hard gate' (i.e., required before any other material milestone in the project development process would have been pursued)."[238] In Ms. Powell's experience, a developer would not typically invest heavily in project development activities, until a FIT contract is awarded.[239]

173. Thus, it was reasonable for Windstream to cause WWIS to apply for and enter into the FIT Contract as the key and most important step in the development of the Project.

[234] CWS-Baines, ¶ 55.

[235] CWS-Baines, ¶ 55.

[236] CWS-Mars, ¶¶ 57, 60; CWS-Mars-2, ¶ 18.

[237] CER-Powell, ¶ 106.

[238] CER-Powell, ¶ 106. MEI has also commented with respect to the Trillium offshore wind project, that it was at a less advanced stage than Windstream's Project because it had not applied to the FIT Program: **C-0852**, Email from Quirke, Christopher (MEI) to Ing, Pearl (MEI) et al (September 26, 2010).

[239] CER-Powell, ¶ 106.

B. Commercially Reasonable for WWIS to Apply to the FIT Program Before Site Release

174. Canada also argues that Windstream "gambled" in causing WWIS to apply to the FIT Program at time when its "offshore wind project was no more than a dream" because "it had not yet been granted site access over a single hectare" of Crown land.[240]

175. In making this argument, Canada fails to mention that the Minister of Natural Resources directed Windstream to apply to the FIT Program within the FIT launch period in order to preserve the priority position of its Crown land applications. In a letter to Windstream dated September 24, 2009 (the date the FIT Program was launched), Minister Cansfield advised Windstream that "[i]n order to maintain priority position within MNR's site release process, you must submit an application to the FIT program within the FIT program launch period. Following the outcome of the OPA's FIT launch application process, the status of all Crown land applications will be reviewed and applicants will be contacted regarding the status of each of their applications."[241] This was confirmed by a November 24, 2009 letter indicating that:

> Existing Crown land applicants who apply to FIT during the launch period, and who are awarded contracts by the OPA, will be given the highest priority to the Crown land sites applied for. This means that these applications will take precedence over all others for this site, and will receive priority attention from MNR.[242]

176. Therefore, applying to the FIT Program during the FIT launch period was a prerequisite for MNR to grant site release to a proponent of a renewable energy project.[243] It was therefore far

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[240] Canada's Counter-Memorial, ¶ 9.

[241] CWS-Baines, ¶ 56; CWS-Mars, ¶ 57 [Emphasis added]; **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009), p. 1. See also: **C-0805**, Email from Boysen, Eric (MNR) to Tasca, Leo (MEI) et al (April 1, 2010).

A question and answers document on aligning the FIT Program with MNR's site release policy for renewable energy projects also stated that applicants for Crown land would "now be asked to apply to the FIT program to maintain priority status under MNR's site release process," and that Crown land applicants who did not apply to the FIT Program risked losing their applications: **C-0800**, Questions and Answers: Aligning the FIT Program and MNR's Site Release Policy for Renewable Energy Projects.

[242] **C-0158**, Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) (November 24, 2009), p. 1.

[243] This was also recognized by Susan Lo of MEI after the decision to apply the moratorium to Windstream was made: **C-0971**, Email from Lo, Sue (MEI) to Killeavy, Michael (OPA) et al (February 10, 2011).

from a "gamble" – to use Canada's words – for Windstream to cause WWIS to apply to the FIT Program without first having obtained access to the Crown land for the project. Rather, Windstream was required to proceed in this manner in compliance with MNR's own policies.

177. Canada's argument that it was a "gamble" for Windstream to cause WWIS to apply to the FIT Program before it received site release is also contradicted by a document on which Canada relies in its Counter-Memorial. In an email to his counterparts at MEI and MOE, Mr. Linley, the Minister of Natural Resources' Senior Policy Advisor, explained that proponents of renewable energy projects "don't need applicant of record status before they get a FIT. The rationale was to weed out speculators among the pool of applicants."[244] He also explained that in 2009, MNR had "negotiated with OPA to allow all existing Crown land applicants to apply to the FIT program. The idea being that MNR would determine priority Crown land projects based on which Crown land applicants secure accepted FIT applications from OPA."[245]

C. Commercially Reasonable for WWIS to Enter into the FIT Contract Before Site Release

178. Contrary to Canada's allegation, it was also commercially reasonable for WWIS to enter into the FIT Contract before WWIS obtained site release, in light of explicit comfort provided by MNR.

179. MNR's August 2010 correspondence[246] provided explicit comfort to Windstream that MNR would not cause regulatory delays to Windstream's site approval.[247] This correspondence was approved by the Premier's and the Minister of Energy. Not only is this letter an extremely rare assurance from MNR,[248] but its approval by the Premier's Office and Minister of Energy

[244] **R-0096**, Email from Linley, Richard (MNR) to Amaral, Utilia (ENE) et al (April 13, 2010) [Emphasis added].

[245] **R-0096**, Email from Linley, Richard (MNR) to Amaral, Utilia (ENE) et al (April 13, 2010).

[246] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

[247] See ¶¶ 141-143 above.

[248] CWS-Roeper-2, ¶ 27; CWS-Roeper, ¶ 38.

brought together all major government stakeholders in support of the Project.[249] MNR continued to act in furtherance of its promise until at least January 2011.[250]

180. Moreover, in Ms. Powell's opinion, "it would have been commercially reasonable for a developer to assume that it would obtain the requisite Crown land tenure in due course and in a timely manner" once it was awarded a FIT contract. This is because "the regulated community generally understood that the MNR would work to support Ontario's commitment to renewable energy by aligning the Crown land access process with the timelines in the OPA's renewable energy procurement process."[251]

181. ***Canada's attempt to minimize the significance of MNR's comfort letter should be rejected.*** Ms. Lawrence of MNR asserts that "this letter did not resemble in form or in substance a comfort letter, which MNR provides to financial institutions […] to facilitate financing," and that "[t]he letter makes clear that any discussions about a grid cell swap must await the results of the EBR posting."[252]

182. The status of the comfort letter as different from one intended to facilitate financing has no bearing on the commitments contained in the letter. As Mr. Roeper explains, the letter was sent to Windstream after nearly four months of meetings with representatives of the Ontario Government in which Windstream's Crown land applications were either the main topic of discussion, or one of the main topics.[253] In this context, the letter gave Windstream comfort that MNR was planning to accommodate the proposed reconfiguration of WWIS' Crown land applications within the evolving policy direction, and that it would grant Windstream AOR status in a timely manner once the policy review was complete.[254]

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[249] See above at ¶ 139, footnote 184.

[250] See ¶ 185 below.

[251] CER-Powell, ¶ 107.

[252] RWS-Lawrence, ¶¶ 35-36.

[253] CWS-Roeper-2, ¶ 28.

[254] CWS-Roeper-2, ¶ 29.

183. Contrary to the impression left by Ms. Lawrence, there is no doubt that MNR was prepared to actually follow through on its commitments to reconfigure WWIS' applications for Crown land once the five-kilometre setback was finalized. Two days after the letter to Windstream was sent, MNR staff began discussing how it could move forward with the proposed reconfiguration and "kick into project gear a bit more." It planned to hold a meeting with Windstream to:

(a) "begin discussions on which additional grid cells may be required outside the five-kilometre exclusion zone;"

(b) "[i]nitiate a site description meeting to begin sharing information on known values [and] concerns;"

(c) "[p]lan out [First Nations] and Public notification and consultation requirements" with relative timelines even though the specific dates could not be confirmed; and

(d) "[p]lan out steps" for WWIS to "achieve the mythical 'Applicant of Record' status."[255]

184. Numerous documents prepared in September 2010 show that MNR intended to follow through on the commitment in its letter and grant AOR status to WWIS expeditiously once the five-kilometre setback was finalized.[256]

185. MNR did not back down from this commitment even after the decision to impose the moratorium on offshore wind development was made. MNR continued to be prepared to

[255] **C-0840**, Email from Boysen, Eric (MNR) to Hayward, Neil (MNR) et al (August 11, 2010), p. 1.

[256] MNR staff indicated that:

(a) "shortly after our policy pieces have landed, we can proceed expeditiously to Applicant of Record status and beyond": **R-0153**, Email from Boysen, Eric (MNR) to Slawner, Karen (MEI) et al (September 29, 2010);

(b) MNR intended to "expedite applicant of record process" for WWIS "post EBR" (which likely refers to the comment period respecting MOE's proposed five-kilometre setback: **C-0850**, Handwritten Notes of Marcia Wallace (ENE) (September 21, 2010), p. 2; and

[redacted] **C-0853**, Email from Cain, Ken (MNR) to Duffey, Barry (ENE) (September 28, 2010).

reconfigure WWIS' Crown land applications to allow the Project to proceed as a pilot. It prepared a document that indicated that MNR would work with Windstream to (a) "amend current offshore windpower application to trade grid cells to areas further offshore" and (b) "issue Applicant of Record for entire application area."[257]

186. MNR even prepared a "Questions and Answers" document to support the decision to reconfigure WWIS' Crown land applications. This document, which would be used to answer questions from journalists and the public, said: "Windstream will be working with MNR's Peterborough District Office to complete the site release process."[258] A number of other documents from this period further confirm MNR's willingness to follow through on its commitments to reconfigure WWIS' Crown land applications so that the Project would be located five kilometres away from shore.[259]

187. These documents confirm the reasonableness of Windstream's reliance on MNR's comfort letter.

D. Commercially Reasonable for Windstream to Invest in the Project in 2008 Based on the State of the Regulatory Framework

188. At paragraphs 4 and 5 of its Counter-Memorial, Canada gives the impression that Windstream invested in the Project at a time when Ontario (a) was not yet representing itself as a destination for offshore wind investment, (b) was not yet accepting applications for Crown land for offshore wind power, and (c) had no environmental assessment process in place to review offshore wind projects. These impressions are inaccurate. Windstream began to invest

[257] **C-0958**, Windstream Offshore Project Proposal (January 26, 2011); **C-0957**, Email from Cain, Ken (MNR) to Carey, Paul (MNR) (January 28, 2011).

[258] **C-0952**, MNR Staff Questions and Answers to Support Government Decision with Regard to Offshore Moratorium (MNR) (January 27, 2011), p. 2.

[259] **C-0454**, Email from Cain, Ken (MNR) to Ing, Pearl (MEI) (January 12, 2011); **C-0929**, Handwritten Notes of Alyssa Kates (ENE) (January 18, 2011); **C-0935**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 21, 2011); **C-0465**, Flowchart, Next Steps for Windstream Offshore Project Proposal (January 26, 2011); **C-0463**, Handwritten Notes of Ken Cain (MNR) (January 20, 2011).

substantially in the Project only after Minister Cansfield lifted the deferral in January 2008 and declared Ontario "open for business" for offshore wind development.[260]

189. Canada also states that Windstream applied for Crown land for the Project at a time when "the [MOE] had no regulatory process applicable to the environmental review of offshore wind projects that streamlined the necessary approvals." This statement gives the impression that there was no environmental assessment process applicable to offshore wind projects when Windstream applied for Crown land. That is also inaccurate. A robust environmental approvals process was in place at the time. That process applied to offshore wind projects and, as the government stated repeatedly, was sufficient to address site-specific concerns.

190. There was no indication in any of the government's public announcements after it lifted the deferral in 2008 that Ontario was "not ready" to receive investment in offshore wind projects. Nor was there any indication that the Government required more scientific research before it could process an environmental assessment for an offshore wind project, or that it could not or would not process an environmental assessment application for an offshore wind project once it received one. There was certainly no indication that Ontario would later impose a second moratorium on offshore wind development premised on the supposed need to conduct further scientific research.

191. On the contrary, Minister Cansfield's announcement lifting the deferral included a statement that "[a]ll proposed facilities must go through an environmental assessment." It further specified that "[o]ver the last year the province has taken steps to ensure decisions on applications for onshore and offshore wind power development are based on the best available information."[261]

192. Minister Cansfield noted in later public announcements that the 2006 deferral had been imposed because the government "needed to get a better understanding of how offshore wind

[260] CWS-Mars-2, ¶ 7.

[261] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

turbines might affect the surrounding environment."[262] She explained that the Government lifted the deferral because it was satisfied that it had gathered sufficient research in order to allow offshore wind projects to proceed through the environmental assessment process:

> For the past two years we've been assessing potential benefits and impacts of this technology. Our research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place. As a result, we were able to lift the deferral last January and began accepting applications for exploration proposals.[263]

193. Premier McGuinty even explained to the Toronto Star newspaper that offshore wind power could be harnessed "in a way that does not compromise ecosystems."[264]

194. Consistent with these public statements, dozens of Government documents show that the Government was satisfied that the existing environmental assessment process was sufficiently developed to allow offshore wind projects to be assessed on a site-specific basis. Officials consistently and repeatedly confirmed their conclusions that the existing environmental assessment process and existing regulatory mechanisms were sufficient to manage offshore wind project development and address site-specific environmental concerns.[265]

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[262] **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008), p. 16; C-0763, Remarks by The Honourable Donna Cansfield, Minister of Natural Resources at the Biomass and Energy for The Great Lakes Economy Conference, Queen's University, Kingston (June 8, 2008), p. 4.

[263] **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008), pp. 16-17; C-0763, Remarks by The Honourable Donna Cansfield, Minister of Natural Resources at the Biomass and Energy for The Great Lakes Economy Conference, Queen's University, Kingston (June 8, 2008), pp. 4-5.

[264] **C-0056**, Article, Hamilton, Tyler (Toronto Star) Premier Reveals Support for Offshore Energy Plan (January 16, 2008), p. 1.

[265] **C-0749**, Presentation (MNR), Offshore Wind Power: Opportunities for Ontario (November 28, 2007), slide 9; C-**0750**, Email from Marinigh, Dan (MNR) to Keyes, Jennifer (MNR) (November 29, 2007); **C-0751**, Minister's Seeking Direction Briefing Note (MNR), Issue: Confirmation on Direction and Next Steps Associated with Lifting of Offshore Windpower Deferral on The Great Lakes (December 6, 2007), p. 3; **C-0052**, House Note (MNR), Issue: Lifting of the Offshore Wind Power Deferral (January 3, 2008), p. 1; **C-0752**, Issues Management Plan, Offshore Wind Power - Lifting the Deferral (January 3, 2008), slide 2; **C-0753**, Key Messages (Draft) (January 7, 2008); **C-0054**, Key Messages (MNR) (January 15, 2008), pp. 1, 2; **C-0758**, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008), p. 3; **C-0754**, Presentation (MNR), Issues Management Plan, Offshore Wind Power - Lifting the Deferral (January 15, 2008), slides 5, 12-15; **C-0768**, Handwritten Notes of Marcia Wallace (December 17, 2008).

195. For example, a "key messages" document emphasized that, based on MNR's studies regarding offshore wind development, MNR had "determined that the existing policy and Environmental Assessment processes are sufficient to address site-specific issues and concerns relating to off-shore wind." The document further noted that proponents of offshore wind projects would be "required to address and mitigate any issues raised through the [Environmental Assessment] process and meet the requirements of any other government permits and approvals." It emphasized that "the Province is 'open for business'"[266] Notes prepared for Minister Cansfield's use in answering questions in the Ontario Legislature similarly emphasized that "the existing and Environmental assessment processes are sufficient to address site-specific issues and concerns related to offshore wind."[267]

196. These determinations were not made in the abstract. The 2006 deferral had been imposed due to concerns expressed by community members about the proposed SouthPoint Wind offshore wind project near Leamington, Ontario. A note prepared for Minister Cansfield confirmed that once the deferral was lifted, the SouthPoint Wind project "may now proceed through the Environmental Assessment process" and that the community's concerns would be considered as part of that process.[268]

E. Commercially Reasonable for WWIS to Enter into the FIT Contract Based on the State of the Regulatory Framework

197. There was a regulatory process applicable to the environmental review of offshore wind projects − the REA Regulation − at the time Windstream applied to the FIT Program and entered into the FIT Contract. Contrary to Canada's submissions, it was not a "high-risk gamble" for

[266] **C-0054**, Key Messages (MNR) (January 15, 2008), pp. 2, 4 [Emphasis added].

[267] **C-0052**, House Note (MNR), Issue: Lifting of the Offshore Wind Power Deferral (January 3, 2008), p. 1;

C-0057, House Note (MNR), Issue: Lifting of the Offshore Wind Power Deferral (January 17, 2008), p. 1;

C-0758, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008), p. 3.

[268] **C-0758**, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008), p. 1.

WWIS to enter into the FIT Contract based on the state of the applicable regulatory framework.[269]

198. In Ms. Powell's opinion, the regulatory framework applicable to offshore wind projects provided reasonable certainty to Windstream.[270] Therefore, in her opinion, it was commercially reasonable for Windstream to cause WWIS to enter into the FIT Contract.[271]

199. Ms. Powell's opinion is based on what the Ontario Government actually communicated to proponents of offshore wind projects. In making its arguments about regulatory uncertainty, Canada relies heavily on Ontario Government staff's internal communications and subjective intentions with respect to potential future amendments to the regulatory framework. These are not relevant to the commercial reasonableness of Windstream's decision to invest in the Project and to cause WWIS to apply for and enter into the FIT Contract. Obviously, in making those decisions, Windstream relied on publically available information and could not know of the Ontario Government's subjective and undisclosed intentions with respect to the future regulatory framework applicable to offshore wind projects.

1. The Regulatory Framework under the REA Regulation Provided Reasonable Certainty to Proponents of Offshore Wind Projects

200. ***REA Regulation applies to offshore wind projects.*** The REA Regulation governed, and continues to govern, the environmental assessment of offshore wind projects. The REA Regulation specifies the various reports that an offshore wind project (defined as a "Class 5" wind facility)[272] would have to prepare as part of its REA application. These are set out in the REA Regulation as follows:

(a) a project description report;[273]

[269] Canada's Counter-Memorial, ¶ 17.

[270] CER-Powell, ¶¶ 95-102.

[271] CER-Powell, ¶¶ 3(iii), 96.

[272] **C-0103**, *Environmental Protection Act*, Ontario Regulation 359/09, s. 6 ["REA Regulation"].

[273] **C-0103**, REA Regulation, s. 13, Table 1.

(b) an offshore wind facility report;[274]

(c) a natural heritage assessment;[275]

(d) an environmental effects monitoring plan in respect of birds and bats;[276]

(e) a water assessment;[277]

(f) a construction plan report;[278]

(g) a consultation report;[279]

(h) a design and operations report;[280]

(i) a specifications report;[281] and

(j) a decommissioning plan report.[282]

201. The Offshore Wind Facility Report is the only report that was specific to offshore wind projects. The REA Regulation provides that the Offshore Wind Facility Report set out a description of the following:

(a) the nature of the existing environment in which the renewable energy project will be engaged;

[274] **C-0103**, REA Regulation, s. 13, Table 1.

[275] **C-0103**, REA Regulation, s. 24.

[276] **C-0103**, REA Regulation, s. 23.1.

[277] **C-0103**, REA Regulation, s. 29.

[278] **C-0103**, REA Regulation, s. 13, Table 1.

[279] **C-0103**, REA Regulation, s. 13, Table 1.

[280] **C-0103**, REA Regulation, s. 13, Table 1.

[281] **C-0103**, REA Regulation, s. 13, Table 1.

[282] **C-0103**, REA Regulation, s. 13, Table 1.

(b) any negative environmental effects that may result from engaging in the renewable energy project; and

(c) mitigation measures in respect of any negative environmental effects identified in paragraph 2 and the negative environmental effects that are expected to result if the measures are implemented.[283]

202. A MOE document released on September 21, 2009, three days before the promulgation of the REA Regulation, explained to offshore proponents how to satisfy MOE's requirements for offshore wind projects under the REA Regulation:

> Offshore wind facilities require an REA. They do not have province-wide standard setbacks at this time; each application will be reviewed based on the local situation. Applicants need to conduct noise studies, demonstrating they do not exceed a noise level of 40 decibels (approximately the noise level experienced in a quiet office or library). They must identify any negative impacts to the natural environment that the project may have and explain how they mitigate any impacts.[284]

203. There is no indication of any uncertainty. Instead, this document makes it clear that REA applications for offshore wind projects will be assessed based on site-specific considerations, and that noise measurements would play an important role in project siting.[285] That is how Windstream understood it.[286]

204. MNR's *Approvals and Permitting Document for Renewable Energy Projects* ("**APRD**") also provided clear rules for completing the Offshore Wind Facility Report with respect to MNR's areas of responsibility.[287] Among other things, it requires proponents to indicate the

[283] **C-0103**, REA Regulation, s. 13, Table 1.

[284] **C-0791**, MOE Fact Sheet Entitled "Wind Facilities" (September 24, 2009) [Emphasis added].

[285] A MOE document from April 2010 further confirms that "everything for onshore" in the REA Regulation applies to offshore wind projects, and that "envi[ironmental] impacts unique to offshore" would be addressed "in the report," likely the Offshore Wind Facility Report: **C-0804**, Handwritten Notes of Dilek Postacioglu (April 1, 2010), p. 2.

[286] CWS-Roeper, ¶ 20.

[287] **C-0132**, Presentation (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 2009), pp. 32-33.

location of shipping channels, the location of commercial fisheries, and the location of oil and gas licences, leases, wells and works.[288] It also requires proponents to submit a coastal engineering study "which addresses the potential effect of the proposed project on natural erosion and accretion."[289]

205. Ms. Powell confirms that there was reasonable regulatory certainty for offshore wind projects because the REA Regulation, among other things, provided rules for offshore wind projects:

> At the time WWIS signed the [FIT Contract], Ontario had indicated its commitment to, and was in the process of developing, setbacks and noise guidelines for offshore wind power projects. The REA Regulation and the APRD also provided the provincial approval requirements for offshore wind projects, thereby providing WWIS with reasonable regulatory certainty with respect to the required regulatory assessment process for the Project.[290]

206. The requirements for the Offshore Wind Facility Report were broad. Thus, according to Ms. Powell, proponents of offshore wind projects understood that offshore wind projects would be assessed on a site-specific and "project-by-project basis, generally consistent with past environmental assessment practice in Ontario."[291] Ms. Powell confirms that to complete this report, Windstream "would have been required to provide a comprehensive assessment of the existing environment where the Project would be located, identify negative environmental effects (including human health) and describe measures to mitigate the identified impacts."[292]

207. MOE itself made this clear in a draft Technical Bulletin that it issued in March 2010, which said: "[f]or specific guidance on off-shore wind projects, applicants should contact MOE's

[288] **C-0132**, Presentation (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 2009), pp. 32-33.

[289] **C-0132**, Presentation (MNR), Approval and Permitting Requirements Document for Renewable Energy Projects (September 2009), pp. 32-33.

[290] CER-Powell, ¶ 95 [Emphasis added].

[291] CER-Powell-2, ¶ 17 [Emphasis added].

[292] CER-Powell-2, ¶ 15.

Renewable Energy Approval Unit and MNR's District Offices."[293] In fact, the technical guidance released by the MOE on March 1, 2010 for completing the REA Regulation's requirements applied equally to onshore and offshore wind projects.[294] Windstream understood this to mean that there would be no specific technical guidance published at that time with respect to the Offshore Wind Facility Report. Instead, proponents would work with MOE and MNR for guidance in completing the report.[295]

208. ***Windstream understood that the Project would be permitted to proceed through the REA application process.*** Canada asserts, implicitly, that the state of the regulatory framework applicable to offshore wind development at the time WWIS applied for, and then entered into, the FIT Contract was so underdeveloped that Windstream was reckless in accepting the OPA's FIT Contract offer.[296] The implication is that Windstream should have known that the Project might not be permitted to proceed through the regulatory approvals process.

209. Windstream and its project manager, Ortech, understood the applicable regulatory framework at the relevant time differently. When the REA Regulation was promulgated, neither Windstream nor Ortech understood that the requirements for offshore wind projects were underdeveloped. Rather, they understood that proponents of offshore wind projects were required to submit the same reports as proponents of onshore wind facilities. They were also required to submit an Offshore Wind Facility Report.[297] Windstream and Ortech understood from this that the burden was on project proponents to identify potential adverse impacts and propose

[293] **C-0189**, Report (MOE), Renewal Energy Approvals, Technical Bulletin One, Guidance for preparing the Project Description Report (March 1, 2010), p. 2.

[294] CWS-Roeper-2, ¶ 6; **C-0189**, Report (MOE), Renewal Energy Approvals, Technical Bulletin One, Guidance for preparing the Project Description Report (March 1, 2010**)**; **C-0190**, Report (MOE), Renewal Energy Approvals, Technical Bulletin Two, Guidance for preparing the Design and Operations Report (March 1, 2010); **C-0191**, Report (MOE), Renewal Energy Approvals, Technical Bulletin Three, Guidance for preparing the Construction Plan Report (March 1, 2010); **C-0192**, Report (MOE), Renewal Energy Approvals, Technical Bulletin Four, Guidance for preparing the Decommissioning Plan Report (March 1, 2010); **C-0193**, Report (MOE), Renewal Energy Approvals, Technical Bulletin Five, Guidance for preparing the Consultation Report (March 1, 2010); **C-0194**, Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines (March 1, 2010).

[295] CWS-Roeper-2, ¶ 7.

[296] Counter-Memorial, ¶¶ 117, 395, 430.

[297] CWS-Roeper-2, ¶ 15; CWS-Baines-2, ¶ 42.

measures to mitigate those impacts to complete the Offshore Wind Facility Report, consistent with environmental assessment practice in Ontario.[298] Moreover, they understood that they would have to work closely with MOE to complete the Offshore Wind Facility Report.[299]

210. ***MOE internal documents confirm Windstream's understanding.*** Contrary to the position that Canada now takes, MOE repeatedly recognized in its internal documents that offshore wind projects were subject to existing rules under the REA Regulation and that there "was nothing stopping anyone from going through the approvals process as it stands (in advance of the new rules)."[300] For example, Dr. Wallace of MOE wrote to the developer of the Trillium offshore wind project, a proposed offshore wind project without a FIT contract, informing him that the MOE would accept and process a REA application submitted for his proposed project:

> As I said at the meeting, we have no experience with offshore projects, and we want to make sure the projects that do go forward are done in a transparent, consultative and environmentally protective manner. When you are ready to submit your application, the Ministry will begin its review against the requirements in Regulation 359. As you know, we haven't completed the guidance for offshore projects and will continue to research and learn in this area for the foreseeable future, so projects such as yours will be part of that mutual learning curve. […][301]

211. This letter is inconsistent with assertions in the witness statement of Doris Dumais, where she expresses the view that an "adaptive management" approach was inapplicable to offshore

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[298] CWS-Roeper-2, ¶ 17; CWS-Baines-2, ¶ 43.

[299] CWS-Roeper-2, ¶ 19.

[300] **C-0829**, Email from Amaral, Utilia (ENE) to Lucas, Brenda (ENE) (June 24, 2010); **C-0900**, Memorandum (Confidential Advice to the Minister) from Lucas, Brenda (ENE) to Minister Wilkinson (ENE) (January 6, 2011). **C-0860**, Email from Mahmood, Mansoor (ENE) to Dumais, Dora (ENE) (October 27, 2010); **C-0861**, Key Points for Minister re Wolfe Island (October 27, 2010); **C-0960**, Email from Vandervecht, Brian (ENE) to Duffey, Barry (ENE) (January 31, 2011); **C-0961**, Email from Postacioglu, Dilek (ENE) to Duffey, Barry (ENE) (January 31, 2011).

[301] **C-0886**, Email from Heneberry, Jennifer (MEI) to Viswanathan, Samira (MEI) (December 23, 2010), p. 3. See also: **C-0799**, Email from Zaveri, Mirrun (MEI) to Guido, Sandra (ENE) (March 2, 2010).

Trillium did begin the REA process for its project: **C-0821**, Email from Santos, Narren (ENE) to Mahmood, Mansoor (ENE) (June 9, 2010); **C-0837**, Email from Santos, Narren (ENE) to Postacioglu, Dilek (ENE) (August 3, 2010); **C-0849**, Email from Santos, Narren (ENE) to John Kourtoff (Trillium Power) et al (September 2, 2010).

wind projects under the REA Regulation.[302] Indeed, Dr. Wallace's letter clearly contemplates an adaptive management approach to the first environmental assessment of an offshore wind project in Ontario.

2. The OPA Recognized that Reasonable Regulatory Certainty Existed when WWIS Applied For and Entered Into the FIT Contract

212. Canada's current position that there was such regulatory uncertainty so as to render Windstream's decision to enter into the FIT Contract "gambling" is also at odds with the position the OPA took immediately after the moratorium was announced. The OPA emphasized in a communications plan that the moratorium decision was a policy reversal that occurred after WWIS signed the FIT Contract. It stated that "all necessary elements required" to authorize the FIT Contract were in place at the time the OPA and WWIS entered into the FIT Contract. The OPA emphasized that "Government policy evolved afterwards" and that it "respect[ed] the change in direction."[303]

3. Dr. Wallace Inaccurately Represents MOE's Public Statements to Present Uncertainty Where None was Communicated to Developers

213. In her witness statement, Dr. Wallace inaccurately represents a number of public documents released by MOE to support her opinion that regulatory uncertainty existed where none was communicated to developers. The section of her witness statement headed "MOE's public communications regarding the underdeveloped regulatory framework"[304] is so inaccurate that the Tribunal should reject it entirely.

214. ***Proposed content for the REA Regulation inaccurately represented.*** At paragraph 20 of her witness statement, Dr. Wallace states that the document explaining the content of the proposed REA Regulation did not include the "to-be-developed regulatory requirements specific to offshore wind facilities."[305] That is inaccurate. The document includes the proposed content of

[302] RWS-Dumais, ¶¶ 35-39.

[303] **C-0979**, OPA (February 11, 2011), Offshore Windpower Not Proceeding.

[304] RWS-Wallace, ¶¶ 19-27.

[305] RWS-Wallace, ¶ 20.

the REA Regulation and specified the requirements that would apply to offshore wind projects under the proposed regulation.[306]

215. Contrary to the impression left at paragraph 20 of Dr. Wallace's witness statement, the document did not state that "future regulatory rules and requirements would include noise requirements."[307] The document stated that the proposed REA Regulation did include such requirements.

216. The only regulatory requirement for offshore wind projects that was identified in the document as not being included in the proposed REA Regulation was a setback. The document stated that MOE and MNR were working together to develop future setbacks related to offshore wind energy facilities that would address natural heritage, coastal impacts and noise emissions.[308] However, when the REA Regulation was adopted, MOE specified that there was no setback applicable to offshore wind projects at that time and that noise would be assessed on a site-specific basis.[309] Ms. Powell confirms that "the regulatory guidance simply noted that, until such time as prescribed setbacks took effect, offshore wind proponents would have to establish in the

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[306] **C-0126**, Report (MOE). Proposed Content for the Renewable Energy Approval Regulation under the *Environmental Protection Act* (June 9, 2009).

Specifically, the document provides:
(a) "[s]ince all hydroelectric facilities and offshore wind turbine facilities will be required to assess effects and document mitigation measures that will be used to protect the natural environment […];" [Emphasis added] (p. 10).

(b) "[i]t is proposed that for offshore wind turbine facilities, the proponent shall submit a noise study […]" [Emphasis added] (p. 15).

(c) "[i]t is proposed that sections 5 and 6 of Part III of this document do not apply to offshore wind energy facilities as all proposed offshore wind facilities will require review and approval by the Ministry of Natural Resources for access to Crown land […]" [Emphasis added] (p. 15).

(d) "[i]t is proposed that proponents will be required to submit a decommissioning plan […]" [Emphasis added] (p. 15).

[307] Ms. Powell confirms that "there is nothing in this posting that so 'cautioned' the regulated community.": CER-Powell-2, ¶ 27.

[308] **C-0126**, Report (MOE). Proposed Content for the Renewable Energy Approval Regulation under the *Environmental Protection Act* (June 9, 2009), p. 15.

[309] **C-0791**, MOE Fact Sheet Entitled "Wind Facilities" (September 24, 2009).

Offshore Wind Facility Report, among other matters, that project-specific noise conditions were in compliance with the 40 decibel noise level requirement."[310]

217. ***Decision notice accompanying REA Regulation inaccurately represented.*** At paragraph 21 of her witness statement, Dr. Wallace says that the notice accompanying the REA Regulation "explicitly stated that 'special rules' would apply to offshore wind projects."[311] This is inaccurate. The notice said that "[t]here are special rules for wind facilities that include turbines in contact with surface water, other than wetlands."[312] This is a reference to the requirement to submit the Offshore Wind Facility Report described above. There was no indication that the "special rules" were yet-to-be developed.[313]

218. ***EBR posting inaccurately represented.*** Dr. Wallace then asserts at paragraph 22 of her witness statement that "MOE also highlighted the underdeveloped state of the regulatory framework for offshore wind facilities in an EBR posting on March 1, 2010." But there is nothing in the posting to that effect.[314]

219. ***Draft technical bulletin inaccurately represented.*** In the same paragraph, Dr. Wallace asserts that the draft technical bulletin for "wind turbine setbacks" (which accompanied the posting discussed in the paragraph above) recognized that "the REA Regulation did not yet specify minimum setback distances" but that "such setbacks would nonetheless play a significant role in the assessment under the offshore wind facility report."[315] This statement gives the impression that the draft technical bulletin clarified that an as-yet-undetermined setback applicable to offshore wind facilities would be an integral part of MOE's assessment of offshore wind projects. That is not what the draft technical bulletin says:

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[310] CER-Powell-2, ¶ 18.

[311] RWS-Wallace, ¶ 21 [Emphasis added].

[312] **R-0072**, Ministry of the Environment, "Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Economy Act, 2009" (EBR Registry No. 010-6516) (September 24, 2009), p. 2 [Emphasis added].

[313] CER-Powell-2, ¶ 14.

[314] **C-0188**, Policy Proposal Notice (MOE), Renewable Energy Approval Technical Guidance Bulletins (EBR Registry Number: 010-9235) (March 1, 2010); CER-Powell-2, ¶ 29.

[315] RWS-Wallace, ¶ 22 [Emphasis added].

> While O.Reg. 359/09 does not specify setback distances, turbine siting will be an important factor assessed in the Off-shore Wind Facility Report required for application for the REA. This report requires applicants to provide a comprehensive assessment of the existing environment where the project will be located, identify any negative environmental effects caused by the project, and describe measures to mitigate identified impacts. Wind turbine location will influence the assessment of environmental effects including noise and increasing setback distances from noise receptors can be used as a mitigation approach. Applicants are strongly encouraged to meet with the Environmental Assessment and Approvals Branch of the Ministry of the Environment prior to preparing this report.[316]

220. Contrary to Dr. Wallace's assertion, the word "yet" does not appear. There is no mention of any as-yet-undetermined setback rules that would be an important part of the Offshore Wind Facility Report. On the contrary, the draft technical bulletin confirmed that there was no standardized setback for offshore wind facilities and that turbine siting would be considered on a site-specific basis. Windstream did not understand this document as communicating any uncertainty or that the regulatory regime for offshore wind was underdeveloped. Rather, the document was consistent with the understanding that setbacks for offshore wind projects would be determined on a site-specific basis to meet MOE's 40-decibel noise limit.[317]

221. Ms. Powell also confirms that "the draft simply stated that turbine siting will be an important factor assessed" in the Offshore Wind Facility Report.[318] According to Ms. Powell, there is no indication in this document that "prescribed minimum setback distances […] would play a significant role in the assessment under the Offshore Wind Facility Report."[319]

222. ***Discussion paper inaccurately represented.*** Dr. Wallace then asserts at the beginning of paragraph 23 of her witness statement that "MOE reiterated the underdeveloped nature of the

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[316] **C-0194**, Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines (March 1, 2010), p. 5; **C-0188**, Policy Proposal Notice (MOE), Renewable Energy Approval Technical Guidance Bulletins (EBR Registry Number: 010-9235) (March 1, 2010).

[317] CWS-Roeper-2, ¶¶ 22-23.

[318] CER-Powell-2, ¶ 29.

[319] CER-Powell-2, ¶ 29.

regulatory framework for offshore wind projects in a June 25, 2010 EBR posting that summarizes our proposed approach to the rules and requirements that would apply to offshore wind facilities." This is an overstatement. The June 25, 2010 posting proposed an amendment to the REA Regulation that would provide "greater certainty and clarity on off-shore wind requirements."[320]

223. The discussion paper that accompanied the posting proposed only one amendment to the REA Regulation: the introduction of a standardized five-kilometre setback from shore for offshore wind projects.[321] The second part of the discussion paper provided:

> The provincial approval requirements for off-shore wind projects themselves are established in the REA requirements of MOE and the Approval and Permitting Requirements Document for Renewable Projects of MNR.[322]

224. The discussion paper provided additional clarity regarding existing requirements under the REA Regulation relating to the natural heritage assessment, the water assessment, the cultural heritage resources assessment, the Offshore Wind Facility Report and technical study requirements.[323] With respect to the Offshore Wind Facility Report, the discussion paper reiterated that the report should describe the nature of the existing environment where the project would be located, any negative environmental effects of the proposed projects and proposed mitigation measures. It further clarified that the Offshore Wind Facility Report "could be organized as an executive summary of the findings of the required studies, including but not limited to natural heritage assessment, coastal engineering study, noise assessment and heritage

[320] **R-0118**, Policy Proposal Notice (MOE), Renewable Energy Approval Requirements for Offshore Wind Facilities - An Overview of the Proposed Approach (EBR Registry Number: 011-0089) (June 25, 2010), p. 1.

[321] **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010).

[322] **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010), p. 3.

[323] **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010), pp. 3-5.

assessments, and will include, in light of the findings of the studies, a discussion about the considerations that informed the proposed design layout."[324]

225. Lastly, the discussion paper indicated that guidance documents would be issued in the future, which included guidance on cultural heritage, noise, coastal engineering and Crown land.[325] These would presumably be intended to assist proponents in preparing the reports required under the REA Regulation.[326]

226. There was no suggestion in the discussion paper that any amendment to the REA Regulation was imminent other than the introduction of a standardized five-kilometre setback from the shoreline. There was certainly no suggestion in the discussion paper that MOE would impose an indeterminate-term moratorium on offshore wind development. Indeed, MOE explained that the policy proposal was to "provide some clarity and further requirements to the rules that are in place already."[327] It was far from a signal that MOE intended to revoke the regulatory approvals process for offshore wind projects.

227. This is consistent with the evidence of Mr. Roeper, who explains that based on a conversation he had with an MEI official, he expected that offshore guidelines and further clarity regarding setbacks would be forthcoming from MOE.[328] However, he also points out that he did

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[324] **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010), p. 5.

[325] **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010), p. 5.

[326] However, these documents are intended only to assist proponents in preparing these reports – they do not impose legally binding obligations. The MOE's own technical guidance sets this out clearly. For instance, the MOE's Technical Guide to Renewable Energy Approvals says "this technical guide is written to provide information on the application requirements, it is not, and it should not be construed or relied on as legal advice about the requirements." Instead, "the requirements are contained in the legislation, including the requirements related to REA applications.": **C-0729**, Technical Guide to Renewable Energy Approvals (MOE) (2013), p. 16. Mr. Roeper explains that he did not understand the issuance of technical guidance documents to be a prerequisite to completing the Offshore Wind Facility Report: CWS-Roeper-2, ¶ 26.

[327] **C-0807**, Email from Wallace, Marcia (ENE) to Postacioglu (ENE) et al (April 12, 2010); **C-0296**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Offshore Wind Facilities - An Overview of the Proposed Approach (June 25, 2010), p. 2; **C-0845**, Presentation (MOE), Offshore Wind, Modernization of Approvals Project, Environmental Programs Division (August 23, 2010), slide 6.

[328] CWS-Roeper-2, ¶¶ 24-26.

not understand the issuance of technical guidance documents to be a prerequisite to completing the Offshore Wind Facility Report.[329]

228. ***No evidence that the requirement for Offshore Wind Facility Report was communicated as a mere "placeholder."*** Dr. Wallace also says that "[t]he requirement to submit an offshore wind facility report [under the REA Regulation] thus indicated that offshore wind projects would have to meet technology-specific rules and requirements that had not yet been developed."[330] There is nothing in the REA Regulation suggesting that proponents of offshore wind projects would have to meet rules that had not yet been developed. There was simply no indication given by MOE to project proponents that MOE was not ready to receive and process a REA application for an offshore wind project.[331]

229. The REA Regulation expressly defines the requirements of the Offshore Wind Facility Report to put the onus on the proponent to identify potential negative environmental effects and proposed mitigation measures.[332] There was no indication that this would be amended in the future to provide more specific requirements. According to Ms. Powell, this "regulatory framework included special rules for offshore wind projects, which required a site-by-site assessment of a project."[333]

230. Moreover, Dr. Wallace's statement follows a number of paragraphs in which Dr. Wallace explains that MOE intended the Offshore Wind Facility Report to be a "placeholder" and intentionally left its requirements broad.[334] Even if these statements are true, they do not support Dr. Wallace's conclusion that the inclusion of the requirement to submit an Offshore Wind Facility Report <u>thus indicated</u> (presumably to proponents) that offshore wind projects would have to meet rules that had not yet been developed. Obviously, proponents like Windstream

[329] CWS-Roeper-2, ¶ 26.

[330] RWS-Wallace, ¶ 18.

[331] CWS-Roeper-2, ¶ 15.

[332] **C-0103**, REA Regulation, s. 13, Table 1.

[333] CER-Powell-2, ¶ 10.

[334] RWS-Wallace, ¶¶ 12-18.

could not have known what MOE subjectively intended but did not communicate to them. Neither Windstream nor the many leading consultants who proposed to complete the environmental assessment work for the Project understood the Offshore Wind Facility Report to be a mere "placeholder."[335]

231. As Ms. Powell confirms, the regulated community did not understand the requirement to submit an Offshore Wind Facility Report as a mere "placeholder." Instead, the regulated community understood that offshore wind projects would be reviewed on a project-by-project basis, generally consistent with past environmental assessment practice in Ontario."[336] In any event, the fact that the REA Regulation might be amended at some point in the future to provide more specific requirements for offshore wind projects does not make the existing process any less certain.[337]

232. Mr. Roeper also confirms that based on the REA Regulation's requirements, he expected that the Offshore Wind Facility Report should be prepared with the guidance and input of the agencies, consistent with general environmental assessment practice in Ontario. He confirms that if other offshore wind-specific rules were developed in the future, he expected to work with the agencies to bring the Project into compliance with those rules.[338]

233. ***Dr. Wallace's evidence contradicts MOE's public statements.*** Further, Dr. Wallace's statements are inconsistent with what MOE told the media when the FIT Program was launched. With respect to offshore wind projects, the MOE spokesperson stated that "there are rules in

[335] CWS-Roeper-2, ¶ 16; **C-0865**, Proposal (Genivar) to Ortech Environmental re Wolfe Island Shoals Offshore Wind Farm, Proposal for Permitting and Field Investigation Services (November 25, 2010), p. 11; **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010), pp. 7, 21; **C-0968**, Proposal (SLR) Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Options 1 and 2 (November 26, 2010), pp. 6, 36, 72; **C-0876**, Proposal (AET Consultants) for Wolfe Island Shoals Offshore Wind Farm, Option 2 - Ecological Field Work (November 30, 2010), p. 6.

[336] CER-Powell-2, ¶ 17.

[337] Mr. Roeper also confirms that based on the REA Regulation's requirements, he expected that offshore wind facility report should be prepared with the guidance of an input of the agencies, consistent with general environmental assessment practice in Ontario. He confirms that offshore wind-specific rules were developed in the future, he expected to work with the agencies to bring the Project into compliance with those rules: CWS-Roeper-2, ¶ 18.

[338] CWS-Roeper-2, ¶ 19.

place today," and that MOE was working on "providing some clarity and further requirements to the rules that are in place already."[339]

4. Leading Environmental Consultants Identify No Substantial Regulatory Uncertainty as They Prepare to Undertake REA Work for the Project

234. Perhaps the best evidence that the regulated community did not perceive substantial regulatory uncertainty with respect to offshore wind projects in 2010 is that none of the leading environmental consultants that submitted proposals to complete the environmental permitting work for the Project identified any risk that the Project might not be permitted to proceed through the regulatory approvals process.

235. On October 8, 2010, Windstream issued a comprehensive Request for Proposal ("**RFP**") for environmental consultants to conduct the necessary permitting work to (a) apply for a REA for the Project, (b) complete MNR's permitting requirements for offshore wind projects, and (c) complete various permitting requirements imposed by the federal government.[340] Windstream received 14 proposals from leading environmental consultants.[341] None of these proposals

[339] **C-0807**, Email from Wallace, Marcia (ENE) to Postacioglu (ENE) et al (April 12, 2010) [Emphasis added].

[340] **C-0374**, Request for Proposal (Ortech), Wolfe Island Shoals Offshore Windfarm Permitting Field Investigation Services (October 8, 2010).

[341] **C-0473**, Letter from Deveaux, Leah (Ortech) to Baines, Ian (WEI) (February 8, 2011), p. 3; **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010); **C-0872**, Response to Request for Proposal (Natural Resource Solutions Inc.), Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Submission for: Option 2. Ecological Field Work (November 25, 2010); **C-0870**, Proposal (HCCL), Wolfe Island Offshore Windfarm Permitting and Field Investigation Services, Option 3, Technical Field Work (November 26, 2010); **C-0869**, Proposal (GEI Consultants), Wolfe Island Shoals Offshore Windfarm, Proposal for Permitting Assistance Services: Option 6 - Inter-Jurisdictional Advisor (November 24, 2010); **C-0867**, Proposal (Bedford Consulting), Wolfe Island Shoals Request for Proposals (File 90803) - Option 5 (November 23, 2010); **C-0865**, Proposal (Genivar) to Ortech Environmental re Wolfe Island Shoals Offshore Wind Farm, Proposal for Permitting and Field Investigation Services (November 25, 2010); **C-0874**, Proposal (MWA) for Permitting and Field Investigation Services - Option 5: Aboriginal Consultation (November 25, 2010); **C-0968**, Proposal (SLR) Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Options 1 and 2 (November 26, 2010); **C-0877**, Technical Proposal for Commissioning Support and Wind Analysis for One Site in Wolfe Island (GL Garrad Hassan) (December 2, 2010); **C-0876**, Proposal (AET Consultants) for Wolfe Island Shoals Offshore Wind Farm, Option 2 - Ecological Field Work (November 30, 2010); **C-0866**, Proposal (Scarlett Janusas and Shark Marine), Wolfe Island Shoals Offshore Windfarm Background Research & Field Investigation Services, Land and Underwater Archaeological Resource Assessments, Option 4 (November 20, 2010); **C-0875**, Proposal (The Central Archaeology Group Inc.), Wolfe Island Shoals Windfarm, Permitting and Field Investigation Services, Option 4 - Cultural Heritage Study & Archaeology Study (November 26, 2010); **C-0868**, Proposal (Ecology and Environment Inc.) to Provide Option 6 -

expressed any concern about the state of the regulatory regime applicable to offshore wind projects in Ontario.[342] None of the proposals provided any indication that the requirements to apply for a REA were underdeveloped or that there were any impediments to Windstream's ability to prepare the necessary studies to submit a complete REA application for the Project.[343]

236. For example, the proposal from Stantec – one of the most experienced environmental consulting firms in Ontario – provided a detailed and rigorous outline of the technical work that would be conducted to apply for a REA for the Project.[344] Windstream was one week away from finalizing its decision to engage Stantec to conduct the environmental assessment work for the Project and another firm to conduct ecological field services when the moratorium decision was announced on February 11, 2011.[345]

237. Stantec's proposal indicated that it would "work closely with relevant agencies throughout the REA process to ensure that any potential agency concerns are addressed and that the content of the REA application meets the reviewing agency expectations."[346] To obtain the requisite permits, Stantec proposed preparing a "draft terms of reference […] for [the Renewable Energy Facilitation Office] and the applicable regulators to facilitate agreement and approval for the proposed approach."[347] Permitting work would include preparing the necessary studies under the REA Regulation (including noise studies) and stakeholder consultation as required under the REA Regulation.[348]

Inter-Jurisdictional Advisor Support for the Windstream Wolfe Island Shoals Offshore Wind Farm (November 24, 2010); **C-0871**, Consultation & Communication Proposal (AECOM) for Windstream Wolfe Island Shoals Inc. Offshore Wind Site (November 25, 2010).

[342] CWS-Roeper-2, ¶ 43.

[343] CWS-Roeper-2, ¶¶ 43-45.

[344] **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010).

[345] CWS-Roeper-2, ¶ 42; **C-0473**, Letter from Deveaux, Leah (Ortech) to Baines, Ian (WEI) (February 8, 2011).

[346] **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010), p. 3.

[347] **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010), p. 3.

[348] **C-0103**, REA Regulation, ss. 14-18.

238. If it were true that the regulatory regime applicable to offshore wind projects was as "underdeveloped" as Canada and Dr. Wallace suggest, such that it was a "gamble" for Windstream to continue to invest in developing the Project, one would expect that these proposals from leading environmental consultants would have mentioned that fact. They did not.

5. Ontario Government Did Not Tell Windstream It was "Not Ready" for Offshore Wind Development

239. Canada's current position that Ontario was "not ready" for offshore wind development is inconsistent with the message that the Ontario Government was sending at the time Windstream decided to invest in the Project. In Mr. Ziegler's words, he finds it "extremely disconcerting that the Province of Ontario would solicit investment in offshore wind so aggressively by representing a settled path to completion certainty, only to now claim that it was not ready for offshore wind development. My partners and I were badly misled by the Ontario Government."[349]

240. During the many meetings that took place between Windstream and the Ontario Government regarding the OPA's offer of a FIT Contract to WWIS and WWIS' acceptance of that offer, no one told Windstream that Ontario was "not ready" to receive investment in the Project. On the contrary, the discussions at the meetings were focused on moving the Project forward.[350]

241. Further, there was no indication at any of the meetings, nor was Windstream ever told, that MOE would not be ready to process WWIS' REA application when WWIS submitted it. Windstream believed that WWIS would be permitted to submit a REA application, and have it processed, in the same manner as all other renewable energy projects subject to the REA Regulation.[351]

[349] CWS-Ziegler-2, ¶ 11.

[350] CWS-Baines-2, ¶ 41.

[351] CWS-Baines-2, ¶¶ 42-43.

242. Significantly, as set out above, Windstream was never told that the Ontario Government was considering imposing a moratorium on offshore wind development or cancelling offshore wind projects altogether.[352]

6. Canada Cites Documents Out of Context to Demonstrate that Windstream was Aware of Alleged Regulatory Uncertainty

243. Under a heading entitled "the Claimant's reluctance to sign back the FIT Contract due to the regulatory uncertainty around offshore wind,"[353] Canada cites a number of Windstream and Ortech documents out of context. Contrary to Canada's assertions, none of these documents support Canada's argument that Windstream was aware that the Project faced so much regulatory uncertainty that entering into the FIT Contract would be a "high-risk gamble." Certainly, none of them demonstrate any awareness by Windstream that Ontario was contemplating a moratorium on offshore wind development or cancelling offshore wind projects altogether.

a) Ortech Preliminary Project Management Analysis – No Knowledge of Forthcoming Moratorium

244. Canada describes an Ortech project management plan that, according to Canada, "included an analysis of the risks inherent in [the] Project."[354] This is only a partially accurate description of the document. The document described a number of risks that are common to all major development projects and which are not unique to offshore wind projects.[355] These include meeting timelines, maintaining investor confidence, dealing with engineering and economics issues, and the need to complete permitting and engineering tasks in parallel.[356]

[352] CWS-Baines-2, ¶¶ 44-45.

[353] Canada's Counter-Memorial, ¶¶ 194-221.

[354] Canada's Counter-Memorial, ¶ 196; **C-0218**, Letter from Uwe Roeper, Ortech to Ian Baines, Windstream Energy Inc. (Apr. 18, 2010).

[355] CWS-Baines-2, ¶ 6.

[356] CWS-Baines-2, ¶ 6.

245. Further, Canada notes that the document identifies "risks associated with REA permitting."[357] While the REA process was new, Windstream had every expectation, based on the Ontario Government's active solicitation of investment in renewable energy, including offshore wind energy, that the Ontario Government would work with Windstream to overcome any uncertainty or challenges in the permitting process.[358] Mr. Baines' substantial experience in permitting, designing and building energy projects also gave Windstream confidence that any challenges in the environmental assessment process could be addressed.[359]

246. None of this was unusual. It does not demonstrate any awareness by Windstream that the Project risked not being permitted to proceed through the regulatory approvals process. On the contrary, it demonstrates that Windstream expected that the Project would proceed through the REA process.

b) Ortech Project Management Plan – No Knowledge of Forthcoming Moratorium

247. Canada cites two statements from Ortech's preliminary Project Management Plan as evidence that Windstream was aware that the Project faced regulatory uncertainty:[360] "the regulatory agencies do not have well established guidelines for off-shore wind projects adding to the uncertainty of the REA process," and "many of the rules governing offshore wind projects have yet to be written."[361]

248. As Mr. Roeper explains, Canada has taken both of these statements out of context.[362] The statements were provided a few days after Windstream was awarded the FIT Contract, and were extremely preliminary.[363] In both cases, Mr. Roeper was referring to technical guidance

[357] Canada's Counter-Memorial, ¶ 198; **C-0218**, Letter from Uwe Roeper, Ortech to Ian Baines, Windstream Energy Inc. (Apr. 18, 2010), p. 3.

[358] CWS-Baines-2, ¶ 8.

[359] CWS-Baines-2, ¶ 9.

[360] Canada's Counter-Memorial, ¶¶ 10, 202.

[361] Canada's Counter-Memorial, ¶¶ 10, 202; **R-0105**, Ortech Consulting, Project Management Plan for the Wolfe Island Shoals Wind Farm, Rev. 0.

[362] CWS-Roeper-2, ¶¶ 30-33.

[363] CWS-Roeper-2, ¶ 31.

documents that MOE sometimes promulgates to guide proponents in completing regulatory requirements.[364] As Mr. Roeper explains, his statements refer to the fact that there was no technical guidance in place with respect to the Offshore Wind Facility Report required to be prepared under the REA Regulation. Contrary to Canada's assertion, Mr. Roeper did not mean to suggest that there was no regulatory process in place for offshore wind projects or that the Project could not proceed through the regulatory approvals process in the ordinary course.[365]

249. In Mr. Roeper's experience, the absence of a technical guidance document would not serve as an impediment to preparing a REA application or engaging in other environmental assessment processes. In fact, regulatory guidance documents are constantly evolving, even while project development is underway.[366] For example, it is common to complete environmental assessments in the absence of technical guidance documents from regulatory agencies like MOE. For example, under the *Environmental Assessment Act* that applied to offshore wind projects before the REA Regulation was introduced, the burden is on the proponent to identify potential environmental impacts from a project and measures to mitigate those impacts.[367] That is also the case with respect to the Offshore Wind Facility Report under the REA Regulation. Mr. Roeper has been involved in numerous projects where the absence of specific technical guidance documents did not pose a barrier to a project moving through the regulatory approvals process.[368]

250. Thus, the fact that Mr. Roeper identified that MOE had not yet published technical guidance with respect to the Offshore Wind Facility Report did <u>not</u> mean that he in any way understood that the Project could not yet proceed through the REA process or that it would be subject to a moratorium. Quite the opposite: as explained above, he understood based on MOE's

[364] CWS-Roeper-2, ¶ 32.

[365] CWS-Roeper-2, ¶ 33.

[366] CWS-Roeper-2, ¶ 8.

[367] CWS-Roeper-2, ¶¶ 9-12.

[368] CWS-Roeper-2, ¶ 11.

publically issued documentation that MOE and MNR would provide guidance to proponents preparing an Offshore Wind Facility Report.[369]

c) Windstream Letters to MEI and the OPA – No Knowledge of Forthcoming Moratorium

251. Canada next cites letters Windstream wrote to MEI and the OPA in May 2010, shortly after it was offered the FIT Contract, in which Windstream noted that it was "struggling with the expectation in the FIT Contract that the Project will achieve Commercial Operations in 4 years on the one hand, the considerable uncertainty caused by unknown setback requirements for off-shore wind, uncertainty in the site release process for Crown land, and uncertainty in the detailed requirements of the REA on the other."[370] These letters were sent before MEI intervened with the OPA to procure a one-year extension to the FIT Contract,[371] and before MEI and the Premier's Office intervened with MNR to procure the letter regarding Windstream's access to Crown land for the Project.[372]

252. Canada asserts that these letters meant that Windstream did not have an "expectation that the Project would be permitted to proceed through the REA process before the establishment of the requirements for offshore wind facilities."[373] That is not correct. With respect to the "detailed requirements of the REA," Windstream was referring to the technical guidance documents referred to above. Windstream did not understand detailed guidance to be a necessary prerequisite to completing an environmental assessment and proceeding through the REA process.[374] Rather, it was concerned that the lack of detailed guidance might cause delays in the

[369] CWS-Roeper-2, ¶¶ 7, 18.

[370] Canada's Counter-Memorial, ¶¶ 205-06, 472; **C-0258**, Letter from Ian Baines, Windstream Energy Inc. to Mirrun Zaveri, Ministry of Energy (May 13, 2010); **C-0262**, Letter from Ian Baines, Windstream Energy Inc. to Michael Killeavy, Ontario Power Authority (May 16, 2010).

[371] **C-0338**, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) (August 10, 2010); **C-0342**, Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) et al (August 12, 2010); **C-0343**, Email from Cecchini, Perry (OPA) to Chamberlain, Adam (BLG) et al (August 12, 2010).

[372] **C-0258**, Letter from Ian Baines, Windstream Energy Inc. to Mirrun Zaveri, Ministry of Energy (May 13, 2010); **C-0262**, Letter from Ian Baines, Windstream Energy Inc. to Michael Killeavy, Ontario Power Authority (May 16, 2010).

[373] Canada's Counter-Memorial, ¶ 472.

[374] CWS-Baines-2, ¶ 57.

permitting and development of the Project. However, Windstream still had every expectation that it would be allowed to conduct an environmental assessment and proceed through the REA process.[375] As Mr. Baines explains, he could "not have possibly imagined that MOE would use the lack of detailed guidance as a pretext for cancelling offshore wind development in the Province."[376]

F. Commercially Reasonable for WWIS to Enter into the FIT Contract as the First Offshore Wind Project in Ontario

253. Canada asserts that the "development of an offshore wind facility is an inherently "high-risk activity," and throughout its Counter-Memorial, Canada criticizes Windstream for its "risk taking."[377] In making this submission, Canada overlooks the fact that the FIT Program was designed to incent renewable energy investment in Ontario by, for instance, offering an attractive rate of return for investors in a predictable and well-defined regulatory process to stimulate green energy investment and job creation.[378] It is inaccurate for Canada to now claim that an investor who heeded Ontario's call – even a first investor – was demonstrating an "extraordinary risk tolerance."[379] On the contrary, as Mr. Smitherman explains, the FIT Program was the key tool in creating investor certainty and getting renewable energy projects built.[380] Minister Smitherman notes that Canada "downplays the degree of certainty that a FIT contract was intended to provide to the proponent of a renewable energy project."[381] Moreover, as MEI noted shortly before the moratorium was announced, it had "never differentiated" between onshore and offshore wind, and its "calculations assumed that the [W]indstream project was a go."[382]

[375] CWS-Baines-2, ¶ 58.

[376] CWS-Baines-2, ¶ 58.

[377] Canada's Counter-Memorial, ¶ 1.

[378] CWS-Smitherman, ¶ 38.

[379] Canada's Counter-Memorial, ¶ 16.

[380] CWS-Smitherman, ¶ 43.

[381] CWS-Smitherman, ¶ 14.

[382] **C-0967**, Email from MacLennan, Craig (MEI) to Mitchell, Andrew (MEI) and Block, Andrew (MEI) (February 8, 2011).

IV. There was No Legitimate Reason for Ontario to Impose an Indefinite-Term Moratorium on Windstream's Project

254. Contrary to Canada's position,[383] the indefinite-term moratorium on offshore wind development was and is not necessary to address legitimate scientific or environmental concerns. Windstream, like all project proponents, was already subject to a detailed regulatory framework under the REA Regulation. Canada has presented no expert evidence demonstrating why the existing framework is not sufficient to protect the environment.

255. The REA Regulation specifically requires proponents to study all environmental impacts associated with an offshore wind project, and demonstrate mitigation measures. Further, the existing regulatory process already requires proponents to study the effects of the project on drinking water and its noise impact – the two factors that Canada has singled out as requiring further study. The studies that Windstream would have completed under the existing regulatory framework would have been site-specific. Canada has failed to explain why the general studies that Ontario proposes to conduct would provide better information about the environmental impacts of the Project than would the site-specific studies that Windstream would have completed under the existing framework.

256. Regardless, Windstream has submitted expert evidence demonstrating that the Project would likely not have any immitigable negative impacts on drinking water, nor would it exceed the noise limits established by existing MOE requirements. It has also submitted expert evidence establishing that the Project likely would not pose any immitigable harm to the environment. No general Government-funded study is required to establish this.

A. The Indefinite-Term Moratorium on Offshore Wind Development

257. The policy decision that MOE announced on February 11, 2011 is best described as an indefinite-term moratorium on offshore wind development. In its posting announcing the decision, MOE stated that "Ontario is not proceeding with any development of offshore wind projects until the necessary scientific research is completed and an adequately informed policy

[383] Canada's Counter-Memorial, ¶ 3.

framework can be developed."[384] The policy decision did not identify what "necessary research" MOE proposed to complete or when it proposed to develop "an adequately informed policy framework." It stated that Ontario would undertake research and study in collaboration with its "United States neighbours" to ensure that future offshore wind projects "are designed and implemented in a manner that is protective of human health, cultural heritage and the environment."

258. On a conference call with Windstream on February 11, 2011, Minister of the Environment John Wilkinson's Senior Policy Advisor for Renewables, Brenda Lucas, explained that "there is no way to proceed in terms of actually obtaining a renewable energy approval from us" and that MOE did not "anticipate issuing any renewable energy approval to anybody" until it put a new offshore wind-specific renewable energy approval regulation in place.[385] Ms. Lucas could not specify a date by which the moratorium would be lifted, but said that "it will be more than months for sure, probably more like years."[386]

259. This policy decision meant that:

(a) MOE would not process REA applications for offshore wind projects, including the Project;

(b) MOE would not issue any REA decisions for offshore wind projects, including the Project;

(c) MOE would not confirm that a five-kilometre standardized setback would be adopted, or alternatively that no standardized setback would be adopted;

[384] **C-0494**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Offshore Wind Facilities - An Overview of the Proposed Approach (February 11, 2011), p. 1.

[385] **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, p. 4; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

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

(d) MOE would undertake research to develop a policy framework for offshore wind development, but there was no time limit for the completion of that research and no specification of what research would be undertaken or by whom;

(e) MOE would at a later unspecified date develop and implement a new policy framework for offshore wind development; and

(f) MNR would not process Windstream's application for access to Crown land for the Project.

260. The policy decision did not list what research MOE proposed to undertake. However, it signalled that the "scientific and technical challenges of developing offshore wind power in a freshwater environment" included "a better understanding of how noise behaves over water and ice, foundation designs, water quality impacts, and impacts to shoreline ecosystems and wildlife."[387]

261. As discussed below in paragraphs 409 to 446, MOE has completed none of this research in the four years and four months since issuing the policy decision. The only completed research that even arguably falls within the ambit of the research MOE identified as necessary before lifting the moratorium is research regarding fish completed by MNR. However, as explained below, this research was commissioned before the moratorium.

B. The Imposition of the Indefinite-Term Moratorium on Windstream's Project is Not Necessary to Address any Legitimate Environmental Concerns

262. Canada submits that "[t]ime is ultimately what this claim is about, and in particular, the time that the Government of Ontario requires to develop the regulatory framework necessary to assess" the Project.[388]

263. This submission ignores that the Project was already subject to a rigorous process under the REA Regulation and other regulatory requirements that were designed to ensure that the

[387] **C-0494**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Offshore Wind Facilities - An Overview of the Proposed Approach (February 11, 2011), p. 2.

[388] Canada's Counter-Memorial, ¶ 3.

Project would only receive permits if it could be built and operated in an environmentally sound manner. The problem with Ontario's imposition of an indefinite-term moratorium on the Project is that the Project was prevented from even engaging in work that, through the established regulatory process, would have shown it could be built and operated without any immitigable impacts on the environment.

264. This submission also ignores the fact that MOE had already determined that the Project needed to be assessed on a site-specific basis because of the Project site's unique geography. Thus, based on MOE's own assessment, any research that it does conduct will have no application to the Project.

1. The Project is Already Subject to Detailed Regulatory Requirements Designed to Protect Human Health and the Environment

265. ***The existing regulatory framework required Windstream to address all environmental impacts.*** Under the REA Regulation, Windstream was required to submit detailed studies for the Project to establish that the Project could be built in an environmentally sound manner.[389] Indeed, Ms. Powell confirms that "the 'burden' would have been on [Windstream] to work with the MOE and other relevant ministries to complete these reports" and the "additional assessment requirements that were set out in the Offshore Wind Facility Report."[390] In Ms. Powell's view, "this 'burden' would not have been materially more onerous, complex or uncertain than completing REA applications for onshore wind projects in the first two years after the REA Regulation took effect."[391]

266. The general areas of concern later identified by MOE as lacking in scientific information, such as noise, lakebed impacts and the effects of an offshore wind project on drinking water, were all "mandatory considerations" under the existing regulatory framework in place at the time Windstream signed the FIT Contract. According to Ms. Power, developers "would have

[389] CER-Powell-2, ¶ 20.

[390] CER-Powell-2, ¶ 20.

[391] CER-Powell-2, ¶ 22.

reasonably assumed that these issues would have been addressed in the REA Regulation requirements."[392]

267. Only a few days before MOE announced the moratorium, WWIS was preparing to engage leading environmental assessment firms, Stantec and Natural Resource Solutions Inc., to complete these studies as part of the process for obtaining a REA and the other permits required for the Project to process.[393] As Mr. Roeper explains, Stantec's proposal provided a detailed and rigorous outline of all the technical work that it would conduct in order to apply for a REA for the Project. This included permitting, ecological fieldwork, technical fieldwork, cultural heritage and archeology.[394] These proposals identified no impediments to the preparation of the studies necessary to submit a complete REA application for the Project.[395]

268. ***Ontario repeatedly recognized that the existing regulatory process is protective of the environment***. MOE officials repeatedly noted that the REA Regulation provided a rigorous approvals process for offshore wind development.[396] For example, a MOE information note from April 2010 (at the time Windstream was offered the FIT Contract) stated that proposed offshore wind projects would go through a "detailed environmental review" through MNR's site release

[392] CER-Powell, ¶ 98.

[393] CWS-Roeper-2, ¶¶ 39-41; **C-0473**, Letter from Deveaux, Leah (Ortech) to Baines, Ian (WEI) (February 8, 2011); **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010); **C-0872**, Response to Request for Proposal (Natural Resource Solutions Inc.), Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Submission for: Option 2. Ecological Field Work (November 25, 2010).

Windstream was also planning to retain Scarlett Janusas Archaeology and Heritage Consulting Education to conduct the required archaeology and cultural heritage work and McLeod Wood to conduct aboriginal consultation: **C-0473**, Letter from Deveaux, Leah (Ortech) to Baines, Ian (WEI) (February 8, 2011); **C-0866**, Proposal (Scarlett Janusas and Shark Marine), Wolfe Island Shoals Offshore Windfarm Background Research & Field Investigation Services, Land and Underwater Archaeological Resource Assessments, Option 4 (November 20, 2010); **C-0874**, Proposal (MWA) for Permitting and Field Investigation Services - Option 5: Aboriginal Consultation (November 25, 2010).

[394] CWS-Roeper-2, ¶ 47.

[395] CWS-Roeper-2, ¶ 43.

[396] **C-0797**, Information Note: *Green Energy Act* and Renewable Energy Approvals (February 3, 2010), p. 6; **C-0184**, Email from Wallace, Marcia (ENE) to Dumais, Doris (ENE) (February 9, 2010); **C-0806**, Information Note: *Green Energy Act* and Renewable Energy Approvals for Offshore Wind Facilities (April 6, 2010); **C-0807**, Email from Wallace, Marcia (ENE) to Postacioglu (ENE) et al (April 12, 2010); **C-0845**, Presentation (MOE), Offshore Wind, Modernization of Approvals Project, Environmental Programs Division (August 23, 2010), slide 5; **C-0878**, Renewable Energy Messaging - Master Sheet (November 29, 2010), pp. 13-16.

process and MOE's REA process.[397] In an email about Windstream's Project, MOE staff stated that "Windstream is subject to the REA regulation requirements for offshore wind projects. […] These rigorous approvals will ensure that there are protections in place to address any potential concerns – from noise setbacks, to protecting lake ecology, birds and bats, to infrastructure, to shipping routes, to commercial fishing, and recreation."[398] Before imposing the moratorium, MOE also informed other offshore wind project proponents that their projects were subject to the REA Regulation and that MOE would process their REA applications once submitted.[399] MOE provided no indication that existing regulatory mechanisms were insufficient.

269. Further, as noted above, at the time the previous deferral on offshore wind projects was lifted in 2008, MNR staff recognized that the existing environmental assessment framework was "sufficient to address site-specific issues and concerns related to off-shore wind."[400] By 2008, the Government's existing research had "made it clear that developing offshore wind potential would be practical and environmentally sound."[401]

270. By 2010, MNR staff were also confident that existing regulatory mechanisms under the new REA Regulation were sufficient to deal with any issues that might arise as a result of the development of an offshore wind project on a site-specific basis. MNR staff noted that MNR was "as ready for [the Project] as all of the others on Crown land."[402] MNR also noted that it "did a policy review years back and determined that there was little to distinguish an offshore farm

[397] **C-0806**, Information Note: *Green Energy Act* and Renewable Energy Approvals for Offshore Wind Facilities (April 6, 2010), p. 1.

[398] **C-0860**, Email from Mahmood, Mansoor (ENE) to Dumais, Dora (ENE) (October 27, 2010); **C-0861**, Key Points for Minister re Wolfe Island (October 27, 2010).

[399] **C-0885**, Email from Cain, Ken (MNR) to Wallace, Marcia (ENE) (December 23, 2010); **C-0880**, Email from Wallace, Marcia (ENE) to Duffey, Barry (ENE) et al (December 10, 2010).

[400] **C-0054**, Key Messages (MNR) (January 15, 2008), pp. 2, 4 [Emphasis added].

[401] **C-0761**, Remarks by Natural Resources Minister Donna Cansfield to the Energy 2100: Making The Great Lakes Conference (April 23, 2008), p. 16. See ¶¶ 106-110 above for a discussion of the necessary infrastructure that would need to be put in place for offshore wind to be developed in a practical and environmentally sound manner.

[402] **C-0810**, Email from Boysen, Eric (MNR) to Au, Dave (MNR) et al (April 19, 2010).

from an onshore farm from a planning/EA/mitigation point of view."[403] At the time the FIT Program was announced, MNR noted that the existing requirements for offshore wind projects "ensur[ed] the protection of public health and safety and the natural environment."[404] Even in areas where there is scientific uncertainty with respect to a particular development, MNR's approach is to require the proponent to address that uncertainty: "[o]ur process is one where we identify our concerns and the proponent spends his time and money figuring it all out to our satisfaction. It works that way on dry land as well."[405]

271. ***Canada submits no expert evidence on why the existing framework is insufficient to protect the environment.*** Canada's evidence is notable for failing to address why Government-led research, as opposed to proponent-sponsored research, is required to address concerns related to noise and drinking water, the two issues which Canada's witnesses have identified as causing the "scientific uncertainty" that supposedly led to the decision to impose the moratorium. Canada

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[403] **C-0198**, Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) (March 23, 2010). Numerous documents from MNR illustrate that senior staff members at that Ministry were confident that their existing policies and procedures were sufficient to deal with any issues that might arise on a site-by-site basis. For example:

(a) In MNR's view, while the "[d]evelopment impacts [of offshore wind development] in large freshwater lakes [were] largely unknown (e.g. coastal impacts, sediment movement, ice build-up, fisheries and fish habitat, etc.)," these impacts "will be site-specific": **C-0811**, Presentation, Offshore Wind Power Development (MNR) (April 20, 2010), slide 6; **C-0815**, Email from Maskell, Lindsay (MNR) to MacLennan Craig (MEI) (April 20, 2010).

(b) When the previous deferral on offshore wind was lifted in 2008, the Ontario Government's view was: "we have determined that the existing policy and Environmental Assessment processes are sufficient to address site-specific issues and concerns related to offshore wind": **C-0052**, House Note (MNR), Issue: Lifting of the Offshore Wind Power Deferral (January 3, 2008), p. 1.

(c) According to the Manager of MNR's Renewable Energy Program: "I do not much like MOE messaging that leaves the public with the misperception that the province has no guidance in place. It sounds like a sad admission. I think we need to rise to Rosalyn's challenge to MOE and message that yes, we have adequate rules in place and we'll improve as we go[.]": **C-0204**, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) et al. (April 7, 2010).

(d) According to the Director of the Biodiversity Branch of the Renewable Energy Program at MNR: "[W]e feel that we can deal with most offshore issues on a site-specific, application based approach and that has been the message that we have been delivering for some time now": **C-0198**, Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) (March 23, 2010).

[404] **C-0800**, Questions and Answers: Aligning the FIT Program and MNR's Site Release Policy for Renewable Energy Projects, p. 8.

[405] **C-0223**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) et al (April 20, 2010). This view is shared by Rosalyn Lawrence, who in her witness statement filed by Canada in this arbitration states that "MNR's preferred approach [during the period in the lead-up to the moratorium] was to carry out site-specific research pertaining to individual projects as the most appropriate means to develop the science required by MNR." RWS-Lawrence, ¶ 46.

has also failed to put forward any evidence to explain why the existing REA Regulation and drinking water protections under Ontario's *Clean Water Act*, which applied to the Project, would not be sufficient to address MOE's concerns regarding the Project's impacts on the environment and human health.

272. Windstream, on the other hand, has put forward extensive evidence showing that Government-led research is not required to address potential environmental impacts from the Project, including potential environmental impacts relating to noise and drinking water. First, Baird explains in its report that the Project would not have adversely affected drinking water in Ontario, and that the existing regulatory process under the REA Regulation and the *Clean Water Act* already required WWIS to establish that the Project would not have an adverse impact on drinking water. Second, based on noise measurements taken at the Project site, Aercoustics has established that the Project would meet MOE's 40 decibel sound limit at the nearest receptor. Windstream would have been required to conduct these studies in order to complete the Offshore Wind Facility Report required to apply for a REA.

2. No Legitimate Reason to Impose an Indefinite-Term Moratorium on Windstream's Project to Protect Drinking Water

a) Project's Impact on Drinking Water Would Have Been Addressed Under Existing Regulations, On a Site-Specific Basis

273. John Wilkinson, the former Minister of the Environment, states that "the issue that heavily influenced [his] decision [to impose the moratorium] was the effect that construction of an offshore wind facility might have on drinking water."[406] Mr. Wilkinson further states that "Ministry officials could not assure [him] that Ontario's drinking water would not be impaired, or if it were, for how long." As a result, "applying the precautionary principle," Minister Wilkinson claims that he decided to impose the moratorium.

274. There was no legitimate reason for MOE to impose an indefinite-term moratorium on Windstream's Project premised on protecting drinking water, because the Project was already

[406] RWS-Wilkinson, ¶ 10.

subject to a regulatory framework that addressed potential impacts on drinking water. Mr. Wilkinson fails to mention in his witness statement that his Ministry, MOE, already administered a regulatory framework that addressed the potential impacts of in-lake construction projects on drinking water, the *Clean Water Act*.[407] As part of the permitting process for the Project, Windstream would have been subject to its requirements.[408] The Act creates "a process for evaluating new projects using conventional, science based approaches."[409] The Act's goal is to provide a "detailed process for evaluating whether or not a project is a threat to drinking water," and the Project would have to comply with the process established under the Act for evaluating new projects. As MNR explained when the FIT Program was announced, the REA Regulation "set out application requirements for offshore wind projects, including information and studies intended to protect Ontario's water quality."[410]

275. Applying the *Clean Water Act* framework to the Project, Baird concludes that any impacts that the Project may have on drinking water "are no different from the impacts that might be expected from other in-water construction projects such as pipeline construction or development of a marina."[411] In fact, according to Baird, "the potential impacts are in many ways more limited" since the closest drinking water intake to the Project is 12 kilometres away.[412] This is in contrast to many other projects that are evaluated under the *Clean Water Act*, and which are "located much closer to drinking water intakes."[413]

276. Indeed, it is very difficult to understand why the Project, which is located more than 12 kilometres away from the existing drinking water intakes,[414] would be subject to different requirements than in-lake construction located much closer to drinking water intakes. Even URS

[407] CER-Baird, pp. 4, 132-133, 140; CER-Baird-2, p. 43.

[408] CER-Baird, p. 141.

[409] CER-Baird, p. 132.

[410] **C-0800**, Questions and Answers: Aligning the FIT Program and MNR's Site Release Policy for Renewable Energy Projects, p. 9.

[411] CER-Baird, p. 138.

[412] CER-Baird-2, p. 35.

[413] CER-Baird, p. 141.

[414] CER-Baird-2, p. 35.

does not dispute Baird's evidence that the potential impacts of the Project on drinking water would be addressed pursuant to the *Clean Water Act*.[415]

277. MOE explicitly recognized in June 2010 that an existing regulatory framework to protect drinking water applied to proposed offshore wind projects. MOE emphasized that under the current regime "site-specific studies" would be required outside the exclusion zone "to assess potential impacts and implement measures to mitigate any potential impact to water quality."[416] Indeed, the protection of drinking water was one of the stated rationales for the five-kilometre setback. MOE stated that "[a] five-kilometre exclusion zone would establish a distance between drinking water intakes, both current and planned, and off-shore wind facilities. Establishing a shoreline exclusion zone would also ensure that sediment dredging and other construction-related activities do not impact any drinking water intakes, given that the intakes are generally located less than four kilometres from the shoreline."[417]

278. This is consistent with the results of a study that MOE appears to have commissioned before the decision to impose the moratorium, in which the authors concluded that "[b]ased on the results of this assessment, it was concluded that any impacts from construction of an offshore windmill would be quite small."[418] Windstream would have been required to address the potential impacts of the Project on drinking water, and any proposed mitigation measures, in its Offshore Wind Facility Report.[419]

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[415] CER-Baird, pp. 132-41; CER-Baird-2, p. 43; RER-URS, ¶¶ 154-58.

[416] CER-Powell-2, ¶ 65; **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010), p. 2.

This was also confirmed in a proposed letter from Minister Wilkinson to a member of the public, approved by Marcia Wallace: **C-0883**, Email from Goode, Christopher (ENE) to Vandervecht, Brian (ENE) et al (December 22, 2010); **C-0884**, Response Letter to MO's Request.

[417] **C-0298**, Report - Discussion Paper - Offshore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010), p. 2.

[418] **C-0637**, Report (MOE), Application of the MIKE3 model to examine water quality impacts within Lake Ontario Nearshore in 2008 (December 28, 2012), p. iv.

[419] Ms. Powell confirms in her report that Windstream would have been required to conduct "site-specific studies regarding sediment quality and sediment transport to assess potential impacts and implement measures to mitigate any potential impact as part of the REA application process." Put succinctly, "it was clear […] that the proponent

279. Thus, there was no need for MOE to impose an indefinite-term moratorium on the Project for the purpose of studying the Project's potential impact on drinking water. Had it been permitted to proceed through the existing regulatory process under the *Clean Water Act* and the REA Regulation, Windstream would have completed those studies itself.

280. According to Baird, a prominent coastal engineering firm that MNR retained to prepare a coastal engineering report relating to the impact of offshore wind projects on the Great Lakes,[420] the lakebed sediments at the Project site are safe and the Project likely would not pose a threat to drinking water given that it is located 12 kilometres away from the nearest drinking water intake.[421]

b) Government-Led Research Would Be of Limited Use Because Lakebed Sediment Displacement Must Be Studied on a Site-Specific Basis

281. In Baird's opinion, the most informative manner to further confirm that the shifting of the lakebed sediments during the installation of the turbine foundations for the Project would not pose a threat to drinking water would be for Windstream to undertake a detailed, site-specific study of the Project site.[422] It is not necessary for the Government to undertake years of scientific research to confirm that the lakebed sediments at the Project site are safe and would not pose a threat to drinking water.[423]

282. Nor would the Government-led research that MOE proposes to conduct even be useful for the Project. In the research plan on which Canada relies, the only work related to the protection of drinking water that MOE identifies is:

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was required to document water quality and sediment quality conditions in the proposed locations in a "manner acceptable to the MOE." CER-Powell 2, ¶ 66.

[420] **C-0530**, Report (Baird), Offshore Wind Power Costal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ontario Ministry of Natural Resources (May 2011); CER-Baird-2, pp. 1, 12.

[421] CER-Baird-2, pp. 19-20, 35.

[422] CER-Baird-2, pp. 19-20.

[423] CER-Baird-2, pp. 19-20.

(a) "A – Assemble and assess existing sediment quality data" – MOE "to map and create database of available sediment" – "Conduct work Q3 2013/14";

(b) "B – Updated guidance – Review and update technical guidance and establish modelling and monitoring framework" – "Development of [Request for Submissions] Q4 2013/14," "Initiate work Q1 2014/2015," "Final report Q2 2014/15."[424]

283. There is no evidence that MOE has even done that work. In any event, the collection of sediment quality data by MOE is not necessary. In preparing its Construction Plan Report pursuant to the REA Regulation, Windstream would have been required to comply with the *Clean Water Act*.[425] This would have included collecting and testing sediment from its specific Project site and assessing potential impacts on drinking water having regard to the specific sediment found at the site, the specific locations of the turbine foundations and the specific locations of the nearest drinking water intakes. The creation by MOE of a database identifying areas for which existing sediment quality data exists would have no bearing on the evaluation of the Project's potential impact on drinking water.[426]

c) No Evidence that Minister Wilkinson was Advised that the Existing Framework under the *Clean Water Act* was Insufficient to Protect Drinking Water

284. It is surprising that Minister Wilkinson would have decided that an indefinite-term moratorium was necessary to protect drinking water without first receiving advice about the sufficiency of the existing regulatory framework to address potential impacts of proposed offshore wind projects on drinking water. But there is no evidence that MOE officials ever gave Minister Wilkinson advice on the sufficiency of the *Clean Water Act* regulatory framework to address potential impacts to drinking water. Nor is there any evidence that advice was provided

[424] **R-0334**, Ministry of the Environment, "Offshore Wind Power - Ministry of the Environment Research Plan" (March 22, 2013), p. 3.

[425] **R-0210**, Ministry of the Environment, "DRAFT Complete Submission Requirements Checklist for Offshore Wind Projects under O. Reg. 359/09," pp. 2-3.

[426] CER-Baird-2, pp. 3-4, 19.

to Minister Wilkinson that years of research would be necessary before MOE would be in a position to approve offshore wind projects under the *Clean Water Act* framework. Mr. Wilkinson does not cite a single document to support his assertion that "Ministry officials could not assure [him] that Ontario's drinking water would not be impaired, or if it were for how long."[427] There is certainly no evidence that he ever received advice that an offshore wind project that met the MOE's requirements under the *Clean Water Act* framework would nevertheless potentially "impair" Ontario's drinking water.[428]

285. The absence of evidence of any advice from MOE officials to Minister Wilkinson casts doubt on his evidence that the moratorium decision was legitimately motivated by a desire to protect drinking water. In any event, none of Minister Wilkinson, Ontario or Canada has explained why the existing process under the *Clean Water Act* would be insufficient to address the potential impacts of the Project on drinking water.

d) Minister Wilkinson's Alleged Reliance on the Precautionary Principle is Misplaced

286. According to Ms. Powell, "the precautionary principle is a tool that is applied only where there is a sound and credible threat of serious or irreversible harm to the environment or human health."[429] In February 2011, there was no "sound and credible threat" to Ontario's drinking water from offshore wind development.[430] Ms. Powell reaches this conclusion for the following reasons:

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[427] RWS-Wilkinson, ¶ 10.

[428] Although Minister Wilkinson states that he made the decision to impose the moratorium, Canada has produced only one document that on its face discloses advice to Minister Wilkinson in connection with the decision. In a memorandum to Minister Wilkinson dated January 6, 2011, his Senior Policy Advisor for Renewable Energy sought his input on the "go" and "no go" zones approach to constraining offshore wind development that the Premier's Office had approved that morning (discussed in additional detail below). [redacted]: **C-0900**, Memorandum (Confidential Advice to the Minister) from Lucas, Brenda (ENE) to Minister Wilkinson (ENE) (January 6, 2011), p. 2. There is not a single mention of drinking water concerns or the sufficiency of the existing regulatory framework in this document.

[429] CER-Powell-2, ¶ 59.

[430] CER-Powell-2, ¶ 59.

(a) there was no credible evidence of potential harm to drinking water in Lake Ontario from offshore wind development;

(b) the impact of offshore wind development on drinking water was considered as part of MOE's five-kilometre setback proposal; and

(c) in areas outside of the five-kilometre setback, Windstream and other project proponents would have been required to conduct site-specific studies regarding sediment quality and transport to assess potential impacts and mitigation measures as part of the REA process.[431]

287. Consequently, Ms. Powell concludes that the stated rationale for the moratorium is "unconvincing."[432]

288. Ms. Powell's opinion is supported the Canadian Environmental Law Association and Ecojustice, prominent non-governmental organizations focused on environmental law. In a letter to Premier McGuinty following the announcement of the moratorium, these organizations expressed their "disapproval and concern regarding the moratorium" and expressed the view that the stated reasons for the decision – namely "lack of science" were "unconvincing." They noted that there was "little serious or credible evidence that windmills in any way threaten drinking water supplies or pose a threat to human health." With respect to the application of the precautionary principle, they stated:

> The precautionary principle is a fundamental tenet of Canadian and international law and governance. Rather than responding to situations where there is a "lack of science," it counsels caution in the face of incomplete but credible scientific evidence of a significant threat to the environment and/or human health. Our organizations are not aware of any serious or credible evidence of risks to drinking water from off-shore wind turbines. Using the precautionary principle to justify shutting down progress on building clean offshore wind in this context undermines this vital legal principle.

[431] CER-Powell-2, ¶ 59-67.

[432] CER-Powell-2, ¶ 67.

> Rather than reversing progress on renewable energy without credible evidence of risks to drinking water, we believe your government should be using the precautionary principle to avoid further harm to ecosystems and human health where there is real evidence that a serious threat exists[.][433]

289. In Ms. Powell's opinion, rather than invoking the precautionary principle, in the absence of credible evidence of harm to the environment, it would have been appropriate for MOE to use the adaptive management approach to managing impacts on drinking water.[434] Adaptive management is a well-established principle of environmental protection in Canada that should coexist in harmony with the precautionary principle.[435]

290. The adaptive management approach recognizes that it may be difficult or impossible to predict all of the potentially adverse environmental effects of a project. It allows the project to proceed based on flexible management strategies that are capable of adjusting to new information.[436] The approach therefore works in harmony with the precautionary principle to ensure effective long-term protection, particularly in cases where uncertainty exists, but allows projects to be built that have significant social, economic and environmental benefits.[437] Therefore, according to Ms. Powell, "knowledge gaps" regarding offshore wind power projects could have been addressed in the context of an adaptive management approach, "i.e., not by way of the Moratorium."[438]

3. No Legitimate Reason to Impose an Indefinite-Term Moratorium on Windstream's Project to Protect Against Noise-Related Impacts

291. Another specific area of concern regarding offshore wind development identified by MOE was noise impacts. MOE was not able to identify a noise propagation model that could be used to define a standardized setback distance. [redacted]

[433] **C-0995**, Letter from Canadian Environmental Law Association and Ecojustice to Dalton McGuinty (Premier) (March 3, 2011), p. 2 [Emphasis added].

[434] CER-Powell-2, ¶¶ 68-78.

[435] CER-Powell-2, ¶¶ 68-71.

[436] CER-Powell-2, ¶ 70.

[437] CER-Powell-2, ¶ 73.

[438] CER-Powell-2, ¶ 78.

[439] Significantly, there was no suggestion by MOE at that time that an indefinite-term moratorium to conduct undefined scientific research was required before MOE could process REA applications for offshore wind projects.[440]

292. However, the lack of an accepted noise propagation model should not have been an impediment to MOE allowing Windstream to proceed through the REA process. As part of the Offshore Wind Facility Report, Windstream would have been required to set out the noise impacts of the Project, and mitigation measures to address them.[441] In the draft Technical Bulletin that MOE issued to explain noise-related setback distances, MOE confirmed that noise impacts from offshore wind projects would be considered on a site-specific basis as part of the Offshore Wind Facility Report.[442] MOE further confirmed that "each application will be reviewed based on the local situation. Applicants need to conduct noise studies, demonstrating they do not exceed a noise level of 40 decibels."[443]

293. Based on these documents, Windstream's consultants understood that noise work would be completed on a site-specific basis for the Project in order to comply with the MOE's existing

[439] **R-0140**, Presentation (MOE), Offshore Wind Noise Requirements, Technical Workshop Findings, Path Forward-Options (August 31, 2010), slides 6-8. The approach recommended by MOE was : **R-0140**, Presentation (MOE), Offshore Wind Noise Requirements, Technical Workshop Findings, Path Forward-Options (August 31, 2010), slide 7. Importantly however, MOE acknowledged ": **C-0848**, Presentation (MOE), Offshore Wind Noise Requirements, ADM Briefing (September 2, 2010), slide 7.

[440] **R-0140**, Presentation (MOE), Offshore Wind Noise Requirements, Technical Workshop Findings, Path Forward-Options (August 31, 2010); **R-0137**, Email from Duffey, Barry (ENE) to Wallace, Marcia (ENE) (August 25, 2010).

[441] **C-0103**, REA Regulation, s. 13, Table 1.

[442] **C-0194**, Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines (March 1, 2010), p. 5; **C-0781**, Decision Points (July 7, 2009).

MOE's draft Plain Language Guide to Renewable Energy Approvals from August 2009 similarly provided that "[t]he proponent of any proposed offshore wind project must submit a noise study taking into account the unique noise conditions the development would create.": **C-0787**, Ministry of the Environment, Plain Language Guide to Approvals for Renewable Energy Projects (August 2009), p. 23.

[443] **C-0791**, MOE Fact Sheet Entitled "Wind Facilities" (September 24, 2009).

noise limits of 40 dBA at the nearest shoreline receptor.[444] This was confirmed by the proposal by Stantec, the leading environmental consultant that Windstream was planning to retain to complete the environmental assessment work for the Project. Stantec's proposal confirmed that a noise report would be prepared on a site-specific basis to comply with the MOE's noise requirements.[445]

294. Therefore, there was no need for MOE to conduct its own studies to determine the noise that would have been produced by the Project because Windstream was already required to do that as part of its REA application. The MOE recognized this on multiple occasions.[446]

295. In support of this Reply Memorial, Windstream has submitted an expert report from Aercoustics, a leading acoustical measurement firm. Aercoustics met with MOE shortly after the moratorium was announced regarding research to measure noise from offshore wind turbines.[447] Based on actual noise measurements taken near the proposed Project area, Aercoustics confirms that noise generated by the Project measured at the closest receptor would be 26 dBA, well below the MOE's 40 dBA limit.[448] Even URS, Canada's experts, admit that the noise-related risk to the Project is low.[449]

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[444] CWS-Roeper-2, ¶ 20.

[445] **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010), p. 16. This is also consistent with Ms. Powell's evidence: CER-Powell-2, ¶¶ 16, 18.

[446] MOE contemplated that [redacted] **R-0165**, Presentation (MOE), Offshore Wind Noise Requirements: Deputy Ministers' Meeting (October 20, 2010), slide 8.

In an email setting out bullet points about the Project for Minister Wilkinson, MOE noted that the "rigorous approvals" already in place "will ensure that there are protections in place to address any potential concerns" including "noise setbacks.": **C-0860**, Email from Mahmood, Mansoor (ENE) to Dumais, Dora (ENE) (October 27, 2010); **C-0861**, Key Points for Minister re Wolfe Island (October 27, 2010), p. 1.

[447] **C-0984**, Email from Schofield, Carine (ENE) to Schroter, V ic (ENE) and Postacioglu, Dilek (ENE) (February 15, 2011); CER-Aercoustics, p. 4.

[448] CER-Aercoustics, pp. 16, 17. Windstream has also established that the Project would meet noise requirements applying the conservative noise propagation models that MOE considered adopting in 2010: CER-HGC, p. 7; CER-HGC-2.f

[449] RER-URS, ¶ 153.

296. Thus, Government-funded noise research is not necessary to establish the noise impacts associated with the Project.

4. MOE Recognizes that Any Research It Conducts Will Have Limited Application to the Project

297. A few weeks before the decision to impose the indefinite-term moratorium was announced, MOE determined that [redacted][450] It further determined that [redacted] This prompted the Chief of Staff to the Minister of Energy to comment that [redacted]

298. This decision is what prompted the Ontario Government to decide to "freeze" Windstream's Project, as described in paragraphs 355 to 371 below, rather than allowing it to proceed as a pilot project. However, it is clear from this document that MOE considered that [redacted]

299. Therefore, there is no legitimate justification for refusing to allow Windstream to conduct the site-specific studies that it was required to conduct under the REA Regulation.

[450] **C-0959**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 28, 2011), p. 2.

[451] **C-0959**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 28, 2011), p. 1.

V. The Real Motivation for the Indefinite-Term Moratorium was the Desire to Constrain Offshore Wind Development and to "Kill" Offshore Wind Projects

300. The real motivation for the indefinite-term moratorium was Ontario's desire to constrain offshore wind development and "kill" offshore wind projects. Canada dismisses as "wild accusations" Windstream's arguments that the moratorium was not adopted out of a legitimate concern about environmental protection.[452] Ontario's own documents provide ample evidence that Ontario wanted to use research as a pretext to "kill" offshore wind projects.

301. If the moratorium had truly been motivated by a concern over environmental protection, the idea to implement it would likely have been initiated by MOE staff raising concerns with high-ranking bureaucratic staff, who would then relay them to the Minister of the Environment for ultimate direction. This does not appear to have occurred here. Instead, the decision to adopt the moratorium appears to have been the result of a determination by the Premier's Chief of Staff that a moratorium would "kill" offshore wind projects.

A. August to December 2010: MEI Seeks to [redacted]

302. The idea to impose an indefinite moratorium on offshore wind development premised on the perceived need to conduct additional scientific research was driven by MEI, not by MOE. As Canada recognizes in paragraph 247 of its Counter-Memorial, [redacted]

303. It is not disputed that MEI was concerned about the cost of offshore wind development. As Ms. Lo notes, "MEI was concerned about a number of large offshore wind projects that had yet to apply to the FIT Program, but were in the early planning stages."[453] MEI identified "offshore wind concerns" in a briefing to the Premier's Office in April 2010, including "costs to

[452] Canada's Counter-Memorial, ¶ 392.

[453] RWS-Lo, ¶ 31.

ratebase" and the "addition of massive quantities of offshore wind to the supply mix."[454] MEI emphasized that "[i]f all offshore FIT projects were to proceed at 19 cents/kWh, electricity bills would increase by 26% of $368 per year."[455] Windstream established in its Memorial that Ontario has realized an economic benefit of approximately $1.3 to $2.1 billion as a result of the Project not proceeding.[456]

304. ***The idea for a moratorium on offshore wind appears to have been proposed by MEI, not MOE.*** The first mention of the possibility of a [redacted] in the documents that Canada has produced is in a presentation dealing with [redacted].[457] The problem that the Government was apparently trying to solve was how to justify its proposed regulatory amendment to include a standardized five-kilometre setback that would apply to all offshore wind projects. To justify replacing the existing process under which noise would be assessed on a site-specific basis with a standardized noise-related setback distance, MOE would need to conduct research to validate a sound-propagation model that could be applied in a standardized way to all offshore wind projects. MOE initially proposed three options for conducting this research. It recommended an option that would complete the theoretical research by December 2010.[458]

305. [redacted]

[454] **C-0240**, Presentation (MEI), Offshore Wind and the *Green Energy Act*, PO Briefing (April 30, 2010), slide 2.

[455] **C-0240**, Presentation (MEI), Offshore Wind and the *Green Energy Act*, PO Briefing (April 30, 2010), slide 3.

[456] Windstream's Memorial, ¶¶ 476-77, CER-PowerAdvisory.

[457] **R-0140**, Presentation (MOE), Offshore Wind Noise Requirements, Technical Workshop Findings, Path Forward-Options (August 31, 2010)**.**

[458] **R-0140**, Presentation (MOE), Offshore Wind Noise Requirements, Technical Workshop Findings, Path Forward-Options (August 31, 2010), slide 7.

[459] **R-0140**, Presentation (MOE), Offshore Wind Noise Requirements, Technical Workshop Findings, Path Forward-Options (August 31, 2010).

[redacted]

306. [redacted]

307. Around the same time, MEI communicated to MOE that it did not "need" offshore wind power and that it wanted to "buy time with research."[462] This coincided with rumours among MEI staff that there was "movement afoot to slow offshore down."[463]

308. [redacted]

[460] **R-0142**, Ministry of the Environment, Presentation, "Offshore Wind Noise Requirements: Deputy Minister's Briefing" ("Noise Requirements DM Briefing #1"), (September 13, 2010), p. 8.

[461] **C-0859**, Meeting Notes for Deputy Minister of Natural Resources and Deputy Minister of the Environment (October 27, 2010), pp. 1-2.

When the moratorium was announced, MEI and the OPA specifically noted that [redacted]

[redacted]

C-0978, Offshore Wind Direction Related Questions and Answers (February 11, 2011), p. 2.

[462] **C-0376**, Handwritten Notes of Dilek Postacioglu (ENE) (November 1, 2010), p. 1.

[463] **C-0862**, Email from Ing, Pearl (MEI) to Slawner, Karen (MEI) and Zaveri, Mirrun (MEI) (November 4, 2010).

[464] **C-0847**, Email from Collins, Jason (MEI) to Wismer, Jennifer (MEI) (September 1, 2010).

309. ***Policy shifts in favour of moratorium to "move away from offshore development."*** It was only after these interactions with MEI that MOE appears to have revised its recommended options [redacted] In this context, MOE's new proposed approach to offshore wind was [redacted]."[465] MOE stated at the outset of its revised slide deck that [redacted][466] MOE staff noted that there was "political direction" coming on offshore wind.[467]

310. MOE's decision to favour an indefinite-term moratorium instead of the options that [redacted] appears to have been heavily influenced by MEI's desire to stall offshore development. In discussions with MOE and MNR regarding offshore wind policy, MEI stated that its objective was "[l]ooking for ways to move away from off-shore development without sending a chill through the energy development and manufacturing markets."[468] MEI left no doubt that the decision to impose an indefinite-term moratorium with a "scientific uncertainty" pretext was meant as a stalling tactic:

[465] **R-0178**, Government of Ontario, Presentation, Offshore Wind Development, Strategies for a Path Forward (November 16, 2010), slide 8.

[466] **R-0178**, Government of Ontario, Presentation, Offshore Wind Development, Strategies for a Path Forward (November 16, 2010), slide 2.

A later version of this presentation noted that the research required to establish the noise modelling "[m]ay not necessarily delay the implementation of the Windstream project with a FIT contract" as the research is likely to be completed within sufficient time for the company to meet its Commercial Operation Date: **C-1044**, Presentation (MOE), Offshore Wind Development, Strategies for a Path Forward (November, 2010), slide 10.

[467] **C-0881**, Email from Abbas, Nuhaad (ENE) to Evans, Paul (ENE) (December 15, 2010).

[468] **C-0403**, Email from Zaveri, Mirrun (MEI) to Slawner, Karen (MEI) et al (December 8, 2010), p. 1.

[redacted]

311. MEI staff succinctly expressed MEI's multiple concerns with proceeding with offshore development in a draft of a slide deck prepared in early January 2011. They noted that there were "some issues" with proceeding with offshore wind, including "[r]atepayer impact," "[r]egulatory uncertainty," "[p]ublic opposition to wind generally and offshore wind specifically," an "[redacted] and "[e]conomic and industry impacts."[470]

312. [redacted]

B. Early January 2011: MEI Recommends, and Premier's Office, MOE and MNR Adopt, a "Transmission Capacity" Rationale for Constraining Offshore Wind Development Instead of an Indefinite-Term Moratorium

313. ***Political staff from MEI and Premier's Office consider a "go" and "no go" zones approach to constraining offshore wind development***. By December 2010 and early January 2011, the Ontario Government's preferred option to move away from offshore wind development shifted from an indefinite-term moratorium, in favour of establishing "go" and "no

[469] **C-0403**, Email from Zaveri, Mirrun (MEI) to Slawner, Karen (MEI) et al (December 8, 2010) [Emphasis added]; **C-0842**, Handwritten Notes of Ken Cain (MNR) (August 16. 2010).

[470] **C-0891**, Presentation (MEI), Offshore Wind, Options for Moving Forward (January 4, 2011), slide 3.

[471] **C-0420**, Presentation (MEI), Offshore Wind Options for Moving Forward (January 4, 2011), slides 4-5.

[472] **C-0420**, Presentation (MEI), Offshore Wind Options for Moving Forward (January 4, 2011), slide 6.

go" zones.[473] Under this proposed approach, offshore wind development would be constrained in certain areas (the "no go" zones). The rationale for establishing the "no-go" zones would be a purported lack of transmission capacity in the areas identified as "no-go" zones [redacted]

314. The idea for this approach to constraining offshore wind development appears to have been initiated by a senior staffer in Minister of Energy Brad Duguid's office. Rather than imposing an indefinite-term moratorium, transmission capacity could potentially "work as a wall for offshore wind" so that proposed offshore wind proponents could be asked "to proceed through FIT, with reassurance they won't find capacity."[474] In the following weeks, there was substantial discussion among political staff in the Minister of Energy's Office and the Premier's Office about using this approach.[475] [redacted]

[473] Many of the documents produced by Canada on May 8, 2015 shed further light on the decision-making surrounding the initial adoption of the "transmission capacity" rationale for constraining offshore wind development. They were therefore not included in Windstream's Memorial, because they had yet been produced by Canada. They are set out below.

[474] The "go" and "no go" zone approach appears to first have been discussed in a December 23, 2010 email from Andrew Mitchell, Minister of Energy and Infrastructure Brad Duguid's Senior Policy Advisor, to MEI staff. Mr. Mitchell asked for the OPA to create a "breakdown of available transmission capacity by transmission area." He explained that he was asking for this because he was "wondering if transmission capacity can work as a wall for offshore wind" and wanted to know whether there were "limitations to using capacity as a buffer": **C-0887**, Email from Bishop, Ceiran (MEI) to Zaveri, Mirrun (MEI) et al (December 23, 2010) [Emphasis added].

[475] **C-0894**, Email from Mitchell, Andrew (MEI) to Mullin, Sean (OPO) (January 5, 2011); **C-0421**, Report (MEI), Can Transmission Capability Limits Aid in Buffering Offshore Applications? (January 4, 2011); **C-0895**, Email from MacLennan, Craig (MEI) to Mitchell, Andrew (MEI) (January 5, 2011); **C-0896**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 5, 2011); **C-0897**, Email from Mitchell, Andrew (MEI) to Mullin, Sean (OPO) et al (January 5, 2011); **C-0898**, Email from Viswanathan, Samira (MEI) to Bishop, Ceiran (MEI) (January 5, 2011),.

[476] **C-0894**, Email from Mitchell, Andrew (MEI) to Mullin, Sean (OPO) (January 5, 2011).

[477] **C-0896**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 5, 2011).

[478] **C-0890**, Presentation (MEI), Offshore Wind Options for Moving Forward (January 4, 2011), slide 6.

[redacted]

315. MEI staff [redacted]

316. ***Premier's Office approves the "go" and "no-go" zones approach to constraining offshore wind development.*** The Premier's Office approved the "go" and "no-go" zone approach at the Energy Issues Meeting on January 6, 2011.[484] Secretary of Cabinet Shelly Jamieson – the most senior public servant in the Ontario Government – and representatives of the Ministers of the Environment and of Natural Resources also attended that meeting.[485] During the meeting, Ms. Jamieson referred to a letter from Windstream to Premier McGuinty explaining the regulatory delays that the Project had faced and "chastiz[ed] MNR and MOE with 'no more regulatory delays'."[486] She further stated that it would be "embarrassing" for the government not to honour

[479] **C-0898**, Email from Viswanathan, Samira (MEI) to Bishop, Ceiran (MEI) (January 5, 2011); **C-0421**, Report (MEI), Can Transmission Capability Limits Aid in Buffering Offshore Applications? (January 4, 2011).

[480] **C-0746**, Comments on Off-Shore Recommendation.

[481] **C-0898**, Email from Viswanathan, Samira (MEI) to Bishop, Ceiran (MEI) (January 5, 2011); **C-0431**, Email from Boysen, Eric (MNR) to Zaveri, Mirrun (MEI) (January 6, 2011); **C-0441**, Handwritten Notes of Jennifer Heneberry (MEI) (January 10, 2011), pp. 1-2; **C-0887**, Email from Bishop, Ceiran (MEI) to Zaveri, Mirrun (MEI) et al (December 23, 2010).

[482] **C-0902**, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) et al (January 6, 2011).

[483] **C-0430**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 6, 2011), slide 8.

[484] **C-0450**, Email from Collins, Jason R. (MEI) to Ing, Pearl (MEI) (January 11, 2011). See Windstream's Memorial, ¶ 355.

[485] **C-0902**, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) et al (January 6, 2011).

[486] **C-0901**, Email from Evans, Paul (ENE) to Wallace, Marcia (ENE) (January 6, 2011).

Windstream's FIT Contract.[487] Following the January 6, 2011 meeting, Mr. Mullin of the Premier's Office expressed to MEI that the Premier's Office was "concerned about other lakes" because of "huge public opposition" and "onshore antiwind sentiment."[488]

317. ***MOE and MNR staff did not identify any environmental concerns with the Project*** [redacted] Both MOE and MNR provided comments on the presentation in which the "go" and "no-go" zones approach was recommended. None of the comments expressed a view that an indefinite-term moratorium should be the preferred option, or that one was necessary in order to protect the environment.[489] Significantly, neither MNR nor MOE indicated that they would not be in a position to work with Windstream to allow the Project to proceed through the REA process until further scientific research was completed.

318. On the contrary, Dr. Wallace of MOE explained that MOE preferred that the decision on offshore policy [redacted] While MOE was initially "out of the loop" on the preparation of the presentation,[490] after reviewing it, Dr. Wallace stated:

[redacted]

319. [redacted]

[487] **C-0904**, Handwritten Notes of Ken Cain (MNR) (January 7, 2011); **C-0920**, Handwritten Notes of Jennifer Heneberry (January 13, 2011), p. 1.

[488] **C-0442**, Handwritten Notes of Jennifer Heneberry (MEI) (January 10, 2011), p. 1.

[489] **C-0935**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 21, 2011).

[490] **C-0423**, Email from Wallace, Marcia (ENE) to Boysen, Eric (MNR) (January 5, 2011).

[491] **C-0903**, Email from Wallace, Marcia (ENE) to Zaveri, Mirrun (MEI) (January 6, 2011).

[redacted]"[492] Moreover, as of January 2011, MOE had budgeted to receive REA application fees for offshore wind projects in the 2012-2013 financial year.[493]

320. Brenda Lucas, Minister of the Environment John Wilkinson's Senior Policy Advisor for Renewables, also did not identify any concerns about the approach in a memorandum to Minister Wilkinson. [redacted]

321. MNR commented that it [redacted].[495] However, in internal emails MNR expressed frustration with the proposed approach because it would be tasked with having to justify the "arbitrary" five-kilometre setback while the OPA "gets to ride under cover of [transmission] constraints."[496]

322. ***Communications plan announcing "go" and "no-go" zones policy emphasizes robust REA process.*** The communications plan developed for the "go" and "no-go" zones policy confirmed that offshore wind projects outside the five-kilometre setback and within the "go" zones would be permitted to proceed through the REA process, which it described as a "vigorous process that protects human and environmental health on a case by case basis for each and every

[492] **C-0903**, Email from Wallace, Marcia (ENE) to Zaveri, Mirrun (MEI) (January 6, 2011).

[493] **C-0888**, Presentation, Green Energy - MOE Internal Resourcing Options (January, 2011), p. 13.

[494] **C-0900**, Memorandum (Confidential Advice to the Minister) from Lucas, Brenda (ENE) to Minister Wilkinson (ENE) (January 6, 2011).

[495] **C-0899**, Email from Zaveri, Mirrun (MEI) to Viswanathan, Samira (MEI) (January 5, 2011).

[496] **C-0905**, Email from Lawrence, Rosalyn (MNR) to Whytock, John (MNR) (January 7, 2011).

project."[497] The key messages planned would be "framed around strong rules in place and strict guidelines."[498] The objectives of the proposed policy were stated to include "[s]et the stage for development of offshore wind that protects ratepayer interests" and "the Great Lakes environment and human health," as well as "[m]anage concerns of anti-wind community groups."[499]

323. There was no mention in the proposed communications plan – circulated 30 days before the decision to impose the indefinite-term moratorium was announced – of any concerns about offshore wind development relating to scientific uncertainty. There was certainly no mention that the development of offshore wind projects outside the proposed five-kilometre exclusion zone would raise environmental concerns relating to noise or drinking water that would take "years" of research to resolve. On the contrary, the plan noted that the existing REA process would "protect human and environmental health on a case by case basis for each and every project."[500]

324. Meanwhile, MOE was getting ready to accept REA applications for offshore wind projects, since it contemplated that Windstream would be submitting one if it were allowed to proceed as a pilot project.[501]

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[497] **C-0916**, Communications Strategy Summary; Offshore Wind - January 2011 (January 12, 2011), p. 3; **C-0915**, Email from Kulendran, Jesse (MEI) to Morley, Chris (OPO) et al (January 12, 2011); **C-0445**, Communications Strategy Summary: Offshore Wind (January 10, 2011), p. 3.

[498] **C-0916**, Communications Strategy Summary; Offshore Wind - January 2011 (January 12, 2011), p. 2.

[499] **C-0916**, Communications Strategy Summary; Offshore Wind - January 2011 (January 12, 2011), p. 1.

[500] **C-0916**, Communications Strategy Summary; Offshore Wind - January 2011 (January 12, 2011), p. 3. This communications plan was circulated on January 12, 2011 to a wide group of senior government officials that included Chris Morley (Premier McGuinty's Chief of Staff), Shelley Jamieson (the Secretary of Cabinet), Sean Mullin (of the Premier's Office) and Craig MacLennan (of the Minister of Energy's Office): **C-0915**, Email from Kulendran, Jesse (MEI) to Morley, Chris (OPO) et al (January 12, 2011).

Previous versions were sent to MOE (including Marcia Wallace and Doris Dumais) and MNR (including Rosalyn Lawrence) for review: **C-0889**, Email from Nutter, George (MEI) to Zaveri, Mirrun (MEI) (January 10, 2011); **C-0908**, Email from Zaveri, Mirrun (MEI) to Boysen, Eric (MNR) et al (January 10, 2011); **C-0906**, Email from Lawrence, Rosalyn (MNR) to Boysen, Eric (MNR) and Cain, Ken (MNR) (January 7, 2011).

[501] **C-0741**, Email from Schroter, Vic (ENE) to Postacioglu, Dilek (ENE) (January 11, 2011); **C-0322**, Checklist for Requirements under O. Reg 359/09 (MOE), Supplement to Application for Approval of a Renewable Energy Project (July 26, 2010); **R-0210**, Ministry of the Environment, "DRAFT Complete Submission Requirements Checklist for Off-shore Wind Projects under O. Reg. 359/09."

C. January 10-12, 2011: Premier's Office Directs Adoption of a New Policy that Would "Kill" Offshore Wind Projects

325. During the week following the January 6, 2011 Energy Issues Meeting, Premier's Office and MEI staff [redacted] By January 13, 2011, the Premier's Office had directed that an approach that would "kill" all offshore wind projects except the Project be adopted. That policy would be an indefinite-term moratorium premised on scientific uncertainty.

326. [redacted]"[502] To that end, Craig MacLennan, the Chief of Staff to the Minister of Energy, recommended to Mr. Mullin of the Premier's Office [redacted][504]

327. [redacted]."[505]

[502] **C-0894**, Email from Mitchell, Andrew (MEI) to Mullin, Sean (OPO) (January 5, 2011).

[503] **C-0892**, Email from MacLennan, Craig (MEI) to Mullin, Sean (OPO) (January 4, 2011).

[504] **C-0890**, Presentation (MEI), Offshore Wind Options for Moving Forward (January 4, 2011), slide 6.

[505] **C-0890**, Presentation (MEI), Offshore Wind Options for Moving Forward (January 4, 2011), slide 5.

328. In a document provided to the OPA explaining the "go" and "no-go" zone approach, MEI noted that [redacted]."[506] MNR later explained to MEI that there would be "many remaining applicants within the [transmission] go zones."[507]

329. During this time, MEI staff continued to express their view that "[r]egarding offshore policy the government needs to question whether or not we require that kind of energy that would be generated from offshore development."[508]

330. ***Chief of Staff to the Premier directed that offshore wind projects be "killed."*** The definitive order to move away from the approach of constraining offshore wind development that was premised on the lack of transmission capacity came from Premier McGuinty's Chief of Staff, Mr. Morley, on January 11, 2011. Upon reviewing the draft communications plan setting out that approach, Mr. Morley wrote to Mr. Mullin and others in the Premier's Office, as well as Mr. MacLennan and Mr. Mitchell:

> Sorry, folks. This isn't good enough. <u>The purpose of this release is to kill all the projects except the Kingston one</u> [Windstream's Project], not suck and blow. <u>Please turn this around so it kills the projects, not sounds like we're in favour of offshore wind.</u>[509]

331. In response to this direction, Minister of Energy Brad Duguid's Director of Communications advised MEI political staff that [redacted]."[510] Thus, the policy would be changed from a "go" and "no-go" zones approach to a moratorium.[511]

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[506] **R-0200**, E-mail from Mirrun Zaveri, Ministry of Energy to Bob Chow and Perry Cecchini, Ontario Power Authority attaching Ministry of Energy Presentation, "Offshore Wind" (January 10, 2011).

[507] **C-0454**, Email from Cain, Ken (MNR) to Ing, Pearl (MEI) (January 12, 2011).

[508] **C-0909**, Minutes, Renewable Energy Policy and Operations Director's Working Group (January 11, 2011), p. 2.

[509] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) et al (January 11, 2011) [Emphasis added].

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

[511] **C-0914**, Email from Mitchell, Andrew (MEI) to Mullin, Sean (OPO) (January 11, 2011).

332. Mr. Morley then followed up with another email [redacted]

[redacted]

[redacted]

[redacted]"[512]

Following this direction, the wheels were put in motion to change the policy from a "go" and "no-go" zones approach to a moratorium.[513]

333. ***Susan Lo's statements that the*** [redacted] ***are inconsistent with the evidence.*** At paragraph 33 of her witness statement, Ms. Lo asserts that [redacted] This is inconsistent with the documents cited above that show that the approach was in fact rejected because it would not be effective at constraining offshore wind development by "killing" all the offshore wind projects. Ms. Lo's bald assertion is not even supported by <u>any</u> of the five documents that she cites in support of it.[514]

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[512] **C-0910**, Email from Morley, Chris (OPO) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 11, 2011).

[513] Following this direction, Mr. Mullin of the Premier's Office announced that there would be a "large regroup" on offshore wind at the January 13, 2011 Energy Issues Meeting: **C-0913**, Email from Maskell, Lindsay (MNR) to Lawrence, Rosalyn (MNR) (January 11, 2011). He also stated that [redacted] **C-0907**, Email from Mullin, Sean (OPO) to Kulendran, Jesse (MEI) et al (January 10, 2011). During the same period, discussions apparently occurred between the Ministers' Offices that indicated that there would be a "shift" in offshore wind policy: **C-0455**, Email from Cain, Ken (MNR) to Whytock, John (MNR) (January 13, 2011).

[514] Ms. Lo cites the following documents in support of her statement [redacted]. None of those documents say that:

(a) First, Ms. Lo cites an email among MEI staff regarding a meeting with Ms. Lo. The email notes that "MNR and MOE" are pleased with the desired outcomes where go/no-go is based on [transmission], recognize that this strategy is not without risk." It mentions that "[t]here are difficulties with the [transmission] messaging because it is in tension with the FIT program and [the Long Term Energy Plan] – for this to work, need to be sure that the OPA can be clear on what happens when an application comes in, especially since there is no FIT rule change." It also noted that the Government would be "solidifying [the] 5 km exclusion zone." There is no mention in this email of "concerns regarding regulatory uncertainty": **C-0444**, Email from Heneberry, Jennifer (MEI) to Viswanathan, Samira (MEI) et al (January 10, 2011).

(b) Second, Ms. Lo cites a chart that MEI staff sent to the OPA regarding the proposed "go" and "no-go" zones. [redacted] **R-0200**, E-mail from Mirrun Zaveri, Ministry of Energy to Bob Chow and Perry Cecchini, Ontario Power Authority attaching Ministry of Energy Presentation, "Offshore Wind" (January 10, 2011).

D. January 13, 2011: Premier's Office Decides to Impose a Moratorium to "Kill" Offshore Wind Projects

334. The final decision to adopt an indefinite-term moratorium as a policy to constrain offshore wind development was made on January 13, 2011. Mr. Wilkinson's evidence is that he made the decision.[515] But the documentary evidence tells a different story. The Premier's Office and MEI likely drove the decision to adopt the indefinite-term moratorium. They did so not because of legitimate scientific concerns but to "kill" offshore wind projects. It was a top-down decision made by the highest-ranking political staff in the Province.

335. There was no one from MOE present when the decision to implement an indefinite-term moratorium premised on scientific uncertainty appears to have been made – at the Energy Issues Meeting on January 13, 2011. Minister Wilkinson himself does not appear to have been present. Nor was his staff. It was Premier McGuinty's Chief of Staff Mr. Morley who delivered the update about offshore wind at that meeting. It was Ms. Lo of MEI who delivered the news to her

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(c) Third, Ms. Lo cites an email exchange among MEI, MNR and MOE staff about the number of offshore wind projects that would remain if the "go" and "no-go" zones approach were adopted. MEI staff note, based on information provided by MNR, that since "[a]ll of Lake Ontario is open," four projects would remain (including the Project), but the "added layer of 5 km as a natural buffer would significantly reduce the number of applications in [Lake] Ontario." In the same exchange, Eric Boysen from MNR criticized the approach as an "oversimplification of the allocation process." There is no mention of any [redacted] with respect to the Project: **C-0431**, Email from Boysen, Eric (MNR) to Zaveri, Mirrun (MEI) (January 6, 2011).

(d) Fourth, Ms. Lo relies on another email among MEI staff setting out notes from a meeting with Ms. Lo. It makes no mention of [redacted]. It notes that the "messaging should not be too enthusiastic – we do not want to encourage more FIT applicants in these areas." It further asserts that "[w]e should be relying on the fact that we don't have rules and regulations in place for offshore wind yet; thus we are restrict[ing] FIT applications to areas where there is existing capacity." It mentions a comment from the Premier's Office that there was "[c]oncern around public opposition in other lakes coupled with onshore anti-wind sentiment." Contrary to Ms. Lo's statement, there is no suggestion in this email that [redacted] played a role in the rejection of the "go" and "no-go" zone approach for constraining offshore wind development. Instead, the email concludes that as a next step, MEI would coordinate with MOE and MNR to discuss how to implement the approach: **C-0433**, Email from Zaveri, Mirrun (MEI) to Powers, Kevin (MEI) (January 6, 2011).

(e) Fifth, Ms. Lo relies on an email exchange among MEI staff about the draft communications plan for the announcement of the "go" and "no-go" zone approach to offshore wind development. In this email, MEI's Manager of Transmission Policy explained that he had edited the draft communications policy to reflect that [redacted]. It says nothing about [redacted] **C-0437**, E-mail from Ceiran Bishop, Ministry of Energy to Samira Viswanathan, Ministry of Energy (Jan. 7, 2011).

[515] RWS-Wilkinson, ¶¶ 4, 5, 15, 18.

counterparts at MOE and MNR. The decision was only delivered to MOE staff after it had been made.

336. ***Premier's Office and MEI decided to "kill" offshore wind, then informed MOE.*** On January 13, 2011, just two days after he directed the adoption of a new offshore wind policy that would "kill all projects except the Kingston one,"[516] Mr. Morley gave an update on offshore wind at an Energy Issues Meeting.[517] Only representatives of the Premier's Office, the Cabinet Office and MEI were invited to the meeting.[518] Neither Minister Wilkinson nor his staff – or indeed anyone from MOE or MNR – were invited to the meeting.[519] The decision to adopt an indefinite-term moratorium appears to have been made at that meeting or shortly thereafter. Two hours after the meeting ended, Ms. Lo advised her counterparts at MOE and MNR that the Premier's Office and the Secretary of Cabinet had "provided some direction" to MEI that she wanted to convey on an urgent basis.[520] Ms. Lo's staff informed their counterparts at MOE and MNR that [redacted][521] MEI staff also informed the Director of Transmission Policy at MEI that the [redacted]"[522]

337. The following day, Ms. Lo received additional direction from the Premier's Office, Cabinet Office and the Minister of Energy's Office. The "preferred option" was now a three- to five-year moratorium on offshore wind development.[523] Ms. Lo subsequently communicated that

[516] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) et al (January 11, 2011).

[517] **C-0917**, Agenda (MOE), Energy Issues Meeting (January 13, 2011).

[518] **C-0915**, Email from Kulendran, Jesse (MEI) to Morley, Chris (OPO) et al (January 12, 2011); **C-0917**, Agenda (MOE), Energy Issues Meeting (January 13, 2011).

[519] **C-0915**, Email from Kulendran, Jesse (MEI) to Morley, Chris (OPO) et al (January 12, 2011); **C-0917**, Agenda (MOE), Energy Issues Meeting (January 13, 2011).

[520] **C-0180**, Email from Evans, Paul (ENE) to Lo, Sue (MEI) et al (January 14, 2011).

[521] **C-0456**, Email from Whytock, John (MNR) to Hanson, Barbara (MNR) (January 13, 2011).

[522] **C-0923**, Email from Zaveri, Mirrun (MEI) to Bishop, Ceiran (MEI) (January 13, 2011).

[523] **C-0180**, Email from Evans, Paul (ENE) to Lo, Sue (MEI) et al (January 14, 2011), p. 2.

approach to her counterparts at MOE and MNR, who in turn communicated it to their staff.[524] MOE bureaucratic staff apparently were not aware of the decision to adopt a moratorium rather than "go" and "no-go" zones until it was communicated to them by Ms. Lo of MEI.[525]

338. ***Mr. Wilkinson's evidence should be rejected.*** Canada has produced no documents and submitted no evidence that contain an account of the January 13, 2011 Energy Issues Meeting or of subsequent high-level discussions on January 14, 2011. Neither Minister Wilkinson nor his staff attended the Energy Issues Meeting at which the Premier's Chief of Staff gave an update on offshore wind development.

339. It is therefore odd that Mr. Wilkinson states that he made the decision to impose the moratorium himself, without the involvement of the Premier or the Premier's Office.[526] Minister Wilkinson asserts in his witness statement:

> **III. THE PREMIER'S OFFICE DID NOT MAKE OR INFLUENCE THE DEFERRAL DECISION**
>
> 18. I understand that the Claimant has alleged that the deferral decision was made by the Premier's office. That is not true. As explained above, I made the decision as the Minister of the Environment, a decision that was supported by my colleagues at the Ministries of Natural Resources and Energy.
>
> 19. I did not discuss the issue of offshore wind development with the Premier or seek his counsel before I made the deferral decision, and he did not attempt to influence my decision in any way. Nor do I recall having any personal communication from the Premier's Office about the issue. However, the Premier's Office was briefed, and it was certainly aware that offshore wind development was a difficult file politically.

340. These paragraphs of Minister Wilkinson's evidence do not tell the complete story:

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[524] **R-0209**, Email from Evans, Paul (ENE) to Hoffman, Martin (ENE) et al (January 14, 2011); **C-0926**, Email from Lawrence, Rosalyn (MNR) to Linley, Richard (MNR) et al (January 14, 2011).

[525] **R-0209**, Email from Evans, Paul (ENE) to Hoffman, Martin (ENE) et al (January 14, 2011); **C-0180**, Email from Evans, Paul (ENE) to Lo, Sue (MEI) et al (January 14, 2011).

[526] RWS-Wilkinson, ¶¶ 18-19.

(a) The first sentence of paragraph 19 refers only to the Premier himself, but not to his staff. While "the Premier" may not have attempted to influence the moratorium decision, the Premier's Chief of Staff had directed the adoption of a moratorium to "kill" offshore wind projects. The Premier's Office did much more than "influence" the decision; it directed it.

(b) In the second sentence of his paragraph 19, Minister Wilkinson states that he does not "recall having any personal communication from the Premier's Office about the issue." He does not exclude having received communications from the Premier's Office that were not personal, for example because they occurred through his staff. [redacted][527]

(c) The last sentence of paragraph 19 does not accurately reflect the role of the Premier's Office. The Premier's Office was not merely "briefed" and "aware that offshore wind development was a difficult file politically." The Premier's Chief of Staff directed that offshore projects be "killed." He led the discussions regarding offshore wind policy at meetings of senior-level staff within the Ontario Government.

341. Mr. Wilkinson's evidence that he made the decision to impose the moratorium because of scientific uncertainty is further called into question by the fact that he only requested a list of the

[527] Minister Wilkinson's Chief of Staff (Sean Hamilton) and his Senior Policy Advisor (Brenda Lucas) has numerous communications with the Premier's Office (Chris Morley, Sean Mullin and Erika Botond) concerning offshore wind policy and the moratorium decision: **C-0882**, Meeting Request – Strategy & Next Steps (December 17, 2010); **C-0897**, Email from Mitchell, Andrew (MEI) to Mullin, Sean (OPO) et al (January 5, 2011); **C-0900**, Memorandum (Confidential Advice to the Minister) from Lucas, Brenda (ENE) to Minister Wilkinson (ENE) (January 6, 2011); **C-0934**, Email from MacLennan, Craig (MEI) to Grando, Sabrina (MCS) and Hamilton, Sean (ENE) (January 19, 2011); **C-0942**, Email from Lucas, Brenda (ENE) to Mullin, Sean (OPO) et al (January 24, 2011); **C-0947**, Email from Lucas, Brenda (ENE) to Hamilton, Sean (ENE) and Murray, Martha (ENE) (January 25, 2011); **C-0946**, Meeting Request – MEETING – with Andrew, Richard, Craig, Alicia, Erika, Brenda, Aaron and Sean (January 25, 2011); **C-0959**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 28, 2011); **C-0966**, Email from Murray, Martha (ENE) to Linley, Richard (MNR) et al (February 8, 2011); **C-0973**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (February 10, 2011).

"science that is lacking" on January 23, 2011, ten days after the decision was made.[528] Such a list had to be hastily created because none existed.[529]

342. Even if Mr. Wilkinson's evidence that he made the decision to impose the moratorium is believed, then he did so without the knowledge of MOE bureaucratic staff. They learned of the decision from MEI after the Energy Issues Meeting.[530] This also undermines the "scientific uncertainty" rationale for the decision and indicates that the decision was instead motivated by some other factor.

343. After the moratorium decision was made, there remained a concern about whether a "scientific uncertainty" rationale was even tenable. MEI continued to express the view that [redacted][31]

344. There is no evidence currently on the record about precisely what was said at the January 13, 2011 Energy Issues Meeting or in subsequent discussions that led the Premier's Office to choose an indefinite-term moratorium as a means to "kill" offshore wind development.

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[528] **C-0939**, Email from Lee, April (ENE) to Lucas, Brenda (ENE) (January 24, 2011), p. 3.

[529] **C-0939**, Email from Lee, April (ENE) to Lucas, Brenda (ENE) (January 24, 2011); **C-0940**, Offshore Wind Further Research Needs.

[530] **C-0180**, Email from Evans, Paul (ENE) to Lo, Sue (MEI) et al (January 14, 2010); **R-0209**, Email from Evans, Paul (ENE) to Hoffman, Martin (ENE) et al (January 14, 2011); **C-0456**, Email from Whytock, John (MNR) to Hanson, Barbara (MNR) (January 13, 2011).

[531] **C-0932**, Email from Mitchell, Andrew (MEI) to Johnston, Alicia (MEI) and MacLennan, Craig (MEI) (January 18, 2011). [redacted]: **C-0953**, Email from Hofmann, Martin (ENE) to Hamilton, Rachel (ENE) and Rabbior, Mark (ENE) (January 27, 2011).

Minister of Energy Brad Duguid confirmed in an interview given after the moratorium announcement that Ontario did not "need" offshore wind power. He stated: "it looks like, with our onshore work on solar and wind, that we are more than going to reach our objectives as laid out in our long-term energy plan, of about 13 per cent of our energy mix coming from renewables": **C-0982**, Email from Zaveri, Mirrun (MEI) to Quirke, Christopher (MEI) et al (February 14, 2011), p. 4.

Even almost a year after the moratorium was announced, Andrew Mitchell of MEI continued to refer to the scientific uncertainty explanation for the moratorium as a "rationale": **C-1062**, Email from Botond, Erika (ENERGY) to Mitchell, Andrew (ENERGY) and MacLennan, Craig (ENERGY) (January 11, 2012).

That is because Canada has chosen not to put forward any of the witnesses who attended (or at least were invited) the meeting.[532]

E. Moratorium Decision Also Motivated by Electoral Politics

345. As explained in paragraphs 335 to 338 and 347 to 349 of Windstream's Memorial, electoral politics also appears to have been another motivation for the decision to "kill" offshore wind development. As noted above, shortly before the moratorium decision was made, Mr. Mullin of the Premier's Office expressed to MEI that the Premier's Office was "concerned about other lakes" because of "huge public opposition" and "onshore antiwind sentiment."[533]

346. Further, the documents produced by Canada show that the two previous efforts to constrain offshore wind development – the 2006-2008 deferral on offshore wind development and the introduction of a proposed five-kilometre setback – appear to have been motivated by a desire to [redacted] The same local politicians who were consulted about the setback decision were also consulted about the moratorium decision.

347. ***2006-2008 deferral motivated by a desire to stop the SouthPoint project.*** The 2006 deferral on offshore wind development had been imposed due to concerns expressed by community members about the proposed SouthPoint Wind offshore wind project near Leamington, Ontario.[534] The SouthPoint Wind project was proposed to be located on Lake Erie,

[532] This includes: Chris Morley, Premier McGuinty's Chief of Staff; Sean Mullin, Premier McGuinty's Director of Policy for Energy Issues; Jamison Steeve, Premier McGuinty's Principal Secretary; Aaron Lazarus, Premier McGuinty's Executive Director of Communications; Erika Botond, Premier McGuinty's Strategic Planner; Shelly Jamieson, the Secretary of Cabinet and Head of the Ontario Public Service; Giles Gherson, then Deputy Minister for Policy and Delivery at the Cabinet Office, now the Deputy Minister of Economic Development, Employment and Infrastructure; David Lindsay, the Deputy Minister of Energy; Craig MacLennan, the Minister of Energy's Chief of Staff; and Alicia Johnston, the Minister of Energy's Director of Communications: **C-0915**, Email from Kulendran, Jesse (MEI) to Morley, Chris (OPO) et al (January 12, 2011); **C-0917**, Agenda (MOE), Energy Issues Meeting (January 13, 2011).

[533] **C-0442**, Handwritten Notes of Jennifer Heneberry (MEI) (January 10, 2011), p. 1.

[534] **C-0758**, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008), pp. 1-3; **C-0803**, Email from Fleischhauer, Andrea (MNR) to Beal, Jim (MNR) et al (March 30, 2010).

within two kilometres from shore.[535] It faced substantial local opposition.[536] The deferral decision was supported by local politicians Pat Hoy and Bruce Crozier.[537]

348. ***Five-kilometre setback proposal motivated by a desire to*** [redacted] As explained at paragraphs 339 to 349 of Windstream's Memorial, MOE's June 2010 proposal to adopt a five-kilometre mandatory setback from shore for offshore wind projects does not appear to have been motivated by legitimate scientific considerations.[538] Instead, the setback proposal appears to have been driven by aesthetic considerations.[539] The drivers of the decision to implement a five-kilometre setback for aesthetic reasons were Minister of the Environment John Gerretsen and Minister of Energy Brad Duguid.[540] Minister Duguid was also the Minister of Energy when the decision to impose the indefinite-term moratorium was made. A chart circulated amongst Government staff shows

[535] **C-0738**, Information Note (MOE), Offshore Wind Power - Status (December 7, 2010).

[536] **C-0758**, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008), p. 2; **C-0754**, Presentation (MNR), Issues Management Plan, Offshore Wind Power - Lifting the Deferral (January 15, 2008), slide 3.

[537] **C-0758**, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008), p. 3.

[538] See the exhibits cited at footnotes 537 to 542 of Windstream's Memorial: **C-0219**, Presentation (MNR), Offshore Wind Power Development (April 19, 2010), p. 5; **C-0253**, Handwritten Notes of Ken Cain (MNR) (May 6, 2010), p. 2; **C-0172**, Handwritten notes of Ken Cain (MNR) (2010), p. 1; **C-0256**, Email from Hamilton, Rachel (ENE) to Duffey, Barry (ENE) May 11, 2010); **C-0271**, Email from Leus, Adam (ENE) to Duffey, Barry (ENE) et al. (May 26, 2010); **C-0222**, Email from Postacioglu, Dilek (ENE) to Leus, Adam (ENE) (April 20, 2010); **C-0234**, Email from Cain, Ken (MNR) to Hayward, Neil (MNR) (April 23, 2010); **C-0228**, Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) (April 21, 2010); **C-0231**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (April 22, 2010); **C-0232**, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) (April 22, 2010); **C-0238**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) et al. (April 28. 2010).

[539] **C-0227**, Handwritten Notes of Dilek Postacioglu (ENE) (April 21, 2010), p. 1; **C-0231**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (April 22, 2010); **C-0223**, Email from Boysen, Eric (MNR) and Lawrence, Rosalyn (MNR) (April 20, 2010); **C-0386**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (November 22, 2010).

[540] **C-0223**, Email from Boysen, Eric (MNR) and Lawrence, Rosalyn (MNR) (April 20, 2010).

An MNR official noted that "[c]learly this is being driven politically and shouldn't pretend we can stop it.":

that the Government was keenly aware of how the setback would affect planned offshore wind projects.[541]

349. As they did with the moratorium, MOE and MNR considered how to rationalize the proposed five-kilometre setback policy only after the decision to propose it had been made. MNR was told to "work backwards from the number and provide a rationale for it."[542] The Ontario Government did not want to cite aesthetic considerations as a rationale for the five-kilometre setback, because that would lead to a demand for similar aesthetic-based setbacks for onshore wind projects as well.[543]

350. Documents produced to Windstream after Windstream's Memorial was filed further demonstrate that the five-kilometre setback was motivated by electoral politics. In the lead-up to the announcement of the proposed setback, multiple communications occurred between political staff at the Premier's Office and the offices of the Ministers of Energy, Natural Resources and the Environment. They noted that there were "political considerations" at play with the setback proposal[544] and that there would be "political issues" to be overcome.[545] They brainstormed possible rationales for the setback.[546]

351. Politicians Pat Hoy and Bruce Crozier, whose constituencies are close to the SouthPoint Wind project, were also consulted about the proposed setback shortly before it was announced.[547] When Mr. Hoy expressed concern that a five-kilometre setback would not be "enough from a

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[541] **C-0261**, Email from Cain, Ken (MNR) to Nowlan, James (MNR) et al. (May 14, 2010); **C-0263**, Email from Linley, Richard (MNR) to Mullin, Sean (OPO) et al (May 17, 2010); **C-0295**, Map (MNR), Offshore Windpower Values Analysis, Lake Ontario (June 25, 2010).

[542] **C-0231**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (April 22, 2010).

[543] **C-0231**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (April 22, 2010); **C-0223**, Email from Boysen, Eric (MNR) and Lawrence, Rosalyn (MNR) (April 20, 2010).

[544] **C-0818**, Email from Freeman, Aaron (OPO) to Amaral, Utilia (ENE) (May 6, 2010).

[545] **C-0820**, Email from Mullin, Sean (OPO) to Amaral, Utilia (ENE) et al (May 12, 2010).

[546] **C-0827**, Email from Amaral, Utilia (ENE) to Grando, Sabrina (ENE) (June 24, 2010).

[547] **C-0824**, Email from Mullin, Sean (OPO) to Espie, Jonathan (OPO) et al (June 23, 2010); **C-0825**, Email from Amaral, Utilia (ENE) to Miller, Lyndsay (ENE) (June 23, 2010); **C-0828**, Email from Miller, Lyndsay (ENE) to Amaral, Utilia (ENE) (June 24, 2010).

visual standpoint," he was assured that the proposed setback would "kill the [S]outhpoint project."[548]

352. Despite what appears to have been a rationale based on aesthetic considerations, MOE nevertheless cited noise and drinking water impacts as rationales for the five-kilometre setback.[549] This foreshadowed MOE's reliance on noise and drinking water impacts as an expedient rationale for the moratorium.

353. ***Local politician from SouthPoint project area consulted about the moratorium decision.*** Mr. Crozier also appears to have been consulted about the moratorium decision. Minister of Energy Brad Duguid consulted Mr. Crozier "to discuss where we stand on offshore wind and upcoming decisions around the matter."[550] Before the decision was announced, the Premier's Office wanted to ensure that the decision was "all good" with Mr. Crozier, as well as with Minister Gerretsen and another local politician.[551]

354. Minister Gerretsen was the former Minister of the Environment who introduced the REA Regulation. He later [redacted].[552] Minister Cansfield, the former Minister of Natural Resources who had declared Ontario "open for business" for offshore wind development, also [redacted].[553]

[548] **C-0823**, Email from Lindsay, Maskell (MNR) to jespie@liberal.ola.org (June 23, 2010).

[549] **C-0298**, Report - Discussion Paper - Off-shore Wind Facilities Renewable Energy Approval Requirements (June 25, 2010).

[550] **C-0937**, Email from Levitan, Daniel (MEI) to Skubik, Elizabeth (MEI) et al (January 21, 2011).

[551] **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011). Minister Gerretsen had also been consulted about the decision earlier: **C-0922**, Email from MacLennan, Craig (MEI) to Grando, Sabrina (MCS) (January 13, 2011); **C-0928**, Email from MacLennan, Craig (MEI) to Amaral, Utilia (MCS) and Grando, Sabrina (MCS) (January 17, 2011); **C-0931**, Email from Johnston, Alicia (MEI) to MacLennan, Craig (MEI) and Mitchell, Andrew (MEI) (January 18, 2011); **C-0933**, Email from MacLennan, Craig (MEI) to Johnston, Alicia (MEI), et al (January 18, 2011); **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011); **C-0987**, Email from MacLennan, Craig (MEI) to Hamilton, Sean (ENE) and Morley, Chris (OPO) (February 23, 2011).

[552] **C-0986**, Email from MacLennan, Craig (MEI) to Johnston, Alicia (OPO) (February 22, 2011).

[553] **C-0986**, Email from MacLennan, Craig (MEI) to Johnston, Alicia (OPO) (February 22, 2011).

VI. Ontario Promises that the Project will be "Frozen" and that it will "Continue" After the Moratorium is Lifted, but Fails to Fulfill that Promise

355. Canada recognizes that Ontario promised to "freeze" Windstream's Project and committed to allowing the Project to "continue" after the moratorium was lifted.[554] Indeed, Canada relies heavily on those promises in its responses to Windstream's claims under Articles 1110 and 1105(1) of NAFTA.[555] However, Canada inexplicably blames Windstream for Ontario's failure to fulfill those promises.[556]

356. The OPA's unreasonable final offer – approved by MEI – was to extend the Commercial Operation Date for Windstream's FIT Contract by a maximum of five years. Under this offer, the Project would remain under *force majeure* until the moratorium was lifted, but could be terminated if it did not achieve commercial operation by May 4, 2020.

357. Windstream properly decided not to accept this unreasonable offer. At the time the offer was made, Ontario refused to specify the length of the moratorium. As of the date of filing this reply, four years and four months have passed since Ontario imposed the moratorium. Ontario has not given any indication as to when – and indeed whether – the moratorium might be lifted. As described in paragraphs 416 to 426 below, MOE has failed to meet the time frames set out under each and every research plan it has prepared. The most recent research plan produced to Windstream does not even contemplate a date for lifting the moratorium.[557] An earlier research plan contemplated that the moratorium would be lifted in 2018. Updated to reflect that the work contemplated under that plan has not even begun to Windstream's knowledge, the moratorium would not be lifted until 2021 at the earliest. Even had it accepted the OPA's offer of a five-year extension, Windstream would be in the same position it is in today.

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[554] Canada's Counter-Memorial, ¶¶ 24, 260, 265, 266, 268, 269.

[555] Canada's Counter-Memorial, ¶¶ 439, 445, 455, 487, 504.

[556] Canada's Counter-Memorial, ¶¶ 270-76.

[557] **R-0334**, Ministry of the Environment, "Offshore Wind Power - Ministry of the Environment Research Plan" (Mar. 22, 2013).

Ministry of the Environment, "Offshore Wind Power - Ministry of the Environment Research Plan" (Mar. 22, 2013),

A. Ontario Recognizes Windstream's Unique Situation as a FIT Contract Holder and Directs that Windstream be "Kept Whole" and that the FIT Contract be "Extended" During the Moratorium

358. Canada's current position that Windstream could have had no expectation to be treated differently from other offshore project proponents as a FIT contract holder[558] is an after-the-fact rationalization that contradicts the approach that government officials at the highest levels – including the Premier's Office – adopted while they were deciding what to do about offshore wind development. During the many months of discussions about offshore wind policy that preceded the government's decision to impose the moratorium, government officials emphasized that [redacted]

359. The options developed after the January 13, 2011 Energy Issues Meeting were focused on [redacted][559]

360. Over the following several weeks, a flurry of communications were exchanged among the three Ministries [redacted]

[redacted]

[redacted]

[redacted]

[558] Canada's Counter-Memorial, ¶¶ 340, 358.

[559] **C-0938**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 24, 2011), slide 5.

[560] **C-0965**, Email from Block, Andrew (MEI) to Mitchell, Andrew (MEI) and MacLennan, Craig (MEI) (February 4, 2011); **C-0966**, Email from Murray, Martha (ENE) to Linley, Richard (MNR) et al (February 8, 2011).

[redacted]

[561] **C-0965**, Email from Block, Andrew (MEI) to Mitchell, Andrew (MEI) and MacLennan, Craig (MEI) (February 4, 2011); **R-0213**, Email from Viswanathan, Samira (MEI) to Zaveri, Mirrun (MEI) (January 20, 2011); **C-0456**, Email from Whytock, John (MNR) to Hanson, Barbara (MNR) (January 13, 2011), p. 5; **C-0938**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 24, 2011), slide 7; **C-0948**, Email from Murray, Martha (ENE) to Lucas, Brenda (ENE) et al (January 25, 2011); **C-0947**, Email from Lucas, Brenda (ENE) to Hamilton, Sean (ENE) and Murray, Martha (ENE) (January 25, 2011); **C-0921**, Presentation (MEI), Offshore Wind: Options for Moving Forward (Draft 3) (January 13, 2011), slide 7; **C-0920**, Handwritten Notes of Jennifer Heneberry (January 13, 2011), p. 1 or "kept whole and open to the possibility of extension": **C-0966**, Email from Murray, Martha (ENE) to Linley, Richard (MNR) et al (February 8, 2011).

[562] **C-0974**, Email from Mullin, Sean (OPO) to Botond, Erika (OPO) et al (February 10, 2011).

[563] **C-0927**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (January 17, 2011); **C-0972**, Email from MacLennan, Craig (MEI) to Botond, Erika (OPO) (February 10, 2011), p. 2; **C-0928**, Email from MacLennan, Craig (MEI) to Amaral, Utilia (MCS) and Grando, Sabrina (MCS) (January 17, 2011); **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011).

[564] **C-0938**, Presentation (MEI), Offshore Wind: Options for Moving Forward (January 24, 2011), slide 7; **C-0921**, Presentation (MEI), Offshore Wind: Options for Moving Forward (Draft 3) (January 13, 2011), slide 7.

[565] **C-0977**, Handwritten Notes of Marcia Wallace (February 11, 2011).

[566] **C-0943**, Email from MacLennan, Craig (MEI) to Morley, Chris (OPO) (January 24, 2011).

[567] **C-0973**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (February 10, 2011); **C-0949**, Email from Lo, Sue (MEI) to Wismer, Jennifer (MEI) et al (January 26, 2011); **C-0970**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (February 9, 2011). Or "ENERGY will allow them to stay in Force Majeure until such time as the science is developed in 3 to 5 years": **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011).

[568] **C-0973**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (February 10, 2011); **C-0970**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (February 9, 2011); **C-0975**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) et al (February 10, 2011); **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011).

[569] **C-0973**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (February 10, 2011); **C-0970**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (February 9, 2011); **C-0975**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) et al (February 10, 2011); **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011).

[570] **C-0983**, Renewable Energy Facilitation Office/Renewables Energy Unit, Weekly Issues and Project Update (February 7-11, 2011), p. 2.

[571] **C-0973**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (February 10, 2011); **C-0970**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (February 9, 2011); **C-0975**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) et al (February 10, 2011); **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011).

[572] **C-0927**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (January 17, 2011); **C-0928**, Email from MacLennan, Craig (MEI) to Amaral, Utilia (MCS) and Grando, Sabrina (MCS) (January 17, 2011); **C-0973**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (February 10, 2011); **C-0970**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (February 9, 2011); **C-0975**, Email from Mitchell, Andrew (MEI) to Lo, Sue

361. MEI was so adamant that the Project be permitted to proceed after the moratorium was lifted that it intervened with MNR [redacted].[573] This was consistent with Mr. Morley's direction that the new policy on offshore wind development should "kill all projects except the Kingston one" – Windstream's.[574]

362. [redacted].[577]

363. MOE and MNR bureaucratic staff were prepared to work with any option that MEI selected.[578] [redacted]

(MEI) et al (February 10, 2011); **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011).

[573] **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011); **C-0975**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) et al (February 10, 2011).

[574] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) et al (January 11, 2011).

[575] **C-0456**, Email from Whytock, John (MNR) to Hanson, Barbara (MNR) (January 13, 2011); **C-0943**, Email from MacLennan, Craig (MEI) to Morley, Chris (OPO) (January 24, 2011).

[576] **C-0942**, Email from Lucas, Brenda (ENE) to Mullin, Sean (OPO) et al (January 24, 2011); **C-0943**, Email from MacLennan, Craig (MEI) to Morley, Chris (OPO) (January 24, 2011).

[577] **C-0945**, Handwritten Notes of Jennifer Heneberry (January 25, 2011).

[578] **R-0213**, Email from Viswanathan, Samira (MEI) to Zaveri, Mirrun (MEI) (January 20, 2011); **C-0955**, Email from Vandervecht, Brian (ENE) to Duffey, Barry (ENE) (January 28, 2011); **C-0956**, Notes - Offshore and Renewable Science (January 28, 2011); **C-0951**, Email from Boysen, Eric (MNR) to Whytock, John (MNR) et al (January 26, 2011).

[579] **C-0955**, Email from Vandervecht, Brian (ENE) to Duffey, Barry (ENE) (January 28, 2011); **C-0956**, Notes - Offshore and Renewable Science (January 28, 2011); **C-0960**, Email from Vandervecht, Brian (ENE) to Duffey, Barry (ENE) (January 31, 2011); **C-0322**, Checklist for Requirements under O. Reg 359/09 (MOE), Supplement to Application for Approval of a Renewable Energy Project (July 26, 2010).

[redacted]

364. However, although the Premier's Office [redacted] and MOE staff were prepared to work with it, Minister Wilkinson was not in favour of allowing the Project to proceed as a pilot. [redacted].[582]

365. The Chief of Staff to the Minister of Energy, Craig MacLennan, recognized [redacted] He expressed to Mr. Mullin of the Premier's Office [redacted]

366. Ontario was having these discussions about Windstream's Project intnerally – it did not communicate any of these options to Windstream until February 11, 2011. Meanwhile,

[580] **C-0960**, Email from Vandervecht, Brian (ENE) to Duffey, Barry (ENE) (January 31, 2011); **C-0961**, Email from Postacioglu, Dilek (ENE) to Duffey, Barry (ENE) (January 31, 2011).

[581] **C-0955**, Email from Vandervecht, Brian (ENE) to Duffey, Barry (ENE) (January 28, 2011); **C-0956**, Notes - Offshore and Renewable Science (January 28, 2011).

[582] **C-0959**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 28, 2011); **C-0942**, Email from Lucas, Brenda (ENE) to Mullin, Sean (OPO) et al (January 24, 2011); **C-0943**, Email from MacLennan, Craig (MEI) to Morley, Chris (OPO) (January 24, 2011).

[583] [redacted] **C-0959**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 28, 2011).

[584] MOE also recognized that a reduced-size pilot project would not be economically feasible: **C-0936**, Email from Duffey, Barry (ENE) to Postacioglu, Dilek (ENE) (January 21, 2011).

Windstream continued to spend money developing the Project while, unknown to it, Ontario had already decided that the Project would not proceed at that time.[585]

B. Ontario Promises that the Project will be "Frozen" and that it will "Continue" after the Moratorium is Lifted

367. Ontario communicated its decision to impose an indefinite-term moratorium on Windstream's Project to Windstream during a conference call on February 11, 2011 (at the same time the announcement was made public).

368. There is no dispute between the parties as to what was said during the call, as it was recorded. MEI officials made the following promises to Windstream:

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

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

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

(d) MEI and the OPA would "attempt to create a solution that [would] be acceptable" to Windstream.[586]

369. When asked when the moratorium would be lifted, the Senior Policy Advisor to the Minister of the Environment could not specify a timeframe. She could say only that it would be

[585] CWS-Mars-2, ¶¶ 41-42.

[586] **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, p. 3; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

"years."[587] It was therefore important to Windstream that any negotiated solution reflect that the moratorium did not have a defined term.[588]

370. In a later meeting, Mr. MacLennan confirmed again that the Ontario Government had decided to allow the Project to continue, that the OPA "[w]ould be open for business" and that MEI would "[m]eet with the OPA to resolve the issues." This would "include Windstream maintaining its applications for land and its FIT Contract."[589] He advised that he wanted to ensure that Windstream was "happy" with the process, and confirmed that the Project could continue.[590] Canada does not dispute that Mr. MacLennan made these promises.

371. These statements from senior MEI officials amounted to a clear commitment that MEI would require that the OPA amend the FIT Contract to ensure that the FIT Contract would be "frozen" while the moratorium remained in effect, such that the Project could continue after the moratorium was lifted on the same terms as applied to the Project before the moratorium was imposed.

C. Ontario Fails to Ensure that Windstream's FIT Contract is Amended so that the Project May Continue After the Moratorium is Lifted

372. Contrary to the commitments made by Mr. MacLennan and Mr. Mitchell, MEI did not ensure that the OPA amended the FIT Contract to insulate Windstream from the effects of the moratorium. The OPA refused to amend the FIT Contract to ensure that it would remain under *force majeure* – and not subject to termination by the OPA – while the moratorium remains in effect.[591]

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

[588] CWS-Mars-2, ¶ 46.

[589] **C-0507**, Email from Baines, Ian (WEI) to Vellone, John et al (February 19, 2011); CWS-Baines, ¶ 118.

[590] CWS-Baines, ¶ 118.

[591] **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain (Borden Ladner Gervais LLP) (March 18, 2011); **R-0247**, Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) June 7, 2011); **R-0248**, Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) June 13, 2011); **R-0250**, Letter from Cecchini, Perry (OPA) to Baines, Ian (WEI) (June 24, 2011).

1. Windstream's First Proposal: Windstream Requests that the Project be Truly "Frozen" During the Moratorium

373. On February 23, 2011, Windstream (through its counsel) made a proposal to the OPA that was intended to ensure that its rights under the FIT Contract would indeed be "frozen" during the moratorium, as Mr. MacLennan and Mr. Mitchell promised they would be.[592]

374. An important aspect of Windstream's first proposal was that Windstream should not be penalized as a result of the government's decision to apply the moratorium to the Project. Thus, Windstream wanted to make sure that it would not be required to continue to incur costs while the moratorium was in effect. It also wanted to make sure that after the moratorium was lifted, it could resume the Project in the same position it had been in before the moratorium was imposed. Thus, it was important that any negotiated solution address the fact that the Project would effectively be on "hiatus" for a number of years.[593]

375. This was especially critical given that Ontario had refused to confirm how long the moratorium would last. MOE's representative on the February 11, 2011 conference call would say only that it would last for "years."[594] Faced with such uncertainty, it was important that Windstream's position be preserved while the moratorium was in effect.[595]

376. Windstream proposed that the *force majeure* situation persist until such date as Windstream elects to resume the Project, and that the OPA waive its *force majeure* termination rights under sections 10.1(g) and (h) of the FIT Contract. Windstream requested that it be permitted to elect when to resume the Project "given that it remains unclear at this stage when a

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Windstream did not include with its Memorial its exchange of correspondence with the OPA that followed the announcement of the moratorium because that exchange was expressly without prejudice. Under Ontario law, "without prejudice" communications made in the course of settlement negotiations are inadmissible in legal proceedings: **C-1190**, *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 S.C.R. 623 at ¶ 13.

[592] **R-0223**, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Perry Cecchini and Michael Killeavy, Ontario Power Authority (February 23, 2011).

[593] CWS-Mars-2, ¶¶ 46-50.

[594] **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, p. 8 (Brenda Lucas);
C-0483, Audio Recording of Telephone Conference Call held February 11, 2011.

[595] CWS-Mars-2, ¶ 46.

commercially reasonable environmental approvals and crown land site release process for fresh water off-shore wind will be completed, or what those processes will entail."[596]

377. Windstream further requested the return of its Completion and Performance Security for the duration of the event of *force majeure*. Windstream also sought other assurances that were aimed at ensuring that the FIT Contract would truly be "frozen" during the moratorium, including certainty with respect to its transmission capacity allocation,[597] certainty that the contract's price would be preserved for the contract's term, relief from domestic content obligations given that the moratorium had undermined the confidence of foreign manufacturers in the stability of the FIT program and thus would make it more difficult for Windstream to meet the domestic content requirements.[598]

378. Windstream recognized that some of the requests in its proposal were beyond the purview of the OPA. Mr. MacLennan had advised that the OPA would be negotiating with Windstream on the government's behalf. Thus, Windstream noted at the outset of its letter that it understood that the OPA would be acting as MEI's agent in the negotiation. Windstream also stated that it expected that the OPA would coordinate a response with the Government of Ontario, Hydro One and the IESO as appropriate to facilitate a reasonable negotiated resolution.

379. Canada has characterized these requests as "numerous and unreasonable."[599] Far from being unreasonable, Windstream's requests were intended to ensure that Windstream was not adversely affected by the moratorium. For example, it was not fair for the OPA to retain Windstream's $6 million in security during the moratorium when Windstream would not have access to the funds and would pay interest on them for an indefinite period. Similarly, it was essential for the Project's transmission capacity allocation to be preserved during the moratorium

[596] **R-0223**, Letter from Adam Chamberlain, Borden Ladner Gervais LLP to Perry Cecchini and Michael Killeavy, Ontario Power Authority (February 23, 2011), p. 3.

[597] Windstream renewed this request on March 3, 2011, when it learned that the OPA had offered a FIT contract to the Amherst Island project, which was proposed for the same transmission connection point as the Project; **C-0996**, Letter from Chamberlain, Adam (BLG) to Cecchini, Perry (OPA) and Killeavy, Michael (OPA) (March 3, 2011).

[598] CWS-Mars-2, ¶¶ 46-50.

[599] Canada's Counter-Memorial, ¶ 271.

so that the Project could continue after the moratorium was lifted. Without that assurance, the Project's reserved transmission capacity could be given to another project during the moratorium period. That would have the effect of preventing the Project from proceeding after the moratorium was lifted. Windstream made these requests on the understanding that the OPA would negotiate in good faith to truly ensure that Windstream was not adversely affected by the moratorium.

2. With MEI's Approval, the OPA Refuses to Grant Windstream *Force Majeure* for the Duration of the Indefinite-Term Moratorium

380. However, it quickly became clear to Windstream that the OPA was not prepared to engage in a broad-based negotiation to ensure that Windstream's Project was truly "frozen" for the duration of the moratorium. In its response dated March 18, 2011, the OPA rejected substantially all of Windstream's requests.[600]

381. The OPA made its proposal at the direction and with the agreement of MEI. Indeed, before finalizing the proposal, the OPA sent MEI a chart of each of its "proposed responses." [redacted].[601] The OPA briefed Ms. Lo and other MEI representatives regularly with respect to its proposed response to Windstream, and she and her staff in turn briefed the Minister's Office.[602]

[600] **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain (Borden Ladner Gervais LLP) (March 18, 2011).

[601] **C-1004**, Chart (MOE), OPA Proposed Response to Windstream (March 18, 2011).

[602] **C-0988**, Email from Cecchini, Perry (OPA) to Zaveri, Mirrun (MEI) (February 24, 2011); **C-0989**, Email from Zaveri, Mirrun (MEI) to Cecchini, Perry (OPA) (March 3, 2011); **C-0992**, Email from Cecchini. Perry (OPA) to Zaveri, Mirrun (MEI) (March 1, 2011); **C-0991**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (March 1, 2011); **C-0990**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (March 1, 2011); **C-0997**, Email from Clark, Ron (Aird & Berlis) to Cecchini, Perry (OPA) (March 4, 2011); **C-0998**, Meeting Request - Updated Weekly Renewables Meetings (MEI) (March 9, 2011); **C-1000**, Email from Cheng, Clarence (MEI) to Slawner, Karen (MEI) (March 11, 2011); **C-1002**, Email from Killeavy, Michael (OPA) to Ing, Pearl (MEI) (March 16, 2011); **C-1003**, Email from Zaveri, Mirrun (MEI) to Viswanathan, Samira (MEI) (March 17, 2011); **C-1005**, Email from Ing, Pearl (MEI) to Tasca, Leo (MEI) et al (March 21, 2011); **C-1006**, Email from Killeavy, Michael (OPA) to Lo, Sue (MEI) et al (March 21, 2011); **C-1007**, Email from Collins, Jason R. (MEI) to Mitchell, Andrew (MEI) et al (March

382. In its proposal, the OPA offered to extend the MCOD for the Project to the earlier of (a) the date on which the Government of Ontario makes a definitive decision to either allow development of the Project or (b) the fifth year anniversary of the original MCOD for the Project (so, May 4, 2020). It offered to waive its *force majeure* termination rights under sections 10.1(g) and (h) of the FIT Contract until the earlier of the dates in (a) or (b).[603] Under the OPA's proposal, the OPA would have the right to terminate the FIT Contract if the Project did not reach commercial operation by May 4, 2020. It would have that right even if the moratorium remained in effect past the date by which the development of the Project would have to restart to achieve commercial operation by May 4, 2020.

383. The OPA was only prepared to reduce WWIS' $6 million in security to $3 million. It would therefore retain the balance of $3 million in security for the duration of the moratorium, regardless of the moratorium's length. The OPA rejected all of Windstream's other requests, except Windstream's request to be relieved from certain reporting requirements.

384. The OPA repeated its position in a further letter dated June 24, 2011, in response to letters from Windstream expressing concerns about the OPA's approach to the negotiations.[604]

385. The OPA's offer was inconsistent with the commitments Windstream had received from Mr. Mitchell and Mr. MacLennan that the FIT Contract would be frozen for the duration of the moratorium and that the Project would be permitted to continue after the moratorium was lifted. The OPA's offer extended the MCOD by a maximum of five years – to May 4, 2020 at the latest – but without any accompanying commitment that the moratorium would be lifted and that the Project would be allowed to proceed on a timeframe that would allow it actually achieve a

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21, 2011); **C-1010**, Email from Tasca, Leo (MEI) to Zaveri, Mirrun (MEI) (March 24, 2011); **C-1013**, Meeting Request from Viswanathan, Samira (MEI) to Zaveri, Mirrun (MEI) et al (April 14, 2011).

Even before negotiations began, Ms. Lo asked the OPA to keep MEI apprised of its negotiations with Windstream: **C-0985**, Email from Lo, Sue (MEI) to Ceccini, Perry (OPA) (February 15, 2011).

[603] **R-0226**, Letter from Michael Killeavy, Ontario Power Authority to Adam Chamberlain, Borden Ladner Gervais LLP (March 18, 2011), p. 2.

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

revised MCOD of May 4, 2020. Thus, if Windstream accepted the OPA's offer, the Project would not truly be "on hold" and could not necessarily "continue" after the moratorium was lifted.[605]

3. Windstream's Second Proposal: Windstream Requests "Extendable" *Force Majeure*

386. Windstream provided a detailed second proposal on July 5, 2011. In that proposal, Windstream stated that it was prepared to accept the five-year extension provided that the *force majeure* could be further extended if the *force majeure* conditions were not resolved on time for the Project to achieve commercial operation before it risked triggering the termination provisions.[606] As Windstream's counsel explained in his response to the OPA's counsel:

> The Fifth Anniversary Date the OPA has proposed represents a dramatic departure from the concept of a "perpetual" *force majeure* which was first proposed by the Ministry of Energy official during our February 11, 2011 conference call. During that call, which as counsel for Windstream we were asked to attend and took detailed notes on, Ministry officials indicated that (1) the length of the *force majeure* delay could take years; (2) that Windstream's project would be preserved; and (3) that the Ministry will direct the OPA to waive its termination rights under subsections 10.1(g) and (h) of the FIT Contract. In our opinion, there is no other reasonable interpretation of these Ministry representations than to allow Windstream an extendable (rather than "perpetual") *force majeure*. We would suggest such an "extendable *force majeure*" could involve the OPA agreeing to extend the *force majeure* if none of the three conditions described in the proposed Decision Date definition are resolved.[607]

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[605] CWS-Mars-2, ¶¶ 51-55.

[606] CWS-Mars-2, ¶¶ 56-58; **R-0254**, Letter from Chamberlain, Alan (BLG) to Clark, Ron (Aird & Berlis) (July 5, 2011), pp. 2-4.

[607] Windstream's counsel proposed that the "Decision Date" be defined as "the date on which the Government of Ontario makes a definitive decision to allow development of the Project, which decision shall be deemed to occur on the later of: (i) the date that the MRN issues a fair and commercially reasonable site release process to allow Windstream to obtain sufficient access rights to facilitate development of the Project; (ii) the date on which MOE issues a fair and commercially reasonable renewable energy approvals process for off-shore wind including confirmation of any specific restrictions including setback, noise level and any other regulatory requirements; or (iii) the date on which the Government of Ontario confirms the domestic content rules that apply to offshore wind.

> The introduction at this stage in negotiation of the concept of a Fifth Anniversary Date into the *force majeure* relief is inconsistent with the well documented representations made by Ministry officials. Windstream's position is that the Decision Date, as defined above, should be the sole determinant to the end of the *force majeure* claim.[608]

387. Windstream repeated its request that WWIS' $6 million in security be returned. It explained that it would not be reasonable for the OPA to continue to retain Windstream's security for the duration of the moratorium, given that there was no process, timeline or rules surrounding the moratorium. It also reminded the OPA that MEI officials had explicitly represented that a return of the security would be part of any negotiated resolution, but recognized that it would be required to replenish the security when the *force majeure* was lifted.

388. Windstream also repeated its concerns with respect to the other issues it had raised in its first proposal, including its transmission capacity allocation, price certainty and the domestic content requirement.

389. Windstream's second proposal was put on the agenda at MEI's weekly renewables meeting.[609] It was also copied to Mr. Mullin of the Premier's Office, senior political staff at MEI (Mr. Mitchell and Mr. MacLennan), and to the Chief of Staff to Minister of Consumer Services Mr. Gerretsen, who had been Minister of the Environment when the FIT Program was launched.[610] The Project was located near Minister Gerretsen's electoral riding.

390. Mr. MacLennan had promised Windstream that the FIT Contract would be "frozen" and "on hold" and that the Project could "continue." MEI must have failed to direct the OPA to implement those commitments, because as discussed below the OPA provided no substantive response to Windstream's letter.

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

[609] **C-1026**, Email from Zaveri, Mirrun (MEI) to Viswanathan, Samira (MEI) and Heneberry, Jennifer (MEI) (July 6, 2011).

[610] **C-1025**, Email from MacLennan, Craig (ENERGY) to Mitchell, Andrew (ENERGY) (July 5, 2011).

4. OPA Provides No Substantive Response to Windstream's Second Proposal

391. The OPA responded to Windstream's second proposal on October 12, 2011 – about 100 days after the second proposal was sent.[611] It did not respond to any of the detailed comments made in Windstream's second proposal. It failed to address Windstream's concerns about limiting the extension to five years given that the moratorium could be in place for longer than five years. It ignored Windstream's proposal to introduce the concept of "extendable" *force majeure*. The OPA's response to Windstream's July 5, 2011 letter, in its entirety, was:

> The OPA has reviewed the content of the July 5 letter and has instructed me to communicate to you that the views of the OPA as set out in its letter of March 18 and June 14 remain unchanged.
>
> Should you have any questions or concerns with respect to the foregoing, please do not hesitate to contact me.[612]

392. At paragraph 275 of its Counter-Memorial, Canada states that "the Claimant refused to accept any proposals put forth by the OPA and correspondence fell silent following the OPA's letter of June 24, 2011, the Claimant's letter of July 5, 2011 and the OPA's subsequent correspondence of October 12, 2011." This statement gives the inaccurate impression that the OPA's October 12, 2011 letter contained a substantive proposal. However, the OPA's final letter hardly invited a response – it was a categorical rejection without justification of Windstream's second proposal. The ball was in the OPA's court to respond. It is the OPA, not Windstream, which caused the correspondence to fall silent.[613]

5. MEI and the OPA Considered Letting the Contract "Lapse" by Triggering the OPA's Force Majeure Termination Right

393. MEI and the OPA were aware that they could let WWIS' contract "lapse" by allowing it to remain in *force majeure* during the moratorium, and that doing so would allow the OPA to

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[611] **R-0264**, Email from Lalla, Geetu (Aird & Berlis) to Chamberlain, Adam (Borden Ladner Gervais) (October 12, 2011).

[612] **R-0264**, Email from Lalla, Geetu (Aird & Berlis) to Chamberlain, Adam (Borden Ladner Gervais) (October 12, 2011); **R-0264**, Letter from Clark, Ron (Aird & Berlis) to Chamberlain, Adam (BLG) (October 12, 2011).

[613] CWS-Mars-2, ¶ 59.

terminate the FIT Contract without penalty. [redacted]

[redacted]"[616]

394. As set out in paragraph 409 of Windstream's Memorial, the OPA had gone through the same analysis the previous year with respect to the OPA's power purchase agreement with TransCanada. The OPA received legal advice that it could rely on its *force majeure* termination rights to terminate the TransCanada contract without penalty in the event that a third party (in that case the local municipality) were to deny or delay a permit that was necessary for TransCanada to meet its commercial operation date.[617]

6. Premier's Office and Minister of Energy's Office Do Nothing to Protect Windstream

395. As set out in paragraphs 286 to 301 of Windstream's Memorial, Windstream continued to engage the Premier's Office, MEI and MNR in discussions about allowing the Project to proceed throughout 2011 and early 2012. In January 2012, Mr. MacLennan and Mr. Mitchell solicited the position of the Premier's Office regarding Windstream.[618] However, despite its enquiries, Windstream never received any further communications from the Premier's Office, MEI or the OPA regarding the status of the Project or the FIT Contract.

396. The Premier's Office and MEI ultimately failed to ensure that the OPA amended the FIT Contract so that it would truly be "frozen" and "on hold" while the moratorium remained in

[614] **C-0945**, Handwritten Notes of Jennifer Heneberry (January 25, 2011); **C-0964**, Email from Ing, Pearl (MEI) to Viswanathan, Samira (MEI) et al (February 3, 2011); **C-0950**, Email from Viswanathan, Samira (MEI) to Heneberry, Jennifer (MEI) (January 26, 2011); **C-0920**, Handwritten Notes of Jennifer Heneberry (January 13, 2011), p. 4; **C-0879**, Email from Lo, Sue (MEI) to Ing, Pearl (MEI) et al (December 7, 2010).

[615] **C-0879**, Email from Lo, Sue (MEI) to Ing, Pearl (MEI) et al (December 7, 2010).

[616] **C-0879**, Email from Lo, Sue (MEI) to Ing, Pearl (MEI) et al (December 7, 2010).

[617] **C-0186**, Memorandum from Aird & Berlis to Ontario Power Authority (OPA) (February 17, 2010), p. 7.

[618] **C-1062**, Email from Botond, Erika (ENERGY) to Mitchell, Andrew (ENERGY) and MacLennan, Craig (ENERGY) (January 11, 2012).

effect and that the Project could "continue" after the moratorium was lifted. This failure is a stark contrast to the commitments that MEI officials made to Windstream when they announced the moratorium.

7. OPA Refuses to Return WWIS' $6 Million Letter of Credit and Reserves its Right to Terminate the FIT Contract as of May 4, 2017

397. Meanwhile, the OPA continued to retain WWIS' $6 million letter of credit.[619] The letter of credit is secured by funds advanced by investors in Windstream, which are not available for use by them and on which they are paying interest.[620] When Windstream requested that the letter of credit be returned, the OPA responded that it had "considered the request" and that it would "not agree to refund or return" the letter of credit.[621]

398. The OPA further specified in the same letter that it "reserves all rights and remedies under the FIT Contract and at law and equity, including the right to exercise any rights and remedies at any time and from time to time."[622] Thus, the OPA has expressly reserved all of its rights under the FIT Contract, including without limitation its right to terminate the FIT Contract on May 4, 2017,[623] when WWIS inevitably will have failed to bring the Project into commercial operation by that date.[624]

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

[620] CWS-Mars ¶ 73; **C-0692**, Standby Letter of Credit (RBS) and Ontario Power Authority (OPA) (April 14, 2014); **C-0247**, Resolution of the Directors (WWIS), Authorization of Feed-in Tariff Contract (May 4, 2010).

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

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

[623] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 10.1(g).

[624] CER-SgurrEnergy-2, pp. 15-16.

VII. The FIT Contract and the Project are Not "Frozen" as Canada Alleges but Rather are Worthless as a Result of the Moratorium and Ontario's Failure to Keep Windstream Whole

A. Contrary to Canada's Allegations, the FIT Contract is Not "Frozen"

399. Contrary to Canada's suggestion that the FIT Contract is "frozen" and that the Project has not been "cancelled,"[625] the Project has faced extraordinary delays as a result of the moratorium and Ontario's failure to take steps to protect Windstream from its effects. As a result of these delays, the Project could not proceed – even if Ontario were to lift the moratorium now – because the Project could no longer be built before the OPA's right to terminate the FIT Contract is triggered. That right will arise when the Project inevitably fails to achieve commercial operation by May 4, 2017 – two years after the Project's Milestone Commercial Operation Date. There is no longer any possibility of the Project achieving commercial operation by that date.[626] As a result, the Project's development and construction cannot be financed.[627] Consequently, the Project is worthless, as are the FIT Contracts and WWIS itself.[628] The FIT Contract is not "frozen," and it will not be possible for the Project to "continue" even if the moratorium is ever lifted. While the FIT Contract may formally still be under *force majeure*, ***in effect***, it and the Project have been cancelled.

400. As set out in paragraph 225 of Windstream's Memorial, the FIT Contract was the key asset associated with the Project, and securing it was a critical milestone in the Project's development. This is because the FIT Contract provided the revenue certainty that Windstream – like other renewable energy developers – needed in order to secure the debt and equity financing needed to bring the Project into commercial operation. The Project could not have proceeded without the FIT Contract – it was the main value driver for the Project.[629]

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[625] Canada's Counter-Memorial, ¶¶ 24, 260, 265, 266, 268, 269.

[626] CER-SgurrEnergy-2, pp. 15-16.

[627] CER-Deloitte (Bucci), p. 9; CER-Deloitte (Bucci)-2, pp. 3, 4, 16.

[628] CER-Deloitte (Taylor and Low), pp. 29-30; CER-Deloitte (Taylor and Low)-2, ¶¶ 3.11-3.12.

[629] CWS-Mars, ¶ 72.

401. As Canada acknowledges in paragraph 55 of its Counter-Memorial, WWIS is required by the terms of the FIT Contract to bring the Project into commercial operation by its MCOD of May 4, 2015 (subject to extension by reason of *force majeure*).[630] WWIS' obligation, under the FIT Contract, to bring the Project into commercial operation by its MCOD is secured by a $6 million letter of credit posted with the OPA. The $6 million letter of credit is itself secured by United States $6.6 million in cash advanced by Windstream's investors, Mr. Ziegler, Mr. Webster and Lucky Star, and held in a bank account not available for any other use.[631]

402. On December 10, 2010, Windstream sent to the OPA a *force majeure* notice setting out the regulatory delays it had experienced since signing the FIT Contract on August 20, 2010. These included the failure by MNR to process Windstream's application for Applicant of Record status and MOE's failure to finalize the setback requirement that would apply to offshore wind projects. These delays had made it impossible for the Project to advance towards its MCOD.[632]

403. On September 9, 2011 – nearly seven months after the Ontario Government announced its decision to impose the moratorium – the OPA recognized that "[t]he delays faced by [Windstream] with respect to the Crown Land site release process for the Project, constitutes a valid Force Majeure event (the "FM Event") commencing on November 22, 2010." The *force majeure* remains in effect as of the date of this Reply Memorial. This has had the effect of extending the MCOD by a period equivalent to the *force majeure* period.

404. However, the *force majeure* provision in the FIT Contract is subject to an important exception. Despite any persisting event of *force majeure*, either party may unilaterally terminate the FIT Contract if the Project does not achieve COD by May 4, 2017, the date that is two years after the original COD. Section 10.1(g) of the FIT Contract provides:

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[630] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 2.5; CWS-Baines, ¶ 104.

[631] CWS-Mars, ¶ 73.

[632] **C-0406**, Exhibit "A" Force Majeure Notice (December 10, 2010), p. 3.

> 10.1(g). If, by reason of one or more events of Force Majeure, the Commercial Operation Date is delayed by such event(s) of Force Majeure for an aggregate of more than 24 months after the original Milestone Date for Commercial Operation (prior to any extension pursuant to Section 10.1(f)), then notwithstanding anything in this Agreement to the contrary, either Party may terminate this Agreement upon notice to the other Party and without any costs or payments of any kind to either Party, and all Completion and Performance Security shall be returned or refunded (as applicable) to the Supplier forthwith.[633]

405. In accordance with this provision, the OPA will be permitted to terminate the FIT Contract as of May 4, 2017 – the date that is two years after the FIT Contract's MCOD of May 4, 2015 – if the Project has not reached commercial operation by that date. The OPA has exercised this right in cases where a *force majeure* event persisted for more than two years.[634]

406. Thus, as set out in paragraph 248 of Windstream's Memorial, the recognition by the OPA of an event of *force majeure* in September 2011 did not have the effect of "freezing" WWIS' rights and obligations under the FIT Contract. Instead, time continued to be of the essence and ever-growing delays meant that the Project became increasingly at risk of not being able to meet its "ultimate" deadline of May 4, 2017 – the date on which the OPA could terminate the FIT Contract.[635]

B. WWIS, the Project and the FIT Contract are Now Substantially Worthless

407. WWIS, the Project and the FIT Contract are now substantially worthless. The indefinite-term moratorium has caused delays in the Project so drastic that there is no longer any hope that the Project could achieve commercial operation before triggering the OPA's right to terminate

[633] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 10.1(g).

[634] **C-0706**, Article (tbnewswatch.com), Contract scrapped (July 25, 2014).

[635] CER-Deloitte (Bucci), pp. 7-9.

the FIT Contract. As a result, the Project is no longer financeable.[636] It has consequently become substantially worthless.[637]

408. This is in stark contrast to the value that WWIS, the Project and the FIT Contract would have had if the Ontario Government had not applied the indefinite-term moratorium on the Project, or had followed through on its promises to "freeze" the Project. The delays caused by the moratorium crystallized such that Windstream's investments became substantially worthless approximately in May 2012.[638] As at that date, according to Messrs. Low and Taylor, Windstream's investments would have had substantial value if the moratorium had not been applied to the Project.[639]

VIII. Ontario has Not Conducted the Research it Claims to Require, and There is No End in Sight to the Moratorium

409. Minister Wilkinson states that he imposed the February 11, 2011 moratorium on offshore wind development because of concerns about its impacts on drinking water. In the press release announcing the moratorium, the Ontario Government said that "Ontario is not proceeding with proposed offshore wind projects while further scientific research is conducted."[640] In its Counter-Memorial, Canada has taken the position that the Ontario Government is following through on its stated intention of undertaking the scientific work it claims is necessary.[641]

410. This claim is not supported by the evidence. First, it would appear that MOE's requests for proposal for noise-related research that were issued shortly after Windstream's Memorial was filed were motivated by a desire [redacted].[642] Second, MOE has failed to meet the deadlines in every research plan it has prepared. Third, the few studies completed by MNR are unrelated to the stated rationales for the moratorium and

[636] CER-Deloitte (Bucci), p. 9; CER-Deloitte (Bucci)-2, p. 3.

[637] CER-Deloitte (Taylor & Low)-2, ¶ 3.11; CER-Deloitte (Taylor & Low) ¶ 2.15.

[638] CER-Deloitte (Bucci)-2, pp. 3-5, 16; CER-Deloitte (Taylor & Low)-2, ¶¶ 3.13.

[639] CER-Deloitte (Taylor & Low)-2.

[640] **C-0485**, News Release (MOE), Ontario Rules Out Offshore Wind Projects (February 11, 2011), p. 1.

[641] Canada's Counter-Memorial, ¶¶ 284-291.

[642] **C-1094**, Email from Block, Jennifer (ENERGY) to Cain, Ken (MNR) (March 6, 2013).

would be either irrelevant or of minimal relevance to the Project. [redacted]

411. By the time the hearing in this arbitration begins on February 15, 2016, five years will have passed since the Ontario Government imposed the moratorium. At the time of writing, there is no evidence that the Ontario Government is contemplating lifting the moratorium or that it is serious about conducting the research MOE claims is necessary for offshore wind development. Canada has failed to provide even an estimate about when – and indeed whether – the moratorium might be lifted.

A. MOE Issues Requests for Proposal After Windstream's Memorial is Filed to [redacted]

412. The only research work initiated by MOE has been to issue requests for proposals for a "[n]oise propagation model scoping study,"[643] and an "[a]ssessment of offshore wind farm decommissioning requirements."[644] These were issued on September 9, 2014, three weeks after Windstream filed its Memorial and supporting evidence in this arbitration (August 19, 2014). An RFP for the noise work had been prepared four years earlier, in September 2010,[645] and both RFPs had been finalized but not approved by June 2013.[646]

[643] **R-0383**, Merx Opportunity Abstract, "Technical Evaluation to Predict Offshore Wind Farm Noise Impacts in Ontario" (September 9, 2014).

[644] **R-0384**, Merx Opportunity Abstract, "Assessment of Offshore Wind Farm Decommissioning Requirements" (September 9, 2014). It appears that this study was budgeted for in 2012, but was eliminated as a way of reducing Source Protection Branch of the MOE's budget: **C-1086**, Email from Klose, Steve (ENE) to Duncan, Heather (ENE) (August 29, 2012).

[645] **C-0854**, Email from Leus, Adam (ENE) to Postacioglu, Dilek (ENE) (September 30, 2010).

[646] **C-1106**, Email from Quirke, Christopher (ENERGY) to Kwan, Helen (ENERGY) (June 28, 2013); **C-1107**, Email from Smet, Larry (ENE) Radcliffe, Steve (ENE) (July 2, 2013); **C-1108**, Email from Smet, Larry (ENE) to Radcliffe, Steve (ENE) (July 10, 2013); **C-1110**, Email from Gurr, Mike (ENE) to SDB, Coordinator (ENE) (August 20, 2013); **C-1111**, Email from Klose, Steve (ENE) to SDB, Coordinator (ENE) (August 21, 2013); **C-1133**, Email from Radcliffe, Steve (ENE) to Klose, Steve (ENE) (July 8, 2014).

[redacted] **C-1056**, Email from Wallace, Marcia (ENE) to Dumais, Doris (ENE) (December 7, 2011).

413. It appears that MOE issued these requests for proposal to give the impression that it is proceeding with the scientific research it had identified as necessary when it announced the moratorium. In April 2013, shortly before the RFPs were finalized, the Director of the Project Management Office at MEI sent an email to senior staff members at MEI, MNR and MOE (including Dr. Wallace) requesting funding for offshore wind energy research in 2013/2014 [redacted]. The email states:

[redacted]

414. Two weeks before the requests for proposal were prepared, the Director of MNR's Renewable Energy Program reported the following about a briefing with the Deputy Minister of Natural Resources: [redacted]

415. Canada's document productions further demonstrate that MOE issued the RFPs for the purpose of increasing the likelihood of Canada's success in this case. In response to a request to produce documents relating to the issuance of the RFPs, Canada produced 70 documents with heavy redactions for privilege. Many of those were copied to the legal team charged with the defence of this case for the Government of Ontario, including lawyers from MEI, MOE, MNR and the Investment and Trade lawyers who act as liaison between the Government of Ontario

[647] **C-1094**, Email from Block, Jennifer (ENERGY) to Cain, Ken (MNR) (March 6, 2013) [Emphasis added].

[648] **C-1098**, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) (June 14, 2013).

and the Government of Canada's Trade Law Bureau in the defence of this case.[649] The RFPs were also approved by the Premier's Office and the Cabinet Office before they were issued.[650] Windstream reserves its rights to challenge these redactions, as they do not appear to reflect proper claims to solicitor-client or litigation privilege. In any event, the extent of redactions speaks for itself. The requests for proposal were inextricably linked to Canada's and Ontario's defence strategy in this case.

B. MOE has Failed to Meet the Research Deadlines in Every Research Plan it has Prepared

416. MOE created numerous research plans in the months and years following the imposition of the moratorium.[651] Initially in 2011, MOE proposed a five-year research timeline.[652] However, none of the deadlines in these research plans have been met. For example:

(a) In June 2011, MOE prepared an *Off-shore Wind Work Plan 2011-2015*. The plan called for work to be complete by the end of 2015.[653] There is no evidence that the work reflected in the plan has been completed.

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[649] See **C-1099**, **C-1100**, **C-1103**, **C-1105**, **C-1108**, **C-1112**, **C-1113**, **C-1117**, **C-1121**, **C-1122**, **C-1124** to **C-1132**, **C-1134** to **C-1136**, **C-1139** to **C-1145**, **C-1147** to **C-1149**, **C-1152** to **C-1163**, **C-1165** to **C-1169**, **C-1171** to **C-1175**, various heavily redacted emails exchanged among staff from MEI, MOE, MNR and the Ministry of Economic Development, Trade and Employment, regarding the requests for proposal exchanged between June, 2013 and September, 2014.

The lawyers copied on emails relating to the requests for proposal include many lawyers who are not with MOE, including four Investment and Trade lawyers, three lawyers from MEI and two lawyers from MNR. Several emails were also copied to seven different staff members in the Trade Policy Branch at the Ministry of Economic Development, Employment and Infrastructure.

[650] **C-1146**, Email from Whitestone, Jim (ENE) to Malczewski, Greg (MOECC) (July 31, 2014); **C-1137**, Email from Whitestone, Jim (ENE) to Neary, Anne (MOECC) (July 22, 2014); **C-1164**, Email from Turchin, John (ENE) to Cates, Alyssa (ENE) et al (August 20, 2014); **C-1116,** Email from Dowler, Rob (CAB) to Whitestone, Jim (MOECC) (January 30, 2014); **C-1131**, Email from Jerschow, Oliver (CAB) to Hurd, Andrew (OPO) (April 15, 2014); **C-1138**, Email from Dowler, Rob (CAB) to Jershow, Oliver (CAB) (July 23, 2014); **C-1147**, Email from SDB, Coordinator (ENE) to Sifo, Vittoria (ENE) (August 1, 2014); **C-1170**, Email from Malczewski, Greg (ENE) to Foster, David (ENE) (August 21, 2014).

[651] For example: **C-1019**, Email from Duffey, Barry (ENE) to Worsley, Nicole (ENE) (May 3, 2011); **C-1049**, Renewable Energy Development 2012-2014; **C-1065**, Email from Dowler, Rob (CAB) to Crouse, Marcelle (CAB) and O'Hara, Charles (CAB) (January 27, 2012); **C-0598**, Government of Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (Feb. 2012); **C-1096**, Offshore Wind Power - Ministry of the Environment Research Plan (March 20, 2013).

[652] **C-1019**, Email from Duffey, Barry (ENE) to Worsley, Nicole (ENE) (May 3, 2011); **C-0598**, Government of Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (Feb. 2012).

(b) [redacted]

(c) In November 2011, the MOE apparently contemplated doing noise studies in April 2013-September 2013.[655] Funding was apparently allocated, but this was not done.[656]

(d) In May 2012, MOE updated the research plan.[657] There is no evidence that the work reflected in the plan has been completed.

417. A February 11, 2013 "issue note" concerning offshore wind development noted, in the context of discussion about this arbitration, that "[t]he MOE is proceeding with the proposed research plan by undertaking short/medium term studies related to water quality, technical standards and safety (August 2012 – March 2014) and decommissioning and valuation of financial assurance (April 2013 – March 2014).[658] There is no evidence that the work reflected on the plan has been completed.

418. After negotiations with [redacted] stalled, MOE "developed an updated MOE-specific research plan in March 2013 which indicated that research would not

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[653] **C-1022**, Presentation (MOE), MOE Offshore Wind, Work Plan 2011-2015 (June 2011); **C-1030**, Presentation (MOE), MOE Offshore Wind, Research Agenda, Presentation to SMC (July 6, 2011), slide 10; **C-1031**, Presentation (MOE), MOE Offshore Wind, Research Agenda, Presentation to SMC (August 30. 2011), slide 7.

[654] Canada's Counter-Memorial, ¶ 284; **C-0598**, Government of Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (February 2012), slide 3.

[655] **C-1049**, Renewable Energy Development 2012-2014; **C-1048**, Meeting Request – Green Energy FTE Discussion (November 23, 2011).

[656] **C-1051**, MOE Green Energy Resources – Internal Allocation by Year; **C-1059**, Draft Business Case (MOE), *Green Energy Act*, p. 9; **C-0583**, Business Case (MOE), *Green Energy Act* (January 19, 2012), p. 7.

[657] **C-0611**, Ontario, Presentation, "Offshore Wind Power Development - Proposed Research Plan" (May 2012).

[658] **C-1091**, Issue Note: Offshore Wind Development (February 11, 2013), p. 2.

be completed until at least the end of 2016."[659] There is no evidence that any of the timelines set out in the research plan have been met.

419. The following table sets out the various areas of study reflected on the March 2013 research plan, the timelines specified in that plan, and Windstream's best information about the status of each of the items based on the information provided by Canada:

Area of Study	Timeline Under MOE's Research Plan	Status Based on Information Provided by Canada
Noise		
Noise propagation model scoping study	• Development of RFS Q1 2013/14 • Initiate work Q3 2013/2014 • Final report Q4 2013/14	Request for proposal issued September 9, 2014 WORK NOT STARTED[660]
Baseline land-based ambient noise measurements	• Development of RFS Q3 2013/14 • Initiate work Q2 2014/2015 • Final report Q4 2014/15	NOT STARTED
Noise propagation model research study	• Development of RFS Q2 2014/15 • Initiate work Q3 2014/2015 • Final report Q4 2015/16	NOT STARTED
Offshore noise simulation field testing study	• Development of RFS Q1 2015/16 • Initiate work Q2 2015/2016 • Final report Q3 2015/16	NOT STARTED
Water and Sediment Quality		
Assemble and assess existing sediment quality data	• Conduct work Q3 2013/14	NOT STARTED[661]

[659] Canada's Counter-Memorial ¶ 294; **R-0333**, E-mail from SDB Coordinator to Steve Klose (MNR) (March 22, 2013); **R-0334**, Ministry of the Environment, "Offshore Wind Power - Ministry of the Environment Research Plan" (March 22, 2013), p. 6.

[660] As of September 2014, MOE estimated that the noise study would be completed by the end of 2015 "as an estimate": **C-1176**, Email from Schroeder, Julie (ENE) to Hussain, Lubna I. (MOECC) (September 8, 2014).

[661] Ready to be started as of September 2010: **C-0854**, Email from Leus, Adam (ENE) to Postacioglu, Dilek (ENE) (September 30, 2010).
MOE engineers were ready to move the work forward as of November 2012: **C-1088**, Email from Klose, Steve (ENE) to SDB, Coordinator (ENE) (November 1, 2012).

Area of Study	Timeline Under MOE's Research Plan	Status Based on Information Provided by Canada
Updated guidance	• Development of RFS Q4 2013/14 • Initiate work Q1 2014/2015 • Final report Q2 2014/15	NOT STARTED
Technical Standards and Safety		
Development of technical standards and guidelines	• Development of RFS Q1 2014/15 • Initiate work Q2 2014/2015 • Final report Q4 2014/15	NOT STARTED[662]
Decommissioning and Valuation of Financial Assurance		
Development of technical standards and guidelines	• Development of RFS Q2 2013/14 • Initiate work Q3 2013/2014 • Final report Q4 2013/14	Request for proposal issued September 9, 2014 WORK NOT STARTED

420. ***Noise research stalled.*** One of the areas that MOE has identified as requiring further study is the modelling of the propagation of noise over water. As Aercoustics has established based on actual measurements, noise emanating from the Project would be well below applicable thresholds.[663] MNR staff noted in February 2012 that MOE had done no noise work, even though they could easily have done so at the Wolfe Island site.[664] That is what Aercoustics has now done for the Project.[665]

421. MOE's noise propagation modeling RFP ultimately released in September 2014 was being drafted as of September 2010.[666] MOE established in October 2010 that it could have completed the theoretical and empirical research required to establish "an acceptable noise prediction model and setback distances for the Great Lakes" by July 2011, with resulting amendments to the REA Regulation in force by January 2012.[667] MOE engineers identified

[662] **C-1088**, Email from Klose, Steve (ENE) to SDB, Coordinator (ENE) (November 1, 2012).

[663] CER-Aercoustics.

[664] **C-1072**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (February 13, 2012).

[665] CER-Aercoustics.

[666] **C-0854**, Email from Leus, Adam (ENE) to Postacioglu, Dilek (ENE) (September 30, 2010).

[667] **C-0858**, Presentation, Offshore Wind Noise Requirements, MO Briefing (October 19, 2010), slide 4; **R-0134**, Offshore Wind Noise Workshop Meeting Notes of Dilek Postacioglu, Ministry of the Environment (August 23, 2010); **C-0846**, Handwritten Notes of Dilak Postacioglu (MOE) (August 23, 2010); **R-0152**, Ministry of the

moving ahead with noise work as their "top priority" and considered preparing an RFP for the noise study in November 2012, but there was "no appetite to see this work move ahead early."[668]

422. There also appears to have been opposition at the Premier's Office to conducting noise research. In May 2012, funding appears to have been secured, but the research did not move forward. According to a MOE official, "[t]he noise study may be a bit contentious. Not sure [Premier's Office] will want to go down that road."[669] The Minister of the Environment's Office also preferred to have "noise studies in long term rather than medium term."[670]

423. ***MOE does nothing to advance offshore wind science until issuing the RFPs for noise research in September 2014.*** Around May 2012, MOE appears to have decided to adopt a "go slow" approach to offshore wind science.[671] MNR staff have consistently noted that "MOE has done nothing" to advance the scientific research it claimed was needed before offshore wind projects could proceed through the regulatory approvals process.[672] According to MNR staff,

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Environment, Presentation, "Offshore Wind Noise Requirements: Deputy Minister's Briefing" ("Noise Requirements DM Briefing #3), slide 4.

[668] **C-1088**, Email from Klose, Steve (ENE) to SDB, Coordinator (ENE) (November 1, 2012).

[669] **C-0612**, Email from Stark, Deb (ENE) to Buckley, Erin (ENE) (May 4, 2012).

An email from a few days earlier indicated that "there is no funding for offshore wind power science": **C-1076**, Email from Orsatti, Sandra (MNR) to Neary, Anne (MNR) et al (May 1, 2012).

[670] **C-1079**, Email from Morton, Jennifer (ENE) to Klose, Steve (ENE) (June 7, 2012).

[671] **C-1077**, Handwritten Notes (May 1, 2012).

Another set of handwritten notes from the same period identified a "10-year plan" for research: **C-1066**, Handwritten Notes of Ken Cain (February 1, 2012).

[redacted]: **C-1068**, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) et al (February 3, 2012).

[672] **C-1040**, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) et al (September 27, 2011). See also: **C-1042**, Email from Whytock, John (MNR) to Cain, Ken (MNR) (October 4, 2011); **C-1041**, Email from Lawrence, Rosalyn (MNR) to Whytock, John (MNR) et al (October 4, 2011); **C-0554**, Email from Whytock, John (MNR) to Richard, Peter (MNR) et al (October 5, 2011); **C-1057**, Presentation (MNR), Minister's Briefing, Offshore Windpower in Ontario (December 13, 2011), slide 7; **C-1074**, Email from Orsatti, Sandra (MNR) to Neary, Anne (MNR) (March 6, 2012); **C-1078**, Email from Orsatti, Sandra (MNR) to Neary, Anne (MNR) (May 8, 2012); **C-0615**, Email from Cain, Ken (MNR) to Dahari, Raj (MNR) (May 17, 2012).

Officials at MEI also emphasized, "[w]e absolutely must remove the reference to MOE currently doing research – it is factually incorrect … at the present time MOE is not doing research pending direction on the file." **C-0944**, Email from Zaveri, Mirrun (MEI) to Ing, Pearl (MEI) et al (January 24, 2011).

"MNR's work is the only science/research that the province of Ontario can put forward – other ministries did not undertake any research, even though the February 2011 government rational[e] said that more science was needed."[673]

424. ***MOE refuses offer from Windstream to assist with research.*** MOE rebuffed offers by Ortech, Windstream's consultant, to assist with offshore science.[674] It also rebuffed Windstream's requests that it be permitted to proceed with its own studies,[675] and Windstream's offer "to fund all of the studies to establish offshore standards,"[676] taking the entire burden off of the Government's shoulders. When Windstream requested an update from MOE, MNR and MEI about offshore research on September 26, 2011,[677] it received only a cursory response.[678] All this

[673] **C-0614**, Email from Orsatti, Sandra (MNR) to Neary, Anne (MNR) (May 8, 2012).

[674] CWS-Roeper-2, ¶ 51; **C-1033**, Email from Henry, Dale (ENE) to Dumais, Doris (ENE) et al (September 20, 2011); **C-1070**, Email from Neary, Anne (MNR) to Orsatti, Sandra (MNR) (February 7, 2012).

[675] **C-0977**, Handwritten Notes of Marcia Wallace (February 11, 2011); **C-1047**, Handwritten notes (November 14, 2011); **C-0602**, Presentation (WWIS), Windstream Wolfe Island Shoals Offshore Wind Project Research Proposal (March 2012), slide 12.

[676] **C-1055**, Agenda (ENE), Bi-Weekly Meeting with Kevin French & Doris Dumais (December 7, 2011), p. 2; **C-0602**, Presentation (WWIS), Windstream Wolfe Island Shoals Offshore Wind Project Research Proposal (March 2012), slide 12.

[677] **C-1034**, Letter from Baines, Ian (WEI) to Lo, Sue (MEI) (September 26, 2011); **C-1035**, Letter from Baines, Ian (WEI) to The Honourable Brad Duguid (Minister of Energy) (September 26, 2011); **C-1036**, Letter from Baines, Ian (WEI) to Ms. Doris Dumais (Director, Approvals Program) (September 26, 2011); **C-1037**, Letter from Baines, Ian (WEI) Ms. Rosalyn Lawrence (Assistant Deputy Minister) (September 26, 2011); **C-1038**, Letter from Baines, Ian (WEI) to The Honourable John Wilkinson (Minister of the Environment) (September 26, 2011).

Pearl Ing of MEI sought guidance about what the "holding messages" to Windstream should be in response to the letter, given that the Government was "quite behind in moving forward with the research work with the US": **C-1039**, Email from Ing, Pearl (MEI) to Zaveri, Mirrun (MEI) (September 26, 2011); **C-1045**, Email from Heneberry, Jennifer (ENERGY) to Zaveri, Mirrun (ENERGY) (October 18, 2011); **C-1046**, Email from Zaveri, Mirrun (ENERGY) to Quirke, Christopher (ENERGY) (October 19, 2011).

[678] Pearl Ing of MEI told Windstream: "I am sorry for the delay in responding to your letter. Staff at our Ministry has been speaking with our colleagues at the Ministry of Natural Resources and the Ministry of Environment about your inquiries and concerns. We are working to provide a complete response to your letter and plan to get this out to you as quickly as we are able: **C-1050**, Letter from Ing, Pearl (MEI) to Baines, Ian (Windstream) (November 25, 2011).

No such "complete response" was ever received: CWS-Baines-2, ¶ 55; **C-1054**, Email from Cain, Ken (MNR) to Boysen, Eric (MNR) et al (December 5, 2011).

Instead, after many months of internal debate about how to respond to Windstream, the matter appears to have fallen off the radar of MEI, MNR and MOE: **C-1052**, Email from Lawrence, Rosalyn (MNR) to Cain, Ken (MNR) et al (December 1, 2011).

despite the fact that the studies that the Ontario Government proposed to do were studies that "we would normally ask a proponent to do as part of a REA."[679]

425. The significant delay in completing this work is even more puzzling given the modest cost of the studies that MOE does propose to undertake, and the fact that Windstream and other proponents offered to pay for studies as early as 2011. As MOE acknowledged when it proposed to release the requests for proposal in 2014:

[redacted]

426. In information notes prepared in connection with the two requests for proposal that MOE issued in September 2014, MOE noted that the cost of the noise study that was the subject of the first request for proposal would not exceed $90,000.[681] The cost of the decommissioning study that was the subject of the second request for proposal would not exceed $75,000.[682] Windstream's budget to conduct environmental studies, including noise and decommissioning studies for the Project, exceeded $[redacted].[683] Windstream could easily have funded this work in 2011 as part of the development of the Project.

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[679] **C-1071**, Email from Boysen, Eric (MNR) to Klose, Steve (ENE) and Neary, Anne (MNR) (February 14, 2012).

[680] **C-1151**, Offshore Wind Technical Studies (August 6, 2014), p. 1; **C-1150**, Email from Smet, Larry (ENE) to Radcliffe, Steve (MOECC) (August 6, 2014).

[681] **C-1101**, Information Note (ENE), Offshore Wind Turbine Sound Project Propagation Modelling - Request for Proposals (June 25, 2013).

[682] **C-1102**, Information Note (ENE), Offshore Wind Turbine Decommissioning Requirements - Request for Proposals (June 25, 2013).

[683] CWS-Roeper-2, ¶ 41; **C-0872**, Response to Request for Proposal (Natural Resource Solutions Inc.), Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, and Submission for: Option 2. Ecological Field Work (November 25, 2010), p. 37; **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010), p. 17, 35, 42; **C-0874**,

C. The Few Studies Completed by MNR are Unrelated to the Stated Rationales for the Moratorium and Would Be Either Irrelevant or of Minimal Relevance to the Project

427. Canada cites eight completed studies in its Counter-Memorial as evidence that the Ontario Government is undertaking the scientific work it said was necessary when it imposed the moratorium on offshore wind projects.[684] None of this work supports Canada's assertion. Indeed, none of them relate to noise, and only one of them relates to drinking water (and that one was commissioned before the moratorium).[685]

428. In any event, all of these studies would be either irrelevant or of minimal relevance to the Project, and provide no better information than the studies that Windstream was required to complete under the REA Regulation and other applicable legislation. There was no reason to stall the Project to await completion of these studies.

1. No Reason to Stall the Project Pending MNR Studies on Fish and Fish Habitat

a) MNR Fish Studies Commissioned Before the Moratorium Announcement

429. The following three studies were commissioned by MNR before the moratorium, and are therefore unrelated to the Ontario Government's announcement on February 11, 2011:

(a) "Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat,"[686] which was commissioned in October 2010;[687]

Proposal (MWA) for Permitting and Field Investigation Services - Option 5: Aboriginal Consultation (November 25, 2010), p. 21; **C-0866**, Proposal (Scarlett Janusas and Shark Marine), Wolfe Island Shoals Offshore Windfarm Background Research & Field Investigation Services, Land and Underwater Archaeological Resource Assessments, Option 4 (November 20, 2010), p. 30.

[684] Canada's Counter-Memorial, ¶¶ 295-296.

[685] MNR staff explicitly recognized that the Government had committed to doing further studies when it announced the moratorium and that MNR had a number of studies it could point to, but that those were not necessarily related to the commitment: **C-0553**, Email from Neary, Anne (MNR) to Cain, Ken (MNR) (October 4, 2011), p. 3.

[686] **C-0572**, Report (CER-Baird), Offshore Wind Power Costal Engineering Report, Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ministry of Natural Resources (May 2011).

(b) "the potential effects of offshore wind power projects on fish and fish habitat in the Great Lakes,"[688] which was commissioned in October 2010;[689]

(c) "Offshore Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ministry of Natural Resources,"[690] which was commissioned in August 2010.[691]

b) MNR Study on Effect of Electromagnetic Fields on Fish

430. Canada cites a study titled "Impacts of Electromagnetic Fields from the Wolfe Island Wind Power Project Submarine Cable on Fish Biodiversity and Distribution." This study was commissioned to examine the impacts (if any) of electromagnetic fields from the cable of the onshore Wolfe Island wind project on fish. While only preliminary results are available, the authors found no adverse effects on fish populations.[692]

c) No Reason to Stall the Project Pending Release of MNR Fish Studies

431. There was no reason to stall the Project until after MNR's fish studies were completed in 2012, because Windstream was required to study impacts of the Project on fish as part of its natural heritage assessment.[693] Stantec's proposal for the environmental permitting work for the Project contemplated the completion of all required fish-related environmental work.[694]

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[687] **C-0856**, Email from Dunlop, Erin (MNR) to Nienhuis, Sarah (MNR) (October 13, 2010).

[688] **C-0543**, Report (MNR), Nienhuis, Sarah and Dunlop, Erin S., "The Potential Effects of Offshore Wind Power Projects on Fish and Fish Habitat in the Great Lakes", Aquatic Research Series 2011-01 (July 6, 2011).

[689] **C-0856**, Email from Dunlop, Erin (MNR) to Nienhuis, Sarah (MNR) (October 13, 2010).

[690] **C-0572**, Report (Baird), Offshore Wind Power Costal Engineering Report, Synthesis of Current Knowledge & Coastal Engineering Study Recommendations Prepared for the Ministry of Natural Resources (May 2011).

[691] **C-0839**, Email from McGillis, Andrew (Baird) to Edwards, Kevin (MNR) (August 9, 2010).

[692] **R-0194**, Scott Reid, Meghan Murrant & Erin Dunlop, MNR Aquatic Research and Development Section Report, "Impacts of Electromagnetic Fields from the Wolfe Island Wind Power Project Submarine Cable on Fish Biodiversity and Distribution: 2011-12 Project Report on Nearshore Fish Community Sampling" (2012).

[693] **C-0103**, REA Regulation, s. 24.

[694] **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010), pp. 25-31.

432. Baird confirms that the Project would likely have no material adverse impact on fish.[695]

d) Release of MNR Fish Studies Severely Delayed

433. MNR's first three fish studies were finalized by July 2011.[696] However, they were not released publicly until February 2013 (after multiple delays and failure to obtain approval for their release), and even then were released only reluctantly.[697] Their release was ostensibly delayed because "offshore is very politicized at this point"[698] and because of a concern that releasing the studies would "necessit[ate] that government re-visit its February 2011 messaging on offshore wind power in Ontario."[699]

2. No Reason to Stall the Project Pending MNR-Funded Master's Student Thesis on Bats

434. Canada cites a 2012 master's student thesis that received MNR funding titled "Spatial and Temporal Activity of Migratory Bats at Landscape Features" as evidence that the Ontario Government is following through on its commitment.[700] There is nothing about offshore wind turbines, or their effects on bats, in this document. The author researched bat activity at twelve sites in Ontario, all of which were on land and none of which were near Lake Ontario. The master's thesis is irrelevant to the Project.

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[695] CER-Baird, p. 113.

[696] **C-0547**, Report (MNR) - Aquatic Research Series 2011-01 - The potential effects of offshore wind power projects on fish and fish habitat in the great lakes (July 2011); **C-0541**, Report (MNR), Nienhuis, Sarah and Dunlop, Erin S. "Offshore Wind Power Projects in the Great Lakes: Background Information and Science Considerations for Fish and Fish Habitat" Aquatic Research Series 2011-02 (July 2011); **C-0543**, Report (MNR), Nienhuis, Sarah and Dunlop, Erin S., "The Potential Effects of Offshore Wind Power Projects on Fish and Fish Habitat in the Great Lakes", Aquatic Research Series 2011-01 (July 6, 2011); **C-1011**, Email from Dunlop, Erin (MNR) Carter, Peter (MNR) (April 8, 2011).

[697] **C-1060**, MNR Information Material for MEI/MNR (January 10, 2012**)**, p. 2; **C-1063**, Email from Wallace, Marcia (ENE) to Klose, Steven (ENE) et al (January 12, 2012); **R-0301**, E-mail from Steve Klose, Ministry of the Environment to Michael Maddock, Ministry of the Environment (July 23, 2012); **C-1081**, Email from Orsatti, Sandra (MNR) to Goman, Natalie (MNR) (August 14, 2012); **C-1087**, Email from Cain, Ken (MNR) to Orsatti, Sandra (MNR) (September 5, 2012); **C-1092**, Email from West, Karen (MNR) on behalf of Boysen, Eric (MNR) to MacNiel, Amber (MNR) (February 14, 2013), p. 2.

[698] **C-0589**, Email from Edwards, Kevin (MNR) to Nienhuis, Sarah (MNR) (February 2, 2012), p. 1.

[699] **C-1064**, Email from Cain, Ken (MNR) to Edwards, Kevin (MNR) (January 23, 2012).

[700] **R-0279**, Rachel M. Hamilton, Spatial and Temporal Activity of Migratory Bats at Landscape Features (2012); Canada's Counter-Memorial, ¶ 295.

435. In any event, there was no reason to stall the Project until this thesis was completed in 2012. Windstream was required to conduct detailed surveys of bat habitat in areas potentially affected by the Project as part of the Natural Heritage Assessment Report required under the REA Regulation.[701] The firm that Windstream was about to engage to conduct ecological field services when the moratorium was announced[702] confirmed in its proposal that its work with respect to bats would "provide details as to the use of the offshore portion of the project area by bats, including flight patterns, seasonality, etc., to address the imposition of curtailment of the proposed wind farm."[703] The proposal also identified the firm's specific expertise in conducting bird and bat radar surveys.[704]

436. According to bat expert Scott Reynolds, it is likely that the Project will have very little indirect impact on bats due to the lack of impact on terrestrial habitats that bats rely upon for roosting and foraging. It is also unlikely that the construction of the Project will have any direct impact on local bat or migratory bat populations. Further, it is likely that the scale of bat mortality from collision from Project turbines will generally be lower than mortality rates at coastal and inland facilities.[705] WSP confirms that there was no material impediment relating to bats to the Project obtaining a REA.[706]

[701] **C-0103**, REA Regulation, s. 24.

[702] **C-0473**, Letter from Deveaux, Leah (Ortech) to Baines, Ian (WEI) (February 8, 2011).

[703] **C-0872**, Response to Request for Proposal (Natural Resource Solutions Inc.), Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Submission for: Option 2, Ecological Field Work (November 25, 2010), p. 4.

[704] **C-0872**, Response to Request for Proposal (Natural Resource Solutions Inc.), Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Submission for: Option 2, Ecological Field Work (November 25, 2010), p. 6.

[705] CER-Reynolds, p. 20.

[706] CER-WSP, pp. v, vii-viii, 28-33, 46.

3. No Reason to Stall the Project Pending "Coastal Engineering Workshop"

437. Canada alleges that a "coastal engineering workshop" was held in 2011 "which determined that further study on impacts of offshore wind projects to shoreline erosion was required."[707] The documents Canada cites as evidence of the 2011 coastal engineering workshop actually refer to a workshop held with Baird & Associates on November 23, 2010 (more than three months before the moratorium was announced).[708]

438. Baird confirms that there are no material impediments relating to coastal processes that would have prevented the Project from achieving commercial operation.[709]

4. No Reason to Stall the Project Pending Release of 2008 Water Quality Impacts Study

439. Canada also cites a drinking water study titled "Application of the MIKE3 model to examine water quality impacts with the Lake Ontario Nearshore in 2008 in support of the Great Lakes Nearshore Monitoring and Assessment Program." This report appears to have been commissioned in 2008. Because the document makes no mention of the moratorium, it is unclear whether this was before or after the imposition of the moratorium. In any event, the study found that "it is likely, even based on this initial and highly speculative exercise, that any impacts associated from construction of offshore windmills would be quite small."[710]

440. There was no reason to stall the Project until this study was published in December 2012. According to Baird, the Project would not pose a threat to drinking water.[711] Furthermore, MOE has well-established guidelines and procedures to review the Project for the protection of

[707] Canada's Counter-Memorial, ¶ 295.

[708] **R-0266**, E-mail from Worsley, Nicole (ENE) to Duffey, Barry (MTO) (October 18, 2011); **R-0265**, Presentation (ENE), Renewable Energy Approval (REA) Offshore Wind (October 14, 2011), slide 6.

[709] CER-Baird, pp. 2, 99; CER-Baird-2, pp. 6, 68.

[710] **C-0637**, Report (MOE), Application of the MIKE3 model to examine water quality impacts within Lake Ontario Nearshore in 2008 (December 28, 2012), p. 46 [Emphasis added].

[711] CER-Baird, pp. 140-141; CER-Baird-2, pp. 2, 19.

drinking water. In fact, WWIS had proposed to undertake additional studies to further confirm that the Project would not be a threat to drinking water.[712]

5. No Reason to Stall the Project Pending MNR's Renewable Energy Atlas

441. Finally, Canada cites a MNR's Renewable Energy Atlas, an interactive online tool that provides a publicly accessible mapping tool identifying wind resources. The tool allows users to create and view maps of wind energy across Ontario.[713] This work has no bearing on the "scientific uncertainty" motivation for the moratorium. Nor does it provide any useful data for the Project. Windstream has already completed detailed Wind Resource Assessments for the Project,[714] the most recent of which are based on actual data gathered from WWIS' meteorological tower for the Project.[715]

D. Ontario Government Stalls [redacted]

442. In its Counter-Memorial, Canada devotes significant attention to [redacted]

Canada fails to recognize that no research was conducted during this period: "neither MOE nor

[712] CER-Baird-2, pp.43-44.

[713] Counter-Memorial, ¶ 117.

[714] CER-SgurrEnergy-2, Appendix 21, Ortech (2015), Wind Resource Assessment (WRA) for Wolfe Island Shoals Offshore Wind Project - 2015, p. 8; **C-0712**, Report (Ortech), Wind Resource Assessment (WRA) for Wolfe Island Shoals Offshore Wind Project Using [redacted] Turbine - 2014 (August 7, 2014), p. 3; **C-0139**, Report (Helimax Energy Inc.), Meteorological and Energy Yield Report, Wolfe Island, Ontario (September 24, 2009); **C-0259**, Report (Zephyr North Ltd.), Offshore Wind Speeds from Boundary Layer Modelling (May 13, 2010); **C-0324**, Report (Ortech), Wolfe Island Shoals Offshore Wind Report (July 30, 2010); **C-0511**, Report (Ortech), Updated Wolfe Island Shoals Offshore Wind Report (March 7, 2011); CWS-Roeper ¶¶ 61-63.

[715] CER-SgurrEnergy-2, Appendix 21, Ortech (2015), Wind Resource Assessment (WRA) for Wolfe Island Shoals Offshore Wind Project - 2015, p. 8; CWS-Roeper ¶ 64; **C-0627**, Report (Ortech), Updated Wolfe Island Shoals Offshore Wind Report (October 24, 2012), ¶ 9; **C-0587**, Meteorological Mast Commissioning Report (GL Garrad Hassan), Long Point, Wolfe Island Shoals Project, Ontario (January 25, 2012).

[716] **C-1069**, Email from Radcliffe, Steve (ENE) to SDB, Coordinator (ENE) (February 6, 2012).

Energy [had] any other work underway of this nature, and I know that federal agencies (e.g. DFO) have nothing either."[717]

443. In any event, this issue is not relevant. No research was conducted [redacted] moved the Ontario Government no closer to lifting the moratorium. [redacted] the window during which the Project could have been developed was shutting.

444. Nonetheless, Canada inaccurately characterizes Ontario's active choice to [redacted] Canada writes that "Ontario was forced to [redacted] in the autumn of 2011 due to a general election."[718] This is not correct. Instead, because of electoral concerns, the Ontario Government simply was not serious about [redacted]

445. By July 2011, [redacted]."[720] However, the Manager of MNR's Renewable Energy Program noted that the "[redacted]"[721] In discussions with [redacted], "[Deputy Minister of Energy] David Lindsay [redacted]

[717] **C-1061**, Email from Cain, Ken (MNR) to Cicconi, Ottavio (MNR) (January 11, 2012); **C-1089**, Email from Cain, Ken (MNR) to Orsatti, Sandra (MNR) (December 11, 2012); **R-0265**, Presentation (ENE), Renewable Energy Approval (REA) Offshore Wind (October 14, 2011); **C-1012**, Handwritten Notes of Marcia Wallace (ENE) (April 13, 2011); **C-1014**, Email from Hamilton, Rachel (ENE) to Cates, Alyssa (ENE) (April 15, 2011); **C-1015**, Email from MacLennan, Craig (MEI) to Lo, Sue (ENE) (April 28, 2011); **C-1016**, Email from Evans, Paul (ENE) to Lo, Sue (ENE) (April 28, 2011).

[718] Canada's Counter-Memorial, ¶ 283; **C-1043**, Email from Tasca, Leo (ENERGY) to Collins, Jason R. (ENERGY) et al (October 4, 2011).

[719] **C-1061**, Email from Cain, Ken (MNR) to Cicconi, Ottavio (MNR) (January 11, 2012), p. 2.

[720] **C-1028**, Email from Cain, Ken (MNR) to Lawrence, Rosalyn (MNR) et al (July 22, 2011).

[721] **C-1028**, Email from Cain, Ken (MNR) to Lawrence, Rosalyn (MNR) et al (July 22, 2011).

requested (and got) [redacted] would be low key – no public release, until further notice."[722]

446. Canada notes that following the election in October 2011, negotiations over the [redacted]

PART THREE. CANADA IS LIABLE FOR BREACHES OF NAFTA

I. Ontario's Measures have Substantially Deprived Windstream of the Value of Its Investments, in Violation of Article 1110 of NAFTA

447. Article 1110 of NAFTA prohibits direct or indirect expropriation of an investment. Ontario expropriated the value of Windstream's investments. Its imposition of the indefinite-term moratorium rendered WWIS, the Project and the FIT Contract worthless. Canada raises a series of unavailing defences, unfounded in fact or law.

448. While Canada acknowledges that WWIS and the Project are investments under Article 1139 and therefore capable of being expropriated, it contests the "investment" status of the FIT Contract. This challenge is based on a mischaracterization of Windstream's interest under the FIT Contract as a business activity contingent on the project receiving regulatory approvals. Windstream's actual interest is the executed FIT Contract itself, currently in force and operating, pursuant to which WWIS paid $6 million in security. The FIT Contract, as "intangible property" and an "interest arising from the commitment of capital" is an "investment."

449. Canada tries to impute to Windstream a duty to give up its rights under the FIT Contract in exchange for a mere five-year extension of the *force majeure* provisions, with no guarantee that the moratorium would ever be lifted. Windstream cannot be faulted for declining this offer.

[722] **C-1028**, Email from Cain, Ken (MNR) to Lawrence, Rosalyn (MNR) et al (July 22, 2011).

[723] **C-0629**, Email from Klose, Steven (ENE) to Neary, Anne (ENE) (November 6, 2012).

450. Canada also argues that the indefinite-term moratorium is temporary. This is irrelevant. Temporary measures can cause permanent loss, as is the case with Windstream's project. There is no prospect that the Project's value can be recovered.

451. Canada relies on a "public purpose" exception – that any regulatory measure of general application cannot amount to an indirect expropriation if the measure was adopted for a legitimate public purpose – that is unfounded in jurisprudence and would gut the meaning of Article 1110. Canada relies on the ambiguous wording in one arbitral decision contradicted by the plain meaning of Article 1110 and the overwhelming weight of jurisprudence.

452. The police powers doctrine, analogous to but more narrow than the alleged "public purpose" exception, is inapplicable because the facts of this case do not meet the legal test. The indefinite-term moratorium was not adopted in good faith or for a legitimate public purpose. The result of the moratorium – killing Windstream's project – was disproportionate to the moratorium's stated rationale – the need to conduct the very same research Windstream would have been required to conduct. The moratorium is precisely contrary to specific commitments Ontario made to Windstream and the legitimate expectations Ontario engendered.

453. Finally, and independent of the above breaches grounded in Ontario's active measures to kill offshore wind development, Ontario's failure to insulate Windstream's investments from the effects of the moratorium – in light of the distinguishing FIT Contract with OPA – also amounts to an unlawful expropriation.

A. WWIS, the Project and the FIT Contract are "Investments" Capable of Being Expropriated

454. As set out in paragraphs 488 to 501 of Windstream's Memorial, WWIS, the Project and the FIT Contract are each investments of Windstream in Canada. In the case of the Project and the FIT Contract, these investments are held indirectly through WWIS.

1. WWIS and the Project are "Investments" Capable of Being Expropriated

455. Canada admits that WWIS is an investment of Windstream.[724] Thus, Canada does not deny that WWIS is itself an investment capable of being expropriated. With the exception of the FIT Contract, Canada also does not appear to dispute that the Project, as described in paragraph 493 of Windstream's Memorial, is an investment of Windstream capable of being expropriated.

2. The FIT Contract is an "Investment" Capable of Being Expropriated

456. Canada's argument, at paragraphs 465 to 473 of its Counter-Memorial, that the FIT Contract does not meet the definition of "investment" in Article 1139 of NAFTA is without merit and should be rejected. Windstream's arguments regarding the status of the FIT Contract as an "investment" within the meaning of Article 1139 are set out in paragraphs 496 to 502 of its Memorial, to which Canada does not respond.

457. Canada's challenge to the status of the FIT Contract as an investment beats a straw man; Canada has constructed an argument that Windstream did not make, and proceeds to refute that argument while failing to address Windstream's actual position. Taking out of context a statement from Windstream's overview that the FIT Contract gives WWIS the right to a guaranteed revenue stream over a 20-year period, Canada asserts that the relevant interest is the "business activity of generating revenue from the operation of a wind project in accordance with the FIT Contract." Thus, Canada invites the Tribunal to conclude that the FIT Contract is not an investment because that kind of interest is contingent on other events having occurred.

458. Nowhere does Windstream assert that any interest in the "business activity of generating revenue from the operation of a wind project in accordance with the FIT Contract" has been expropriated. Windstream defined its investments in paragraphs 488 to 502 of its Memorial. They are WWIS, the Project and the FIT Contract. Windstream does not assert that its investments include an operational wind farm that generates guaranteed income from the sale of

[724] Canada's Counter-Memorial, ¶ 474.

electricity. If it did, Windstream's damages in this case would be many orders of magnitude greater than they are.[725]

a) FIT Contract is "Intangible Property" and an "Interest Arising from the Commitment of Capital" under Article 1139

459. Article 1139 provides that the following are included in the definition of "investment":

> (a) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (b) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
> (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise […][726]

460. ***The definition of "investment" under NAFTA includes contracts committing capital.*** As the tribunal in *Feldman* noted, the term "investment" is defined in Article 1139 in "exceedingly broad terms." It covers "almost every type of financial interest, direct or indirect, except certain claims to money."[727] Tribunals in several NAFTA cases have confirmed that contracts may qualify as investments within the meaning of Article 1139,[728] subject to the limits set out under paragraphs (i) and (j) to the definition of investment.[729]

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[725] CER-Deloitte (Taylor and Low)-2, ¶¶ 3.4-3.5.

[726] **C-0001**, NAFTA, art. 1139 [Emphasis added].

[727] **RL-024**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("***Feldman***"), ¶ 96; **CL-061**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case) Award, 31 March 2010 ("***Merrill & Ring***"), ¶ 139.

[728] **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("***Mondev***"), ¶ 80; **CL-061**, *Merrill & Ring*, ¶ 139.

[729] **CL-061**, *Merrill & Ring*, ¶ 139.

461. The tribunal in *PSEG Global v. Turkey* found that a concession contract was itself an investment because it was a valid contract under Turkish law.[730] The requirement for further approvals did not alter that analysis.[731] Canada's attempt to distinguish this case on the basis that the treaty at issue (the Turkey-U.S. BIT) includes "any right conferred by law or contract" in its definition of "investment" is misplaced. Article 1139 of NAFTA, too, specifically provides that "interests" such as "contracts" are investments provided that they arise from the commitment of capital or other resources in Canada to economic activity in Canada. There is no substantive difference between two definitions of investment that would render the *PSEG Global* tribunal's reasoning inapplicable here.

462. Moreover, tribunals have repeatedly found that contracts constitute "intangible property."[732] They have also repeatedly found that rights that may be the subject of a valuable commercial transaction (such as the FIT Contract) are investments capable of being expropriated.[733]

463. ***The FIT Contract is an "investment."*** The cases Canada relies on are inapposite. As set out beginning at paragraph 496 of Windstream's Memorial, the FIT Contract is an "interest arising from the commitment of capital or other resources in the territory of [Canada] to economic activity in such territory." The FIT Contract is also intangible property "acquired in the expectation or used for the purpose of economic benefit or other business purposes." Thus, the FIT Contract satisfies paragraphs (g) and (h) of the definition of "investment" in Article 1139. Canada does not appear to dispute that Windstream committed capital to acquire the FIT

[730] **CL-076**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007 ("***PSEG Global***"), ¶¶ 89, 90, 102, 104.

[731] **CL-076**, *PSEG Global*, ¶¶ 79-80.

[732] **CL-125**, *Khan Resources Inc. v. Mongolia*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 ("***Khan Resources***"), ¶¶ 302-08; **CL-092**, *Wena Hotels Ltd. v. The Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award on Merits, 8 December 2000 ("***Wena Hotels***"), ¶ 98; **CL-119**, *British Caribbean Bank Ltd. (Turks & Caicos) v. The Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, ¶ 200.

[733] See *e.g.* **RL-022**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014 ("***Emmis International***"), ¶ 165.

Contract (among other capital, its $6 million in security) or that it did so with the expectation or for the purpose of economic benefit or for other business purposes.

464. The cases that Canada cites at paragraphs 468 to 470 of Canada's Counter-Memorial are not relevant here. None involve situations where, as here, the investment alleged to have been expropriated was itself a contract. The rights alleged to have been expropriated in those cases were: (1) a right to a broadcasting licence (that the tribunal found did not arise from the relevant contract under Hungarian law);[734] (2) a gambling operation which the claimant did not operate pursuant to any permit or contract;[735] (3) an alleged right to export cigarettes to which the claimant had no right under a contract or otherwise;[736] and (4) a "potential interest" in exporting logs "that may or may not materialize under contracts the Investor might enter into with its foreign customers."[737] In *Merrill & Ring*, the tribunal specified that a right to export logs would be a property right subject to expropriation "if an existing contract for a certain volume of logs, at a certain price, had been interfered with by the government to the requisite extent."[738] There was therefore no question in those cases as to whether an existing contract – such as the FIT Contract – was itself a property interest capable of being expropriated. They do not apply here.

b) FIT Contract is Intangible Personal Property Under Ontario Law

465. Canada's position appears to be that the FIT Contract is neither "intangible property" nor an "interest" within the meaning of Article 1139 because it is a "contingent interest."[739] There is no merit to this submission.

466. The question of whether the FIT Contract is intangible property or a property interest capable of being expropriated is a question of Ontario law.[740] Windstream has submitted

[734] **RL-022**, *Emmis International*, ¶ 221.

[735] **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Arbitral Award, 26 January 2006 ("***International Thunderbird***").

[736] **RL-024**, *Feldman*, ¶ 152.

[737] **CL-061**, *Merrill & Ring*, ¶¶ 139-40.

[738] **CL-061**, *Merrill & Ring*, ¶ 149.

[739] Canada's Counter-Memorial, ¶ 471.

substantial expert evidence from Ms. Powell that the FIT Contract is in and of itself intangible personal property under Ontario law. Canada does not put forward any evidence at all – let alone expert evidence on Ontario law – in response to these arguments, nor does it respond to them in its Counter-Memorial.

467. As set out in paragraphs 497 to 500 of Windstream's Memorial, and in paragraphs 111 to 130 of Ms. Powell's first report, the FIT Contract is WWIS' most important asset.[741] Under Ontario law, the FIT Contract is a valuable asset and constitutes intangible personal property which could be the subject matter of a security interest and which would be transferable on bankruptcy to the trustee-in-bankruptcy of WWIS.[742] The FIT Contract may be the subject of a change of control.[743] It may also be mortgaged, charged or otherwise encumbered to the benefit of a secured creditor.[744] Indeed, numerous renewable energy projects with FIT contracts have been subject to a pre-Notice to Proceed and pre-commercial operation change of control that involved the payment of material consideration.[745] Had WWIS not been offered the FIT Contract, the Project would have been at an end.[746] WWIS' FIT Contract has particular value because the OPA has waived its Pre-Notice to Proceed Termination Right.

468. Moreover, the FIT Contract is not a "contingent" or "potential" interest under Ontario law.[747] It is a valid and binding contract which creates a long list of obligations and rights. Under section 2.5 of the FIT Contract, WWIS is required to bring the Project into commercial operation in a timely manner and by the MCOD of May 4, 2015, subject to extension for *force majeure*.[748]

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[740] **RL-022**, *Emmis International*, ¶ 162; **CL-125**, *Khan Resources*, ¶¶ 302-08.

[741] CER-Powell, ¶ 111.

[742] CER-Powell, ¶ 130.

[743] CER-Powell, ¶ 118; CER-Powell-2, ¶ 81.

[744] CER-Powell, ¶¶ 126-29.

[745] CER-Powell, ¶¶ 115, 124-25.

[746] CER-Powell, ¶ 113.

[747] CER-Powell-2, ¶¶ 79-86.

[748] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 2.5; **C-0243**, Schedule 2 (OPA), FIT Contract, Special Terms and Conditions Wind (Offshore) Facilities (May 4, 2010).

WWIS is also required to maintain in good standing the $6 million letter of credit it posted as security.[749] If WWIS does not bring the Project into commercial operation within 18 months of that date (as extended by *force majeure*), WWIS will be in default.[750] This is the case even if there are delays in obtaining regulatory approvals.[751] The OPA would then have the right to retain WWIS' $6 million in security.[752] Once the Project achieves commercial operation, the OPA has the obligation to pay WWIS for all electricity generated by the Project after the Project achieves commercial operation.[753] The OPA has confirmed that it continues to treat the FIT Contract as valid and binding and that it "reserves all rights and remedies under the FIT Contract and at law and equity, including the right to exercise any rights and remedies at any time and from time to time."[754]

469. Contrary to Canada's assertion at paragraph 471 of its Counter-Memorial, the "FIT Contract" is not "expressly conditioned on the Claimant acquiring all of the permits and approvals needed to develop, construct and operate" the Project. Canada cites section 2.4 of the FIT Contract for this statement. Section 2.4 provides that the OPA may not issue a Notice to Proceed under the FIT Contract until a REA and other permits necessary for the construction of the Contract Facility to commence have been provided. It does not state that the FIT Contract is "conditional" upon all approvals being obtained such that the contract is somehow not binding if the permits are not obtained. On the contrary, WWIS' security may be forfeited if it fails to bring the contract into commercial operation on time. Its security would also be forfeited if it exercised its right to terminate the FIT Contract before Notice to Proceed is issued.[755] The forfeiture would

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

[750] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 9(j).

[751] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 9.1(c).

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

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

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

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

occur pursuant to the binding terms of the FIT Contract, not somehow as a result of its allegedly conditional nature. Moreover, the OPA has waived the right it otherwise would have had to terminate the FIT Contract before issuing a Notice to Proceed.[756]

470. According to Ms. Powell, Canada conflates the FIT Contract's NTP pre-requisites with the FIT Contract itself.[757] She states that, under Ontario law, the NTP pre-requisites are not "true conditions precedent" to there being an enforceable contract.[758] Rather, the FIT Contract was from the outset a valid, enforceable and valuable contract.[759]

471. Canada's submission is neither supported by the terms of the contract itself nor by any expert evidence (or any evidence at all) as to their effect under Ontario law. It should be rejected.

B. The Indefinite-Term Moratorium and the Failure to Insulate Windstream from its Effects have Substantially Deprived Windstream of the Value of its Investments

1. Windstream's Investments in WWIS, the FIT Contract and the Project are Now Substantially Worthless

472. Windstream relies on the arguments set out in paragraphs 543 to 565 of its Memorial, to which Canada barely responds except as set out below. Throughout its Counter-Memorial, Canada insists that the FIT Contract is "frozen" or "on hold" and that the Project will be permitted to continue if the moratorium is ever lifted.[760] However, Canada ignores Windstream's expert evidence that this is not the case, and fails to provide any evidence in response to Windstream's evidence or in support of Canada's position.

473. To repeat, and as set out in paragraphs 407 to 408, Windstream's investments in WWIS, the FIT Contract and the Project are now substantially worthless. As a result of the drastic delays caused by the moratorium, the Project no longer has any hope of achieving commercial operation

[756] **C-0549**, Waiver Agreement OPA and WWIS re: Pre-NTP Termination Right (August 29, 2011).

[757] CER-Powell-2, ¶ 82.

[758] CER-Powell-2, ¶ 84.

[759] CER-Powell-2, ¶ 86.

[760] Canada's Counter-Memorial, ¶¶ 21, 260, 265, 266, 268, 353, 486-487.

by the deadlines set out in the FIT Contract. Under the FIT Contract, the OPA has the right to terminate the FIT Contract if it does not achieve commercial operation by May 4, 2017, even though the FIT Contract is currently under *force majeure*. The OPA refused to waive this right, and has on the contrary gone so far as to reserve all of its right under the FIT Contract. This has rendered the Project unfinanceable. Thus, even if the moratorium was lifted and the Project allowed to proceed, the Project could not continue. It has been *de facto* cancelled. The moratorium therefore has deprived Windstream of the value of its investments.

474. This situation is analogous to that in the recent decision in *Khan Resources v. Mongolia*. In that case, the invalidation and failure to re-register a mining license made the execution of contractual obligations impossible. The tribunal found that this deprived the claimant of the benefits of the relevant agreements, even though the agreements had never been formally terminated.[761]

475. This extreme result would have been avoided had the Ontario Government fulfilled its promise to keep the FIT Contract "frozen" and the Project "on hold." As described above, it refused to do so. This too deprived Windstream of the value of its investments.

476. As set out in detail below, and contrary to the assertions in paragraph 481 of Canada's Counter-Memorial, WWIS, the FIT Contract and the Project would have had substantial value had the moratorium not been applied to the Project. WWIS, the FIT Contract and the Project also would have had substantial value had the Ontario Government insulated Windstream from the effects of the moratorium.

477. The fact that Windstream's investments are now worthless as a result of the moratorium, or alternatively of the failure to insulate Windstream from its effects, is enough for the tribunal to conclude that Windstream's investments have been unlawfully expropriated contrary to Article 1110. In this regard, Windstream continues to rely on the arguments in paragraphs 542 to 576 of its Memorial.

[761] **CL-125**, *Khan Resources*, ¶¶ 309-12.

2. Negotiations with the OPA Support Windstream's Position, Not Canada's

478. Canada goes so far as to suggest, in paragraph 489 of its Counter-Memorial, that Windstream's failure to accept a settlement offer from the OPA demonstrates that the fact that Windstream's investments are now worthless is somehow Windstream's fault. This submission is without foundation in the evidence and should be rejected.

479. As explained in paragraphs 380 to 385 above, the OPA refused Windstream's request that the FIT Contract remain under *force majeure* for the duration of the moratorium. It instead insisted on capping any extension to the FIT Contract to five years, even though the Ontario Government had refused to specify how long the moratorium would be in place. It also insisted on retaining at least $3 million in security from WWIS for the duration of the indefinite-term moratorium. The moratorium has now been in place for more than four years and four months with no end in sight. Thus, even if Windstream had accepted the OPA's unreasonable offer, this would not have done Windstream any good.

480. The exchange of correspondence with the OPA instead demonstrates that Windstream was acting in good faith throughout, and that it was the Ontario Government that failed to act in good faith by following through on its promises to keep the FIT Contract "frozen" so that the Project could "continue" after the moratorium. Even if the moratorium is ever lifted (of which there is no indication), the Project can no longer continue. It has thus been *de facto* cancelled.

3. Alleged Temporariness of Indefinite-Term Moratorium is Not Relevant to the Expropriation Analysis

481. Canada's focus in paragraphs 482 and 483 of its Counter-Memorial on the alleged temporariness of the moratorium is misplaced. It is the nature of the deprivation that is relevant, not the duration of the measure. As noted in paragraph 551 of Windstream's Memorial, a substantial deprivation may be caused by a temporary measure.[762] This occurs where there is no

[762] **CL-029**, *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012 ("***Burlington Resources***"), ¶ 483; **CL-059**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability ("***LG&E***"), 3 October 2006, ¶ 193; **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000

immediate prospect that the investment's value can be recovered,[763] including where, as here, the investment's success is tied to a fixed timeline that can no longer be met.[764] Canada addresses neither this argument nor the cases cited in support of it.

482. Recently, in *Belokon v. The Kyrgyz Republic*, the tribunal concluded that a "temporary" measure suspending the powers of the Board and managing bodies of five Kyrgyz banks was expropriatory.[765] Even the *Tecmed* decision, on which Canada relies, confirms that a temporary measure may lead to a permanent deprivation.[766] In addition to the decisions cited in Windstream's Memorial, tribunals in a number of decisions have found that temporary measures may be expropriatory if they lead to a permanent deprivation.[767]

483. We do not know if the moratorium will be temporary or permanent. But even if it is temporary, it has permanently deprived Windstream of the value of its investments. The fact that the moratorium may be lifted at some unspecified date in the future is irrelevant to the expropriation analysis. The only relevant factor is whether Windstream has been permanently deprived of the value of its investments as a result of the moratorium and the failure to insulate Windstream's investments from the moratorium's effects. As set out in Windstream's Memorial and above, it has.

("***S.D. Myers***"), ¶¶ 282-283; **CL-025**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006 ("***Azurix***"), ¶ 313.

[763] **CL-039**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶ 607.

[764] **CL-041**, *Compagnia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case ARB/97/3) Award, 20 August 2007 ("***Vivendi II***"), ¶ 7.5.17; **CL-068**, *National Grid plc v. The Argentine Republic* (UNCITRAL) Award, 3 November 2008 ("***National Grid***"), ¶ 147; **CL-078**, *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation* (SCC No. 24/2007) Award, 20 July 2012, ¶ 45.

[765] **CL-131**, *Valeri Belokon v. The Kyrgyz Republic* (UNCITRAL) Award, 24 October 2014, ¶¶ 4, 206-210, 215.

[766] Canada's Counter-Memorial, ¶ 482 citing **CL-084**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award ("***Tecmed***"), 29 May 2003, ¶¶ 116-17.

[767] **CL-125**, *Khan Resources*, ¶ 310 (the Tribunal found that a temporary suspension of a Mining License amounted to an expropriation); **CL-092**, *Wena Hotels*, ¶ 99 (the hotels were returned to Wena after a year, but were stripped of furniture and fixtures. As a result, Wena was unable to continue with its investment); **CL-128**, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (ICSID Case No. ARB/99/6) Award, 12 April 2002 ("***Middle East Cement***"), ¶¶ 107, 178 (the Tribunal held that the government decree was expropriatory, even though it only affected the investor's licence for four months).

484. In any event, even if the alleged temporariness of the moratorium were relevant (which it is not), there is no indication that Ontario has been conducting research in good faith with a view to lifting the moratorium. As described in paragraphs 409 to 426, the Ontario Government has conducted very little research since announcing the moratorium. It has failed to meet the timelines in every research plan it has developed. The few studies it has disclosed publicly are either irrelevant to the Project or minimally relevant to it, and most of them are unrelated to the stated rationale for the moratorium.[768] The only work it appears to have done since is issue requests for proposal to conduct noise and decommissioning studies. Those requests for proposal appear to have been prompted by a desire to avoid an adverse ruling in this arbitration.

485. There is no indication on the record that the Ontario Government truly intends to lift the moratorium in the near future, or at all. It has never provided even an approximate "end date" for the moratorium, nor has Canada specified one in its Counter-Memorial. The fact is that the moratorium may never be lifted. But even if the moratorium is not permanent, Windstream's loss is.

C. Indefinite-Term Moratorium Not Immune from the Application of Article 1110

486. In paragraphs 475 and 494 to 504 of its Counter-Memorial, Canada urges the Tribunal to adopt a broad public policy exception to indirect expropriation. In substance, Canada's position is that any regulatory measure of general application cannot amount to an indirect expropriation, provided that the measure was adopted for a legitimate public purpose, in good faith and in a non-discriminatory manner.

487. Windstream makes the case at paragraphs 577 to 582 of its Memorial that the rationale for the moratorium is not relevant to the expropriation analysis and will not repeat those arguments extensively here. In summary, the Tribunal should reject Canada's arguments that there is a broad "public policy" exception to expropriation because such an exception would be inconsistent with the plain language of Article 1110 and in any event is not justifiable. Thus, Article 1110 will be breached if the Tribunal concludes that Windstream has been substantially

[768] See ¶¶ 427-441 above.

deprived of the value of its investments as a result of the application the indefinite-term moratorium.

488. However, even if the Tribunal agrees that Article 1110 includes an exception for the exercise of police powers, any such exception is not engaged here. First, the indefinite-term moratorium was not imposed in good faith or for the legitimate purpose of protecting the environment. Second, the application of the moratorium to the Project is grossly disproportionate to its effects on Windstream's investments, particularly given MOE's acknowledgement that any research it conducts will not apply to the Project. Third, the application of the moratorium to the Project is contrary to Windstream's legitimate expectations arising from the Ontario Government's solicitation of Windstream's investment in the Project through the FIT Program.

1. Broad "Public Purpose" Exception to Expropriation Inconsistent with the Plain Language of Article 1110

489. The recognition of a broad "public purpose" exception to expropriation would be inconsistent with the plain wording of Article 1110. Indeed, Article 1110(1)(a) provides that a public purpose is a prerequisite to a finding of expropriation, including indirect expropriation.[769] It would be inconsistent with that plain language for the Tribunal to accept Canada's argument that a broad public purpose defence to indirect expropriation also exists.[770]

490. The *Vivendi II* tribunal recognized that a public purpose exception to expropriation would be inconsistent with the plain language of Article 5(2) of the Argentina–France BIT,[771] which is identical in substance to Article 1110.[772] The tribunal stated: "If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose."[773] Canada does not respond in its Counter-Memorial

[769] **C-0001**, NAFTA, Art. 1110(1)(a).

[770] **CL-116**, Article 31(1) of the 1969 Vienna Convention on the Law of Treaties sets forth the cardinal rule for construing international agreements. It states: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

[771] **CL-041**, *Vivendi II*, ¶¶ 7.5.20-7.5.21.

[772] **CL-041**, *Vivendi II*, ¶ 7.5.1.

[773] **CL-041**, *Vivendi II*, ¶ 7.5.21.

to the argument that the construction of Article 1110 does not permit a public purpose to be a defense to a finding that a measure is expropriatory.

491. The *Azurix* tribunal similarly rejected the suggestion that a broad public purpose exception to expropriation exists on the basis that such an exception would be inconsistent with a public purpose as a prerequisite to expropriation.[774] It criticized the respondent's argument on the basis that, if accepted, "the BIT would require that investments not be expropriated except for a public purpose and that there be compensation if such expropriation takes place and, at the same time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose."[775]

492. Canada relies on the *Methanex* tribunal's decision which recognizes a public purpose exception to expropriation. As set out below, the more accurate view is that the *Methanex* tribunal was really applying the more narrow police powers doctrine. But in any event, there is no suggestion in the *Methanex* decision that the tribunal considered whether the recognition of a broad public purpose exception to expropriation would be contrary to the plain language used in Article 1110. Notably, Mr. William Rowley, Q.C., a member of the *Methanex* tribunal, was the President of the *Vivendi II* tribunal that did recognize this inconsistency. As one commentator has noted, "*Methanex*'s decision to ignore Article 1110(1)(d) while rendering Article 1110(1)(a) redundant runs counter to the ordinary meaning of Article 1110 and should thus be strongly questioned."[776]

493. Canada attempts to distinguish *Vivendi II*, but does not respond to that decision's rejection of the argument that the plain language of Article 5(2) of the Argentina–France BIT permits an interpretation that would make a public purpose a defence to expropriation.

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[774] **CL-025**, *Azurix*, ¶¶ 309-311.

[775] **CL-025**, *Azurix*, ¶ 311.

[776] **CL-137**, Marlles, J., *Public purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law* (16 J. Transnat'l L. & Pol'y 275, 2007) ("**Marlles**") at pp. 294-295.

494. The Tribunal should thus reject Canada's argument that a broad "public purpose" exception to expropriation immunizes the indefinite-term moratorium from being expropriatory within the meaning of Article 1110.

2. No Broad "Public Purpose" Exception to Article 1110

495. Many tribunals have rejected the suggestion that a public purpose somehow immunizes regulatory measures from being expropriatory. Nearly every regulatory measure that a government sees fit to adopt will be justifiable as having a public purpose. As the *Vivendi II* tribunal noted, "international tribunals, jurists and scholars have consistently appreciated that states may accomplish expropriations in ways other than by formal decree; often in ways that may seek to cloak expropriative conduct with a veneer of legitimacy."[777] Accepting a broad "public purpose" exception to expropriation would render the protections granted by Article 1110 illusory.

496. ***No broad public purpose exception to expropriation.*** Several NAFTA tribunals applying Article 1110 have rejected the application of a broad public purpose exception to expropriation. For example, in *Pope & Talbot*, Canada took the position that regulations, if non-discriminatory, constitute an exercise of "police powers" and are thus beyond the reach of Article 1110.[778] The tribunal rejected this argument. It found that "a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation."[779] Similarly, in *Metalclad*, the tribunal found that it did not need to consider the motivation or intent of an ecological regulatory measure to determine that the measure was expropriatory.[780] In *Feldman*, a decision on which Canada relies,[781] the tribunal found that "[i]f there is a finding of

[777] **CL-041**, *Vivendi II*, ¶ 7.5.20. **CL-074**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 ("***Pope & Talbot,* Interim Award**"), ¶ 99; **CL-025**, *Azurix*, ¶¶ 310-311.

[778] **CL-074**, *Pope & Talbot*, Interim Award, ¶ 99.

[779] **CL-074**, *Pope & Talbot*, Interim Award, ¶ 99 [Emphasis added].

[780] **CL-062**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2001 ("***Metalclad***"), ¶ 111.

[781] Canada's Counter-Memorial, ¶ 98.

expropriation, compensation is required, *even if* the taking is for a public purpose, non-discriminatory and in accordance with due process of law."[782]

497. Tribunals interpreting expropriation provisions substantially similar to Article 1110 have also rejected a broad public purpose exception to expropriation, including where the relevant measures had an environmental protection purpose. In *Santa Elena*, the tribunal stated that "[e]xpropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may implement in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."[783] In *Tecmed*, the tribunal rejected the application of a broad principle that would immunize regulatory administrative actions from being expropriatory, "even if they are beneficial to society as a whole – such as environmental protection."[784] The *Tecmed* tribunal considered that this was particularly the case if the effect of the regulatory measure was to "neutralize in full the value, or economic or commercial use" of the investment without providing any compensation.[785]

498. Tribunals in a number of other cases have found measures that were stated to have been adopted for an environmental protection purpose to be expropriatory.[786]

499. ***Canada creates an artificial distinction.*** Canada attempts to distinguish *Vivendi II* and *Santa Elena* on the basis that the impugned measures in those cases were not regulatory

[782] **RL-024**, *Feldman*, ¶ 98.

[783] **CL-042**, *Compañiá del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1) Final Award, 17 February 2000 ("***Santa Elena***"), ¶ 71.

[784] **CL-084**, *Tecmed*, ¶ 121.

[785] **CL-084**, *Tecmed*, ¶ 121.

[786] **CL-125**, *Khan Resources*, ¶ 366 (the measure at issue was the cancellation of uranium exploration and mining licenses under a law stated to provide a comprehensive regulatory scheme for the exploitation of radioactive materials in a manner that ultimately protected the environment and human health); **CL-062**, *Metalclad*, ¶¶ 106, 109, 111 (the measures at issue included denial of a construction permit for a landfill site by a municipality based on its perception of adverse ecological effects and the creation of an ecological preserve in an area that included the landfill site); **CL-127**, *Marion Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) Award, 16 May 2012 ("***Unglaube***"), ¶¶ 220-223 (the measure at issue was a decree expropriating a strip of property for the purpose of protecting endangered nesting sea turtles).

measures of general application but instead targeted specific investments. This distinction is artificial. Tribunals have repeatedly rejected attempts to distinguish regulatory measures from targeted measures in the expropriation analysis. Indeed, the *Pope & Talbot* tribunal expressly rejected Canada's attempt to draw that distinction on the basis that the distinction would create a "gaping loophole" in international protections against expropriation.

500. In any event, there is no principled basis on which a targeted measure that has a legitimate environmental protection purpose (like the measure at issue in *Santa Elena*) would be expropriatory, while a measure of general application that has the same purpose would not be expropriatory. For example, in *Santa Elena*, the measure at issue was a decree converting the claimant's property into a national park for the purpose of protecting "flora and fauna of great scientific, recreational, educational and tourism value, as well as beaches that are especially important as spawning grounds for sea turtles."[787] The tribunal found that the decree was expropriatory, and gave rise to compensation, even though the environmental protection purpose of the measure was legitimate, "even laudable."[788] If Canada's position is accepted, a measure of general application that converted all private property that was in the vicinity of sea turtle nesting sites into national parks would not be expropriatory, while a targeted measure that converted a specific property into a national park would be expropriatory. Such a distinction is artificial and would lead to the very kind of "gaping loophole" in the protections granted by investment protection treaties against which the *Pope & Talbot* tribunal cautioned. It should be rejected.

501. ***Canada asserts an exception unfounded in law.*** Canada asks the Tribunal to accept the proposition that "a non-discriminatory measure, designed to protect legitimate public welfare objectives such as health, safety and the environment, is not an indirect expropriation except in the rare circumstances where its impacts are so severe in light of its purpose that it cannot be reasonably viewed as having been adopted in good faith."[789] The authorities on which Canada relies do not stand for this broad proposition. They involve the application of the police powers doctrine, rather than a broad public purpose exception to expropriation that Canada urges this

[787] **CL-042**, *Santa Elena*, ¶ 18.

[788] **CL-042**, *Santa Elena*, ¶ 72.

[789] Canada's Counter-Memorial, ¶ 495.

Tribunal to accept. As set out below, the police powers doctrine has traditionally been narrowly construed and should be invoked only where immediate intervention is necessary to prevent serious and significant damage. In the cases relied upon by Canada, there was proven harm to the public.[790] No such situation exists here.

502. In *Chemtura*, the tribunal found that the measure at issue was not expropriatory because it did not result in a substantial deprivation. It did not apply a broad "public purpose" exception to expropriation. Rather, it found that a ban on lindane-based pesticide was a valid exercise of the state's police powers motivated by awareness of dangers presented by lindane for human health and the environment.[791] Nothing in the *Chemtura* decision suggests that a measure that substantially deprives an investor of the value of its investments but has a public purpose is immune from being expropriatory in a context broader than what the police powers doctrine would allow. The *Suez* tribunal found that measures taken by Argentina were within its police powers "given the nature of the severe crisis facing the country," and that in any event they did not substantially deprive the claimant of its investments.[792] The *Saluka* tribunal also applied the police powers doctrine, rather than a broader public purpose exception, in finding that the forced administration of a bank in which the claimant held shares was a justifiable exercise of the state's police powers.[793]

503. Moreover, while the language used by the *Methanex* tribunal appears to suggest that the tribunal accepted a broad public purpose exception, even in that case the measure at issue was a ban on the use of a chemical that had been proven to be harmful to human health.[794] Significantly, the tribunal found that the ban did not substantially deprive the claimant of the value of its investment, so it was not required to decide whether the measure's purpose rendered

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[790] **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010 ("***Chemtura***"), ¶ 266; **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 ("***Methanex***"), Part IV, chapter D, ¶ 7.

[791] **CL-037**, *Chemtura*, ¶ 266.

[792] **CL-130**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, 30 July 2010, ¶ 140.

[793] **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006 ("***Saluka***"), ¶¶ 262-265.

[794] **CL-063**, *Methanex*, Part IV, chapter D, ¶ 7.

it non-expropriatory.[795] In any event, the *Methanex* tribunal's broad formulation of the police powers doctrine has been criticized because "under this definition any indirect expropriation would be within the State's police power."[796]

504. ***Canada seeks to unilaterally alter the language of Article 1110.*** Finally, the tribunal should reject Canada's attempt, at paragraph 475 of its Counter-Memorial, to import into Article 1110 language that is not there. The interpretive Annex reproduced at paragraph 475 has not been adopted as an interpretive Annex to NAFTA by the NAFTA parties and therefore should have no bearing on the Tribunal's interpretation of Article 1110. Indeed, if the NAFTA parties had intended for all regulatory measures adopted for a public purpose to be immune from the application of Article 1110, they would have said so explicitly in Article 1110. Their failure to do so suggests a contrary intention.

505. Thus, the Tribunal should reject Canada's argument that a broad public purpose exception to expropriation applies under Article 1110.

3. Police Powers Doctrine has No Application to this Case

506. Even tribunals that have accepted that the police powers doctrine may immunize a measure from being expropriatory have construed the doctrine narrowly.[797] The police powers doctrine has no application where (a) the measure was not adopted in good faith or for a legitimate public purpose; (b) the measure's effects are disproportionate to its stated public policy rationale; and (c) the measure is contrary to specific commitments made to the investor and to the investor's legitimate expectations. All of those factors are engaged here.

[795] **CL-063**, *Methanex*, Part IV, chapter D, ¶ 16.

[796] **CL-108**, Mostafa B., "The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law" 15 Austl. Int'l L.J. 267 (2008), pp. 273-274.

[797] See **CL-080**, *Saluka*, ¶ 258.

a) Indefinite-Term Moratorium was Not Adopted in Good Faith or for the Purpose of Protecting the Environment

507. Properly construed, the police powers doctrine has no application here because Canada has failed to establish that it was adopted in good faith and for the legitimate purpose of protecting the environment.

508. Even tribunals that have applied a police powers exception to expropriation have recognized that the doctrine is narrow. It does not apply where a state acts for an ulterior, political motive that is disconnected from a measure's stated rationale,[798] nor does it apply where the state has not acted in good faith.[799]

509. As set out in detail in paragraphs 254 to 299 above, there was no legitimate reason for the Ontario Government to apply the indefinite-term moratorium to Windstream. There was no need to apply the moratorium to the Project to protect the environment, because Windstream was already required to prove that the Project was environmentally sound under the existing regulatory framework under the REA Regulation.[800] Canada has submitted no expert evidence that supports its assertions that the moratorium was necessary to protect the environment. Canada's own expert does not even reach this conclusion.[801]

510. This is particularly the case given the ample evidence before the Tribunal that the moratorium was not in fact motivated by a legitimate desire to protect the environment. As explained in paragraphs 334 to 344 above, the moratorium was adopted as a policy decision for the purpose of "killing" offshore wind projects.[802] While the moratorium was not originally intended to "kill" the Project, it did have that effect. The "scientific uncertainty" rationale for the

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[798] **CL-084**, *Tecmed*, ¶¶ 122, 130; **CL-122**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, (ICSID Case Nos. ARB/05/18 and ARB/07/15) Award, 3 March 2010 ("***Kardassopoulos***"), ¶¶ 391-392; **CL-093**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 ("***Yukos***"), ¶¶ 1579-1580.

[799] **CL-122**, *Kardassopoulos*, ¶ 387; **RL-025**, *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006 ("***Fireman's Fund***"), ¶ 176(j).

[800] See ¶¶ 265-272 above.

[801] RER-URS.

[802] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) (January 11, 2011).

moratorium was merely a pretext, arrived at only after another policy for constraining offshore wind development was rejected because it would not "kill" all offshore wind projects. The moratorium allowed the Ontario Government to stall offshore wind development by citing the need to conduct further research. This rationale could be maintained indefinitely. The moratorium would allow Ontario to "buy time with research" because it considered that it did not "need offshore power."[803]

511. Ontario has done just that. As set out in paragraphs 409 to 426, the Ontario Government has done very little since it announced the moratorium to advance the scientific research it says it needs to do. What little research it has commissioned appears to have been initiated for the purpose of avoiding an adverse ruling in this arbitration.[804] Neither Ontario, nor Canada in its Counter-Memorial, has ever given any indication of when the moratorium might be lifted, or indeed whether it will ever be lifted at all.

512. The police powers doctrine cannot be applied to immunize Canada from liability where Ontario has not acted in good faith for the purpose of protecting the environment.

b) Indefinite-Term Moratorium is Disproportionate to its Stated Environmental Protection Rationale

513. The police powers doctrine also has no application because its application to the Project is disproportionate to the stated environmental protection rationale. Canada does not attempt to explain why it was necessary for the Ontario Government to prevent Windstream from proceeding through the regulatory approvals process for the Project in order to protect the environment generally. Nor does it explain why preventing Windstream from proceeding through the regulatory approvals process was necessary to protect the environment from threats relating to drinking water or noise, the two areas that Canada and Ontario have identified as being of particular concern.

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[803] **C-0376**, Handwritten Notes of Dilek Postacioglu (ENE) (November 1, 2010), p. 1.

[804] See ¶¶ 412-415 above.

514. In *Tecmed*, the tribunal held that the police powers doctrine may only immunize a measure from being expropriatory if the measure's effects on the investment in question are proportional to the public interest presumably protected by the measure.[805] In finding that the police powers doctrine was not engaged, the tribunal was influenced by the fact that the state had not proven that the measure was required to respond to a "serious urgent situation, crisis, need or social emergency."[806] Nor was there any evidence that the measure was necessary to prevent a "present or imminent risk to the ecological balance or to people's health."[807] Several other tribunals have similarly concluded that the police powers doctrine only applies where it is truly necessary and is proportionate to the measure's stated rationale.[808]

515. ***No evidence of harm to the environment.*** Canada attempts to secure a blanket immunity from liability for expropriation on the basis of the police powers doctrine without even identifying the specific environmental risks that the Project would pose that warrant the application of the doctrine. There is no legitimate basis for this approach, and it should be rejected. As stated above, there is no evidence that allowing the Project to proceed through the regulatory approvals process, as contemplated by the REA Regulation, would have posed any risk to the environment at all. Moreover, there is no evidence that the Project itself, when built, would have had any immitigable negative environmental impacts.[809] Canada's own expert has not identified any immitigable negative environmental impacts that would be caused by allowing the Project to be built, much less by allowing it to proceed through the environmental approvals process.[810]

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[805] **CL-084**, *Tecmed*, ¶ 122.

[806] **CL-084**, *Tecmed*, ¶ 139.

[807] **CL-084**, *Tecmed*, ¶¶ 147-49.

[808] **CL-029**, *Burlington Resources*, ¶ 519; **CL-120**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02) Award, 31 October 2012 ("***Deutsche Bank***"), ¶ 522; **CL-025**, *Azurix*, ¶ 311. **RL-025**, *Fireman's Fund*, ¶ 176(j); **CL-059**, *LG&E*, ¶ 195.

[809] CER-Powell, ¶¶ 36, 38, 42, 97; CER-Powell-2, ¶¶ 15, 20; CER-Baird, pp. 2-8, 99, 113; CER-Baird-2, pp. 3-11; CER-WSP, pp. v-ix, 46.

[810] RER-URS.

516. Canada has pointed to concerns relating to drinking water[811] and noise[812] as the primary motivations for the indefinite-term moratorium. There is no evidence that either allowing the Project to proceed through the environmental approvals process or allowing it to be built would have posed any threat at all to drinking or would have had a noise-related impact that exceeded the applicable thresholds. In Baird's opinion, the Project would have no negative impacts on drinking water given that it is more than 12 kilometres away from the nearest drinking water intake.[813] With respect to drinking water, Canada's expert URS specifically does not conclude that the Project would pose any threat. Instead, it simply states that consultations with the relevant authorities would have been required.[814] Nor would the Project have caused any negative environmental impacts related to noise. Based on actual noise measurements performed by Aercoustics, the Project would not have generated noise in excess of MOE's 40-decibel limit at the closest receptor.[815] URS acknowledges that the permitting risk associated with noise is low.[816]

517. Canada's reliance on the precautionary principle should be rejected.[817] For the precautionary principle to provide justification for the indefinite-term moratorium, evidence allowing the Project to proceed through the regulatory approvals process could have caused serious harm to the environment would have been required. As made clear by Ms. Powell, the precautionary principle is a tool that is applied only where there is a sound and credible case that "a threat of serious or irreversible harm to the environment or human health exists."[818] In her opinion, the MOE did not have the requisite "sound and credible case" regarding serious harm to appropriately invoke the precautionary principle.[819] Ms. Powell's opinion regarding the

[811] Canada's Counter-Memorial, ¶¶ 255-257; RWS-Wilkinson, ¶ 10.

[812] Canada's Counter-Memorial ¶¶ 236, 241, 255; RWS-Wilkinson, ¶ 10.

[813] CER-Baird-2, pp. 20, 22, 27, 30-32.

[814] RER-URS, ¶¶ 154-58.

[815] CER-Aercoustics, pp. 16, 17; CER-HGC, p. 7; CER-WSP, p. viii.

[816] RER-URS, ¶¶ 150-53.

[817] Canada's Counter-Memorial, ¶ 501.

[818] CER-Powell-2, ¶ 59.

[819] CER-Powell-2, ¶ 64.

inappropriateness of the invocation of the precautionary principle in this context is shared by the Canadian Environmental Lawyers Association and Ecojustice.[820]

518. There is no such evidence. Allowing the Project to proceed through the environmental approvals process could have caused no harm to the environment at all. In any event, the Project would only have received the required approvals if WWIS established that it would have no immitigable negative impacts on the environment.[821]

519. In any event, the Project could not have been permitted and built in the first place if the relevant studies demonstrated any immitigable negative environmental impact. Thus, there can be no possible environmental justification for preventing Windstream from proceeding through the environmental approvals process. This situation is distinct from those at issue in *Chemtura* and *Methanex,* which involved bans of chemicals that did pose a real and substantial threat to the environment.[822]

520. Thus, Canada has failed to establish that the application of the indefinite-term moratorium to Windstream was necessary in order to prevent serious and imminent harm to the environment.

521. ***Ontario had many options that would have preserved Windstream's investments.*** Even if the moratorium was necessary, options, such as truly "freezing" the FIT Contract or allowing Windstream to pursue an alternative project, were available to Ontario that at least had the potential of bringing its actions within the realm of proportionality. Having failed to pursue any reasonable option, Canada cannot now rely on the police powers doctrine in an attempt to immunize itself from liability for destroying the value of Windstream's investments.

[820] **C-0995**, Letter from Canadian Environmental Law Association and Ecojustice to Dalton McGuinty (Premier) (March 3, 2011).

[821] **C-0103**, REA Regulation, s. 13, Table 1.

[822] **CL-063**, *Methanex*; **CL-037**, *Chemtura*.

c) Indefinite-Term Moratorium Inconsistent with Commitments to Windstream and Windstream's Legitimate Expectations

522. As set out in paragraph 587 of Windstream's Memorial, the police powers doctrine also does not immunize the indefinite-term moratorium from being expropriatory because it is contrary to specific commitments made to Windstream and to Windstream's legitimate expectations arising from those commitments. Canada does not dispute[823] that tribunals applying the police powers doctrine have accepted that the doctrine does not apply where its application is inconsistent with specific commitments made to the investor or with the investor's legitimate expectations.[824] However, Canada inaccurately characterizes the nature of Ontario's commitments.

523. Contrary to Canada's statements in paragraph 492 of its Counter-Memorial, the application of the moratorium to the Project was inconsistent with Windstream's legitimate expectations arising from Ontario's heavy solicitation of investment in offshore wind development and of Windstream's investment in the Project specifically.

524. ***Ontario's commitments.*** As set out in detail in paragraphs 57 to 110 above, beginning in 2008, the Ontario Government heavily solicited investment in offshore wind development generally, and then specifically through the FIT Program. Minister of Natural Resources Donna Cansfield declared Ontario "open for business" for offshore wind development. She declared that the existing environmental approval processes were sufficient to ensure that offshore wind projects would be developed in an environmentally sound manner. When Minister of Energy George Smitherman announced the *Green Energy Act*, he explained that the Act would create "certainty" for investors with FIT contracts, including "certainty" that environmental approvals would be granted in a timely way, within a service guarantee. At the direction of the Ontario Government, the OPA created the FIT Program, and through it solicited investment in offshore wind projects. MOE's REA Regulation specifically applied to the environmental approval of

[823] Canada's Counter-Memorial, ¶ 490.

[824] **CL-063**, *Methanex*, Part IV, Ch. D., ¶ 7; **CL-068**, *National Grid*, ¶ 151; **CL-062**, *Metalclad*, ¶ 107; **CL-025**, *Azurix*, ¶ 318.

offshore wind projects. Windstream invested in the Project, and caused WWIS to apply for a FIT Contract, in reliance on those commitments.

525. Next, as described in paragraphs 111 to 159 above, the Ontario Government specifically solicited Windstream's investment in the Project and expressed its support for the Project for the purpose of encouraging WWIS to enter into the FIT Contract. Through the OPA, the Ontario Government offered WWIS a FIT Contract for the Project under which WWIS was required to bring the Project into commercial operation by May 2014. Before it signed the FIT Contract, Windstream was assured that the Project had the support of the Ontario Government, including the Premier's Office.

526. ***No reason Windstream should have known that the moratorium was forthcoming.*** Canada appears to be suggesting, at paragraph 492 of its Counter-Memorial, that Ontario's solicitation of investment in offshore wind development generally, and in the Project specifically, should be ignored because Windstream should have known that "changes" to the regulatory system were "forthcoming" and that the Project "required regulatory change to proceed." There is no merit to these suggestions.

527. As described in paragraphs 200 to 211 above, the REA Regulation applied to the Project and did not require any amendment before the Project could proceed. The only "forthcoming" change to the regulatory system that had been communicated between the time WWIS was offered the FIT Contract (May 2010) and the time WWIS entered into the FIT Contract (August 2010) was a proposed amendment to the REA Regulation that would require offshore wind projects to be located more than five kilometres from shore. Under the existing regulation, there was no specific minimum distance from shore, and each offshore wind project would be assessed on a site-specific basis to ensure that it was the appropriate distance from shore. Shortly after MOE announced this proposed amendment, Windstream determined that the Project could meet it.

528. After it announced this proposed regulatory amendment, the Ontario Government specifically encouraged Windstream to sign the FIT Contract. First, MEI intervened with the OPA to secure a one-year extension to the commercial operation date under the FIT Contract. It

did so after Windstream expressed concern that the delay caused by finalizing the regulatory amendment compromised its ability to bring the Project into commercial operation by May 2014. WWIS would therefore be required to bring the Project into commercial operation by May 2015, instead of by May 2014. Second, MNR, with the approval of the Premier's Office, committed in writing to discuss with WWIS a reconfiguration of WWIS' applications for Crown land so that WWIS would obtain Applicant of Record status in a timely manner after the proposed five-kilometre setback was confirmed. While these solutions were being discussed, the Ontario Government and the OPA had multiple opportunities to allow the FIT Contract offer to lapse. Relying on this demonstration of support for the Project by the Ontario Government, Windstream caused WWIS to execute the FIT Contract, and put substantial capital at risk.

529. There was never any question during any of these discussions between Windstream and the Ontario Government that any "changes" to the regulatory system were "forthcoming" that would prevent WWIS from proceeding through the regulatory approvals process for the Project because of an indefinite-term moratorium. There was certainly never any question that any changes were forthcoming that would make it impossible for WWIS to bring the Project into commercial operation by May 2015 as it would be contractually bound to do once it signed the FIT Contract. If there had been any such suggestion, Windstream would never have caused WWIS to enter into the FIT Contract.

530. Contrary to Canada's arguments, the application of the indefinite-term moratorium to the Project was a stark reversal of the Ontario Government's solicitation of investment in offshore wind, commitment to provide "certainty" for renewable energy project proponents and of its specific support for the Project. This also excludes the application of the police powers doctrine.

D. Failure to Insulate Windstream's Investments from the Effects of the Moratorium also, and Independently, Amounts to Unlawful Expropriation

531. Even if the Tribunal accepts that the police powers doctrine immunizes Canada from liability for the indefinite-term moratorium, it has no application to the Ontario Government's failure to insulate Windstream's investments from the effects of the moratorium.

532. As set out in paragraphs 367 to 371 above, the Ontario Government promised that the FIT Contract would be "frozen" and that the Project would be "on hold" for the duration of the moratorium so that it could "continue" after the moratorium was lifted. Internally, the Government decided that Windstream would be kept "whole."[825] Yet the Government failed to ensure that this promise was fulfilled.[826] The OPA refused to amend the FIT Contract so that it would be "frozen" and that the Project would be "on hold" and could "continue" after the moratorium was lifted. There is no evidence that MEI ever took any steps to direct the OPA to do so, or otherwise to ensure that the Government's promises to Windstream were fulfilled.

533. As explained in paragraphs 542 and 555 to 565 of Windstream's Memorial, this failure is an independent breach of Article 1110. Had the Ontario Government fulfilled its promise to insulate Windstream from the effects of the moratorium, the value of Windstream's investments would not have been destroyed.

534. Canada does not respond to this argument except to deny that WWIS, the Project and the FIT Contract are now worthless and to blame Windstream for the failure of negotiations with the OPA.[827] Both arguments are untenable. As noted above, Canada has not responded at all, let alone with expert evidence, to the expert evidence from Messrs. Low, Taylor and Bucci that Windstream's investments are now worthless.[828]

535. In addition, the failure of negotiations with the OPA cannot be blamed on Windstream. The OPA unreasonably refused to agree that the Project remain frozen for more than five years, whatever the moratorium's duration.[829] Agreeing to this unreasonable proposal would not have done Windstream any good. Windstream cannot be faulted for declining it.

536. Thus, the failure to insulate Windstream from the effects of the moratorium also, and independently, breaches Article 1110 of NAFTA.

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[825] See ¶ 360 above.

[826] See ¶¶ 372-398 above.

[827] Canada's Counter-Memorial, ¶¶ 465-489.

[828] See ¶¶ 472-477 above.

[829] See ¶¶ 385, 391 above.

II. Ontario has Failed to Grant Windstream's Investments Fair and Equitable Treatment in Breach of Canada's Obligations under NAFTA Article 1105(1)

537. Article 1105(1) of NAFTA guarantees foreign investors fair and equitable treatment of their investments in accordance with the minimum standard of treatment under customary international law. Contrary to Canada's submission, a breach of the fair and equitable treatment obligation includes, among other conduct, a breach of commitments made to induce the investment, a breach of the investor's legitimate expectations arising from a state's representations and assurances, arbitrary treatment, and grossly unfair treatment.

538. Ontario's conduct fits all of the breaches set out above. The imposition of the indefinite-term moratorium was inconsistent with Windstream's legitimate expectations arising from Ontario's commitments and assurances. The moratorium is arbitrary and grossly unfair because, (a) it is unnecessary to achieve its stated environmental protection objective, (b) it abruptly repudiated the well-established regulatory framework for offshore wind development, and (c) it was motivated by a desire to "kill" all the offshore wind projects.

539. Putting Ontario's choice to impose the moratorium to one side, Ontario's failure to "freeze" the FIT Contract and protect Windstream's investment amounts to an independent breach of Article 1105(1). Similarly, Ontario's comparably more favourable treatment of TransCanada, Samsung, and other renewable energy project proponents contravened Article 1105(1) as well.

A. Canada Inaccurately States the Legal Standard Under Article 1105(1)

540. Windstream set out in paragraphs 591 to 596 of its Memorial the test that NAFTA tribunals have applied in finding a breach of the fair and equitable standard under Article 1105(1). As summarized in paragraph 596 of Windstream's Memorial, NAFTA tribunals have found a breach of Article 1105(1) in circumstances involving treatment that:

(a) breaches commitments to the investor made to induce the investment or breaches the investor's legitimate expectations arising from state representations and assurances;[830]

(b) fails to maintain regulatory fairness and predictability;[831]

(c) is unfair, inequitable and unreasonable;[832]

(d) is grossly unfair, unjust or idiosyncratic;[833]

(e) is arbitrary;[834] or

(f) is discriminatory.[835]

541. Canada argues, incorrectly, that the threshold for proving a violation of Article 1105(1) is "extremely high" such that "NAFTA tribunals have consistently affirmed that a violation of the minimum standard of treatment under customary international law will not be found unless there

[830] **CL-134**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 ("***Bilcon***"), ¶¶ 442, 445, 455; **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 ("***Waste Management II***") ¶ 98; **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012 ("***Mobil***") ¶ 152; **CL-117**, *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/09/2), Award, 18 April 2013 ("***Abengoa***"), ¶ 641.

[831] **CL-051**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004 ("***GAMI***"), ¶ 104 ("outright and unjustified repudiation" of legal rules).

[832] **CL-061**, *Merrill & Ring* ¶ 210; **CL-066**, *Mondev* ¶¶ 119, 125.

[833] **CL-134**, *Bilcon*, ¶ 442; **CL-064**, *Mobil*, ¶ 152; **CL-091**, *Waste Management II*, ¶ 98; **CL-061**, *Merrill & Ring*, ¶ 199; **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 ("***Cargill***"), ¶ 296; **CL-085**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013 ("***TECO***"), ¶ 454; **CL-117**, *Abengoa*, ¶ 641.

[834] **CL-134**, *Bilcon*, ¶ 442; **CL-064**, *Mobil*, ¶ 152; **CL-091**, *Waste Management II*, ¶ 98; **CL-081**, *S.D. Myers*, ¶¶ 262-263; **CL-061**, *Merrill & Ring*, ¶ 187; **CL-051**, *GAMI*, ¶ 94; **CL-085**, *TECO*, ¶ 454; **CL-058**, *Ronald S. Lauder v. The Czech Republic* (UNCITRAL) Final Award, 3 September, ¶ 221.

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[835] **CL-064**, *Mobil*, ¶ 152; **CL-091**, *Waste Management II*, ¶ 98; **CL-051**, *GAMI* ¶ 94; **CL-085**, *TECO* ¶ 454.

is evidence of egregious conduct, such as serious malfeasance, manifestly arbitrary behaviour or denial of justice by the respondent NAFTA Party."[836]

542. This extreme position has been advanced by Canada in many cases, but has in fact been rejected by several NAFTA tribunals.[837] Indeed, in the recent decision in *Bilcon v. Canada*, the tribunal explicitly rejected Canada's arguments that the challenged conduct rises to the level of shocking or outrageous behaviour.[838] In *Mondev v. United States of America*, the tribunal stated that "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious."[839] Rather, the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.[840]

543. The only NAFTA tribunal to have accepted the extremely high "egregious conduct" standard that Canada urges the Tribunal to adopt is that in *Glamis Gold*. That tribunal's reasoning rested entirely on its finding that it was bound to apply the standard from the 1926 *Neer* decision absent evidence that the minimum standard of treatment under customary international law had evolved since *Neer*.[841] That reasoning has consistently been rejected by NAFTA tribunals,[842] other tribunals applying the minimum standard of treatment[843] and commentators such as Judge Stephen Schwebel.[844] This Tribunal should reject it too.

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[836] Canada's Counter-Memorial, ¶ 382.

[837] **CL-066**, *Mondev*, ¶¶ 114-119; **CL-022**, *ADF Group v. United States* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 ("***ADF Group***"), ¶¶ 179-186; **CL-091**, *Waste Management II*, ¶ 93; **CL-061**, *Merrill & Ring*, ¶¶ 209, 213; **CL-134**, *Bilcon*, ¶¶ 433-441; **CL-037**, *Chemtura*, ¶ 121; **CL-051**, *GAMI* ¶ 95; **CL-075**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 ("***Pope & Talbot,* Award on the Merits of Phase 2**"), ¶ 118.

[838] **CL-134**, *Bilcon*, ¶ 444.

[839] **CL-066**, *Mondev*, ¶ 116 [Emphasis added].

[840] **CL-057**, *International Thunderbird*, ¶ 194.

[841] **CL-053,** *Glamis Gold, Ltd. v. United States of America*, (UNCITRAL), Award, 8 June 2009 ("***Glamis Gold***"), ¶¶ 612-616.

[842] **CL-037**, *Chemtura*, ¶ 121; **CL-075**, *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 118; **CL-091**, *Waste Management II*, ¶ 93; **CL-061**, *Merrill & Ring*, ¶ 204; **CL-022**, *ADF Group*, ¶ 179; **CL-134**, *Bilcon*, ¶¶ 433-441.

[843] **CL-085**, *TECO*, ¶¶ 449-55; **CL-120**, *Deutsche Bank*, ¶¶ 419-20.

[844] **CL-138**, Schwebel, S.M., *Is Neer Far From Fair and Equitable* (Int'l Arb. Club, London, 5 May 2011) at 557-558.

B. Ontario Breached Windstream's Right to Fair and Equitable Treatment under Article 1105(1) by Imposing the Indefinite-Term Moratorium on Windstream's Investments

544. The application of the indefinite-term moratorium to the Project breached Windstream's right to fair and equitable treatment for at least four reasons. First, the indefinite-term moratorium is inconsistent with Windstream's legitimate expectations fostered by the Ontario Government's commitments and assurances made to induce the investment. Second, third and fourth, the moratorium is arbitrary and grossly unfair because it:

(a) is unnecessary to achieve its stated environmental protection objective, allowing for the opportunity to study impacts on drinking water and noise, two areas the proponent was required to study in the course of seeking regulatory approvals;

(b) abruptly repudiated the well-established regulatory framework for offshore wind development, set out in the REA Regulation and relied on by Windstream; and

(c) was motivated by a desire to "kill" offshore wind development arising from political calculus.

1. Moratorium is Inconsistent with Windstream's Legitimate Expectations Arising from the Ontario Government's Commitments

a) Article 1105(1) Protects an Investor's Legitimate Expectations Arising from Specific Commitments Made to Induce the Investment

545. Contrary to Canada's assertions,[845] tribunals applying Article 1105(1) have consistently held that, in determining whether the standard has been breached, it is relevant to consider whether a state has breached an investor's legitimate expectations arising from specific commitments made to the investor to induce the investment.

546. ***Abundant jurisprudence interprets Article 1105(1) to protect legitimate expectations arising from commitments.*** In *Mobil v. Canada*, the tribunal accepted that a breach of

[845] Canada's Counter-Memorial, ¶¶ 405-12.

representations made to the investor to induce the investment and which were reasonably relied upon are relevant considerations in finding a breach under Article 1105(1).[846] Although Canada erroneously suggests the contrary,[847] the *Mobil* tribunal established a three-part test for a Claimant to establish a breach of Article 1105(1) based on a breach of legitimate expectations. It stated:

> Having regard to the above conclusions, in support of its claim that there has been a breach of Article 1105, the burden is on the Claimants to establish a number of factual propositions. They must establish that (1) clear and explicit representations were made by or attributable to Canada in order to induce the investment, (2) such representations were reasonably relied upon by the Claimants; and (3) these representations were subsequently repudiated by Canada.[848]

547. The *Mobil* tribunal found that no such representations had been established, and therefore rejected Mobil's claim for breach of Article 1105(1).[849] However, contrary to Canada's assertion, there is no suggestion that the tribunal would have required Mobil to show anything more than meeting this three-part test to establish a breach of Article 1105(1).

548. The tribunal in *Bilcon* recently applied this test to conclude that a breach of Article 1105(1) had occurred.[850] In that case, the tribunal found that the Claimants had invested in a quarry project based on encouragements from the relevant governmental authorities to pursue their project at the site they chose. It found that they reasonably expected, based on these representations, that the project would be assessed on the merits of its environmental soundness in accordance with the same legal standards applied to applicants generally. Ultimately, the project could not be assessed based on its specific environmental soundness because the panel reviewing the project adopted an unprecedented approach based on "community core values" rather than environmental soundness. Thus, the tribunal found a breach of Article 1105 because

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[846] **CL-064**, *Mobil*, ¶ 152.

[847] Canada's Counter-Memorial, ¶ 408.

[848] **CL-064**, *Mobil*, ¶ 152.

[849] **CL-064**, *Mobil*, ¶¶ 154-71.

[850] **CL-134**, *Bilcon*, ¶¶ 445-54.

the claimant had been encouraged to engage in a process that was in retrospect "unwinnable from the outset."[851]

549. Other NAFTA tribunals have consistently recognized that a breach of specific commitments, reasonably relied upon by an investor and subsequently repudiated by the state would amount to a breach of Article 1105(1).[852] The tribunal in *International Thunderbird v. Mexico* explained that "[a] contracting Party's conduct creates reasonable and justifiable expectations on the part of the investor (or investment) to act in reliance on said conduct, such that failure by the NAFTA Party to honour these expectations could cause the investor (or investment) to suffer damages."[853] In his separate opinion, Thomas Walde agreed on the test but not its application to the facts of the case. He wrote:

> One can observe over the last years a significant growth in the role and scope of the legitimate expectation principle, from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self-standing subcategory and independent basis for a claim under the 'fair and equitable standard' as under Art. 1105 of the NAFTA.[854]

550. Even the tribunal in *Glamis Gold*, on which Canada relies heavily to support its proposed "egregious conduct" standard,[855] recognized that "a State may be tied to the objective expectations that it creates *in order to induce* investment."[856] Several arbitral decisions interpreting treaties other than NAFTA have also considered, in the same terms as does the

[851] **CL-134**, *Bilcon*, ¶¶ 446-54.

[852] **CL-091**, *Waste Management II*, ¶ 98; **CL-022**, *ADF Group*, ¶ 189; **CL-057**, *International Thunderbird*, ¶ 147.

[853] **CL-057**, *International Thunderbird*, ¶ 147.

[854] **RL-052**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Separate Opinion of Thomas Walde, December 2005, ¶ 37 [Emphasis added].

[855] Canada's Counter-Memorial, ¶¶ 386-387, 407.

[856] **CL-053,** *Glamis Gold*, ¶ 621.

NAFTA jurisprudence, that the fair and equitable treatment standard does protect investors from the breach of specific commitments made to induce their investment.[857]

551. As noted in paragraph 599 of Windstream's Memorial, the tribunal in *Merrill & Ring* went further, and accepted that Article 1105 protects investors' legitimate expectation that their business may be conducted in a normal framework free of government interference, even in the absence of specific representations made to induce the investment.[858]

552. ***Canada inaccurately characterizes Windstream's argument.*** At the outset of its argument with respect to Article 1105(1), Canada spends three pages asserting that Windstream has failed to establish that the autonomous fair and equitable treatment standard and the customary international law minimum standard are the same standard.[859] This argument is beside the point. Windstream does not argue, and the expert report of Professor Dolzer does not conclude, that the two standards are the same conceptually. Windstream argues, supported by the reasoning of a number of tribunals, that the content of the so-called "autonomous" fair and equitable treatment standard and the fair and equitable treatment standard as part of the minimum standard of treatment under customary international law is not substantively different.[860] Thus, tribunal decisions applying the legitimate expectations doctrine may also provide useful guidance to the Tribunal with respect to the application of Article 1105(1).

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[857] **RL-023**, *Enron Creditors Recovery Corporation* (*formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007 ("***Enron***"), ¶ 262; **CL-084**, *Tecmed*, ¶ 154; **RL-049**, *Sempra Energy International v. Argentine Republic* (ICSID No. ARB/02/16) Award, 28 September 2007 ("***Sempra Energy***"), ¶ 298; **CL-044**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award ("***Duke Energy***"), 18 August 2008, ¶ 340.

The existence of a contract is particularly important when assessing the claimant's legitimate expectations: **CL-133**, *Walter Bau v. Thailand*, UNCITRAL, Award, 1 July 2009, ¶ 12.9.

[858] **CL-061**, *Merrill & Ring*, ¶ 233.

[859] Canada's Counter-Memorial, ¶¶ 371-79.

[860] Windstream's Memorial, p. 234, footnote 947, citing **CL-049**, *Eureko B.V. v. Republic of Poland* (Ad Hoc Arbitration) Partial Award, 19 August 2005 ("***Eureko***"), ¶¶ 234-35; **CL-021**, *ADC Affiliate Limited and ADC & ADC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16) Award of the Tribunal, 2 October 2006 ("***ADC***"), ¶ 445; **CL-059**, *LG&E*, ¶¶ 121-23; **CL-076**, *PSEG Global*, ¶¶ 238-39; **CL-044**, *Duke Energy*, ¶ 337; **CL-129**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S., v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, ¶ 611.

553. The expert report of Professor Dolzer also supports this conclusion.[861] Contrary to the suggestion at paragraph 374 of Canada's Counter-Memorial, Professor Dolzer's opinion is not based on the views of tribunals. As set out in his opinion, it is based on the "proliferation of BITs and other investment treaties that contain FET provisions, combined with the fact that states are acting out of a sense of obligation in entering into these provisions."[862]

554. In any event, this analysis is included simply to respond to Canada's repeated assertion that the tribunal cannot seek guidance from tribunal decisions applying the so-called "autonomous" fair and equitable treatment standard. The Tribunal is not required to consider any non-NAFTA cases to reach the conclusion that the Ontario Government has breached Article 1105(1). Nevertheless, tribunal decisions from outside the NAFTA context also provide useful guidance to the Tribunal.

b) The Indefinite-Term Moratorium is a Repudiation of Ontario's Commitment to Process Regulatory Approvals for Projects with FIT Contracts in a Timely Way Within a Six-month "Service Guarantee"

555. As set out in paragraphs 259 to 263 above, the application of the indefinite-term moratorium to Windstream's Project has prevented Windstream from moving through the regulatory approvals process for the Project, and specifically from moving through the process to obtain a REA, the key environmental permit for the Project. This in turn has caused delays so drastic in the Project that the Project, WWIS and the FIT Contract have now all been rendered worthless.

556. As set out in detail in paragraphs 154 to 155 above, Windstream invested in the Project, and specifically entered into the FIT Contract against the backdrop of the Ontario Government strongly soliciting investment in renewable energy projects, and offshore wind projects specifically.

[861] Windstream's Memorial, footnote 947; CER-Dolzer.

[862] CER-Dolzer, ¶ 64.

557. The Ontario Government made multiple commitments intended to secure investment in the FIT Program. FIT contracts issued under the FIT Program had aggressive timelines by which a project would be required to achieve commercial operation. These timelines were introduced because the Government wanted to get renewable energy projects built quickly. Mr. Smitherman acknowledges this in his witness statement, explaining that the Ontario Government's goal was to get renewable energy projects built expeditiously, both to stimulate the economy by creating jobs and also to fill the supply gaps resulting from the closure of the coal-fired plants.[863] Ontario had success with renewable energy procurement in the past, which is why the Government was confident that the *Green Energy Act* could stimulate Ontario's economy.[864]

558. Thus, one of the key commitments that Minister Smitherman, as Minister of Energy and Infrastructure, made to investors in introducing the *Green Energy Act* was that FIT contract holders would have "certainty" that MNR and MOE "would issue permits in a timely way" in a "streamlined process within a service guarantee."[865] He emphasized that the new legislation would "[c]o-ordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process within a service guarantee," and that "[p]ermits would be issued within a six-month service window" provided that "all necessary documentation is successfully completed."[866]

559. These remarks "were designed to attract investors to Ontario."[867] Mr. Smitherman stressed that the Government's goal was to create certainty.[868] He states that he intended for investors *to rely* on the commitments made in his public statements, including that the relevant

[863] CWS-Smitherman, ¶ 56.

[864] CWS-Smitherman, ¶ 12.

[865] **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009), pp. 2-3; **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009), p. 2.

[866] **C-0114**, Notes for a Statement to the Legislature by Smitherman, George (MEI), Introduction of the Proposed *Green Energy and Green Economy Act, 2009* (February 23, 2009), pp. 2-3 [Emphasis added]; **C-0116**, Legislative Assembly of Ontario (Hansard Transcript), George Smitherman Statement (February 23, 2009), p. 2.

[867] CWS-Smitherman, ¶ 21.

[868] CWS-Smitherman, ¶¶ 14, 16.

permits would be issued within a six month service guarantee.[869] In fact, the six-month service guarantee was a key element in their plan to stimulate Ontario's economy through the FIT program because the construction of projects, the main components of the economic stimulus they hoped to achieve, would not occur until a project received a REA. Thus, it was very important to the Government that REAs be issued in a timely way.[870]

560. The context for these commitments was Ontario's aggressive solicitation of investment in renewable energy development through the FIT Program. The Government's "overriding objective in passing the *Green Energy Act* and in developing the tools to implement it, in particular the FIT Program, was to attract investment."[871]

561. Windstream relied on these commitments when it decided to invest in WWIS and the Project.[872] Mr. Mars understood Mr. Smitherman's comments as "an invitation for investors, including investors in offshore wind, to come to Ontario."[873] He relied on these comments (and others) when continuing to invest in the Project.[874] Indeed, Mr. Mars explained Mr. Smitherman's commitments in a memorandum to Windstream's investors, where he noted that the *Green Energy Act* "offered incentives and guarantees for renewable energy projects" and would "streamline the regulatory process and enable the rapid development of green energy projects across Ontario."[875]

562. These representations are akin to the representations given to the claimant in *Bilcon*, on which the tribunal in that case relied in finding that Canada had breached Article 1105(1). The representations given to the investor in that case included that the Province was "open for

[869] CWS-Smitherman, ¶¶ 19, 53.

[870] CWS-Smitherman, ¶ 54.

[871] CWS-Smitherman, ¶ 14 [Emphasis added].

[872] CWS-Mars-2, ¶¶ 11-22;CWS-Baines-2, ¶ 29; CWS-Ziegler-2, ¶¶ 7-8.

[873] CWS-Mars-2, ¶ 14.

[874] CWS-Mars-2, ¶ 14.

[875] CWS-Mars-2, ¶ 14; CWS-Mars, ¶ 51; **C-0120**, Memorandum from Ziegler, William (WEI) et al to [redacted] (March 13, 2009).

business" for quarry projects and expressions of support for the project from Government officials.[876]

563. Canada does not appear to dispute that Windstream relied on these representations. However, it suggests that Windstream's reliance on these representations was not reasonable in light of the alleged underdeveloped framework that applied to offshore wind projects.[877] There is no merit to Canada's argument, and it should be rejected for the following reasons.

564. First, Windstream's reliance on the Ontario Government's commitment to issue regulatory approvals for offshore wind projects in a timely way would only be unreasonable if the Government had made public statements reneging those commitments. For example, if the Government had announced publicly that the Government was considering imposing an indefinite-term moratorium on offshore wind development before Windstream entered into the FIT Contract, this might have rendered unreasonable Windstream's reliance on the Government's commitments to process regulatory approvals for offshore wind projects.

565. But the Government never gave any indication before Windstream applied for or entered into the FIT Contract that it was considering imposing an indefinite-term moratorium on offshore wind development. On the contrary, the applicable legislation required – and continues to require – that REA applications for offshore wind projects would be processed and assessed in the same manner as REA applications for the other types of renewable energy technologies to which the REA Regulation applies.[878]

566. As explained in pargraphs 156 to 159 above, none of the public documents on which Canada relies in any way suggested that Ontario was considering imposing an indefinite-term moratorium on offshore wind development.

[876] **CL-134**, *Bilcon*, ¶¶ 456-70.

[877] Canada's Counter-Memorial, ¶¶ 426-30.

[878] **C-0103**, REA Regulation, s. 13, Table 1.

567. Moreover, throughout many meetings with Government officials about the Project before Windstream entered into the FIT Contract,[879] no one ever suggested to Windstream that the Government was considering imposing an indefinite-term moratorium on offshore wind development. On the contrary, Windstream was advised that the Project had the support of the Ontario Government, including the Premier's Office.[880] Discussions were focused on the Project moving forward.[881] There was never any suggestion that the Project might be stalled indefinitely through an indefinite-term moratorium.

568. Second, the Ontario Government's January 2008 lifting of an earlier deferral on offshore wind development undermines the validity of Canada's argument. The Minister of Natural Resources had declared Ontario "open for business" for offshore wind development.[882] She lifted the deferral on offshore wind development on the basis that the Ontario Government's research "made clear" that the existing environmental approvals process was sufficient to ensure that offshore wind projects would be built in a manner that protected the environment.[883] Windstream could not have reasonably anticipated that the Ontario Government would reverse its view only three years later.

569. Third, in any event, as explained in paragraphs 213 to 233 above, the Ontario Government never communicated to developers that it considered the regulatory framework applicable to offshore wind projects to be "under-developed." There was no indication in any of the government's public announcements after it lifted the deferral in 2008 that Ontario was "not ready" to receive investment in offshore wind projects. Rather, Minister Cansfield's announcement lifting the deferral included a statement that "[a]ll proposed facilities must go through an environmental assessment."[884] As set out paragraphs 194 to 196 above, dozens of

[879] See ¶¶ 146-159 above. See also Windstream's Memorial, ¶¶ 273-277.

[880] CWS-Baines, ¶ 87; CWS-Mars, ¶ 69; CWS-Chamberlain, ¶ 16.

[881] CWS-Baines-2, ¶ 41.

[882] **C-0765**, Article (Toronto Star), Company blown away by Ontario (June 20, 2008); **C-0054**, Key Messages (MNR) (January 15, 2008), pp. 2, 4.

[883] **C-0147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference (October 21, 2009).

[884] **C-0058**, Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power (January 17, 2008).

Government documents show that the Government was satisfied that the existing environmental assessment process and regulatory mechanisms were sufficient to manage offshore wind project development and address site-specific environmental concerns.[885] This was the message that was received by investors.

570. Thus, Windstream could not have known that the Government was considering imposing an indefinite-term moratorium on offshore wind development. Had it known that, it would not have entered into the FIT Contract and incurred the obligation to bring the Project into commercial operation within specified time frames. Canada's assertions that Windstream's reliance on the Government's commitments to issue regulatory approvals for offshore wind projects in a timely way was unreasonable and should therefore be rejected.

571. In summary, the application of the indefinite-term moratorium to the Project was a breach of the Ontario Government's commitment that investors with FIT contracts could expect that regulatory approvals for renewable energy projects would be issued in a timely way with a service guarantee. Windstream reasonably relied on those commitments in investing in WWIS, the Project and the FIT Contract. Contrary to Canada's assertions, Windstream could not reasonably have anticipated that the Government would impose an indefinite-term moratorium on Windstream. That it did so was grossly unfair, in breach of Article 1105(1).

[885] **C-0749**, Presentation (MNR), Offshore Wind Power: Opportunities for Ontario (November 28, 2007), slide 9; **C-0750**, Email from Marinigh, Dan (MNR) to Keyes, Jennifer (MNR) (November 29, 2007); **C-0751**, Minister's Seeking Direction Briefing Note (MNR), Issue: Confirmation on Direction and Next Steps Associated with Lifting of Offshore Windpower Deferral on The Great Lakes (December 6, 2007), p. 3; **C-0052**, House Note (MNR), Issue: Lifting of the Offshore Wind Power Deferral (January 3, 2008), p. 1; **C-0752**, Issues Management Plan, Offshore Wind Power - Lifting the Deferral (January 3, 2008), slide 2; **C-0753**, Key Messages (Draft) (January 7, 2008); **C-0054**, Key Messages (MNR) (January 15, 2008), pp. 1, 2; **C-0758**, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008), p. 3; **C-0754**, Presentation (MNR), Issues Management Plan, Offshore Wind Power - Lifting the Deferral (January 15, 2008), slides 5, 12-15; **C-0768**, Handwritten Notes of Marcia Wallace (December 17, 2008).

c) The Indefinite-Term Moratorium is a Repudiation of Ontario's Commitment to Grant Crown Land Access in a Timely Manner

572. The indefinite-term moratorium has also prevented Windstream from obtaining the access to Crown land for the Project that it would need in order to proceed with development of the Project and achieve the timelines set out in the FIT Contract.

573. MNR made multiple commitments to Windstream that its applications for Crown land for the Project would be processed in a timely manner. Ostensibly because of the indefinite-term moratorium, MNR has refused to process Windstream's application for Crown land access. This, too, amounts to a breach of Article 1105(1).

574. First, on September 24, 2009, Minister of Natural Resources Donna Cansfield specifically directed Windstream to apply to the FIT Program during the Program's launch period so that Windstream could maintain its priority position within MNR's site release process.[886] Relying on this representation that Windstream would have a priority position for access to Crown land at the Project site, Windstream applied to the FIT Program.[887]

575. Second, this assurance was confirmed in another letter from MNR on November 24, 2009, which stated that "[e]xisting Crown land applicants who apply to FIT during the launch period, and who are awarded contracts by the OPA, will be given the highest priority to the Crown land sites applied for." MNR further confirmed that "these applications will take precedence over all others for this site, and will receive priority attention from MNR."[888]

576. Third, after Windstream was offered the FIT Contract but before it signed it, MNR issued a letter to Windstream that confirmed its willingness to discuss with Windstream the reconfiguration of WWIS' Crown land applications given the proposed five-kilometre setback and that WWIS had been offered a FIT Contract. Those discussions would take place after the

[886] **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009).

[887] CWS-Baines, ¶ 56; CWS-Mars, ¶ 57; **C-0144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) (September 24, 2009), p. 1.

[888] **C-0158**, Letter from Lawrence, Rosalyn (MNR) to Homung, Robert (Canadian Wind Energy Association) (November 24, 2009), p. 1.

proposed five-kilometre setback had been finalized.[889] MNR emphasized in the letter, dated August 9, 2010, that the Project would be permitted to move through the remainder of the Crown land application process after the setback had been finalized and that MNR would not be the cause of regulatory delays. It stated:

> I appreciate your need for certainty on this file, and we will move as quickly as possible through the remainder of the application review process in order that you may obtain Applicant of Record status in a timely manner.[890]

577. Fourth, the Premier's Office and the Minister of Energy's Office also approved the sending of this letter to Windstream,[891] after Windstream's representative advised the Minister of Natural Resources' Office that the purpose of the letter was to "sell" the FIT Contract to Windstream's investors.[892]

578. This letter gave Windstream significant comfort that the Ontario Government was committed to working with it to accommodate any policy changes in order to make the Project a reality.[893] It also gave Windstream significant comfort about the timing of receiving the Applicant of Record status.[894] Windstream therefore relied on these specific assurances when it caused WWIS to execute the FIT Contract.[895]

579. ***Canada's interpretation of these assurances is unreasonable.*** Canada suggests that these letters "could not have reasonably been interpreted as providing any specific assurances regarding the length of time it would take MNR to grant AOR status or, for that matter, whether MNR would grant it at all."[896]

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[889] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

[890] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010), p. 2 [Emphasis added].

[891] **C-0838**, Email from Maskell Lindsay (MNR) to Linley, Richard (MNR) (August 4, 2010).

[892] **C-0328**, Email from Linley, Richard (MNR) to Benedetti, Chris (Sussex Strategy Group) (August 5, 2010).

[893] CWS-Mars-2, ¶ 31.

[894] CWS-Mars-2, ¶ 32.

[895] CWS-Mars-2, ¶ 29.

[896] Canada's Counter-Memorial, ¶ 418.

580. This suggestion is inaccurate, and should be rejected. MNR specifically advised Windstream, for the purpose of inducing it to sign the FIT Contract, that it would "move as quickly as possible through the remainder of the application review process so that [WWIS] may obtain Applicant of Record status in a timely manner."[897] MNR committed to do that immediately after the five-kilometre setback was finalized. This was never done because of the imposition of the indefinite-term moratorium by the Ontario Government. The Ontario Government was aware, when it made that commitment, that Windstream would be required to post millions of dollars in security if it entered into the FIT Contract. It was also aware that Windstream would be required to bring the Project into commercial operation within five years.[898]

581. Against that background, it is difficult to see how Windstream could have reasonably interpreted this letter in any way other than as a commitment that WWIS' application for AOR status would be processed and granted in a timely manner. Ostensibly because of the indefinite-term moratorium, MNR has still failed to grant Windstream AOR status for the Project site, nearly five years after the August 9, 2010 letter was issued. On any reasonable interpretation, this is a clear repudiation of MNR's commitment to "move as quickly as possible" through the remainder of the process and to grant AOR status to WWIS "in a timely manner."

582. ***MNR emphasized necessity of applying to FIT Program.*** In addition, MNR had earlier assured Windstream directly, and the renewable energy industry more generally, that applying to the FIT Program was a prerequisite for maintaining a priority position for access to Crown land. MNR must have been aware, when it gave this direction, that Windstream would be required to post millions of dollars in security to apply for the FIT Program.

583. MNR's letters also amounted to specific commitments to give WWIS' applications for AOR status priority attention if WWIS applied for and obtained a FIT Contract. Canada attempts to dismiss the importance of the second letter and does not mention the first at all.[899] At the time

[897] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010), p. 2.

[898] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

[899] Canada's Counter-Memorial, ¶ 418.

of writing this Reply Memorial, it has been more than five and a half years since those letters were issued. On any reasonable interpretation, MNR's failure to process WWIS' applications for AOR status within a reasonable period of time is contrary to its commitment to give WWIS' applications priority attention.

2. Moratorium is Arbitrary and Grossly Unfair Because it is Unnecessary to Achieve its Stated Environmental Protection Objective

584. Canada takes the position that there is nothing neither manifestly arbitrary nor grossly unfair about the moratorium because "the reason for this decision was that additional scientific research was needed to ensure that the policy framework for offshore wind that was under development would have an adequate foundation."[900]

585. This position should be rejected. The application of the moratorium to the Project is arbitrary and grossly unfair because it is completely unnecessary to achieve the environmental protection purpose that is the moratorium's stated rationale.

586. As discussed above,[901] the Project is already subject to detailed regulatory requirements that protect human health and the environment. Simply put, the existing regulatory process requires that Windstream conduct research on a site-specific basis to establish that the Project will not have any immitigable negative environmental impacts. It is Windstream's burden, under the existing process, to conduct the studies to prove that the Project is environmentally sound. By applying the moratorium to the Project, Ontario has prevented Windstream from establishing that the Project would be environmentally sound. It has prevented Windstream from doing the very work that Ontario says is needed, while not advancing the work substantially itself.

587. Relying on the witness statement of John Wilkinson, Canada points to the need to address "noise emissions, water quality, disturbance on benthic life forms, and the potential of structural failure."[902] This is no justification for preventing Windstream from proceeding through the

[900] Canada's Counter-Memorial, ¶ 392.

[901] See ¶¶ 200-211, 265-272 above.

[902] Canada's Counter-Memorial, ¶ 397.

existing regulatory process under the REA Regulation. That process already requires that Windstream conduct research on a Project-specific basis to establish that none of those factors would raise immitigable negative environmental impacts.[903]

588. Moreover, Canada has submitted no evidence – let alone expert evidence – that explains what information Ontario could hope to glean through generalized research that would be more protective of the environment than the research Windstream is already required to conduct for the Project on a site-specific basis. Windstream's Project-specific studies would have addressed any impacts related to "noise emissions, water quality, disturbance of benthic life forms, and the potential of structural failure." Indeed, Windstream's Project-specific studies would have addressed all environmental impacts from the Project, because that is what the existing regulatory framework – REA Regulation – required.[904] [redacted]

[903] See ¶¶ 200-211, 265-272.

[904] **C-0873**, Request for Proposal (Stantec Consulting Ltd.), Wolfe Island Shoals Offshore Windfarm Permitting and Field Investigation Services (November 25, 2010); **C-0872**, Response to Request for Proposal (Natural Resource Solutions Inc.), Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Submission for: Option 2. Ecological Field Work (November 25, 2010); **C-0870**, Proposal (HCCL), Wolfe Island Offshore Windfarm Permitting and Field Investigation Services, Option 3, Technical Field Work (November 26, 2010); **C-0869**, Proposal (GEI Consultants), Wolfe Island Shoals Offshore Windfarm, Proposal for Permitting Assistance Services: Option 6 - Inter-Jurisdictional Advisor (November 24, 2010); **C-0867**, Proposal (Bedford Consulting), Wolfe Island Shoals Request for Proposals (File 90803) - Option 5 (November 23, 2010); **C-0865**, Proposal (Genivar) to Ortech Environmental re Wolfe Island Shoals Offshore Wind Farm, Proposal for Permitting and Field Investigation Services (November 25, 2010); **C-0874**, Proposal (MWA) for Permitting and Field Investigation Services - Option 5: Aboriginal Consultation (November 25, 2010); **C-0968**, Proposal (SLR) Wolfe Island Shoals Offshore Windfarm, Permitting and Field Investigation Services, Options 1 and 2 (November 26, 2010); **C-0877**, Technical Proposal for Commissioning Support and Wind Analysis for One Site in Wolfe Island (GL Garrad Hassan) (December 2, 2010); **C-0876**, Proposal (AET Consultants) for Wolfe Island Shoals Offshore Wind Farm, Option 2 - Ecological Field Work (November 30, 2010); **C-0866**, Proposal (Scarlett Janusas and Shark Marine), Wolfe Island Shoals Offshore Windfarm Background Research & Field Investigation Services, Land and Underwater Archaeological Resource Assessments, Option 4 (November 20, 2010); **C-0875**, Proposal (The Central Archaeology Group Inc.), Wolfe Island Shoals Windfarm, Permitting and Field Investigation Services, Option 4 - Cultural Heritage Study & Archaeology Study (November 26, 2010); **C-0868**, Proposal (Ecology and Environment Inc.) to Provide Option 6 - Inter-Jurisdictional Advisor Support for the Windstream Wolfe Island Shoals Offshore Wind Farm (November 24, 2010); **C-0871**, Consultation & Communication Proposal (AECOM) for Windstream Wolfe Island Shoals Inc. Offshore Wind Site (November 25, 2010).

[905] **C-0959**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) (January 28, 2011).

589. It therefore makes no sense for Canada to suggest that additional, Government-led research is required in order to ensure that the Project would not have adverse impacts on those areas of environmental concern it identifies.[906]

3. Moratorium is Arbitrary and Grossly Unfair Because it Abruptly Repudiated the Applicable Regulatory Framework for Offshore Wind Development

590. Canada is also incorrect in stating that the moratorium is anything less than an abrupt repudiation of the REA Regulation's application to offshore wind projects. Canada, and Dr. Wallace's witness statement, give the incorrect impression that the REA Regulation does not specify the requirements that offshore wind projects would be required to meet.[907]

591. This is inaccurate. As discussed in paragraphs 265 to 267 above, the REA Regulation applied to the environmental review of offshore wind projects at the time Windstream caused WWIS to apply to the FIT Program and enter into the FIT Contract. The REA Regulation applies to offshore wind projects as well as to other specified types of renewable energy projects. The REA Regulation specifies the requirements that an offshore wind project proponent must meet in order to apply for a REA. Those requirements include submitting a specified list of reports. One of those reports was the Offshore Wind Facility Report, which is a specific report that applies only to offshore wind projects. That report requires that the proponent (a) describe the nature of the existing environment in which the project will be engaged, (b) identify any negative environmental effects that may result from engaging in the project, and (c) identify mitigation measures.[908]

592. Because of the indefinite-term moratorium "Ontario is not proceeding with any development of offshore wind projects."[909] Thus, MOE would refuse to accept an application by WWIS for a REA for the Project. Because of the moratorium, it became impossible for WWIS to

[906] Canada's Counter-Memorial, ¶ 397.

[907] Canada's Counter-Memorial, ¶¶ 401-02; RWS-Wallace, ¶¶ 12-18, 19, 22-23.

[908] **C-0103**, REA Regulation, s. 13, Table 1.

[909] **C-0494**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Offshore Wind Facilities - An Overview of the Proposed Approach (February 11, 2011).

proceed with the environmental approvals process and comply with the requirements set out in the REA Regulation. As Windstream argued in paragraph 615 of its Memorial, this is the kind of abrupt repudiation of a regulatory framework that tribunals have consistently found to breach the fair and equitable treatment standard.[910]

593. Canada seeks to justify the moratorium's repudiation of the REA Regulation as it applies to offshore wind projects by accusing Windstream of "gloss[ing] over the technology-specific requirements in the REA Regulation."[911] Windstream has done no such thing. The technology-specific requirement in the REA Regulation for offshore wind projects is the submission of an Offshore Wind Facility Report. There are no other, as-yet-unspecified, "technology-specific requirements" for offshore wind facilities in the REA Regulation. The moratorium prevents WWIS from complying with the very technology-specific requirements that the REA Regulation requires it to complete in order to proceed with the REA application process. The moratorium is therefore very much a repudiation of the existing regulatory framework for offshore wind projects.

594. To address this point, Canada inaccurately represents the decision notice that accompanied the REA Regulation communicated to proponents of offshore wind projects to allegedly state that "'special rules' would eventually apply to offshore wind projects."[912] As explained above in paragraph 217, the decision notice states that <u>there are</u> special rules that <u>do</u> apply to offshore wind projects. This is a reference to the Offshore Wind Facility Report set out in the REA Regulation. The decision notice, which Canada and Dr. Wallace repeatedly misquote, states:

[910] See **CL-031**, *Cargill*, ¶ 291, 293; **CL-085**, *TECO*, ¶ 621.

[911] Canada's Counter-Memorial, ¶ 402.

[912] Canada's Counter-Memorial, ¶ 402, citing **R-0072**, Ministry of the Environment, "Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Economy Act, 2009" (EBR Registry No. 010-6516) (September 24, 2009).

> There are special rules for wind facilities that include turbines in contact with surface water, other than wetlands. These facilities require an REA and are required to submit an off-shore wind facility report as part of the application. The Ministry of the Environment and the Ministry of Natural Resources continue to work on a coordinated approach to off-shore wind facilities which would include province-wide minimum separation distances for noise.[913]

595. Nothing about this document could have given Windstream an indication that the Ontario Government would abruptly impose a moratorium on offshore wind projects that would prevent WWIS from proceeding through the regulatory approvals process for the Project. Canada's repeated suggestion to the contrary is a misrepresentation of the facts in this case.

4. Moratorium is Arbitrary and Grossly Unfair Because it was Motivated by a Desire to "Kill" Other Offshore Wind Projects, and Ended Up "Killing" the Project Too

596. The application of the indefinite-term moratorium is all the more arbitrary and grossly unfair given that it was motivated by the desire to "kill" offshore wind projects, ostensibly to save costs and because of electoral politics.[914] The Ontario Government apparently did not originally intend to "kill" Windstream's Project with the moratorium,[915] but the moratorium did in fact have that effect.[916] Ontario caused Windstream's investments to become worthless in circumstances where it had heavily solicited investment in offshore wind development,[917] and encouraged Windstream to cause WWIS to enter into the FIT Contract.[918]

597. NAFTA tribunals[919] and tribunals interpreting fair and equitable treatment provisions in other treaties[920] have repeatedly found that measures taken for a motive other than their stated

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[913] **R-0072**, Ministry of the Environment, "Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Economy Act, 2009" (EBR Registry No. 010-6516) (September 24, 2009), p. 1.

[914] See ¶¶ 334-354 above.

[915] See ¶¶ 325-344 above.

[916] See ¶¶ 325-344 above.

[917] See ¶¶ 57-110 above.

[918] See ¶¶ 111-159 above.

[919] **CL-031**, *Cargill*, ¶¶ 291, 293, 299; **CL-062**, *Metalclad*, ¶ 86; **CL-081**, *S.D. Myers*, ¶¶ 183, 185, 193-195.

rationale amount to a breach of the fair and equitable treatment standard. This is particularly the case where the measure is motivated by political expediency.[921]

598. Canada dismisses as "wild accusations" Windstream's argument that the moratorium was born out of political expediency without addressing the evidence on which Windstream relies.[922] Canada is wrong. The record is replete with references to the true motivation for the moratorium being to stall and constrain offshore wind development, so that Ontario could "buy time with research."[923]

599. As explained in paragraphs 334 to 354 above, the moratorium was adopted as a policy decision based on political motivations. No piece of evidence is more clear that this was the true motivation for the moratorium than the email from Premier McGuinty's Chief of Staff, Mr. Morley, on January 11, 2011:

> Sorry, folks. This isn't good enough. The purpose of this release is to kill all the projects except the Kingston one [Windstream's Project], not suck and blow. Please turn this around so it kills the projects, not sounds like we're in favour of offshore wind.[924]

600. The decision to impose the moratorium was not based on legitimate scientific concerns as Canada claims. Instead, it was to "kill" offshore wind projects.[925] This is further supported by the fact that very little research has been done,[926] and the research MOE is pursuing appears to be motivated by a desire to avoid an "adverse ruling" in this arbitration.[927] It is also supported by the fact that there is not, nor has there ever been, an end in sight to the moratorium. It is apparent

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[920] **CL-084**, *Tecmed*, ¶¶ 152-174; **CL-049**, *Eureko*, ¶¶ 198, 233; **CL-041**, *Vivendi II*, ¶ 5.2.5; **CL-045**, *Eastern Sugar B.V. v. Czech Republic* (SCC Case No. 088/2004) Partial Award, 27 March 2007 ("***Eastern Sugar***"), ¶ 265.

[921] **CL-049**, *Eureko*, ¶¶ 198, 233; **CL-081**, *S.D. Myers*, ¶¶ 183, 185, 193-195; **CL-041**, *Vivendi II*, ¶ 5.2.5; **CL-045**, *Eastern Sugar*, ¶ 265; **CL-031**, *Cargill*, ¶ 299.

[922] Canada's Counter-Memorial, ¶ 392.

[923] **C-0376**, Handwritten Notes of Dilek Postacioglu (ENE) (November 1, 2010), p. 1.

[924] **C-0911**, Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) et al (January 11, 2011) [Emphasis added].

[925] **C-0376**, Handwritten Notes of Dilek Postacioglu (ENE) (November 1, 2010), p. 1.

[926] See ¶¶ 409-446 above.

[927] **C-1094**, Email from Block, Jennifer (ENERGY) to Cain, Ken (MNR) (March 6, 2013) [Emphasis added].

from the above that the "scientific uncertainty" rationale for the moratorium can be nothing other than a pretext to justify the Government's decision to eliminate offshore wind development in Ontario.

C. Ontario Government's Failure to "Freeze" the FIT Contract and Allow the Project to "Continue" Breached Article 1105(1)

601. Windstream also made the case in paragraph 623 of its Memorial that the Ontario Government's failure to fulfill its commitments to "freeze" the FIT Contract so that the Project could "continue" after the moratorium is lifted is an independent breach of Article 1105(1). Canada's only response to this argument is that Windstream "ignores the fact that Ontario took all reasonable measures to accommodate" Windstream.[928] For the reasons set out in paragraphs 372 to 394 above, even accepting the OPA's best offer would not have done Windstream any good. Canada's position that "Ontario took all reasonable measure to accommodate" Windstream is not supported by the evidence.

D. Ontario Government's More Favourable Treatment of TransCanada, Samsung and Other Renewable Energy Project Proponents Breached Article 1105(1)

602. A measure is discriminatory under international law if it has a discriminatory effect.[929] Discriminatory intent is not necessary.[930] According to Canada, Windstream failed to distinguish between its Article 1105 claims with respect to TransCanada and Samsung from its claims under Articles 1102 and 1103. Canada argues that nationality-based discrimination has never been prohibited as a matter of customary international law. Canada cites no legal authorities to support this narrow interpretation of Article 1105. Contrary to Canada's argument, several NAFTA tribunals have found that discriminatory treatment may amount to a breach of Article 1105.

[928] Canada's Counter-Memorial, ¶ 446.

[929] **CL-127**, *Unglaube*, ¶¶ 262-63.

[930] **CL-127**, *Unglaube*, ¶¶ 262-63.

Discriminatory conduct that does not violate Articles 1102 and 1103 may still violate Article 1105.[931]

603. Therefore, whether Windstream was treated less favourably than other investors is also a relevant consideration to the Tribunal's analysis under Article 1105. As set out in detail at paragraphs 624 to 633 of its Memorial, Ontario provided preferential treatment to TransCanada, Samsung and other applicants for Crown land and other developers of large-scale projects who were awarded FIT contracts at the same time as Windstream.

604. Contrary to the argument in paragraph 444 of Canada's Counter-Memorial, the fact that MNR has granted AOR status to 19 other applicants, as reflected on the map referenced in paragraph 633 of Windstream's Memorial,[932] further demonstrates that MNR's treatment of Windstream was discriminatory and grossly unfair. Windstream was assured that MNR appreciated its "need for certainty" and that it would "move as quickly as possible through the remainder of the application review process in order that [WWIS] may obtain Applicant of Record status in a timely manner."[933] Contrary to those commitments, MNR has failed to even process Windstream's applications, while it has granted AOR status to other applicants for Crown land. Further, contrary to Canada's assertion that Windstream did not identify the proponents that received Applicant of Record status,[934] the proponents are identified in the map.[935]

605. Moreover, as set out in paragraph 633 of Windstream's Memorial, every other developer of a large-scale onshore wind energy project awarded a FIT contract at the same time as Windstream has been allowed to proceed through the regulatory approvals process. This also

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[931] **CL-060**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 123; **CL-091**, *Waste Management II*, ¶ 98; **CL-053**, *Glamis Gold*, ¶¶ 22, 829.

[932] **C-0690**, Map (Ortech), Windstream Application v. Crown Land Wind Sites with Accepted Applications (April 8, 2014).

[933] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010).

[934] Canada's Counter-Memorial, ¶ 444.

[935] **C-0690**, Map (Ortech), Windstream Application v. Crown Land Wind Sites with Accepted Applications (April 8, 2014).

shows that Windstream was subject to discrimination and gross unfairness. While Canada attempts to distinguish Windstream as an offshore wind project, no such distinction was made by Minister Smitherman when he promised all FIT contract holders "certainty," and specifically "certainty" with respect to the timeliness of the permitting process.

III. Ontario has Treated Windstream Less Favourably than Canadian and Foreign Investors, Contrary to Canada's Obligations Under Articles 1102 and 1103 of NAFTA

606. In paragraphs 634 to 645 of its Memorial, Windstream established that the Ontario Government treated Windstream less favourably than two investors in like circumstances: TransCanada, a Canadian investor, and Samsung, an investor of a third party, contrary to Articles 1102 and 1103 of NAFTA. For the reasons set out below, Canada's arguments that the procurement exception applies and that TransCanada is not in like circumstances to Windstream should be rejected. Windstream relies on the arguments set out in paragraph 645 of its Memorial with respect to the more favourable treatment of Samsung.

A. Procurement Exception Does Not Apply In These Circumstances

607. Canada argues that Windstream's claims based on Articles 1102 and 1103 are foreclosed by the exception contained in Article 1108(7)(a). NAFTA Article 1108(7) sets out a limited exception to the application of Articles 1102 and 1103 by stating that they do not apply to "procurement by a Party or a state enterprise." As a FIT Contract holder, Windstream's Crown land applications were to "receive priority attention from MNR."[936]

608. Canada's argument should be rejected. Canada argues that the "FIT Program" involves procurement by a state enterprise within the meaning of Article 1108(7)(a).[937] But Windstream never claimed that it was subject to less favourable treatment by the OPA in connection with "the FIT Program."

[936] **C-0158**, Letter from Lawrence, Rosalyn (MNR) to Homung, Robert (Canadian Wind Energy Association) (November 24, 2009), p. 1.

[937] Canada's Counter-Memorial, ¶¶ 326-32.

609. As set out in paragraphs 642 to 644 of Windstream's Memorial, Windstream was subject to less favourable treatment than TransCanada by the Ontario Government in connection with the means by which the Ontario Government implemented a termination of their respective projects. When a decision was made to terminate TransCanada's project, the Premier's Office intervened with the OPA to ensure that TransCanada was kept "whole."[938] A decision to effectively terminate Windstream's project also appears to have been made, yet Windstream was not kept "whole." Thus, the relevant measure for the purpose of the analysis under Article 1102 is the failure to keep Windstream "whole" after the moratorium decision was made. The treatment of an investor in the face of a decision to cancel a project is not "procurement by a Party or a state enterprise."

610. Like all exceptions in investment treaties,[939] the procurement exception must be construed narrowly. Properly construed, the exception applies only with respect to the act of "procuring." For example, as Canada acknowledges,[940] the tribunal in *ADF Group Inc.* found that "procurement" refers to the act of obtaining, "as by effort, labor, or purchase." Governmental procurement refers to "the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery."[941]

611. Canada cites no authority in support of its argument that the exception applies more broadly than to the act of procuring. Properly construed, the procurement exception does not apply to exempt from the application of Articles 1102 and 1103 treatment of an investor

[938] **C-0650**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 23, 2013); **C-0649**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 18, 2013), p. JP-275; **C-0652**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 30, 2013), p. JP-368; **C-0653**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), p. JP-399; **C-0654**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 14, 2013), pp. JP-448-JP-449; **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013), p. 14; **C-0535**, Notes to file of Calwell, Carolyn (MEI) and Perun, Halyna (MEI) re Meeting with Michael Barrack and John Finnegan (June 2, 2011).

[939] **CL-030**, *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 July 2006, ¶ 187; **RL-049**, *Sempra Energy*, ¶ 373; **RL-023**, *Enron*, ¶ 331; **CL-123**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011 ("***Lemire***"), ¶¶ 44-47.

[940] Camada's Counter-Memorial, ¶ 323.

[941] **CL-022**, *ADF Group*, ¶ 161.

following a decision to cancel the investor's procurement contract. Such a broad interpretation of the exception would gut the protections afforded by Articles 1102 and 1103.

612. Moreover, "procurement" does not extend to procurement of electricity by the OPA for the purpose of reselling it to customers. The OPA buys electricity for the purpose of immediate resale to customers via Ontario's electricity grid. The plain definition of "procurement" referred to above makes clear that "procurement" refers to the obtaining of title to or possession of a good or a service. The Tribunal should reject a broad definition of "procurement" that extends to situations where, as here, the state enterprise acts as a conduit for the sale of a good or service to customers.

613. The one authority that Canada cites in support of its position,[942] *UPS v. Canada*, did not involve procurement by a government for the purpose of resale. Rather, it involved procurement of government services, for the benefit of the government, but paid for by third parties.[943] That decision does not assist Canada's argument.

B. TransCanada is in Like Circumstances to Windstream With Respect to Treatment Following the Decision to Terminate Its Project

614. Canada distinguishes TransCanada's situation from Windstream's by raising irrelevant distinctions that obscure the strikingly similar circumstances arising in connection with the termination of TransCanada's and Windstream's respective projects. With respect to the contractual implications of the cancellation of their respective projects, TransCanada and Windstream operated in a nearly identical legal framework.

615. ***Both parties had power purchase agreements with the OPA.*** As set out in paragraph 401 and 642 of Windstream's Memorial, TransCanada and Windstream were both parties to power purchase agreements with the OPA that guaranteed them a fixed price for electricity once their projects reached commercial operation. Canada argues that TransCanada and Windstream are not in like circumstances because their respective contracts were awarded pursuant to different

[942] Canada's Counter-Memorial, ¶¶ 324-25.

[943] **CL-088,** *United Parcel Services of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007.

procurement processes.[944] That argument might hold true if the relevant treatment was treatment during the procurement process,[945] but that is not the case. What is at issue is the Ontario Government's vastly different treatment of two electricity project proponents with power purchase agreements with the OPA, following a decision to cancel their projects. The process by which those contracts were procured is irrelevant to the "like circumstances" analysis.

616. ***Both contracts were under force majeure and could not avoid triggering the OPA's force majeure termination right.*** As set out in paragraph 407 to 410 and 643 of Windstream's Memorial, both contracts were under *force majeure* at the time the cancellation decision was made – TransCanada's because of a legal dispute, and WWIS' because of MNR's failure to grant WWIS AOR status. The *force majeure* provisions in both contracts were identical. Both provided that the OPA could terminate the contract if the project did not reach commercial operation within two years of its original commercial operation date. Because of *force majeure* events outside their control, both projects were unable to meet that ultimate deadline.

617. Canada draws a distinction based on the nature of the *force majeure* at issue in both cases, without explaining the relevance of that distinction.[946] The reason why both contracts were under *force majeure* does not matter. What matters is that they were both under *force majeure* and unable to avoid triggering the OPA's *force majeure* termination rights because of events outside the proponents' control.

618. ***Both projects were cancelled.*** TransCanada's project was formally cancelled for political reasons – because of local opposition to the project.[947] As established in paragraphs 334 to 354 above, Windstream's Project was *de facto* cancelled as a result of the indefinite-term moratorium, a decision made to "kill" offshore wind projects. There is no principled basis on

[944] Canada's Counter-Memorial, ¶ 350.

[945] Although tribunals have consistently rejected the undue narrowing of the class of potential comparators: **CL-134**, *Bilcon*, ¶ 692; **CL-071**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11) Award, 5 October 2012.

[946] Canada's Counter-Memorial, ¶ 351.

[947] Windstream's Memorial, ¶ 411; **C-0652**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (April 30, 2013), ¶ JP-368; **C-0653**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee on Justice Policy (May 7, 2013), ¶ JP-399.

which a project proponent whose project is expressly cancelled should be kept "whole," while a project proponent whose project is *de facto* if not formally cancelled should not be kept "whole."

619. ***Ontario Government decided to keep both TransCanada and Windstream "whole" but followed through only for TransCanada.*** The Ontario Government, and in particular the Premier's Office, decided to keep TransCanada "whole" and directed the OPA to negotiate with TransCanada to achieve that objective.[948] The Government instructed the OPA to increase its offer from $462 million to $712 million, which made TransCanada more than "whole," since at the outset it claimed a net present value of $503 million for its project.[949]

620. Similarly, the Ontario Government, and the Premier's Office, decided to keep Windstream "whole"[950] and directed the OPA to negotiate with Windstream to achieve that objective.[951]

621. Canada attempts to distinguish TransCanada's situation because TransCanada entered into an arbitration proceeding with the OPA after negotiations over keeping it "whole" failed.[952] Canada's argument confuses different treatment with the "like circumstances" analysis. This position conflates the relevant factors under Article 1102 and should be rejected.

622. When TransCanada and the OPA failed to reach a resolution on how the Ontario Government's decision to keep TransCanada "whole" would be implemented, the OPA agreed to resolve the matter by way of binding arbitration which resulted in TransCanada being kept "whole."[953] In contrast, when Windstream and the OPA could not agree on how to preserve Windstream's rights following the moratorium decision, the OPA refused to give Windstream

[948] Windstream's Memorial, ¶¶ 411-426.

[949] **C-1906**, OPA, Winding Up of the Oakville Generating Station (OGS) Contract (May 18, 2011), p. 2; **C-1905**, OPA, Analysis of TCE Cost of Capital (November 24, 2011), p. 5.

[950] **C-0965**, Email from Block, Andrew (MEI) to Mitchell, Andrew (MEI) and MacLennan, Craig (MEI) (February 4, 2011); **C-0966**, Email from Murray, Martha (ENE) to Linley, Richard (MNR) et al (February 8, 2011).

[951] See ¶¶ 358-371 above; **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, p. 2; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

[952] Canada's Counter-Memorial, ¶ 353.

[953] **C-0792**, Arbitration Agreement, *TransCanada Energy Ltd. v. Her Majesty the Queen in Right of Ontario and OPA*.

any alternative project,[954] refused to return Windstream's full $6 million in security,[955] and preserved its right to exercise its *force majeure* termination right.[956] That is the basis on which Windstream argues that TransCanada received better treatment in like circumstances.

623. In summary, with respect to their treatment following the decisions to cancel their respective projects, TransCanada and Windstream were in like circumstances – indeed, strikingly so. Canada does not appear to deny that TransCanada was afforded better treatment than Windstream. Thus, for the reasons set out above and in paragraphs 634 to 644 of Windstream's Memorial and above, Ontario's better treatment of TransCanada than Windstream in like circumstances breaches Canada's obligations under Article 1102 of NAFTA.

624. ***Other offshore wind project proponents not in like circumstances.*** Canada's assertion that other offshore wind project proponents were more in like circumstances to Windstream than TransCanada should also be rejected.[957] Canada's position ignores that the treatment that Windstream asserts breached Article 1102 was the better treatment of TransCanada following the decision to cancel its project, given that its power purchase agreement was also under *force majeure* at the time and risked triggering the OPA's *force majeure* termination right. None of the other offshore project proponents had a FIT Contract. They are therefore not appropriate comparators. The Ontario Government repeatedly recognized Windstream's unique status among offshore wind project proponents as the only FIT Contract holder.[958] As the *Methanex* tribunal recognized, "it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed."[959] In these circumstances, TransCanada is the more appropriate comparator.

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[954] **C-0528**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (April 18, 2011); **C-0556**, Email from Heneberry, Jennifer (MEI) to Slawner, Karen (MEI) et al. (October 17, 2011); **C-0537**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (June 7, 2011).

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

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

[957] Canada's Counter-Memorial, ¶¶ 358-360.

[958] **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011, pp. 2-3; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011.

[959] **CL-063**, *Methanex*, Part IV, chapter B, ¶ 17.

PART FOUR. THE TRIBUNAL HAS JURISDICTION OVER WINDSTREAM'S CLAIMS

A. Failure to "Freeze" the FIT Contract is an Omission of MEI

625. There is no question that MEI could have directed the OPA, whether formally or informally, to "freeze" the FIT Contract for the duration of the moratorium. It is MEI's failure to do so that is attributable to Canada.

626. Contrary to the statement in paragraph 301 of Canada's Counter-Memorial, the discussion at paragraphs 513 and 515 to 535 of Windstream's Memorial is not intended to establish that the OPA's failure to "freeze" the FIT Contract is attributable to Canada. It is intended to establish that the failure to "freeze" the FIT Contract is an omission of MEI, not of the OPA. As explained in paragraphs 512 and 513, the Ontario Government, and MEI in particular, exercise both *de jure* and *de facto* control over the OPA. The Ontario Government could have fulfilled its commitments to keep the FIT Project "frozen" so that the Project could "continue" by causing the OPA to fulfill those commitments. Therefore, the failure to "freeze" the FIT Contract is an omission of the Ontario Government, even though WWIS' contractual counterparty is the OPA. Canada does not deny that MEI's failure to "freeze" the FIT Contract is attributable to Canada.[960]

627. Throughout its Counter-Memorial, Canada takes the position that the OPA is "independent."[961] Windstream filed extensive evidence with its Memorial, set out at paragraphs 515 to 535, demonstrating that MEI controls the OPA both formally and informally. Aside from a failed attempt to strike much of this evidence from the record, Canada has not responded to it. Mr. Smitherman also explains that he exercised a high degree of control over the OPA during his tenure as Minister of Energy and Infrastructure through his power to issue directives to the OPA.[962] Mr. Smitherman states that the directive power "gave [him] and [his] successors more power to direct the affairs of the OPA than any other agency over the purview of MEI," and that

[960] Canada's Counter-Memorial, ¶ 303.

[961] Canada's Counter-Memorial, ¶¶ 34, 39, 41, 308, 309.

[962] CWS-Smitherman, ¶¶ 69-72.

he exercised this power regulatory to pursue the Government's policy objectives with respect to renewable energy.[963]

628. In addition to the evidence of control set out in Windstream's Memorial, Windstream has filed with this Reply Memorial documents that show that MEI was heavily engaged with the OPA with respect to post-moratorium negotiations with Windstream.[964] [redacted].[965] Windstream's second proposal was put on the agenda at MEI's weekly renewables meeting.[966] It was also copied to Mr. Mullin of the Premier's Office, senior political staff at MEI (Mr. Mitchell and Mr. MacLennan) and Minister Gerretsen.[967] Before the moratorium was announced, MEI also had discussions with the OPA about letting the FIT Contract "lapse" through the exercise of the OPA's force majeure termination right.[968] Even after negotiations with the OPA had failed,

[963] CWS-Smitherman, ¶ 71.

[964] Windtsream did not file this evidence with its Memorial given the without prejudice nature of the negotiations with the OPA. **C-1004**, Chart (MOE), OPA Proposed Response to Windstream (March 18, 2011); **C-0988**, Email from Cecchini, Perry (OPA) to Zaveri, Mirrun (MEI) (February 24, 2011); **C-0989**, Email from Zaveri, Mirrun (MEI) to Cecchini, Perry (OPA) (March 3, 2011); **C-0992**, Email from Cecchini. Perry (OPA) to Zaveri, Mirrun (MEI) (March 1, 2011); C-0991, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (March 1, 2011); **C-0990**, Email from Mitchell, Andrew (MEI) to Lo, Sue (MEI) (March 1, 2011); **C-0997**, Email from Clark, Ron (Aird & Berlis) to Cecchini, Perry (OPA) (March 4, 2011); **C-0998**, Meeting Request - Updated Weekly Renewables Meetings (MEI) (March 9, 2011); **C-1000**, Email from Cheng, Clarence (MEI) to Slawner, Karen (MEI) (March 11, 2011); **C-1002**, Email from Killeavy, Michael (OPA) to Ing, Pearl (MEI) (March 16, 2011); C-1003, Email from Zaveri, Mirrun (MEI) to Viswanathan, Samira (MEI) (March 17, 2011); **C-1005**, Email from Ing, Pearl (MEI) to Tasca, Leo (MEI) et al (March 21, 2011); **C-1006**, Email from Killeavy, Michael (OPA) to Lo, Sue (MEI) et al (March 21, 2011); **C-1007**, Email from Collins, Jason R. (MEI) to Mitchell, Andrew (MEI) et al (March 21, 2011); **C-1010**, Email from Tasca, Leo (MEI) to Zaveri, Mirrun (MEI) (March 24, 2011); **C-1013**, Meeting Request from Viswanathan, Samira (MEI) to Zaveri, Mirrun (MEI) et al (April 14, 2011); **C-1017**, Email from Cecchini, Perry (OPA) to Killeavy, Michael (OPA) (May 3, 2011); **C-1018**, Presentation, Windstream Proposal Discussion; **C-1020**, Email from Viswanathan, Samira (MEI) to Quirke, Christopher (MEI) et al (May 3, 2011).

Even before negotiations began, Ms. Lo asked the OPA to keep MEI apprised of its negotiations with Windstream: **C-0985**, Email from Lo, Sue (MEI) to Ceccini, Perry (OPA) (February 15, 2011).

[965] **C-1004**, Chart (MOE), OPA Proposed Response to Windstream (March 18, 2011)

[966] **C-1026**, Email from Zaveri, Mirrun (MEI) to Viswanathan, Samira (MEI) and Heneberry, Jennifer (MEI) (July 6, 2011).

[967] **C-1025**, Email from MacLennan, Craig (ENERGY) to Mitchell, Andrew (ENERGY) (July 5, 2011).

[968] **C-0945**, Handwritten Notes of Jennifer Heneberry (January 25, 2011); **C-0964**, Email from Ing, Pearl (MEI) to Viswanathan, Samira (MEI) et al (February 3, 2011); **C-0950**, Email from Viswanathan, Samira (MEI) to Heneberry, Jennifer (MEI) (January 26, 2011); **C-0920,** Handwritten Notes of Jennifer Heneberry (January 13, 2011), p. 4; **C-0879**, Email from Lo, Sue (MEI) to Ing, Pearl (MEI) et al (December 7, 2010).

MEI was still engaged with respect to the treatment of Windstream and sought the advice of the Premier's Office in that regard.[969]

629. MEI also recognized that it had the power to direct the OPA with respect to the preservation of Windstream's project. For example, MEI considered that it could direct the OPA to take Windstream out of the FIT Program altogether.[970] MEI also expressly referred to the responsibility of freezing the FIT Contract as its own.[971]

630. Moreover, as set out in paragraphs 525 to 533 of Windstream's Memorial, the OPA had earlier felt compelled to fulfill the promise of the Premier's Office and MEI to TransCanada to keep TransCanada "whole." The OPA heeded MEI's direction to renegotiate TransCanada's power purchase agreement to achieve that objective.

631. As set out in paragraph 535 of Windstream's Memorial and at paragraph 130 above, MEI intervened with the OPA to obtain a one-year extension for the FIT Contract, over the OPA's protests, and with the support of the [redacted][972] MEI has directed the OPA to amend FIT Contracts by either granting *force majeure* relief[973] or an MCOD extension[974] to account for regulatory delays. MEI and the OPA have also taken the position in Ontario court proceedings that MEI exercises control over the OPA.[975]

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[969] **C-1062**, Email from Botond, Erika (ENERGY) to Mitchell, Andrew (ENERGY) and MacLennan, Craig (ENERGY) (January 11, 2012).

[970] **C-0945**, Handwritten Notes of Jennifer Heneberry (January 25, 2011).

[971] **C-0976**, Email from Botond, Erika (OPO) to Lucas, Brenda (ENE) et al (February 10, 2011).

[972] **C-0338**, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) (August 10, 2010); **C-0836**, Email from Maskell, Lindsay (MNR) to Mullin, Sean (OPO) (August 2, 2010).

[973] **C-0954**, Letter from Lindsay, David (MEI) to Andersen, Colin (OPA) (January 28, 2011); **C-0969**, News Release (OPA), One-year extension of Milestone Date for Commercial Operations (February 9, 2011).

[974] **C-1104**, Letter from Chiarelli, Bob (ENE) to Andersen, Colin (OPA) (June 26, 2013); **C-0893**, Presentation (MEI), Feed-In Tariff Program-Update (January 5, 2011), p. 7.

[975] The MEI and OPA have consistently taken the position that the OPA is bound to obey formal directives and informal direction from the Government. For example:

(a) The OPA has stated that it has the power to "disregard" the FIT Rules when the Minister of Energy makes a decision that is contrary to them: **C-0801**, Capital Solar Power v. Ontario Power Authority, 2015 ONSC 2116, ¶ 22.

B. Alternatively, OPA's Failure to "Freeze" the FIT Contract so the Project Could "Continue" is Attributable to Canada

632. As Windstream argues in the alternative at paragraphs 505, 514 and 536 to 541, in the event that the Tribunal disagrees that the failure to fulfill the Government's commitments to "freeze" the FIT Contract is an omission of MEI or the Premier's Office, then it is necessarily an omission of the OPA. Thus, contrary to Canada's remark at paragraph 303 of its Counter-Memorial, the question of whether any measures of the OPA can be attributed to Canada is not "wholly irrelevant in this arbitration." Further, contrary to Canada's arguments at paragraphs 304 to 309 of its Counter-Memorial, Windstream does not allege that the OPA is a state organ.

633. Under Article 1503(2) of NAFTA, the acts or omissions of a state enterprise are attributable to Canada if the challenged acts or omissions were done in the exercise of governmental authority that was delegated to the state enterprise by the Party. Canada does not dispute that the OPA is a state enterprise,[976] but it disputes that the OPA was exercising delegated governmental authority in failing to implement MEI's commitment to "freeze" the FIT Contract or its decision to keep Windstream "whole."[977]

634. Canada's arguments must be rejected for two reasons. First, Canada argues that Windstream has failed to prove that MEI delegated the implementation of its commitment to the OPA.[978] This is incorrect. The Chief of Staff to the Minister of Energy advised Windstream that

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(b) Susan Lo of MEI has testified that the OPA would "check in with the Ministry and the Minister" before making "any multi-billion dollar commitment on behalf of the ratepayer to award contracts." She stated that before awarding a contract, the OPA "would come forward to seek more formal endorsement from the Ministry or Minister." She further noted that MEI works "very closely with the OPA" and that "in advance of any contract awards, there was always a back and forth between the Ministry and the OPA in terms of when to award contracts and get ready.": **C-1080**, Cross-Examination of Susan Lo, Skypower et al v. Minister of Energy et al (Court File No. 352/12) (August 10, 2012).

(c) JoAnne Butler of the OPA testified in the same proceeding that the OPA and MEI made sure they "were all working towards the same timelines and deadlines and towards the same objectives.": **C-1082**, Cross-Examination of Josephine Anne Cavanagh-Butler, Skypower et al v. Minister of Energy et al (Court File No. 352/12) (August 15, 2012).

[976] Canada's Counter-Memorial, ¶ 310.

[977] Canada's Counter-Memorial, ¶¶ 310-16.

[978] Canada's Counter-Memorial, ¶ 315.

the OPA would ensure that the commitment was fulfilled.[979] But in any event, if the responsibility for fulfilling the commitment was not delegated to the OPA, then it necessarily continued to rest with MEI. As noted above, there is no dispute that MEI's omissions are attributable to Canada.

635. Second, Canada argues that the fulfillment of the commitment to "freeze" the FIT Contract is not governmental authority because it is commercial in nature.[980] That position also should be rejected. The classification of a state enterprise's sphere of authority as "governmental" depends on a number of factors, including the purposes for which the powers are to be exercised and the extent to which the state enterprise is accountable to the Government for the exercise of the power.[981] The question is whether the sphere of authority is directed to the objectives that the Government was seeking to accomplish through the state enterprise.[982] Thus, where a state enterprise acts in the fulfillment of a governmental objective delegated to it, the state enterprise is exercising delegated governmental authority.

636. If the Tribunal finds that MEI did not retain for itself the responsibility of fulfilling its objective of keeping the FIT Contract "frozen" to insulate Windstream from the effects of the moratorium, then MEI must necessarily have delegated that responsibility to the OPA. Thus, the fulfillment of the responsibility is squarely directed to the fulfillment of a governmental objective delegated to the OPA.

637. This case is not akin to the *UPS* decision which Canada cites, where the actions of the state enterprise were not in furtherance of a governmental objective.[983] Nor is it akin to the

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[979] **C-0484**, Transcription of Audio Recording of Telephone Conference Call held February 11, 2011; **C-0483**, Audio Recording of Telephone Conference Call held February 11, 2011; Windstream's Memorial, ¶ 265; **C-0507**, Email from Baines, Ian (WEI) to Vellone, John et al (February 19, 2011); CWS-Baines ¶ 118.

[980] Canada's Counter-Memorial, ¶¶ 315.

[981] As set out in **RL-029**, *ILC Articles – Commentary*, Article 5, p. 101., what is regarded as 'governmental' depends not just on the content of the powers, "but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to the government for their exercise." [Emphasis added.]

[982] **CL-126**, *Maffezzini v. Kingdom of Spain* (ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 ("***Maffezzini***"), ¶¶ 71-89.

[983] Canada's Counter-Memorial, ¶ 312, **CL-088**, *UPS – Award*, ¶ 78.

circumstances in *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*. In that case, the tribunal found that the Suez Canada Authority's treatment of the Claimants during the tendering process and the performance of the contract was not the exercise of delegated governmental authority. But that finding rested on the tribunal's conclusion that the Authority acted "like any contractor" trying to achieve the best price for the services it was seeking. It did not act as a State entity.[984] The facts of that case bears no resemblance to the circumstances here, where the OPA was not acting "like any contractor" but rather ought to have been fulfilling an express Government commitment born of the need to insulate Windstream from the effects of the moratorium decision, a Government policy.

638. In any event, the acts of the OPA in administering the FIT Program and FIT contracts are also the exercise of delegated governmental authority. The OPA has taken the position in domestic proceedings that its actions in administering the FIT Program are legislative in nature: the "OPA submits that its decisions in administering the FIT program were of a legislative nature, and based on broad considerations of public policy that flowed through the Ministry to the OPA."[985] The actions of the OPA in administering the FIT Program are sovereign acts to carry out the Ontario Government's objective of increasing procurement of electricity from renewable energy sources. This is set out in the FIT Rules:

> The Ontario Power Authority has developed this Feed-In Tariff Program for the Province to encourage and promote greater use of renewable energy sources including wind, waterpower, Renewable Biomass, Bio-gas, landfill gas and solar (PV) for electricity generating projects in Ontario. The fundamental objective of the FIT Program, in conjunction with the Green Energy and Green Economy Act, 2009 is to facilitate the increased development of Renewable Generating Facilities of varying sizes, technologies and configurations via a standardized, open and fair process.[986]

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[984] **RL-031**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, ¶ 169.

[985] **C-1084**, Factum of the Respondent Ontario Power Authority, *Skypower et al v. Minister of Energy et al* (Court File No. 352/12) (August 22, 2012), ¶ 83.

[986] **C-0146**, OPA Feed-In Tariff Program, FIT Rules Version 1.1. (September 30, 2009), s. 1.1. The OPA's role in connection with the FIT Program is akin to that of the state enterprise in **CL-126**, *Maffezzini* (the Tribunal attributed

639. Further, Mr. Smitherman explains that the FIT Program, which the Ontario Government tasked the OPA with administering, was the key component of the Ontario Government's signature policy objective of procuring more electricity from renewable energy sources in order to stimulate economic activity in the Province. In effect, the Ontario Government delegated to the OPA responsibility for selecting renewable energy projects that would receive a FIT Contract to achieve the government's objective of promoting economic development. Canada's argument ignores this public purpose behind the OPA's involvement in the FIT program, which simply cannot be characterized as merely commercial in nature.

640. Thus, even if the Tribunal finds that the responsibility for fulfilling the commitment to "freeze" the FIT Contract was the OPA's, then the OPA's failure to do so is attributable to Canada.

PART FIVE. DAMAGES

641. In its Memorial, Windstream demonstrated its entitlement to compensation in the range of between $357.5 and $486.6 million, to be updated as of the time of the hearing, for the harm resulting from Canada's breaches of NAFTA.[987] Deloitte has updated these figures to a range of between $277.8 and $369.5 million plus interest as of May 22, 2012 (the date of breach), and $495.5 to $565.5 million plus interest as of June 19, 2015 (the date of Deloitte's report).[988] As explained below, these differences result from revisions to the "but for" scenario,[989] the

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the conduct of the state entity to Spain in circumstances where its functions included the seeking and soliciting of new industries, investing in new enterprises, processing loan applications with official sources of financing, etc.).

[987] That amount is based on a Project design that assumes a five-kilometre setback. Windstream's Memorial also established damages in the alternative between $427.9 and $568.5 million if the five-kilometre setback did not apply and the turbines for the Project were built closer to shore. See Windstream's Memorial, ¶¶ 681-682.

[988] CER-Deloitte (Taylor and Low)-2, ¶ 1.8.

[989] See ¶¶ 668, 710-715 below.

establishment of a detailed Project Schedule,[990] revisions to the Project layout[991] and an updated wind resource analysis.[992]

642. The following table sets out Windstream's damages under two scenarios. The first sets out Windstream's damages in the event that the Tribunal finds the moratorium to be a breach of Articles 1110, 1105 or 1102 of NAFTA. The second sets out Windstream's damages in the event that the Tribunal finds that the moratorium did not breach Articles 1110, 1105 or 1102 of NAFTA, but the failure to keep Windstream whole following the imposition of the moratorium constituted a breach of these articles:

CAD millions	At May 22, 2012		At June 19, 2015	
	Low	High	Low	High
Articles 1110 (unlawful expropriation)/1105/1102				
Total (with 5KM setback)	277.8	369.5	495.5	565.5
Add: Pre-judgment interest	32.9	43.8	9.1	11.1
Total with pre-judgment interest (with 5KM setback)	**310.7**	**413.2**	**468.6**	**576.7**
Total (3 year delay, with 5KM setback)	299.3	392.3	407.3	516.2
Add: Pre-judgment interest	35.4	46.5	8.0	10.2
Total with pre-judgment interest (3 delay, with 5KM setback)	**334.8**	**438.8**	**415.3**	**526.4**

643. Deloitte has also calculated Windstream's damages in the event that MOE does not adopt a five-kilometre setback, in which case capital and operating costs for the Project will be lower and damages will be higher.[993]

644. Deloitte's valuation employs the DCF methodology. For the reasons set out below, this is the appropriate methodology for calculating Windstream's damages. The appropriateness of

[990] See ¶¶ 682-688 below.

[991] See ¶¶ 700-702 below.

[992] CER-SgurrEnergy-2, Appendix 21, Ortech, Wind Resource Assessment (WRA) for Wolfe Island Shoals Offshore Wind Project – 2015, Report 70347-6-WRA, May 26, 2015.

[993] CER-Deloitte (Taylor and Low)-2, ¶ 1.9.

Deloitte's DCF valuation is corroborated by Deloitte's application of the market comparables approach.[994]

I. Discounted Cash Flow Approach is Appropriate to Determine the Fair Market Value of Windstream's Investments

A. DCF is the Appropriate Valuation Methodology Because the FIT Contract Provided Certainty as to the Project's Future Profitability

645. Windstream established that the DCF methodology is the appropriate methodology for valuing Windstream's losses at paragraphs 665 to 674 of its Memorial. Canada takes the position that DCF is not an appropriate valuation methodology because, according to Canada, Windstream's revenues from the Project were "highly speculative."[995] Yet Canada has not submitted any evidence to establish that the DCF methodology is an inappropriate valuation methodology.[996]

646. Deloitte explains that DCF is the appropriate methodology to value Windstream's damages because Windstream's future cash flows can be forecast with a relatively high degree of confidence.[997] This is because (i) the price per kilowatt for electricity sold by the Project is established by contract, (ii) the Project's projected electricity output can be reasonably estimated on the basis of numerous high-quality and independently prepared wind resource assessments, (iii) the majority of the Project's capital costs and operating costs would have been contractual and therefore can be determined using benchmark data, and (iv) engineering for the Project would not have involved the use of any novel technology.[998]

647. The appropriateness of the DCF methodology to quantify damages is well-established where future cash flows can be anticipated with a reasonable degree of certainty.[999] In *Ioan*

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[994] CER-Deloitte (Taylor and Low)-2, ¶ 2.3.

[995] Canada's Counter-Memorial, ¶ 563.

[996] CER-Deloitte (Taylor and Low)-2, ¶ 2.2.

[997] CER-Deloitte (Taylor and Low)-2, ¶ 2.5.

[998] CER-Deloitte (Taylor and Low)-2, ¶ 2.5.

[999] **CL-121**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID) Case No. ARB (AF) 09/1, Award, 22 September 2014 ("***Gold Reserve***"), ¶¶ 681, 687; **CL-123**, *Lemire*, ¶ 254; **CL-040**, *CMS Gas Transmission Company*

Micula v. Romania, the tribunal held that "[d]epending on the circumstances of the case, there may be instances where a claimant can prove with sufficient certainty that it would have made future profits but-for the international wrong. This might be the case, for example, where the claimant benefitted from a long-term contract or concession that guaranteed a certain level of profits."[1000]

648. Similarly, in *Anatolie Stati v. Kazakhstan*, the tribunal held that investors can establish a claim for lost profits where their project "has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. This is true even for projects in early stages."[1001] In *Karaha Bodas v. PLN*, the tribunal found that the claimant's power purchase agreement created enough certainty to warrant the award of lost profits.[1002] The tribunal noted that although the project had yet to be fully developed and was subject to a number of risks typical of this kind of project,[1003] the most significant risks for the foreign investor[1004] would have been eliminated under the parties' contractual arrangements.[1005] Like the FIT Contract, the contract at issue in that case eliminated the commercial risks of market availability, price fluctuations and inflation.

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v. The Republic of Argentina (ICSID Case No. ARB/01/8) Award, 12 May 2005 ("***CMS Gas***"), ¶ 411; **CL-047**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011 ("***El Paso***"), ¶ 712; **CL-031**, *Cargill*, ¶¶ 444-447; **CL-041**, *Vivendi* II, ¶¶ 8.3.3-8.3.8; **CL-064**, *Mobil*, ¶ 438; **CL-076**, *PSEG Global*, ¶¶ 311-312 (DCF was not applied in this case as the parties had never finalized the terms of the contract at issue); **CL-117**, *Abengoa*, ¶¶ 683-83.

[1000] **CL-065**, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case NO. ARB/05/20) Final Award, 11 December 2013 ("***Micula***"), ¶ 1010.

[1001] **CL-118**, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd. v. Kazakhastan* Case No. 1:14 cv-00175-ABJ, 19 December 2013, ¶ 1688.

[1002] **CL-124**, *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT*. PLN (Persero), ad hoc arbitration under UNCITRAL rules, Final award of 18 December 2000 ("***Karaha Bodas***"). Under this contract with a state-owned electricity utility, the claimant was required to develop geothermal energy, and build, own and operate electricity generating facilities, and the state-entity was required to purchase electricity generated by the project.

[1003] **CL-124**, *Karaha Bodas*, ¶¶ 124-125.

[1004] These risks included commercial risks of market availability and price fluctuations, the currency and inflation risks, and the risk of governmental interference.

[1005] **CL-124**, *Karaha Bodas*, ¶¶ 125-126. See also **CL-125**, *Khan*, ¶ 391, where the Tribunal held that in the case of a mine with proven reserves, the DCF method is often considered an appropriate methodology for calculating fair market value.

649. Canada asserts that other cases on which Windstream relied in its Memorial to establish the appropriateness of the DCF methodology are distinguishable. For instance, Canada argues that *EDF v. Argentina*, *Ruralec v. Bolivia* and *El Paso Energy v. Argentina* are inapplicable because the claimants in those cases were regulated utilities with predictable revenues which were already operating.[1006] Contrary to Canada's argument, Windstream's future revenues from the Project were reasonably predictable.[1007] These cases involved regulated utilities, which Deloitte explains "face similar risks to those faced by wind projects."[1008]

650. Canada also argues that *Ioan Micula v. Romania* does not support the application of the DCF methodology because "this tribunal recognized that the 'sufficient certainty standard' associated with using a discounted cash flow method to determine lost profits 'is usually quite difficult to meet in the absence of a going concern and a proven record of profitability.'"[1009] However, Canada omits from its quote the immediately following sentence:

> Depending on the circumstances of the case, there may be instances where a claimant can prove with sufficient certainty that it would have made future profits but for the international wrong. This might be the case, for example, where the claimant benefitted from a long-term contract or concession that guaranteed a certain level of profits or where, as here, there is a track record of similar sales.[1010]

651. Thus, the use of the DCF methodology is appropriate where, as here, future revenues can be forecasted with a reasonable degree of confidence.

[1006] Canada's Counter-Memorial, ¶ 562.

[1007] CER-Deloitte (Taylor and Low)-2, ¶ 2.8(c).

[1008] CER-Deloitte (Taylor and Low)-2, ¶ 2.9(c).

[1009] **CL-065**, *Micula*, ¶ 1010.

[1010] **CL-065**, *Micula*, ¶ 1010 [Emphasis added].

B. The Fact that the Project Faced Risks Does Not Make the DCF Methodology Inappropriate

652. Contrary to Canada's position, the fact that the Project faced future uncertainties, including regulatory risk and construction risk, does not render the DCF methodology inappropriate. Rather, the DCF methodology specifically accounts for future uncertainties and risks through the application of an appropriate discount rate.[1011]

653. As Deloitte explains, it specifically accounted for construction and regulatory risks in determining the appropriate discount rate.[1012] Deloitte relies on the expert evidence submitted by Windstream, set out in detail in paragraphs 682 to 688 below, that establishes that it is more likely than not that the Project would have been developed, permitted and built within the parameters of the FIT Contract.[1013]

654. However, the discount rate that Deloitte applied expressly accounts for the fact that the Project faced future risks. Deloitte explains the impact of the discount rate for the Project compared to the discount rate it would have applied had the Project faced more limited future risks, for example because it was already an operational energy-generating facility.[1014] Applying a discount rate of between [redacted] and [redacted] (with a midpoint of [redacted]) to account for the life cycle of the Project, Deloitte values the Project at between $191.7 million and $259.1 million.[1015] If the Project had been operational, Deloitte would have applied a discount rate of between [redacted] and [redacted] (with a midpoint of [redacted]). This would have yielded a valuation of between $865.4 million and $951.0 million.[1016]

[1011] **CL-053**, *Glamis Gold*, ¶ 515. The Tribunal held, "The valuation of an investment […] must take into account the fact that the activities of, and cash flows from, that investment will span many years. This lengthy duration increases the number and variety of risks that may interfere with the investment and reduce its expected return. This uncertainty is reflected in the discount rate, a rate at which future cash flows are discounted to account for a number of risks, both general and specific, to reflect the investment's specific risk profile." [Emphasis added].

[1012] CER-Deloitte (Taylor and Low)-2, ¶¶ 3.2.

[1013] CER-Deloitte (Taylor and Low)-2, ¶¶ 3.3.

[1014] CER-Deloitte (Taylor and Low)-2, ¶¶ 3.4-3.5.

[1015] These figures are before the gross-up for tax and interest.

[1016] CER-Deloitte (Taylor and Low)-2, ¶ 3.4.

Project life cycle	Discount rate	Valuation (000 CAD)	
		Low	High
Late-stage development (Deloitte Economic Losses)	[redacted]	191.7	259.1
Operating	[redacted]	865.4	951.0

655. Tribunals have accepted the DCF methodology in a number of cases involving projects or companies that faced future risks.[1017] The fact that a project faced future risks did not render the DCF methodology inappropriate, but rather factored in to the selection of a discount rate. These include the following cases: *Gold Reserve v. Venezuela*,[1018] *Lemire v. Ukraine*,[1019] *Karaha Bodas Company v. PLN*,[1020] *CMS Gas v. Argentina*,[1021] *El Paso v. Argentina*,[1022] and *Cargill v. Mexico*.[1023]

C. Cases Relied on By Canada Are Not Applicable Here

656. The cases on which Canada relies to support its argument that the DCF methodology is not appropriate are inapplicable under these circumstances. In Deloitte's opinion, none of those

[1017] **CL-121**, *Gold Reserve*; **CL-123**, *Lemire*; **CL-124**, *Karaha Bodas*; **CL-040**, *CMS Gas*; **CL-047**, *El Paso*; **CL-031**, *Cargill*.

[1018] The tribunal applied the DCF methodology to determine the fair market value of the Project, even though it had yet to be constructed, did not have all required approvals and was subject to a change in project design: **CL-121**, *Gold Reserve*, ¶¶ 762, 772, 780, 782.

[1019] The tribunal applied the DCF methodology where the claimant had been unfairly denied broadcasting licenses. The tribunal recognized that this was a heavily regulated business, and factored regulatory uncertainties into the discount rate: **CL-123**, *Lemire*, ¶ 244, 254, 280, 286, 296, 303, 305.

[1020] The tribunal noted risks that might arise when developing the Project, such as "[p]ossible delays in the plant's construction and operation, actual availability of reserves in the quantities estimated by the Claimant, availability of the financing necessary for the project implementation at an acceptable cost." These risks were factored into the discount rate: **CL-124**, *Karaha Bodas*, ¶¶ 127, 134, 136.

[1021] The tribunal recognized that it had to look 27 years into the future as part of its damages determination. But, it held that it was possible to arrive at rationally justified figures that would not be "arbitrary or analogous to a shot in the dark." The uncertainty of Argentina's future economic health was factored into the discount rate: **CL-040**, *CMS Gas*, ¶¶ 443-446.

[1022] The tribunal applied the DCF methodology, but adjusted the discount rate to account for the additional risk stemming from the Argentine financial crisis: **CL-047**, *El Paso*, ¶¶ 718, 721.

[1023] The tribunal discounted damages because there were difficulties in projecting the overall market for high fructose corn syrup, the claimant's market share, and the appropriate price of and demand for the syrup in light of the claimant's four-year absence from a competitive market: **CL-031**, *Cargill*, ¶¶ 444-445, 448.

cases are analogous because none of them involved an investment with a contract that had a fixed revenue stream.

657. For instance, Canada relies on *Metalclad* to assert that Windstream is entitled only to its investment costs.[1024] The investor in that case did not have a contract that specified a fixed revenue stream. Therefore, as Deloitte explains in its report, the investors' revenues could not be reliably estimated, unlike Windstream's revenues.[1025]

658. The same distinction applies to the balance of the cases relied on by Canada to argue that Windstream should only be entitled to its investment costs: *Wena Hotels v. Egypt*, *Siemens v. Argentina* and *PSEG v. Turkey*.[1026] Deloitte explains that, unlike Windstream, none of the investments in these cases had contracts or a solid base on which to predict profits.[1027] In *Vivendi v. Argentina*, another case relied on by Canada, the tribunal declined to award lost profits. However, it acknowledged that "a claimant might be able to establish the likelihood of lost profits with sufficient certainty even in the absence of a genuine going concern" where there was convincing evidence of the ability to generate future profits.[1028]

D. OPA Utilizes DCF Methodology to Value TransCanada's Project

659. Canada's argument that the DCF methodology is not appropriate to value a project with a FIT Contract that faces future risks is inconsistent with the approach that the OPA and the Ontario Government adopted to determine the value of TransCanada's gas-fired power plant project that was cancelled by the Ontario Government in 2011. As set out in paragraph 403 of Windstream's Memorial, the Government's objective in negotiating with TransCanada was to keep TransCanada "whole."

[1024] Canada's Counter-Memorial, ¶ 561; **CL-062**, *Metalclad*.

[1025] CER-Deloitte (Taylor and Low)-2, ¶ 2.9(a).

[1026] Canada's Counter-Memorial, ¶ 561.

[1027] CER-Deloitte (Taylor and Low)-2, ¶ 2.9(b).

[1028] **CL-041**, *Vivendi II*, ¶ 8.3.4 [Emphasis added]. The Tribunal further states at ¶ 8.3.8, "the absence of a history of demonstrated profitability does not absolutely preclude the use of DCF valuation methodology. But to overcome the hurdle of its absence, a claimant must lead convincing evidence of its ability to produce profits in the particular circumstances it faced." [Emphasis added]. CER-Deloitte (Taylor and Low)-2, ¶ 2.9(c).

660. The OPA and the Ontario Government used the DCF methodology to determine the respective net present values of TransCanada's cancelled gas-fired power plant project and of the replacement project that it was awarded.[1029] It also used the methodology to determine the net present value of TransCanada's replacement project. Both projects, at the time they were valued, had not yet received all required approvals. The cancelled project was undergoing an environmental assessment and was undergoing litigation relating to the relevant municipality's failure to grant a required approval.[1030]

661. The OPA also used the DCF methodology to develop the FIT Program pricing.[1031]

E. If DCF is Not Appropriate, then the Appropriate Alternative Methodology is a Comparable Transactions Methodology

662. As Deloitte explains, in the event that the DCF methodology is rejected, the second most-appropriate valuation methodology is the comparable transactions methodology. The comparable transactions methodology is appropriate to determine the value of Windstream's investments because precedent transaction multiples would reflect value attributed to the FIT Contract and turbine contracts and other characteristics of the Project, such as wind data and resource assessments, seismic, engineering and electrical interconnection work.[1032] This approach identifies the development stage of the Project, and determines project value on the basis of transactions involving projects at a similar stage of development.

663. As set out in the Deloitte report, this methodology yields damages in the same range as the DCF methodology.[1033] The appropriateness of the comparable transactions methodology

[1029] **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013); **C-1905**, OPA, Analysis of TCE Cost of Capital (November 24, 2011).

[1030] **C-0855**, Meeting Note, TransCanada Energy (October 5, 2010), p. 2; **C-1024**, Notes to File (MEI), Meeting with Michael Barrack and John Finnegan (June 2, 2011), p. 1.

[1031] **C-0121**, Presentation (OPA), Proposed Feed-In Tariff Schedule, Stakeholder Engagement - Session 4 (April 7, 2009), slide 26; CER-Compass, p. 7

[1032] CER-Deloitte (Taylor and Low)-2, ¶ 2.3.

[1033] CER-Deloitte (Taylor and Low)-2, ¶ 2.3.

where sufficient information about comparable transactions exists has been recognized by several tribunals.[1034]

F. The Investment Value Approach Proposed by Canada Would Severely Undervalue Windstream's Investments

664. Canada asserts that the appropriate valuation methodology is the investment value approach, which would reimburse Windstream for the investment costs it expended developing the Project.[1035] In Deloitte's opinion, this approach is inappropriate because it ascribes no value to the FIT Contract, which is Windstream's most valuable asset.[1036] This approach does not accurately reflect the market research that Deloitte has conducted, which establishes that FIT contracts have significant value beyond the investment costs associated with project development.[1037]

665. Deloitte also points out the significant differences between the situation facing the Project and the facts of cases relied on by Canada to argue that Windstream is entitled only to its sunk costs. For instance, the investment in *Metalclad*, as explained above, is an inappropriate comparator because its revenues could not be predicted. The same is true for *Wena Hotels*, *PSEG* and *Vivendi*.[1038] Therefore, the Tribunal should reject Canada's argument that Windstream is entitled only to its investment costs.

[1034] **CL-132**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award, 1 June 2009, ¶ 543, 563, 566, 570, 572; **CL-093**, *Yukos*, ¶¶ 1785-1787.

[1035] Canada's Counter-Memorial, ¶ 565.

[1036] CER-Deloitte (Taylor and Low)-2, ¶ 2.3.

[1037] CER-Deloitte (Taylor and Low)-2, ¶ 2.3.

[1038] CER-Deloitte (Taylor and Low)-2, ¶ 2.9.

II. Valuation of Windstream's Investments "But For" the Moratorium

A. Appropriate "But For" Scenario is One Where the Project was Permitted to Proceed Through the Regulatory Approvals Process Unimpeded by Unreasonable Regulatory Delays

666. The goal of compensation is to re-establish the situation which likely would have existed but for the unlawful act.[1039] In applying the DCF methodology, it is appropriate to establish a "but for" scenario that sets out reasonable assumptions about the Project's development, construction and operation had the wrongful act not occurred.[1040] The "but for" scenario should eliminate the consequences of the application of the indefinite-term moratorium to Windstream's investments. Thus, the appropriate "but for" scenario is one where the Project was permitted to proceed through the regulatory approvals process unimpeded by regulatory delays, and where the Ontario Government fulfilled its commitments made to Windstream. The appropriate "but for" scenario must also assume that the Ontario Government did not engage in any further wrongful conduct in connection with Windstream's investments.[1041]

667. In completing its first valuation, Deloitte assumed that pre-moratorium delays had not occurred, including MNR's failure to grant AOR status to WWIS on a timely basis. This was an appropriate assumption, as the "but for" scenario may properly eliminate wrongful conduct that occurred before the treaty breach or account for events that occurred before the treaty breach.[1042]

668. However, Windstream has refined its proposed "but for" scenario on the basis of the following assumptions. In constructing a "but for" scenario, Windstream has assumed that the Ontario Government did not adopt an indefinite-term moratorium on offshore wind development on February 11, 2011. Instead, Windstream has assumed that the following would have occurred by February 11, 2011:

[1039] **CL-034**, *Case Concerning the Factory at Chorzów (Germany v. Poland),* 1928 P.C.I.J (ser. A) No. 17 (September 13, 1928) ("***Chorzów Factory***"), ¶ 125.

[1040] **CL-093**, *Yukos*, ¶¶ 1803-1829; **CL-123**, *Lemire*, ¶¶ 243-261.

[1041] **CL-123**, *Lemire*, ¶¶ 244.

[1042] **CL-093**, *Yukos*, ¶¶ 1803-1829; **CL-123**, *Lemire*, ¶¶ 243-261.

(a) MOE would have confirmed its proposed regulatory amendment to include a five-kilometre setback, or confirmed that it would not proceed with any regulatory amendment (such that setbacks for offshore wind projects would continue to be assessed on a site-specific basis);[1043]

(b) MNR would have fulfilled its commitment to discuss the reconfiguration of Windstream's applications for Crown land for the Project (if a five-kilometre setback was confirmed), and would have thereafter fulfilled its commitment to "move as quickly as possible through the remainder of the application review process so that [WWIS] may obtain Applicant of Record status in a timely manner."[1044]

(c) MOE and MNR would have fulfilled their commitment to process WWIS' application for a REA within the six-month service guarantee;[1045]

(d) MNR would have permitted Windstream to proceed through MNR's Crown land application process and granted Windstream site release;[1046] and

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[1043] This is a reasonable assumption, as several documents indicate that MOE was planning for the regulatory amendment to be in force by January 1, 2011: See Windstream's Memorial, ¶¶ 211-214; **C-0268**, Email from Evans, Paul (ENE) to Lo, Sue (MEI) et al (May 21, 2010); **C-0269**, Offshore Wind Delivery Timeline (MOE) (May 21, 2010); **C-0316**, Proposed Offshore Wind Delivery Timeline (MOE) (July 16, 2010); **C-0278**, Flowchart, Offshore Wind Project Requirements Work Plan (June 1, 2010); **C-0327**, Presentation (MEI), Offshore Wind, Premier's Office Information (August 5, 2010), slide 3; **C-0842**, Handwritten Notes of Ken Cain (MNR) (August 16, 2010), p. 2; **C-0843**, Handwritten Notes of Marcia Wallace (ENE) (August 20, 2010); **C-0352**, Flowchart (MNR), Offshore Timeline Overview (August 23, 2010); **C-0351**, Email from Nowlan, James (MNR) to Cain, Ken (MNR) (August 23, 2010); **C-0380**, Chart (ENE), GE Program Development and Delivery Plan (Draft) (November 8, 2010); **C-0379**, Email from Duffey, Barry (ENE) to Wallace, Marcia (ENE) (November 8, 2010); **C-0468**, Email from Baines, Nancy (WEI) to Mars, David (White Owl Capital) (January 29, 2011).

[1044] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010), p. 2. Numerous documents MNR was actually planning to follow through on this commitment had the Project been allowed to proceed: see ¶¶ 183-185 above.

[1045] See ¶¶ 82-89 above**.**

[1046] WSP explains in its report that based on existing policies and WSP's experience conducting environmental assessments in Ontario, there was no material impediment to Windstream being granted site release: CER-WSP, pp. 17-18. See also CER-Powell, ¶¶ 107-108, who confirms that it was reasonable for a developer to expect that the requisite Crown land tenure would follow the grant of a FIT Contract. Numerous documents from the Ontario Government establish that existing regulatory mechanisms were sufficient to conduct environmental assessments for offshore wind projects: **C-0749**, Presentation (MNR), Offshore Wind Power: Opportunities for Ontario (November 28, 2007), slide 9; **C-0750**, Email from Marinigh, Dan (MNR) to Keyes, Jennifer (MNR) (November 29, 2007);

(e) the Ontario Government would have dealt with Windstream in good faith and not have subjected the Project to unreasonable regulatory delays.[1047]

669. This "but for" scenario has the effect of erasing the effects of the indefinite-term moratorium on Windstream's investments and of keeping Windstream "whole." It is thus the "but for" scenario that erases Canada's breaches of Articles 1110 and 1105(1) of NAFTA in connection with the application of the indefinite-term moratorium to Windstream's investments. It is also the "but for" scenario that erases the failure to accord to Windstream the treatment afforded to TransCanada in like circumstances, contrary to Article 1102. As set out in paragraphs 614 to 623 above, TransCanada was kept "whole" following the cancellation of its project.

B. BRG's Proposed Counterfactual Scenario is Inappropriate

670. BRG proposes a counter-factual scenario that includes the following assumptions:

(a) the moratorium is applied to the Project;[1048]

(b) the moratorium is lifted by May 4, 2012;[1049]

(c) the project resumes development on May 4, 2012;[1050]

(d) the OPA does not extend the FIT Contract to account for the delays caused by the moratorium;[1051] and

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C-0751, Minister's Seeking Direction Briefing Note (MNR), Issue: Confirmation on Direction and Next Steps Associated with Lifting of Offshore Windpower Deferral on The Great Lakes (December 6, 2007), p. 3; **C-0052**, House Note (MNR), Issue: Lifting of the Offshore Wind Power Deferral (January 3, 2008), p. 1; **C-0054**, Key Messages (MNR) (January 15, 2008), pp. 1, 2; **C-0758**, House Note (MNR), Issue: Southpoint Wind, Leamington (Offshore Wind Power Project) (January 18, 2008); **C-0754**, Presentation (MNR), Issues Management Plan, Offshore Wind Power - Lifting the Deferral (January 15, 2008), slides 5, 12-15.

[1047] According to MOE's REA processing priorities, projects with FIT and RESOP contracts had first priority for processing by MOE, and the project's COD dates "drive the process": Therefore, it is reasonable to assume that "but for" the moratorium, MOE would have treated WWIS' REA application with priority as a FIT Contract holder, and would have been mindful of its MCOD in processing WWIS' application: **C-1008**, Minutes, Renewable Energy Policy and Operations Director's Working Group (March 22, 2011).

[1048] RER-BRG, ¶ 45.

[1049] RER-BRG, ¶ 45.

[1050] RER-BRG, ¶ 45.

(e) the Project would have been subject to further regulatory delays.[1052]

671. This counter-factual scenario is not an appropriate "but for" scenario because it fails to eliminate the consequences of the moratorium by assuming an inappropriate project restart date. BRG's proposal would have the effect of delaying the Project's development by more than 14 months, adding 14 months of *force majeure* time to the Project Schedule, while the OPA's *force majeure* termination right remains in place.[1053] This would not have the effect of eliminating the effects of the moratorium on Windstream's investments, and should therefore be rejected as a "but for" scenario assumption.

672. Moreover, BRG's rationale for selecting May 4, 2012 as the date on which the Project resumes development is illogical. BRG relies on a project development schedule highlights document[1054] prepared by Ortech at the request of Remo Bucci of Deloitte. The document was prepared to demonstrate the last possible date on which project development would have been required to restart for the Project to achieve commercial operation before triggering the OPA's *force majeure* termination right.[1055] Based on the revised Project Schedule, this date has been revised to May 22, 2012.[1056] The purpose of the document was to establish the date as of which the Project could no longer attract the necessary financing.[1057] Its purpose was not to set out an appropriate "but for" scenario.

673. In addition, the document assumes a five-year project development and construction schedule.[1058] If the project schedule were longer, then the Project would have been required to

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[1051] RER-BRG, ¶¶ 45-46.

[1052] RER-BRG, ¶ 170.

[1053] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 10.1(g).

[1054] **C-0711**, Spreadsheet (WWIS) Overall Project Development Schedule Highlights (Detailed COD – May 2017) (August 1, 2014); RER-BRG, ¶ 170.

[1055] CER-Deloitte (Bucci)-2, p. 4; CWS-Roeper, ¶¶ 34-36.

[1056] CER-Deloitte (Bucci)-2, pp. 3-5.

[1057] CER-Deloitte (Bucci)-2, p. 4; CWS-Roeper, ¶¶ 34-36.

[1058] **C-0711**, Spreadsheet (WWIS) Overall Project Development Schedule Highlights (Detailed COD – May 2017) (August 1, 2014); RER-BRG, ¶ 170.

resume development earlier than May 4, 2012 in order to achieve commercial operation on time to avoid triggering the OPA's *force majeure* termination right. In choosing the May 4, 2012 start date, BRG effectively assumes both the five-year schedule set out in the project development schedule highlights document and the eight-year schedule proposed by URS.[1059] These assumptions are not reconcilable.

674. BRG's counter-factual also improperly relies on further anticipated NAFTA breaches to establish that the Project could not have reached commercial operation within the parameters of the FIT Contract. For instance, the BRG counter-factual scenario assumes that the Project would face numerous regulatory delays caused by the Ontario Government, including uncertainty about a five-kilometre setback and other offshore regulatory requirements,[1060] a failure to grant Crown land tenure in a timely fashion,[1061] a failure of the MOE to meet its six-month service guarantee,[1062] and decisions by permitting authorities to delay issuing permits because of public opposition.[1063]

675. Any number of these delays, alone or in combination, could have constituted breaches of NAFTA because they are contrary to the Ontario Government's commitment to provide "certainty" to FIT Contract holders, including certainty with respect to the timely issuance of regulatory approvals. It is not appropriate to assume, as part of a "but for" scenario, that the Government will engage in further treaty breaches or wrongful conduct.[1064] It is also not

[1059] RER-BRG, ¶ 166.

[1060] RER-BRG, ¶¶ 174-175.

[1061] RER-BRG, ¶ 178.

[1062] RER-BRG, ¶ 178(e).

[1063] RER-BRG, ¶ 181.

[1064] **CL-123**, *Lemire*, ¶ 244; **CL-052**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3) Award, 16 June 2008 ("***Gemplus***"), ¶¶ 13-92; **CL-136**, Kantor M., *Valuation for arbitration compensation standards valuation methods and expert evidence* (Kluwer Law International, 2008), p. 72 ("**Kantor**").

appropriate to use hindsight information that establishes that further wrongful conduct may have occurred or that future risks would have materialized.[1065]

676. Thus, the appropriate "but for" scenario assumes that the Ontario Government followed through on its commitment to process and grant regulatory approvals in a timely way with a service guarantee.[1066]

C. "But For" the Moratorium, the Project Would Likely Have Achieved Commercial Operation in Accordance with the FIT Contract

677. SgurrEnergy,[1067] COWI,[1068] Weeks Marine and its Canadian subsidiary McNally,[1069] WSP[1070] and Baird[1071] have collaborated to prepare a detailed design, permitting and construction schedule for the Project.[1072] As set out in paragraphs 682 to 688 below, the Project Schedule sets out all steps necessary to bring the Project to commercial operation. The Project Schedule is supported by the reports of SgurrEnergy, COWI, Weeks Marine/McNally, WSP and Baird. The

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[1065] **CL-120**, *Deutsche Bank*, ¶ 330; **CL-034**, *Charzów Factory*; **CL-135**, Abdala, M.A., *Key Damage Compensation Issues in Oil and Gas International Arbitration Cases* (American University International Law Review, V. 24, I. 3, 2009), p. 558.

This is consistent with the approach of courts in Canada who will not use post-valuation date information (hindsight) to determine value: **C-1191**, *Maurice v. Alles*, 2013 ONSC 6046, ¶ 29; **C-1188**, *Ramsinghani v. 117325 Ontario Ltd*., 2003 CarswellOnt 2225, ¶ 31 (S.C.J.); **C-1189**, *Debora v. Debora* (2006), 83 O.R. (3d) 81 ¶¶ 45-46 (C.A.); **C-1187**, *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)*, 2000 CarswellOnt 1530, ¶ 5 (S.C.J.).

[1066] **C-0110**, News Release, Smitherman, George (MEI), The Green Economy (February 20, 2009).

[1067] **SgurrEnergy** has had direct involvement in 35 offshore wind energy projects by acting as lender's engineers, independent engineers, owner's engineers and technical advisors. They have also conducted feasibility and technical studies and bankability assessments for offshore wind projects: CER-SgurrEnergy-2, pp. 13-14.

[1068] **COWI** is a leading designer for offshore wind turbine foundations. They have designed 184 gravity based foundations that are either fully commissioned or under construction, and nearly 14% of all European offshore wind foundations: CER-SgurrEnergy-2, p. 14.

[1069] **Weeks Marine** and **McNally** have extensive experience in the fields of marine construction, dredging and vessel construction, and Weeks was selected to install the foundation's structures for the Block Island Offshore Wind Farm in the U.SCER-SgurrEnergy-2, pp. 14-15.

[1070] **WSP** has extensive experience in the development, permitting, design and construction of wind energy projects in Ontario and around the world. This includes experience with permitting the Argyll Array Offshore Wind Energy Project in Europe, and extensive work under the REA Regulation in Ontario: CER-WSP, pp. 1-5.

[1071] **Baird** has extensive experience with coastal processes on the Great Lakes, including drinking water issues. Baird was previously retained by MNR to prepare Offshore *Wind Power Coastal Engineering Report: Synthesis of Current Knowledge & Coastal Engineering Study Recommendations*: CER-Baird-2, p. 12.

[1072] CER-SgurrEnergy-2, Appendix 4, Project Schedule.

Project Schedule and the supporting expert evidence establishes that in the "but for" scenario, all the steps necessary to bring the Project to commercial operation would more likely than not have been completed by **May 2016**.[1073] This is well within the contractual parameters of the FIT Contract.

678. Therefore, "but for" the moratorium, and contrary to the opinion of URS,[1074] the Project would more likely than not have achieved commercial operation by May 2016.[1075] It would then have generated a predictable guaranteed revenue stream over a 20-year term.[1076]

1. Project Would be Required to Achieve Commercial Operation by July 2018

679. A commercial operation date of May 2016 is well within the timeframes set out in the FIT Contract timeframes. The following table summarizes the applicable FIT Contract milestones under the "but for" scenario:

Event	Date
Project resumes development	February 11, 2011
Original MCOD	May 4, 2015
Adjusted MCOD (extended for *force majeure*)[1077] • *First adjustment* – 81 days of *force majeure* from November 22, 2010 to February 11, 2011[1078] • *Second adjustment* – assumed 180 days of *force majeure* if the REA is appealed to the Environmental Review Tribunal[1079]	January 20, 2016

[1073] CER-SgurrEnergy-2, Appendix 4, Project Schedule.

[1074] RER-URS, ¶ 4.

[1075] CER-SgurrEnergy-2, pp. 15-18.

[1076] CER-Deloitte (Taylor and Low)-2, ¶ 2.5.

[1077] Events of *force majeure* extend the MCOD under the FIT Contract: **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 10.1.

[1078] The FIT Contract has been under *force majeure* since November 22, 2010: **C-0550**, Letter from Killeavy, Michael (OPA) to Baines, Nancy (WWIS) (September 9, 2011).

[1079] The Project Schedule contemplates that the FIT Contract would have been under *force majeure* for six months if the Project's REA were appealed to the Environmental Review Tribunal. The OPA has recognized that this constitutes a valid *force majeure* event: **C-1119**, IESO, Approach for FIT Contracts That Have REAs Appealed to

Event	Date
Supplier Default Date[1080]	July 20, 2018

680. Thus, the ultimate deadline for the Project to reach commercial operation in the "but for" scenario is the Supplier Default Date of July 20, 2018, which may be extended by further events of *force majeure*. That is the date on which the OPA could terminate the FIT Contract and retain WWIS' $6 million in security if the Project has failed to achieve commercial operation.[1081]

681. No default would occur if the Project achieved commercial operation after the adjusted MCOD of January 20, 2016 but before the Supplier Default Date of July 20, 2018. However, WWIS would be required to pay a penalty to the OPA to preserve the FIT Contract's 20-year term.[1082] Given that the Project Schedule establishes that the Project would more likely than not have achieved commercial operation in May 2016, after the adjusted MCOD of January 20, 2016, Deloitte's valuation reflects this penalty.[1083]

2. Project Would More Likely Than Not Have Achieved Commercial Operation by May 2016

682. The Project Schedule establishes that the Project would more likely than not have achieved commercial operation by May 2016, assuming that development of the Project continued on February 11, 2011. It establishes the following milestones:

Environmental Review Tribunal (February 14, 2014); **C-1120**, OPA, FIT Amending Agreement: MCOD Extension for Appeal of REA.

[1080] The Supplier Default Date is 18 months from the adjusted MCOD: **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 9.1(j).

[1081] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 9.2.
The OPA's *force majeure* termination right is not triggered under this scenario, because the Project would not have accumulated an aggregate of 24 months of *force majeure*: **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 10.1(g).

[1082] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 8.1(d).

[1083] CER-Deloitte (Taylor and Low)-2, ¶ 3.28.

Activity[1084]	Start Date	Completion Date
Work to complete application for REA	Feb. 11, 2011	Oct. 26, 2012
REA review by MOE	Jan. 22, 2013	Jul. 24, 2013
REA appeal	Aug. 12, 2013	Feb. 11, 2014
Crown land site release	Aug. 23, 2011	Aug. 7, 2012
Notice to Proceed from the OPA	Aug. 13, 2012	Sept. 10, 2013
Foundation fabrication	Feb. 11, 2014	Apr. 22, 2015
Foundation installation	Jun. 11, 2014	Oct. 8, 2015
Transmission cable procurement and installation	Feb. 11, 2014	Jun. 23, 2015
Design and commission of offshore substation	Feb. 11, 2011	Jul. 21, 2015
Wind turbine installation	Apr. 6, 2015	Nov. 10, 2015
Commissioning	Mar. 31, 2016	May 23, 2016

683. The Project Schedule contains a detailed, logic-linked matrix for all project design, permitting and construction tasks. It incorporates realistic and conservative timelines for completing these tasks.[1085] It responds directly to URS' conclusion that the Project could not have achieved commercial operation within the parameters of the FIT Contract. In SgurrEnergy's opinion, which is based on its direct involvement with 35 offshore wind projects totalling more than 10,000 megawatts, the timeframes included in the Project Schedule are consistent with those that have been realized by other offshore wind projects.[1086]

684. There were no material impediments to the Project being developed, permitted and constructed within the parameters of the FIT Contract. This is confirmed by the evidence of the following experts filed with Windstream's Reply Memorial, which supplements the detailed expert evidence filed with Windstream's Memorial and responds to the evidence of URS:

[1084] Per the Project Schedule, many of these tasks will take place in parallel.

[1085] CER-SgurrEnergy-2, pp. 15-18.

[1086] CER-SgurrEnergy-2, p. 16.

(a) **WSP**, which establishes that there was no material impediment to the Project obtaining a REA, other necessary permits, and the requisite Crown land tenure within the FIT Contract timelines.[1087]

(b) **SgurrEnergy**, with input from **COWI** and **Weeks Marine/McNally Marine**, which establishes that there was no material impediment to developing and constructing the Project within the timelines of the FIT Contract.[1088]

(c) **Aercoustics** and **HGC**, which establish that the Project would have complied with noise requirements.[1089]

(d) **Baird**, which establishes that there are no drinking water, navigation, ice, wind and wave, and fisheries issues that would have served as an impediment to the permitting and construction of the Project.[1090]

(e) **Remo Bucci** and **SgurrEnergy**, which establish that there were no material impediments to financing the Project.[1091]

685. The expert evidence submitted by Windstream establishes that URS' conclusion[1092] that the Project would not have achieved commercial operation until July 9, 2020 is unfounded. In the opinion of SgurrEnergy and Baird, URS' analysis is inaccurate in the following respects, among others:

(a) URS incorrectly assumes that the Project was "first of a kind" and therefore faced considerable uncertainty,[1093] when in fact the Project cannot be characterized as "first of a kind" given the number of offshore wind projects operating globally,

[1087] CER-WSP, pp. v, 46.

[1088] CER-SgurrEnergy-2, p. 41.

[1089] CER-Aercoustics, pp. 16, 17; CER-HGC-2.

[1090] CER-Baird-2, pp. 2-11.

[1091] CER-Bucci 2, p. 3; CER-SgurrEnergy-2, pp. 9-10, 26, 32.

[1092] Canada's Counter-Memorial, ¶ 544; RER-URS, p. 1, ¶ 4(a).

[1093] RER-URS, pp. 6, 7, 26, 68.

including one in fresh water, that all the Project's constituent parts are commonly used throughout Canada and Ontario and that the construction techniques used to build the Project are common in the Great Lakes;[1094]

(b) URS incorrectly presents generic development risks facing all projects as extraordinary risks for the Project;[1095]

(c) URS incorrectly concludes that numerous Project activities would occur in sequence, when in fact they would occur in parallel;[1096]

(d) URS incorrectly assumes that only a single construction vessel spread would have been used in support of foundation installation, when in fact the Project would have used multiple vessel spreads;[1097]

(e) URS incorrectly concludes that Windstream's project team lacked sufficient experience to bring the Project into commercial operation, while in fact Windstream had organized a sophisticated and experienced project team with the requisite experience to overcome project risks as they arose.[1098]

686. According to SgurrEnergy, URS has, on many occasions, either exaggerated risks to the Project Schedule or has imagined risk where none exists.[1099] Canada claims that the Project faced "significant construction risks," and Windstream "fails to take these risks into account" in its schedule for the Project.[1100] As explained by SgurrEnergy, the Project Schedule is consistent with project schedules for other offshore wind projects and it shows that the Project is "technically

[1094] CER-SgurrEnergy-2, pp. 6-7; CER-Baird-2, pp. 1-2.

[1095] RER-URS, pp. 17, 24. As SgurrEnergy explains in its report, many of the development risks facing the Project were generic development risks: CER-SgurrEnergy-2, pp. 7, 10.

[1096] CER-SgurrEnergy-2, pp. 108, 112.

[1097] CER-SgurrEnergy-2, pp. 39, 83-85.

[1098] CER-SgurrEnergy-2, p. 7.

[1099] CER-SgurrEnergy-2, p. 26.

[1100] Canada's Counter-Memorial, ¶ 540.

feasible and could have been engineered and constructed within the timeframe required by the FIT Contract."[1101]

687. URS' conclusion that the Project could not have achieved Commercial Operation rests on a number of assumptions that were derived from a high-level project timeline developed by Ortech for the Project. Canada and URS criticize this document as being "inappropriately simplistic."[1102] However, this document was never intended to serve as a detailed project schedule. Rather, it was intended to provide "overall project development schedule highlights."[1103] Mr. Roeper of Ortech explains that as the Project progressed, a more detailed project schedule (similar to the one filed with this Reply Memorial) would have been developed. However, in his experience, detailed project schedules are not generally created until a project reaches the detailed design phase. Windstream was not able to move to the detailed design phase because of the moratorium.[1104]

688. The statement at paragraph 533 of Canada's Counter-Memorial regarding the "project development schedule highlights" document relied upon by Mr. Bucci of Deloitte is also inaccurate. The schedule highlights document on which Mr. Bucci relied was prepared at his request by Ortech to establish the last possible date on which the project's development would have had to resume to achieve commercial operation before triggering the OPA's *force majeure* termination right. That document was not intended to be a detailed project schedule.[1105]

[1101] CER-SgurrEnergy-2, p. 12.

[1102] Canada's Counter-Memorial, ¶¶ 529-531; RER-URS, ¶ 300.

[1103] CWS-Roeper-2, ¶ 34; C-0375

[1104] CWS-Roeper-2, ¶ 36.

[1105] CWS-Roeper-2, ¶¶ 34-36; CER-Deloitte (Bucci)-2, p. 5.

3. URS Overstates the Risks Facing the Project

689. URS identifies a number of construction risks, design risks and permitting risks that, in the opinion of the experts on whose reports Windstream relies, have been overstated.

a) URS Overstates Construction Risks

690. URS identifies the following construction risks, which it states could have a direct impact on the project schedule: weather, the limited availability of suitable specialized vessels operating in Lake Ontario due to access restrictions, wind and wave conditions and ice formations.[1106] As detailed below, none of these risks present material impediments to the Project achieving commercial operation within the time constraints of the FIT Contract:

691. ***Weather related delays.*** Weeks Marine/McNally, which has been operating in Lake Ontario for 25 years, has incorporated a 25% weather allowance into the Project Schedule for all construction activities from the beginning of April to the end of December.[1107] No construction will take place between the end of December and the beginning of April.[1108] In SgurrEnergy's opinion, the construction season selected is appropriate, and the weather contingency "is prudent and appropriate."[1109]

692. ***Suitable specialized vessels.*** According to Weeks Marine/McNally, "all of the equipment required to dredge, tow, deploy and backfill" foundations for the Project "are currently in [their] inventory or are readily available for local charter."[1110] The majority of the construction vessels for the Project will be "lower cost barge based installation vessels," which are widely available in the Great Lakes. The only specialized vessel required, a jack up vessel to install turbines, "would have been available, either existing or as new builds."[1111]

[1106] RER-URS, ¶¶ 253-292.

[1107] CER-SgurrEnergy-2, p. 196.

[1108] CER-SgurrEnergy-2, p. 201.

[1109] CER-SgurrEnergy-2, p. 196.

[1110] CER-SgurrEnergy-2, p. 64.

[1111] CER-SgurrEnergy-2, p. 209.

693. ***Wind and wave conditions*.** According to the metocean analysis conducted by Baird, the Project site has favourable weather conditions for marine construction operations throughout the ice-free season.[1112] Moreover, the vessels that Weeks Marine/McNally would use for project construction are designed to work in these weather conditions.[1113] Finally, these conditions also compare favourably to the conditions in the North Sea, where the majority of offshore wind projects are located.[1114]

694. ***Ice conditions*.** As Baird explains in its report, URS has not raised "any substantive issues with respect to ice conditions that were previously unknown or that would alter the design development and permitting" for the Project.[1115] On the contrary, ice conditions in the Project area are well understood, and this understanding has been incorporated into the development of the Project Schedule.[1116]

b) URS Overstates Design Risks

695. URS also states that the Project faced various "design risks."[1117] URS identifies as concerns "the use of [Gravity Based] Foundations with respect to lakebed conditions, as well as the onshore facilities where they would have to be fabricated and prepared for deployment."[1118] URS has overstated these risks.

696. ***Foundation risks*.** SgurrEnergy disagrees with URS's assertion that the selection of a semi-floating gravity base foundation ("**GBF**") poses a high risk to the Project Schedule. In SgurrEnergy's opinion, GBF foundations are among the "simplest and best understood foundation technologies available for offshore wind projects."[1119] According to SgurrEnergy and COWI, GBF foundations are the easiest foundations to install at the Project site, and the best

[1112] CER-SgurrEnergy-2, p. 159; CER-Baird, p. 78.

[1113] CER-SgurrEnergy-2, p. 199.

[1114] CER-SgurrEnergy-2, p. 159.

[1115] CER-Baird-2, pp. 85, 87.

[1116] CER-Baird-2, pp. 78-79.

[1117] Canada's Counter-Memorial, ¶ 538. RER-URS, ¶¶ 166-230.

[1118] Canada's Counter-Memorial, ¶ 539.

[1119] CER-SgurrEnergy-2, p. 162.

foundation solution in light of "the water depth, geotechnical conditions and ice found in Lake Ontario."[1120]

697. ***Foundation construction facility risks.*** SgurrEnergy and COWI disagree with URS's assertion that onshore foundation construction risk poses a high risk to the Project Schedule. Foundation fabrication facilities "are designed to be low impact and to capitalize on existing infrastructure."[1121] SgurrEnergy and COWI explain that there are multiple potential sites on Lake Ontario that may serve as foundation fabrication facilities, including the [redacted] facility, which COWI proposes as the foundation fabrication facility.[1122] This facility can accommodate the three fabrication lines required to support the construction of 130 foundations for the Project. Refining a port facility to accommodate a foundation construction facility would not be unduly onerous; according to SgurrEnergy, refining port facilities to "accommodate changing cargos and cargo volumes" is something that "ports undergo all the time."[1123]

c) URS Overstates Permitting Risks

698. Based on the URS Report, Canada also claims that the Project faced numerous permitting issues that "threatened the viability of the Project altogether," including: shipping and navigation, fish and fish habitat, migratory birds, and the release of chemical contaminants into the Lake.[1124] As Windstream's experts explain, none of these risks identified by Canada posed a significant risk to the Project, let alone threatened the viability of the Project.

699. ***Navigation***. Baird explains that the Project does not pose a threat to existing navigation channels in the Great Lakes: "[t]he existing configuration and width of the designated Lake Ontario upbound navigation route for the Great Lakes – St. Lawrence Seaway shipping, adjacent

[1120] CER-SgurrEnergy-2, p. 162.

[1121] CER-SgurrEnergy-2, p. 168.

[1122] CER-SgurrEnergy-2, pp. 29, 128, 153.

[1123] CER-SgurrEnergy-2, p. 166.

[1124] Canada's Counter-Memorial, ¶ 538.

to the Project turbine array (refined 2015 layout"), are safe."[1125] There is no expectation that the existing shipping channel will need to be relocated, and as a result, the significant schedule delays identified by URS would not have materialized. In fact, according to Baird, URS fails to even correctly identify "the actual location of the upbound route" in Lake Ontario.[1126] Baird has also accounted for the need to obtain *Navigation Protection Act* approvals in the Project Schedule.

700. In its first report, Baird identified the presence of a navigation route in the Project area and that positioning of the turbines could be adjusted to provide a passage of sufficient width for seaway traffic. In consultation with Baird and in response to the comments of URS,[1127] Windstream has adjusted the layout for the Project (the "**2015 Layout**"). The 2015 Layout relocates 27 turbines from the southeast corner of the Project away from the existing St. Lawrence Seaway – Lake Ontario upbound shipping route. In Baird's opinion, the reconfiguration of the Project will not impact Great Lakes navigation along this shipping route (or more generally) and will not create project delays on account of project scheduling issues on the *Navigation Protection Act*.[1128]

701. Under the 2015 Layout, each Project turbine is set back at least five-kilometres from the mainland, from noise receptors,[1129] and from inhabitable areas of Wolfe Island.[1130] Under the 2015 Layout, 20 turbines will be less than five-kilometres from Long Point, a small uninhabited peninsula that protrudes into Lake Ontario from Wolfe Island. However, based on the mean (or average) shoreline of Wolfe Island, each turbine will remain a minimum of five-kilometres from

[1125] CER-Baird-2, p. 52.

[1126] CER-Baird-2, p. 53.

[1127] RER-URS, ¶¶ 79, 91, 94-108.

[1128] CER-Baird-2, pp. 4-6.

[1129] The REA Regulation defines "noise receptors" as "the centre of a building or structure used for overnight accommodation" or "the centre of a building or structure used as an educational facility, a day nursery or a place of worship."

[1130] CER-SgurrEnergy-2, Appendix 21.

the shoreline of Wolfe Island.[1131] Ortech, Windstream's project manager, proposed a definition of "shoreline" that excluded uninhabited or uninhabitable areas in response to MOE's request for comments on the setback proposal in September 2010.[1132]

702. According to Sgurr, Baird and WSP, it is very common in the development of renewable energy projects to change project layouts up to the start of construction: as proponents undertake site-specific studies to characterize the local environment, project layouts are modified to account for previously unknown constraints, such as sloping terrain, natural gas deposits or shipwrecks.[1133] In fact, WSP notes that the REA Regulation includes provisions which accommodate modifications to project layout.[1134] As a result, and in SgurrEnergy's expert opinion, layout uncertainty is not a risk to projects in the development stage.[1135]

[1131] The adoption of a mean (or average) shoreline is a reasonable approach to complying with MOE's proposed five-kilometre "shoreline exclusion zone" because MOE never defined "shoreline" for the purposes of the setback. No decision appears to have been taken whether "shoreline" would include major islands, minor islands, or uninhabited points. In Ms. Powell's opinion, a proponent of f an offshore wind energy project could reasonably expect that MOE would have adopted a contextual and purposive definition of "shoreline" that took into account noise guidance issued by MOE. As a result, the presence (or lack) of noise receptors would have been a relevant consideration in the determination of the applicable setback: CER-Powell-2, ¶ 23.

In any event, numerous documents produced by Canada and the Ontario Government indicate that neither MNR nor MOE had any scientific rationale to justify imposing a five-kilometre setback:

C-0219, Presentation (MNR), Offshore Wind Power Development (April 19, 2010), p. 5; **C-0253**, Handwritten Notes of Ken Cain (MNR) (May 6, 2010), p. 2; **C-0172**, Handwritten notes of Ken Cain (MNR) (2010), p. 1; **C-0256**, Email from Hamilton, Rachel (ENE) to Duffey, Barry (ENE) May 11, 2010); **C-0271**, Email from Leus, Adam (ENE) to Duffey, Barry (ENE) et al. (May 26, 2010); **C-0222**, Email from Postacioglu, Dilek (ENE) to Leus, Adam (ENE) (April 20, 2010); **C-0234**, Email from Cain, Ken (MNR) to Hayward, Neil (MNR) (April 23, 2010); **C-0227**, Handwritten Notes of Dilek Postacioglu (ENE) (April 21, 2010), p. 1; **C-0228**, Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) (April 21, 2010); **C-0231**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) (April 22, 2010); **C-0232**, Email from Boysen, Eric (MNR) to Cain, Ken (MNR) (April 22, 2010); **C-0238**, Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) et al. (April 28. 2010); **C-0223**, Email from Boysen, Eric (MNR) and Lawrence, Rosalyn (MNR) (April 20, 2010); **C-0386**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (November 22, 2010); **C-0273**, Email from Harvey, Deborah (MNR) to Boysen, Eric (MNR) (May 26, 2010). This email was sent in the context of discussions about implementing setbacks for offshore wind turbines, which was originally scheduled for late May, 2010: **C-0272**, Email from West, Karen (MNR) to Dottin, Bev (MNR) (May 26, 2010).

[1132] **C-0918**, Report (Ortech), Submission Regarding Discussion Paper on Offshore Wind Facilities: Renewable Energy Approval Requirements (September 27, 2010).

[1133] CER-Baird-2, pp. 4-5, 52, 59; CER-SgurrEnergy-2, p. 22; CER-WSP, pp. viii-ix.

[1134] CER-WSP, pp. viii-ix.

[1135] CER-SgurrEnergy-2, p. 33.

703. ***Fish and fish habitat.*** Baird also explains that the risk to the Project Schedule from permitting issues related to fish and fish habitat is low.[1136] The Project Schedule allows sufficient time to conduct the necessary fieldwork, analysis and consultation to assess the Project's potential impacts on fish and fish habitat. In any event, in Baird's opinion, there is a low probability that habitat of species identified as being "at risk" exists in the vicinity of the Project.[1137] As a result, in Baird's opinion, it is "highly unlikely" that permits will be required under Ontario's *Endangered Species Act*.[1138] Baird has also accounted for the need to obtain approval under the federal *Fisheries Act* in the Project Schedule.[1139]

704. ***Migratory birds.*** WSP explains that conducting the necessary work to assess the Project's impact on migratory birds "does not pose a significant risk to the Project Schedule."[1140] As WSP explains, surveys for avian species, including migratory birds, is a standard component of the REA process and is accounted for in the Project Schedule. Further, as Windstream's expert Dr. Paul Kerlinger explains in his report, "there is no migratory stopover habitat within many kilometres of the Project turbines. Thus, birds migrating over the east end of Lake Ontario will be flying at altitudes greater than the height of turbines and they will not be descending or ascending through the airspace of the turbine rotors."[1141] As a result, the Project would pose "no risk to these birds while nesting, wintering, or making migratory stopovers."[1142]

705. ***Drinking water.*** As Baird explains in its report, "[t]he available evidence indicates that the level of contaminants in the existing lakebed sediments of Lake Ontario in the area of the Project would be safely manageable within established [MOE] criteria and guidelines. Preliminary analysis also indicates that shifting of those sediments during installation of the turbine foundations would pose no threat to drinking water and the Project would meet all MOE

[1136] CER-Baird-2, p. 89.

[1137] CER-Baird-2, p. 89.

[1138] CER-Baird-2, p. 89.

[1139] CER-Baird-2, pp. 89-91.

[1140] CER-WSP, p. 22.

[1141] CER-Kerlinger, ¶ 34.

[1142] CER-Kerlinger, ¶ 36.

criteria."[1143] In addition, McNally has completed several projects in the vicinity of the Project, including laying the high voltage cable connecting the onshore Wolfe Island Wind Project to the mainland, and it confirms that it was not required to take measurements for contaminated sediments in advance of carrying out this work.[1144]

706. ***Noise.*** Windstream's noise experts conclude, based on actual noise measurements at the Project site, that the Project would comply with MOE's sound level limits for noise receptors.[1145]

707. ***Onshore permitting.*** Canada claims that Windstream has "completely ignored" the onshore permitting requirements for the Project. This is incorrect. According to WSP, the REA Regulation includes all aspects of the Project within the definition of the "Project Location." As a result, all components of the Project, terrestrial and aquatic, are included in the testing and permitting required to apply for a REA.[1146] All of this work is accounted for in the Project Schedule.

4. Conclusion On Risk

708. The risks facing the Project are accounted for in the Project Schedule. These are all risks that, more likely than not, would have been managed by the experienced development team created by Windstream.[1147] In fact, in the opinion of SgurrEnergy, if URS's approach to project risk was adopted industry-wide, "it is unlikely that anything would ever get built."[1148]

709. In any event, these risks are also accounted for in the discount rate applied to determine the net present value of the Project. Deloitte explains that, based on its review of the reports submitted with Windstream's Memorial and this Reply Memorial, it is more likely than not that the Project would have been developed, permitted and constructed within the contractual

[1143] CER-Baird-2, p. 19.

[1144] CER-SgurrEnergy-2, p. 26.

[1145] CER-Aercoustics, p. 4.

[1146] CER-WSP, p. vi.

[1147] CER-SgurrEnergy-2, pp. 10, 38, 41, 194.

[1148] CER-SgurrEnergy-2, p. 10.

constraints of the FIT Contract.[1149] However, the possibility that the Project may not achieve these milestones is expressly accounted for in the discount rate applied to determine the net present value of the Project.[1150]

D. Valuation of Windstream's Investments "But For" the Moratorium

1. Deloitte's Revised DCF Valuation

710. Applying the "but for" scenario set out in paragraph 668 above, Deloitte has revised its valuation of Windstream's losses resulting from Canada's breaches of Articles 1110, 1105(1) and 1102 of NAFTA relating to the application of the indefinite-term moratorium to the Project.

CAD millions	At May 22, 2012		At June 19, 2015	
	Low	High	Low	High
Articles 1110 (unlawful expropriation)/1105/1102				
Total (with 5KM setback)	277.8	369.5	495.5	565.5
Add: Pre-judgment interest	32.9	43.8	9.1	11.1
Total with pre-judgment interest (with 5KM setback)	**310.7**	**413.2**	**468.6**	**576.7**
Total (3 year delay, with 5KM setback)	299.3	392.3	407.3	516.2
Add: Pre-judgment interest	35.4	46.5	8.0	10.2
Total with pre-judgment interest (3 delay, with 5KM setback)	**334.8**	**438.8**	**415.3**	**526.4**

711. This valuation is supported by Deloitte's application of the market comparables approach.[1151]

712. Deloitte proposes a discount rate for the Project in the range of [redacted] to [redacted]. This is based (among other things) on a cost of debt of [redacted] to [redacted], a cost of equity of [redacted] to [redacted], and a country-specific risk premium ("**CSRP**") of [redacted] to [redacted] to adjust for regulatory and construction risk facing the Project.[1152]

[1149] CER-Deloitte (Taylor & Low)-2, ¶ 3.3

[1150] CER-Deloitte (Taylor & Low)-2, ¶ 3.4.

[1151] CER-Deloitte (Taylor and Low)-2, ¶ 5.19.

[1152] CER-Deloitte (Taylor and Low)-2, ¶ 4.2.

713. These assumptions (in addition to the other assumptions informing the discount rate) are reasonable and prudent. Deloitte's proposed cost of equity is consistent with the 10.9% cost of equity proposed by Pricewaterhouse Coopers ("**PWC**") for offshore wind projects and the 11% cost of equity the OPA used in its valuation assumptions to determine the pricing structure for renewable energy projects.[1153] Deloitte's cost of debt was derived from market soundings with wind energy project lenders.[1154] Although Deloitte concludes that more likely than not the Project would have reached commercial operation in the timelines set out in the FIT Contract, their CSRP factors the possibility of this not happening into the discount rate.[1155] As Deloitte explains, the fact that Windstream held a 20-year fixed price power purchase agreement significantly reduces the risks facing the Project, further contributing to the appropriateness of their CSRP.[1156]

714. BRG assumes a discount rate for the Project in the range of 10% to 11%. It arrives at this figure using (among other things) a cost of equity of between 22.49% and 24.58%, and an inappropriate proxy group.[1157] These are unreasonable assumptions. BRG's proposed cost of equity is more than *double* the cost of equity suggested by the OPA and PWC.[1158] Mr. Mars explains that Windstream's investors, in their 100 years of combined development experience, "have never seen a cost of equity this high." Mr. Mars explains that this number "falls well outside of the realm of reality in relation to a project with a 20 year fixed price contract with a credit worthy counter party. If the cost of equity was remotely close to this amount development of these projects would not happen."[1159]

715. BRG's discount rate is also based on inappropriate comparator companies, since none of the companies selected by BRG had secured a fixed-price power purchase agreement for 100%

[1153] CER-Deloitte (Taylor and Low)-2, ¶¶ 4.14(d), 4.21, 4.42.

[1154] CER-Deloitte (Taylor and Low)-2, ¶¶ 4.28.

[1155] CER-Deloitte (Taylor and Low)-2, ¶ 4.14(c).

[1156] CER-Deloitte (Taylor and Low)-2, ¶ 4.14.

[1157] CER-Deloitte (Taylor and Low)-2, ¶ 4.42.

[1158] CER-Deloitte (Taylor and Low)-2, ¶¶ 4.14(d), 4.21, 4.42.

[1159] CWS-Mars-2, ¶ 72.

of its electricity output.[1160] The fact that BRG's selected comparator companies lacked power purchase agreements made them "significantly riskier" than the Project, and therefore inappropriate comparators.[1161]

2. BRG's Criticisms of Deloitte's Original Valuation are Unfounded

a) Deloitte Appropriately Considered Development and Construction Risks as Part of the Discount Rate in its DCF Valuation

716. BRG asserts that Deloitte assumed that the Project did not face any development and construction risk and that Deloitte treats "the Project as if it was already built and operating."[1162] This is inaccurate. In determining the appropriate discount rate, Deloitte accounted for risk, including regulatory, project design, permitting and construction risk. This is clearly set out in both Deloitte reports:[1163]

> [I]t is our opinion that the Project could have been developed, permitted and constructed within the timelines of the FIT Contract. However, the possibility that the Project might not have been developed, permitted and constructed within the time constraints of the FIT Contract is accounted for in the discount rate.[1164]

717. Contrary to the assertion that Deloitte "treats the Project as if it was already operating," Deloitte accounted for the risks faced by the Project in selecting a discount rate. Had the Project already been in operation, the valuation would have been between $673.7 to $691.9 million higher – the low-end valuation would have been $865.4 million, while the high-end valuation would have been $951.0 million.[1165]

[1160] CER-Deloitte (Taylor and Low)-2, ¶ 4.44.

[1161] CER-Deloitte (Taylor and Low)-2, ¶ 4.45.

[1162] Canada's Counter-Memorial, ¶ 550; RER-BRG, ¶¶ 27 (c), 30, 34.

[1163] CER-Deloitte (Taylor and Low)-2, ¶¶ 3.2-3.3; CER-Deloitte (Taylor and Low), ¶ 4.14, 4.50-4.58.

[1164] CER-Deloitte (Taylor and Low)-2, ¶ 3.4

[1165] CER-Deloitte (Taylor and Low)-2, ¶ 3.4. These figures are before the gross-up for tax and interest.

b) Deloitte Appropriately Determined Likely Turbine Costs

718. BRG also asserts that Deloitte failed to take the following considerations into account when valuing the Project: (i) the turbine supply agreement that Windstream signed with Siemens, (ii) the harmonized sales tax ("**HST**") that would have applied pursuant to this agreement, and (iii) the "industry standard" service agreement for these turbines.[1166]

719. These criticisms are without foundation. First, the [redacted]..[1167] Indeed, because the [redacted].[1168] As a result, Deloitte appropriately [redacted].[1169]

720. Second, WWIS would have received a refund for HST paid for the purchase of turbines.[1170] Deloitte therefore appropriately did not reflect this cost in its valuation.

721. Finally, Deloitte relies on specific cost estimates prepared for the Project based on market data in establishing costs associated with the servicing of the turbines.[1171] URS has, for no reason and without any supporting evidence, inflated the cost of the service agreement by 15 percent over market data.[1172]

[1166] Canada's Counter-Memorial, ¶ 554; RER-BRG, ¶¶ 39, 63, 131-135, 231 /56, 63, 134, 231/136-138, 178.

[1167] CER-Deloitte (Taylor and Low)-2, ¶ 6.1; CWS-Mars-2, ¶ 62.

[1168] CER-Deloitte (Taylor and Low)-2, ¶ 6.1.

[1169] CER-Deloitte (Taylor and Low)-2, ¶ 6.1.

[1170] CER-Deloitte (Taylor and Low)-2, ¶ 6.4.

[1171] CER-Deloitte (Taylor and Low)-2, ¶ 6.9.

[1172] CER-Deloitte (Taylor and Low)-2, ¶ 6.9.

c) BRG's Assertion that Deloitte Made Calculation Errors is Unfounded

722. BRG also incorrectly alleges that Deloitte erroneously failed to calculate the base land rent fee applicable to the Project and failed to account for the decommissioning costs of the Project.[1173] In Deloitte's opinion, BRG incorrectly calculates the Base Land Rent Fee, resulting in BRG inflating the amount payable by nearly $9 million.[1174] The correct calculation of base land rent fees for the operative period results in a cost of [redacted] for the two years prior to the Project's commercial operation.[1175]

723. Similarly, Deloitte also concludes that the cost of decommissioning set out by BRG (and drawn from URS) inflates the cost of decommissioning the Project. URS suggests a decommissioning cost of $70 million. However, it provides no support or clear methodology for how this figure was determined.[1176] On the other hand, Deloitte concludes, on the basis of information from industry experts, that the net realizable value of an offshore wind project's assets would offset the costs of decommissioning.[1177] This is a standard industry assumption for offshore wind projects.[1178] Similarly, it is also possible that the Project would not need to be decommissioned after 20 years, and that the Project would continue to produce electricity after the expiry of the FIT Contract.[1179]

[1173] Canada's Counter-Memorial, ¶ 555; RER-BRG, ¶ 64, 143-144.

[1174] CER-Deloitte (Taylor and Low)-2, ¶ 6.16.

[1175] CER-Deloitte (Taylor and Low)-2, ¶ 6.16.

[1176] CER-Deloitte (Taylor and Low)-2, ¶ 6.20.

[1177] CER-Deloitte (Taylor and Low)-2, ¶ 6.18.

[1178] CER-Deloitte (Taylor and Low)-2, ¶ 6.18.

[1179] CER-Deloitte (Taylor and Low)-2, ¶ 6.18.

d) Deloitte has Appropriately Included Windstream's Incurred Costs in its Valuation

724. Canada's argument that Windstream's investment costs are insufficiently substantiated is without merit.[1180] Deloitte relied on Windstream's reviewed and audited financial statements and the general ledger for WWIS in determining WWIS' investment costs.[1181] These documents are in evidence.[1182] To avoid all doubt that Windstream actually incurred the costs reflected in Deloitte's report, Windstream includes as an exhibit to this Reply a CD containing a broad sample of invoices and bank statements for work incurred on the Project.[1183] Deloitte has audited these documents by (i) testing 30% of the total invoices paid from inception to July 31, 2014, (ii) obtaining interest calculations on the letters of credit and reviewing them for accuracy, and (iii) reviewing amounts accrued by Controltech Engineering and White Owl Capital management fees. These procedures have resulted in Deloitte testing approximately 83 percent of the balance of the total past costs incurred.[1184]

725. Canada's claim that Windstream should not recover the amounts spent to secure its $6 million letter of credit because it ought to have terminated the FIT Contract in May 2012 is also without merit. At paragraph 567 of its Counter-Memorial, Canada states:

[1180] Canada's Counter-Memorial, ¶ 566.

[1181] CER-Deloitte (Taylor and Low)-2 (Taylor and Low), ¶ 6.25.

[1182] **C-0102**, Financial Statements, Windstream Wolfe Island Shoals Inc. (December 31, 2008); **C-0170**, Financial Statements (Draft) Windstream Wolfe Island Shoals Inc. (December 31, 2009); **C-0418**, Financial Statements, Windstream Wolfe Island Shoals Inc. (December 31, 2010); **C-0579**, Financial Statements, Windstream Wolfe Island Shoals Inc. (December 31, 2011); **C-0638**, Financial Statements, Windstream Wolfe Island Shoals Inc. (December 31, 2012); **C-0679**, Financial Statements (Draft), Windstream Wolfe Island Shoals Inc. (December 31, 2013); **C-1894**, Windstream Wolfe Island Shoals Inc. Financial Statements (December 31, 2009); **C-1895**, Windstream Wolfe Island Shoals Inc. Financial Statements (December 31, 2013); **C-1896**, Windstream Wolfe Island Shoals Inc. Financial Statements (December 31, 2014); **C-1898**, Windstream General Ledger. The ledger was not an exhibit to the Memorial but was relied on by Deloitte and was produced to Canada.

[1183] **C-1899**, CD containing invoices and bank statements. The invoices submitted include all costs incurred by Windstream, including in some cases costs that are not attributable to the Project. The attribution of costs to the Project is reflected on WWIS' audited and reviewed financial statements, and in the ledger. In any event, it is well established that a Claimant is not required to establish its incurred costs with absolute certainty: **CL-041**, *Vivendi II*, ¶ 8.3.16.

[1184] CER-Deloitte (Taylor and Low)-2, ¶¶ 6.25-6.26.

> Further, $6 million of the alleged sunk costs lost relate to the Letter of Credit that the Claimant submitted along with its FIT Application. However, that Letter of Credit would be returned to the Claimant if the Claimant exercised its right to terminate its FIT Contract in accordance with the Pre-NTP termination clauses. The Claimant would not have incurred any penalty if it had terminated its FIT Contract on May 4, 2012.[1185]

726. This is false. Section 2.4 of the FIT Contract's General Terms and Conditions provide:

> 2.4 Notice to Proceed […]
>
> (b) If the Supplier terminates this Agreement in accordance with Section 2.4(a), then notwithstanding section 9.5, as the OPA's sole and exclusive remedy for such termination, the Supplier shall pay as liquidated damages and not as a penalty, a sum equivalent to the amount of all Completion and Performance Security required to be provided by the Supplier as of the date of such termination.[1186]

727. Therefore, if WWIS had terminated the FIT Contract in May 2012, it would have been liable to pay the OPA $6 million in damages – in effect, WWIS would have forfeited its security. Canada's argument is that WWIS should have forfeited $6 million to save in interest costs. This is unfounded, and is not required mitigation.

728. Windstream is also entitled to engineering and other costs incurred after the date of breach.[1187] As Mr. Mars explains in his witness statement, when the Ontario Government imposed the moratorium, Windstream still understood that it would be permitted to proceed with the Project in the future. In fact, WWIS was and is still bound by the FIT Contract. If the Ontario Government were to suddenly lift the moratorium, Windstream would be required to resume project development in order to avoid being in default under the FIT Contract and forfeiting its

[1185] Canada's Counter-Memorial, ¶ 567 [Emphasis added].

[1186] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 2.4(a)(ii) [Emphasis added].

[1187] **CL-082**, *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Award, February 6, 2007 ("***Siemens***"), ¶¶ 386-387; **CL-041**, *Vivendi II*, ¶ 8.3.17; **RL-043**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Award, 28 June 2012, ¶ 277; **CL-062**, *Metalclad*, ¶¶ 127, 131.

$6 million in security (though the Project would not be financeable in those conditions unless the OPA waived its *force majeure* termination right).[1188]

3. Valuation Date

729. In Deloitte's opinion, the Project became substantially worthless on the date on which it was no longer possible for the Project to reach commercial operation before triggering the OPA's termination rights under section 10.1(g) of the FIT Contract.[1189] Based on the revised Project Schedule, this occurred as of May 22, 2012, and Windstream's investments have been substantially worthless ever since, because:

(a) by May 22, 2012, the FIT Contract had been under *force majeure* for 18 months;[1190]

(b) the Project Schedule contemplates a further six months of *force majeure* given that the Project's REA may have faced an appeal to Ontario's Environmental Review Tribunal;[1191]

(c) the OPA may terminate the FIT Contract if, by reason of one or more events of *force majeure*, the Project's commercial operation date is delayed for an aggregate of more than 24 months after May 4, 2015 – in other words, is delayed to May 4, 2017 or later;[1192]

[1188] CWS-Mars-2, ¶¶ 88-90.

[1189] CER-Deloitte (Taylor and Low), pp. 29-30; CER-Deloitte (Taylor and Low)-2 (Taylor and Low), ¶ 3.11.

[1190] The FIT Contract has been under *force majeure* since November 22, 2010: **C-0550**, Letter from Killeavy, Michael (OPA) to Baines, Nancy (WWIS) (September 9, 2011).

[1191] CER-SgurrEnergy-2, Appendix 4, Project Schedule, line 68; **C-1119**, IESO, Approach for FIT Contracts That Have REAs Appealed to Environmental Review Tribunal (February 14, 2014); **C-1120**, OPA, FIT Amending Agreement: MCOD Extension for Appeal of REA.

[1192] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 10.1(g).

(d) based on the Project Schedule, the Project would have been required to resume development by February 2012 to achieve commercial operation by May 4, 2017;[1193] and therefore

(e) based on the Project Schedule, as of May 22, 2012, the Project could no longer achieve commercial operation before triggering the OPA's *force majeure* termination right.

730. As a result, the Project, and consequently the FIT Contract and WWIS, became substantially worthless as of May 22, 2012 and continue to be substantially worthless.[1194] Deloitte has used a May 22, 2012 valuation date in conducting its revised valuation.

III. Valuation of Windstream's Investments "But For" the Failure to Insulate Them from the Effects of the Moratorium

731. Deloitte has also completed a valuation of Windstream's investments that would apply if the Tribunal finds that Canada did not breach NAFTA by applying the moratorium to the Project but that it did breach NAFTA by failing to insulate Windstream's investments from the effects of the moratorium.

A. Appropriate "But For" Scenario is One Where FIT Contract is "Frozen" During the Moratorium and the Project Continues Thereafter

732. The appropriate "but for" scenario flowing from this breach is one where:

(a) the FIT Contract remained under *force majeure* for the duration of the moratorium without triggering any termination right by the OPA;

(b) the Ontario Government completed the research it deemed necessary in good faith and in a timely manner;

[1193] CER-Sgurr-Energy-2, pp. 15-16.

[1194] CER-Deloitte (Taylor and Low)-2, ¶¶ 3.11-3.12.

(c) the Government lifted the moratorium within a reasonable period of time – Windstream has assumed a three-year moratorium imposed between February 11, 2011 and February 11, 2014;[1195]

(d) the Project would be permitted to resume development in February 2014;

(e) by that time, MNR would have fulfilled its commitment to discuss the reconfiguration of Windstream's applications for Crown land for the Project (if a five-kilometre setback was confirmed), and would have thereafter fulfilled its commitment to "move as quickly as possible through the remainder of the application review process so that [WWIS] may obtain Applicant of Record status in a timely manner;"[1196]

(f) MOE and MNR would have fulfilled their commitment to process WWIS' application for a REA within the six-month service guarantee;[1197] and

(g) the Ontario Government would have dealt with Windstream in good faith and not have subjected the Project to unreasonable regulatory delays.

B. "But For" the Failure to Insulate Windstream from the Moratorium's Effects, the Project Would Likely Have Achieved Commercial Operation in Accordance with the FIT Contract

733. As set out above in paragraphs 682 to 688, the Project, more likely than not, would have been developed, permitted and constructed in 63 months. This includes six months of *force majeure* time as a result of a likely appeal to Ontario's Environmental Review Tribunal.

[1195] This is a reasonable assumption, as MOE's initial plan showed that the research it was proposing to establish a standardized noise-related setback would take only 15 months: **C-0858**, Presentation, Offshore Wind Noise Requirements, MO Briefing (October 19, 2010), slide 7.
At the time the moratorium decision was made, internal correspondence among MOE and MEI staff contemplated that the moratorium would last between two and five years: **C-0927**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (January 17, 2011); **C-0973**, Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) (February 10, 2011); **C-0970**, Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) (February 9, 2011).

[1196] **C-0334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) (August 9, 2010), p. 2. MNR was actually planning to follow through on this commitment had the Project been allowed to proceed. See ¶¶ 182-186 above.

[1197] See ¶¶ 82-89 above.

Therefore, under the alternative "but for" scenario, the Project would have reached Commercial Operation by May 2019, well in advance of the Supplier Default Date of July 20, 2021.

734. The following table summarizes the applicable FIT Contract milestones under the alternative "but for" scenario. These milestones are the same as in the "but for" scenario described above, but are extended by three years.

Event	**Date**
Project resumes development	February 11, 2014
Original MCOD	May 4, 2015
Adjusted MCOD *First Adjustment* – 81 days of *force majeure* from November 22, 2010 to February 11, 2011[1198] *Second Adjustment* – 3 year extension for moratorium *Third Adjustment* – assumed 180 days of *force majeure* if the REA is appealed to the Environmental Review Tribunal[1199]	January 20, 2019
Supplier Default Date[1200]	July 20, 2021

735. The Project Schedule applies equally to this scenario, except that the dates set out in the Project Schedule are extended by three years. Thus, the Project would reach commercial operation by May 2019, instead of May 2016.[1201] This is well before the Supplier Default Date of July 20, 2021.

[1198] The FIT Contract has been under *force majeure* since November 22, 2010: **C-0550**, Letter from Killeavy, Michael (OPA) to Baines, Nancy (WWIS) (September 9, 2011).

[1199] As noted above, the Project Schedule contemplates that the FIT Contract would have been under *force majeure* for six months if the Project's REA were appealed to the Environmental Review Tribunal. The OPA grants FIT Contract extensions for a period equivalent to the appeal period. The six-month extension is considered to be a period of *force majeure* for the purpose of the OPA's termination right under section 10.1(g) of the FIT Contract: **C-1119**, IESO, Approach for FIT Contracts That Have REAs Appealed to Environmental Review Tribunal (February 14, 2014); **C-1120**, OPA, FIT Amending Agreement: MCOD Extension for Appeal of REA.

[1200] The Supplier Default Date is 18 months from the adjusted MCOD: **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), Section 9.1(j).

[1201] CER-SgurrEnergy-2, Appendix 4, Project Schedule.

C. Deloitte' Valuation of Windstream's Investments "But For" the Failure to Insulate Windstream from the Moratorium's Effects

736. Under this scenario, Deloitte has calculated Windstream's damages as follows:[1202]

CAD millions	At May 22, 2012		At June 19, 2015	
	Low	High	Low	High
Articles 1110 (unlawful expropriation)/1105/1102				
Total (3 year delay, with 5KM setback)	299.3	392.3	407.3	516.2
Add: Pre-judgment interest	35.4	46.5	8.0	10.2
Total with pre-judgment interest (3 delay, with 5KM setback)	**334.8**	**438.8**	**415.3**	**526.4**
Total (3 year delay, original layout)	**355.4**	**454.8**	**479.2**	**594.3**
Add: Pre-judgment interest	**42.1**	**53.9**	**9.4**	**11.7**
Total with pre-judgment interest (3 delay, original layout)	**397.5**	**508.7**	**488.6**	**606.0**

737. Deloitte made a number of adjustments to its base case scenario in order to complete the appropriate financial modelling for this alternative scenario. These include: (i) adjusting the pricing of the FIT Contract to reflect the benefit of inflation to the revised COD of May 23, 2019; (ii) rolling forward the construction schedule by three years; (iii) adjusting the cost of turbines based on forecast foreign exchange rates; and (iv) updating operating costs accordingly.[1203]

IV. Windstream May Elect the Date of the Award as the Valuation Date

738. As set out in Windstream's Memorial, it is well-established that in cases of unlawful expropriation, the investor is entitled to choose as a valuation date either the date of the breach or the date of the award.[1204]

739. Windstream can only be placed in the same position it would have occupied but for Canada's treaty breaches if it is put in the same situation it would have been in on the date of the

[1202] CER-Deloitte (Taylor and Low)-2, ¶ 3.38.

[1203] CER-Deloitte (Taylor and Low)-2, ¶ 3.37.

[1204] Windstream's Memorial, ¶¶ 658-660; **CL-093**, *Yukos*, ¶ 1763; **CL-021**, *ADC*, ¶¶ 496-497; **CL-082**, *Siemens*, ¶ 353; **CL-122**, *Kardassopoulos*, ¶ 514.

award.[1205] Contrary to Canada's submission, it is not relevant that no NAFTA decision has adopted this approach.[1206] The tribunal in *Feldman* acknowledged that NAFTA only addresses the measure of compensation to be awarded in a case of lawful expropriation and this silence indicates the intention of the treaty drafters to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case.[1207] NAFTA tribunals have "considerable discretion in fashioning what they believe to be reasonable approaches to damages."[1208] Thus, the tribunal can and should be guided by the decisions of other tribunals that establish that the claimant may choose either the date of breach or the date of the award as a valuation date.

V. The Ontario Government, Not Windstream, is to Blame for Windstream's Investments Becoming Worthless

740. Canada also asserts that Windstream is to blame for its investments being rendered worthless by the moratorium. Canada's position is, effectively, that Windstream should have accepted the OPA's offer to extend the FIT Contract deadlines by a maximum of five years even though the moratorium was indefinite. Canada's position is, effectively, that Windstream is to blame because Windstream decided not to accept the OPA's offers to extend the FIT Contract deadlines for a maximum of five years even though the moratorium was indefinite. As set out in detail in paragraphs 380 to 394 above, the OPA's offers were unreasonable because they failed to "freeze" the FIT Contract for the duration of the moratorium, contrary to the promises that MEI made to Windstream when the moratorium was announced.[1209] The moratorium has now been in place for four years and four months and will have been in place for five years at the time of the

[1205] **CL-021**, *ADC*, ¶¶ 496-497: "the application of the Chorzów Factory standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed." [Emphasis added].

See also **CL-082**, *Siemens*, ¶ 353, where the Tribunal noted that it was "only logical" that "if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award be compensated in full. Otherwise compensation would not cover all the consequences of the illegal act." [Emphasis added].

[1206] Canada's Counter-Memorial, ¶ 515.

[1207] **RL-024**, *Feldman*, ¶¶ 194-195; **CL-081**, *S.D. Myers*, ¶¶ 303-319.

[1208] **RL-024**, *Feldman*, ¶ 197.

[1209] ¶¶ 367-371 above.

hearing. There is not (nor has there ever been) an end in sight. Hindsight has confirmed that Windstream's decision to reject the OPA's unreasonable offer was a reasonable one.

741. Contrary to Canada's assertions, it would also not have been reasonable for Windstream to accept a termination of the FIT Contract without penalty. Doing so would have extinguished the value of the FIT Contract, WWIS' most valuable asset.[1210] Moreover, at the time, Windstream had no reason to believe that the moratorium would not be temporary or that the FIT Contract would not be "frozen."[1211] Thus, WWIS had no reason to agree to terminate the FIT Contract, and it would not have been reasonable for it to have done so.

VI. Pre- and Post-Award Interest

742. Windstream is entitled to an award of interest in order to fully compensate it for the wrongs committed by Canada. The vast majority of international investment tribunal awards have included pre and post-award interest.[1212] Deloitte explains that interest is required because, "from an economic point of view, Economic Losses are measured at the Valuation Dates and interest would compensate Windstream for the period from the Valuation Dates to the date of the judgment."[1213]

743. Canada states that the burden is on the claimant to prove the circumstances of this case justify an award of interest, yet points to no authority to establish such a burden. This argument is inconsistent with clear authority which recognizes that interest is an integral part of the compensation itself. Consequently, interest accrues from the date when the State's international responsibility became engaged.[1214] The purpose of interest is to ensure that the claimant receives the full present value of the compensation it should have received at the time of taking and to

[1210] CER-Deloitte (Taylor & Low)-2, ¶ 2.3.

[1211] CWS-Mars-2, ¶¶ 88-90.

[1212] See **CL-041**, *Vivendi II*, ¶ 11.1; **RL-049**, *Sempra Energy*, ¶ 486; **CL-092**, *Wena Hotels*, ¶ 129; **RL-023**, *Enron*, ¶ 452; **CL-082**, *Siemens*, ¶ 399; **CL-021**, *ADC*, ¶ 522; **RL-047**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 307.

[1213] CER-Deloitte (Taylor and Low)-2, ¶ 3.42.

[1214] **CL-062**, *Metalclad*, ¶ 128. See also **CL-128**, *Middle East Cement*, ¶ 174; **CL-084**, *Tecmed*, ¶ 196.

prevent the state from being unjustly enriched by reason of the fact that payment of compensation has long been delayed.[1215]

744. Therefore, if the date of breach is selected as the valuation date, Windstream is also entitled to pre- and post-award interest. If the date of the award is selected as the valuation date, Windstream is entitled to post-award interest. BRG does not dispute the appropriateness of the rate selected by Deloitte, which is 3.0 percent compounded annually, based on the Canadian bank prime interest rate.[1216]

VII. Costs

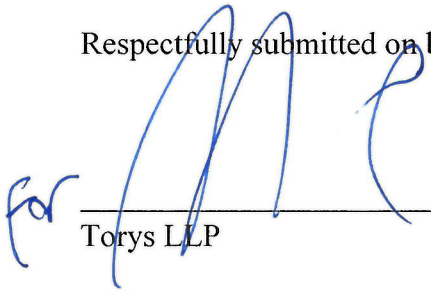
745. Finally, Windstream respectfully reiterates its request that it be awarded all of its legal fees and costs associated with this arbitration.[1217] Like Canada, Windstream requests the opportunity to make a submission on costs after the hearing, or as the Tribunal deems appropriate.

PART SIX. RELIEF REQUESTED

746. For the foregoing reasons and those set out in its Memorial, Windstream respectfully requests that the Tribunal grant the relief requested in paragraph 691 of its Memorial.

DATED: June 22, 2015

Respectfully submitted on behalf of Windstream Energy LLC,



Torys LLP

Counsel for the Claimant, Windstream Energy LLC

[1215] **CL-042**, *Santa Elena*, ¶¶ 101, 104.

[1216] RER-BRG, ¶ 142.

[1217] Pursuant to NAFTA Article 1135.

PART SEVEN. CAST OF CHARACTERS

Name	Title	Entity	Relationship
Abbas, Nuhaad	Executive Assistant to the Assistant Deputy Minister, Environmental Programs Division	MOE	Government
Baines, Ian	President of Windstream Energy Inc. (WEI) Director of Windstream Wolfe Island Shoals Inc. (WWIS)	Windstream Energy Inc. (WEI) Windstream Wolfe Island Shoals Inc. (WWIS)	Windstream
Baker, Bliss	President	Bentham & Associates	Windstream
Benedetti, Chris	Principal	Sussex Strategy Group Inc.	Windstream
Boysen, Eric	Director of Biodiversity Branch, Renewable Energy Program	Ministry of Natural Resources (MNR)	Government
Brodhead, John	Executive Director	Office of Premier of Ontario (OPO)	Government
Butler, JoAnne	Vice-President of Electricity Resources	Ontario Power Authority (OPA)	Government
Cain, Ken	Manager, Renewable Energy Program	MNR	Government
Cansfield, Donna	Minister of Natural Resources	MNR	Government
Carey, Paul	Executive Assistant to the Assistant Deputy Minister, Policy Division	MNR	Government
Cates, Alyssa	Briefing and Issues Coordinator, Assistant Deputy Minister's Office, Environmental Programs Division	MOE	Government

Name	Title	Entity	Relationship
Cecchini, Perry	Manager, RESOP/FIT	OPA	Government
Chamberlain, Adam	Partner	Borden Ladner Gervais	Windstream
Collins, Jason	Executive Assistant, Assistant Deputy Minister's Office, Renewables & Energy Efficiency Division	MEI	Government
Cronkwright, Shawn	Director, Renewables Procurement	OPA	Government
Duffey, Barry	Manager, Program Development, Green Energy, Modernization of Approvals Project	MOE	Government
Duguid, Brad	Minister	MEI	Government
Dumais, Doris	Director, Environmental Approvals Access and Service Integration Branch (EAASIB)	MOE	Government
Evans, Paul	Assistant Deputy Minister, Environmental Programs Division	MOE	Government
French, Kevin	Assistant Deputy Minister, Operations Division	MOE	Government
Gherson, Gilles	Deputy Minister, Policy and Delivery	CO	Government
Goode, Christopher	Senior Program Advisor, Environmental Programs Division	MOE	Government
Hamilton, Sean	Chief of Staff	MOE	Government
Hayward, Neil	Business Manager, Renewable Energy Program	MNR	Government

Name	Title	Entity	Relationship
Henneberry, Jennifer	Senior Project Advisor, REFO	MEI	Government
Ing, Pearl	Director, Renewables and Energy Facilitation Branch	MEI	Government
Jamieson, Shelly	Secretary of Cabinet	Cabinet Office (CO)	Government
Jeffrey, Linda	Minister	MNR	Government
Kennedy, Susan	Director, Corporate/Commercial Law Group	OPA	Government
Killeavy, Michael	Director, Contract Management	OPA	Government
Kulendran, Jesse	Policy Coordinator, Office of the Deputy Minister	MEI	Government
Lawrence, Rosalyn	Assistant Deputy Minister, Natural Resource Management Division	MNR	Government
Lee, April	Senior Policy and Project Advisor, Deputy Minister's Office	MNR	Government
Lindsay, David	Deputy Minister	MEI	Government
Linley, Richard	Special Assistant Policy	MNR	Government
Lo, Sue	Assistant Deputy Minister, Renewables and Energy Efficiency Division	MEI	Government
Lucas, Brenda	Senior Policy Advisor, Renewables	MOE	Government
Lyle, Michael	General Counsel	OPA	Government
MacDougall, Jim	Manager, FIT Program	OPA	Government

Name	Title	Entity	Relationship
MacLennan, Craig	Chief of Staff	MEI	Government
Mansoor, Mahmood	Manager, Renewable Energy Approvals	MOE	Government
Mars, David	Co-founder, Officer & Director of Windstream Energy LLC	Windstream Energy LLC and its subsidiaries	Windstream
Maskell, Lindsay	Chief of Staff	MNR	Government
McGuinty, Dalton	Premier	OPO	Government
Mitchell, Andrew	Senior Policy Advisor (Renewables)	MEI	Government
Morley, Chris	Chief of Staff	OPO	Government
Mullin, Sean	Policy Advisor, Energy	OPO	Government
Neary, Anne	Director, Applied Research and Development Branch	MNR	Government
Nowlan, James	Senior Policy Advisor, Renewable Energy Section	MNR	Government
O'Toole, David	Deputy Minister	MNR	Government
Orsatti, Sandra	Manager, Aquatic Research and Development Section	MNR	Government
Penic, Jordan	Senior Policy Advisor	MEI	Government
Postacioglu, Dilek	Senior Program Advisor, Green Energy	MOE	Government
Roeper, Uwe	President	Ortech Consulting Inc.	Windstream
Smitherman, George	Deputy Premier, Minister	MEI	Government
Steeve, Jamison	Principal Secretary	OPO	Government

Name	Title	Entity	Relationship
Tracey, Cheryl-Ann	Issues Manager & Strategic Advisor	MOE	Government
Ungerman, Paul	Director of Policy	MEI	Government
Vandevecht, Brian	Senior Program Coordinator, Modernization of Approvals Project	MOE	Government
Viswanathan, Samira	REFO	MEI	Government
Wallace, Marcia	Director, Modernization of Approvals Project	MOE	Government
Whytock, John	Director of Communications	MNR	Government
Wilkinson, John	Minister	MOE	Government
Yunker, Geoff	EA to the ADM	MNR	Government
Zaveri, Mirrun	Deputy Director, Renewable Energy Facilitation Office	MEI	Government
Ziegler, William	Co-Founder and Chairman	Windstream Energy LLC	Windstream
Zindovic, Bojana	FIT Contract Management, Electricity Resources	OPA	Government

PART EIGHT. TABLE OF ABBREVIATIONS AND DEFINED TERMS

Abbreviation	Description
ADMs	Assistant Deputy Ministers
AOR	Applicant of Record
APRD	Approval and Permitting Requirements Documents
CAFTA	Central American Free Trade Agreement
CanWEA	Canadian Wind Energy Association
CCEA	Connection Cost Estimate Agreement
CCRA	Connection Cost Recovery Agreement
[redacted]	[redacted]
CIA	Customer Impact Assessment
COD	Commercial Operation Date
CPI	Competition Policy International
CREC	Canadian Renewable Energy Corporation
CSD	Canadian Soil Drilling
DARSIWA	International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts
DMs	Deputy Ministers
EBR	Environmental Bill of Rights
ECT	Economic Connection Test
EMF	Electro Magnetic Field
EWEA	European Wind Energy Association
FIPPA	Ontario's *Freedom of Information and Protection of Privacy Act*
FIT	Feed-in Tariff (Ontario Power Authority Program)
GBF	Gravity Based Foundation
GEA	*Green Energy and Green Economy Act, 2009*
GEI	*Green Energy Investment Agreement*
GS	Generating Station
GWh	GigaWatt Hour
HONI	Hydro One Networks Inc.
IESO	Independent Electricity System Operator
IPO	Initial Public Offering
IPSP	Ontario's Integrated Power System Plan
IRR	Internal Rate of Return
KWh	KiloWatt Hour
LTEP	Long-Term Energy Plan (Ontario)
MCL	Ministry of Culture
MCOD	Milestone Date for Commercial Operation
MEI	Ministry of Energy and Infrastructure
MNR	Ministry of Natural Resources
MO	Minister's Office

Abbreviation	Description
MOE	Ministry of the Environment
MOU	Memorandum of Understanding
MTC	Ministry of Tourism, Culture and Sport
MW	MegaWatt
MWh	MegaWatt Hour
NAFTA	North American Free Trade Agreement
NHA	Natural Heritage Assessment
NRSA	Natural Resource Solutions Inc.
NYSERDA	New York State Energy Research and Development Authority
OCP	Ontario Clean Power Ltd.
OEB	Ontario Energy Board
OPA	Ontario Power Authority
OPO/PO	Office of the Premier of Ontario
PPA	Power Purchase Agreement
RBS	Royal Bank of Scotland
REA	Renewal Energy Approval
REFO	Renewable Energy Facilitation Office
RFP	Request for Proposals
SIA	System Impact Assessment
SOI	Statement of Intent
Project	Windstream Wolfe Island Shoals Project
TSA	Turbine Supply Agreement
WEI	Windstream Energy Inc.
WIS	Wolfe Island Shoals
WTG	Wind Turbine Generator
WTO	World Trade Organization
WWIS	Windstream Wolfe Island Shoals Inc.