

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

BETWEEN:

MESA POWER GROUP, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

Witness Statement of Richard Duffy

February 28, 2014

Department of Foreign Affairs,
Trade and Development
Trade Law Bureau
Lester B. Pearson Building
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I. INTRODUCTION

1. My name is Richard Duffy. I live at [REDACTED] in Burlington, Ontario, Canada. I was born on [REDACTED]. I am the Manager of Generation Procurement at the Ontario Power Authority (“OPA”).

2. I received my B.Sc. degree from Laurentian University in 1987. After graduation, I began my career in the energy industry at London Hydro. I moved to the OPA in 2005 as the Manager, Commercial Services. I held that position until July of 2009, when I moved into my current position.

3. In May 2009, the *Green Energy and Green Economy Act, 2009*¹ received Royal assent and became law. This Act contemplated the creation of a Feed-in Tariff Program (“FIT Program”).² The OPA began work on developing that program in the summer of 2009, including holding numerous public stakeholder sessions.³ Although I was not involved directly in the development of the FIT Rules, I was tasked with working as the Project Manager, ensuring that the various independent components of the program were all completed as well as setting up and implementing a process to review, approve, rank and order the FIT applications received for potential contract offers under the FIT Program. As the Manager of Generation Procurement, I was also responsible for making FIT contract offers.

4. As a general matter, I note that once the Ministry of Energy has informed the OPA of the policy it has adopted and wishes to pursue, the OPA is then in charge of its

¹ R-057, *Green Energy and Green Economy Act*, S.O. 2009, c. 12 (“*Green Energy Act*”).

² *Ibid*, Sch. B, amending s. 25.35 of the *Electricity Act, 1998*.

³ R-169, Ontario Power Authority website excerpt, “Past Events – 2009”. Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009>.

implementation. The FIT Program was no exception to this approach. The Minister of Energy, by way of directions,⁴ instructed the OPA to put in place this program and to make certain modifications along the way. However, while the OPA worked with the Ministry of Energy on things like the development of the FIT Rules, or the communications strategy, with respect to other aspects described below, like the ranking of the projects and the award of contracts, the Ministry had limited input. These were OPA processes, and indeed, given our mandate, on specific technical tasks like those I would not have accepted Ministry involvement.

II. THE DESIGN OF THE FIT PROGRAM

5. The OPA designed the FIT Program as a simplified and more streamlined process than a Request for Proposals (“RFP”), but with more rigor than the previous Renewable Energy Standard Offer Program (“RESOP”). In particular, the OPA required less evidence and documentation with the submission of a FIT application than was typically required in an RFP process. All that was required for a FIT application to be identified as complete was information identifying the project location and confirming access to the project site, the proposed type of renewable fuel, its proposed capacity, and details of its proposed connection to the transmission or distribution network.⁵ In addition the appropriate fee for participation and any applicable security requirements had to have been met. We designed the FIT Program this way because we were uncertain as to how many applicants the program would attract and we hoped that an easier process would

⁴ R-001, Letter (Direction) from the Honourable George Smitherman, Minister of Energy and Infrastructure to Colin Andersen, CEO, Ontario Power Authority (Sep. 24, 2009).

⁵ R-168, Ontario Power Authority website excerpt, “New Application”. Available at: http://fit.powerauthority.on.ca/Storage/10962_FIT_Application_Form_Version_1.0.pdf.

attract numerous participants, including those who were not traditional energy companies or sophisticated players in the field. Overall, the objective was to ensure that a sufficient number of FIT applications for the development of renewable energy projects would be submitted.

6. There were three categories of project classifications in the FIT Rules. MicroFIT projects were those 10 kW or less in size (e.g. residential rooftop solar panels).⁶ Capacity allocation exempt (“CAE”) projects were those that were generally between 10 kW and 500 kW in size.⁷ For these two types of projects, provided the FIT application was approved, there was simply a right of access to the distribution network associated to the project without further analysis as it was believed that their relatively small size would not have any significant effect on the upper level transmission resources. On the other hand, capacity allocation required (“CAR”) projects were typically those that were larger than 500 kW in size.⁸ With respect to these large projects, planning was required, and it was for these projects that the OPA developed the review process that I describe below.

III. THE DESIGN OF THE LAUNCH PERIOD REVIEW PROCESS

7. In any electricity system, it is simply not possible to procure an unlimited amount of new capacity. There needs to be a balance between supply and demand, and having too much power flow through the system can damage equipment. While the FIT Program contemplated expanding transmission capacity to accommodate more projects if it was economical to do so, the nature of the system meant that the OPA could not procure

⁶ R-155, Ontario Power Authority website excerpt, “About microFIT”. Available at: <http://microfit.powerauthority.on.ca/about-microfit>.

⁷ R-149, Ontario Ministry of Energy, “Ontario’s Feed-in Tariff Program: Two-Year Review” (2012), p. 22. Available at: <http://www.energy.gov.on.ca/docs/en/FIT-Review-Report.pdf>.

⁸ *Ibid.*

capacity from every FIT applicant immediately. We needed to devise an order in which we would proceed to assess complete and eligible FIT applications and award contracts for CAR projects.

8. The OPA initially considered the approach of assessing FIT applications for contracts for CAR projects simply in the order in which they were received, as indicated by a “time stamp” that the OPA would apply to each FIT application.⁹

9. However, we were also aware that the Government of Ontario wanted to procure “shovel-ready” projects as a matter of priority in order to spur job creation.¹⁰ In an environment of limited transmission capacity, a simple ordering by time stamp would not accomplish this goal – it would reward those who got their FIT applications in quickly, rather than those whose projects were the furthest advanced in terms of development.

10. Thus, the OPA designed the FIT Program to start with what we called the “launch period”.¹¹ This was to be a 60-day period, beginning October 1 and ending November 30, 2009, during which all FIT applications would be considered to be received at the same time at the OPA. Applicants would have the opportunity to reduce the standard time required (3-years for a wind power facility) to achieve commercial operation by submitting evidence with their FIT application of their shovel-readiness and by indicating the total number of days that the applicant was willing to accelerate the time required for their project to reach commercial operation. The process considered that the greater the

⁹ R-055, Ontario Power Authority Presentation, “Proposed Feed-in Tariff Project Eligibility, Application Requirements, and Application Review: Stakeholder Engagement – Session 2” (Mar. 24, 2009), p. 13. Available at: http://fit.powerauthority.on.ca/Storage/10120_Session_2_Presentation_-_March_24_2009.pdf (“Ontario Power Authority Presentation, Stakeholder Engagement - Session 2”).

¹⁰ R-074, Ontario Power Authority, “FIT Program Backgrounder” (Dec. 16, 2009). Available at: <http://fit.powerauthority.on.ca/program-resources/newsroom/december-16-2009-ontarios-feed-tariff-program-backgrounder>.

¹¹ R-055, Ontario Power Authority Presentation, Stakeholder Engagement – Session 2, pp. 14; 16.

number of acceleration days, the more ‘shovel-ready’ a project was and any such project would receive an “earlier” time stamp for their FIT application.

11. In essence, if an applicant could show that its project met one of the “shovel-readiness” criteria developed by the OPA, the applicant would be awarded a point for each such criterion.¹² The applicant could decide to commit to a commercial operation date (“COD”) 90 days earlier than otherwise required under the standard FIT Contract (known as “COD Acceleration Days”) for each point awarded.. There were four such criteria. They were: (1) the project was exempt from the Renewable Energy Approval process (“REA Exempt”); (2) the Applicant owned or had a firm order for a major component (“Major Equipment Control”); (3) the Applicant had successfully developed a similar facility to the project (“Prior Experience”); and (4) the Applicant had the financial backing to develop the project (“Financial Capacity”).¹³ I explain these in more detail below.

12. Evidence for all 4 points would provide an opportunity for a developer to indicate they would bring the project into commercial operation 360 days earlier than otherwise required by the FIT Contract. In addition, the OPA allowed every applicant to indicate that their project would be ready by up to 365 days (1 year) earlier than otherwise required by the contract without any additional evidence.¹⁴ As such, an applicant could bid a maximum of 725 COD Acceleration Days. There were serious contractual penalties if an applicant that was awarded a FIT contract did not meet its COD, and this served as a

¹² R-003, Ontario Power Authority, FIT Program Rules, v. 1.2, (Nov. 19, 2009) s. 13.4(b)(i). Available at: http://fit.powerauthority.on.ca/Storage/10912_FIT_Rules_Version_1.2_November_19_2009.pdf (“Ontario Power Authority, FIT Program Rules, v. 1.2”).

¹³ *Ibid.*

¹⁴ *Ibid.*

check on applicants simply bidding all or as many COD Acceleration Days as possible in order to get a contract.¹⁵

13. After the launch period closed, the OPA then planned to rank the projects submitted based on the number of COD acceleration days to which they were entitled. For example, assuming that two projects each took the 365 COD acceleration days that they could without submitting evidence, a project that was awarded two points would have a total of 545 COD acceleration days whereas a project awarded only one point would have only 455 COD acceleration days and would, thus, rank lower. Once the ordering was completed (with tiebreakers as needed), we then converted it to a time stamp so that we could have a single ranking for all projects which included those that bid no COD acceleration days and those that were submitted after the launch period.¹⁶

IV. THE REVIEW OF THE LAUNCH PERIOD APPLICATIONS

14. During the program launch period, 498 applications were submitted for CAR projects, representing 9,907 MW. In addition, we received 535 CAE applications. This exceeded our launch period expectations. The first step was to substantively review these applications for completeness and eligibility.

A. The Review of FIT Applications for Completeness and Eligibility

15. As I mentioned above, the OPA made the FIT Program's application process a simplified one compared to a more typical RFP. This had the desired effect of encouraging broad participation. However, in my view, the lack of experience of the applicants was also apparent and the quality of the FIT applications was much lower than

¹⁵ *Ibid.*

¹⁶ *Ibid.*, s. 13.5(a).

what was usually seen in a standard RFP process.

16. Putting together a good response to an RFP requires experience and knowledge of how a submission should be completed and it also requires significant resources. In standard RFPs, from my understanding, it is not uncommon for applicants to invest in excess of \$1 million on the application itself. In my view, it was clear from our review of the applications that many applicants had foregone the usual tools, such as hiring lawyers and consultants.

17. The number of applications which were incomplete in terms of the information that was provided was enormous. I would estimate that approximately 95% of applications would have failed and been rejected simply on the grounds that they provided insufficient or incomplete information to establish their completeness and eligibility.

18. The OPA decided that the only practical way to remedy this situation would be for the team conducting the review for completeness and eligibility to contact the FIT applicants, identify issues, and request further or clarifying information. This would allow more applications to proceed through the review process. Had the OPA not reached out to the applicants to clarify and correct their application so that they could be deemed complete for evaluation, the entire program risked becoming a massive failure.

19. In order to facilitate reaching out to the hundreds of applicants in a very short time, the FIT review team utilized the OPA's online FIT Application Management tool.¹⁷ This online tool provided applicants the ability to create, submit and manage their applications, as well as allowed the OPA to communicate via electronic messages with

¹⁷ R-134, Ontario Power Authority, FIT Application Management Extranet – FIT – FZ2K5LZ – Twenty Two Degree Energy (Jun. 27, 2013); R-135, Ontario Power Authority, FIT Application Management Extranet – FIT – FNRGE96 – Arran Wind Energy (Jun. 27, 2013).

the FIT applicants. The tool did not allow the applicants to communicate directly with the OPA in return. FIT applicants were required to respond to the OPA's information requests via email or hard copy submission. When a request to modify the information in an application was made by the OPA, the tool would be utilized to "unlock" the application to allow access to the applicant so that they could make the requested changes and/or provide the additional requested information.

20. The mistakes most commonly made by FIT applicants, and brought to their attention by the OPA for correction through the online tool, were with respect to information regarding site access, letters of credit and identification of connection point information.

21. Communications with the FIT applicants during the first review stage led to a back and forth between the OPA and the applicants. I have reviewed the OPA's records of these communications and can confirm that there were such communications for the launch period applications for both the Arran and the TTD wind projects, which I understand are at issue here.¹⁸ With respect to the TTD wind project, we required amendments to its letter of credit and a correction with respect to the connection point information. With respect to the Arran wind project, we required further information on the correct name of the grantee and on the easements for the site access, a revision to the name of the circuit where the connection to the transmission system was to be made, as well as changes to the letter of credit. If the OPA had not reached out, the applications for the Arran and TTD wind projects would have been rejected at the first stage of our review.

¹⁸ *Ibid.*

22. Ultimately, of the 498 launch period applications we received, 34 were rejected as the application submitted was determined not to have met the completeness and eligibility requirements, 13 turned out to be CAE projects that did not require review, and 4 were identified as ‘Projects Under Construction’ that also did not require review. As such, there were a total of 447 CAR launch period applications that passed the completeness and eligibility review and had to be reviewed for criteria points bid.¹⁹ This volume of applications brought significant challenges in terms of how they would be reviewed and processed.

B. The Launch Period Criteria Review

23. In a standard RFP process, each application would be reviewed, notes would be made, and discussions had concerning which proposals scored the highest. However, with close to 450 applications in the launch period alone that needed to be reviewed and ranked, there was no way the OPA could practically follow that approach. As such, we worked with the firm London Economics International (“LEI”), who we had retained as a fairness monitor for the application review and ranking process (I provide more detail on this below), in order to develop a different approach to assessing this substantial volume of applications. Working with them we came up with an “assembly line” approach that facilitated the review of the applications in the most efficient manner possible.

24. The review team the OPA put together was composed of 6 individuals. Susan Kennedy, the OPA’s Associate General Counsel and Director, Corporate/Commercial Law and I were the supervisors on the team. In addition to my supervisory role, I also undertook the task of identifying the earliest date that access rights to a project site had

¹⁹ R-079, Ontario Power Authority, Evaluation Criteria Checklist (Feb. 16, 2010), “Applicant listing” tab (Ontario Power Authority, Evaluation Criteria Checklist”).

been granted for an applicant. Because of staffing pressures, three of the other 4 individuals were seconded to us for this project by the Independent Electricity System Operator (“IESO”). The other team member was the OPA’s Corporate Secretary. Each of these four individuals was assigned a single criteria point to review for all applications. In this way, we ensured that there would be as much consistency as possible in terms of how that criteria point was assessed. In some cases because of work load, the team members would provide assistance to each other. For example, the IESO employee specifically assigned to assess whether projects were REA Exempt tended to assist with other criteria where there was more work, as there were not many projects that bid to get this criteria point.

25. For each of the criteria, we sought to have a person with relevant expertise in the subject matter. Thus, the IESO Manager of Settlement assessed bids for the financial capacity criterion, and the OPA’s Corporate Secretary assessed whether anyone within the corporate structure of the applicants had relevant prior experience developing renewable energy projects. In addition, the individual from IESO who was reviewing whether a project was REA Exempt would call the Ministry of the Environment if a question ever arose. The final IESO employee reviewed the major equipment control point. Whenever there were complex or difficult calls to be made, Ms. Kennedy or myself was consulted.

26. We set the review team up in one room, where they reviewed the applications over a period of two weeks. Once the applications were considered to be complete after the completeness and eligibility review, the applications were transferred into this room. A control sheet designed by the OPA was added to each application to track the review

process. Ms. Kennedy looked through the applications, and on the control sheet indicated which criteria had to be reviewed. There was no order amongst the reviewers in terms of which criteria points were reviewed first. Whichever reviewer was free would take the application, review the application for the criteria point he or she was responsible for and then return the application for the next reviewer when he or she was done.

27. An Excel spreadsheet was created as the master document for tracking the reviewer determinations and creating a ranking of all the project applications.²⁰ Every reviewer had access to the Excel ranking spreadsheet so that they could work simultaneously. At the end of each day, the information was aggregated into the single master Excel spreadsheet. I have attached the master Excel sheet to this witness statement for the Tribunal's convenience.²¹

28. For each criteria point, the reviewer needed to answer a series of "yes or no" questions. Based on the results of those answers, the spreadsheet would automatically indicate whether the applicant was granted the criteria point for which it had bid.

1. The REA Exempt Criteria Point

29. Applicants could bid for this criteria point if they believed they were exempt from the Renewable Energy Approval process set up by the Ministry of the Environment to environmentally assess and approve renewable energy projects.²² If a project was exempt from this process, it would be able to save a significant amount of time in terms of obtaining its required regulatory approvals, and would therefore be considered more "shovel-ready".

²⁰ *Ibid.*

²¹ *Ibid.*

²² R-003, Ontario Power Authority, FIT Program Rules, v. 1.2, s. 13.4(a)(i).

30. However, few projects that were applying for FIT contracts during the launch period were REA Exempt. Large wind and solar projects all required an REA approval. Only 80 applicants bid for this point, with 78 being awarded it.

2. The Major Equipment Control Criteria Point

31. The major equipment control criteria point would be awarded if an applicant could submit evidence that it, any entity that controlled it, or any entity that it controlled (collectively the “Applicant Control Group”) owned or had a fixed-price contract for a piece of major equipment, and, if it was a wind or solar project, that this equipment would be able to meet the domestic content requirements in the FIT Rules.²³ For wind projects, major equipment included things like towers, turbines or nacelles.

32. It is important to understand that this requirement did not mean that an applicant had to have already purchased the equipment or that they had a contract which bound them to purchase it regardless of whether or not they were awarded a FIT contract. All that it required was evidence of a guaranteed supply of the major pieces of equipment at a fixed and binding price – the contract could be, and almost always was, from my observations and for obvious business reasons, conditional upon the applicant being awarded a FIT contract.²⁴ Having these supply issues figured out in advance would eliminate delay in bringing a project into operation, and as such, was deemed to make a project more “shovel ready.”

33. With respect to the domestic content requirement that was a component of this criteria, the OPA was aware of the difficulties of providing proof that pieces of

²³ *Ibid.*, s. 13.4(a)(ii).

²⁴ R-070, FIT Application – FIT – F020180 – Skyway 127, p. 5, Article 1. Terms of Sale (“Skyway 127 FIT Application”).

equipment that had potentially not yet even been built (as we did not require ownership at the application stage) met Ontario's domestic content requirements. As such, we only required FIT applicants to supply an engagement letter from their supplier indicating that the supplier could meet the domestic content requirement of the FIT Rules.

34. Out of approximately 500 applicants, 185 bid for this criterion, and only 92 were actually awarded a point.²⁵ However, given what I understand has been alleged in this claim, I think that it is important to confirm that having domestic content was not a requirement for being awarded a contract. In fact, a significant number of applicants were granted contracts for their projects without providing proof that they could meet the domestic content requirements. Less than a quarter of applicants overall were awarded this criteria point, and 109 applicants received FIT contracts without having bid for this criterion at all. A further 27 applicants bid for this criterion, but were not awarded it and still received a contract.

3. The Prior Experience Criteria Point

35. The prior experience criteria point would be awarded if an applicant claimed and submitted evidence that an entity within the Applicant Control Group or that three full-time employees of the Applicant Control Group, had experience developing a similar project anywhere else in the world.²⁶ Prior experience with similar projects was considered to be a shovel-readiness criteria because it would show that the people running the project understood and were ready for the typical difficulties that would be

²⁵ R-079. Ontario Power Authority, Evaluation Criteria Checklist, "Applicant listing" tab.

²⁶ "Similar Facilities" is defined in Section 13.1(1) of the FIT Rules, as follows: "*Similar Facilities means an electricity generation facility, other than the Project, that is located anywhere in the world, which (i) uses the same Renewable Fuel as the Project, and (ii) has a Nameplate Capacity of at least 25% of the proposed Contract Capacity of the Project.*", R-003, FIT Program Rules, v. 1.2, s. 13.4(a)(iii).

encountered in getting the project into operation.

36. A common mistake in the applications was bidding for this point based on the experience of individuals who were outside consultants rather than full-time employees of the Applicant Control Group. This was one of the primary reasons why applicants failed in their bid for this point.

37. In total, 261 applicants bid for this point, but only 102 were awarded it.

4. The Financial Capacity Criteria Point

38. Finally, the Financial Capacity criteria point was awarded based on a Tangible Net Worth (“TNW”) test.²⁷ This test would be met if any one person (natural or legal) or group of persons which had a 15% or greater economic interest in the company had a TNW of more than \$500/kW of the proposed contract capacity at the end of the most recent fiscal year. In order to support such a claim, the OPA generally required an audited balance sheet in conformity with GAAP with respect to the most recent fiscal year.²⁸ It was believed that having financial capacity of this magnitude mitigated some of the serious financial risks involved in an undertaking of this size, and thus made the project more “shovel-ready”.

39. A total of 259 applicants bid for this point, but only 142 were awarded it.²⁹

C. The Review of Mesa’s Launch Period Applications

40. I have reviewed the results of the ranking process with respect to Mesa’s applications for its TTD and Arran wind projects. The applicant for the TTD and Arran wind projects bid for 3 criteria points on each project: Major Equipment Control, Prior

²⁷ *Ibid*, s. 13.4(a)(iv).

²⁸ *Ibid*, s. 13.4(a)(iv)(a).

²⁹ R-079, Ontario Power Authority, Evaluation Criteria Checklist, “Applicant listing” tab.

Experience, and Financial Capacity. Each of the projects received 0 criteria points during the ranking process. The reasons why these projects failed to receive any points are clear from a quick review of their applications.

1. TTD's and Arran's Bids for the Major Equipment Control Point

41. As noted above, in order to receive a point for this criterion, it was necessary for an applicant for a wind project to submit (1) evidence that it owned or had fixed or guaranteed maximum price contract for the supply of towers, turbines or nacelles, and (2) a letter from a supplier committing to meet Ontario's domestic content requirements.

42. In the applications for the TTD and Arran wind projects, the only evidence submitted was a one sentence letter, dated November 24, 2009, [REDACTED]

[REDACTED]³⁰ No copy of this contract was submitted with either the TTD or Arran applications. As the Excel spreadsheet indicates, we nevertheless generously considered that this one sentence letter was sufficient to establish that the first prong of the above test had been met.

43. With respect to the second aspect, related to domestic content, [REDACTED]

[REDACTED] This statement was far from sufficient. It does not mention anything about the Ontario domestic content requirements, or confirm that they could be met. In fact, it does not mention Ontario at all. Moreover, it states that the turbines [REDACTED] -

³⁰ Letter from GE to Mesa (Nov. 24, 2009) contained in C-0364, Twenty-Two Degrees Wind Project, FIT Application (Nov. 25, 2009), p. 103 ("Twenty-Two Degrees, FIT Application"); Letter from GE to Mesa (Nov. 24, 2009) contained in C-0365, Arran Wind Project, FIT Application (Nov. 25, 2009), p. 104 ("Arran, FIT Application").

whatever that meant – but only [REDACTED]. As the contract had not been included, we had no way of understanding what those terms were.

44. The insufficiency of what GE was willing to say with respect to the TTD and Arran wind projects is best contrasted with what GE was willing to say with respect to other projects for which it was supplying turbines, including for example, the Skyway 127 project.

45. In its application, Skyway 127 submitted a letter from GE indicating that GE and Skyway had entered into a fixed-price agreement for the supply of turbines. However, in its letter to Skyway, GE also confirmed that the turbines and certain services “will have undergone one of the designated activities set out in the Domestic Content Grid in Exhibit D of the FIT Contract.”³¹ This statement was sufficient to establish domestic content at the time of application in the OPA’s view. The difference between the two letters, both from GE, is as striking now as it would have been to the reviewer at the time.

2. Mesa’s Bid for the Prior Experience Criteria Point

46. Mesa failed to obtain a point for this criterion for a simple reason that is really just evidence in my view, of the sloppiness of its applications. As explained above, the prior experience criteria point would be awarded if an applicant claimed and submitted evidence that a member of the Applicant Control Group, or any three full-time employees working for the Applicant Control Group, had experience developing a similar project anywhere else in the world.³²

47. Neither the application for the TTD nor the Arran wind project contained a statement that either of these two tests was satisfied. In essence, neither application

³¹ Letter from GE to Skyway 127 (Nov. 27, 2009) contained in R-070, Skyway 127 FIT Application.

³² “R-003, FIT Program Rules, v. 1.2, s. 13.4(a)(iii).

stated on what grounds the point was being sought. The TTD and Arran applications were not the only ones to fail for this reason – 68 other applicants bid for this point but failed to include the required statements that showed on what grounds they were claiming the point.

48. The review would have gone no further than this at the time. But even if it had, the evidence that Mesa submitted to demonstrate that it was entitled to a point for prior experience, were the resumes of Mark Ward (Mesa), Brian Case (GE), Charles Edey (Leader Resources), Heather Boa (Leader Resources) and Steven St. Jacques (Leader Resources).³³ Aside from the cover page which gives a broad overview of the background of the three entities involved, Mesa, GE and Leader, the resumes do not give detail on the renewable energy projects that these entities or these individuals had brought into successful operation. There would have been no way to assess whether these individuals had in fact successfully developed similar projects elsewhere. Moreover, the information submitted did not indicate whether all of these individuals were full-time employees of one of the entities which made up the Applicant Control Group. Thus, even if the evidence Mesa submitted had been considered, it was insufficient to get the criteria point.

3. Mesa's Bid for the Financial Capacity Criteria Point

49. Mesa failed to obtain a point for this criterion again as a result of, in my view, the sloppiness of its applications. As indicated above, the OPA required audited financial statements from the most recent fiscal year for this criterion.³⁴ As a specific note entered into the master Excel spreadsheet indicates (and it was unusual for a reviewer to feel compelled to write such a note) Mesa relied upon unaudited financial statements for the

³³ C-0364, Twenty-Two Degrees, FIT Application, pp. 23-29; C-0365, Arran, FIT Application, pp. 23-29.

³⁴ R-003, Ontario Power Authority, FIT Program Rules, v. 1.2, s. 13.4(a)(iv)(a).

Mesa Power Group, LLC from 2008 rather than audited statements for the most recent fiscal year, 2009. As the FIT Rules made clear, unless Financial Capacity was being established through a natural person, the failure to provide audited balance sheets would be fatal to the bid for this criteria point.³⁵ As Mesa's evidence was unaudited and for the wrong fiscal year, the review did not need to continue further.

4. Summary with Respect to Mesa's Applications

50. In my view, many of Mesa's failures were caused by its sloppiness and lack of care in preparing its applications, and the consequent failure to satisfy clearly defined criteria. While it is possible that Mesa's projects were better than they proved with the applications submitted, the OPA could only assess the applications received.

51. Once the second stage of the review of the launch period applications was started, all communications with FIT proponents stopped. Errors such as those made by Mesa were not uncommon, but as a matter of principle, the OPA would not call up proponents to have them submit further or better information once the second stage review started. This practice was modeled on the standard RFP processes to ensure that all applicants were treated equally. Once we had ensured we had complete applications, applicants were stuck with the information that they had provided. It would have been unfair to provide advice to applicants who had not made the required efforts and taken the required care at the expense of those who had. In my view, Mesa submitted two poorly put together applications – if it had submitted applications that were better put together, it might have received a better ranking, and potentially even a contract. But the fault in this regard is Mesa's, and Mesa's alone.

³⁵ *Ibid.*

D. The Fairness Monitor: London Economics International

52. It is typical for the OPA to obtain the services of a fairness monitor for an RFP process. Participants are often disappointed by their results, and as a result criticize the OPA for its process. A fairness monitor is therefore often hired by the OPA, to ensure that fairness and transparency can be verified by an external third party.

53. For the FIT Program, an RFP for the services of a fairness monitor was published on the OPA website. A number of proposals were received in response to our RFP. After evaluating all the candidates, and conducting face-to-face meetings with the top two, the OPA decided to retain LEI. In our view, they seemed to be the best suited to come up with a plan to deal with the substantial number of applications that the OPA had received.

54. LEI provided us with advice on the organization of the review team, on how to streamline the review and on how to track the results. In particular, they assisted us in designing the evaluation criteria checklist, including in coming up with the series of questions that the reviewers were to run through in order to determine whether a bid-for criteria point should be awarded.

55. In addition to providing this up-front assistance with the process to ensure it was fair, LEI also audited a sample of 72 applications to compare their results with those of the OPA's review team.³⁶ LEI and the review team then sat together to compare results, in order to determine whether there were any discrepancies in the evaluation. It was ultimately found that there were none. LEI concluded that the OPA's process for the ranking during the launch period was fair and consistent.³⁷

³⁶ R-082, London Economics Report, Feed-in-Tariff Launch Period Criteria Evaluation – Independent Process Review (Mar. 31, 2010), p. 14 (“London Economics Report”).

³⁷ *Ibid.*, p. 16.

V. The Award of FIT Contracts

56. As a result of the launch period process, the OPA came up with a provincial ranking of all projects – those from the launch period ranked in accordance with the process above, and those submitted after the launch period ranked in the order in which they were received. There was only one ranking at the OPA, and it was the one at the provincial level. At various times we published the provincial ranking, accompanied by a regional breakdown, but there was never a regional ranking *per se*. For anyone to suggest otherwise is misleading.

57. After the connection availability tests, which I understand is described in my colleague Bob Chow's witness statement, confirmed whether or not transmission capacity was available for any particular project, we began offering the first round of contracts to launch period applicants on April 8, 2010.³⁸ The OPA offered a total of 184 contracts to launch period CAR applicants.³⁹ After the completion of the second TAT was run for applications submitted after the close of the launch period, we offered an additional 40 contracts to CAR projects on February 24, 2011.⁴⁰

58. Because of transmission capacity constraints, we offered no contracts to projects connecting in the Bruce and West of London region in these first rounds. It was only in May of 2011 that the OPA felt confident enough that the new Bruce to Milton transmission line would receive all of its required regulatory approvals that we began the

³⁸ R-005, Ontario Power Authority, Backgrounder (Apr. 8, 2010). Available at: <http://fit.powerauthority.on.ca/program-updates/newsroom/april-8-2010-backgrounder>.

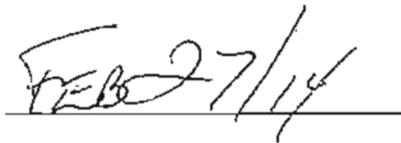
³⁹ C-0080, Ontario Power Authority, News Release, "Ontario Announces 184 Large-Scale Renewable Energy Projects" (Apr. 8, 2010). Available at: http://fit.powerauthority.on.ca/Storage/10986_Apr_8_News_Release_FINAL.pdf.

⁴⁰ R-102, Ontario Power Authority, News Release, "Second Round Of Large-Scale Renewable Energy Projects" (Feb. 24, 2011). Available at: <http://fit.powerauthority.on.ca/program-updates/newsroom/february-24-2011-second-round-large-scale-renewable-energy-projects>.

process of considering FIT applications that proposed to connect in the Bruce region. We finally awarded contracts to projects in the Bruce region and additional contracts in the West of London region on July 4, 2011 following the Bruce to Milton allocation process.⁴¹ In total, we offered another 25 FIT contracts to CAR projects in those two regions.⁴²

59. The July 4th contracts were the last contracts for CAR projects that the OPA offered under the FIT Program. All of the contracts offered to applicants who submitted applications during the launch period were based on the provincial ranking assigned to each such application in accordance with the OPA's audited ranking criteria.

Dated:

A handwritten signature in black ink, appearing to read "Feb 27/14", written over a horizontal line.A handwritten signature in black ink, appearing to read "Richard Duffy", written over a horizontal line.
Richard Duffy

⁴¹ R-014, Ontario Power Authority News Release: "Projects enabled by Bruce to Milton transmission line offered contracts" and List of Contract Offers for Bruce-Milton Capacity Allocation Process (Jul. 4, 2011). Available at: <http://fit.powerauthority.on.ca/program-updates/newsroom/projects-enabled-bruce-milton-transmission-line-offered-contracts>.

⁴² *Ibid.*