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**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**

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**Witness Statement of Jim MacDougall**

**February 28, 2014**

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Department of Foreign Affairs,  
Trade and Development  
Trade Law Bureau  
Lester B. Pearson Building  
125 Sussex Drive  
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**1. INTRODUCTION**

1. My name is Jim MacDougall. I live at [REDACTED] in Toronto, Ontario, Canada. I was born on [REDACTED]. I am the President of Compass Renewable Energy Consulting Inc., a consulting firm in renewable energy that I founded in June 2011. Prior to that, I worked at the Ontario Power Authority (“OPA”) as a Manager – Feed-in Tariff Program.

2. I received my Electrical Engineering degree from Queen's University in 1985. After graduation, I began my career at Northern Telecom of Canada, as an Electronics Test Engineer. I eventually joined the Ontario Ministry of Environment and Energy as an Energy Policy Analyst in 1991. I continued to work in various positions with the provincial government until 1999 when I joined Toronto Hydro Energy Services, as Manager - Marketing Programs. In 2003, I moved to the Ontario Energy Board as the Manager of Market Compliance. Finally, in 2006, I moved to the OPA as the Manager, Distributed Generation. I held that position until July of 2009, when I was promoted to my last position with the OPA.

3. On May 14, 2009, the *Green Energy and Green Economy Act, 2009* (the “GEGEA”) received Royal Assent and became law.<sup>1</sup> The GEGEA contemplated the creation of a Feed-in Tariff Program (“FIT Program”).<sup>2</sup> The OPA began work on developing that program in early 2009, including holding numerous public stakeholder

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<sup>1</sup> R-057, *Green Energy and Green Economy Act*, S.O. 2009, c. 12.

<sup>2</sup> R-161, Ontario Power Authority website excerpt, “FIT Program”. Available at: <http://fit.powerauthority.on.ca/fit-program>. Specifically, the GEGEA contained a provision to amend section 25.35 of the *Electricity Act, 1998* to authorize the Minister of Energy to direct the OPA to develop the FIT Program.

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sessions.<sup>3</sup> On September 24, 2009, the Minister of Energy issued a Direction to the OPA to develop and implement the FIT Program<sup>4</sup>, which the OPA did, thereby launching the FIT Program on October 1 of that same year.

4. I was involved in the design and implementation of the FIT Program, and in particular in the development of the FIT Rules and the FIT Contract documents, the conduct and content of the stakeholder sessions and providing customer service to applicants interested in the FIT Program.

5. After I left the OPA and formed Compass Renewable Energy Consulting Inc., I was contacted by a number of industry participants that had questions about the OPA FIT Contract award process as it related to the capacity recently made available as a result of the new Bruce to Milton transmission project. There were concerns expressed about the process and whether it was fair and transparent. I confirmed that the process had been completed in a fair manner, and that there were no advantages or more favourable treatment granted to any particular company in the process.

6. In early November 2013, I was approached by Mesa asking that I act as an expert witness on the Ontario electricity system in this arbitration. I was not asked to be a fact witness. As I was personally involved in some of the issues in this arbitration, I felt uncomfortable with the Claimant's request and declined.

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<sup>3</sup> R-166, Ontario Power Authority website excerpt, "Stakeholder submissions". Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/qa-toolstakeholder-submissions/stakeholder-submissions> ("Ontario Power Authority, Stakeholder Submissions").

<sup>4</sup> R-001, Letter (Direction) from the Honourable George Smitherman, Minister of Energy and Infrastructure to Colin Andersen, CEO, Ontario Power Authority (Sep. 24, 2009). Available at: [http://www.powerauthority.on.ca/sites/default/files/page/15420\\_FIT\\_Directive\\_Sept\\_24\\_09.pdf](http://www.powerauthority.on.ca/sites/default/files/page/15420_FIT_Directive_Sept_24_09.pdf).

## II. DEVELOPMENT OF THE FIT RULES

7. My involvement in FIT Program design started in January 2009, when, as Manager for the Renewable Energy Standard Offer Program (“RESOP”),<sup>5</sup> I was asked to participate in the development of the FIT Program and associated FIT Rules and other program documents.

8. The OPA began developing the FIT Rules in early 2009, following the introduction of the GEGEA into the Ontario legislature. We had four teams working on the process. My team was tasked with developing the FIT Rules and other program documents and ensuring implementation of the FIT Program. Bob Chow’s transmission integration team was charged with managing all of the technical aspects related to transmission grid capability and power system planning. The operations team dealt with business processes and IT tools required for FIT applications in-take and their review. Finally, a communications team was set up to assist all other teams with web design, public information, and other program related issues. We also worked with energy consulting firms, such as Power Advisory LLC to develop the FIT price schedule, and with the law firm Osler, Hoskin & Harcourt LLP to draft the FIT Rules, Contracts and other program documents.

### A. Consultations During the Development of the FIT Rules

9. During this period in early 2009, the OPA had bi-weekly meetings with the

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<sup>5</sup> **R-044**, Ontario Power Authority Presentation, “Renewable and Clean Energy Supply Procurement Update” (May 13, 2008). Available at: [http://www.powerauthority.on.ca/sites/default/files/news/6461\\_ORE\\_-\\_Presentation.pdf](http://www.powerauthority.on.ca/sites/default/files/news/6461_ORE_-_Presentation.pdf). RESOP was the first program of its kind in North America, for renewable energy projects under 10 MW in size, which provided developers who had been granted access to the grid by Hydro One or their local distribution company with a guaranteed price for electricity for twenty years.

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Minister of Energy to provide status updates on the development of the Rules. During these meetings, we would update the Minister on our progress in developing the FIT Program. The Minister at the time, George Smitherman, had no desire to micro-manage the implementation of the policy. He simply wanted to ensure that the policy vision, for which the Ministry of Energy was responsible, was being correctly understood. As such, we did not receive any specific comments on the draft rules or other documents. Rather, the Minister might give some general policy related directions, and then send us back to the drafting table to develop the guidelines, specific mechanics and rules of the FIT Program.

10. In addition to meetings with the Minister, we also had regular meetings with officials from the Ministry of Energy in order to coordinate efforts on certain aspects. For example, while some aspects of the FIT Program were strictly managed by the OPA, such as the specific criteria and evidentiary requirements to be used in the ranking of the applications or the criteria to be used in the award of contracts, other areas required more collaboration between the Ministry of Energy and the OPA, such as the development of the domestic content requirements.

11. Finally, we also consulted with the public and stakeholders with respect to the development of the FIT Program. From March to July 2009, the OPA held a series of public consultations by webcast and teleconference.<sup>6</sup> I was in charge of coordinating and leading the process. The objective of the public consultation process was to obtain feedback from stakeholders on the design of the FIT Program. Representatives from all

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<sup>6</sup> R-169, Ontario Power Authority FIT Program website, "Past Events-2009". Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009>

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sectors of the energy industry (wind, hydro, renewable biomass, bio-gas, landfill gas and solar photovoltaic development), energy associations (including solar and wind energy associations), non-governmental organizations and aboriginal and consumer groups participated.

12. The first consultation was held on March 17, 2009.<sup>7</sup> A draft of the FIT Rules was put to the stakeholders for their comments. At that time, the launch of the FIT Program was envisaged for early June. The initial plan was to hold 8 consultations, from March 17, 2009 to May 5, 2009, every Tuesday from 9am to 4pm. Each session would address a specific topic, and would therefore allow the stakeholders to comment in turn on: (1) the process and objectives of the FIT Program and the project eligibility requirements, (2) the application requirements (two sessions); (3) the price schedule; (4) the FIT Contract Form, Execution and Milestones program initialization; (5) resource integration, metering requirements and settlement, treatment of incremental projects; (6) the program review and amendments on program initialization; and (7) any final issues, discussions and questions.

13. After the eight sessions originally planned, a ninth session was held in July 2009 on the proposed revision to the draft FIT Rules.<sup>8</sup> The draft FIT Rules had been modified to reflect the feedback received from stakeholders. The consultation process led the OPA to further in-depth consideration of the FIT Program. This translated into: (1) greater

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<sup>7</sup> **R-053**, Ontario Power Authority Presentation, "Proposed Feed-in Tariff Program Stakeholder Engagement – Session 1", (May 17, 2009). Available at: [http://fit.powerauthority.on.ca/Storage/10117\\_Session\\_1\\_Presentation\\_-\\_March\\_17.pdf](http://fit.powerauthority.on.ca/Storage/10117_Session_1_Presentation_-_March_17.pdf).

<sup>8</sup> **R-064**, Ontario Power Authority Presentation, "Proposed Feed-in Tariff Program – Revisions to Draft FIT Rules", (Jul, 21, 2009). Available at: [http://fit.powerauthority.on.ca/Storage/10333\\_FIT\\_July\\_21\\_Presentation.pdf](http://fit.powerauthority.on.ca/Storage/10333_FIT_July_21_Presentation.pdf).

detail on new concepts being developed, such as the Transmission Availability Test (“TAT”), Distribution Availability Test (“DAT”), and the Economic Connection Test (“ECT”), (2) more clarity on the regulatory changes proposed for the development of renewable energy supply, through a proposal for amendments to the Ontario Energy Board’s Distribution System Code, the production of a draft working paper regarding the Ministry of the Environment’s Renewable Energy Approval, and a consultation on domestic content, and (3) the restructuring of the FIT Rules to transfer certain aspects from the FIT Rules to the FIT Contract.

14. To facilitate the consultation process, we had a section of the website set-up where stakeholders could submit comments.<sup>9</sup> Overall, more than 230 stakeholders posted their comments on this website from March 16, 2009 to July 2009. This tool also allowed my team at the OPA to publicly answer the questions posted during the consultation process.

#### **B. The Launch Period Ranking Criteria**

15. I understand that the limitations of a transmission system have been described in other witness statements, and I will not repeat those facts here. Such technical limitations meant that the OPA had to come up with a way of deciding how to award the limited number of contracts we could in a way that met the policy goals of the government. As we understood it, the Ministry of Energy’s main goal in this regard was to allow “shovel-ready” projects to “float to the top”, “Quick wins” for the program, meaning immediate investments in development, were seen as crucial for the government’s strategy of

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<sup>9</sup> R-166, Ontario Power Authority, Stakeholder Submissions.

creating jobs in the renewable energy sector as a means of economic stimulus during the economic downturn.

16. [REDACTED]

17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>10</sup> R-060, Presentation, "Feed-in Tariff Program Design Update", Ontario Power Authority (May 22, 2009), pp. 7-12 ("Ontario Power Authority, FIT Program Design Update").

<sup>11</sup> *Ibid.*, p. 8.

<sup>12</sup> *Ibid.*, p. 9.

<sup>13</sup> *Ibid.*, p. 11.

[REDACTED]

18. [REDACTED]

19. In selecting the criteria, we once again drew from our past experience running procurement programs. The concept of considering project maturity and progress towards development milestones is a standard and often used concept in procurement. Moreover, the concept of “shovel-readiness” had been previously employed by the OPA. It helps to identify projects that are further along in the development cycle and usually demonstrate the seriousness of the developer behind the project. For example, we had used similar strategies and criteria for the RES III Program. The four criteria we selected for the FIT program launch were: (1) the project was exempt from the Renewable Energy Approvals process because of maturity through the Environmental Assessment process; (2) the applicant owned or had a contract for major equipment components; (3) the applicant had prior team member experience in successfully developing a similar facility; and (4) the applicant had the proven financial capacity to develop the project.

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<sup>14</sup> *Ibid.*

These are included and described in Section 13.4 of the FIT Rules, version 1.1.<sup>15</sup>

20. [REDACTED]

**1. Renewable Energy Approval Exempt**

21. The first “shovel-readiness” criterion we selected was whether the project was exempt from the Renewable Energy Approval (“REA”) process.<sup>17</sup> The GEGEA contained provisions requiring that a streamlined or one-window process for assessing the environmental effects of renewable energy projects be established under the *Environmental Protection Act* (“EPA”). As a result, in the summer of 2009, the Ministry of the Environment began work on the REA Regulation made under the EPA.<sup>18</sup> We

<sup>15</sup> C-0258, Ontario Power Authority, FIT Program Rules, v. 1.1 (Sep.30, 2009), s. 13.4 (“Ontario Power Authority, FIT Program Rules, v. 1.1”).

<sup>16</sup> R-060. Ontario Power Authority, FIT Program Design Update, p. 8.

<sup>17</sup> R-101, Ministry of Energy Presentation, “Guide - Provincial Approvals for Renewable Energy Projects”, Ministry of Energy (2011), slides 10-15. Available at: [http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01\\_079527.pdf](http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079527.pdf); R-003, Ontario Power Authority, FIT Program Rules, v. 1.2 (Nov. 19, 2009), s. 13.4(a)(i). Available at: [http://fit.powerauthority.on.ca/Storage/10912\\_FIT\\_Rules\\_Version\\_1.2\\_November\\_19\\_2009.pdf](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”).

<sup>18</sup> R-065. *Renewable Energy Approvals Regulation*, O. Reg 359/09.

believed that a project being exempt from this process would aptly demonstrate shovel-readiness because it would mean that a project had already made satisfactory progress under the Environmental Assessment process, and therefore did not have to undergo the REA environmental assessment process which, even if streamlined, would still be lengthy.

22. The REA Regulation was formally made under the EPA on September 8, 2009. Under the regulation, a project was REA-exempt if it was not subject to the REA regime, or if the transitional provisions of the REA regulation did not require the facility to have an REA. Under the REA regulation, a Class 1 wind facility, meaning a facility with a capacity of less than 3 kW, was exempt from assessment.<sup>19</sup> Any wind project with a larger capacity, which was almost all of them, required an REA before development began, unless the transition provisions applied. The transitional provisions of the REA Regulation essentially covered projects that already had all of their required permits and approvals under the Environmental Assessment process on the date that the REA Regulation came into force.<sup>20</sup>

## **2. Control of a Major Equipment Component**

23. The second criterion was the control of major equipment components.<sup>21</sup> This was a standard criterion in our procurement processes used to assess the level of project development. When a project already controlled the major equipment components that it required at the time of application, it minimized supply-side risks that might delay its

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<sup>19</sup> *Ibid.*, s. 8(b).

<sup>20</sup> *Ibid.*, s. 9

<sup>21</sup> **R-003**, Ontario Power Authority, FIT Program Rules, v. 1.2, s. 13.4(a)(ii).

development. Accordingly, in the FIT Rules we provided that the Applicant must own, or have a fixed or guaranteed maximum price contract for a major equipment component.

<sup>22</sup> For a wind facility, a major equipment component included the towers, turbines or nacelles.

24. The difference in the FIT Program with respect to this criteria vis-à-vis our other procurement process was the FIT Program's domestic content requirements.<sup>23</sup> As I noted above, Minister Smitherman had been very vocal on the domestic content requirements being a key part of Ontario's policy in order to create jobs in a green energy economy. As such, we were conscious of the need to incorporate these criteria into our requirements for projects to be ranked near the top for purposes of contracting priority. My group therefore developed language consistent with this policy objective, and incorporated it into the major equipment component control requirement. Thus, for this criterion, if a facility was a wind or solar project, any components used to bid for this criterion had to meet, or be able to meet when they were manufactured, the domestic content requirements set out in the FIT Rules.<sup>24</sup>

### 3. Prior Experience

25. The third criterion was the prior experience in constructing a similar facility.<sup>25</sup>

This was also a criterion that we had used in other procurement processes. It was seen as

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<sup>22</sup> **R-082**, London Economics Report, Feed-in-Tariff Launch Period Criteria Evaluation – Independent Process Review (Mar. 31, 2010), p. 7 (“London Economics Report”).

<sup>23</sup> **R-159**, Ontario Power Authority website excerpt, “Domestic Content”. Available at: <http://fit.powerauthority.on.ca/program-resources/faqs/domestic-content>.

<sup>24</sup> **R-064**, Presentation, “Proposed Feed-in Tariff Program – Revisions to Draft FIT Rules”, Ontario Power Authority (Jul. 21, 2009), pp. 8-9. Available at: [http://fit.powerauthority.on.ca/Storage/10333\\_FIT\\_July\\_21\\_Presentation.pdf](http://fit.powerauthority.on.ca/Storage/10333_FIT_July_21_Presentation.pdf).

<sup>25</sup> **R-003**, FIT Program Rules, v. 1.2, s. 13.4(a)(iii).

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a good indicator of shovel-readiness not because it specifically related to the level of work done, but rather because it related to the ability of the project's proponents to manage the risks and challenges attendant upon the successful planning, permitting and construction of the facility. One of the issues we had to address was who had to have the relevant experience. We decided that we would approach this in two ways. First, if any of the applicant, an entity the applicant controlled, or an entity that controlled the applicant (together, the "Applicant Control Group")<sup>26</sup> had relevant prior experience taken as a whole, this would be sufficient. This applied at the Applicant entity level. So for example, if Company A was the 100% owner of a Company B, and Company B applied for a FIT contract, if Company A had, as an entity, relevant prior experience, Company B could propose that it met this criterion. The second way that this criterion could be satisfied was if any three full time employees of any entity in the Applicant Control Group had relevant prior experience. This recognized the fact that many of the applicants and companies involved were new to renewable energy or were special purpose vehicles being set up specifically for the purposes of applying for a FIT contract in Ontario. We did not want to exclude entities from meeting this criterion merely because they brought in appropriate expertise rather than having had the experience directly. What we did exclude was experience of part-time employees or outside consultants. We believed that such people did not have a sufficient role in the projects to justify a determination that their experience would satisfy the criterion.

26. The next issue was what we would consider relevant similar experience. We

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<sup>26</sup> **R-081**, Ontario Power Authority, Comparison of FIT Rules Version 1.2 to 1.3.0, March 9, 2010, p. 29. Available at: [http://fit.powerauthority.on.ca/Storage/11100\\_Comparison\\_FIT\\_Rules\\_Version\\_1.2\\_to\\_1.3.pdf](http://fit.powerauthority.on.ca/Storage/11100_Comparison_FIT_Rules_Version_1.2_to_1.3.pdf).

decided that we would accept experience from anywhere in the world. Of course, the environment in Ontario is different than many places in the world, and the winters and weather bring unique challenges, but we were aware that we were developing the first comprehensive FIT Program in North America, and thus a geographic limitation was not feasible. For this reason, we defined similar facility in the FIT Rules as one using the same renewable energy source with a capacity of at least 25% of the proposed contract capacity of the FIT application.

#### **4. Financial Capacity**

27. The fourth criterion was proven financial capacity of the Applicant Control Group.<sup>27</sup> Again, this was a criterion taken from other procurement processes. In essence, we were aware that one of the most significant risks in developing capital intensive projects like energy generation facilities, was funding failures during the development phase. Thus, this criterion was related to shovel-readiness because having guaranteed funding at the application stage minimized this risk.

28. This criterion required that a person or group of persons be a Designated Equity Provider, meaning that it or they accounted for more than 15% of the economic interest of the Applicant. It then required that the Designated Equity Provider have a Tangible Net Worth ("TNW") of at least \$500/kW of proposed Contract Capacity at the end of the most recent fiscal year. For example, if a project was a 100 MW wind facility, the Designated Equity Provider was required to have had a TNW of \$50 million at the end of the most recent fiscal year.

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<sup>27</sup> **R-003**, Ontario Power Authority, FIT Program Rules, v. 1.2, s. 13.4(a)(iv).

29. This was a sizeable requirement, and thus, we needed a way to ensure proof of any claims made in this regard. Unless the Designated Equity Provider was an individual (i.e. a natural person), we required an audited balance sheet done in accordance with GAAP or IFRS for the most recent fiscal year. The applicant also had to provide a summary of the TNW calculation.

### **III. COMMUNICATIONS WITH FIT APPLICANTS**

30. Over the five years that I worked at the OPA, I likely communicated with between two to three hundred FIT proponents after program launch. In fact, it was part of my role as Manager of the FIT Program to provide customer service to applicants interested in the FIT Program. This consisted of communications with stakeholders to explain the FIT Program and its requirements. I also assisted FIT proponents with application related questions before applications were submitted. Explanations on how to fill the forms, understanding the process, and ensuring that applications in general were properly completed, were all tasks that were part of my job.

31. To facilitate these communications, we organized a number of stakeholder outreach initiatives,<sup>28</sup> such as telephone conferences or webinars, in which I or other OPA staff members would set out the program and the different administrative steps to pursue an application for a FIT contract.

32. Five full day stakeholder sessions were held from September to November 2009.<sup>29</sup> These sessions were designed to help potential proponents with their FIT applications.

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<sup>28</sup> **R-169**, Ontario Power Authority website excerpt, "Past Events 2009". Available at: <http://fit.powerauthority.on.ca/public-consultation/past-events/past-events-2009>. Specifically, the sessions were held on September 28 and 29; October 8 and 21; and November 20, 2009.

<sup>29</sup> *Ibid.*

They also allowed the OPA to answer a number of new questions which had arisen after the issuance of the direction on September 24, 2009. Of these five sessions, three were general question and answer sessions, one was for the First Nations and Metis Communities, and one was on Transmission and Distribution Technical Information.<sup>30</sup>

33. An online training module was also available to guide participants through the steps and requirements of the FIT Program. This material was designed for all types of potential applicants, for the residential, commercial and agricultural sectors. Training sessions for potential applicants were also held throughout the province and our team was involved in many presentations inside and outside of Ontario promoting the FIT Program.

34. Often participants to these events would then continue communication with our team with follow-up questions. As many of these participants were FIT applicants, and consultants hired by the applicants, they often sought to obtain information that would help with their applications.

35. Our objective in responding was to explain the FIT Program, encourage proponents to apply and assist them in the completion of their application should they decide to go forward. Careful consideration was given to avoid giving privileged or confidential information. My team and I were acutely aware of the fact that we had to ensure that everyone was given access to the same information. Thus, while we provided individual assistance to applicants, we always made sure to only communicate publicly available information. This meant that we would share general information on the program objectives, as well as explain the intricacies of FIT application requirements for

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<sup>30</sup> *Ibid.*

providing connection point details and site access rights. Although the information we provided could be as specific as to a particular connection point, it was always information that was accessible to all. As an example, we could tell an applicant if connection was available at a certain connection point based on the public information (general public information), but we could not tell the applicant if connecting to that particular connection point would grant it an advantage in the ranking the projects and subsequent award of contracts. We treated all applicants in the same way without exception.

**IV. Communications with NextEra**

36. I am aware that the Claimant alleges otherwise, and in particular, it seems to be alleging that I gave confidential non-public information to NextEra Energy LLC (“NextEra”) that benefited them by giving them advance notice of upcoming changes to the FIT Program Rules. This is absolutely false. I never provided any company non-public information regarding the FIT Program or any other procurement program of the OPA.

37. The Claimant’s specific allegations regarding my relationship with NextEra were brought to my attention when I was asked by the Government of Canada to provide a witness statement. I did not have a special and privileged relationship with NextEra. My relationship with NextEra was not different than any other I had with other proponents I communicated with. In fact, I do not specifically recall having meetings with NextEra. There was nothing about my relationship with them that stands out from my relationship with many other proponents.

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38. In reviewing the communications with Nicole Geneau of NextEra that are referred to by the Claimant, it is apparent that they took place in the context of an administrative request for FIT application assignment.<sup>31</sup> I pause here to offer some background on FIT application assignments.

39. Given the OPA's experience in other procurement processes, we expected that it would be relatively common for one entity to apply for a number of contracts, and then want to assign those applications or contracts out to affiliated special purpose vehicles at some later time. As such, we drafted the FIT Rules to allow for such a situation.<sup>32</sup> In particular, the FIT Rules provided that an application could be assigned twelve months after the original application had been made.<sup>33</sup>

40. By the spring of 2011, we had received a number of applications which were eligible for assignment. In addition, all of the launch period applications which had not received contracts were eligible for assignment as they had been made more than 12 months prior. As such, we were dealing with assignment requests on a regular basis at that point.

41. An assignment request was communication intensive. A team member or I would explain the process, and as there were several steps to complete, it was standard practice

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<sup>31</sup> C-0299 E-mail from Patricia Lightburn, Ontario Power Authority to Jim MacDougall, Ontario Power Authority (May 31, 2011); C-0068, E-mail from Jim MacDougall, Ontario Power Authority to Nicole Geneau, NextEra (May 31, 2011); C-0212, E-mail from Nicole Geneau, NextEra to Jim MacDougall, Ontario Power Authority (May 26, 2011); and C-0220, E-mail from Jim MacDougall, Ontario Power Authority to Nicole Geneau, NextEra (May 31, 2011).

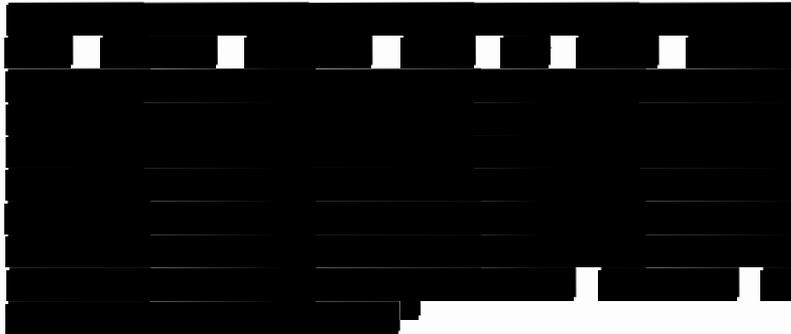
<sup>32</sup> C-0258, Ontario Power Authority, FIT Program Rules, v. 1.1, s.15.5.

<sup>33</sup> R-165, Ontario Power Authority website excerpt, "Pre-COD Assignment to Affiliate". Available at: <http://fit.powerauthority.on.ca/contract-management/other-contract-issues/contract-assignment/pre-COD-assignment-to-affiliate>.

to be in regular contact with the applicant until the process was completed.

42. There was no cut-off of communications set for assignments requests of FIT applicants when the Minister's June 3rd<sup>34</sup> direction on the Bruce to Milton transmission line was announced. The application assignment process was entirely distinct from the Bruce to Milton's transmission capacity procurement process. Consequently, when the Minister's June 3rd Direction was issued, and the OPA announced that it would not have individual communications with FIT applicants, this did not affect our team in charge of application assignments.<sup>35</sup>

43. With this context, I now turn back to my communications with Ms. Geneau in late May and early June 2011. On May 31, 2011, Ms. Geneau wrote to me with the following question:



44. At that time, it was common knowledge in the industry that the Bruce to Milton

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<sup>34</sup> C-0119, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, CEO, Ontario Power Authority (Sep. 17, 2010). Available at: [http://www.powerauthority.on.ca/sites/default/files/page/17131\\_MEI\\_Directive\\_re\\_KC\\_Siemens\\_Sept\\_17\\_10.pdf](http://www.powerauthority.on.ca/sites/default/files/page/17131_MEI_Directive_re_KC_Siemens_Sept_17_10.pdf).

<sup>35</sup> C-0298, E-mail from Tracy Garner, Ontario Power Authority to Bob Chow, Ontario Power Authority, (Jun. 6, 2011); R-115, Email from Shawn Cronkwright, Ontario Power Authority to Bob Chow, Ontario Power Authority et. al (Jun. 6, 2011).

<sup>36</sup> C-0068, E-mail from Jim MacDougall, Ontario Power Authority to Nicole Geneau, NextEra (May 31, 2011).

transmission line had recently passed one of its final outstanding regulatory hurdles. The final appeal of its development had just been resolved in favour of the line's construction on May 10, 2011, less than two weeks before Ms. Geneau's email.<sup>37</sup> It was also public knowledge that the OPA was considering options on how to allocate capacity on that new line, and that the running of the ECT, which the public knew was being considered, would involve a window in which connection point changes could be made. This concept of offering a connection point change window in advance of running the ECT forms part of the FIT Rules.<sup>38</sup> We had been saying this to proponents throughout the FIT Program and it was well documented in prior OPA presentations in regard to the step by step mechanics of the FIT Program and ECT administration.<sup>39</sup>

45. As such, Ms. Geneau's statement that NextEra "knew" that the window was opening is not surprising. What she would not have known is when. It was not unusual for proponents to try and "fish" for information from the OPA, which was the reason that we were very careful in how I responded to this request.

46. The OPA had decided that, as a matter of policy, we would not allow for assignments of applications to be made once the window was open.<sup>40</sup> While it was therefore relevant to inform Ms. Geneau of this policy (which we would have done for anyone), it was equally important not to give away non-public details about the work

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<sup>37</sup> **R-105**, Ministry of Natural Resources, Notice of Decision made under the provision of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990 (May 10, 2011). Available at: <http://www.hydroone.com/Projects/BrucetoMilton/Documents/09130d1.pdf>.

<sup>38</sup> **R-003**. Ontario Power Authority, FIT Program Rules, v. 1.2, s. 5(3)(d).

<sup>39</sup> RWS Chow ¶¶ 28-31.

<sup>40</sup> **C-0299**, E-mail from Patricia Lightburn, Ontario Power Authority to Jim MacDougall, Ontario Power Authority (May 31, 2011).

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going on regarding allocating the Bruce to Milton transmission capacity (work that I was not substantially involved in personally).

47. As you see from my response, we told Ms. Geneau that it was better “to request assignment asap, in advance of any change window.”<sup>41</sup> I discussed my response with colleagues before sending it, and our choice of the word “any” to describe the change window was quite deliberate. By using it we were making a general statement, and were acknowledging nothing more than what the industry already knew – that a change window would be a part of the process of allocating the capacity on the Bruce to Milton line. I certainly did not give her any specifics on when that change window might be occurring nor did I give her any information that was not publicly known.

48. I continued to exchange emails with Ms. Geneau about the prior request of assignment of these applications after the Bruce to Milton Direction was issued on June 3rd, 2011. In fact, on June 6, 2011, Ms. Geneau emailed me with the confirming information regarding the assignments made by NextEra.<sup>42</sup> I understood that the objective of her email was to bring to my attention the fact that they had completed the assignment before the change window opened.

49. I am aware that the Claimant in this arbitration seems to suggest that it was wrong for the OPA to communicate specifically with NextEra during this period because we had decided that we would not be individually communicating with applicants regarding potential changes in connection points. They are misunderstanding what I and my team

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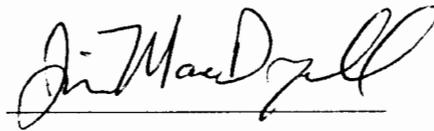
<sup>41</sup> C-0068, E-mail from Jim MacDougall, Ontario Power Authority to Nicole Geneau, NextEra Energy (May 31, 2011).

<sup>42</sup> C-0302, Email from Nicole Geneau, NextEra to Jim MacDougall, Ontario Power Authority (Jun. 6, 2011).

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were doing. We were not communicating with NextEra about connection point changes – in fact, I had no knowledge about what would be decided in that regard. The lead group within the OPA in charge of determining the mechanics of the connection point change window and the allocation of the Bruce to Milton capacity was our Power System Planning team. We were only communicating about an administrative matter of the assignment of an application or applications. This was entirely appropriate, and we would have done the same for any proponent.

Dated: Feb 27, 2014

A handwritten signature in black ink, appearing to read "Jim MacDougall", written over a horizontal line.

Jim MacDougall