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

GOVERNMENT OF CANADA

OUTLINE OF POTENTIAL ISSUES

July 31, 2012

Department of Foreign Affairs
and International Trade
Trade Law Bureau
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CANADA

1. In response to the Tribunal's request of July 16, 2012, Canada offers the following concise outline of its positions on potential issues in this claim so as to "complete the Tribunal's preliminary understanding of the main elements of the dispute for it to draft the initial procedural documents". As noted by the Tribunal in its letter of July 16 and as confirmed by Canada in its letter of July 17, we provide these preliminary comments without prejudice both to Canada's position that no valid claim has been submitted to arbitration, and to Canada's right to fully set forth its arguments in subsequent filings.

I. FACTUAL BACKGROUND

2. In the latter part of the last decade, the Government of Ontario decided to promote and develop a significant and robust renewable energy sector as part of the largest climate change initiative in Canada. This critical initiative had several components, including the *Green Energy and Green Economy Act* of 2009 and the *Green Energy Investment Agreement* of 2010.

3. The *Green Energy and Green Economy Act* provided the Ontario Minister of Energy with the authority to direct the Ontario Power Authority ("OPA"), the independent, non-profit corporation established under the *Electricity Restructuring Act* which is responsible for procuring electricity for the province, to establish the Ontario Feed-in Tariff Program ("FIT Program"). The Minister exercised that authority on September 24, 2009 and the OPA initiated the FIT Program a week later, on October 1, 2009. The FIT Program provides the OPA with a means of promoting and procuring renewable energy via long-term contracts with renewable energy producers pursuant to standardized rules, terms and prices.

4. In addition to the FIT Program, the Ontario government publicly disclosed in September 2009 that it had been in negotiations for over a year with Samsung C&T and the Korea Electric Power Corporation ("Korean Consortium") with respect to an investment agreement that would boost renewable energy supply and augment the Province's capacity to manufacture renewable energy technologies. The *Green Energy Investment Agreement*, concluded on January 21, 2010, provided that the Korean

Consortium would open four new manufacturing plants for renewable energy technologies, and supply 2,500 megawatts of wind and solar generating capacity into the Ontario grid. In exchange for this substantial investment, Ontario agreed to allocate certain transmission capacity to the Korean Consortium for their renewable energy projects, so long as key milestones and requirements were met.

5. The amount of new generating capacity that can be accommodated by the existing transmission and distribution system in Ontario is not unlimited. It is simply not possible for the OPA to procure all of the renewable energy from every producer who applies to participate in the FIT Program. In light of this system constraint, the OPA has had to adopt a methodology, the FIT Program Rules ("FIT Rules"), through which a province-wide priority ranking can be given to projects so as to determine the order in which they will be considered for a contract offer.

6. Under the FIT Rules, the applications received during the first 60 days of the FIT Program ("Launch Period") were ranked based on the status of their environmental approvals, their control of the major generation equipment required for their project, their previous experience developing renewable energy projects, and their financial capacity to support the construction of the project. The applications received after the end of the Launch Period were ranked based solely on the order in which they were received.

7. FIT Program applications for the TTD and Arran projects allegedly owned by the Claimant were made during the Launch Period. Based on the objective criteria in the FIT Rules, the TTD and Arran projects received province-wide priority rankings of 91 and 96 respectively. Priority rankings of Launch Period applications were posted on the OPA website on December 21, 2010.

8. FIT Program applications for the other two projects allegedly owned by the Claimant, Summerhill and North Bruce, were submitted after the Launch Period had closed. As a result, their province-wide priority rankings reflect the order in which they were received. The two phases of the Summerhill Project received province-wide priority rankings of 318 and 319, and the two phases of the North Bruce Project received province-wide priority rankings of 320 and 321. Updated priority rankings reflecting FIT

Program applications received between the end of the Launch Period and June 5, 2010, were posted on the OPA website on February 24, 2011.

9. All of the projects allegedly owned by the Claimant are located in the Bruce area, an area in Ontario which has a strong wind resource but limited transmission capacity. As a result, none of these projects was offered a FIT contract when contracts were awarded by the OPA in 2010 and early 2011.

10. In light of the transmission capacity constraints described above, the Government of Ontario has been working to increase the amount of transmission capacity available. In particular, in order to increase transmission capacity in the Bruce area and a neighbouring area, a new transmission line was built, known as the "Bruce to Milton" line. Much of the new capacity created by this new line was to be allocated to renewable energy producers, including FIT Program applicants and the Korean Consortium under the *Green Energy Investment Agreement*. In particular, on June 3, 2011, the Minister of Energy directed the OPA to allocate some of the new capacity created by this new line (which came into service in June 2012) to proposed FIT projects.

11. As part of the allocation process, FIT Program applicants were offered a window during which they could change the point at which they wished to connect their project to the grid. This period, known as the "Connection Point Amendment Window," ran from June 6 to June 10, 2011. During the Connection Point Amendment Window, 37 FIT Program applicants changed the Connection Point for their projects, including many of the top ranked projects in the province. A change in the connection point of one of the projects allegedly owned by the Claimant, the TTD project, was also made during this window.

12. After the close of the Connection Point Amendment Window, FIT Program applications for projects were considered on the basis of their provincial rankings. A proposed project's provincial ranking was not altered by whether or not it chose to change its connection point. The OPA announced contract offers on July 4, 2011. Some of the contract offers were made to FIT Program applicants who had elected to change the connection point of their highly ranked project during the Connection Point

Amendment Window. None of the projects allegedly owned by the Claimant was offered a FIT contract.

II. PROCEDURAL BACKGROUND

13. On July 6, 2011, two days after the OPA announced the contract offers, the Claimant served Canada with a Notice of Intent to Submit a Claim to Arbitration against the Government of Canada under Chapter 11 of NAFTA.

14. Three months later, on October 4, 2011, the Claimant purported to serve a Notice of Arbitration on the Government of Canada. In addition to alleging that the measures identified in the Notice of Intent gave rise to a NAFTA claim, the Claimant also identified new alleged events and measures that occurred as late as August 5, 2011. In particular, the Claimant identified, without further explanation, an August 2 instruction from the Ministry of Energy to the OPA to offer FIT contract holders the opportunity to request a waiver of the OPA's right to terminate the contract, and the OPA's enactment of that directive on August 5, 2011, as relevant measures underlying its NAFTA claim.

15. The Government of Canada wrote to the Claimant with an offer to hold consultations on five separate occasions. However, the Claimant has not accepted any of these offers and no consultations have occurred as a result.

III. POTENTIAL ISSUES TO BE ADDRESSED BY THE TRIBUNAL

16. As Canada explained in its letter to the Tribunal of July 17, 2012, the Claimant has failed to respect the conditions precedent for submitting a claim to arbitration under NAFTA Chapter 11. In particular, in contravention of NAFTA Article 1120(1), the Claimant purported to submit its Notice of Arbitration without waiting six months from the occurrence of the events giving rise to its claim.[1] As a result, Canada has not

[1] Article 1120(1) of NAFTA provides, in relevant part: "Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under . . . (c) the UNCITRAL Arbitration Rules." (emphasis added).

consented to the submission of this claim to arbitration and the Tribunal lacks jurisdiction to adjudicate it.

17. Moreover, Canada denies that any of the measures mentioned in the Notice of Intent or in the invalid Notice of Arbitration breach Canada's obligations under Chapter 11. Rather, in making its renewable energy procurement decisions under the FIT Program, the Government of Ontario and the OPA acted in a non-discriminatory manner consistent with all of Canada's obligations under NAFTA. As with any procurement program, there is no doubt that some FIT Program applicants were disappointed when their projects were not selected for contracts. However, such disappointment is not grounds for a claim under NAFTA.

18. First, none of the measures of the Government of Ontario in designing or administering the *Green Energy and Green Economy Act*, the FIT Program, or in entering into the *Green Energy Investment Agreement*, violated Articles 1102 or 1103. Indeed, the Claimant and the Claimant's investments were accorded no less favourable treatment than that accorded to Canadian or other non-NAFTA party investors or investments of such investors in like circumstances.

19. Second, all of the measures identified in the Notice of Intent and invalid Notice of Arbitration are consistent with Canada's obligations under Article 1105. The treatment accorded to the Claimant's investments was consistent with the customary international law minimum standard of treatment of aliens.

20. Third, the FIT Program does not contain any performance requirements that are prohibited by Chapter 11 of NAFTA. In addition, as a simple factual matter, none of the measures that the Claimant seems to identify as violations of Article 1106 caused the Claimant to suffer any damage. Thus, the condition for bringing a claim that is contained in Article 1116(1), namely that the investor "has incurred loss or damage by reason of, or arising out of" the allegedly breaching measure, has not been met.

21. Fourth, there has been no breach of Article 1502(3) as no state enterprise has acted in a manner inconsistent with Canada's obligations under NAFTA Chapter 11 in the

exercise of regulatory, administrative or other governmental authority that has been delegated to it.

22. Finally, NAFTA Articles 1108(7)(a) and 1108(8)(b) provide that procurement by a Party or state enterprise is not subject to the obligations in NAFTA Articles 1102, 1103 and 1106.

23. In conclusion, none of the measures identified by the Claimant in its Notice of Intent or invalid Notice of Arbitration are inconsistent with Canada's obligations under NAFTA Chapter 11.

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Respectfully submitted on behalf of Canada,

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