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

CLAIMANT'S COSTS SUBMISSIONS

April 11, 2016

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I. OVERVIEW

1. If it is successful in this arbitration, Windstream requests that the Tribunal order that the Government of Canada bear the costs of arbitration that have been incurred by Windstream, as defined in Article 40 of the UNCITRAL Arbitration Rules, in the total amount of CDN **$6,474,864.84**.

2. These include the following costs, as set out in greater detail in the Annexes to these costs submissions:

(a) legal fees of $3,323,115.01;

(b) costs of expert witnesses, third-party service providers and witness travel costs of $2,268,712.27;

(c) disbursements of $233,037.56; and

(d) Tribunal and Permanent Court of Arbitration costs advanced by Windstream of $650,000.00.

3. These costs are reasonable in light of the length of the proceedings and the complexity of the issues raised. Moreover, a number of the steps taken by Canada throughout the proceeding caused Windstream to incur costs that would otherwise have been avoided. These steps include (i) the fact that Canada produced relevant documents 30 days before Windstream's then-deadline to file its Reply Memorial, which increased the time required to prepare the Reply Memorial; (ii) Canada's meritless request to strike portions of Windstream's Memorial and evidence from the record on the ground of parliamentary privilege, which the Tribunal rejected; and (iii) the fact that Canada's rejoinder expert evidence contained numerous incorrect and unsubstantiated assertions, which caused Windstream to incur substantial additional costs in preparing for the hearing, notably by having its experts prepare presentations that responded to and corrected the incorrect and unsubstantiated assertions. This further demonstrates that the quantum of costs incurred by Windstream is reasonable and should be recovered if Windstream is successful.

II. THE QUANTUM OF COSTS INCURRED BY WINDSTREAM IS REASONABLE

A. The Legal Costs Incurred By Windstream Are Reasonable

4. The legal costs incurred by Windstream of $3,323,115.01 are reasonable and are well within the range of legal costs incurred by claimants in investment treaty arbitrations.[1] As set out in greater detail in the Appendix, these costs were incurred over five phases of the arbitration, as follows:

(a) $553,844.05 for the initial pleadings, preliminary preparation and procedural hearing;

(b) $918,804.34 for the first round submissions, including the Memorial, witness statements and expert reports submitted in the first round, and document production and review;

(c) $866,310.49 for the second round submissions, including the Reply Memorial, the witness statements and expert reports submitted in the second round, and document production and review;

(d) $957,422.00 for preparation for and attendance at the hearing; and

(e) $26,734.13 for preparation of the costs submissions and Appendix setting out the costs incurred.

5. These amounts reflect the fees actually paid by Windstream, based on Torys' standard hourly rates but reflecting discounts applied.

[1] **CL-021**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16) Award of the Tribunal, 2 October 2006 ("***ADC***"), ¶ 542 (claimants were awarded US$7,623,693 in respect of their costs and expenses in the arbitration); **CL-121**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB (AF) 09/1) Award, 22 September 2014 ("***Gold Reserve***"), ¶¶ 860-862 (claimant was awarded US$5 million for its legal costs); **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***"), ¶ 353 (claimant was awarded US$13,553,563.80 in legal costs); **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 561 (claimant was awarded US$3,296,140 for the costs of the arbitration and half of its legal fees).

6. The legal fees incurred by Windstream are reasonable having regard to the volume of evidence and substantial written submissions submitted by both sides. This was a factually-complex case that required extensive fact and expert evidence. It involved a relatively lengthy ten-day oral hearing, with oral testimony by a total of 11 fact witnesses and 14 expert witnesses. Windstream produced a total of 1,570 documents in response to Canada's document requests, and Canada produced a total of 13,069 documents in response to Windstream's document requests, all of which needed to be reviewed by counsel.[2]

B. The Expert Witness Fees and Third Party Costs Incurred By Windstream Are Reasonable

7. As set out in greater detail in the Appendix, Windstream incurred $2,268,712.27 in costs for expert witnesses, the travel costs of witnesses and third-party service providers.

8. This amount does not include the costs of the expert evidence submitted with Windstream's Memorial that were included in Deloitte's sunk costs calculation because they were costs of the project that Windstream continued to incur given the position of Ontario and of Canada that the project had not been cancelled and, thus, that Windstream was still required to bring the project into commercial operation in accordance with the terms of the FIT Contract. Indeed, in its Amended Response to the Notice of Arbitration, Canada asserted that the "current deferral is not intended to be permanent" and that Windstream had "retained its interest in WWIS and WWIS has retained its FIT Contract."[3] Canada maintained this position in its Counter-Memorial and Rejoinder Memorial, and asserted in both submissions that it continued to conduct research with a view to eventually lifting the moratorium.[4] Consistently with this position, in January 2014, the OPA refused to return Windstream's $6 million in security and stated that it "reserve[d] 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."[5] It was not until the hearing that Canada

[2] These figures only represent the documents exchanged by the Parties on April 14, 2014. They do not include any of the documents produced at a later date, or any of the documents Windstream received through its requests under Ontario's freedom of information legislation.

[3] Government of Canada's Amended Response to the Notice of Arbitration, ¶ 58.

[4] Canada's Counter-Memorial, ¶¶ 483-485; Canada's Rejoinder Memorial, ¶¶ 105-114.

[5] **C-680**, Letter from OPA to Chamberlain, Adam (BLG) (January 10, 2014).

finally acknowledged that Ontario would not conduct offshore wind research in the near term,[6] and that Mr. Cecchini of the OPA admitted that Windstream's rights under the FIT Contract are "not frozen."[7]

9. Therefore, it is reasonable that the work product developed by the engineering experts that would have been required for the development of the project be seen as a project cost, and not a cost of arbitration. As Mr. Low stated, these costs "can be characterized as the equivalent of development costs that would have been incurred."[8] This was confirmed by Mr. Irvine, "[O]ur work stands and can be utilized with regards to the development of the project. […] It would be a cost of the project."[9] Since these costs were included in the sunk costs calculation, they are not included in the calculation of Windstream's costs of arbitration. In contrast, as Mr. Low stated in his presentation, costs relating to reply reports were excluded from Deloitte's sunk costs valuation because they were not costs incurred in relation to the project.[10]

10. The costs incurred by Windstream for expert evidence are reasonable. This was a complicated case that raised numerous technical issues requiring expert evidence. The focus of Canada's defence was that there was significant regulatory uncertainty regarding offshore wind in Ontario, Ontario was not ready for offshore wind, and that the Project was valueless because it was "doomed to fail from the moment that the Claimant signed on the dotted line."[11] Therefore, in order to satisfy its burden of proof and respond to Canada's arguments, Windstream presented the evidence of experts with specialized expertise to establish the reasonableness of its decision to invest in the Project, the technical feasibility of the Project and the quantum of its damages.

11. The expert evidence presented by Windstream is summarized below.

12. ***Sarah Powell***. Ms. Powell provided evidence on (i) the regulatory environment for offshore wind in place at the time Windstream decided to invest in the Project and, through WWIS,

[6] Transcript (Public & Confidential Version), February 15, 2016, pp. 210-211.
[7] Transcript (Full Version), February 17, 2016, p. 211, lines 16-19.
[8] Transcript (Public Version), February 23, 2016, p. 44, lines 19-25.
[9] Transcript (Confidential Version), February 21, 2016, p. 226, lines 10-21.
[10] Transcript (Confidential Version, February 23, 2016, p. 9, lines 11-19.
[11] Canada's Counter-Memorial, ¶ 25.

enter into the FIT Contract, (ii) whether it was reasonable for Windstream to cause WWIS to enter into the FIT Contract, (iii) whether the FIT Contract and other Project assets are intangible personal property under Ontario law; and (iv) the financeability of the FIT Contract. Ms. Powell was the only Ontario lawyer to provide evidence about the regulatory regime in Ontario for offshore wind projects and the FIT Program. Ms. Powell provided two expert reports, assisted counsel in responding to the arguments raised by Canada, assisted counsel with preparing for cross-examination of Canada's witnesses, prepared a detailed presentation at the hearing responding to the evidence presented and arguments raised by Canada, and testified at the hearing.

13. ***Richard Taylor and Robert Low of Deloitte LLP***. Mssrs. Taylor and Low provided a valuation of the losses Windstream incurred as a result of Canada's breaches of NAFTA. Mssrs. Taylor and Low prepared two extensive reports, as well as an addendum, conducted extensive additional work to respond to issues raised in the rejoinder expert reports of Berkeley Research Group and of Green Giraffe, assisted counsel with preparing for cross-examination of Canada's witnesses, prepared a detailed presentation at the hearing, and testified at the hearing.

14. ***Remo Bucci of Deloitte LLP***. Mr. Bucci provided his expert opinion on the financeability of the Project. His reports established when Windstream's investments became worthless and responded to the evidence submitted by Canada regarding the financeability of the Project. Mr. Bucci was the only expert with FIT Program experience to opine on the financeability of the Project. Mr. Bucci prepared two reports for this Tribunal, prepared a detailed presentation at the hearing, and testified at the hearing.

15. ***Richard Aukland of 4C Offshore***. Mr. Aukland provided evidence regarding the likely Project costs and information about four freshwater offshore wind farm projects in Europe. 4C Offshore prepared two reports for this Tribunal, prepared a detailed presentation at the hearing, and Mr. Aukland appeared as a witness at the hearing. Mr. Auckland was the only expert witness in the proceeding with expertise in the costs associated with offshore wind projects.

16. ***SgurrEnergy***. SgurrEnergy provided its expert opinion on the technical feasibility of constructing and operating the Project. As part of this work, ***COWI*** and ***Weeks Marine*** were retained to opine on the design and fabrication of Gravity Based Foundations for the Project and construction of the Project. This evidence was necessary to establish the technical feasibility of the

Project. All three experts worked together to provide two extensive reports, including a highly detailed project schedule, and Mr. Irvine, Mr. Palmer, and Mr. Cooper testified at the hearing. They also assisted counsel with preparing for cross-examination of Canada's witnesses, and each expert prepared a detailed presentation at the hearing responding to the evidence presented and arguments raised by URS. They were the only offshore wind technical experts to give evidence at the hearing.

17. ***W.F. Baird & Associates Coastal Engineers***. Baird provided its expert opinion on the technical and permitting feasibility of the Project in connection with the aquatic environment aspects of the Project. As part of this work, ***Beacon Environmental, Dr. Michael Risk***, and ***Scarlett Janusas Archeology Inc.*** were retained to provide their expert opinion on the aquatic resources of Lake Ontario (including habitat and fisheries), the potential electromagnetic field effects, and the archeological aspects of the Project, respectively. Baird – in association with these other experts – provided two extensive reports, and assisted in the development of the detailed project schedule. Mr. Kolberg assisted counsel with preparing for cross-examination of Canada's witnesses, prepared a detailed presentation at the hearing responding to the evidence presented and arguments raised by URS, and appeared as a witness at the hearing. Baird was the only expert on the Great Lakes acquatic environment to provide evidence in this proceeding, and this evidence was necessary to establish that the Project would more likely than not have received necessary permits and been built.

18. ***WSP***. WSP provided evidence on the permitting feasibility of the Project under the Renewable Energy Approval process. WSP provided one report to this Tribunal and worked in collaboration with SgurrEnergy, COWI, Weeks Marine and Baird to develop the detailed project schedule. Mr. Roberts also assisted counsel with preparing for cross-examination of Canada's witnesses, prepared a detailed presentation at the hearing responding to the evidence presented and arguments raised by URS, and appeared as a witness at the hearing. WSP's evidence was necessary to reply to assertions by Canada and its experts regarding the permitting of the Project.[12]

[12] RER-URS 2, ¶ 6, Counter-Memorial, ¶ 538.

19. ***ORTECH***. ORTECH provided an expert report on the environmental aspects of the Project and wind resource assessments relied upon by Deloitte. Mr. Roeper also provided two witness statements, assisted counsel with preparing for cross-examination of Canada's witnesses, and testified at the hearing.

20. ***Dr. Paul Kerlinger***. Dr. Kerlinger provided an expert report on the absence of any material impediments to the Project obtaining a Renewable Energy Approval on the basis of the available information related to birds, and what mitigation measures would be expected for the Project. Dr. Kerlinger was the only expert in this proceeding qualified to give evidence regarding the potential impact of the Project on birds. His report was relied upon by WSP in support of its conclusion that the Project would more likely than not have received necessary permitting related to birds.

21. ***Dr. Scott Reynolds***. Dr. Reynolds provided an expert report on the absence of any material impediments to the Project obtaining a Renewable Energy Approval on the basis of the available information related to bats. Dr. Reynolds was the only expert in this proceeding qualified to give evidence regarding the potential impact of the Project on bats. His report was relied upon by WSP in support of its conclusion that the Project would more likely than not have received necessary permitting related to bats.

22. ***Brian Howe of HGC Engineering***. Mr. Howe provided an expert report and a letter that concluded that the Project would have met established noise level limits even under worst case conditions.

23. ***Aercoustics***. In September 2014, three weeks after Windstream had filed its Memorial, MOE issued a request for proposal for a "noise propagation model scoping study" relating to the noise propagation from offshore wind projects (a version of which had been prepared as early as September 2010).[13] In light of this late-coming study and of Canada's assertion that Government-led research is necessary to address the noise that would emanate from the Project, Windstream retained Aercoustics to conduct actual noise measurements near the Project site. Aercoustics

[13] See ¶ 412 of Windstream's Reply Memorial. An email Windstream obtained as a result of its requests under the freedom of information legislation indicates that, preceding this study, funding was requested for research to avoid an "adverse ruling" in this arbitration: see **C-1094**, Email from Block, Jennifer (ENERGY) to Cain, Ken (MNR) (March 6, 2013).

prepared one report, which concluded that noise from the Project would make a negligible contribution to the cumulative noise impacts at sensitive receptors (residences), and would meet established sound level limits.

24. ***Jim MacDougall of Compass Renewable Energy Consulting***. In his report, Mr. MacDougall explained the considerations and assumptions that were used in determining the FIT Program design and pricing. His report illustrates that the OPA intentionally included offshore wind in the FIT Program, as the OPA established the price to be paid for offshore wind power based on certain assumptions specific to offshore wind. It also demonstrated that the OPA used the DCF methodology to develop the FIT Program pricing.

25. ***Power Advisory LLC***. In its report, Power Advisory quantified the economic benefit to Ontario from cancelling the Project. Its report compared the cost of electricity that the OPA would have procured from the Project to the cost of electricity procured from other sources by the OPA to determine the economic benefit Ontario realized as a direct consequence of having cancelled the Project. This was necessary evidence to illustrate that the moratorium was motivated by costs concerns.

26. ***Professor Rudolph Dolzer***. Professor Dolzer provided an expert opinion that the fair and equitable treatment standard is part of the minimum standard of treatment under customary international law, and thus forms part of the protections afforded to investors under Article 1105 of NAFTA.

27. In addition to the costs associated with these expert reports, Windstream incurred costs for other third-party service providers, for witness travel costs and for other disbursements (such as the cost of document production and paper copying), which are described in the Appendix. If it is successful, Windstream requests that the Tribunal order Canada to pay for these costs as well.

III. WINDSTREAM INCURRED ADDITIONAL COSTS AS A RESULT OF CANADA'S CONDUCT

28. Canada took a number of steps in this proceeding that substantially increased the costs incurred by Windstream. This further supports the reasonableness of the quantum of costs that Windstream incurred. These include (a) Canada's production of relevant documents 30 days before

Windstream's then-deadline to submit its Reply Memorial; (b) Canada's meritless request that the Tribunal strike out portions of Windstream's Memorial and strike documents from the record on the basis of the doctrine of parliamentary privilege; and (c) the fact that Canada's experts made a number of incorrect and unsubstantiated assertions in their rejoinder expert reports, which required substantial additional work by Windstream's experts in preparing for the hearing.

1. Canada Produced Relevant Documents One Year Late, and Only 30 Days Before Windstream's Deadline to File its Reply Memorial

29. Throughout this proceeding, and as described above, Canada failed to provide documents that were responsive to a number of Windstream's document requests in a timely manner (and in some cases, not at all since many of these documents were obtained through freedom of information requests), causing delays and substantially increasing Windstream's legal fees and expenses.

30. Pursuant to Procedural Order No. 1, Canada and Windstream exchanged document requests on October 16, 2013, and produced documents responsive to those requests on April 14, 2014. Canada failed to produce hundreds of responsive documents, many of which were highly relevant. In fact, aside from documents that were first provided to Windstream through freedom of information requests, Canada initially produced no documents from the Premier's Office from the period leading up to the February 11, 2011 moratorium or from the period immediately following the imposition of the moratorium.

31. Instead, Windstream had to rely on requests for documents under Ontario's freedom of information legislation in order to obtain responsive documents not produced by Canada. This took significant time and effort by Windstream's legal counsel because of the need to (i) submit and pursue the requests, and (ii) review the thousands of documents that were received through this process. The documents Windstream obtained through this process were numerous and were extensively relied upon in these proceedings. As set out in its Reply Memorial, after filing its Memorial, Windstream received approximately 2,000 documents through freedom of information from the Ministry of the Environment, the Ministry of Energy, and the Ministry of Natural Resources that had not previously been produced.

32. In addition, on May 8, 2015, just one month before Windstream's then deadline to file its Reply Memorial, Canada produced 727 additional documents to Windstream. It did so only after those documents had been produced to Windstream through the freedom of information process. Of those, nearly 500 were responsive to Windstream's document requests that were due in April 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."[14] Its failure to provide any explanation is notable in light of the inaccurate statement in its Counter-Memorial that "there are simply no more documents for Canada to produce" from the Premier's Office and that "Canada has met its document production obligations."[15]

33. Many of these documents are centrally relevant to this case (and responsive to Windstream's document requests). For example, Windstream requested "[a]ll documents in the possession, power or control of the Premier's Office related to the consideration and implementation of the moratorium on the development of offshore wind projects, announced on February 11, 2011, including documents of Dalton McGuinty, Jameson Steeve, Dave Gene, Sean Mullin and Chris Morley." However, Canada did not produce to Windstream until May 8, 2015 an email from the former Premier's Chief of Staff directing the creation of a policy that would "kill all the projects" except Windstream's Project.[16] 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.

34. As a result of this delayed production of documents, Windstream had to obtain an extension to file its Reply Memorial. Furthermore, instead of being able to rely on its Memorial and use the Reply Memorial to more narrowly focus on the issues raised in Canada's Counter-Memorial, Windstream had to redraft its Reply Memorial to re-tell its affirmative case in a manner that

[14] Winstream's Reply Memorial, ¶ 48; **C-1186**, Email from Neufeld, Rodney (Foreign Affairs, Trade, and Development Canada) to Seers, Myriam (Torys) (June 5, 2015).

[15] Winstream's Reply Memorial, ¶ 50; Canada's Counter-Memorial, ¶ 574.

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

included the new documents produced after the Memorial was filed. This required Windstream's legal counsel to spend significantly more time and resources than would have otherwise been used in drafting the Reply Memorial.

2. Canada Brought a Meritless Request to Strike Out Material on the Basis of Parliamentary Privilege

35. After submitting its Counter-Memorial in January 2015, Canada brought an unsuccessful motion to strike evidence relied on by Windstream in its Memorial from the record on the grounds that it was protected by parliamentary privilege. This evidence consisted of testimony given by numerous witnesses before an Ontario legislative committee regarding the cancellation of two gas-fired power plants in Ontario, and the subsequent deletion by the Ontario government of relevant documents concerning these cancellations.

36. Windstream was completely successful in resisting this motion. In its Procedural Order No. 4, the Tribunal found that Canada failed to show that under Canadian law, parliamentary privilege prohibits the use of testimony given before a parliamentary committee in circumstances where the purpose of the proceedings is not to establish the civil or criminal liability of the person who gave the testimony, or where the credibility of the witness will not and cannot be impugned on cross-examination because none of the individuals in question has been produced as a witness.

37. Windstream's legal costs were further increased as a result of having to respond to this meritless motion, and to draft submissions regarding the motion at the same time as it was preparing the Reply Memorial and related evidence.

3. Canada's Expert Rejoinder Reports Contained Several Inaccurate and Unsubstantiated Assertions

38. Windstream also incurred substantial costs in addressing inaccuracies and unsubstantiated assertions in Canada's rejoinder expert reports. As a result, Windstream incurred higher legal costs and expert witness costs in preparation for the hearing than it otherwise would have incurred.

39. Examples of inaccurate and unsubstantiated assertions in Canada's rejoinder expert reports include:

(a) In its rejoinder report, BRG purported to conduct a full forensic audit of Windstream's expenses, which, as Mr. Low testified, is highly unusual.[17] To respond to this audit, Messrs. Low and Taylor verified all of the sunk costs incurred by Windstream for the Project[18] and found numerous errors in BRG's audit.[19]

(b) In its second report, URS stated that a REA would be required for the proposed onshore foundation fabrication facility for the Project, and that construction of this facility could not begin until Windstream obtained a REA.[20] This is false, and URS' representative Marc Rose admitted this in his expert presentation.[21] Ms. Dumais of MOE also admitted that the manufacturing facility would not require a REA.[22] However, before Mr. Rose corrected this error, Windstream and its experts, specifically WSP and Sarah Powell, were required to spend significant time identifying and correcting this error. This error would have been avoided had URS simply consulted with MOE before finalizing its report.

(c) In its second report, URS asserted that Windstream could obtain its Notice to Proceed from the OPA only after the Project reached financial close.[23] This was also false, as Windstream's expert Sarah Powell explained in her presentation.[24] Mr. Barillaro of URS admitted on cross-examination that the assertion was based on his own reading of the FIT Contract, with which he has no experience.[25] This error would have been avoided had URS simply consulted with the OPA before

[17] Transcript (Confidential Version), February 23, 2016, p. 39, lines 7-11, pp. 222-223.

[18] Summary Presentation of Deloitte Expert Reports, Robert Low and Richard Taylor, February 23, 2016, slide 26.

[19] *Ibid*. A small number of these errors were also drawn out during Mr. Goncalves' cross-examination: Transcript (Full Version), February 24, 2016, pp. 382-390. Furthermore, in conducting its "full forensic audit", BRG never requested any "missing" invoices or records despite the fact that Deloitte had indicated that they had only originally tested a sampling of invoices.

[20] RER-URS-2, ¶¶ 221-225.

[21] Transcript (Confidential Version), February 19, 2016, pp. 257-258.

[22] Transcript (Confidential Version), February 18, 2016, pp. 374-375.

[23] RER-URS-2, ¶ 216.

[24] Transcript (Confidential Version), February 18, 2016, p. 17, lines 13-21.

[25] Transcript (Full Version), February 24, 2016, pp. 50-52, 56, lines 13-19.

finalizing its report. Once again, significant time, effort and expense was required to identify and correct the errors of Canada's expert.

(d) In its second report, URS asserted that "the Greak Lakes environment is known to create conditions not often found at sea with a frequency and build-up of wave peaks often resulting in confusing seas with rogue waves frequently recorded."[26] Mr. Kolberg of Baird addressed this claim in his presentation to the Tribunal, and noted that "there is no evidence to support a URS claim that there is this issue of somehow rogue waves or confusing seas that are somehow special to the Great Lakes. This is – I have no other way of putting it. This is false, There is no evidence to support that whatsoever."[27] When cross-examined on what evidence URS had relied on to support such a claim, Mr. Clarke responded, "I accept that the reference behind that was, it came from Mr. Sturgeon. If you actually consulted with a friend of his and I accept that that's only – its probably not admissible evidence, but a friend of his who is a captain on the Great Lakes."[28] Again, URS' unsupported allegation caused Baird and Windstream's counsel to incur additional costs that would have been avoided had URS' evidence been more carefully presented.

40. These represent only a small sample of the numerous examples where Windstream and its experts had to spend significant amount of time preparing to correct the errors in the rejoinder reports of Canada's experts. This contributed to the increased cost of preparing for this arbitration by Windstream's counsel and by the expert witnesses who testified at the hearing in support of Windstream's case.

41. Furthermore, despite the requirement in s. 11.1 of Procedural Order No. 1 that "[e]xpert reports shall be accompanied by any documents or information upon which they rely", both BRG and Green Giraffe failed to provide documents and information relied upon in their reports. Windstream made specific requests for these underlying documents on December 9, 2015 and January 11, 2016. On January 6, 2016 and January 26, 2016, respectively, Canada rejected both

[26] RER-URS-2, ¶ 393.

[27] Transcript (Full Version), February 19, 2016, p. 177, lines 1-6.

[28] Transcript (Confidential Version), February 21, 2016, p. 298, lines 12-23.

requests.[29] As set out in its letter to the Tribunal on February 2, 2016, these documents were essential to Windstream's ability to meaningfully respond to the evidence of BRG and Green Giraffe – who was a new expert and so Windstream had no previous opportunity to test its evidence.

42. Despite its outright refusal to provide the documnents requested, Canada did provide the documents relied upon by Mr. Cecchini in his letters to BRG after the hearing had already begun, and the day before Mr. Cecchini testified.[30] This caused disruption in the hearing by requiring that Mr. Cecchini be called to testify twice, and wasted costs by requiring that counsel analyze the newly produced information with its experts in the middle of the hearing. Canada failed to provide any reasonable explanation for why that information was not produced together with Canada's Rejoinder Memorial, or in any event before the hearing as requested by Windstream.

43. Therefore, the failure of Canada to provide this required information also increased Windstream's legal costs in this arbitration. Windstream's counsel had to conduct research to attempt to locate any publically available information, correspond with Canada on multiple occasions in an attempt to resolve this issue, and ultimately had to bring a successful motion to the Tribunal to take into account, when assessing the weight to be given to the expert evidence, the fact that some of the underlying evidence and information had not been made available.

IV. PRINCIPLES APPLICABLE TO THE ALLOCATION OF COSTS

44. If Windstream is wholly successful, the Tribunal should order Canada to pay Windstream's costs of arbitration in full, in accordance with the principle that costs follow the event. If Windstream is partially successful, the Tribunal should order Canada to pay an appropriate portion of Windstream's costs. However, if Windstream is not successful, Windstream requests that the Tribunal bear in mind the several decisions in which NAFTA tribunals have declined to order an unsuccessful claimant to pay the respondent's costs, particularly where, as here, the claimant brought this arbitration in good faith and had no other meaningful way of obtaining compensation.

[29] At the hearing, Canada raised issue with Windstream's arguments on this point by suggesting that Windstream's experts also did not produce all of their underlying documentation. Despite this claim, Canada did not request any documents.

[30] Transcript (Full Version), February 17, 2016, pp. 153-154.

45. Article 1135(1) of the NAFTA provides that "[a] tribunal may also award costs in accordance with the applicable arbitration rules." Articles 40 to 42 of the UNCITRAL Arbitration Rules allow a tribunal to award costs to indemnify a successful party for its arbitration costs and for reasonable legal and other costs incurred in connection with the arbitration.

46. Article 40 of the UNCITRAL Arbitration Rules provides:

> 1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.
>
> 2. The term "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
>
> (b) The reasonable travel and other expenses incurred by the arbitrators;
>
> (c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) <u>The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable</u>;
>
> (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

47. Article 42 specifies that a tribunal should award the successful party its legal costs and the costs of the arbitration, and creates a rebutable presumption that the unsuccessful party will bear these costs:

> 1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment in reasonable, taking into account the circumstances of the case.
>
> 2. The arbitral tribunal shall in the final award, or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

48. This presumption in favour of awarding the successful party its costs of the arbitration and legal costs is consistent with the increasingly common practice in investment arbitration – endorsed by Canada – that costs should "follow the event."[31] This is consistent with the more general damages principles set out in the *Chorzów Factory* case that the injured party be restored to the position it would have been in but for the breach.[32] As the tribunal in *S.D. Myers* explained:

> The logical basis for this policy appears to be that the "successful" claimant has in effect been forced to go through the process in order to achieve success, and should not be penalized by having to pay for the process itself.[33]

49. The tribunal in *ADC v. Hungary* similarly found:

> [N]o reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. This was a complex, difficult, important and lengthy arbitration which clearly justified experienced and expert legal representation as well as the engagement of the top experts on quantum. […]. Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole.[34]

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[31] The Government of Canada has endorsed this principle in its submissions in other NAFTA cases: **CL-149**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Government of Canada Submission on Costs, 25 February 2010, ¶¶ 9, 13.

[32] **CL-150**, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia* (ICSID Case No. ARB/05/24) Award, 17 December 2015, ¶ 599. See also **CL-151**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Final Award, 30 December 2002 ("***S.D. Myers***"), ¶ 49; **CL-021**, *ADC*, ¶ 533; **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 ("***Waguih***"), ¶ 621; **CL-083**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award on the Merits, 20 May 1992, ¶ 207; **CL-121**, *Gold Reserve*, ¶ 860.

[33] **CL-151**, *S.D. Myers*, ¶ 15.

[34] **CL-021**, *ADC*, ¶ 533 (emphasis added).

50. The tribunal in *Azinian v. Mexico* articulated the rationale for this practice, which "serves the dual function of reparation and dissuasion."[35]

51. Even in cases where the claimant was not wholly successful, tribunals have awarded legal and arbitration costs because the actions of the respondent forced the claimaint to initiate the arbitration. For instance, in *PSEG*, the claimant did not prevail in major portions of its monetary claims. However, the tribunal found that in order "[t]o obtain justice, they had no option but to bring this arbitration forward and to incur related costs," and it therefore ordered the respondent to bear 65% of the costs associated with the arbitration, including legal costs and fees. The tribunal awarded the claimant over US$13.5 million in costs.[36]

52. Thus, if Windstream is wholly successful, the Tribunal should order Canada to pay the costs of arbitration incurred by Windstream, including Windstream's legal and other costs incurred in connection with the arbitration, as well as Windstream's share of the costs of the Tribunal and the PCA. If Windstream is partially successful, the Tribunal should order Canada to pay an appropriate portion of Windstream's costs.

53. However, if Windstream is unsuccessful, in determining the appropriate disposition as to costs, the Tribunal should bear in mind the substantial number of NAFTA decisions in which an unsuccessful claimant was not ordered to pay a successful respondent's costs.[37] For example, the *Mondev* tribunal declined to order the unsuccessful claimant to pay the respondent's costs, in part

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[35] **RL-007**, *Robert Azinian, Kenneth Davitian & Ellen Bacan v. The United Mexican States* (ICSID No. ARB(AF)/97/2) Award, 1 November 1999, ¶ 125.

[36] **CL-076**, *PSEG*, ¶ 352.

[37] **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 159; C**L-053**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 833; **CL-022**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003, ¶ 200; **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, ¶ 240; **CL-088**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 188; **CL-061**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case) Award, 31 March 2010, ¶¶ 270-271; **RL-025**, *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award, 17 July 2006, ¶ 221; **CL-051**, *Gami Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 135; **CL-089**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Arbitral Award, 2 June 2000, p. 239.

because although it had failed to establish NAFTA breaches, the evidence demonstrated that the claimant had been treated unfairly.

54. Here, whether or not the Tribunal determines that Canada breached its NAFTA obligations, there was clear evidence that Windstream was treated unfairly both in the application of the moratorium to the Project and in the failure to "freeze" the FIT Contract and the Project as promised. The Tribunal will recall that, in response to questions from the Tribunal, Mr. Roeper, Ms. Powell, former Ministry of Energy and Infrastructure George Smitherman and Chris Benedetti stated that, in their view and based on their experience with Ontario electricity projects, Windstream had been treated unfairly. As put by Mr. Roeper, "So do I feel it was – Windstream was treated fairly? No I think the moratorium is one of the most unusual tools I've seen in my practice over the years. [...] And I was really surprised by the moratorium, and I don't think it was a fair thing to do for Windstream or for the offshore industry as a whole."[38] Similarly, Ms. Powell testified: "So, in that way, is that unfair to not have a transparent and science-based rationale? To me, it is."[39]

DATED: April 11, 2016

Respectfully submitted on behalf of Windstream Energy LLC,

Torys LLP

Counsel for the Claimant, Windstream Energy LLC

[38] Transcript (Full Version), February 17, 2016, p. 122, lines 24-25, p. 124, lines 1-7.

[39] Transcript (Confidential Version), February 18, 2016, pp. 127-129. See also Transcript (Public & Confidential Version), February 16, 2016, pp. 112-113 (Mr. Benedetti, in response to questions from Dr. Cremades, testified that he believes that Windstream may have been "discriminated" against in part because of political reasons); Transcript (Public & Confidential Version), February 16, 2016, p. 392, lines 7-16 (Mr. Smitherman, in response to questions from Dr. Cremades, testified that he is "sympathetic to the view that there was an opportunity to appropriately implement this project and Ontario did not, to my measure, fully – fully comply with the expectations that were placed upon it").

ANNEX I – COST OF LEGAL REPRESENTATION

Lawyers' Fees		
Description	**Hours**	**Fees**
PHASE 1 - Initial Pleadings, Preliminary Preparation and Procedural Hearing (August 2012 to February 11, 2014): reviewing documents related to NAFTA claim; conducting legal research and reviewing case law; drafting Notice of Intent and Notice of Arbitration; filing and serving of both; considering potential arbitrators; correspondence and meetings with clients; preparing for and participating in the procedural hearing; interviewing witnesses; assisting in the preparation of witness statements; document collection and review.		
John Terry	319.2	$257,197.93
Myriam Seers	24.8	$12,518.80
James Gotowiec	132.0	$48,609.60
Ishat Reza	458.3	$140,239.80
Law Clerks	79.9	$23,430.82
Students	412.6	$71,291.20
Library Staff	2.0	$555.90
PHASE 1 FEES TOTAL		**$553,844.05**

Lawyers' Fees		
Description	**Hours**	**Fees**
PHASE 2 - First Written Submissions (February 12, 2014 to August 20, 2014): conducting legal research and reviewing case law; assisting in the preparation of witness statements; preparing the Memorial; document production and review; reviewing expert reports; discussions and correspondence with legal team and clients.		
John Terry	188.4	$133,836.12
Myriam Seers	628.5	$295,975.58
James Gotowiec	289.1	$99,528.65
Stefanie Lafrance	306.2	$92,728.99
Nick Kennedy	446.0	$104,206.35
Lawyers outside Core Team (specialized services including advice on environmental and energy law issues)	5.1	$2,354.54
Law Clerks	521.1	$129,013.05
Students	337.2	$56,349.62
Library Staff	39.2	$4,811.44
PHASE 2 FEES TOTAL		**$918,804.34**

Lawyers' Fees		
Description	**Hours**	**Fees**
PHASE 3 – Document Production and Second Written Submissions (August 21, 2014 to July 7, 2015): revising and finalizing document requests; reviewing Canada's productions; conducting legal research; correspondence with Canada's counsel regarding productions; document review; preparing and assembling all required hard and electronic copies of materials for production; drafting and revising letters to tribunal regarding productions; conducting legal research and reviewing case law; drafting and reviewing Reply Memorial; reviewing expert reports; assisting in the preparation of witness statements; discussions and correspondence with legal team and clients.		
John Terry	144.1	$109,973.94
Myriam Seers	775.4	$410,977.28
James Gotowiec	5.4	$2,063.49
Stefanie Lafrance	11.4	$3,470.21
Ryan Lax	66.1	$21,565.22
Nick Kennedy	848.5	$230,738.04
Emily Sherkey	123.7	$27,368.68
Lawyers outside Core Team	9.0	$6,271.52
Law Clerks	174.2	$46,888.84
Library Staff	12.7	$1,945.77
Litigation Support Staff	46.0	$5,047.50
PHASE 3 FEES TOTAL		**$866,310.49**

Lawyers' Fees		
Description	**Hours**	**Fees**
PHASE 4 - Preparation for and Attending Hearing – Arbitration Hearing (July 8, 2015 to February 26, 2016): preparing witnesses for hearing; preparing cross-examination materials; preparing opening and closing arguments for hearing; reviewing expert witness materials; discussions with Canada's counsel regarding procedural issues; meeting with witnesses and reviewing documents; reviewing and revising submissions; all other necessary preparation; attendance at hearing.		
John Terry	378.5	$289,552.50
Myriam Seers	573.6	$316,425.93
Ryan Lax	15.6	$5,048.18
Nick Kennedy	641.3	$200,587.94
Emily Sherkey	472.9	$127,624.51
Lawyers outside Core Team	16.1	$10,102.77
Law Clerks	49.1	$7,549.16
Students	2.4	$531.01
PHASE 4 FEES TOTAL		**$957,422.00**

Lawyers' Fees		
Description	**Hours**	**Fees**
PHASE 5 - Submissions on Costs (February 27, 2016 to April 7, 2016): drafting cost submissions; preparing appendix of costs outline; discussions with legal team, clients and Canada's counsel regarding costs submissions.		
John Terry	4.1	$3,136.50
Myriam Seers	18.4	$10,212.00
Nick Kennedy	3.6	$1,174.50
Emily Sherkey	20.0	$5,400.00
Law Clerk	44.3	$6,811.13
PHASE 5 FEES TOTAL		**$26,734.13**

BREAKDOWN OF TORYS' FEES	
Description	**Fees**
Phase 1 – Initial Pleadings, Preliminary Preparation and Procedural Hearing	$553,844.05
Phase 2 – First Written Submissions	$918,804.34
Phase 3 – Document Production and Second Written Submissions	$866,310.49
Phase 4 – Preparation for Arbitration Hearing	$957,422.00
FEES TOTAL (BEFORE COST SUBMISSIONS)	**$3,296,380.88**
Phase 5 – Submissions on Costs	$26,734.13
FEES TOTAL	**$3,323,115.01**

DISBURSEMENTS	
Torys' Disbursements	
Agents Fees	$30,069.75
Copies	$21,466.70
Copies, printing and preparation of court materials	$1,613.25
Courier	$5,825.41
Laser Printing	$9,761.22
Library Costs	$4,195.70
Loading, processing, standard coding and data management	$150,612.33
Meals	$2,538.45
Miscellaneous	$3,858.82
Online Research Charges	$2,863.43
Taxi & Travel	$205.89
Telephone Calls	$26.61
TORYS' DISBURSEMENTS TOTAL	**$233,037.56**

Costs of Witnesses & Third Parties[1]		
Party	**Description**	**Disbursements**
4C Offshore Ltd.	CER-4C Offshore-2 report and Mr. Aukland's preparation and attendance at the hearing	$30,247.84
905085 Ontario Inc.	Mr. Baines' attendance at the hearing and travel expenses	$2,683.08
Aercoustics Engineering Ltd.	CER-Aercoustics report	$56,984.64
Baker & McKenzie LLP (US)	Legal opinion before issuance of the notice of arbitration	$32,781.23
Bennett Jones LLP	Consulting services regarding written submissions and hearing preparation	$23,890.75
Bentham & Associates	Access to information requests	$3,150.00
Break and Enter Advertising + Design	Graphics and design services in preparation for the hearing	$6,760.00
Compass Renewable Energy Consulting Inc.	CER-Compass report	$1,500.00
COWI North America Inc.	COWI's contribution to the CER-Sgurr-2 report, and Mr. Cooper's preparation and attendance at the hearing	$54,880.15
Curry & Kerlinger, LLC	CER-Kerlinger report	$1,842.42
Davies Ward Phillips & Vineberg LLP	CER-Powell and CER-Powell-2 reports, Ms. Powell's attendance at the hearing, assistance with preparation of cross-examination of Canada's witnesses	$275,707.19
Deloitte LLP	CER-Taylor and Low, CER-Taylor and Low-2, CER-Bucci and CER-Bucci-2 reports, Mr.	$1,169,052.50

[1] This table illustrates the costs Windstream incurred that were not included in Deloitte's sunk costs valuation. The invoices for the costs have not been submitted, but are available if requested.

Costs of Witnesses & Third Parties[1]		
Party	**Description**	**Disbursements**
	Low and Mr. Bucci's preparation and attendance at the hearing	
Howe Gastmeier Chapnik Ltd.	CER-HGC-2 report	$2,674.34
Ortech Power	CWS-Roeper-2 statement, CER-Ortech report, consulting services, and Mr. Roeper's preparation and attendance at the hearing	$179,115.24
Professor Dr. Rudolph Dolzer	CER-Dolzer report	$37,317.24
SgurrEnergy Ltd.	CER-Sgurr-2 report and Mr. Irvine's preparation and attendance at the hearing	$141,102.74
W. F. Baird & Associates Ltd.	CER-Baird-2 report and Mr. Kolberg's preparation and attendance at the hearing	$160,532.11
Weeks Marine, Inc.	Weeks' contribution to the CER-Sgurr-2 report, and Mr. Palmer's preparation and attendance at the hearing	$32,815.30
White Owl Capital	Mr. Mars' and Mr. Ziegler's attendance at the hearing and travel expenses	$17,134.75
WSP Canada Inc.	CER-WSP and Mr. Roberts preparation and attendance at the hearing	$38,540.75
COSTS TOTAL		**$2,268,712.27**

ANNEX II – ARBITRATION COSTS

Description	**Costs**
Permanent Court of Arbitration	$650,000.00
COSTS TOTAL	**$650,000.00**