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11/05/13

AMENDED NOTICE OF ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AND THE NORTH AMERICAN FREE TRADE AGREEMENT

WINDSTREAM ENERGY LLC

Claimant

v.

GOVERNMENT OF CANADA

Respondent

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
Canada M5K 1N2
Fax: 416.865.7380

Counsel for Windstream Energy LLC

January 28, 2013

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11/05/13

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

1. Pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules") and Articles 1116, 1117 and 1120 of the North American Free Trade Agreement (the "NAFTA"), the Claimant, Windstream Energy LLC ("Claimant" or "Windstream"), on its own behalf and on behalf of its enterprise Windstream Wolfe Island Shoals Inc. ("WWIS"), hereby demands and commences arbitration against the Respondent, the Government of Canada.

2. Pursuant to Article 1119 of the NAFTA, the Claimant delivered a Notice of Intent to Submit a Claim to Arbitration to Canada on October 17, 2012, more than 90 days prior to the submission of this claim.

3. Pursuant to Article 1121 of the NAFTA, the Claimant and WWIS consent to arbitration in accordance with the procedures set out in the NAFTA and waive their rights to initiate or continue before any administrative tribunal or any court, or any other dispute settlement procedures, any proceedings with respect to the measures outlined herein, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages, before an administrative tribunal or court under the laws of Canada. The executed consent and waiver of the Claimant and WWIS are attached to this Notice of Arbitration as Annex A.

B. NAMES AND ADDRESSES OF THE PARTIES

4. The Claimant is:

Windstream Energy LLC
338 Harris Hill Road, Suite 102
Williamsville, New York, USA 14221

5. The Respondent is the Government of Canada. Pursuant to Article 1137(2) and Annex 1137.2 of the NAFTA, delivery of notices and documents to the Government of Canada should be made to the following address:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario, Canada K1A 0H8

C. ARBITRATION CLAUSE OR SEPARATE ARBITRATION AGREEMENT INVOKED

6. The Claimant invokes Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1117, 1120 and 1122 of the NAFTA, as authority for this arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions concerning the settlement of disputes between a Party and an investor of another Party.

D. CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

7. The dispute is in relation to the Claimant's investment in Canada and the damages that have arisen out of Canada's breach of its obligations under Section A of Chapter 11 of the NAFTA.

E. BRIEF DESCRIPTION OF FACTS GIVING RISE TO THE CLAIM

Claimant Windstream and Its Enterprise WWIS

8. Windstream is a limited liability company organized under the laws of Delaware, USA.

9. Windstream is owned by a New York-based investment group with over 35 years of substantive experience in the energy and technology sectors. Its investors together have founded and later sold firms with an aggregate value of more than CDN $11 billion, and currently have over CDN $300 million invested in controlling stakes in a range of energy and technology companies worldwide.

10. The activities of Windstream and its investments in Ontario are led by Ian Baines, an Ontario-based engineer who has worked for more than two decades as a renewable energy developer, developing district heating, cogeneration, hydro and wind energy projects.

11. Windstream owns 100 per cent of the shares of WWIS, a corporation incorporated under the laws of Ontario.[1]

[1] Windstream owns 85 per cent of the shares of WWIS directly and the remaining 15 per cent of the shares of WWIS indirectly, through its 100 per cent ownership of OCP Option Inc., which in turn owns 15 per cent of the shares of WWIS.

Ontario Adopts FIT Program to Attract Investment in Renewable Energy

12. Beginning in the mid-2000s, the Government of Ontario began adopting policies to encourage investment in renewable energy sources to increase Ontario's energy production capacity and replace fossil fuel-based, non-renewable energy sources. In 2009, the Ontario Legislature enacted the *Green Energy Act, 2009* and amended related legislation. The Government of Ontario promulgated additional regulations and rules, creating a Feed-in-Tariff Program (the "FIT Program") that established a 20-year fixed premium price to be paid by the Ontario Power Authority (the "OPA"), a non-profit corporation controlled by the Government of Ontario, for energy from renewable sources, including onshore and offshore wind, hydroelectric, solar, biogas, biomass and landfill gas. The FIT Program created standard sets of bidding rules, standard pricing, and standard FIT contracts that applied to renewable energy applicants.

13. Government of Ontario representatives stated repeatedly that a primary purpose of the *Green Energy Act* was to create certainty for investors to invest in renewable power in Ontario and thereby create jobs -- more than 50,000 new jobs between 2009 and 2012. Ontario's Minister of Energy and Infrastructure George Smitherman, speaking on February 20, 2009 to the Toronto Board of Trade, stated that the *Green Energy Act*,

> … will make the province the destination of choice for green power developers, and incent proponents large and small to develop projects by offering an attractive price for renewable energy AND the certainty that creates an attractive investment climate.
>
> Certainty that we will purchase the power at a fair price.
>
> Certainty that we will get the power connected to the grid.
>
> Certainty that government will issue permits in a timely way.

14. In its February 23, 2009 press release announcing the *Green Energy Act*, Ontario's Ministry of Energy and Infrastructure described the "most notable" elements of the *Green Energy Act* as including:

> 1. Creating a new attractive feed-in tariff regime – a pricing system for renewable energy – that will guarantee rates and help

spark new investment in renewable energy generation, increase investor confidence and access to financing

2. Establishing the "right to connect" to the electricity grid for renewable projects

3. Establishing a streamlined approvals process, including providing service guarantees for renewable energy projects and a Renewable Energy Facilitator.

Windstream's Wolfe Island Shoals Project is Awarded a FIT Contract

15. Since the mid-2000s, Windstream had been assessing wind resources in Ontario, in particular in the shallow water shoals located near Wolfe Island in eastern Lake Ontario. Ian Baines who, as described in paragraph 10 above, leads the activities of Windstream and its investments in Ontario, had been central to developing a successful onshore wind project on Wolfe Island, and knew that the area had outstanding potential as a site for an offshore wind project.

16. Between 2006 to 2008, the Ministry of Natural Resources ("MNR"), which, among other things, exercises regulatory authority on behalf of the Government of Ontario for granting access to Crown land for offshore wind development, had deferred approving applications for access to Crown land to develop offshore wind projects to allow further scientific study of the effects of offshore wind projects. In January 2008, the Natural Resources Minister announced that the MNR was lifting the deferral and would be accepting new applications for access to Crown land to develop offshore wind projects. Both the Natural Resources Minister and the Minister of Energy and Infrastructure stated that the government was committed to developing clean, renewable sources of energy, including from offshore wind projects. In June 2008, Natural Resources Minister Donna Cansfield stated that Ontario was "open for business" for offshore wind development.

17. In February 2008, on the basis of the actions and representations on the part of the Government of Ontario, Windstream's subsidiary WWIS submitted to the MNR Crown land applications to develop an offshore wind facility (the "WWIS Project") in the Wolfe Island Shoals area. Beginning in 2008, WWIS spent heavily on resource evaluation, engineering and technical reviews with respect to the WWIS Project. When the FIT

Program was announced in 2009, WWIS focused its efforts on ensuring it would meet the FIT Contract requirements.

18. In a letter to WWIS dated September 24, 2009, the MNR made it clear that in order for WWIS to maintain the priority position of its Crown land applications, WWIS had to submit an application to the FIT program within the initial FIT application period. In a subsequent letter to WWIS dated November 24, 2009, MNR stated that Crown land applicants, such as WWIS, who applied to the FIT Program and were awarded a FIT Contract

> … will be given the highest priority to the Crown land sites applied for. This means that these applications will take precedence over all others for this site, and will receive priority attention from MNR.

MNR's representations were confirmed by OPA's statements, in the FIT Rules published at that time, that an applicant for a FIT Contract would be deemed to have access rights to the project site required for a FIT Contract so long as the applicant had submitted a Crown land application to the MNR.

19. On the basis of these assurances, on November 27, 2009, WWIS applied for a FIT Contract, depositing with its application a CDN $3 million letter of credit, in accordance with the FIT Program rules. On April 8, 2010, WWIS was informed that its application had been accepted by the OPA and it was offered a FIT Contract dated May 4, 2010. At 300 MW, the WWIS Project was the largest single FIT Contract and accounted for 19.6 per cent of the wind power contracted by the OPA during that first round of FIT Contract awards.

20. On August 20, 2010, after obtaining the additional assurances from the MNR described in paragraph 26 below, WWIS executed the FIT Contract, with a five-year period, commencing May 4, 2010, for the WWIS Project's development and construction to be completed. As required by the FIT rules, WWIS delivered to the OPA a letter of credit in the amount of CDN $6 million, in place of the previous CDN $3 million letter of credit.

21. At that time, Windstream and WWIS looked forward to developing a highly beneficial and profitable energy project. Windstream had conducted wind assessments that showed the wind speeds in the Wolfe Island Shoals area were higher and steadier than those in the areas of any of the onshore wind projects in Ontario, a fact that would likely result in the WWIS Project having a higher energy-generating capacity than any other FIT project. Windstream and WWIS expected that, during the 20-year FIT Contract period, the WWIS Project would generate approximately CDN $5.1 billion in revenue. It also anticipated that the WWIS Project would involve an investment of approximately CDN $1.5 billion, including CDN $850 million for Ontario goods and services (because of the FIT Program's 50 per cent Ontario content requirements), and create approximately 1900 jobs during project development and construction, and 175 permanent jobs.

Ontario Imposes a Moratorium on Offshore Wind Energy Development, Frustrating Windstream's and WWIS' Ability to Obtain the Benefits of WWIS' FIT Contract

22. As described above, when WWIS applied for its FIT Contract for the WWIS Project, the Government of Ontario, through the MNR, had represented that Crown land applicants with a FIT Contract would be given the "highest priority" to the Crown land sites for which they applied. However, far from granting WWIS "highest priority", the Government of Ontario has done the opposite – first delaying the approval process, and then imposing a moratorium that has frustrated WWIS from being able to take any steps to develop the WWIS Project in accordance with the FIT Contract granted to it by the OPA.

23. When the Government of Ontario implemented the FIT Program in September 2009, it published two main documents that it described as setting out the "streamlined" approval process that would apply to renewable energy projects, including both onshore and offshore wind facilities.

    (a) First, the Government of Ontario promulgated a Renewable Energy Approvals Regulation ("REA Regulation"), made under Ontario's *Environmental Protection Act*, which established the environmental approval requirements for wind, solar, thermal and anaerobic digestion energy facilities. The REA Regulation sets out

specific requirements for all types of wind facilities, including offshore wind projects, which it defines as Class 5 wind facilities and for which it requires the submission of an additional offshore wind facility report.

(b) Second, the MNR published its Approval and Permitting Requirements Document ("APRD") for Renewable Energy Projects, which describes the requirements and approval process for matters that fall under the responsibility of the MNR. Like the REA Regulation, the APRD refers to offshore wind facilities, and outlines the specific requirements that apply to offshore wind facilities on Crown land, which include the offshore wind facility report required by the REA regulation, a coastal engineering study, and certain specified additional information.

24. These documents clearly established:

(a) the regulatory requirements and approvals that applied to all renewable projects;

(b) the regulatory requirements that applied to only wind projects; and

(c) the regulatory requirements – such as the production of an offshore wind facility report and a coastal engineering study – that were specific to offshore wind projects.

They set out a reasonable and transparent regulatory framework for WWIS to follow once it had obtained its FIT Contract and proceeded to develop the WWIS Project.

25. In June 2010, the Ministry of the Environment posted for public comment a new policy proposal respecting offshore wind projects, accompanied by a Discussion Paper on Offshore Wind Facilities Renewable Energy Approval Requirements. The Discussion Paper proposed that all offshore wind facilities be located at least five kilometres from shore. It also provided a description of the regulatory framework described in the REA Regulation and the APRD, providing more detail with respect to certain aspects of this framework and noting that future guidance documents would be developed. The June 2010 policy proposal noted that MNR was undertaking a phased review of Ontario's current process for making Crown land available for renewable energy projects, and that

the second phase of this review would include consideration of where, when and how the Government of Ontario makes land available for offshore wind projects. A further policy proposal related to that review was posted by MNR in August 2010.

26. Windstream and WWIS were concerned about what was intended with respect to these policy proposals. However, Windstream's technical studies confirmed that the WWIS Project could be successfully developed in the areas described in Windstream's Crown land applications that fell outside the five kilometre exclusion zone. Windstream and WWIS were further encouraged when they approached the MNR with a proposal to re-configure the areas described in Windstream's Crown land applications so the WWIS Project could be developed as efficiently as possible with a five kilometre setback and was advised by MNR that it was prepared to discuss this proposal. In his August 9, 2010 letter confirming this, a senior MNR official stated:

> Once the re-configuration of applications has been finalized the amended applications can begin to move through the normal Crown land application process, including holding a site information meeting with MNR to discuss known or potential constraints in the project area, public and aboriginal notification, and confirmation of requirements for offshore windpower in the renewable energy approval process.
>
> I appreciate your need for certainty on this file, and we will move as quickly as possible through the remainder of the application review process in order that you may obtain Applicant of Record status in a timely manner. [emphasis added]

27. On the basis of these representations, WWIS proceeded to execute the FIT Contract, as described at paragraph 20 above, and take the necessary steps to develop the WWIS Project, deploying its experienced project advisors to assist it in doing so. On September 9, 2010, WWIS representatives met with MNR officials to discuss the studies that the MNR would permit it to undertake related to the WWIS Project while MNR and the Ministry of the Environment considered the issues raised in the June and August 2010 policy proposals. The MNR advised WWIS that the Crown land application process was on hold and that wind testing, the review of the WWIS Project under the REA Regulation, and re-configuration could not occur until the situation changed.

28. On September 30, 2010 and October 7, 2010, WWIS wrote to the MNR seeking permission for wind testing and for further definition of the WWIS Project area. The MNR did not respond to these letters until November 22, 2010, when a MNR official stated in an email response that because the government's offshore wind generation policy review was still outstanding, the MNR would not be able to advance the WWIS Project nor implement the potential re-configuration discussed in paragraph 26 above. On December 10, 2010, to preserve its ability to develop the WWIS Project with an extended timeline in accordance with the provisions of the FIT Contract, WWIS filed a force majeure notice in accordance with the terms of the FIT Contract, stating that WWIS was unable to advance the WWIS Project further toward the milestone dates in the FIT Contract without being able to carry out wind testing, further defining of the WWIS Project area, and related studies.

29. During this time period, opponents of wind turbines were becoming increasingly vocal and well-organized, targeting the electoral ridings of government MPPs in anticipation of an upcoming 2011 provincial election. Anti-wind opponents mounted especially strong campaigns against a proposed offshore project in Lake Ontario located near Energy Minister Brad Duguid's electoral riding in the Toronto area and against another proposed offshore project in Lake Erie located near the swing ridings of Essex and Windsor West (the WWIS Project was not located near those projects). Concerned about the lack of response they were receiving from Government of Ontario officials and anxious to move the WWIS Project forward, WWIS representatives proposed to Ministry of Energy officials that the WWIS Project – the only offshore wind project with a FIT Contract – could proceed as a "pilot project" that could generate scientific data to assist the Government of Ontario in determining how to proceed with future offshore wind projects.

30. On February 11, 2011, with no notice to or consultation with Windstream, WWIS or the renewable energy industry more generally, the Government of Ontario announced that it was placing a moratorium on the further development of offshore wind projects. It justified the moratorium on grounds that further scientific research had to be completed before offshore wind development could proceed. However, internal Government of

Ontario communications documents identified organized opposition to wind power and rising electricity costs to consumers as key issues related to this decision. In addition, although Minister Duguid in his statements to the media repeated the scientific study rationale for the moratorium, he also made clear that cost was a factor, stating: "If we're reaching our clean energy objectives with onshore project in solar, wind, bioenergy, why would we then want to expand into offshore which is going to be more costly?" (The FIT price OPA had agreed to pay for electricity generated from offshore wind projects was 19.0 cents per kilowatt hour compared to 13.5 cents per kilowatt hour for electricity generated by onshore wind projects.)

31. Although internal Government of Ontario documents show that the Ministry of Energy's preferred option was to allow the WWIS Project to proceed, the Ministry was ultimately overruled, and the WWIS Project was included in the moratorium, despite the fact that it had a FIT Contract. In a telephone conversation with representatives of Windstream and WWIS on February 11, 2011, Government of Ontario officials acknowledged that the WWIS Project was "unique" because it had a FIT Contract. They assured Windstream and WWIS that the WWIS Project had not been terminated but was merely "frozen", and that the FIT Contract for the WWIS Project would be amended to ensure no penalties were incurred by Windstream and WWIS as a result of this delay, which they acknowledged would likely be a matter of "years". In further conversations that week, Ministry of Energy officials assured Windstream and WWIS that they wanted to make Windstream and WWIS happy with the process and that the WWIS Project could continue. Minister Duguid confirmed in statements to the media that the WWIS Project "won't be cancelled, it'll be extended until the science is done".

32. The Government of Ontario has failed to comply with its promise to extend the WWIS Project. Although the OPA has granted WWIS force majeure as a result of the moratorium, the FIT Contract provides the OPA with a unilateral right to terminate the FIT Contract if the force majeure results in the WWIS Project's commercial operation date being delayed for more than 24 months beyond the original milestone date for commercial operation or if the period of force majeure lasts for longer than 36 months during any 60 month period. As there is no evidence that the Government of Ontario has

any intention of lifting the moratorium, which has now been in place for approximately two years, the FIT Contract is at risk of being unilaterally terminated by the OPA as a result of Ontario's actions.

33. The Government of Ontario has also declined Windstream's good faith efforts to develop other renewable energy projects to make up for the frustration of its right to develop the WWIS Project, as follows:

(a) On February 15, 2011, Windstream proposed that the FIT Contract for the 300 MW WWIS Project be replaced with a FIT Contract or Contracts for one or more of Windstream's onshore wind FIT applications, which total 745 MW. The OPA had already accepted these applications as valid and was holding CDN $7.45 million in letters of credit as security. On March 18, 2011, the OPA advised Windstream it would not consider Windstream's onshore wind projects as alternatives.

(b) On April 15, 2011, Windstream proposed that the FIT Contract for the WWIS Project be replaced with a 300 MW solar project on the adjacent mainland (the proposal was later reduced to a 100 MW solar project in discussions with the OPA). On May 30, 2011, the OPA advised Windstream that it did not accept this proposal.

(c) In Fall 2011 and Winter 2011/2012, WWIS representatives had numerous separate meetings with senior government officials from the OPA, the Ministry of Energy, the MNR and the Ministry of Environment, with four Ontario Cabinet Ministers (the Ministers of Natural Resources, Environment and Agriculture, and (by teleconference) the Attorney General), and with representatives of the Premier's Office to propose that WWIS develop the WWIS Project as an active research project, allowing scientific research to be carried out in conjunction with the Government of Ontario and jobs to be created as a result of the project. No response to this proposal has been received to date from any of the Ministers and officials with whom WWIS representatives met. To the extent that the Government of Ontario has conducted any scientific studies respecting offshore

wind – it has not released them or shared them with Windstream, WWIS or anyone else in the renewable energy industry.

34. Despite the moratorium, WWIS has complied with its obligations under the FIT Contract, maintaining the CDN $6 million letter of credit, incurring ongoing financing, staff, engineering and other costs, and entering into contractual arrangements to meet the FIT Contract's 50% domestic content requirements, including entering into a binding turbine supply agreement with Siemens Canada, valued at greater than CDN $600 million, in order to obtain the benefit of a waiver of certain OPA termination rights that the OPA has offered to all FIT Contract holders. However, as described above, the actions of the Government of Ontario have frustrated WWIS' ability to develop the WWIS Project in accordance with its rights under the FIT Contract and left WWIS vulnerable to losing all of those rights. As of the date of the filing of this Notice of Arbitration, the Government of Ontario has provided no indication as to when this moratorium will end, or whether it will end at all.

35. It is also unclear what the legal basis for the moratorium is under Ontario law. To Windstream's and WWIS' knowledge, the Government of Ontario has taken no steps to formally implement its announcement of the moratorium through, for example, an amendment to the REA Regulation or the APRD. As a matter of law, it would appear that WWIS has rights under the REA Regulation, the APRD and other applicable laws and regulations to carry out testing and studies, make applications and have those applications considered under these provisions, but the Government of Ontario has refused to allow it to do so.

F. BRIEF DESCRIPTION OF VIOLATIONS OF NAFTA CHAPTER 11

36. Canada is responsible for measures taken by the Government of Ontario, including the OPA, that are inconsistent with Canada's commitments under NAFTA Chapter 11. The measures described in this Notice of Arbitration breach Canada's obligations under Article 1110 (Expropriation and Compensation), 1105 (Minimum Standard of Treatment), 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment) and, to

the extent that the OPA is a state enterprise, as defined in NAFTA Article 1505, Article 1503(2).

37. By reason of Canada's breach of its obligations, Windstream, an investor of a Party as defined in Section C of NAFTA Chapter 11, has incurred damages in relation to both WWIS itself and WWIS' rights under the FIT Contract -- both of which are investments of Windstream as defined in Section C of Chapter 11. Windstream is entitled to be compensated for Canada's failure to comply with its obligations arising under NAFTA Chapter 11.

38. The particular NAFTA breaches are outlined below.

Canada Has Unlawfully Expropriated Windstream's Investments

39. NAFTA Article 1110 prohibits Canada from directly or indirectly nationalizing or expropriating an investment of a U.S. investor in its territory or taking measures tantamount to nationalization or expropriation of such an investment except (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance with due process of law and the minimum standard of treatment under international law, and (d) on payment of fair market value compensation.

40. By virtue of the laws, policies, actions and representations made above, Canada, through the Government of Ontario, made a specific commitment to Windstream and WWIS that if WWIS applied for and obtained a FIT Contract for an offshore wind facility, it would be able to apply for required regulatory approvals under a streamlined approvals process. Contrary to that commitment and despite granting WWIS a FIT Contract, the Government of Ontario, through its moratorium and related measures, including for example the measures described in paragraphs 31 to 35 above, has effectively annulled the existing regulatory framework for the development of the WWIS Project, frustrating WWIS' ability to develop the WWIS Project and to obtain the benefit of its FIT Contract in accordance with the representations made to it by the Government of Ontario.

41. Canada, through the Government of Ontario's moratorium and related measures, has deprived Windstream of control of its investments and of the benefits it and WWIS

would have obtained had the WWIS Project been developed in accordance with the terms of the FIT Contract. As there is no evidence that the Government of Ontario has any intention of lifting the moratorium and neither Canada nor Ontario has paid fair market value for effectively depriving Windstream of all the value of WWIS and its interests arising from the FIT Contract, its actions constitute unlawful expropriation contrary to NAFTA Article 1110.

Canada has Violated Windstream's Right to Fair and Equitable Treatment

42. NAFTA Article 1105(1) requires Canada to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".

43. The adoption of the moratorium by Ontario and its application to the WWIS Project was arbitrary, irrational and discriminatory. It violated the legitimate expectations of Windstream and WWIS that if they applied and obtained a FIT Contract for an offshore wind facility, they would be able to apply for required regulatory approvals under a streamlined regulatory approvals process. The Government of Ontario's post-moratorium treatment of Windstream and WWIS, described in paragraphs 31 to 35 above, has also been arbitrary and unfair. Contrary to the representations it made in its February 11, 2011 teleconference call with representatives of Windstream and WWIS, the Government of Ontario has failed to take steps to protect Windstream and WWIS from being penalized as a result of the moratorium.

44. These measures, among others, constitute violations of the principle of fair and equitable treatment under Article 1105, and have caused damage to Windstream and WWIS by, among other things, depriving it of all the value of WWIS and its interests arising from the FIT Contract.

Canada Has Violated Windstream's Rights Not to be Subject to Discrimination

45. NAFTA Chapter 11 prohibits discrimination against investors of the other State Parties, vis-à-vis both nationals and investors of other States. Under Article 1102(2), "[e]ach Party shall accord to investments of investors of another party treatment no less favorable

than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The same principle is found in Article 1103(2), but in reference to "investments of investors of any other Party or of a non-Party."

46. In this case, Canada, through the Government of Ontario, has granted special, more favorable treatment under the FIT program to investments made by Samsung C & T Corp., a South Korean company, than investments made by Windstream. In addition, none of the developers from Canada or other jurisdictions who have been provided a FIT Contract to date have been subject to a moratorium and unable to proceed with their projects, in contrast to Windstream and WWIS. The Government of Ontario has also recently arranged to relocate two gas generation facilities and to pay compensation to the Canadian investors that own them after the two projects were canceled by the Government of Ontario as a result of community opposition. The Government of Ontario has made no similar efforts to relocate the WWIS Project, despite the proposals made by Windstream, or to compensate Windstream and WWIS for their costs or the loss of their rights to develop the WWIS Project.

47. These measures, considered with the moratorium and related measures described at paragraphs 31 to 35 above, have violated the rights of Windstream and WWIS not to be subject to discrimination under NAFTA Articles 1102(2) and 1103(2), and have caused damage to Windstream and WWIS by, among other things, depriving it of all the value of WWIS and its interests arising from the FIT Contract.

NAFTA Article 1503(2)

48. Windstream's position, as described above, is that the Government of Canada is responsible under the NAFTA and as a matter of international law for measures of the OPA that are inconsistent with Canada's obligations under Chapter 11. In addition, to the extent that the OPA is regarded as a state enterprise as defined in NAFTA Article 1505, then, with respect to the measures of the OPA that are inconsistent with Canada's obligations under Chapter 11, the Government of Canada has breached its obligations in Article 1503(2) to ensure, through regulatory control, administrative supervision or the

application of other measures, that the OPA in the exercise of delegated government authority has acted in a manner that is not inconsistent with Canada's obligations under Chapter 11.

G. RELIEF REQUESTED

49. Windstream claims:

(a) damages in the amount of at least CDN $475,230,000, including for lost profits and other damages incurred as a result of the moratorium and related measures;

(b) all legal fees and costs associated with this arbitration;

(c) pre- and post-award interest; and

(d) such other relief as the Tribunal considers appropriate.

H. NUMBER AND APPOINTMENT OF ARBITRATORS

50. Article 1123 of NAFTA provides that "the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."

51. The Claimant appoints Mr. R. Doak Bishop as arbitrator. Mr. Bishop's address and contact information is:

R. Doak Bishop
King & Spalding
1100 Louisiana, Suite 4000
Houston, Texas 77002

dbishop@kslaw.com

Respectfully submitted on behalf of Windstream,

_____
John Terry

_____
Ishat Reza

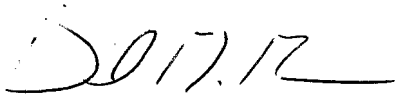
Torys LLP
79 Wellington Street West
Suite 3000
Box 270, TD Centre
Toronto, Ontario
Canada M5K 1N2

ANNEX A

WAIVER AND CONSENT

Pursuant to Articles 1121(1) and 1121(2) of the North American Free Trade Agreement (the "NAFTA"), Windstream Energy LLC ("Windstream") and Windstream Wolfe Island Shoals Inc. ("WWIS") each consent to arbitration in accordance with the procedures set out in the NAFTA and waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to the measures of Canada alleged in the Notice of Arbitration to be a breach referred to in Articles 1116 or 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of Canada.

Windstream Energy LLC



By:

Name: David M. Mars

Title: Director

Date: January 15, 2013

Windstream Wolfe Island Shoals Inc.

By:

Name: Ian D. Baines, P. Eng.

Title: Officer, Wolfe Island Shoals Inc.

Date: January 15, 2013