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

(the "Claimant")

- and -

GOVERNMENT OF CANADA

(the "Respondent")

PROCEDURAL ORDER NO. 5
REVISED

ARBITRAL TRIBUNAL:
Dr. Veijo Heiskanen (President)
Mr. R. Doak Bishop
Dr. Bernardo Cremades

REGISTRY:
Permanent Court of Arbitration

23 May 2015

Pursuant to Sections 7.4 and 16.1 of Procedural Order No. 1 dated 16 September 2013 (as amended) and Article 27.3 of the 2010 UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**"), the Tribunal issues the following Procedural Order.

1 Procedural background

1.1 Section 7.1 of Procedural Order No. 1 provides with regard to document production:

> The Calendar sets out the steps and applicable dates that shall govern the production of documents in this proceeding.

Annex A to Procedural Order No. 1 establishes a schedule with regard to the document production process as follows:

Date	Action
16 October 2013	Exchange of Document Requests
15 November 2013	Exchange of Objections to Document Requests
2 December 2013	Exchange of Replies to Objections to Document Requests
20 December 2013	Submission of Disputes relating to Document Requests (if any) to the Tribunal
TBD (e.g. 20 January 2014)	Tribunal Decision on Disputed Document Requests
90 days (e.g. 21 April 2014)	Production of Documents in Response to All Document Requests

1.2 Annex B to Procedural Order No. 1 contains the template of a Redfern Schedule for the Parties' document production requests.

1.3 In late 2013, the Parties exchanged document production requests in the form of Redfern Schedules pursuant to the schedule contained in Annex A to Procedural Order No. 1. On 20 December 2013, the Claimant submitted three document production requests, to which the Respondent had objected, for decision to the Tribunal. On the same date, the Parties confirmed that they had reached agreement on all of the Claimant's other requests and all of the Respondent's requests.

1.4 On 12 January 2014, the Tribunal issued Procedural Order No. 2, granting one of the Claimant's outstanding document production requests and denying the other two. The relevant documents were subsequently produced by the Respondent.

1.5 On 28 April 2015, the Claimant submitted a Supplementary Request to Produce (the "**Supplementary Request**"), requesting the Tribunal to "order the Respondent to produce the documents set out in the [Supplementary Request] [...] as soon as possible and in any event no later than within 30 days of the Tribunal's decision on any disputed document request."

1.6 On 29 April 2015, the Respondent informed the Tribunal that it would respond to the Supplementary Request within five business days pursuant to Section 12.1 of Procedural Order No. 1.

1.7 On 5 May 2015, the Respondent submitted a response to the Supplementary Request (the "**Response**").

1.8 On 6 May 2015, the Claimant wrote to the Tribunal to request a conference call "to address some of the issues raised in Canada's letter and other issues related to document productions by Canada and Ontario." This request was opposed by the Respondent by e-mail of the same date, referring in particular to the procedure for dealing with procedural requests in Section 12.1 of Procedural Order No. 1.

2 The issues disputed between the Parties

2.1 The Parties' positions on the disputed issues that are addressed in this Procedural Order can be summarized as follows.

a) The position of the Claimant

2.2 The Claimant contends that it is appropriate for it to request additional documents at this stage of the proceedings because they "arise from and are relevant to the positions taken in the Respondent's Counter-Memorial or the evidence set out in the witness statements submitted by the Respondent." The Claimant states that it did not request those documents in accordance with Procedural Order No. 1 because it "did not know that the Respondent would take those positions or submit that evidence."

2.3 The Claimant refers to Article 27(3) of the UNCITRAL Rules, which provides that the Tribunal may "at any time during the arbitral proceedings" require a party to produce documents. The Claimant also refers to Article 3(10) of the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"), providing that the Tribunal may request any party to produce documents at any time before the arbitration is concluded.

2.4 The Claimant further relies on the findings of the tribunal in *Mesa Power Group, LLC v. Canada*[1] to support its view that document requests can be made "in respect of new issues raised, provided that the requesting party establish why the requests could not have been made earlier."

b) The position of the Respondent

2.5 The Respondent submits that the Claimant's request should be denied, as "the Claimant has no right in this arbitration to file a supplementary request." The Respondent argues that, according to Section 7.1 of Procedural Order No. 1, the arbitration calendar attached as Annex A to the Procedural Order "sets out the steps and applicable dates that shall govern the production of documents in this proceeding." The Respondent claims that, pursuant to that calendar, "document production was to occur once, on April 21, 2014, prior to the filing of initial pleadings," implying that "a second round of production is not contemplated." According to the Respondent, therefore, if the Claimant wants to request further document production, it would have to request a "modification of the procedural rules ..., explaining why such a modification is appropriate."

2.6 In any event, the Respondent submits that the Claimant's request is untimely. Referring to Sections 7.5 and 9.5 of Procedural Order No. 1, the Respondent argues that the Claimant's last chance to submit any documents into the record will be the Claimant's Reply, due on 8 June 2015. Under the circumstances, the Respondent suggests that the Claimant would effectively not have any opportunity to make use of any documents it might receive. The Respondent also points out that "[t]he only justification offered by the Claimant for filing its Supplementary Request to Produce at this late stage," namely that "the Claimant did not know Canada would take certain positions or submit certain evidence prior to the submission of Canada's Counter-Memorial," is meritless, since "the issues have been well defined for a long time" and "Canada submitted its Counter-Memorial ... over three months ago."

2.7 The Respondent argues that, contrary to what the Claimant suggests, the tribunal in *Mesa Power v. Canada* in fact agreed with the Respondent's objections and rejected the new requests on the basis that they had been brought belatedly and that no reasons had been provided to explain the delay. According to the Respondent, "[t]he Claimant's new requests in this arbitration should be denied for the same reason."

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[1] *Mesa Power Group, LLC v. Government of Canada*, Procedural Order No. 7, dated 10 April 2014, para. 21.

2.8 The Respondent further highlights the amount of time it has already devoted to responding to the Claimant's original requests and the number of documents it has already produced, claiming that granting the Claimant's Supplementary Request would create a significant and unjustifiable burden on the Respondent and further delay the proceedings. The Respondent submits that, based on Article 3(5) of the IBA Rules, any further document production request would have to be dealt with "pursuant to a schedule similar to that laid out in Annex A to Procedural Order No. 1 that allows for objections to document requests to be made, and production following an eventual ruling from the Tribunal." According to the Respondent, a period of approximately seven weeks would be required for it to object to the Claimant's individual requests, the Tribunal to issue a decision, and the Respondent to search for responsive documents and redact privileged and restricted access information. Allowing the Claimant to submit documents after filing its Reply would not be an option, as it would "effectively reduc[e] the amount of time that Canada has to prepare its response", and therefore be "inconsistent with Canada's due process rights."

3 Reasons

3.1 The Tribunal has considered the Parties' submissions and finds that it is in a position to rule on the Claimant's Supplementary Request without any further submissions or hearing of the Parties.

3.2 The Tribunal recalls that pursuant to Procedural Order No. 1, which was adopted by the Tribunal based on the agreement of the Parties, document production would take place at the beginning of the proceedings, before the submission of written pleadings. No further document production was envisaged in Procedural Order No. 1 or in any subsequent decision issued by the Tribunal. The Tribunal notes that this would not necessarily preclude further requests for production if there are good reasons for it, in accordance with Article 27(3) of the UNCITRAL Rules. Section 7.6 of Procedural Order No. 1 also confirms that the Tribunal may on its own motion order a party to produce documents at any time.

3.3 The Tribunal notes that the Claimant has made five supplementary requests for production, two of which are effectively requests that the Respondent confirm that any documents responsive to the requests have already been produced. The three remaining requests are justified by reference to arguments made in the Respondent's Counter-Memorial and in certain witness statements, however, at least Request No. 3 seems in fact based on documents provided to the Claimants through Ontario's Freedom of Information and Protection of Privacy Act, rather than on the Respondent's Counter-Memorial or the statements of the Respondent's witnesses. The two remaining requests do refer to passages in the Counter-Memorial and in the witness statements.

3.4 As noted above, the sole justification provided by the Claimant in support of its request for production is that it "did not know that the Respondent would take those positions or submit that evidence, and therefore had no reason to request those documents in its Request to Produce submitted to the Respondent in accordance with Procedural Order No. 1." The Tribunal does not consider that this is a sufficient justification to support the Claimant's Supplementary Request. The Parties agreed, and the Tribunal confirmed, that document production would take place at the beginning of the proceedings. The Claimant has not persuaded the Tribunal that it could not have requested the requested documents earlier, or that the Respondent has made entirely novel and surprising allegations that would justify a deviation from the agreed procedure. The Tribunal is also mindful of the fact that the Claimant's Supplementary Request was filed more than three months after the Respondent's Counter-Memorial, and only a few weeks before the Claimant is due to file its Reply. In the circumstances, reopening the document production process now, in particular as the Respondent would have to be given an opportunity to reply to the requests and procedural steps would have to be provided for disputed requests, as pointed out by the Respondent, would likely upset the procedural calendar, which has recently been amended. In the

circumstances, the reasons put forward by the Claimant do not justify a re-opening of the document production process.

3.5 The Tribunal stresses that its decision to deny the Claimant's Supplementary Request is without prejudice to its authority to order further production of documents if so required, in accordance with Section 7.6 of Procedural Order No. 1.

4 The Tribunal's decision

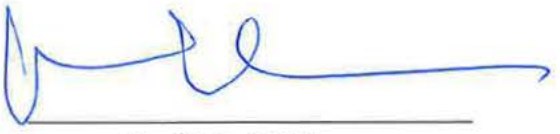
4.1 In light of the above, the Tribunal decides as follows:

a) The Claimant's request for the production of documents is denied; and

b) The Tribunal's decision is without prejudice to its authority to order further production of documents on its own motion if so required, in accordance with Section 7.6 of Procedural Order No. 1.

Seat of arbitration: Toronto, Ontario, Canada

Date: 23 May 2015



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal