PCA Case No. 2012-17 10 April 2014

AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA AND THE UNCITRAL ARBITRATION RULES, 1976

between

MESA POWER GROUP, LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 7

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

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I. PROCEDURAL BACKGROUND

1. In their communications over the past month, the Parties have made several procedural requests. This Order outlines the Parties' positions and provides the Tribunal's decisions on each request.

II. THE REQUESTS

A. MOTION FOR SUMMARY DETERMINATION

1. The Claimant's position

2. In its communications of 11, 18 and 21 March 2014, the Claimant requested the Tribunal to make a preliminary determination on the Respondent's reliance on Article 1108 of the NAFTA. According to the Claimant, "[a] determination that the NAFTA Article 1108 procurement exception does not apply to the claims would result in the elimination of the Article 1106 issue from consideration as Canada has put forward no defense to it. Alternatively, the determination that the NAFTA Article 1108 exception applies to the NAFTA inconsistent measures would potentially eliminate four of the Investor's claims (namely, Articles 1102, 1103, 1104 and 1106)." The Claimant submitted that the resolution of its request would not require a separate phase in the arbitration and would save time and cost.

2. The Respondent's position

3. In its response of 18 and 21 March 2014, the Respondent opposed the request on the basis that the Tribunal had yet to determine that it has jurisdiction over the issues in dispute, that the request was untimely, and that bifurcating the proceedings at this stage would not be efficient. The appropriate place for the Claimant to provide its response to the Respondent's Article 1108 argument was in the Claimant's Reply, not in letters and motions.

3. Analysis

4. The Tribunal recalls that the Respondent has challenged the jurisdiction of the Tribunal. In Procedural Order No. 3, the Tribunal determined that all jurisdictional objections would be heard together with the merits at the forthcoming hearing. It set the calendar accordingly. In order to decide on the Claimant's request, the Tribunal would

have to first establish its jurisdiction over the dispute. To do this, it will have to alter the existing calendar that has been in place for over a year. Further, additional pleadings and witness testimony may be required, which will delay the schedule and is unlikely to save time and cost. Finally, it is not clear why, despite having knowledge of the Respondent's Article 1108 argument since July 2012, the Claimant did not make its request earlier. For all these reasons, the Tribunal denies the Claimant's request.

5. The Tribunal believes that the Claimant will not be prejudiced by this decision. It can fully address the Respondent's arguments in its forthcoming Reply submission, at the hearing (which has been lengthened by the Tribunal), and possibly in its post-hearing briefs (if any).

B. POSTPONEMENT OF THE NOTIFICATION TO THIRD PARTIES

1. The Respondent's position

6. In its communication of 11 March 2014, the Respondent pointed out that following the schedule in Procedural Order No. 6 ("PO 6"), the Memorial and Counter-Memorial along with the supporting documents would only be available to the public on 4 April 2014. It therefore suggested that the date of notification to third parties (fixed in PO 6 on 28 March 2014) should be postponed to 4 May 2014, which would enable potential third parties to review the Parties' submissions in order to decide whether or not to file submissions.

2. The Claimant's position

7. In its response of 17 March 2013, the Claimant opposed the Respondent's position contending that the third parties were not to file their actual submissions by 28 March 2014. They were merely to express their interest in making submissions, which, if accepted, would be made in July 2014. Hence, there was no need to alter the existing calendar.

3. Analysis

8. In accordance with the calendar set in PO 6, third parties were to be notified on 28 March 2014. However, in its letter of 27 March 2014, the Tribunal suspended this time limit until the resolution of the pending requests.

9. The Tribunal believes that it would not be advisable to notify third parties until the Memorial and Counter-Memorial have been publicly available for a reasonable period of time, or else they will not be able to obtain an understanding of the dispute. Confidential information in these submissions must be appropriately redacted before they can be made public. On this basis, the Tribunal inserts the following steps into the existing calendar:

   a. 17 April 2014 – Claimant to produce its Amended Memorial and supporting documents;
   b. 28 April 2014 – Respondent to request additional designations and/or object to existing designations in the Claimant's Amended Memorial;[1]
   c. 28 April 2014 – Respondent to produce its re-designated Counter-Memorial;
   d. 5 May 2014 – Tribunal's decision on additional designations and/or objections in Claimant's Amended Memorial;
   e. 9 May 2014 – Claimant to produce public version of its Memorial and supporting documents;
   f. 8 May 2014 – Claimant to request additional designations and/or object to existing designations in the Respondent's re-designated Counter-Memorial;
   g. 15 May – Tribunal's decision on additional designations and/or objections in the Respondent's re-designated Counter-Memorial;
   h. 19 May – Respondent to produce public version of its Counter-Memorial and supporting documents; and,
   i. 26 May 2014 – Notification to third parties.

C. Extending the Time-Limit for Filing the Amended Memorial

1. The Claimant's position

10. In its communications of 13 March 2014, the Claimant submitted that it was in the process of amending its Memorial in accordance with the Tribunal's directions in PO 6. It requested additional time for the submission of the amended version so that it could "continue its efforts to resolve the outstanding issues with the non-disputing party supplying the document before filing its amended Memorial" and because it needed to review "thousands of pages of documents supporting the Memorial."

2. The Respondent's position

11. On 20 March and 2 April 2014, the Respondent objected on the basis that the Claimant had not provided any reason for its failure to comply with the Tribunal's directions. It submitted that the Tribunal had already denied a similar request earlier and that there was no need for the Tribunal to reconsider its decision now. The Claimant should either

[1] Under paragraph 4 of the Confidentiality Order, a Party has ten days to designate additional information contained in the opposing Party's submission as confidential. Under PO 6, a Party may challenge the designations made by the other Party (if at all) within a period of ten days.

correct its designations in its Memorial, or withdraw the information in question from the record amending its Memorial accordingly.

3. Analysis

12. In its communication of 13 March 2014, the Tribunal requested the Claimant to clarify the length of the extension it sought to file its amended Memorial. From its reply and its later communication of 25 March 2014, the Tribunal understands that the Claimant seeks an extension until 17 April 2014.

13. The Tribunal recalls that the Claimant has been trying to procure the consent of third parties to the disclosure of their confidential information since at least 8 January 2014. In PO 6, the Tribunal recognised that the Claimant may not be able to disclose confidential third party information and accordingly gave the Claimant the opportunity to withdraw such information from the record within a specific time. Rather than continuing its efforts with the third parties, the Claimant should have complied with the Tribunal's directions. Be that as it may, it is true that the Claimant had to re-designate a number of exhibits (running into several thousands of pages) to comply with PO 6, which will possibly affect the references to those exhibits in its Memorial. In the circumstances, and also given the short time frame between the date of this Order and 17 April 2014, the Tribunal believes the extension sought by the Claimant may be granted.

14. The Tribunal is aware of the Respondent's contention that as the Claimant did not submit an amended version of its Memorial within the time limit set in PO 6, the Tribunal should "deem it to have chosen to withdraw the information in question from the record." A similar request is made in respect of the expert report of Messrs Low and Taylor. For the reasons mentioned above, the Tribunal denies the Respondent's requests. The Claimant should submit the amended expert report of Messrs Low and Taylor by 17 April 2014 as well.

D. Extending the Time-Limit for Filing the Amended Exhibits

15. This request was made in the Claimant's communication of 13 March 2013. In its later communication of 25 March 2014, however, the Claimant appears to have modified its request, seeking a variation of PO 6 relating to the designation of its exhibits. The Tribunal's decision on the modified request is addressed below (request (H)).

E. EXTENDING THE HEARING

1. The Claimant's position

16. In its communication of 13 March 2014, the Claimant submitted that in light of the size and number of witness statements provided with the Respondent's Counter-Memorial, the Tribunal should reserve at least eight days for the forthcoming hearing. A longer hearing was needed to allow the Claimant to examine the witnesses on the Respondent's new evidence regarding the nature of the electricity market and transmission system in Ontario.

2. The Respondent's position

17. The Respondent objected to this request on the basis that the Claimant had made similar requests before, all of which had been rejected by the Tribunal. The Parties should allocate their hearing time to cross-examine witnesses and present legal arguments in the time reserved.

3. Analysis

18. The breadth of issues to be covered and the number of witnesses and experts to be examined became clear only after receipt of the Counter-Memorial. Thus, while it may not be a "new" request, the Claimant's request is premised on elements which it did not know beforehand. Further, additional evidence produced through the document production phase contemplated below may have to be addressed at the hearing (see request (F) below). For these reasons, the Tribunal considers that it is prudent to reserve two additional days. Presently, the hearing is to take place from 27 to 30 October with 31 October and 1 November 2014 as reserve days. Due to other commitments, the Tribunal members cannot extend the hearing beyond 1 November 2014. They may, however, start one day earlier. Thus, subject to the Parties' availabilities, the Tribunal proposes holding the hearing from 26 to 31 October 2014 and keeping 1 November 2014 in reserve.

F. DOCUMENT PRODUCTION

1. The Claimant's position

19. In its communication of 15 March 2014, the Claimant enquired whether the Tribunal would entertain further document requests. It submitted that it required additional information to address the arguments raised in the Respondent's Counter-Memorial.

2. The Respondent's position

20. On 21 March 2014, the Respondent objected to this request on the basis that without knowing the content of the proposed requests, it was not possible to comment on their timeliness or the relevance and materiality of the information sought.

3. Analysis

21. The Tribunal believes that it would not be efficient to entertain document production requests at this stage because it may derail the existing calendar and because the document production phase has already passed. However, if necessary, the Tribunal will entertain document requests after the completion of the second round of submissions. These requests should be limited to new issues raised in the Reply and Rejoinder,[2] and the requesting Party would have to establish why the requests could not be made earlier. On this basis, the Tribunal inserts the following steps into the existing calendar:

    a. 23 July 2014 – Simultaneous Requests to produce documents;
    b. 6 August 2014 – Simultaneous Production of Evidence or Reasoned Objections (Redfern Schedules);
    c. 20 August 2014 – Simultaneous Reply to objections (Redfern Schedules);
    d. 3 September 2014 – Tribunal's decision;
    e. 17 September 2014 – Production of evidence as ordered;

22. The Parties may rely upon the documents that may be produced as a result of this additional document production phase at the hearing and in their post-hearing briefs (if any).

G. Production of Seven Documents

1. The Claimant's position

23. In its communications of 15 and 25 March 2013, the Claimant sought the Tribunal's directions in respect of seven documents that it claimed would have to be withdrawn from the record if the Respondent were not directed to produce them. These were the only documents that reflected meetings between NextEra and officials in Ontario in relation to renewable energy. The documents were known to exist and were relevant and material.

[2] Procedural Order No. 5 contemplates new documents, factual allegations and legal arguments.

2. The Respondent's position

24. In its response of 21 March and 2 April 2014, the Respondent submitted that not all of the documents requested were in the possession of the OPA, Hydro One or the IESO. Further, the Claimant assumed that all the documents requested responded to the document requests to which the Respondent was ordered to respond, which was not the case. Even if the Claimant was making altogether new document requests, there was no reason why the Tribunal should reconsider its earlier decision where it had denied similar requests. Having itself chosen *ex parte* procedures to obtain evidence rather than approaching this tribunal, the Claimant could not now complain that it was being prejudiced. If the documents were withdrawn from the record, the Claimant could still question relevant officials from Ontario and the OPA at the hearing. By contrast, if the documents were retained, the Respondent would be prejudiced as it would not be able to discuss them with its witnesses etc.

3. Analysis

25. Here, the Claimant insists that seven documents allegedly containing "important evidence" of the relationship between Ontario and NextEra should not be excluded from the record. Either they should be produced by the Respondent, or the Tribunal should retain them in the record as "Restricted Access" documents.

26. The seven documents in question apparently are the only documents on which the Claimant relies to establish secret meetings between Ontario and NextEra. The Claimant alleges that it will be disadvantaged if it is compelled to withdraw these documents from the record. On the basis of the record before it, the Tribunal finds that the Claimant has made a reasonable case for the Tribunal not to exclude the documents in question.

27. However, the OPA, Hydro One and the IESO are unable to produce the documents because they have not received NextEra's consent to disclosure. In the absence of NextEra's consent, the Tribunal does not believe it can compel the Respondent to produce the documents in question.[3] In the circumstances, the Tribunal invites the Parties to advise the Tribunal how the documents can be retained on the record. For instance, the Tribunal may consider writing to NextEra directly or offering measures to

[3] The Tribunal notes the Respondent's representation that "[if NextEra] consents to the disclosure [of the documents in question] in this arbitration, then Canada will use its best efforts to obtain and produce the responsive documents."

protect NextEra's confidentiality concerns. Should these endeavors fail, the Tribunal may be compelled to make an exception to its decision in PO 6 and retain the seven documents on the record with their existing "Restricted Access" designations.

H. VARYING THE FILING REQUIREMENT OF EXHIBITS

1. The Claimant's position

28. In its communications of 13 and 25 March 2014, the Claimant submitted that the Tribunal's direction in PO 6 directing it to amend the designations of its exhibits imposed an "arduous burden", which required it to ensure that it did not disclose confidential information of third parties. The purpose of this additional work was only to permit the public disclosure of the documents. The work was prejudicing the Claimant's compliance with the U.S. Court orders and the Tribunal's procedural orders; it was also affecting the Claimant's ability to produce its submissions in a timely fashion. In the circumstances, it requested a variation in the filing requirement of the exhibits. Should the Tribunal decide not to vary its decision, it requested (a) an extension of time for filing its Memorial until 17 April 2014 and (b) a hearing.

2. The Respondent's position

29. In its communications of 21 March and 2 April 2014, the Respondent submitted that the Claimant had four months more than contemplated in the Confidentiality Order to review its exhibits and that the preparation of the Reply was no reason for it to be given more time to comply with the time-limits prescribed in PO 6. Despite its own burdens, the Respondent had adhered to the schedule prescribed by the Tribunal. Further, the Claimant should not be permitted to delay complying with its obligations in this arbitration because of the U.S. Court orders, which do not apply to these proceedings. The Claimant itself chose to approach the U.S. Courts and it should not complain now that it cannot comply with the Tribunal's orders and those of the U.S. Courts. The Respondent also reiterated that the Claimant could simply withdraw the problematic exhibits from the record.

3. Analysis

30. In PO 6 the Tribunal found that exhibits were "written submissions" and directed the Claimant to either designate specific information in its exhibits as "Restricted Access" or "Confidential" or to withdraw those exhibits from the record. Now the Claimant complains that this direction imposes an unfair burden on it.

31. The Tribunal is not convinced that it should alter its decision in PO 6. If the Claimant wishes to retain documents in the record, then it bears the burden of ensuring that the confidential portions of those documents are appropriately designated. If the Tribunal were to retain the blanket "Restricted Access"/"Confidentiality" designations, the Respondent may be prejudiced ("Restricted Access" documents cannot be shared with officials, possible witnesses etc.). The Claimant's practical difficulties should not operate to prejudice the Respondent. The Tribunal will thus not vary its decision in PO 6, except as mentioned above (i.e. designation of the seven documents and extension of the time-limit for the Claimant to make its amended submissions).

I. MODIFICATION OF THE CONFIDENTIALITY ORDER

1. The Claimant's position

32. Relying on its submissions summarized above, on 25 March 2014, the Claimant requested a variation of the Confidentiality Order "to permit a disputing party to not produce a public version of confidential exhibits or testimonial evidence that supports its written submissions."

2. The Respondent's position

33. In its response of 2 April 2014, the Respondent objected to this request stressing that paragraph 21 of the Confidentiality Order contemplates amendments only if "compelling circumstances so require". The Claimant had failed to show any such circumstances. Further, the Claimant was ill-placed to complain that it was too time-consuming to comply with its obligations under PO 6, when it should have complied a long time ago. Moreover, public versions of the exhibits and the evidence were essential as there was considerable public interest involved. In any event, even if the Confidentiality Order were varied, the Claimant would still not be relieved of its obligations under PO 6 designate its submissions properly.

3. Analysis

34. The Confidentiality Order was issued with the consent of both Parties. Therefore, in the absence of the Respondent's consent, it would not be possible to amend it. In any event, for many of the reasons mentioned above, the Tribunal does not believe that the Claimant's request should be granted. The Claimant seeks to vary the Confidentiality Order because of some practical difficulties faced by it. The Claimant has not presented any "compelling circumstances" that should cause the Tribunal to amend the

Confidentiality Order at this stage. The Claimant has been aware of the requirements of the Confidentiality Order since the beginning of the arbitration. In fact, on several occasions, the Claimant has itself insisted that the proceedings should be transparent. In the circumstances, the Tribunal denies the Claimant's request.

III. OTHER MATTERS

35. The Claimant has requested a hearing "to review the admissibility of the evidence, Memorial and witness statements at issue", to which the Respondent has objected. In light of its decisions above, particularly its decision to retain the seven NextEra documents on the record, the Tribunal does not believe a hearing is necessary. It is also mindful that a hearing will only further delay the schedule.

36. In its communication of 20 March 2014, the Respondent requested the Tribunal to order the Claimant "to file a corrected version of the witness statement of Cole Robertson which removes all Restricted Access labels." The Tribunal trusts that the amended statement produced by the Claimant on 25 March 2014 satisfies the Respondent's request.

37. On account of its decisions in PO 6 and in this Order, the Claimant will re-designate its Memorial, exhibits, witness statements and expert report. The Tribunal would appreciate receiving hard copies of these documents in accordance with the rules prescribed in Procedural Order No. 1 ("PO 1"). Unless it hears from the Claimant to contrary by 17 April 2014, the Tribunal will destroy the Memorial, exhibits, witnesses statements and expert report as presently filed by the Claimant. Further, in the future, instead of sending two copies of exhibits in standard letter size to the President, only one copy of the exhibits should be sent.

38. Further, the Parties are invited to advise the Tribunal of their preferred venue for the hearing by no later than 17 April 2014.

39. Finally, the Tribunal notes the Claimant's statement that "[it] elects to withdraw the proposed Section 1782 applications that were filed with the Tribunal on December 10, 2013."

IV. DECISION

40. For the reasons set out above, the Tribunal:

i. denies the Claimant's request to make a preliminary determination on the Respondent's reliance on Article 1108 of the NAFTA;

ii. amends the calendar as follows:

a. 17 April 2014 – Claimant to produce its Amended Memorial and supporting documents;
b. 28 April 2014 – Respondent to request additional designations and/or object to existing designations in Claimant's Amended Memorial;
c. 28 April 2014 – Respondent to produce its re-designated Counter-Memorial;
d. 5 May 2014 – Tribunal's decision on additional designations and/or objections;
e. 9 May 2014 – Claimant to produce public version of its Memorial and supporting documents;
f. 8 May 2014 – Claimant to request additional designations and/or object to existing designations in Respondent's re-designated Counter-Memorial;
g. 15 May – Tribunal's decision on additional designations and/or objections;
h. 19 May – Respondent to produce public version of its Memorial and supporting documents; and,
i. 26 May 2014 – Notification to third parties.

iii. denies the Respondent's request concerning the withdrawal of information over which the Claimant inappropriately claimed confidentiality in its Memorial;

iv. denies the Respondent's request concerning the expert report of Messrs Low and Taylor;

v. denies the Claimant's request for an eight-day hearing. Unless either Party objects by **17 April 2014** the hearing will be held from 26 October 2014 to 1 November 2014, the last day being held in reserve;

vi. denies the Claimant's request for document production at this stage. If either Party deems it necessary, it may file a request for further document production with the conditions set out in paragraph 21 above, as follows:

a. 23 July 2014 – Simultaneous Requests to produce documents;
b. 6 August 2014 – Simultaneous Production of Evidence or Reasoned Objections (Redfern Schedules);
c. 20 August 2014 – Simultaneous Reply to objections (Redfern Schedules);
d. 3 September 2014 – Tribunal's decision;
e. 17 September 2014 – Production of evidence as ordered;

The documents produced may be used by the Parties at the hearing and in their post-hearing briefs (if any).

vii. invites the Parties suggestions on how the seven "Restricted Access" documents may be retained on the record by **15 April 2014**. Should the Tribunal be unable to find a solution, the documents will be retained on the record as "Restricted Access" documents;

viii. denies the Claimant's request to vary PO 6 relating to the filing requirements of the Claimant's exhibits;

ix. denies the Claimant's request to modify paragraph 2 and 3 of the Confidentiality Order;

x. denies the Claimant's request for a case management hearing; and,

xi. directs to Parties to advise the Tribunal of the venue for the hearing by **17 April 2014**;

xii. directs the Claimant to submit copies of its amended submissions as set out in paragraph 37 above. Unless it hears from the Claimant to contrary by **17 April 2014**, the Tribunal will destroy the submissions as presently filed by the Claimant;

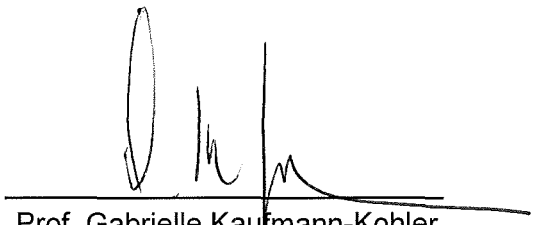
xiii. directs the Parties to send only one copy of their exhibits to the President. Paragraph 10.4 of PO 1 stands modified to this extent; and,

xiv. reserves all questions of costs for subsequent determination.

Seat of arbitration: Miami, Florida, U.S.A

10 April 2014

For the Arbitral Tribunal:



Prof. Gabrielle Kaufmann-Kohler
President of the Arbitral Tribunal