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. 14

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

I. PROCEDURAL BACKGROUND

1. On 28 August 2014, the Tribunal advised the Parties that the pre-hearing hearing conference call would take place on 16 September 2014. A draft agenda was conveyed to the Parties, on which the Parties commented in their subsequent correspondence.

2. On 16 September 2014, the pre-hearing conference call took place with the following participants:

For the Tribunal:
- Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator);
- Rahul Donde (Secretary).

For the Claimants:
- Barry Appleton
- Dr. Alan Alexandroff
- Kyle Dickson-Smith
- Celeste Mowatt

For the Respondents:
- Counsel for Canada:
  - Shane Spelliscy
  - Rodney Neufeld
  - Raahool Watchmaker
  - Heather Squires
  - Laurence Marquis
  - Melissa Perrault
- Client Attendees:
  - Lucas McCall (Trade Policy Officer, Department of Foreign Affairs, Trade and Development Canada)
  - Michael Solursh (Counsel, Ontario Ministry of Economic Development, Employment and Infrastructure)
  - Jennifer Kacaba (Counsel, Ontario Ministry of Energy)

3. On the basis of a proposal made by the President at the beginning of the call to which the Parties agreed, the call was limited to a discussion of procedural/organizational matters for the forthcoming hearing. A second conference call with the full Tribunal was scheduled to discuss the issues raised in the Parties' correspondence, as well as any issues left open for discussion at the first call.

4. On 22 September 2014, the second conference call took place with the full Tribunal, a representative of the PCA and the participants listed above.

5. On 26 September 2014, the Tribunal informed the Parties that it would provide a comprehensive order on hearing and pre-hearing matters shortly. However, given the proximity of some of the time limits discussed at the call, the Tribunal already provided some directions to the Parties. These directions are restated here.

6. This Order is issued following the two conference calls, and the Tribunal's letter of 26 September 2014.

II. ORGANIZATIONAL/PROCEDURAL MATTERS FOR THE HEARING

1. Witness and expert examinations

a. Witnesses and experts to be examined

7. The following witnesses/experts have been called for examination by the Claimant:[1]

i. Bob Chow;
ii. Shawn Cronkwright;
iii. Christopher Goncalves;
iv. Rick Jennings;
v. Susan Lo;
vi. Jim MacDougall.

8. The following witnesses/experts have been called for examination by the Respondent:

i. T. Boone Pickens;
ii. Cole Robertson;
iii. Seabron Adamson;
iv. Gary Timm;
v. Robert Low.

b. Sequence of examinations

9. The witnesses/experts will be examined in the following order:

i. T. Boone Pickens;
ii. Cole Robertson;
iii. Bob Chow;
iv. Shawn Cronkwright;
v. Rick Jennings;
vi. Susan Lo;
vii. Jim MacDougall;
viii. Seabron Adamson;

[1] In accordance with the Tribunal's ruling of 10 September 2014, on 24 September 2014, the Claimant amended its witness and expert list withdrawing Mr. Steve Dorey as a witness.

ix. Gary Timm;
x. Robert Low;
xi. Christopher Goncalves.

10. As a general rule, each Party is to determine the order in which it will present its witnesses/experts for cross-examination. However, Messrs Low and Goncalves will be examined at the end.

c. Sequestration

11. The Tribunal recalls that under paragraph 13.12 of PO 1:

> "Unless agreed otherwise, a fact witness shall not be present in the hearing room during the opening statement, the hearing of oral testimony, nor shall he or she read any transcript of any oral testimony, prior to his or her examination. This limitation does not apply to expert witnesses and to a witness of fact if that witness is a party representative."

12. The Claimant wished to nominate its two fact witnesses (Messrs Pickens and Robertson) as party representatives on the basis that both individuals would be needed in the hearing room to provide instructions (Mr. Pickens is the ultimate owner of Mesa; Mr. Robertson is the Vice President Finance for Mesa Power Group, responsible for the day-to-day operations of the company). The Respondent objected, stating that the applicable rules allowed for the nomination of only one party representative.

13. In the Tribunal's view, on the basis of paragraph 13.12 of PO 1 ("*a* witness of fact..."), each Party should be entitled to nominate only one Party representative. Thus, by **15 October 2014**, the Claimant should nominate either Mr. Pickens or Mr. Robertson as its party representative. The Tribunal does not believe that any prejudice would be caused to the Claimant by this ruling – Mr. Pickens or Robertson would only be excluded for the duration of the opening arguments and (in the case of Mr Robertson) the examination of Mr. Pickens.

14. No party representative has been nominated by the Respondent.

d. Rules applicable for examination/cross-examination of the witnesses and experts

15. In addition to the rules mentioned in PO 1, the following shall apply to the examination/cross-examination of witnesses and experts:

i. Direct examination may serve to address written or oral testimony provided after the expert/witness filed his/her witness statement or expert report; and

ii. Expert witnesses (i.e. Messrs Goncalves, Adamson, Timm and Low) may make a presentation as part of their direct examination summarizing their report, explaining their methodology and divergences with the opposing Party's expert(s), if any. This presentation shall not last more than 20 minutes.

e. Witness and expert document bundles

16. The Parties will prepare witness and expert bundles for each witness/expert containing the documents on which the witness or expert will be cross-examined. These bundles shall be handed over to the witness/expert, the Tribunal and Secretary, the court reporter, and the opposing Party prior to the examination of the witness/expert.

17. The Parties have agreed that they will not prepare a joint core bundle.

f. Tentative Schedule

18. The Parties shall liaise with each other and propose a tentative schedule for each witness/expert by **15 October 2014**. As a general rule, each witness/expert should be available for examination half a day before and after the time at which his/her examination is scheduled.

g. Other practicalities related to the examination of witnesses or experts.

19. On 12 September 2014, the Claimant requested that "all of Canada's experts and consultants called by the Investor (namely, Messrs Dorey, Goncalves and MacDougall) bring for examination a copy of their letters of engagement, any instructions issued by Canada with respect to their witness statements and their preparatory notes for their witness reports. It would be most practical if these documents were produced in

advance of the hearing, but the documents should be available to the witness for their cross-examination."

20. In this respect, at the second call, the Parties agreed that:

    i. By **10 October 2014**, they would exchange the engagement letters of their experts;

    ii. Documents relied on by the Parties' experts in their expert reports but not appended to the reports would be available at the hearing. The Claimant will liaise with the Respondent concerning any specific documents in this respect.

2. Opening/Closing Arguments

21. Each Party may present an opening statement, not to exceed two hours, out of which time may be reserved for rebuttal/sur-rebuttal. The time taken for oral arguments shall be counted towards the overall time allocation of each Party.

22. Each Party may present a closing statement not to exceed three hours, out of which time may be reserved for rebuttal/sur-rebuttal. The time taken for oral arguments shall be counted towards the overall time allocation of each Party.

3. Allocation of hearing time between the Parties

23. The Parties have agreed that they be allocated an equal amount of hearing time. Each Party shall have a total time allocation, including opening and closing statements, of 17 hours.[2]

4. Confirmation of the dates, location and schedule of the hearing

24. The hearing will be conducted on **26 October 2014 to 1 November 2014** at the Arbitration Place, Toronto. The closing statements will in principle take place on Saturday, 1 November 2014.

[2] 7 days x 5 hours for Party time = 35 hours, from which the Tribunal deducts 1 hour for the final procedural discussion, which makes 34 hours/2 = 17 hours each.

25. The hearing will start at 9:00 a.m. and end by 5:00 p.m. daily. There will be a one hour lunch break and one 15 minute break during each half day. The Tribunal may extend the hearing hours if necessary.

5. Arrangements to deal with Confidential/Restricted Access information at the hearing

26. In its communication of 9 September 2014, the Claimant proposed the following arrangement, with which the Respondent agreed:

> "a) A disputing party shall reasonably notify the Court Reporter before raising topics where confidential information could reasonably be expected to occur. Such discussion shall be beard in camera and the transcript shall be marked confidential.
> b) A disputing party shall reasonably notify the Court Reporter before raising topics where Restricted Access Information could reasonably be expected to occur. Such discussion shall be beard in camera, and those persons not entitled to hear such evidence shall be removed from the hearing room. The Court Reporter shall mark the transcript as Restricted Access Information."

6. Logistical Arrangements

27. The Parties agreed that they would liaise directly with the PCA and/or the Arbitration Place and/or the Secretary of the Tribunal in respect of the logistical arrangements for the hearing. The Parties are requested to provide the name of a contact person with whom the Secretary may coordinate in this respect.

a. Special equipment (i.e. for Power-Point presentations)

28. Large LCD monitors will be placed around the room rather than smaller monitors on the tables.

b. Documentary issues (copy of presentations; demonstrative exhibits)

29. The Parties may use both paper and electronic documents at the hearing. Further, they may use power point presentations for oral arguments or expert presentations, provided that a copy of the presentation is made available to the Tribunal and the Secretary, the court reporter, and the opposite Party before the presentation is used.

30. The Parties may use demonstrative exhibits. Such exhibits must (i) clearly identify the exhibits in the record which are the source of the information appearing in the demonstrative exhibit; (ii) not contain any information that is not on record; and (iii) be made available to the Tribunal and the Secretary, the court reporter, and the opposite Party as soon as practicable and in any event before the exhibit is used.

c. Broadcasting

31. The hearing will be broadcast via a closed-circuit video at a function room in a nearby hotel (such as the Trump hotel). The Arbitration Place will provide only one login for use at the room. A representative of the Arbitration Place will register attendees at the room.

32. After consultation with the Parties at the close of the hearing, the Tribunal will give directions in respect of the modalities of making the video recording of the hearing available on the PCA's website (timing, redaction of confidential information etc.).

d. Other logistical issues

33. The hearing room shall be arranged in accordance with the layout proposed by the Claimant on 9 September 2014.

34. The Secretary of the Tribunal shall meet one representative of each Party at the Arbitration Place on **25 October 2014 at 11:00 a.m.** to ensure that all the necessary arrangements have been made.

7. Post-Hearing Briefs

35. The Tribunal will consult the Parties and give directions in respect of the post-hearing briefs at the end of the hearing.

8. Miscellaneous

36. By **10 October 2014**, the PCA will enquire with the non-disputing NAFTA Parties whether they intend to attend the hearing. If needed, after consulting the Parties, the Tribunal will then issue appropriate directions.

37. By **15 October 2014** or as soon as practicable thereafter, the Parties should advise the Tribunal of any corrections in the written testimony of their witnesses/experts.

38. By **20 October 2014**, the Parties should provide their final list of participants at the hearing.

III. Production of "new" documents

39. In its letter of 8 September 2014, the Respondent made three suggestions in relation to the documents to be produced by it on 17 September 2014 ("the new documents").[3] First, it suggested that if a Party intended to use a new document at the hearing, it should submit that document to the other Party and to the Tribunal with an appropriate exhibit number by 1 October 2014. Second, it proposed an expedited procedure for settling any disputes about the confidentiality of the information in any such newly identified exhibits. Finally, it suggested that each Party should provide the Tribunal and the other Party with a CD-ROM containing all of the final public, confidential and restricted access versions of its exhibits by 27 October 2014. In response to the Claimant's arguments below, the Respondent submitted that it should be given an equal opportunity to introduce the new documents into the record.

40. At the second conference call, the Claimant opposed the Respondent's proposals. It pointed out that the new documents were produced by the Respondent because of the Tribunal's directions in Procedural Order No. 13 on the Claimant's document production requests. For the Claimant, these documents should have been produced earlier with the Respondent's written submissions, especially because of the Respondent's position that the documents requested by the Claimant were co-extensive with the Claimant's earlier document requests. Finally, the Claimant made its own proposal with respect to resolving disputes about the confidentiality of the information contained in such new documents.

41. The Tribunal recalls that in Procedural Order No. 7, it established a document production process under which both Parties were allowed to request documents from the other in respect of new issues arising in the Reply and the Rejoinder. The Tribunal did not impose any limitations on which Party could introduce into the record documents generated as a result of that document production process. Further, in PO 13, the Tribunal observed:

[3] The Tribunal understands that the Respondent's suggestions equally apply to the NextEra documents indicated in the Respondent's letter of 1 August 2014.

"The documents produced shall not be considered part of the record, unless and until *one of the Parties* submits them as exhibits [...] (emphasis added)"

42. The Tribunal does not see why the Claimant would be the only Party entitled to file new documents at this stage. The NextEra documents were available for production in the arbitration only in August 2014. Therefore, they could not have been introduced into the record with the Respondent's submissions. The other documents produced by the Respondent on 17 September 2014 concern new issues raised in the Reply and the Rejoinder. For the Tribunal to be fully apprised of the matters in dispute, it considers that both Parties should have an equal opportunity to submit new documents into the record.

43. In the circumstances, on the basis of the proposals made by the Parties during the conference call, the Tribunal establishes the following procedure:[4]

i. By **1 October 2014**, a Party intending to use a new document at the hearing should submit that document to the other Party and to the Tribunal with an appropriate exhibit number;

ii. By **10 October 2014**, the Party should (i) designate the information in the exhibit that it believes is confidential/restricted access; and (ii) explain why it believes its designation is appropriate (in the form of the table provided in Procedural Order No. 6, modified as necessary);

iii. By **10 October 2014**, the Claimant may challenge the designations made by the Respondent on 1 October 2014 in the table mentioned above;[5]

iv. By **15 October 2014**, the Respondent may challenge any designations made by the Claimant in the table mentioned above;[6]

v. By **20 October 2014**, the Tribunal will decide on the Parties' challenges. Given the short time available for this order and the proximity of the hearing, the order may be issued without reasons;

vi. By **23 October 2014**, each Party shall provide the Tribunal with a USB stick containing all of the final public, confidential and restricted access versions of its submissions, witness statements, expert reports and exhibits.

[4] The Tribunal already informed the Parties of items (i) and (ii) below in its letter of 26 September 2014.
[5] On 1 October 2014, the Respondent already (i) designated information in the exhibits it admitted into the record on 1 October 2014 as confidential/restricted access; and (ii) explained why it believed those designations were appropriate. As a result, in the interests of time, the Tribunal invites the Claimant to challenge any designations made by the Respondent by 10 October 2014.
[6] The Tribunal understands that additional designations will not be necessary.

IV. Witnesses to be called by the Tribunal

44. The Tribunal does not wish to call any witnesses.

V. Subsidy defence

45. At the second conference call it was agreed that:

i. the Claimant could introduce one document into the record with its comments on the Respondent's subsidy defence;
ii. the Claimant could examine witnesses and experts on the subsidy defence;
iii. the Parties would proceed on the basis of the Tribunal's ruling of 4 September 2014 (as clarified on 8 September 2014).

VI. Exhibits attached to the Claimant's response to the Article 1128 submissions of the non-disputing Parties

46. On 2 September 2014, the Respondent requested the Tribunal to strike from the record the exhibits that the Claimant attached to its response to the Article 1128 submissions of the non-disputing Parties. It submitted that the non-disputing Party submissions were limited to legal issues on the interpretation of the NAFTA. The Tribunal had contemplated "Observations" to be filed by the Parties on these submissions. Accordingly, the observations should be limited to the questions of law raised by the non-disputing Parties. The Claimant had thus wrongly annexed exhibits to its observations. Further, the Respondent pointed out that the Claimant could have annexed the very same exhibits to the Claimant's Memorial or Reply. The Claimant's strategy of submitting the new exhibits after the Respondent's final written submission meant that the Respondent's witnesses were prevented from offering any direct testimony about them.

47. On the Tribunal's invitation, the Claimant replied on 10 September 2014, emphasizing that "[it] was entitled to fully respond to the observations of the non-disputing NAFTA Parties". The Claimant's response constituted a "written submission" and the Tribunal had ruled that the Parties were to submit exhibits together with their written submissions. Further, all of the exhibits in question were relevant, and addressed legal issues arising from the Article 1128 submission of the U.S. Government. According to the Claimant, no prejudice was caused to the Respondent through the admission of the

new evidence, as all of the documents were, or should have been, in the Respondent's possession. The Claimant also pointed out that new exhibits had been admitted in previous NAFTA arbitrations in 1128 responses. For all these reasons, the Claimant submitted that the evidence should be left in the record. It further submitted that "[i]f Canada wishes to comment on these specific new exhibits, it should be entitled to do so within the next five days. Each side will also have the ability to examine on evidence that has been filed since the last pleading at the hearing."

48. The Tribunal understands that the non-disputing Parties have made legal submissions, and have not expressly commented on the facts in dispute. However, references to the underlying facts may be necessary in order to fully explain a legal submission. Further, the Tribunal had not imposed any limitations prohibiting the Parties from filing documents with their comments on the non-disputing party submissions. For these reasons, the Tribunal believes that it cannot strike from the record the exhibits attached to the Claimant's comments on the non-disputing party submissions.

49. This said, it is true that the Claimant has filed a large number of exhibits with its submission, specifically over 50. In the circumstances, it would be appropriate to give the Respondent an opportunity to comment on such exhibits – a possibility contemplated by the Claimant as well. Hence, if it so wishes, the Respondent may comment on the exhibits filed with the Claimant's "Response to the 1128 Submissions of the Non Disputing Parties" of 27 August 2014 by **10 October 2014**.

50. Finally, during the second conference call, the Claimant made some comments about the Respondent's compliance with PO 13, but made no request to the Tribunal in this respect.

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

Date: 3 October 2014

For the Arbitral Tribunal:

Prof. Gabrielle Kaufmann-Kohler
President of the Arbitral Tribunal