

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PCA Case No. 2012-17
AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES, 1976

BETWEEN:

MESA POWER GROUP LLC (USA)
Claimant

- and -

GOVERNMENT OF CANADA
Respondent

ARBITRATION HELD BEFORE

PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING ARBITRATOR)
THE HONOURABLE CHARLES N. BROWER,
MR. TOBY T. LANDAU QC
held at Arbitration Place, 333 Bay Street,
Suite 900, Toronto, Ontario on Monday,
October 27, 2014 at 9:13 a.m.

PUBLIC ONLY

VOLUME 2

A.S.A.P. Reporting Services Inc. © 2014
200 Elgin Street, Suite 1105 333 Bay Street, Suite 900
Ottawa, Ontario K2P 1L5 Toronto, Ontario M5H 2T4
(613) 564-2727 (416) 861-8720

1 APPEARANCES:

2 Barry Appleton For the Claimant

3 Dr. Alan Alexandroff

4 Kyle Dickson-Smith

Celeste Mowatt

5 Sean Stephenson

Edward Mullins

6 Sujey Herrera

7 Shane Spelliscy For the Respondent

Sylvie Tabet

8 Heather Squires

Raahool Watchmaker

9 Laurence Marquis

Susanna Kam

10 Rodney Neufeld

11

Also Present:

12

Alicia Cate

13 Jennifer Kacaba

Saroja Kuruganty

14 Lucas McCall

Alex Miller

15 Harkamal Multani

Darian Parsons

16 Adriana Perezgil

Melissa Perrault

17 Chris Reynolds

Cole Robertson

18 Sejal Shah

Michael Solursh

19 Mirrun Zaveri

20

21 Lisa Barrett, CRR, RMR, CSR, Court Reporter

22

23

24

25

INDEX

1		
2		PAGE
3	SWORN: LEE ALLISON ROBERTSON	5
4	EXAMINATION IN CHIEF BY MR. APPLETON	5
5	CROSS-EXAMINATION BY MS. SQUIRES	9
6	CROSS-EXAMINATION BY MR. WATCHMAKER	64
7	CONTINUED RE-EXAMINATION BY MR. APPLETON	94
8	FURTHER CROSS-EXAMINATION BY MR. SPELLISCY	114
9		
	SWORN: RICHARD JENNINGS	125
10	EXAMINATION IN-CHIEF BY MR. WATCHMAKER	125
11	CROSS-EXAMINATION BY MR. MULLINS	126
	CONTINUED RE-EXAMINATION BY MR. WATCHMAKER	216
12	FURTHER CROSS-EXAMINATION BY MR. MULLINS	222
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

Toronto, Ontario

--- Upon commencing on Monday, October 27, 2014

at 9:05 a.m.

THE CHAIR: So, I hope you are all doing fine and you are all ready to start Day 2 of this hearing. I am also greeting those who are participating from the viewing room.

We will start now with the examination of Mr. Robertson. Is there anything that needs to be mentioned before, in terms of organization or procedure, from Mr. Appleton's side? No. From Mr. Spelliscy's side? No. Fine, then we can proceed.

Mr. Robertson, good morning.

THE WITNESS: Good morning.

THE CHAIR: For the record, can you please confirm that you are Lee Allison Robertson, known as "Cole Robertson"?

THE WITNESS: I am.

THE CHAIR: You are Vice-president Finance for Mesa Power Group?

THE WITNESS: I was during the time of this hearing. I am now Managing Director of BP Energy Partners.

THE CHAIR: Thank you. You have given two witness statements in this arbitration, one dated

1 November 19, 2013 and the other one April 28, 2014 --

2 THE WITNESS: Correct.

3 THE CHAIR: -- is that correct? As
4 you know, you are here as a witness and as a witness
5 you have a duty to tell us the truth. Can you please
6 confirm that this is what you intend to do?

7 THE WITNESS: Yes, ma'am, I will.

8 THE CHAIR: Thank you. And you also
9 know how we proceed, so I immediately turn to Mr.
10 Appleton for his direct question.

11 SWORN: LEE ALLISON ROBERTSON

12 MR. APPLETON: Thank you very, very
13 much, Madam President. If you can hear me? Thank you
14 very very much and, again, good morning to all those
15 watching this over by live feed.

16 EXAMINATION IN-CHIEF BY MR. APPLETON:

17 Q. Mr. Robertson, I'm going to ask
18 you just a few questions for the purpose of
19 introduction, and then Mr. Spelliscy or someone from
20 Canada will come up and ask you some questions after
21 that and of course, as you know, the Tribunal can ask
22 you questions at any time.

23 Now, you told us what your old title
24 was. You are currently the managing director of BP
25 Energy Partners?

1 A. That's correct.

2 Q. What's your role with the Mesa
3 Power Group; that's the investor in this arbitration?

4 A. Sure. I handled all the
5 financial analytics, as well as the day-to-day
6 operations of the company.

7 Q. Do you have any degrees or
8 certifications?

9 A. I do. I have a bachelors degree
10 in accounting and a masters degree in finance, both
11 from Texas A&M University.

12 Q. Now I see on October 15, 2014,
13 you filed some minor corrections to your witness
14 statement. Those were, if I recall, some
15 typographical errors and things like that; do you have
16 any further corrections to make to your witness
17 statements?

18 A. I do not.

19 Q. Could you tell us a little bit
20 about the Mesa Power wind team?

21 A. Sure. In addition to myself we
22 have Mark Ward. Mark has a background in power
23 development, both thermal and renewable, working with
24 companies like Entergy, which is a large utility in
25 the U.S., TXU who, at the time, was one of the largest

1 utilities in the country. He developed both -- like I
2 said -- renewable and thermal power projects and also
3 operated thermal and renewable projects, including the
4 Top of Iowa project, a wind power project.

5 We also had Ray Harris. Ray was the
6 head of renewables for TXU, before joining Mesa and we
7 had Mike Reid. Mike did both thermal and renewable
8 development and project management while at TXU before
9 joining Mesa, and we had a gentleman named Monty
10 Humble, who was our general counsel.

11 Q. How did your background add to
12 this team?

13 A. Yeah, we had very capable
14 engineers and project managers, with Mark, Ray and
15 Mike. We also had a very good general counsel, in
16 Mr. Humble.

17 My skillset on the finance and
18 accounting side was brought in to round out the team,
19 from a financial analytical perspective, as well as
20 bringing kind of an operational control into the
21 entity.

22 Prior to working at Mesa, I was at
23 Ernst & Young in the assurance practice. Part of --
24 one of my clients there was a group called Texas
25 Pacific Group, a very large private equity firm who

1 looked at and did acquisitions of utilities in and
2 around the U.S. and I worked on those transactions as
3 a member on the consulting side for Ernst & Young with
4 our client, Texas Pacific Group.

5 Q. Mr. Robertson, what was Mesa's
6 plan, if it had been successful about obtaining a FIT
7 contract or contracts?

8 A. Sure. Had we obtained the
9 Feed-in Tariff contracts, we would have outsourced the
10 construction to an outside -- EPC, engineering,
11 procurement construction firm.

12 We'd also have brought on additional
13 people for construction management, and then we would
14 have brought on operational folks as well, both under
15 the Mesa team and outsourced to operation groups,
16 which is typical in the structure of our type of
17 finance entity, where you bring in -- or you outsource
18 to third parties operations and management of the wind
19 farm.

20 Q. Would Mesa operate the wind
21 facility itself or would someone else be doing that?

22 A. We had a broad mandate at Mesa,
23 as far as being able to sell projects or operate
24 projects, depending on where they were in the life
25 cycle.

1 Our goal was to create the highest
2 equity return on an internal rate of return basis, or
3 percentage basis, for our equity provider,
4 Mr. Pickens. So, we could either sell projects in the
5 development stage. We could sell projects in the
6 construction phase or we could own and operate those
7 projects.

8 The attractive power rate that was
9 given in the FIT Program, along with the 20-year
10 contract, provided a very nice internal rate of return
11 for the equity provider, and we intended to own and
12 operate the projects in Ontario, had we received
13 a Feed-in Tariff contract.

14 Q. Thank you, Mr. Robertson. Do you
15 have anything else to add right now?

16 A. I do not.

17 Q. Great. Well, I'd like to turn
18 you over to Canada.

19 CROSS-EXAMINATION BY MS. SQUIRES:

20 Q. Can you hear me okay?

21 A. We're great. I don't need
22 a hearing aid. Not yet.

23 Q. Not yet, right, for both of us.

24 MR. BROWER: Unless you live to be

25 114.

1 BY MS. SQUIRES:

2 Q. That's what we're aiming for.

3 Good morning, Mr. Robertson.

4 A. Good morning.

5 Q. My name is Heather Squires, and
6 I'm counsel for Canada in this arbitration.

7 I'm going to be asking you a series of
8 questions regarding your part of the testimony, in
9 connection with this dispute and when I'm done my
10 colleague Mr. Watchmaker is going to ask you some
11 other questions about the remainder of your testimony.

12 If you don't understand what I ask
13 you, please stop me and I'll clarify. It is important
14 that we both understand each other, so feel free. In
15 this regard, I also ask that if my answer to my
16 question is "yes" or "no" that you state that first,
17 and then I'll give you the proper time to provide the
18 context or further explanation for your answer, but
19 for the record, it would be easier if we had the "yes"
20 or "no" first.

21 A. Okay.

22 Q. Please let me know if you need to
23 take a break. This may take a little while, as you've
24 probably been told. We can find the appropriate time
25 to do so, if you do need that break.

1 Now, Mr. Appleton has been through a
2 few questions with you this morning about your
3 experience and your education, but for the record I'd
4 like to go through a couple more questions in that
5 regard.

6 Now, at the time of your applications
7 and the time of your witness statements, you were the
8 Vice-president of Finance for Mesa Group; correct?

9 A. That's correct.

10 Q. And you were in that position
11 since 2008; correct?

12 A. That's correct.

13 Q. And in that position you were in
14 charge of the day-to-day operations of Mesa Power?

15 A. That's correct.

16 Q. And in that position you also
17 oversaw the financial reporting of the company;
18 correct?

19 A. That's correct.

20 Q. And prior to taking this position
21 at the Mesa Power Group, you worked at Ernst & Young
22 in their asset management practice; correct?

23 A. Their assurance practice and the
24 sub-division of asset management, correct.

25 Q. So then your job with Mesa

1 Power Group was your first time being directly
2 employed by an energy company; correct?

3 A. That is correct. I had clients
4 in the Entergy space at Ernst & Young, but it was my
5 first time being directly employed by an energy
6 company.

7 Q. Let's now talk about the Mesa
8 group, and I'd like to take you to volume 1 of your
9 binder.

10 A. Okay.

11 Q. And you can turn to tab 24 and
12 for the record that's Exhibit C-055. So, this is the
13 corporate organizational chart of the Mesa group;
14 correct?

15 A. It is.

16 Q. And the entities which applied to
17 the FIT Program are the four entities that are listed
18 there at the bottom of the chart; correct?

19 A. That is correct.

20 Q. And the companies that are
21 controlling these entities, are those above them on
22 the chart; is that correct?

23 A. It all rolls up to Mesa
24 Power Group, yes.

25 Q. And at the time of the FIT

1 applications, AWA was a joint-venture between GE
2 Energy and Mesa; correct?

3 A. At the time of the...?

4 Q. Of the FIT applications.

5 A. FIT applications, yes.

6 Q. Now while we have these corporate
7 structures in mind, I'd like to turn you to the
8 claimant's reply memorial at paragraph 102. I believe
9 a copy has been provided to you.

10 A. I'm sorry, what paragraph?

11 Q. Paragraph 102.

12 MR. BROWER: Is that in the --

13 MS. SQUIRES: In the reply memorial.

14 The claimant's reply. No, I'm sorry. I can give
15 everyone a minute to get there.

16 THE CHAIR: Yes.

17 BY MS. SQUIRES:

18 Q. Now, Mr. Robertson, this

19 paragraph lists the Applicant's control group of the
20 investors TTD project, as consisting of Mesa
21 Power Group, Mesa Wind, AWA, AWA TTD Development,
22 Twenty-Two Degrees Holdings and TTD Wind; correct?

23 A. Yes.

24 Q. And that paragraph also indicates
25 that this is the Applicant Control Group for the

1 purposes of the FIT roles; correct?

2 A. It does.

3 Q. All right. So I'd like to talk
4 now about Mesa's investments in Canada, specifically.

5 Now, Mesa's first investments were
6 incorporated in Canada in November 2009; correct?

7 A. We actually made an investment in
8 Canada through the Twenty-Two Degrees project. We
9 closed on that acquisition in August of 2009.
10 I believe it was middle of the month. I don't
11 remember exactly what date. But that's when we
12 purchased the Twenty-Two Degrees asset. We paid
13 equity capital for the investment, started development
14 with an intent of filing FIT applications in November.

15 Q. But they were incorporated in
16 Canada in November 2009; correct?

17 A. I believe Twenty-Two Degrees --
18 Arran, I think, was November 2009. I'm fairly certain
19 that Twenty-Two Degrees was incorporated as an Alberta
20 ULC in August of 2009.

21 Q. Let's have a look at the
22 incorporation certificates for both of those entities.

23 A. Okay.

24 Q. And you can turn to tab 5 and 6
25 in your binder. One is TTD and one is Arran.

1 So on both of those documents, it
2 indicates that the date of incorporation is November
3 17th, 2009 for both; correct?

4 A. Yes, it looks like it was for the
5 Alberta incorporation. I do know we purchased the
6 Twenty-Two assets, had a closing in August, but it
7 looks like the certificate of incorporation for the
8 ULC was in November.

9 Q. Now, for the Summerhill and North
10 Bruce projects, Mesa's investment, the incorporation
11 was April 2010; correct?

12 A. I don't remember the date of the
13 incorporation. That sounds about right.

14 Q. Now, the FIT applications for the
15 TTD and Arran projects were filed in November 2009;
16 correct?

17 A. They were.

18 Q. And for the Summerhill and North
19 Bruce projects in May of 2010; correct?

20 A. That is correct.

21 Q. So, I'd like to turn now to
22 Mesa's FIT applications themselves.

23 A. Okay.

24 Q. You previously mentioned that you
25 were in charge of the day-to-day operations of Mesa

1 Power, so you were in this position during the
2 preparation of these applications; correct?

3 A. Yes, myself and Mark Ward, yes.

4 Q. So you were in this position on
5 the day the TTD and Arran FIT applications were
6 actually filed on November 25th, 2009?

7 A. Yes.

8 Q. So, you're familiar with what was
9 contained in the FIT applications for these projects;
10 correct?

11 A. I am.

12 Q. And then you are also familiar
13 with the FIT Rules; correct?

14 A. I am.

15 Q. And you would agree that to be
16 successful in the FIT Program, one would have to
17 comply with the FIT Rules; correct?

18 A. Comply with the FIT Rules, yes,
19 I think that is a requirement.

20 Q. Now I'd like to take you to
21 paragraph 25 of your first witness statement.

22 A. Can you point me in the direction
23 of that?

24 --- (Off-record discussion)

25 MR. APPLETON: It is in the binder at

1 tab A.

2 THE CHAIR: While we are looking for
3 this, you speak very fast. You know, sometimes
4 I struggle.

5 MS. SQUIRES: I apologize. I'll slow
6 it down.

7 THE CHAIR: I know that you are under
8 time pressure, but...

9 MS. SQUIRES: I am from the east coast
10 of Canada, where we speak very fast, so I will tone it
11 down for you. All right.

12 Q. Are we there, Mr. Robertson?

13 --- (Off-record discussion)

14 BY MS. SQUIRES:

15 Q. Have you got the paragraph there,
16 Mr. Robertson?

17 A. Give me just a second to get
18 familiar with it.

19 Q. Yes, no problem. Paragraph 24
20 and 25.

21 A. 24?

22 Q. 25 specifically.

23 A. Okay.

24 Q. So here you confirm that:

25 "Mesa believed that to ensure

1 a competitive application, it
2 needed to follow the letter
3 and the spirit of the FIT
4 Rules..." [As read]

5 Correct?

6 A. Yes.

7 Q. All right. Now I'd like to take
8 you to the FIT Rules and you can turn to tab 9 in your
9 binder in volume 1. Just for the record we're going
10 to be referring to volume 1 in the course of my
11 questions.

12 Volume 2 is for my colleague
13 Mr. Watchmaker, so if you want to set volume 2 aside,
14 it's okay.

15 A. What tab was that, I'm sorry?

16 Q. Tab 9, it is Exhibit R-003.

17 A. Okay.

18 Q. We're going to turn to Section 2.
19 Now, this section contains requirement for eligibility
20 for the FIT Program; correct?

21 A. That's what it says here, yeah.

22 Q. So, to be eligible for the FIT
23 Program and to be eventually be considered for
24 a contract you would have to meet these requirements;
25 correct?

1 A. I would assume so. I'm not
2 familiar with all the rules in here. I read them at
3 one time, but I don't have them memorised.

4 Q. Right, but that would be your
5 understanding, based on the title of the section.

6 A. Correct.

7 Q. Let's skip ahead to Section 3,
8 specifically Section 3.1. And that section contains
9 further requirements on what was to be submitted with
10 an application; correct?

11 A. Again, I don't remember
12 everything in the Section. If you'd like for me to
13 read it I can or -- it says "Application materials."

14 Q. Right. So, you confirm based on
15 the title that it says "Application materials". These
16 are the materials that you would have included with
17 your application?

18 A. That is what it says.

19 Q. Now, for an application to be
20 complete, you would have to meet each of the
21 applicable requirements in Section 2 and 3 then;
22 correct?

23 A. For an application to be
24 complete. I think this refers to the basic
25 eligibility requirements and the application

1 requirements. I'm not sure it says to be complete.

2 Q. Well, let's just turn to
3 Section 4. And Section 4 deals with application
4 review and acceptance; correct?

5 A. It does.

6 Q. And under Section 4.1(a) in the
7 first sentence it indicates that:

8 "Only after an application
9 has successfully met the
10 requirements in both
11 Section 2 and 3, that
12 an application would be
13 considered for a FIT
14 contract..." [As read]

15 Correct?

16 A. I don't know. I'd have to read
17 that. I'm sorry, let me --

18 Q. That's okay.

19 MR. BROWER: Sorry, did you say
20 4.1(a)?

21 MS. SQUIRES: 4.1(a), yes.

22 THE CHAIR: What's the number you were
23 referring to because I can't find it.

24 BY MS. SQUIRES:

25 Q. I'm sorry, it's 4.2. So it's

1 4.1(a), the first sentence says:

2 "Applicants who wish to
3 participate in the FIT
4 Program shall submit
5 an application to the OPA in
6 accordance with instructions
7 posted on the website from
8 time to time, together with
9 all documents required to
10 establish that the Applicant
11 has satisfied all the project
12 and application eligibility
13 criteria set out in sections
14 2 and 3 respectively." [As
15 read]

16 A. Okay, so what was the question?

17 Q. So, to confirm that you would
18 have to meet the requirements of Section 2 and 3 to be
19 considered for a FIT contract?

20 A. I think what it says is that you
21 have to submit an application in accordance with the
22 instructions posted on the website from time to time,
23 and that the Applicant has satisfied all of the
24 project and application eligibility criteria set out
25 in Section 2 and 3.

1 If that means -- I'm not here to
2 interpret it, that means completing them. It just
3 says that "you have satisfied."

4 Q. So you do have to show that
5 you've satisfied those requirements.

6 A. I think you'd have to show that
7 you've satisfied, is what the document says.

8 Q. Now, if we turn to Section 4.2(b)
9 on the next page, here it indicates that:

10 "The OPA reserves the right
11 but is not obliged (sic) to
12 request clarification of
13 additional information in
14 relation to the application
15 at any time." [As read]

16 Correct?

17 MR. BROWER: "Obligated".

18 MS. SQUIRES: "Is obligated to,"
19 apologies.

20 THE WITNESS: It does say that, yes.

21 BY MS. SQUIRES:

22 Q. And as the OPA is not obligated
23 to reach out, an Applicant could not expect that they
24 would; correct?

25 A. It doesn't talk to whether they

1 should or shouldn't. It just says they reserve the
2 right.

3 Q. Right. You agree that they are
4 not obliged to reach out; they are not obligated to?

5 A. It just says it's not obligated
6 to. I mean that's -- I understand what it says in the
7 rules.

8 Q. Now, when the TTD project
9 application was submitted, it did not meet these
10 requirements because of issues of TTD's letter of
11 credit, which was required under Section 3.1(b) of the
12 rules; correct?

13 A. We did receive correspondence
14 back from the OPA requesting clarification on our
15 letter of credit and, as we heard from Mr. Spelliscy
16 yesterday, 95 per cent of the applicants had some
17 issue like letters of credits that needed to be
18 clarified with the applications.

19 Q. So, let's just turn to the
20 correspondence you had with the OPA in that regard and
21 you can turn to tab 10 in your binder and that's
22 Exhibit R-134. We're going to turn to page 3 at the
23 bottom of the page. Here is where the OPA is seeking
24 information from Mesa, in relation to its letter of
25 credit; correct?

1 A. Can you point me to exactly what
2 we're talking about?

3 Q. Just towards the bottom of the
4 page there, the words "Letter of credit" appear. It's
5 highlighted. It's going to be highlighted on the
6 screen there for you, if that makes it easier.

7 A. Okay.

8 Q. Now, it specifically states that
9 a number of changes to this letter of credit are
10 required in order for the application to be approved;
11 is that correct?

12 A. It does say that, yes.

13 Q. So, the letter as credit as
14 originally submitted then did not meet the
15 requirements of Section 3; correct?

16 A. Of Section 3 of the --

17 Q. Of the rules?

18 A. Section 3 in the rules. That was
19 tab 7.

20 Q. Tab 9. 3.1(b).

21 A. Doesn't look like from the
22 paragraph that you've highlighted, that it explains
23 what was not acceptable at that time, based on 3.1(b).

24 Q. Right. It doesn't explain
25 exactly what was missing, but it does indicate that

1 additional information is required for your
2 application to be approved; correct?

3 A. Yeah, I think additional
4 information is different than it not being sufficient.

5 Q. But you do agree that they're
6 indicating to you that your application won't be
7 approved, if you don't provide this additional
8 information; correct?

9 A. Yes.

10 Q. And then the OPA reached out for
11 this information; correct?

12 A. They did.

13 Q. Now, when the TTD project
14 application was submitted it also did not meet the
15 requirements of Section 3 because of issues with its
16 selected connection-point; correct?

17 A. I don't recall that. Can you...

18 Q. Yeah, we can go back to the web
19 to look at tab 10, the document we were just looking
20 at.

21 A. Okay.

22 Q. Exhibit R-134. And we'll look at
23 page 2, specifically, at the top of the page, it will
24 be highlighted on the screen here for you, as well.

25 Now, here the OPA is looking for

1 information, again, but this time with respect to
2 TTD's connection-point; correct?

3 A. I'm sorry, just give me a second
4 to familiarize myself.

5 Q. Yeah. Absolutely.

6 A. Looks like there was some
7 clarification needed on the 230 kV at Seaforth
8 transmission station.

9 Q. Right. It indicates that the TTD
10 application selected a connection-point at that
11 transmission station, but that connection-point did
12 not exist; correct?

13 A. I think what it's -- my
14 interpretation of what it says is that we selected the
15 230 kV at Seaforth, but that it could have -- the
16 email said that the 230 kV in the area of Seaforth, so
17 it looks like a small change, yes.

18 Q. Now, the OPA again reached out
19 for this information; correct?

20 A. It appears that way. I do not
21 recall this communication. I recall the LC. I do not
22 recall this, but it appears that way.

23 MR. LANDAU: Forgive me for
24 interrupting. I just wanted to put this in context.
25 Just to understand, what was your involvement at the

1 time with these kinds of exchanges?

2 THE WITNESS: Sure.

3 MR. LANDAU: We see here that the
4 recipients of these messages are Chuck and M. Ward.

5 THE WITNESS: Sure.

6 MR. LANDAU: Just briefly if you could
7 put this in context.

8 THE WITNESS: Absolutely. Mr. Edey --
9 Chuck Edey was our contracted developer on the project
10 through a company called "Leader Resources" and they
11 developed numerous projects in Ontario. So, he was
12 our contracted developer.

13 Mr. Ward was a -- my partner at Mesa,
14 and handled more of the day-to-day development
15 activities, I should say, while I oversaw the
16 activities of the entire company, on things such as
17 this, as picking out the correct interconnect point or
18 clarifying the correct interconnect point from the
19 correspondents. Those did not come directly to me.
20 I was usually briefed if it was something of what we
21 saw as importance, but I was not directly on the
22 communication.

23 MR. LANDAU: But you had
24 a responsibility for the applications?

25 THE WITNESS: I did.

1 MR. LANDAU: Thank you. Sorry.

2 BY MS. SQUIRES:

3 Q. So I'd like to speak now about
4 the Arran application. And that's at tab 11 in your
5 binder.

6 A. Okay.

7 Q. The web toolkit. That's Exhibit
8 R-135. And the Arran application had an issue with
9 its site access documents and, in particular, the name
10 of the grantee; correct?

11 A. I don't recall that, but I'm sure
12 you can point me to it.

13 Q. I will do my best. We'll turn to
14 page 4 in that document. And at the bottom of the
15 page, it speaks to the name of the grantee under the
16 site access point; correct?

17 A. Where it says the name of the
18 grantee of the agreement is Echo Power and
19 international; is that --

20 Q. That's right?

21 A. -- what you're referring to?

22 Q. Yeah, that's what I'm referring
23 to.

24 A. Okay.

25 Q. So, it indicates that the site

1 access -- the document demonstrating site access
2 refers to Echo Power, and not the name of the
3 Applicant, Arran Wind; correct?

4 A. It does. The site access
5 documents that I believe you are referring to is the
6 land leases, the ability to then access the property
7 for permitting and for eventual construction of
8 a project, the land leases.

9 Echo Power is originally who had
10 developed the project. When we purchased the project,
11 we then transferred all of those leases over to the
12 Arran project ULC, but the name that was still on the
13 lease was the former -- the former entity.

14 Q. So I want to just turn back to
15 the FIT Rules for a second at tab 9 in your binder.
16 I'm going to be back to those rules quite a bit, so
17 I don't know if it's easier for you to take them out
18 of the binder to save yourself from flipping pages,
19 but we're going to look at specifically
20 Section 3.1(e).

21 Now, this section indicates that
22 an application must include evidence that the
23 Applicant has either title or right to site access;
24 correct?

25 A. It does.

1 Q. And the relationship between
2 Arran and Echo Power was not indicated in Arran's
3 application; correct?

4 A. I do not recall whether that was
5 in the application or not.

6 Q. You would agree that if that
7 relationship is not in the applications that the OPA
8 would not have evidence that Arran itself had the site
9 access rights; correct?

10 A. I'm not sure, in the application,
11 to explain the relationship, I -- we had transferred
12 the title and right of those leases from a legal
13 perspective from Echo in the closing of the
14 transaction, so I know from a legal perspective that
15 occurred. I don't know in the application, if it
16 specifically stated that information.

17 Q. Now, if we come back to the web
18 toolkit for the Arran project, Exhibit R-135 at tab 11
19 in your binders, I am just going to look at the top of
20 page 5, I believe. It also indicates that the Arran
21 application was missing a copy of the easements
22 referred to in Schedule 5 of its applications to
23 demonstrate site access; correct?

24 A. Not sure if it says that it's
25 missing. It just says "Please provide a copy of

1 easement A and B referred to in Schedule 5."

2 Q. So, we can infer though if
3 they're asking for a copy that they don't already have
4 one; correct?

5 A. I'm not going to make that
6 inference, but it just asks for a copy.

7 Q. But the OPA is reaching out for
8 this information --

9 A. Correct.

10 Q. -- correct? Okay, now, the Arran
11 application also had issues with its connection-point;
12 correct?

13 A. I don't recall.

14 Q. Well, let's just go back to
15 page 4.

16 A. Okay.

17 Q. No, right where you are, page 4
18 and above the Echo Power we were just discussing, it
19 speaks to under the name of circuit, it indicates
20 that:

21 "Mesa submitted its
22 applications and it requested
23 circuits B275 and B285." [As
24 read]

25 Correct?

1 A. Yes.

2 Q. And then the OPA asked you to
3 change this as B275 and B285 are not actual circuits.
4 The correct circuits end with the letter "s" and not
5 the number "5"; correct?

6 A. It appears there was a typo
7 between "5" and "S".

8 Q. Right. And then the OPA reached
9 out for this additional information and you provided
10 the information or someone from Mesa provided this
11 information; correct?

12 A. I'm sure -- I don't recall, but
13 I'm sure Mr. Edey who was the contracted developer,
14 provided the information.

15 Q. Let's look at page 3 and at the
16 end of it. At the bottom of the page, under the title
17 "Name of circuit."

18 It indicates that even after this
19 additional information was submitted, there was still
20 an issue with the name of the circuit that was
21 specified in the application; correct?

22 A. It looks like we -- based on the
23 information here, we corrected it to what the OPA
24 suggested --

25 Q. Right.

1 A. -- in the previous communication.

2 Q. Right. And there is further
3 communication on the connection-point; correct? It
4 indicates that the application specifies two circuits
5 instead of one, which was required for your
6 application to proceed properly; correct?

7 A. It says you may only have one
8 circuit listed, yes.

9 Q. So the OPA reaches out for you to
10 specify the one circuit; correct?

11 A. It looks that way, yes.

12 Q. Now there was an additional
13 problem with Arran's application, when it was
14 submitted because it also had a letter of credit
15 issue; correct, the same as the TTD project?

16 A. I recall the letter of credit,
17 yes.

18 Q. So the OPA then also reached out
19 for this information?

20 A. Yes.

21 BY MS. SQUIRES:

22 Q. Now, I want to speak about the
23 application, specifically, so in that regard, we are
24 going to go into a confidential session and we'll have
25 to cut the feed so ... I'll wait until that's done and

1 get the signal.

2 We're good to go.

3 --- Upon commencing the confidential session

4 at 9:40 a.m. under separate cover

5 --- Upon resuming in public session at 10:36 a.m.

6 BY MS. SQUIRES:

7 Q. Now I'd like to take a minute and
8 discuss some correspondence with the Ontario Power
9 Authority.

10 A. Okay.

11 Q. And on May 20th, 2011 Mesa wrote
12 to the OPA to inquire about its ranking; correct?

13 A. That sounds about -- it was
14 within that short timeframe. I don't -- if you have
15 it, I can turn to it but I think that's about the
16 right timeframe.

17 Q. It's at tab 14 of your binder,
18 but I would ask that the document not be put up on the
19 screen as it is a confidential document, but you can
20 use it to confirm the date, if you like.

21 A. Can I look at it?

22 Q. It is Exhibit C-0098.

23 A. There's the date.

24 Q. Now, prior to this with the
25 exception of the communication that Mesa had with the

1 OPA with respect to completeness and eligibility,
2 those discussions we had earlier this morning with the
3 web toolkit, Mesa never reached out to the OPA with
4 questions on the FIT Program or its rules; correct?

5 A. Chuck Edey who was our contracted
6 developer and in charge of some of the development
7 activities of the project, did have conversations with
8 members of OPA. I don't know that they were
9 documented in letters. Some were formal, some were
10 informal but he discussed with the OPA at different
11 times.

12 Q. But in your witness statement you
13 don't describe any other communications with the OPA;
14 correct?

15 A. I did not, no.

16 Q. And can you point, in the
17 exhibits that we have for this arbitration, any of
18 those communications that Mr. Edey had with the OPA,
19 other than the ones we discussed this morning?

20 A. There's been a lot of documents
21 in this case. I'm sorry. I do not recall if it's in
22 evidence or not. I do know that throughout the
23 process, he would have both informal and sometimes
24 more formal communications with members of OPA.

25 Q. Now, Mesa attended a webinar,

1 according to paragraph 37 of your witness statement,
2 if you'd like to turn there, a webinar hosted by the
3 Ministry of Energy on May 19, 2011 which discussed the
4 Economic Connection Test; correct?

5 A. Correct.

6 Q. But you're actually referring to
7 the OPA's presentation though, not the Ministry of
8 Energy's presentation; correct?

9 A. Possibly. I'd have to -- at the
10 time I recalled it being MOE because I know they
11 issued the directive. It might have been the OPA.

12 Q. I would refer you to the footnote
13 then of what you're citing to for that proposition?

14 A. Okay.

15 Q. I believe it says an OPA
16 presentation; correct?

17 A. Okay, then that should probably
18 be the OPA.

19 Q. Now, you attended this
20 presentation yourself; correct?

21 A. I believe it was a web
22 presentation but I have watched the web presentation.

23 Q. And you didn't attend any other
24 presentations yourself though; correct?

25 A. No, I attended some of the other

1 webinars from time to time.

2 Q. But you don't describe those in
3 your witness statement; correct?

4 A. I don't think those are described
5 explicitly in my witness statement. I'd have to --
6 I don't think so.

7 Q. So, I'm going to take a few
8 minutes now to discuss the 500 kV line and it's the
9 IESO, not the OPA that decides whether a FIT applicant
10 can ultimately connect to this line; correct?

11 A. I'm sorry, can you repeat the
12 question?

13 Q. So it's not the Ontario Power
14 Authority, it's the IESO, so the independent
15 electricity organisation, that ultimately decides
16 who -- if you can connect to the line.

17 A. I don't know how the
18 decision-making authority is made between the two.
19 I know there's input from both groups and I would
20 assume that it's a collaborative process. But I don't
21 know who has the ultimate decision-making authority on
22 that. I don't know.

23 Q. You do know that the OPA is the
24 one who determines whether there's sufficient capacity
25 at a connection-point then; correct?

1 A. Again, I think it's the IESO who
2 controls the transmission grid. I would assume that
3 it is a collaborative process between the OPA who is
4 handing out the contracts and the IESO who controls
5 the grid to see how much capacity is allowed at
6 certain points and who is allowed where. I would
7 assume that's a collaborative process. I don't know
8 who holds the ultimate decision-making. I don't know.

9 Q. Now, according to your witness
10 statement at paragraph 41, if you'd like to turn
11 there, it indicates that Mesa asked to connect to this
12 500 kV line prior to June 3rd and it was told, "No";
13 correct?

14 A. Yes, Mr. Edey had discussions
15 with the IESO back in 2007 and then again in early
16 2009 about connecting to the 500 kV and he had
17 represented to us that at both times he was told that
18 was not an option.

19 Q. But there are no documents on the
20 record which speak to those communications that
21 Mr. Edey had with the IESO; correct?

22 A. My testimony is that he had
23 represented to us that he had had those conversations
24 and was told "No."

25 Q. Now I'd like to turn to Exhibit

1 R-181 which is at tab 12 of your binder. This is
2 an email between yourself and Mr. Edey; correct?

3 A. Okay. I agree it's an email
4 between Mr. Edey and myself.

5 Q. And in that email you indicate
6 that Capital Power selected connection points B562L
7 and B563L; correct?

8 A. I believe I was relying on the
9 transmission availability tables that had been
10 published about a month before in December of 2010 to
11 come to that analysis. That was my own analysis.

12 Q. Sorry, to clarify, you are
13 referring to the December 21st, 2010 rankings, not the
14 TAT table; correct?

15 A. I don't remember which I was
16 referring to. This is my own assessment of one of
17 those two documents.

18 Q. Now, Mr. Edey confirms that these
19 points are on the 500 kV line; correct?

20 A. He does say that.

21 Q. And Capital --

22 A. Kind of.

23 Q. Sorry, I didn't mean to cut you
24 off.

25 A. I didn't really know what the

1 first part is of this thing but he does say it goes
2 into a 500 kV circuit.

3 Q. And Capital Power applied to
4 connect to this point during the launch period;
5 correct?

6 A. I'm not sure when they applied.

7 Q. Let's turn to tab 17 in your
8 binder, it's Exhibit C-0073. Apologies for the very
9 small font but we'll pull it up on the screen to make
10 it a bit easier for you.

11 A. Now you are making me feel like
12 Mr. Pickens.

13 Q. My eyesight is bad from looking
14 at this too. I'll just wait to get it on the screen.
15 Here we go. Now this is the December 21st, 2010
16 rankings; is that correct?

17 A. I don't see that reference on
18 here, but let's see.

19 I don't see a date but I will assume
20 that it is for the purposes of this examination.

21 Q. And this lists projects which
22 applied for the FIT Program between October 1st and
23 November 30th, 2009 that did not receive a FIT
24 contract?

25 A. Again, I don't see that on --

1 where...

2 Q. Now I'm doing the same then. So
3 note number 1, if we could move this screen up to the
4 first note.

5 A. This all -- list includes...?

6 Q. All launch period applications
7 submitted prior to December 1st, 2009 which are in the
8 FIT reserve awaiting ECT.

9 A. Okay.

10 Q. So they are the launch period
11 applications; correct?

12 A. That sounds correct, yes.

13 Q. And if we scroll down that first
14 page to the highlighted line there, at the project
15 ranked 224, it's Capital Power; correct?

16 A. Yes.

17 Q. And the connection points which
18 I've listed are the two we just discussed, B562L and
19 B563L; correct?

20 A. That's sounds --

21 Q. I've made that large for you.

22 A. I can refer back to the document.

23 I don't have it open but, yes, I would assume it is
24 the one that...

25 Q. If you want to refer back to the

1 document, it was tab 12.

2 A. 12, okay.

3 Q. Exhibit R-181.

4 A. Yes, those are right there.

5 Q. So to be on this ranking then you
6 would agree that Capital Power applied during the
7 launch period?

8 A. I don't know exactly when they --
9 this is what it says before December 1st, 2009 which
10 I think we're defining as the launch period, that
11 these were all the projects during that time, I think
12 you could make the assumption. I don't know when
13 Capital Power applied but I can see your logic and you
14 can make that assumption.

15 Q. So when Capital Power applied
16 then during the launch period, it applied to connect
17 to that 500 kV line; correct?

18 A. Again, I don't know what Capital
19 Power put in their application. I don't know if they
20 subsequently changed or modified the application.
21 I can't opine on what Capital Power did.

22 Q. Based on this exhibit then, it
23 appears that they've selected those connection points;
24 correct?

25 A. That is where they are slotted on

1 this, as of December -- what's the date?

2 Q. December 21, 2010.

3 A. 2010. That is where they're
4 slotted out at that time. I don't know what Capital
5 Power did before then.

6 Q. Now if we come back to tab 12,
7 Exhibit R-181, this email is dated January 21st, 2011;
8 is that correct?

9 A. It is.

10 Q. And Mr. Edey indicates that
11 connecting to the 500 kV circuit is not easy but does
12 not indicate that connecting is impossible at that
13 time; correct?

14 A. He does not say impossible. He
15 does say "Not easy."

16 Q. And he doesn't indicate that it's
17 not a valid connection-point for the purposes of the
18 FIT Program; correct?

19 A. He did not go into that detail in
20 this email and I'm not sure that I was asking for that
21 detail. I wouldn't have expected him to go into that
22 detail.

23 Q. But you do confirm the email does
24 not say that?

25 A. The email does not say that.

1 Q. Nor does this email demonstrate
2 that Mesa had any interest itself in connecting to the
3 500 kV line; correct?

4 A. Again, this email -- I don't see
5 why he would have responded with that information in
6 this email. I don't think I was asking for that
7 information, but you're right, it does not say it.

8 Q. So Mr. Edey confirms though in
9 that email that as long as Capital Power "Doesn't
10 change connection points" that Mesa" will be fine";
11 correct?

12 A. Yes, I mean we had done the
13 analysis of where we were in the ranking. We knew we
14 were 8 and 9 in the region and had the rule changed or
15 the directive not been published in June later that
16 year to allow the West-of-London projects to move into
17 Bruce, which was never contemplated in the rules, then
18 we would have been fine and we would have received
19 contracts.

20 Q. So, just that I understand, given
21 that -- Mesa Power is ranked 91 and 96 and then it's
22 in the interest of Mesa that Capital Power stay on the
23 line, as the rankings currently stood at that time?

24 A. I don't think what Capital Power
25 was doing here -- I think his response is it doesn't

1 matter to us because of where we were ranked. We were
2 ranked 8th and 9th in the region. Even by their own
3 rules, the ECT was going to be run on a region basis,
4 that's in the rules, and therefore we would have
5 passed because of the 700-megawatts of availability
6 even after the Korean Consortium was granted 500
7 earlier in 2010, in the Bruce region, even after that,
8 we still would have been fine had the directive of
9 NextEra not been made.

10 Now, if the Korean Consortium would
11 never have been allocated the 500 in the Bruce Region,
12 had you made the change to NextEra, I don't know what
13 would have happened. We would have had to see that
14 play out, or the change from west of London into
15 Bruce, but that's why we felt comfortable with where
16 we were at because of the rankings within the
17 Bruce Region and the fact that the ECT was going to be
18 run on a region basis as in the rules.

19 Q. Now let's turn to the June
20 3rd TAT Tables and that's at tab 28 of your binder and
21 it's at Exhibit C-0266 and we'll turn to the second
22 page.

23 It indicates there in the explanatory
24 notes that applicants should contact the IESO for
25 information regarding connections to the 500 kV

1 circuit; correct?

2 A. It does say that in note 3, yes.

3 Q. Now, Mesa didn't ask to connect
4 to this circuit after the June 3rd TAT Table was
5 published; correct?

6 A. I don't believe we did. And the
7 reason we didn't is we thought, through our analysis,
8 that there was sufficient capacity at our
9 interconnects for our projects to connect. So we
10 wouldn't have looked to change to the 500 kV if we
11 thought there was capacity based on this transmission
12 availability table at our interval connects.

13 Q. So Mesa was not interested in the
14 500 kV then?

15 A. I would say at this time, on June
16 3rd, 2011, when we had five days -- I mean, part of
17 what needs to be discussed at this point was the
18 five-day change window. Five days to change
19 an interconnect point is totally changing the
20 development of your project. You have to then get
21 right of way. You have to build -- you have to plan
22 to build an electrical transmission line to
23 a completely separate area than where you were
24 planning to interconnect.

25 You may have to have a different step

1 up transformer which is when you do a collection of
2 the wind farm electricity into one substation, you
3 then, to put it onto a different size line, you may
4 have to have a different transformer. There is a lot
5 of planning and development that needs to go into
6 changing your interconnect point, especially over
7 a distance. And to do that in five days' time, we did
8 not have that -- we did not feel that that was
9 anywhere near sufficient time to do that type of
10 planning and development to make that change.

11 Q. Yet earlier in your testimony you
12 did indicate that Mr. Edey was in discussions with the
13 IESO since 2007 and, in fact, as late as early as
14 2011; correct?

15 A. Not 2011. What I said was --

16 Q. Sorry, 2009.

17 A. Yeah, what I said was he had had
18 initial discussions in 2007 and 2009, but it did
19 not -- was not continued discussions. It wasn't
20 something that was ongoing -- I'm not sure of the
21 words you used, I don't have a transcript, but it
22 wasn't ongoing discussions. He asked at one time in
23 2007. He asked at one time in 2009.

24 Q. So, Mr. Edey then would have been
25 aware of what was involved in connecting to that line;

1 correct? He would have been aware of the technical
2 feasibility discussion that you just had at that time?

3 A. No, I think it goes -- it is
4 a much bigger process than having a discussion one day
5 and deciding "yes" or "no."

6 I mean there is a lot of electrical
7 planning that needs to go in to whether you connect to
8 a 500 kV line. That's a big line. It requires a big
9 step-up transformer to go in. It requires planning on
10 the right-of-way collection systems, making sure that
11 you are managing your upstream system of the
12 connection appropriately. No, I don't think that's
13 something you can do in five days or something he even
14 did at the time.

15 He was curious when he asked -- and
16 this is his representation to me -- he was curious
17 when he asked at the time whether it was possible and
18 was told "No" and so we no longer looked at that as
19 an option.

20 Q. But he was aware then that there
21 was a lot to go into to try and figure out even what
22 to do then to connect to the line?

23 A. Sure.

24 Q. He knew it was complicated
25 essentially?

1 A. I think connecting to a 500 kV
2 can be complicated. I think that's an appropriate way
3 to say it and five days' time is not appropriate time
4 in my view, to be able to do the planning and analysis
5 necessary to make that decision.

6 Q. Now you mention that Mr. Edey
7 made representations to you. Those are not on the
8 record; correct?

9 A. I believe my testimony is on the
10 record and that's -- I mean...

11 THE CHAIR: I'm not sure what
12 representations you have in mind.

13 MS. SQUIRES: He just referred to
14 representations that he had with Mr. Edey and I was
15 wondering if they were actually on the record.

16 THE CHAIR: What I understand is that
17 Mr. Edey, according to your testimony, had contacts
18 with IESO in 2007 and early 2009 about connecting to
19 the 500 kV line, and he was told "No." That is your
20 testimony?

21 THE WITNESS: That is my testimony.

22 BY MS. SQUIRES:

23 Q. So, we are going to go back into
24 a confidential session for a minute, if you could cut
25 the feed.

1 --- Upon commencing the confidential session
2 at 10:54 a.m., which is now deemed public

3 BY MS. SQUIRES:

4 Q. And I want to speak a bit about
5 the June 3rd direction that you referred to, the
6 Bruce-to-Milton allocation.

7 A. Okay.

8 Q. When Mesa applied to the FIT
9 Program there was zero capacity in the Bruce; correct?

10 A. There was discussion of the
11 Bruce-to-Milton line which we knew would free up
12 additional renewable capacity based on the nuclear
13 development that was going on Bruce nuclear station on
14 the west side of the region.

15 To say there was no capacity, I don't
16 know, I know that the OPA made a decision not to
17 allocate any contracts until that Bruce-to-Milton line
18 was -- had its final approvals and go ahead. I don't
19 know if electrically there was any capacity or not.
20 I don't know.

21 Q. So, apologies for turning you
22 back to the exhibit with very small font. We're going
23 to turn back to tab 17 and Exhibit C-0073.

24 A. Can I get this on the screen?

25 Q. Yeah, I think we're on it.

1 So, there's a line there in the gray
2 box that says:

3 "The area limit prior to TAT
4 for post-launch
5 applications 0MW.." [As read]

6 So zero capacity; correct?

7 A. (Reading):

8 "Area limit prior to TAT for
9 post-launch application:
10 0MW." [As read]

11 Okay.

12 Q. I want to look at the OPA's
13 presentation from March 23rd, 2010 and that's at tab
14 20 of your binder and that's Exhibit C-0034. Now you
15 don't refer to this presentation in your witness
16 statement; correct?

17 A. I don't believe I do.

18 Q. And let's turn to slide 14.

19 MR. APPLETON: Excuse me, are we off
20 the confidential side now?

21 MS. SQUIRES: No. I'm going to be
22 asking some questions in a second that relate to this
23 and that refers to a confidential document.

24 MR. APPLETON: I understand.

25 THE CHAIR: While we're --

1 MS. SQUIRES: We are confidential
2 right now.

3 THE CHAIR: I want to make use of this
4 interruption to say that we have going for about two
5 hours soon and I don't want to interrupt you in your
6 sequence of questions but you simply have this in mind
7 when it will get to a good time to break, it will be
8 good for the witness and --

9 MS. SQUIRES: I think I have about 20
10 minutes left and we could break perhaps after I'm done
11 and Mr. Watchmaker starts.

12 THE CHAIR: That may be a little long
13 and I know that 20 minutes is often a little bit more
14 and I'm looking at the court reporter.

15 MS. SQUIRES: So maybe after -- this
16 confidential session should last, at most, for ten
17 minutes and we can stop right when the confidential
18 session ends -- or we can break now.

19 THE CHAIR: We can break now before we
20 go into it. Does that make sense?

21 MR. APPLETON: I think before we
22 break, we just simply want to object to the fact that
23 if we're going to have confidential sessions, we'd
24 like for the confidential questions to come. We feel
25 otherwise, the public aren't able to hear and we think

1 the public have a right to know. So this is a public
2 document, a public webinar, and so we would -- I'm
3 sorry, I'm losing my voice as you can tell, so we
4 were --

5 MR. MULLINS: Our point is that we
6 think the culling out should be as limited as
7 possible. If it's a specific document that's
8 confidential, that's fine. I don't know where counsel
9 is going but she's put a document that is clearly
10 public and I'm concerned that we ought to work on both
11 sides. We will do the same on our side to make sure
12 that we try to leave the confidentiality as limited as
13 possible.

14 If there are public documents being
15 used, we should do that and just go on the record and
16 go off. I will tell you during our examinations they
17 will be broken up that way but there is no way we can
18 get around it. That is just an observation.

19 THE CHAIR: That is certainly right.
20 The rule is transparency and the exception is
21 confidentiality. So we should restrict the exception
22 as much as possible. When something is really
23 confidential then we should close the feed and
24 otherwise we should leave it open, absolutely.

25 MS. SQUIRES: That's fine. When we

1 come back after the break we can do this in the public
2 session and then I will ask for confidential
3 immediately prior to referring to the confidential
4 documents.

5 THE CHAIR: That's fine. And I should
6 ask you, Mr. Robertson, not to speak to anyone about
7 your testimony during your break, being what you have
8 said before or what you may say as we go ahead.

9 THE WITNESS: Yes, ma'am.

10 THE CHAIR: Thank you. So let us take
11 15 minutes and then we will resume at 11:15.

12 --- Recess taken at 10:59 a.m.

13 --- Upon resuming at 11:19 a.m.

14 BY MS. SQUIRES:

15 Q. I just have one final topic to
16 speak to you about, Mr. Robertson.

17 A. Okay.

18 Q. I'd like to point you to the
19 reply memorial and a copy has been provided to you,
20 I believe, it's this document right here.

21 A. We're not using this one?

22 Q. No. Sorry. And we're going to
23 turn to page 184.

24 MR. BROWER: What is it we're looking
25 at?

1 MS. SQUIRES: We are in the reply
2 memorial at page 184.

3 Q. Now this section indicates that
4 the claimant's position was that the connection-point
5 changes were not allowed between regions prior to the
6 June 3rd direction; correct?

7 A. Correct.

8 Q. And you confirmed that position
9 earlier for us today; correct?

10 A. I did.

11 Q. Now, I would like you to look in
12 your binder there at tab 26, come back to the witness
13 bundle, and that's Exhibit C-0666. We also have that
14 exhibit up on the screen.

15 Now, this is a map that was produced
16 by the claimant of various projects in the Bruce and
17 West-of-London Region; correct?

18 A. Okay.

19 Q. If we look at the bottom of the
20 map there, there's a dotted black line towards the
21 bottom left corner. And this is the division between
22 the Bruce and west-of-London area; correct?

23 A. Okay, I follow the map.

24 Q. If we look at the specific
25 projects then on the map, we can see that the TTD

1 project is the pink project there towards the middle
2 of the map; correct?

3 A. Yes.

4 Q. And the TTD project, as we've
5 already discussed was in the Bruce Region; correct?

6 A. Yes.

7 Q. And if we look two projects below
8 the TTD project, the blue project there is the Goshen
9 project; correct?

10 A. Okay.

11 Q. And the Goshen project was also
12 in the Bruce Region; correct?

13 A. It looks like a portion -- just
14 going by the map, a portion was in the Bruce Region
15 and a portion in the West-of-London Region.

16 Q. Well, if we quickly just turn
17 back to tab 17 in your binder. That's Exhibit C-0073,
18 that unfortunately small font exhibit.

19 A. Okay.

20 Q. And this is a list here of the
21 projects that were located in the Bruce Region and the
22 Goshen project is on this list; correct? It's number
23 1 there, I believe.

24 A. Okay.

25 Q. Now, I want to talk for a minute

1 about the Bluewater project and we'll come back to the
2 map at tab 26. Exhibit C-0066.

3 Now, the Bluewater project is the blue
4 project that's on the map just south of the TTD
5 project; correct?

6 A. By the map, yes.

7 Q. And it's located just north of
8 the Goshen project; correct?

9 A. By the map, yes.

10 Q. So it's sandwiched between two
11 projects in the Bruce Region; correct?

12 A. By the map, yes.

13 Q. So it's physically located,
14 according to this map, in the Bruce Region; correct?

15 A. I'm assuming the map is correct
16 so, yes.

17 Q. Now, the Bluewater project was
18 ranked in the West-of-London Region; correct?

19 A. Possibly. I don't -- is there
20 a ranking for those --

21 Q. Yeah, we can confirm. If we go
22 back to tab 17, Exhibit C-0073 and you turn to page 6,
23 and the third line item, I believe, is the Bluewater
24 project.

25 A. And this is the west of --

1 Q. It's the west-of-London
2 transmission area?

3 A. Yeah, well, I'm not sure why the
4 developer of that project had a -- submitted to the
5 west-of-London area if it's in the Bruce Region but it
6 appears to have done that.

7 Q. So the Bluewater project was
8 an enabler-requested project; correct?

9 A. I have no idea.

10 Q. So if we look back at that small
11 font and we scroll over to the right for the Bluewater
12 project, it indicates there under "Connection-point"
13 that it's enabler-requested.

14 A. Okay.

15 Q. So the OPA, when they're placing
16 projects in regions, if you are enabler-requested,
17 they do it based on project location, correct, because
18 they don't have a connection-point; correct?

19 A. I don't know. I'm not sure on
20 that.

21 Q. But we do confirm, at least, that
22 they are ranked in the West-of-London Region?

23 A. It looks like they were ranked in
24 the West-of-London Region and I'm assuming that the
25 developer chose to be in that region for some reason.

1 I can't tell you why they would have chosen -- if
2 their project is in the Bruce Region, why they would
3 have chosen to be ranked in the West-of-London Region,
4 I don't know.

5 Q. So, I want to just come back to
6 the map. Under your understanding of the FIT Rules,
7 in terms of selecting connection points, the Bluewater
8 project then should be limited to connecting only in
9 the West-of-London Region, even though -- as a cluster
10 facility because it's enabler, simply because the OPA
11 was the one that placed them in that region; correct?

12 A. I have no idea if the OPA placed
13 them in that region or they placed themselves in that
14 region. I have no idea of the history on that
15 project. I can't speculate on that. It looks like
16 they're in the West-of-London Region and then by the
17 rules, as in Section 5 of the rules, it states that
18 the ECT will be run on a region basis. I believe it's
19 Section 5.4(a) says:

20 "The Economic Connection Test
21 will be run for each region
22 of the province at least
23 every six months." [As read]

24 So I can't tell you why that project
25 was in the West-of-London Region if it was physically

1 located in the Bruce Region. You would probably need
2 to ask the developer of that project.

3 Q. Just give me one second there,
4 Mr. Robertson.

5 Mr. Robertson, you do understand in
6 your FIT application, you just specified
7 a connection-point, not a region; correct?

8 A. And our connection-points were in
9 the Bruce Region.

10 Q. But you specified merely the
11 connection-point itself, not a region; correct?

12 A. I would have to go back and
13 review the Feed-in Tariff applications. I don't
14 remember. I don't know if we specified a specific
15 region or not. I would assume that where your
16 connection-point is located is based on region, so
17 therefore you're selecting. I don't know.

18 Q. But you do confirm that
19 enabler-requested projects do not select
20 a connection-point?

21 A. I do not know that because we did
22 not select enabler-requested. We selected specific
23 connection-points within the Bruce Region. I do not
24 know if enabler-requested -- I don't know how -- I did
25 not go down that process.

1 Q. Let's come back to the map again
2 for a second.

3 A. I'm sorry, give me the tab again.

4 Q. I'm getting it for you there. It
5 is tab 26, Exhibit C-0666, for the record.

6 A. Okay.

7 Q. So, you'll see there at the east
8 end of the Bluewater property, there's a transmission
9 station called the Seaforth Transmission Station;
10 correct?

11 A. Yes, I see that.

12 Q. And it's electrically in the
13 Bruce Region; correct?

14 A. By the map, yes, I agree.

15 Q. So your position then is that the
16 Bluewater project would not be able to connect to the
17 Seaforth Transmission Station even though it borders
18 their project; correct?

19 A. Again, Ms. Squires, I have no
20 involvement in the development of the Bluewater
21 project at all. I have no idea why they chose enabler
22 line and why -- I have no idea, so I can't answer any
23 specific questions about the Bluewater project, other
24 than what is listed on the tables which was they were
25 in the West-of-London Region.

1 Q. Right, and I'm asking more for
2 your interpretation of the FIT Rules versus
3 Bluewater's intention in selecting their project
4 location, and given that Bluewater is located in the
5 West-of-London Region in the rankings they would not
6 be able to connect to the Seaforth Transmission
7 Station; correct?

8 THE CHAIR: I think it is difficult to
9 ask this question from Mr. Robertson who was not
10 involved in the Bluewater project. I mean, we can
11 read the map, but beyond that, I don't think that
12 Mr. Robertson can help.

13 MS. SQUIRES: Right.

14 Those are all the questions that
15 I have, Mr. Robertson, and I believe Mr. Watchmaker
16 has several more for you.

17 MR. APPLETON: Madam President, before
18 we begin, it is most unusual to have two counsel do
19 a witness. We're prepared to accept this obviously,
20 if in fact the same indulgence is given to us, but it
21 is a very unusual situation and we want to make sure
22 that there's no repetition caused by the change of
23 counsel because that would be very unfair to
24 the witness.

25 THE CHAIR: Yes, sometimes, indeed, it

1 is considered that it should be just one counsel who
2 does the cross-examination and other times it's not
3 objected to that there are two counsel.

4 We will, of course, apply the same
5 rule to both parties and, indeed, we should have no
6 repetition. But, as I understand it, just from the
7 binder organisation, it should be different topics --
8 is that the idea, Mr. Watchmaker?

9 MR. WATCHMAKER: They will, indeed be
10 different topics. I may refer to an exhibit in the
11 binder that Ms. Squires has already put to
12 Mr. Robertson, volume 1, but it will be related to
13 a different topic.

14 THE CHAIR: So the binder is just
15 an illustration of the topics so I understand it is
16 different topics because that is what matters.

17 MR. WATCHMAKER: Correct.

18 THE CHAIR: Thank you.

19 THE WITNESS: Mr. Watchmaker, before
20 we proceed. The Feed-in Tariff Rules, do I need to
21 put them back in this binder or keep them out?

22 MR. WATCHMAKER: I think you will be
23 pleased to hear that you should not need the
24 Feed-in Tariff Rules.

25 THE WITNESS: And what -- is that

1 tab 9?

2 MR. WATCHMAKER: I think we'll also
3 spare your eyes a bit.

4 THE WITNESS: But no promises.

5 MR. WATCHMAKER: It depends how you
6 respond.

7 CROSS-EXAMINATION BY MR. WATCHMAKER:

8 Q. Mr. Robertson, my name is Raahool
9 Watchmaker. I am counsel for Canada.

10 I'm going to ask you a few questions
11 about topics in your witness statements not covered by
12 Ms. Squires this morning.

13 A. Okay.

14 Q. And I'd like to make sure that
15 you've now got both volumes of your binders free?

16 A. I do.

17 Q. Mr. Robertson, I'd like to
18 discuss with you Mesa's Pampa project briefly.

19 A. Okay.

20 Q. And if we turn to paragraph 18 of
21 your reply witness statement.

22 A. Page 18 or paragraph?

23 Q. Paragraph 18. You mention
24 several factors leading to Pampa's demise here, and
25 I'd just like to turn to a few of them. If

1 I understand your testimony here, Pampa faltered for
2 a number of reasons. First, you say that the Global
3 Financial Crisis resulted in a steep decline in energy
4 demand. You also say that natural gas prices
5 declined. And you say that it became difficult to
6 obtain debt financing; is that right?

7 A. Well, I would not say that the
8 Pampa project faltered, I think is the word you used.
9 We delayed the project because of several factors that
10 I covered in my testimony earlier, relating to the
11 decline in energy pricing, specifically in the market.

12 As I state in my witness statement, it
13 was, as I think most people in the room, especially
14 the tribunal understands, the global debt crisis of
15 2008 and 2009 did make it difficult to finance a lot
16 of different types of projects, so those were all
17 constraints for that project, but I wouldn't say
18 that -- as I testified earlier, I think that it
19 delayed that project significantly.

20 Q. Nevertheless, Mr. Pickens
21 yesterday -- and you heard his testimony, he did say
22 that it was not ultimately successfully developed and
23 made operational; correct?

24 A. And in my testimony earlier this
25 morning, you know, I gave the definition of

1 "successfully developed" a little differently than he
2 did. I think he was -- I don't want to opine on what
3 he was thinking, it's hard to do but, in my opinion,
4 I think it was a successful development. It did not
5 reach commercial operation, if that's what you're
6 asking.

7 Q. But you will also agree with me
8 that Mr. Pickens' testimony yesterday that a lack of
9 transmission capacity was also a major factor in what
10 happened with Pampa; right?

11 A. And as I testified, I actually
12 differ with him slightly on that. As I testified this
13 morning as well, we were looking at building our own
14 private transmission line. He did not reference that
15 in his reply. From the project site to interconnect
16 directly, there was transmission constraints but that
17 the building out of our own private transmission line
18 was an option that we were considering.

19 Q. Maybe we could turn to tab 12 of
20 volume 2 of your binder. This is Exhibit DRG-86.

21 A. Uh-hmm.

22 Q. This is a press clipping from
23 July 7, 2009; do you see that?

24 A. I do.

25 Q. And it reports in the first

1 paragraph that:

2 "...Mesa Power was scrapping
3 the Pampa project due to
4 transmission issues." [As
5 read]

6 Do you see that?

7 A. I see it but it does not appear
8 to be a direct quote from myself, from Mr. Pickens or
9 anyone else at Mesa.

10 Q. If you go down to the fourth
11 paragraph it explains that:

12 "Like many planned wind
13 projects, Pampa Wind Farm has
14 been nixed due to lack of
15 transmission to the proposed
16 site." [As read]

17 Do you see that?

18 A. I do.

19 Q. It goes on:

20 "But Mr. Pickens said he
21 would construct his own
22 transmission line, but it was
23 a little more complicated
24 than we thought." [As read]

25 Do you see that?

1 A. I do, and I don't agree with the
2 characterisation of the article that it had been
3 nixed. We still had wind leases and we were still
4 developing -- collecting wind data at that point in
5 time as of July 7, 2009. So I don't agree with the
6 characterisation of the article that it had been
7 nixed. I will agree that the transmission lines, as
8 Mr. Pickens stated, was a little more complicated than
9 we thought. As I have already talked about in
10 relation to the Ontario project --

11 (Court reporter appeals.)

12 A. It was a little more complex.
13 Building transmission is difficult. And so building
14 long transmission projects can be difficult. So,
15 I think what he's referring to also, in that it was
16 a little more complicated than we thought, directly is
17 related to the financial crisis and the ability to
18 finance private transmission.

19 Q. So the ability to finance
20 transmission projects was affected by the Global
21 Financial Crisis and so was the development of wind
22 farms as well; right?

23 A. Like most things at that period
24 of time, 2008, 2009, almost every part of
25 infrastructure and energy and global commodities was

1 financial crisis touched, yes.

2 Q. But you'd agree with Mr. Pickens'
3 testimony of yesterday that in addition to the factors
4 that you laid out at paragraph 18 of your reply
5 witness statement, the transmission capacity was
6 an additional factor in what happened with the Pampa
7 project?

8 A. I would agree with additional
9 factor. I would say it would -- in my opinion, it was
10 not as important a factor as the power pricing and the
11 lack of debt capacity within the market. I would put
12 those as the two most important factors.

13 Q. And so that we understand power
14 pricing, that's because, as Mr. Pickens said
15 yesterday, the price of gas, which essentially forms
16 the marginal price in that particular market, fell
17 below, I believe he said \$6; right?

18 A. As I talked about earlier this
19 morning, you know, this is a very different market
20 than what we have in Ontario. 20-year fixed price
21 contracts are very --

22 THE CHAIR: I don't think you need to
23 repeat this. One is spot and one is fixed price
24 long-term contract, so there is obviously a
25 difference.

1 BY MR. WATCHMAKER:

2 Q. You may also recall my colleague,
3 Mr. Spelliscy yesterday asking Mr. Pickens questions
4 about whether, in the duration of your relationship,
5 your joint-venture with GE, AWA successfully developed
6 any wind projects; do you recall that?

7 A. I do. In the AWA joint-venture,
8 it was always contemplated that we would develop the
9 projects together to a certain period of time, and
10 then GE would exit that joint-venture, where Mesa
11 would then continue on in the construction and
12 operation of the project, mainly because GE did not
13 want to be perceived as competing with their
14 customers.

15 So if they were doing construction and
16 operation of wind farms, they could be perceived as
17 competing with their customers. So the idea of the JV
18 was always for us collectively to develop up to
19 a certain point and then Mesa to take over from that
20 point.

21 That's exactly what happened in
22 Ontario. We expected the contracts to be issued with
23 the Feed-in- Tariff so, we took those projects and
24 then GE exited.

25 Q. But you agree with Mr. Pickens

1 that during that period there wasn't a successful
2 development of any wind projects in that time; right?

3 A. I think there was a successful
4 development. Again, we're going back to another thing
5 that we talked about this morning, the definition of a
6 successful development.

7 THE CHAIR: I think we're going
8 a little bit in circles about the successful
9 development. You have a different understanding of
10 what is successful development, and for you it does
11 not imply reaching commercial operation. That is what
12 I understand.

13 THE WITNESS: For instance, the
14 Stephens Ranch wind project and the Goodhue project,
15 both of which were sold for profit by Mesa, I would
16 consider that a successful development. Just because
17 it did not reach commercial operation, does not mean
18 it was not a successful development.

19 BY MR. WATCHMAKER:

20 Q. So you'd agree that the value
21 that you can get on a return for successfully
22 developing a project changes throughout the course of
23 development then, early stage development, surplus
24 value and later stage developments, and it's your
25 position that when you enter a development project,

1 you're going to take it up to a higher value; is that
2 right?

3 A. Well, there's several parts to
4 your question there. I mean ... can you repeat, maybe
5 in stages for me?

6 Q. Sure, I just want to understand
7 that what you're saying is that you enter into
8 development, you develop a project further than it may
9 have already been developed, in order to obtain higher
10 value, once you decide to leave that development.

11 A. In some circumstances, yes,
12 that's exactly what happens.

13 Q. You try to maximise value; right?

14 A. I think any prudent investor is
15 trying to maximise value.

16 Q. Right. Now, if you turn to
17 paragraph 13 of your reply witness statement. Here
18 you are describing how Mesa Power began to realise on
19 the promise of a clean energy investment; do you see
20 that?

21 A. I do.

22 Q. And you list Pampa as a project
23 that we've already discussed and here you also list
24 four more projects that Mesa developed.

25 A. I agree.

1 Q. They were Goodhue in Minnesota,
2 Monterey in Michigan, Greenfield in Missouri and
3 Stephens Bor-Lynn; right?

4 A. Correct.

5 Q. Were any of these AWA projects
6 that GE brought to the joint venture?

7 A. They were. The Monterey wind
8 project and the Greenfield wind project were those
9 that GE brought to the joint venture.

10 Q. And they took those when they
11 left; right?

12 A. When we dissolved the joint
13 venture, they took those, yes.

14 Q. And your involvement in Stephens
15 Bor-Lynn, you announced partnership, I believe it was
16 on WindTex Energy on April 4th, 2012?

17 A. We purchased the equity in the
18 Stephens Ranch project from WindTex Energy. We then
19 retained them as a contract developer similar to what
20 we'd done with Leader Resources Corp in Ontario. We
21 liked to have some continuity when we are developing
22 a project, in terms of relationships with land owners
23 and consultants, and we did the same thing with WinTex
24 in the Stephens Bor-Lynn project that we had done with
25 Leader Resources Corp in Ontario.

1 Q. And that date, April 4th, 2012,
2 that was just shortly a year after you failed to
3 receive FIT contracts in Ontario; right?

4 A. April 4, 2012? Well, the
5 directive was issued June 3rd of 2011 and the
6 contracts were issued June 4th, 2011. We stayed in
7 the process. We still own the projects in Ontario.
8 We continue to develop, but we stayed in the
9 Feed-in Tariff process until it was dissolved. We did
10 not exit the projects but the date was April,
11 I believe, for the WinTex transaction. If that's the
12 question.

13 Q. The question is that that's about
14 nine months now, I think, after you failed to receive
15 FIT contracts; right?

16 A. Again, my answer is that there
17 were contracts issued in the Bruce Region. We did not
18 receive the contract on July 4th. And I think that's
19 very well known in this arbitration.

20 Q. So if we consider Mesa Power
21 wind-development experience prior to your
22 applications, in Ontario, we're talking about the
23 Pampa project; right? We're talking about Goodhue and
24 Monterey?

25 A. Goodhue --

1 Q. Just Mesa Power now. Goodhue and
2 Monterey?

3 A. As I just testified to, Monterey
4 and Greenfield were brought by GE to the AWA joint
5 venture. But we actively -- the main entity for
6 development for Mesa Power, outside of the Pampa
7 project was the AWA joint venture. You can tell by
8 the chart, you know, that that's kind of where we
9 focused a lot of our development.

10 Q. So then just focusing on Mesa,
11 before your applications into the FIT Program, we're
12 really just talking about being focused on Pampa;
13 right?

14 A. We developed the Pampa project.
15 We also had the Goodhue project and our team had a lot
16 of experience on other projects.

17 Q. Mr. Robertson, you also complain
18 about Ontario's deal with the Korean Consortium. And
19 you say that the GEIA, or the Green Energy Investment
20 Agreement, was a secret deal and that you didn't know
21 that the Feed-in Tariff program was not the only or
22 even the primary renewable energy initiative that
23 Ontario was pursuing; is that right?

24 A. Are you referring to a certain
25 paragraph in the witness statement?

1 Q. Yeah, I can take you there if you
2 like?

3 A. Please.

4 Q. Sure. So we're in paragraph 28
5 of your first witness statement.

6 A. Okay.

7 Q. At paragraph 29, you say:
8 "It wasn't until the
9 commencement of this
10 arbitration that Mesa began
11 to fully appreciate the
12 extent of the GEIA and the
13 prejudice its applications
14 were under." [As read]

15 Do you see that?

16 A. I don't see "it was under". It
17 continues on in the paragraph. I'm happy to read the
18 paragraph, or you can just refer to it. I've read it.

19 Q. Yes.

20 A. You want me to read it? All
21 right:

22 "It was not until the
23 commencement of this
24 arbitration, however, that
25 Mesa began to fully

1 appreciate the extent to
2 which the GEIA prejudiced its
3 application for obtaining
4 a FIT contract and to the
5 extent to which the Korean
6 Consortium used its leverage
7 with Ontario in a competitive
8 way against Mesa. When
9 announced, the terms of the
10 GEIA were secret." [As read]

11 Q. Let's look at tab 28, and this is
12 Exhibit R-68.

13 A. Okay.

14 Q. This is a news release by the
15 Ministry of Energy. It's dated September 26th, 2009.

16 A. Yes, sir.

17 Q. Now, that date is roughly over
18 a month before you incorporate TTD and Arran; right?

19 A. But it's over a month after, when
20 we purchased TTD and had the full intention of course
21 when we purchased the Twenty-Two Degrees asset that we
22 would apply for the Feed-in Tariff contract. That's
23 why we purchased the asset, so when we purchased the
24 asset this had not been released.

25 Q. Let's look at this, right?

1 A. I am looking at this.

2 Q. And this news release refers to
3 a few things. It refers to the substantial scale of
4 the agreement; do you see that reference?

5 A. In the next-to-last paragraph on
6 the bottom I see the words "substantial scale of this
7 proposed investment." Yes.

8 Q. It also refers to the commitment
9 to manufacturing; do you see that?

10 A. It does. I don't see any other
11 details though in this release.

12 Q. Sure. Let's look at paragraph 3.
13 It refers to historic framework agreement; correct?

14 A. It does.

15 Q. I'd like to turn to tab 29. This
16 is a Toronto Star article from the very same day. And
17 in the second paragraph it refers to a multi-billion
18 dollar investment; do you see that?

19 A. I do.

20 Q. And further down, it quotes the
21 Energy Minister who refers to Samsung's potential
22 investment as several billions of dollars; correct?

23 A. Yeah, it also -- it does. And it
24 also says right above that they are looking to get
25 into the renewable energy business in a big way.

1 Q. In a big way. So you would agree
2 that several billions of dollars might purchase a
3 considerable volume of electricity, wouldn't you?

4 A. It would be a heck of an entrance
5 into the market.

6 Q. And even in this article, if you
7 turn the page, it refers to the contract rate for wind
8 electricity in the fourth full paragraph. It is 13.5
9 cents per kilowatt hour?

10 A. Correct, the same as the
11 Feed-in Tariff contract.

12 Q. The same as the Feed-in Tariff
13 contract. And at the very bottom, last paragraph, it
14 refers to "the possibility of an economic adder" on
15 top of the 13.5 cents rate; correct?

16 A. Yeah, it also says in that
17 paragraph, it says:

18 "But if the company commits
19 to manufacturing its
20 equipment in Ontario, it will
21 give what's called
22 an economic adder on top of
23 the 13.5 cents rate." [As
24 read]

25 I think we've now learned through this

1 arbitration, or I know we've learned through this
2 arbitration, that Samsung and the Korean Consortium
3 was not committing to do its manufacturing. They just
4 had to allocate partners for manufacturing, which is
5 different than what this paragraph says.

6 Q. I understand that's the
7 allegation. We'll have a chance to talk about that,
8 I think, but if you would just confirm for me that it
9 does mention that economic adder, correct?

10 A. Based on their commitment to
11 manufacturing equipment in Ontario, yes.

12 Q. Now, you would agree with me that
13 an investor in the electricity sector might wonder how
14 a project worth several billions would access
15 transmission capacity, wouldn't you?

16 A. I think that's a prudent
17 question, yes.

18 Q. Did you contact the Ministry to
19 confirm whether these stories were accurate, of the
20 GEIA?

21 A. The Toronto Star story?

22 Q. Yeah, the Toronto Star story or
23 the initial -- the press release of the same day from
24 the Ministry?

25 A. The Ministry's press release

1 obviously did not say much and based on the tone of
2 the Ministry's press release, they were not wanting
3 this to get out yet. As it says, I believe that they
4 were still -- back on number 28, and I think:

5 "...concerning negotiations
6 between Samsung C&T and
7 Government of Ontario has
8 prematurely entered the
9 public domain."

10 So obviously they were not wanting
11 this to get into the public domain but the Toronto
12 Star wrote the story. But no, we did not contact the
13 Ministry of Energy or the Ontario Government about the
14 story, no.

15 Q. Let's take a look at tab 30, and
16 that's Exhibit C-105. And this is a letter from the
17 Ministry of Energy to the president of the OPA and
18 it's dated December 30th, 2009. In the second
19 paragraph you will see that the Minister refers to his
20 direction of a week prior; do you see that?

21 A. I do see it.

22 Q. And that was the direction
23 requiring the OPA to develop the FIT Program, wasn't
24 it?

25 A. I'll take your word for it.

1 I believe that timing sounds about right.

2 Q. So you'd agree with me,
3 Mr. Robertson, that Ontario announced the creation of
4 a FIT Program virtually at the same time that it
5 announced a several million dollar framework agreement
6 with Samsung?

7 A. I think it announced the FIT
8 Program at roughly the same time that the Toronto Star
9 broke a story about the Samsung agreement and the
10 Minister was, to his own admission -- or the press
11 release had to reluctantly put out a statement, saying
12 that they were working on something.

13 Q. I think we can agree that that
14 press release was probably not how they wanted to
15 handle the publicity?

16 A. Right.

17 Q. But they were, as it happens, in
18 fact, contemporaneously reported and announced; right?

19 A. Close, yes, closely and
20 prematurely, by the government's own admission.

21 Q. If we look they at the third
22 paragraph:

23 "The Minister is directing
24 the OPA to hold in reserve
25 a total of 500-megawatts of

1 transmission capacity for
2 proponents who have signed
3 a province-wide framework
4 agreement." [As read]

5 Do you see that, Mr. Robertson?

6 A. I see it in the letter, yes.

7 Q. And further below in the next
8 paragraph:

9 "The Minister asks that
10 a further 100-megawatt
11 capacity be held in reserve
12 in the west region for the
13 proponents of the framework
14 agreement." [As read]

15 Do you see that? It's near the bottom
16 of that paragraph.

17 A. For solar projects; is that what
18 you're referring to?

19 Q. Yes.

20 A. Right, for solar projects.

21 Q. So in this public document, which
22 was sent by the Minister to the OPA six days after he
23 directed the creation of the FIT Program, would you
24 agree that a total of 600-megawatts of transmission
25 capacity is being set aside for proponents of the

1 framework agreement; right?

2 A. From the wind perspective up
3 above in a previous paragraph, this is in the -- in
4 a region not in the Bruce Region, this is in Haldimand
5 County and Essex County, both of which are not in the
6 Bruce Region.

7 Q. No, but we do know at this point
8 that there is going to be a framework agreement with
9 Korean Consortium and it is going to be for
10 potentially significantly more transmission capacity?

11 A. Umm...

12 Q. A billion dollars?

13 A. I don't know that.

14 Q. Let's turn to paragraphs 54 and
15 55 of your first witness statement.

16 A. Okay.

17 Q. And here you say that Mesa did
18 not know the transmission capacity was to be set aside
19 in the GEIA.

20 A. Where are you referring to? Can
21 you give me a paragraph?

22 Q. Paragraph 55:

23 "Mesa did not know that the
24 FIT Program was not Ontario's
25 primary energy initiative and

1 that the terms provided
2 advantages to the Korean
3 Consortium." [As read]

4 A. Okay, I think that's very
5 different than the question that you just asked me.

6 Q. My apologies. It is the wrong
7 reference. So paragraph 54(a):

8 "The Korean Consortium was
9 given preferential access to
10 transmission capacity that
11 Mesa did not know was set
12 aside by the GEIA." [As read]

13 A. I see that. I see that
14 statement. Okay, your question?

15 Q. Yes, so, these documents that
16 we've looked at, they did set aside transmission
17 capacity for the Korean Consortium; correct?

18 A. Nowhere in the documents that we
19 just looked at did it say it was given preferential
20 access to transmission capacity, no, sir.

21 Q. So you don't consider the set
22 asides in the ministerial directions we looked at
23 preferential access to transmission capacity?

24 (Court reporter appeals.)

25 A. No, sir, I think being -- having

1 access to transmission and giving preferential
2 treatment of access to transmission, being able to
3 jump to the front of the line essentially is very
4 different.

5 Q. Maybe we can take a look at
6 tab 31, and this is Exhibit R-178. This is an article
7 in the Toronto Star. Again you will notice the date
8 on the article is October 31st, 2009. And if you look
9 at the last paragraph you will see that the Toronto
10 Star reported that there was some controversy about
11 the deal in the Ontario Cabinet meeting, and that
12 Samsung would also get priority access to the Ontario
13 grid space; do you see that?

14 A. I do. This is an article from
15 the Toronto Star. This is nothing from the Ministry
16 or from the OPA or the IESO who controls the
17 transmission.

18 Q. Did you contact the IESO or the
19 OPA or the Ontario Ministry to confirm whether this
20 was correct?

21 A. Based on the Toronto Star's
22 article talking about Samsung's turbine being in
23 jeopardy, no, sir.

24 Q. So then when the GEIA was
25 announced on January 21st, 2010, and the government

1 again referred to a \$7 billion investment, an economic
2 adder, priority transmission access for
3 2,000-megawatts of wind, and the Premier actually
4 invited --

5 A. I'm sorry, sir, do you have
6 a document -- do you have a document reference?

7 Q. Sure. Go to tab 32. And that's
8 Exhibit R-76. Do you see at the bottom of the page:

9 "In addition to the standard
10 rates for electricity
11 generation, the Korean
12 Consortium will be eligible
13 for an economic adder..." [As
14 read]

15 Do you see the middle of that page:

16 "...will bring \$7 billion of
17 renewable generation
18 investment to Ontario." [As
19 read]

20 If you look at the bottom of page 2.
21 It mentions 2,000-megawatts of wind power.

22 A. Okay.

23 Q. Did you contact the Ministry
24 after that?

25 A. We did not. And I think since

1 this arbitration, we learned that the 16,000 jobs
2 referenced in this document is very different than
3 what's in the GEIA. I believe it's 700 to 900 jobs.

4 We also know that the -- this agreement says:

5 "The agreement will lead to
6 more than 16,000 Green Energy
7 jobs over six years. Jobs
8 will be created during
9 construction, installation
10 and operation." [As read]

11 Obviously this is referencing -- or in
12 my interpretation, this is referencing Samsung of
13 which Samsung was not required to do any of those jobs
14 under the agreement. And then, as we flip to the
15 transmission impact, and I'm sorry, I need to
16 familiarise myself with -- it says:

17 "The insurance of
18 transmission".

19 This is at the bottom of the second
20 page and carries over to the top of the third
21 page that it says:

22 "Insurance of transmission in
23 subsequent phases is
24 contingent on the delivery of
25 four manufacturing plants

1 commitments earlier." [As
2 read]

3 Again, the word "priority" is not used
4 in this release from the government.

5 Q. Now, Mr. Pickens said yesterday
6 that you were responsible for doing due diligence into
7 the Ontario market. Did you contact the Ontario
8 government to confirm any of these things?

9 A. This was a release from the
10 government. We did not confirm this release, no.

11 Q. So you didn't confirm the Toronto
12 Star article either earlier and you didn't confirm
13 this government press release either?

14 A. No, I...

15 Q. You didn't contact the government
16 to see if you could negotiate a similar contract?

17 THE CHAIR: I think it's just -- he
18 has already said twice that he did not contact the
19 government, as a result of this publication.

20 MR. WATCHMAKER: I don't think I heard
21 an answer to my last question --

22 THE CHAIR: Oh, so can you --

23 MR. WATCHMAKER: -- which was --

24 THE CHAIR: I understood you on two
25 occasions you have said that you have not contacted

1 the government on the basis of this information?

2 THE WITNESS: On the publications by
3 both the Toronto Star and the OPA or, I believe, it's
4 Ministry -- Minister of Energy release as it relates
5 to this. On those articles we did not contact the
6 government. Yes, Ma'am.

7 MR. LANDAU: Could I -- forgive me for
8 interrupting. I just want to again understand this
9 evidence in its actual context because the exercise
10 that's being done at the moment, some of your answers
11 are what you now understand and how this compares to
12 whatever the issues are as you understand them in this
13 case. If you cut all that out and just put yourself
14 back into this position at the time, can you just
15 explain: Did you see these reports at the time -- let
16 me finish my question first.

17 THE WITNESS: Yes, sir.

18 MR. LANDAU: Did you see them at the
19 time? Was it your responsibility to have these things
20 on your radar? And if not, who, within your operation
21 had responsibility in terms of, as far as we put this
22 under the heading of "due diligence" that you've
23 described in your witness statement?

24 THE WITNESS: Yes, sir, did we see
25 them at the time? We did see them at the time and

1 what was our reaction to them? We were concerned,
2 I think as any prudent developer would be.

3 There were a lot of unknowns though in
4 the press release that I've already talked about. We
5 didn't know what the manufacturing commitment would
6 be. We didn't know how the jobs were going to be
7 created.

8 We are a wind development and finance
9 entity. We did not have the manufacturing
10 capabilities of someone like Samsung. Had we known --
11 and I'm not -- Mr. Landau, I'll answer your question.
12 You are asking for my reaction to the press release at
13 the time. We were concerned and looking at the scale
14 and what was written and released about the GEIA, we
15 weren't sure that we could meet those same conditions.

16 So we weren't sure -- there were a lot
17 of unknowns and I think everyone in the province felt
18 the same way about this agreement. We knew it was
19 a good deal but what that meant for all of us at the
20 time, we really didn't know.

21 And then secondly, I hold myself
22 ultimately responsible for all the activities of the
23 development entities. Was I monitoring every piece of
24 development activity, every single day on all of the
25 multiple projects that you've seen we had going on?

1 No, but the team did brief me every single day.

2 I knew the minute these releases were made, maybe not
3 the minute but within a few hours, that they were
4 made, I was notified and reviewed.

5 So, actually I do hold myself
6 responsible. I think Mr. Pickens holds me responsible
7 but, you know, we did have team members all of which
8 had specific areas that they worked on and when we
9 compiled information and met as a team, we briefed one
10 another on what we were doing. That's the
11 collaborative process that we went through. But to
12 answer your question, I do hold myself responsible.

13 MR. LANDAU: Whose decision at the
14 time would it have been to approach the Ministry with
15 questions, for example? Would that be your decision?

16 THE WITNESS: I would have supported
17 such a request had we come to that. We did not
18 because we did not understand what was going on, and I
19 thought that the Feed-in Tariff process was the best
20 avenue for us, to receive Feed-in Tariff contracts,
21 because of the process that was defined in the rules,
22 and we thought it was, quite frankly, a very complete
23 set of rules and would be followed, based on the rules
24 that were established and we felt good about that
25 process.

1 We felt good about our projects and so
2 we didn't feel the need to go on a -- forgive the term
3 "wild goose chase" -- on trying to find something else
4 as opposed to sticking in the process that we were in,
5 that we thought would be carried out fairly and that's
6 where we were.

7 To carry that out into where we are
8 now, we then started learning that the manufacturing
9 commitment was nothing more than allocating partners
10 or if we'd have known that, would we have done that?
11 I guarantee you we would have tried. I mean because
12 2,000-megawatts of wind power contracts at north of
13 13.5 cents, that's very, very attractive to any
14 developer.

15 But at the time we saw the
16 manufacturing commentary in all these releases as
17 actual Samsung manufacturing jobs, and them building
18 the wind turbines and them creating -- and that,
19 at all, wasn't the terms of the actual GEIA.

20 MR. LANDAU: Just finally, when you
21 say that you thought the FIT Program was the best
22 avenue, does that mean the only avenue or there were
23 other avenues but you were not interested because the
24 FIT avenue was good enough for you?

25 THE WITNESS: I believe -- and I'm

1 trying to work on some recollection here. The
2 Feed-in Tariff process had been the only large-scale
3 renewable procurement process. Now, let me think.
4 There was the standard offer program before -- I'm
5 getting -- there was another way that they could buy
6 power and that was prior to -- I think when the
7 Feed-in Tariff process came in, that was the only way
8 for them to issue power contracts at that time.

9 So, it would have been the only way
10 for us to participate outside of something like the
11 Green Energy Investment Act which we did not feel we
12 were able to get because we were not at the same
13 manufacturing scale as someone like Samsung.

14 MR. LANDAU: Thank you.

15 BY MR. WATCHMAKER:

16 Q. Maybe we can move on from the
17 GEIA. Mr. Robertson, I'd also like to discuss your
18 turbine agreement with GE for a few minutes, so at
19 this time I'd ask that the public feed be cut off and
20 we go into confidential session.
21 --- Upon resuming the confidential session at 12:06 p.m.
22 under separate cover now deemed public

23 THE CHAIR: Thank you. Any redirect
24 questions?

25 MR. APPLETON: I believe so.

1 I'm ready whenever you are. I'm going
2 to make reference to some of Canada's materials.

3 THE CHAIR: Yes.

4 MR. APPLETON: So you should take their
5 binders away. I'm sorry.

6 RE-EXAMINATION BY MR. APPLETON:

7 Q. Okay, well, Mr. Robertson, you've
8 been very patient with everyone today. You've been on
9 for a long time. I shouldn't take too long. I am
10 going to take him through that. Just in case my voice
11 goes again.

12 Now, you've had a long testimony
13 today. I'm going to try to take you back to some of
14 that testimony. I'm going to hope that you might be
15 able to recall some of the things that we talked
16 about.

17 A. Okay.

18 Q. I know you've covered a lot of
19 different things. Whenever possible I'm going to
20 refer to the exhibit number and to a tab number so
21 that it will be easy for everybody in the room to see
22 what's there.

23 If that's okay, I'm going to ask my
24 colleague, Celeste Mowatt here, wherever possible, to
25 maybe take a document and flash it up on the ELMO, on

1 the electronic machine here, and there will be
2 documents from the book.

3 MR. SPELLISCY: Sorry, Mr. Appleton,
4 are we still in confidential session?

5 MR. APPLETON: I didn't realise we
6 were still in confidential. Sorry. Let's go back.
7 Again, I'm sorry to -- again, it's counsel job to --
8 as soon as we go off, so I assume that Mr. Watchmaker
9 would have done that when he finished.

10 SPEAKER: Go back on.

11 --- Upon resuming the public session at 2:04 p.m.

12 MR. APPLETON: Are we not live? Have
13 we been live through this?

14 So I've been live the whole time so
15 I just hope we don't deduct this from my side.

16 MR. SPELLISCY: Make that 30 seconds
17 more.

18 BY MR. APPLETON:

19 Q. A little bit more than that. We
20 are very time-focused here. We have a lot of expert
21 to deal with for the next few days.

22 So, Mr. Robertson, you were asked by
23 Ms. Squires, what Mesa's investments in Ontario, at
24 the time of your investment in Canada, in 2009 and you
25 reference investments made before December 2009's

1 incorporation of an Alberta ULC for TTD; do you recall
2 that discussion?

3 A. I do.

4 Q. Could you please tell us the work
5 that you did as of you, as in Mesa, leading up to the
6 FIT applications in 2009?

7 A. Sure, we purchased the projects
8 and -- we purchased Twenty-Two Degrees in August of
9 2009. We then were also trading term sheets and
10 definitive agreements on the Arran project as well
11 during that time. I don't recall, as we sit here
12 today, the date that we actually signed the Arran
13 agreement but I know we were working on those with
14 a view of submitting applications to the
15 Feed-in Tariff program for both of those projects.

16 We had done a due diligence as far as
17 looking at the market, looking at the Feed-in Tariff
18 program, working at Feed-in Tariffs programs elsewhere
19 around the world and how they were structured and
20 operated, trying to figure out contract link,
21 equipment, suppliers, land leases, all of the due
22 diligence that goes into purchasing an asset and then
23 getting asset ready for application into the
24 Feed-in Tariff programs.

25 Q. Do you recall when you started

1 doing this work? Roughly or specifically, do you
2 know?

3 A. We actually first looked at these
4 assets all the way back in, probably, March of 2009
5 was the first time we looked at them. We then dove
6 heavy into due diligence and transaction work probably
7 starting in July of 2009.

8 Q. And I'm going to show you
9 a document to you, it's from the record. It is
10 Exhibit C-461. I don't believe it's in the binders;
11 correct? So this is just a document -- and because
12 I'm going to display it I'll just explain for the
13 record that if you look at C461 it should be the
14 6th page under Exhibit A. So if you decide to look at
15 this yourself later, you will see where this is and
16 just to make sure that this is not confidential?

17 MS. MOWATT: It is a confidential
18 document. This portion is not confidential.

19 BY MR. APPLETON:

20 Q. The document while it's marked
21 "Confidential" this portion is not confidential and so
22 I am actually going to put it up on the electronic
23 display.

24 A. Okay.

25 Q. "Confidentiality" is Mesa's

1 confidentiality so on your behalf I'm actually going
2 to waive it.

3 So, let's just put this document up
4 for a moment. You need to hit the switch for that to
5 happen behind you. Someone needs to -- can somebody
6 help us technologically for a moment so we can make
7 sure this works, so we will show you the document if
8 the technology gods will assist us. There is a switch
9 there. Josh knows all about it.

10 --- Off record at 2:08 p.m.

11 --- Upon resuming at 2:09 p.m.

12 MR. APPLETON: We can go back on the
13 record, if that's all right.

14 BY MR. APPLETON:

15 Q. Fine. So this is Exhibit 461 and
16 I understand this is an operating agreement from
17 August 2009. Actually you can see what this is. Can
18 you see that document?

19 A. I can, yes.

20 Q. Could you tell us what this
21 document is?

22 A. Sure. This is the operating
23 agreement of AWA TTD development LLC which is
24 a Delaware LLC created for the purpose of purchasing
25 the Twenty-Two Degrees asset at that time, in August

1 of 2009.

2 Q. Can you just go to that first
3 paragraph and you will see a date in there?

4 A. I did. August 14th, 2009.

5 Q. So this could be one of the
6 documents that you were referring to?

7 A. Sure.

8 Q. Okay, great. We can take that
9 down now.

10 Now, Ms. Squires spent almost an hour
11 of time today talking about your FIT application. Did
12 any deficiencies in the application prevent Arran and
13 TTD from being averaged 8th and 9th in the
14 Bruce Region?

15 A. No, sir.

16 Q. Do you recall that Ms. Squires
17 mentioned the satisfaction of FIT requirements under
18 section 3 -- I guess section 3 of the FIT contract.
19 Now did the OPA -- so do you recall that discussion
20 about we were looking at the terms?

21 A. I recall.

22 Q. Did the OPA tell you that Mesa
23 was not eligible for a contract because Mesa's
24 applications did not meet them, did not meet its
25 requirements and that Mesa's programs, both TTD and

1 Arran were, in fact, were awarded to priority
2 rankings?

3 A. I'm sorry, I just -- that threw
4 me off.

5 Q. It threw me off too. Let's try
6 this again. Did the OPA ever tell you that Mesa was
7 not eligible for a contract because Mesa's
8 applications did not meet their requirements?

9 A. No, they did not.

10 Q. Did they ever tell you that
11 Mesa's projects -- and by that I mean TTD and Arran,
12 the launch period projects -- were in fact awarded
13 priority rankings?

14 A. No, they did the not.

15 Q. They never told you that they
16 had --

17 A. Higher in points.

18 Q. No, in rankings?

19 A. They were ranked 8th and 9th in
20 the province by the tables that were published in -
21 I mean in the region. In those regions.

22 Q. Just confirm this again because
23 we got a little lost here so again just to confirm
24 that you said that the OPA did not tell you that Mesa
25 was not eligible for a contract?

1 A. The OPA did not -- correct.

2 Q. And they did, in fact, tell you
3 that Mesa had achieved priority rankings for these two
4 launch period projects.

5 A. Correct.

6 Q. Okay, that was a little tricky.
7 I'll try to make them simpler. Ms. Squires spent
8 about 30 minutes today about criteria points; do you
9 recall that?

10 A. I do.

11 Q. Did the fact that Mesa did not
12 obtain criteria points prevent Mesa from getting these
13 rankings?

14 A. No, it did not.

15 Q. So this was extra credit that
16 would give you a higher ranking then?

17 A. You could characterise it that
18 way, yes, sir.

19 Q. Did Mesa have to satisfy any
20 criteria points to obtain a FIT contract?

21 A. No, sir.

22 Q. For example, when Ms. Squires
23 said that the FIT Rules required an audited financial
24 statement, that was actually only for this extra
25 credit then; isn't that correct?

1 A. Right, the FIT Rules did not
2 require. I agree.

3 Q. Okay. So, I'm going to ask that
4 we look at the documents that are at Tabs 10 and 11.
5 I believe it's of Canada's first binder. These are
6 documents R134 and R135. We will look at our -- which
7 ones do we look at first, 134? We'll look at 134
8 first, for no reason than it seems to be numbered
9 first. I believe that's tab 10? Excellent. Can we
10 put this up on the screen.

11 Now I need to look at my own binder to
12 find this here, tab 134, and I'm going to ask that you
13 look in the binder at the second page in the middle of
14 the page.

15 It is hard to read. I'm very sorry.
16 Can we make this a little bigger? I'm going to ask
17 that you look at the middle of page 2 where you see it
18 says, "Message" and then is it starts:

19 "The OPA is pleased to
20 advise ..." [As read]

21 A. Yes, sir.

22 Q. Can do see that?

23 A. Yes.

24 Q. Could you just read that first
25 line to us all?

1 A. (Reading):
2 "The OPA is pleased to advise
3 that your application form
4 and submit the documents have
5 been reviewed in detail by
6 the OPA and are deemed
7 complete and that the project
8 satisfies all the eligibility
9 requirements set out in
10 section 2 and 3 of the FIT
11 Rules." [As read]

12 Q. Now, if we turn to the next tab,
13 and we look at the bottom of the first page, I believe
14 we'll find a similar message. Could we just look
15 there. This is, I understand, with respect to the
16 Arran Wind Project?

17 A. Yes, sir.

18 Q. Could we just look -- do you see
19 the same type of message there?

20 A. I do, sir, yes.

21 Q. This is with respect to Arran.
22 Could you read that again?

23 A. (Reading):
24 "The OPA is pleased to advise
25 that your application form

1 and submitted documents have
2 been reviewed and in detail
3 by the OPA and deemed
4 complete and that the project
5 satisfies all the eligibility
6 requirements set out in
7 section 2 and 3 of the FIT
8 Rules." [As read]

9 Q. And that was document, of course,
10 R-135 for the record. You can take my word for that
11 one. That is not the real question.

12 If you look, for example, at document
13 C-182. That's not in the binders; correct? So we'll
14 project this document. So let's just look and see
15 C-182.

16 Let's look at the beginning to see
17 what it is. So this is a letter from the Ontario
18 Power Authority. It is dated April 8th, 2010. It is
19 sent to the Arran Wind Project ULC, to the attention
20 of Chuck Edey. It says Charles Edey. That's Chuck
21 Edey?

22 A. It is.

23 Q. So on this document, where does
24 it say that the Arran project will proceed to an ECT.

25 Let's see if we can -- it's all

1 vertical. Maybe we can assist you.

2 I believe if we start -- there is
3 a part that says, "The OPA has completed it's
4 assessment", can we see that? You could assist me
5 slightly by just -- okay.

6 Can you see at the beginning of this,
7 in the first paragraph, it says:

8 "As per section 5.2 of the
9 FIT Program Rules ..." [As
10 read]

11 A. I do.

12 Q. Could you just read that line for
13 me, after that?

14 A. Sure:

15 "As per section 5.2 of the
16 FIT Program rules, the OPA
17 has completed an assessment
18 of the transmission resources
19 associated to the connection
20 of for your project to the
21 electricity system. The
22 results of the transmission
23 availability testing have
24 identified that the
25 connection resource

1 requirements identified
2 within your FIT application
3 do not have adequate system
4 capacity in order to connect
5 your project. Specifically,
6 the letting resource for
7 connecting your project is
8 identified as this project
9 exceeded the..." [As read]

10 Q. Right. Go down the page and
11 we're going to go to -- there a the first paragraph
12 where it says, "This projection exceeded" can you read
13 the first line after that. Just a sec. Yeah, just
14 read that please?

15 A. (Reads):
16 "At this time, your project
17 will proceed to the next
18 Economic Connection Test,
19 which is scheduled to be
20 performed during the summer
21 of this year." [As read]

22 Q. Excuse me just one minute. There
23 is one more thing that I wanted to show. I just can't
24 seem to find it here. Ms. Squires did not show this
25 document to you this morning, did she?

1 A. I do not recall this document,
2 no.

3 Q. You can take my word for it it's
4 not in the record it's not in the binder?

5 A. Okay.

6 MS. MOWATT: Sorry, it is in the
7 record.

8 BY MR. APPLETON:

9 Q. Excuse me, it is in the record.
10 It wasn't in the record extracts brought to you this
11 morning --

12 A. I understand.

13 Q. -- in the binder. All right.

14 The part I'm just looking for, this letter says:

15 "The OPA has completed
16 an assessment of the
17 transmission resources
18 associated to the connection
19 of for your project to the
20 electricity system." [As
21 read]

22 Correct?

23 A. Yes.

24 Q. Right. He's answered that.

25 Sorry.

1 Now, was Mesa's FIT application,
2 actually any of Mesa's FIT applications ever rejected
3 by the OPA?

4 A. No, sir.

5 Q. Now, you were present during
6 Canada's opening statement.

7 A. I was.

8 Q. And do you recall that
9 Mr. Spelliscy noted that 95 per cent of FIT
10 applications were defective?

11 A. Yes, sir.

12 Q. Do you know that the OPA ended up
13 awarding many FIT contracts despite these types of
14 deficiencies?

15 A. I'm not sure who received
16 contracts that had deficient applications but I would
17 assume that some of those were deficient applications
18 since 95 did, did receive contracts.

19 Q. Now you mentioned that Mesa was
20 ranked 8th and 9th in the priority for the
21 Bruce Region, even after 500 megawatts of transmission
22 access had been reserved in priority for the Korean
23 Consortium.

24 A. That's correct.

25 Q. Now, isn't it logical that if

1 Ontario had not entered into the GEIA, that Mesa's
2 ability to obtain projects in the Bruce, would have
3 been easier?

4 A. Yes, sir.

5 Q. Now, Ms. Squires showed you
6 a document at tab 12 of volume 1, so R-181.

7 A. Okay.

8 Q. Okay, sorry, I've just given away
9 my book so I'm unfortunately not able to look at the
10 document with you but I will in a minute. R-181.
11 Here we are. So, I'd like to bring to your attention
12 here, something that Ms. Squires didn't show you in
13 the email chain. There are a number of emails that
14 are in here.

15 If we could just turn to the first --
16 the first page there's an email that's at 3:24 p.m. so
17 second email here.

18 A. From me to Mr. Edey and Mr. Ward?

19 Q. Yes. Could you just read that
20 email. I believe it's really it's one line long. You
21 can read both lines if you like?

22 A. (Reading):

23 "The rumour I just heard is
24 that Capital Power has sold
25 their 270-megawatt to

1 Samsung/Pattern. Selection
2 points are B562L and B562L."

3 [As read]

4 Q. Did that sale go through?

5 A. I believe it did.

6 Q. Why were Samsung and Pattern
7 buying FIT projects?

8 A. They recognised projects that
9 were further down the priority ranking queue and were
10 not ding and decided that those projects were projects
11 that were easy to pick off, and move to the front of
12 the transmission queue because of their priority
13 transmission rights so they approached projects in the
14 region who were lower ranked and tried to buy them to
15 move them to the front of the line.

16 Q. When you say "lower ranked", what
17 do you mean by "lower ranked"?

18 A. Outside of 1200 megawatts. Below
19 1200 megawatts of allocation in the Bruce Region so
20 below Twenty-Two Degrees and Arran.

21 Q. So, in other words, the Korean
22 Consortium -- the Korean Consortium and its
23 joint-venture partner, Pattern Energy?

24 A. Pattern Energy.

25 Q. Were buying low- FIT projects and

1 they would use them those to meet their obligations
2 under the GEIA?

3 A. Correct sir.

4 Q. Now, Mr. Robertson, you were
5 asked a great deal about Mesa's experience. Do you
6 know Samsung's experience in wind power when it
7 entered the GEIA?

8 A. My understanding is Samsung had
9 little to no experience developing wind power. That's
10 the reason they sought a development partner such as
11 Pattern to do those activities and my understanding is
12 also they had not completed the manufacturing of wind
13 turbine generators to, too at that point.

14 Q. Originally, did Samsung intend to
15 use Samsung turbines for its projects or to use
16 Samsung turbines?

17 A. My understanding is they intended
18 using Samsung manufactured turbines but were unable to
19 do so and then made partnership with other
20 manufacturers to use their turbines.

21 Q. So, do you know who they used?

22 A. I believe they used Siemens,
23 their turbines.

24 Q. Now, let's turn to volume 2
25 before you. Look we're going to look at Exhibit R177.

1 That's at tab 29 of volume 2.

2 This is a Toronto Star Article. If
3 you recall, you were taken to this.

4 A. Yes, sir.

5 Q. Now, look at the article for
6 a moment. I'm not sure how familiar you are with this
7 article at this point, where we are years later. Now,
8 can you tell me where in this Toronto Star Article,
9 that it identifies that the Korean Consortium could
10 jump ahead in the line -- so jump in the line ahead of
11 other FIT applicants? Take your time.

12 A. I do not see it in this document.

13 Q. It doesn't say anything about
14 this priority, does it?

15 A. No, sir.

16 Q. Where does it mention in which
17 region the Korean Consortium would go to for the rest
18 of its transmission excess?

19 A. It makes no mention.

20 Q. We're done with that. During
21 your testimony you had mentioned that the FIT was
22 a procurement process. Did you mean procurement in
23 the legal sense under the NAFTA?

24 A. I'm not a lawyer. I am
25 definitely not an international trade lawyer. I did

1 not mean definition of procurement as I've heard it
2 used in the openings of both Canada and Mr. Appleton.
3 I use it in the sense of every utility when they're
4 going out and issuing power purchase contracts, at
5 this point typically called a procurement process for
6 any power purchase agreement, that is with the utility
7 directly is the term which I was using.

8 It is commonly used in the industry.
9 I am not a lawyer. I did not use it in the sense
10 of -- did I heard it used yesterday.

11 Q. That's fine. We understand you
12 loud and clear?

13 A. Sorry.

14 Q. So, Mr. Robertson, do you recall
15 when Mr. Watchmaker asked you about the need for a 347
16 turbines for the Arran and TTD projects? He talked
17 about the MTSA and how you were going to organise
18 things; do you recall that conversation?

19 A. Yes, I do.

20 Q. Do you recall whether the amended
21 and restated MTSA gave Mesa the right to increase its
22 turbine orders as needed?

23 A. It did. It said that we would
24 continue to buy turbines as needed from GE for our
25 projects.

1 Q. In fact, if I take you to
2 a document, document C-379. It's not in the binder --
3 oh, it is in the binder, oh, tab 5 of which -- of 1 or
4 2?

5 MS. MOWATT: Two.

6 BY MR. APPLETON:

7 Q. Must be volume 2. Mr. Watchmaker
8 has a beautiful volume that is very nicely organised.

9 So can you look at the Bates stamps,
10 page 111978. Do you have that page? I'm going to
11 look at section F, 111978. Okay, oh, yes, excuse me,
12 those are -- we need to get off the record -- we need
13 to go confidential just for a moment, just for this
14 one page. Excuse me, thank you very much. My
15 apologies. Thank you.

16 --- Upon commencing the confidential session at

17 2:26 p.m. under separate cover

18 --- Upon resuming the public session at 2:30 p.m.

19 MR. SPELLISCY: Just give us one
20 minute, please.

21 THE CHAIR: Yes, of course. Are there
22 any questions from Canada?

23 MR. SPELLISCY: I probably have five
24 questions. I'm just waiting for a document to come
25 up.

1 THE CHAIR: Okay.

2 FURTHER CROSS-EXAMINATION BY MR. SPELLISCY:

3 Q. Thank you, Mr. Robertson. This
4 is the third face that you're seeing. You said
5 something that piqued my interest and it is hard for
6 me to keep sitting down there as the rest of my team
7 knows.

8 I just have a couple of questions and
9 maybe before I could get a clarification so C0461
10 which your counsel showed to you, this is still
11 a confidential document. I think you said you waived
12 confidentiality but before I put it up on the screen
13 I wanted to know for sure?

14 MR. APPLETON: Let's be very specific.
15 The document is still confidential, when it's
16 confidential. That page had nothing that was
17 confidential so we said that for that page we were
18 displaying we would waive the confidentiality for that
19 page, only for that page, so that the public would be
20 able to see. But the document is still confidential.

21 There was nothing marked confidential
22 on that page so if you intend to go to other pages
23 which you feel is confidential, but if you are going
24 back to that page, go crazy. We can show everyone.
25 It is whatever -- so you tell me, Mr. Spelliscy, do we

1 need to go confidential or not?

2 MR. SPELLISCY: Let me look at the
3 document, the page there.

4 I think we can avoid confidential.
5 There doesn't appear to be any confidential
6 designations on the page that I'm going to go to.

7 BY MR. SPELLISCY:

8 Q. In your response to one of
9 Ms. Squires' questions, and then at more length in
10 your testimony with Mr. Appleton there, you said that
11 the Mesa project purchased the TTD -- or Mesa
12 purchased the TTD project in August of 2009, but
13 I just want to confirm, you never stated that in any
14 of the witness statements that you filed in this
15 arbitration, did you?

16 A. I would have to review all the
17 witness statements.

18 Q. Let's go to your reply witness
19 statement which I think is in front of you.

20 A. Okay.

21 Q. And it's at paragraph 31,
22 I believe.

23 A. Okay.

24 Q. Now in paragraph 31 I believe you
25 said that Mesa made its investments in the fall of

1 2009; do you see that?

2 A. I do.

3 Q. Okay. So you don't say you need
4 it in the summer of 2009; correct?

5 A. We bought the TTD assets in
6 August of 2009 and -- I don't know.

7 Q. Well, I understand that's your
8 testimony today. I am trying to understand what you
9 had said in your witness statement.

10 A. Okay, fall of 2009, it was August
11 of 2009, we continued on with the projects. I don't
12 know what else to say.

13 Q. Do you have the Claimant's reply
14 memorial in front of you there? I believe you do.
15 It's right there. I apologise. If you to go
16 paragraph 859.

17 THE CHAIR: Can you give us a page?

18 MR. SPELLISCY: It is on page 224.

19 THE CHAIR: Thank you.

20 MR. APPLETON: At?

21 MR. SPELLISCY: At paragraph 859.

22 BY MR. SPELLISCY:

23 Q. And the first sentence of that
24 paragraph says:

25 "Mesa's first investment in

1 November of 2009..." [As
2 read]

3 Do you see that?

4 A. I do.

5 Q. Okay, so is that just another
6 mistake?

7 A. Sir, we purchased the assets in
8 August of 2009 for Twenty-Two Degrees. We purchased
9 the Arran assets, and I believe it was closer to the
10 date of the Feed-in-Tariff application. I don't
11 remember exactly. I don't know what else to say.

12 Q. Okay, well I want to then --
13 let's look at the document that was flashed up on the
14 screen, C-0461 and if you turn to the third page which
15 doesn't have any confidentiality designations on it.
16 Because I don't have it, maybe we'll get it pulled up
17 there.

18 If you look at the first paragraph
19 there -- I'm going to take you through this a little
20 bit and we highlight, it so it says that -- and it
21 mentions an August 14th, 2009 asset purchase
22 agreement; is that what you're referring to?

23 A. It is.

24 Q. Now, this says in a few lines
25 down that, in fact, that:

1 "As of August 14th, these are
2 authorised and approved and
3 each of the authorised party
4 be and each of them acting
5 singly hereby is, authorised,
6 empowered and directed, to
7 execute and deliver the
8 agreement." [As read]

9 Correct?

10 A. I see the wording, yes. Yes,
11 sir.

12 Q. So, in fact, at this time, on
13 August 14th, that agreement hadn't actually been
14 executed. You've just been authorised to execute and
15 deliver it now; right?

16 A. My understanding, sir, is we
17 pretty much executed pretty much simultaneously with
18 the asset purchase agreement. But the asset
19 manufacture agreement is the execution of the duly
20 authorised and approved.

21 Q. That asset purchase agreement
22 it's not on the record in this arbitration, is it?

23 A. I'm not sure if it is.

24 MR. SPELLISCY: Thank you. That's all
25 my questions.

1 MR. APPLETON: Madam President, if
2 I could have a question arising out of Mr. Spelliscy's
3 exchange. Just one.

4 THE CHAIR: Actually we have not
5 provided for really re-redirect but we will allow this
6 one question.

7 MR. APPLETON: One question.

8 THE CHAIR: We should avoid making
9 this a never-ending process but ask the question.

10 MR. APPLETON: I agree with you and
11 I'm sure that Mr. Robertson would like to go home. He
12 is probably going to stay here?

13 THE WITNESS: Not home, just...

14 BY MR. APPLETON:

15 Q. This document, C-0461, I'm just
16 going to take us to the last page. I'm going to ask
17 that it being up on the Elmo. The signature is not
18 a problem so we're in public session now. Are we in
19 public session? Yes.

20 We have no problem with this being in
21 public session. It is just a signature page. Would
22 you put that up, please.

23 MR. LANDAU: Page 5.

24 MR. APPLETON: Yes.

25 BY MR. APPLETON:

1 Q. So, first of all, this is
2 document C-0461, which is on the record here. Can we
3 please back it up a bit so we can see the whole thing.

4 It says here -- you're aware of this
5 document; have you seen this document before?

6 A. I have.

7 Q. Yes. It says:

8 "The undersigned have
9 executed this consent to be
10 effective as of the date
11 first written above." [As
12 read]

13 A. Correct.

14 Q. All right. You see that it's
15 signed here; yes?

16 A. I do.

17 Q. It's signed by someone from
18 General Electric, a Mr. John Stevens and it's signed
19 from Mr. Pickens, the gentleman that was here
20 yesterday?

21 A. Correct.

22 Q. All right. Now, could I have the
23 first page? The first page of that document had
24 a date which you were looking at; is that correct?

25 A. August 14 of 2009.

1 Q. That would be the date written
2 above that was referred to a moment ago?

3 A. That would be my understanding.

4 Q. Right. Thank you.

5 THE CHAIR: I don't think there is
6 an issue that this document is dated 14 August 2009
7 and that it was signed on that date. The question is:
8 The point as thought to understand was that this was
9 a resolution approving the conclusion of other
10 documents, but we will have a closer look at that, if
11 we have to.

12 Do my co-arbitrators have any
13 questions for Mr. Robertson? I was looking through my
14 documents and it is true that we have gone through
15 many, many documents that are largely answered.

16 Could we just come back to one issue
17 that I'd like to make sure I understand correctly what
18 your evidence is, about the connection-point change,
19 the window that was introduced, I would like to know
20 what was -- you have a concern with it? Was the
21 concern a question of principle that there was this
22 window or is it a question of the timing that was too
23 short? Is it a question of the fact that it could
24 work across regions as opposed to within one region?

25 THE WITNESS: It's multiple things

1 within that, Your Honour, but there are several -- the
2 most important of course for us was the change of west
3 of London to Bruce, being allowed to change between
4 regions. Nowhere had that been discussed in the
5 rules. It had not been discussed in the webinars or
6 other areas that the OPA initiated. Even in the
7 rules, as I mentioned earlier, in section 5 -- I have
8 to go back.

9 THE CHAIR: I know, it's 5.8 or
10 something like that, we looked at it before.

11 THE WITNESS: It says ECT by region.
12 At no point was there ever a discussion of moving from
13 one region to the next. It also begs the question, if
14 it's just west of London to Bruce, why not south into
15 Bruce and why not other places, why not Bruce into
16 other regions? I mean there was never a discussion on
17 that. It was specific to moving just west of London
18 in to Bruce.

19 And that was concerning, obviously
20 because there was limited transmission and there were
21 other projects that when they got the ability to move
22 in, that brought this on and that was never part of
23 the process. It was never in the rules and we relied
24 on those rules to make investment decisions and to
25 plan our projects and that's what bothered me the

1 most.

2 The five-day connection-point change
3 window to go through a full transmission study, and to
4 really look at all the options among electrical grid
5 circuits, look at all the different points that
6 connect and do that in five days it's just not
7 realistic. I mean it's just not. There is not a
8 the -- we did look at it.

9 We spent hours and worked 24-7 for
10 those five days trying to figure it out because we
11 needed to try and figure out where other people were
12 moving. It was difficult to do. It's not something
13 that I think we could -- we did to the best of our
14 ability because I don't think anyone could in that
15 short of a timeframe.

16 Now if someone had pre-knowledge or
17 pre-expectations of being able to move interconnect
18 points, without an ECT being run, which, again
19 defaulting back to the rules, it was always going to
20 be an ECT run and then there was a process by which
21 you could change your interconnection-point.

22 We defaulted to the rules, as you
23 would expect in a process to look at how the
24 procedures would be played out and that didn't happen
25 in this instance.

1 THE CHAIR: Thank you. That answers
2 my question. And that completes your long
3 examination, Mr. Robertson. Thank you very much for
4 your explanations.

5 THE WITNESS: Thank you very much.

6 MR. BROWER: Watch others go through
7 the same process.

8 THE CHAIR: So I would suggest that we
9 take five minutes, but really five minutes, just to
10 get organised for the next witness, who is
11 Mr. Jennings.

12 --- Recess taken at 2:44 p.m.

13 --- Upon resuming at 2:51 p.m.

14 THE CHAIR: Ready to start? Good
15 afternoon, sir. Could you please confirm to us that
16 you are Rick Jennings?

17 THE WITNESS: That's correct.

18 THE CHAIR: You're Assistant Deputy
19 Minister, Head of the Energy Supply Division at the
20 Ontario Ministry of Energy?

21 THE WITNESS: Yes, that's correct.

22 THE CHAIR: You have given two witness
23 statements, two written statements in this
24 arbitration, one dated 27 February, 2014 and the other
25 one 27th of June, 2014.

1 THE WITNESS: That's correct.

2 THE CHAIR: You heard as a witness in
3 this arbitration, as a witness you are under a duty to
4 tell us the truth. Could you please confirm that this
5 is what you intend to do?

6 THE WITNESS: Yes, I do.

7 SWORN: RICHARD JENNINGS

8 THE CHAIR: Thank you. So we will
9 first have a direct questions and then we'll turn to
10 Mr. Watchmaker and then we'll turn to counsel for the
11 claimants for further questions.

12 EXAMINATION IN-CHIEF BY MR. WATCHMAKER:

13 MR. WATCHMAKER: I only have one
14 question.

15 BY MR. WATCHMAKER:

16 Q. I just wanted to confirm,
17 Mr Jennings, you have no corrections to make to your
18 statement; is that correct?

19 A. I have no corrections to make.

20 THE CHAIR: Fine, then Mr. Mullins.

21 CROSS-EXAMINATION BY MR. MULLINS:

22 THE WITNESS: I hope your questions
23 are as easy.

24 BY MR. MULLINS:

25 Q. Unfortunately not. Good

1 afternoon, Mr. Jennings, as we just heard, you are the
2 Assistant Deputy Minister of Energy Supply,
3 Transmission and Distribution Policy with the Ontario
4 Ministry of Energy?

5 A. Yes, the titles change a bit from
6 years to year, but I have held that title at the time
7 during the time this was discussed.

8 Q. During the operative time?

9 A. Yes.

10 Q. And we have heard you've provided
11 two witness statements to this arbitration and
12 I understand that they are accurate, to the best of
13 your knowledge?

14 A. Yes, that's correct.

15 Q. I'll probably be switching back
16 and forth, if need be so, if you have both of them
17 available that would be helpful.

18 THE CHAIR: The witness statements.

19 Does the witness have his witness statements
20 available?

21 SPEAKER: They are in the red cover.

22 BY MR. MULLINS:

23 Q. Thank you, Mr. Jennings. Now,
24 I'm going to ask you a number of questions and I would
25 appreciate if you could listen to my question and try

1 to answer them accurately. It may be very well that
2 your counsel may want to follow up but we'll have them
3 do so because you'll understand that we have a number
4 of witnesses to talk to, and unlucky for you, you are
5 number one for Canada, so we're going to be ask asking
6 a lot of questions. So if you could please listen to
7 my question and try to answer it "yes" or "no" if it's
8 a "yes" or "no" question?

9 A. Yes.

10 Q. Thank you. Now, during the
11 relevant time period and currently now you are
12 involved in electricity pricing; correct?

13 A. Yes.

14 Q. Transmission planning?

15 A. Yes.

16 Q. Nuclear regulation?

17 A. Yes.

18 Q. Long term energy plans?

19 A. Yes.

20 Q. Supply director to the OPA?

21 A. Yes.

22 Q. Energy and trade and
23 environmental issues?

24 A. Yes.

25 Q. And in doing your duties at the

1 Ministry of Energy, you agree that you should do so in
2 a fair, non-arbitrary and transparent manner?

3 A. That would be a standard goal of
4 public service, yes.

5 Q. For yourself and the entire
6 Ministry; correct?

7 A. Those would be standard goals of
8 public service, yes.

9 Q. In fact, specifically, you would
10 agree that the Ministry of Energy had the duty to
11 operate the entire renewable energy program in a fair
12 and non-arbitrary and transparent manner?

13 A. Well, certainly there were --
14 operating the energy system requires taking several --
15 various things into account and certainly those are
16 factors you would want to do and of course their
17 people would challenge whether you're doing them that
18 way, but that certainly would be the intention to
19 be -- to deal with, as you stated.

20 Q. It would be the Ministry of
21 Energy's duty to do so; correct?

22 A. Well, as I'm trying to ascertain
23 where you're going, but certainly those are all noble
24 objectives in the -- again, as public servant.

25 Q. Okay, it might be helpful if you

1 don't try to guess where I'm going and just maybe
2 concentrate on the question. I'm going to ask it one
3 more time just so the record is clear. It would be
4 the duty, "yes" or "no", for the Minister of Energy to
5 operate the renewable energy program in a fair,
6 non-arbitrary and transparent manner, "yes" or "no"?

7 A. Yes, it would be.

8 Q. And being transparent means being
9 truthful and open; correct?

10 A. So I don't have a dictionary in
11 front of me but I think that is what it means, yes.

12 Q. Thank you. And all this work is
13 really to regulate this industry on behalf of
14 ratepayers; correct?

15 A. So there are principal factors
16 that you have to take into account so certainly the
17 ultimate customer is important, in terms of what
18 prices they pay. They need reliable supply, they need
19 to have a sustainable system, those are all factors
20 that have to be taken into account.

21 Q. Well, ultimately it is the
22 ratepayers that pay for the generation and
23 transmission and distribution of electricity; right?

24 A. They are billed and they have to
25 cover the cost. I'm just saying that in terms of --

1 it's not just rates, it's reliability and supplies.

2 Q. Correct. And you've talked about
3 that in your statement, thank you. But the
4 electricity that we're talking about is generally not
5 consumed by the government, it is generally consumed
6 by the consumers, the ratepayers?

7 A. So, the government in the system
8 that we have here makes, I believe, the procurement
9 decisions but ultimately how much power is used is the
10 consumer. They turn the lights on and they are
11 ultimately billed for those -- for that services.

12 Q. I use the word "Procurement".
13 You are not a NAFTA lawyer, are you, sir?

14 A. I didn't say that I was, but
15 I said that in terms of looking at even the
16 legislation, various references are -- so renewable
17 energy is procured through government decisions,
18 Ontario Power Authority.

19 Q. Okay, but you're using that in
20 the industry term, not a legal sense; correct?

21 A. Well, I'm --

22 Q. In the NAFTA legal sense?

23 A. I'm not sure what the distinction
24 is but I'm just saying that the way the system
25 operates here, the procurement is procurement of

1 renewable energy by the Ontario Power Authority.

2 Q. By the OPA?

3 A. Yes.

4 Q. Thank you. Now, in fact what
5 you've said, the electricity once it's generated must
6 be simultaneously transmitted and consumed; correct?

7 A. Yes.

8 Q. And as we talked about
9 essentially that's consumed by the ratepayers; right,
10 that's who consumes it?

11 A. Well, the system as a whole has
12 to instantaneously meet -- so that is about the
13 reliable supply of the system as a whole has to match
14 supply and demand at any point in time and throughout
15 the system.

16 But again, so the ratepayers -- so the
17 consumers ultimately are billed each month. Those
18 bills are paid by them and that covers the electricity
19 that they consumed.

20 Q. They consume the electricity;
21 that's what I asked; correct?

22 A. The final end point, yes.

23 Q. Because you actually say in your
24 statement that the government can't store the power;
25 it has to do it immediately?

1 A. No-one can store the power.
2 There is no economic or technically feasible way of
3 storing large amounts of power, but the electricity
4 is, of course, moved through the Hydro One
5 transmission system for the most part and that's
6 government-owned.

7 Q. Fair enough, but what you're
8 saying, also, in your statement, is that in terms of
9 cost, we need to keep costs at reasonable levels
10 because it's ultimately the commercial and industrial
11 consumers that have to bare the costs; right?

12 A. Yes.

13 Q. And when you also talk about
14 reliability, reliability generally, wind generations
15 can be less reliable than other methods; correct?

16 A. Yes, that's correct.

17 Q. But that didn't stop Ontario from
18 including wind projects in its green initiative, did
19 it?

20 A. So the government decided to
21 pursue, as many other governments have done, a policy
22 of promoting Green Energy. In terms of its effect on
23 reliability, there's no question that it has different
24 impacts on reliability than other generation so that
25 had to be taken into account in any of the system

1 planning.

2 Q. And it didn't stop Ontario from
3 entering into a special deal with the green consortium
4 for wind either, correct?

5 A. Well, again it was a priority of
6 the government to pursue Green Energy.

7 Q. Now, as I understand it, the
8 majority of what the GEIA was doing was for wind and
9 then some solar; right?

10 A. Solar was a big component so
11 I think it was 2,000 megawatts of wind and
12 500 megawatts of solar.

13 Q. So, the purpose of the whole
14 renewable energy initiative was to reduce the coal for
15 environmental reasons?

16 A. It was a factor in reducing coal,
17 yes.

18 Q. And what happened is this
19 renewable energy program became much more successful
20 than you expected; right?

21 A. Yes.

22 Q. And what ended up happening was
23 that the cost to the ratepayers went up; correct?

24 A. Yes, that's correct.

25 Q. And so what ended up happening is

1 that the customer started complaining about the high
2 prices of this renewable energy program; correct?

3 A. There was particularly -- in 2010
4 there was quite a bit of consumer complaints.
5 I wouldn't say -- there always is but it became a very
6 particularly vocal issue.

7 Q. Because what you say is, and this
8 is quoting your statement at paragraph 14 -- if you
9 want to look at it, that's fine.

10 A. Is this the first one?

11 Q. Correct.

12 A. Okay.

13 Q. If you look at paragraph 14:
14 "In every electricity system,
15 unless it is heavily
16 subsidised by the government,
17 electricity customers or
18 ratepayers ultimately have to
19 pay for generation,
20 transmission and distribution
21 or else the system is
22 under-built and they have to
23 cope with rotating
24 alternatives." [As read]

25 Correct?

1 A. Yes.

2 Q. So, in fact, the Ontario
3 electricity system is not heavily subsidised, is it,
4 sir?

5 A. No.

6 Q. In fact, it is not subsidised
7 at all, is it?

8 A. No, it is not. I guess there was
9 a program subsequent to this concern about prices that
10 led to the -- it is called the "Clean energy benefit
11 for residential consumers."

12 Q. That has nothing to do with what
13 we're talking about?

14 A. That's right.

15 Q. Let's talk a little bit about the
16 FIT Program, the GEIA, but let me just talk a little
17 bit, just generally about expectations. You
18 understood that a lot of stakeholders ultimately
19 invested in the FIT Program; correct?

20 A. There certainly was a lot of
21 interest in the FIT Program and we did get proposals
22 for several thousand megawatts, yes.

23 Q. From all over the world.

24 A. There was considerable interest
25 and it was the -- I don't know about all over the

1 world but certainly there was international interest
2 in it.

3 Q. International, thank you. And in
4 fact it would have been important for Ontario to meet
5 the expectations of the stakeholders in the FIT
6 Program; correct?

7 A. Well, I don't know what you mean
8 by "Meet their expectations." The principal thing
9 that we have to get back to is what is the price
10 impact, what is the reliability impact, what is the
11 sustainability of the system.

12 Q. Let me ask it this way: Do you
13 agree that it was important for Ontario to comply with
14 those duties we talked about earlier, and also respect
15 those duties on behalf of the stakeholders?

16 A. Yes, and I think that we did
17 operate to the best of their ability to do that.

18 Q. Thank you. And Ontario shouldn't
19 be playing any favourites in operating the renewable
20 energy program; right?

21 A. Well, again, that would be --
22 people will look at things differently but, no, the
23 idea was to have a widely-available program.

24 Q. Mr. Jennings, you agree with me
25 that normally Ontario notified stakeholders in this

1 program, this FIT Program, of their rights through
2 rules, webinars and directives from the Ministry of
3 Energy; right?

4 A. Yes, so that was initially
5 launched through a directive from the Ministry of
6 Energy.

7 Q. She is going to be a lot happier,
8 if you don't cut my question off. We're going to hear
9 about that later. I'm trying to make sure we don't do
10 that to each other.

11 In fact, these directives were very
12 important and had to be very carefully written because
13 it was the official government representation by the
14 Ministry of Energy on these initiatives?

15 A. Yes, and they were also framed
16 from the legislation.

17 Q. Did you have any say in the
18 drafting or did you review these directives?

19 A. I was involved in them. They
20 were ultimately of course signed by the Minister so
21 they would be ultimately his.

22 Q. You were involved during the time
23 in the period that you were at the Ministry of Energy
24 during this program?

25 A. Yes.

1 Q. Let me finish my question. Thank
2 you.

3 A. Sorry. I'm just trying to be
4 cooperative.

5 Q. I appreciate you're being
6 cooperative but I just want to make sure the record is
7 clear.

8 Now, you understood that while the FIT
9 Program was being announced and also it was become
10 known that Ontario would be doing renewable energy,
11 that stakeholders were, in fact, investing in Canada;
12 correct, in anticipation of the FIT Program?

13 A. So, there was certainly the
14 legislation which was passed in March of that year,
15 had envisaged there would be a FIT Program so people
16 were aware of it before it was launched, there was
17 a lot of consultation going into it before it was
18 launched.

19 Q. Can you remind us when that
20 legislation was?

21 A. It was introduced in February and
22 then several things before passage so I think it was
23 essentially passed in April. It has been on the
24 record...

25 Q. It would have been reasonable for

1 a potential stakeholder to recognise that the FIT
2 Program was coming and to start relying on that fact
3 throughout the summer of 2009?

4 A. I believe there would have been
5 consultation with stakeholders during the summer.

6 Q. I don't think you answered my
7 question, sir. Let me try to ask it again. It would
8 have been reasonable for stakeholders to recognise
9 that the FIT Program was coming throughout the summer
10 of 2009 and rely on that fact and make an investment
11 to your country; correct?

12 A. Yes, so the legislation was
13 intended to promote it and there were specific
14 consultations with stakeholders, some of them that
15 I was involved in, so prospective investors not only
16 knew of the program but had been involved in
17 consultations on it.

18 Q. I'm going to go to a confidential
19 provision now just for a short period of time.

20 --- Upon resuming the confidential session at
21 3:08 p.m. under separate cover

22 --- Upon resuming the public session at 3:16 p.m.

23 MR. BROWER: The public.

24 MR. MULLINS: Yes. We're okay?

25 BY MR. MULLINS:

1 Q. Now, Mr. Jennings, let's talk
2 a little bit about the GEIA, how that thing got
3 started. You were responsible for negotiating the
4 GEIA; is that right?

5 A. Yes, I was involved in the
6 negotiations, yes.

7 Q. And your specific role ended
8 approximately in January of 2010; right?

9 A. So that was when it was signed,
10 yes, by the Minister at the time.

11 Q. So you're available to talk to us
12 about all the events that occurred from when Samsung
13 first approached the government to the signing of the
14 GEIA, is that fair?

15 A. Yes.

16 Q. And then I can talk to Ms. Low
17 about what happened after that?

18 A. Yes.

19 Q. But I'm probably going to -- you
20 were still around after January 2010, you just weren't
21 negotiating the GEIA?

22 A. Yes, I was around but it was not
23 my direct responsibility after.

24 Q. In fact, though, before the
25 signing of this GEIA, what you've told us in your

1 statement is that in the summer of 2008, Samsung
2 approached the Ontario Ministry of Energy to do
3 an investment in renewable energy.

4 A. Yes, in fact, ourselves and the
5 Minister of Finance did.

6 Q. Now could you tell, please, the
7 tribunal what Samsung's experience was with renewable
8 energy at the time they approached you?

9 A. So they were certainly a very
10 large international conglomerate that was
11 substantially well financed.

12 They had not, themselves, developed,
13 as far as I know, wind or solar. Again, this was
14 a very large competent, financially-sound entity that
15 was looking to invest in Ontario.

16 Q. So, the short answer to that
17 question is "none"; correct?

18 A. Your question makes it sound like
19 there was no reason for talking with them or having
20 a meeting with them.

21 Q. No, no, we talked about not
22 trying to figure out where I'm headed. Just answer my
23 question, okay?

24 MR. SPELLISCY: I do think that the
25 witness does need to be allowed to give context.

1 I appreciate your desires for "yes" or "no" but just
2 as we allowed your witness to give context he does
3 need to be allowed to give context.

4 THE CHAIR: I'm paying attention. It
5 is true that the witness has been asked to respond by
6 "yes" or "no," and a witness is entitled to give
7 explanation if a "yes" or "no" is not feasible or if
8 the "yes" or "no" requires some additional
9 explanation.

10 However, I have noticed that you have
11 given the explanations, I think, every time you wish
12 to, so that -- therefore, I didn't think it was
13 necessary to tell you more about it.

14 MR. MULLINS: That's fine.

15 THE CHAIR: And obviously "yes" or
16 "no" is the rule whenever you can and then explain it.

17 MR. MULLINS: I think we're doing
18 fine. I would ask if there is a "yes" or "no" then he
19 could explain at some point, but go ahead.

20 My point -- I think we made the point,
21 let me move on.

22 THE WITNESS: Yes, they were not an
23 internationally known developer of renewable energy
24 projects.

25 BY MR. MULLINS:

1 Q. And in fact they weren't
2 operating in any renewable energy projects in Canada?

3 A. No, not in Canada.

4 Q. They weren't operating any
5 renewable energy projects anywhere?

6 A. Not that I am aware of but
7 I don't profess to be an expert on it.

8 Q. In fact, the main things they're
9 known for were TVs and cell phones; right?

10 A. So electronics and control
11 equipment -- certainly, they were a high-technology
12 company. That technology would be certainly relevant
13 in doing major projects.

14 Q. And based upon your prior answer,
15 I take it then you were essentially relying on the
16 fact that they're a big company in order to ascertain
17 whether or not they could accomplish what they were
18 promising to do; correct?

19 A. We certainly did get
20 presentations from them, that explained what they
21 planned to do, and how they would source. So one of
22 the things is they would be accessed to supply chains
23 in Korea and elsewhere so it isn't again necessary
24 whether they themselves would build it all. They
25 talked about how they would set up supply chains to

1 build these.

2 Q. So, it was perfectly appropriate
3 then, Samsung then -- let me ask you this: So you knew
4 at the time that Samsung had no intention of actually
5 operating these renewable energy programs?

6 A. I wouldn't say at no -- whether
7 they had no intention or not and what -- their
8 proposal obviously evolved, over time, we did
9 negotiate over time, so as I said, they approached us
10 in August of 2008 so it's -- we obviously did due
11 diligence over time, but a lot of it was they were
12 bringing in partners.

13 So they brought in the Korean Electric
14 Power Company, so we talk about Korean Consortium
15 consists of companies beyond Samsung and included,
16 I believe, CS Wind, which is a power manufacturer in
17 Korea.

18 Q. So there was nothing
19 inappropriate for Samsung or any FIT applicant to
20 bring in partners and to have others operate actual
21 projects themselves; correct?

22 A. Well, this was an example of
23 bringing forward, a large project management team
24 where they would bring in supply chain people so
25 people did towers, people who did blades and they

1 would be really managing the project of
2 2,500-megawatts.

3 Q. I don't think you answered my
4 question. There was nothing inappropriate for Samsung
5 or any FIT applicant to bring in partners or others to
6 operate the actual projects in the renewable energy
7 program; correct?

8 A. Well, we're talking about Samsung
9 so there was certainly nothing inappropriate about
10 that.

11 Q. And there was nothing
12 inappropriate about the FIT applicants doing the same
13 thing; correct?

14 A. So about operating, I think there
15 were rules about flipping the contracts but I'm not
16 sure that's what you're asking.

17 Q. Okay, thank you. Now, when
18 Samsung came to you, you immediately then did a bid to
19 all the renewable energy companies in the world, to
20 see if you could come up with a better deal; correct?

21 A. So, I believe you know the answer
22 to that question.

23 Q. What's the answer, for the
24 record?

25 A. So, there would be no reason for

1 doing that so of course we didn't do that because this
2 was a company that had come in with an unsolicited
3 bid. It was their proposal. For us to then say:
4 Well, we'll take your proposal and shop it around to
5 everyone else, I don't think that would be -- it would
6 have been unusual, as far as I know, in terms of the
7 government operating.

8 Q. Well, in fact, not only do you
9 not do a bid, you didn't even go out and approach
10 anyone who had experience in renewable energy to
11 determine if they could do the same deal; correct?

12 A. Okay, so, again, it was
13 an offer -- this was a proposal that Samsung came
14 forward with. If it was a government initiative, to
15 say we are going to go down this route, we've come up
16 with this idea, we're going to put it out for tender,
17 that wasn't how the idea came up. They came us to us
18 with this proposal.

19 Q. At the time Samsung came to you,
20 you had no obligations to Samsung to do that
21 negotiation; correct?

22 A. We had no obligations to.
23 Negotiations are, first of all, the discussions and
24 then negotiations were entered into because it was
25 seen by the government as a valuable exercise.

1 Q. Prior to the entry of the
2 memorandum of understanding, Ontario had no obligation
3 to be exclusively negotiating to Samsung; correct?

4 A. Memorandum of -- yes, that's
5 correct. Memorandum of understanding was the
6 framework that we signed to work on this.

7 Q. Well, I'm going to get to the
8 memorandum of understanding but I was asking prior to
9 the signing of that document, Ontario had no
10 obligation to Samsung to exclusively negotiate this
11 kind of deal; correct?

12 A. Yes, the discussions we had just
13 led to the MOU.

14 Q. Right.

15 A. We weren't -- there was no
16 commitment before then.

17 Q. And you do recognise that --
18 well, at the time you recognised that there were other
19 companies that probably could have done the same deal;
20 correct?

21 A. I'm not aware of any. We had
22 discussions with some companies either --
23 concurrently, but no-one else offered the same type of
24 arrangement.

25 Q. Concurrently?

1 A. Umm...

2 Q. Or later?

3 A. Well, actually later because the
4 Samsung one was very early on in the stage. This is
5 another thing. They came forward before anyone else
6 was really interested in pursuing Ontario for these
7 types of investments. We did have discussions with
8 some other companies, but mostly -- so certainly they
9 didn't have the same manufacturing commitments.

10 Q. So I understand your testimony,
11 the fact that Ontario was -- sorry, that Samsung was
12 a big company and the fact that they came to you first
13 was the two reasons that you didn't try to look for
14 any other competitor to see if you could get a better
15 deal; is that correct?

16 A. Okay, so they had a specific
17 proposal they came to us with, so, yeah, I think you
18 were talking about this treating people fairly or
19 transparently or whatever, if someone came to you with
20 a proposal and you, in effect, stole it and then
21 shopped it around to other people, that wouldn't seem
22 to be a very fair way of dealing with people, in other
23 words.

24 They came with the proposal and one of
25 the things we did discuss at the time was that not

1 only would they have -- we're talking about
2 exclusivity -- exclusivity for that amount of power
3 and also that Samsung would deal exclusively with
4 Ontario in the project.

5 Q. I think we made our point,
6 Mr. Jennings. Let me go on. Just so the record is
7 clear, how long was the exclusive negotiations before
8 the entry of the MOU took place, how long was that
9 period of time?

10 A. So, we initially, as I think I
11 said, they came in August 2008. We signed the MOU in
12 December, I think it was December 12th, but I could
13 check that, perhaps, of 2008.

14 Q. All right, so from August to
15 December of 2008 --

16 A. Yes.

17 Q. -- the Minister of Energy, the
18 Ministry of Energy made --

19 A. Yes.

20 Q. -- made no public announcement to
21 anyone that they were having these negotiations with
22 Samsung; is that correct?

23 A. So, if you're having a commercial
24 negotiation with someone and it would generally not be
25 the case that we would be negotiating it in public.

1 Q. So the answer to new question is,
2 "Yes, there were no communications"; correct?

3 A. Yes.

4 Q. Again, if you could just try and
5 answer the question, if you want to explain that's
6 fair.

7 A. Okay.

8 Q. I don't want to have to ask the
9 questions twice. Now just so we're clear then, the
10 two main agreements that we're talking about here are
11 the memorandum of understanding and then the
12 Green Energy Investment Agreement; right?

13 A. Yes.

14 Q. There are no other contracts
15 other than the PPAs between Ontario and the Korean
16 Consortium?

17 A. Yes, there obviously was a draft
18 before it became a final but that was the agreement.

19 Q. Well, you knew where I was going.

20 A. Yeah.

21 Q. I was going to ask you about the
22 draft agreement. So you mentioned in your rejoinder
23 statement that there was a draft framework agreement
24 but it never got corporate or government approval?

25 A. No, but it became substantially,

1 and I would say 90 per cent, I don't even -- I won't
2 be able to say what the difference would be. It
3 basically became the GEIA. When I say it didn't get
4 agreement at the time, it had to get Cabinet approval
5 in Ontario, and obviously, corporate approval at
6 Samsung and its partners.

7 Q. Okay, so, if I understand what
8 you're saying then, the framework agreement more or
9 less went through revision and eventually becomes
10 a GEIA?

11 A. Yes, but I think that there were
12 very few, if any, actual revisions. Basically what
13 was arrived at, September 2009 --

14 Q. Right?

15 A. -- effectively was the agreement.
16 What happened was, there was time to get people on
17 side with the approvals.

18 Q. I understand, but it wasn't
19 signed until January of 2010?

20 A. Yes, that's correct.

21 Q. Thank you. Now let's go back
22 a little bit to the MOU but could we bring that up.
23 It's tab 2 of your documents and we can pull it up.

24 MR. MULLINS: What happened to the
25 Elma.

1 MR. APPLETON: They can't tell us.

2 We'll have to proceed without it at this time.

3 Is there any way we could pull up 536?

4 Maybe Canada could bring up C-536? They have access
5 but this side is not able -- there is something wrong
6 for the feed here. We cannot bring it up. Well,
7 that's kind of a shame.

8 MS. TABET: It is not an internet
9 issue; it's a cable issue.

10 MR. MULLINS: Is it possible that
11 I could ask Canada to bring it up?

12 MR. SPELLISCY: 536. There is
13 a problem with the cable. They can't deal with it
14 until they can get in here. They will do it over the
15 break. We understand.

16 MR. MULLINS: You are a gentleman and
17 a scholar, sir. I appreciate the cooperation from the
18 Government of Canada.

19 All right. Thank you.

20 BY MR. MULLINS:

21 Q. Now, in the memorandum of
22 understanding, you talk about in your statement that
23 there were commitments. Now, you said in your witness
24 statement it required the completion of a feasibility
25 study.

1 A. I believe that is part of the
2 memorandum of understanding, and...

3 Q. And then you also say they
4 acquired exclusive negotiation for 2,500 megawatts
5 between Ontario and the Korean Consortium; right?

6 A. Yeah, but there is reference to,
7 I believe, nothing that's preventing -- yeah, so if
8 you look at 4.2:

9 "Nothing in this MOU shall
10 affect the rights of the
11 Government of Ontario or the
12 Ontario Power Authority or
13 any current or future
14 Government of Ontario
15 related to renewable energy
16 procurement, including but
17 not limited to programs such
18 as the renewable energy
19 standard offer program." [As
20 read]

21 And that was really a precursor of the
22 FIT Program.

23 Q. Correct. But I think you
24 explained in your statement what this meant though was
25 that Ontario had the exclusive to have 2,500 megawatts

1 reserved for the Korean Consortium and the Korean
2 Consortium would shop that to some other jurisdiction?

3 A. Yes.

4 Q. Meanwhile, Ontario would not do
5 a similar deal with anybody else?

6 A. For that 2500-megawatt.

7 Q. Okay, so pursuant to -- your
8 understanding is it's pursuant to this memorandum of
9 understanding nothing prevented Ontario, at this
10 point, to enter into a similar GEIA-type contract with
11 a competitor of the Korean Consortium; right?

12 A. So that's correct. It also
13 leaves the room for the FIT Program which, as I said,
14 adopts this what was called the RESOP plan, but it
15 really that type of a program which was a standard
16 offer program.

17 Q. I'm a little confused though.
18 Why was it important to Ontario that the Korean
19 Consortium didn't do a similar deal in some other
20 country, like my country, for example?

21 A. Well, that was seen as a marquis
22 project that would show that Ontario was pursuing
23 Green Energy in a large way. If the Korean Consortium
24 was doing a project of this magnitude in Ontario, it
25 was also doing one in Ohio or Iowa or somewhere, then

1 that would make it more challenging for them to do
2 this one. I mean if we wanted to make sure that the
3 Ontario one was a success, you didn't want to have
4 that work diluted by dealing with people all over the
5 world.

6 Q. And you also wanted to be able to
7 brag about it that you had this Green Energy?

8 A. No, as I said, it was intended to
9 be a marquis event.

10 Q. And I take it from your answer,
11 you busted me and realised I'm from the United States.

12 A. (LAUGHTER).

13 Q. The answer?

14 A. Or Iowa, I'm not sure which one.

15 Q. So let me go back to the
16 memorandum of understanding.

17 Now, first off, just so we're clear,
18 this was just a memorandum of understanding like we
19 hear in commercial cases. This does not require
20 either company -- sorry, either entity of Ontario and
21 the Korean Consortium to actually enter into a final
22 binding agreement; correct?

23 A. Yes, that's correct. That's what
24 it -- a memorandum of understanding basically just
25 sets out -- it's kind of an agreement to agree.

1 Q. So, if, for example, at any time
2 Ontario or the Korean Consortium says "You know what,
3 this is not working for me" they can just walk away
4 from it; right?

5 A. So that's generally what an MOU
6 is. I would have to refamiliarise myself with what --
7 there were specific things about the roles and
8 relationships of each party.

9 Q. Now, I'm going to point you to
10 Bates Number 99246.

11 The Bates numbers, this is a lawyer
12 thing, that's a machine called Bates literally. So
13 that's what that is and so I'm looking at
14 paragraph 2.1, subsection 3.

15 A. Yeah.

16 Q. Okay, and we're going to go
17 through this. First off, our copy was delivered with
18 these handwritten conditions; do you know where that
19 came from?

20 A. Well, this is the version that
21 was initialed by people, and that must have been done
22 at the time it was initialed.

23 Q. So it was important to both
24 parties that these be conditions that the parties
25 meet?

1 A. So, I'm just reviewing what they
2 are. You're referring to what's numbered as 1, 2 and
3 3 at the bottom?

4 Q. Yes, sir.

5 A. So it appears really that was
6 just at some point deciding to number these points.
7 That's the only addition.

8 Q. Well, they were labelled --
9 sorry, I didn't mean to cut you off. They were
10 labelled as conditions; right? I think it's being cut
11 off on the screen but people have it in front of them
12 they can see it now. Let's go to the top of that
13 paragraph and again I appreciate the cooperation from
14 counsel on the other side of the aisle.

15 Now, what it says is that, first:

16 "Based on a mutual desire to
17 determine the benefits for
18 renewable manufacturing in
19 green collar jobs..." [As
20 read]

21 It goes on that the project would have
22 a feasibility study; do you see that?

23 A. Yes.

24 Q. There was no feasibility study,
25 was there, sir?

1 A. No, there was not.

2 Q. Okay, thank you. And in fact,
3 the Auditor General looked at this in 2011 and found
4 that there was no economic analysis or business case
5 done to determine whether the agreement with the
6 consortium was economically prudent and cost
7 effective; do you remember that?

8 A. So I know there was
9 Auditor General's study on renewable Green Energy in
10 particular in total and I was certainly involved in
11 some work on that.

12 Q. Well, if you go to tab 24 of your
13 notebook.

14 MR. SPELLISCY: Which Exhibit?

15 BY MR. MULLINS:

16 Q. I'm sorry, it is Exhibit Number
17 C-228 and I'm going to go way down. It is numbered
18 page 91 from the document and the Bates Number is
19 9928.

20 And if you can go on the first -
21 left-hand column about one quarter of the way down,
22 starting with the word "However."

23 A. Yeah, yes.

24 Q. And exactly what I read was
25 exactly what the Auditor General found.

1 A. Yes, yes, and this report, in
2 general, is also critical of the FIT Program,
3 basically the Green Energy Act.

4 Q. That's correct, the
5 Auditor General was credited with all of the renewable
6 energy initiatives, weren't they?

7 A. Yes.

8 Q. But this is a true statement,
9 what they've said there, correct? It is not just the
10 Auditor General saying it, you agree that that was
11 true that:

12 "No economic analysis or
13 business case was done to
14 determine whether or not the
15 GEIA with the consortium was
16 prudent or cost effective."

17 [As read]

18 You agree with that statement don't
19 you, sir?

20 A. There was certainly no
21 independent economic analysis or economic business
22 case done. So again they are saying criticism was
23 made of the FIT Program.

24 Q. Now, you've said in your
25 statement that the FIT Program was extremely

1 successful; do you remember that testimony?

2 A. Yes.

3 Q. And you also said that you could
4 have walked away. So, how many applications in the
5 FIT Program did Ontario get in the fall 2009?

6 A. Okay, so I don't have that at the
7 top of my head, although I know that it is in some of
8 the testimony. So the sequencing of it was that the
9 FIT Program and the Samsung agreement had basically
10 been done concurrently so that the Korean Consortium
11 agreement had reached a stage that it was going for
12 Cabinet approval. And the FIT Program had had
13 ministerial directives so those were all very short
14 time within each other. So it isn't that one was done
15 and well-established and then you did the other. The
16 idea was to do both of them at the same time.

17 Q. Now the chronology is extremely
18 important here so let's go back. You remember that
19 you started receiving FIT applications in November of
20 2009; correct?

21 A. Yes.

22 Q. And in fact you got an
23 overwhelming response to the FIT Program in 2009;
24 correct?

25 A. Yes, yes.

1 Q. And in fact you told us earlier
2 that you could have walked away from the GEIA before
3 it was signed in January of 2010; correct?

4 A. So, you asked about at the time
5 of the MOU and certainly that was the case. By the
6 time we get to September we have actually had a draft
7 agreement prepared, that has gone to Cabinet, so that
8 was in October. It would have gone to the
9 decision-making at the Korean Consortium, Samsung and
10 KEPCO, so it is much more advanced than what we are
11 talking about of the MOU in December of 2008.

12 Q. I understand it was advanced but
13 it wasn't signed until January of 2010?

14 A. Yes.

15 Q. And it wasn't a binding agreement
16 until January of 2010?

17 A. Yes, so it was going through
18 a decision-making --

19 THE CHAIR: This is a legal
20 characterisation whether an MOU is binding on what it
21 is binding and so I understand --

22 MR. MULLINS: I'll move on. I think
23 he answered though so I think we're fine.

24 THE CHAIR: Yes, he answered. Just
25 I'm not sure he's qualified to give this answer. So

1 we understand that this was Mr. Jennings'
2 understanding?

3 THE WITNESS: Yes.

4 THE CHAIR: With this reservation,
5 that's fine.

6 BY MR. MULLINS:

7 Q. Thank you. Now, the memorandum
8 of understanding though did have a confidentiality
9 term; correct?

10 A. Yes.

11 Q. And whose idea was it to keep it
12 confidential?

13 A. I suspect that both parties
14 agreed to it. I don't remember the exact sequence.
15 I believe it's --

16 Q. And I understand that Samsung was
17 supposed to be an anchor tenant; correct?

18 A. Yes. Yes.

19 Q. Normally anchor tenants are
20 advertised to attract other tenants?

21 A. Well, that would be at the time,
22 again, when it became final agreement. You're talking
23 about the period before we had negotiated the final
24 agreement.

25 Q. Okay, so it was important in

1 Ontario to keep this confidential prior to the signing
2 of the final agreement in January of 2010.

3 A. So, there was -- in terms of what
4 was -- I think there is discussion here about
5 potentially announcing it earlier. These are all
6 things that -- in the government context,
7 communications people could think about this. I think
8 there was contemplation of making it public at
9 different times.

10 It was certainly public in September
11 2009 when, again, we had basically come to the
12 agreement, was awaiting approval, there was coverage
13 in the media, in the Toronto Star, both at the time
14 there was the agreement reached, and at the time it
15 was discussed in Cabinet.

16 Q. And you agree with me though,
17 that it actually got leaked to the media; correct?

18 A. So we put out a news release just
19 after it was reported on in the media. I believe the
20 sequence was actually around the time that that the
21 Minister had been interviewed so I'm not sure what
22 the -- but anyway, that was how we responded with the
23 news release after it was in the meeting.

24 Q. But you agree with me that had it
25 not been exposed by the Toronto Star in the media, you

1 would have kept it confidential until its signing;
2 correct?

3 A. So, again, that happened in
4 October, as well, and so it was at least publicised
5 three times. I don't -- again you are correct,
6 I don't think -- it was certainly not the Ministry's
7 intention to have it made -- we didn't do anything
8 ourselves to make it public.

9 Q. We'll talk about --

10 A. It was responding to the fact
11 that it had become public.

12 Q. And we'll talk about those
13 reports in a moment but let me ask you this: Up to the
14 signing of the GEIA in January of 2010, can you tell
15 us any other reasons than what you've already given
16 us, why Ontario favoured Samsung over its competitors,
17 sir?

18 A. Well, again, I would say that it
19 was Samsung's ability to manage a project. This is
20 a very large project so it isn't that they would be
21 equipment suppliers or that they would even be the
22 project developers but they had the financial ability
23 and the connections with other industries, to put
24 together the supply chain to develop it.

25 They had agreed to make a commitment

1 to bring in four manufacturing plants which was
2 actually, from the government's perspective, seen as
3 very crucial, that's what they wanted to demonstrate
4 to the Green Energy, and the Green Economy Act, so
5 there is the commitment to bring in power
6 manufacturers, blade manufacturers, solar converters,
7 solar modules, and they also agreed to do a very
8 aggressive schedule of phases for bringing in the
9 projects, much more quickly than we could expect
10 through the FIT or any other program.

11 So they would also be, if you had them
12 bringing in -- the intention was to have manufacturing
13 in Ontario. There was going to be provisions, content
14 provisions for the FIT contractors. It wasn't
15 necessarily clear how they would be able to -- that
16 they would be able to generate enough business on
17 their own so this was a way of attracting large
18 companies that could then serve others as well.

19 Q. Well, I guess what I'm trying to
20 understand, I understand why you wanted to deal with
21 Samsung, which I think you answered. What I'm trying
22 to understand is why you did not give that
23 opportunity, up to January 2010, to any competitor of
24 Samsung, the stuff you just talked about?

25 A. Yeah, so that, as I said, for

1 two decision-making processes. For instance, when we
2 talked about it having gone to Cabinet, if ultimately
3 it had not been approved at Cabinet, that would have
4 been where that decision would have been made, then
5 there would not have been a deal.

6 Q. And do you know whether or not
7 Samsung paid any special benefits for this deal, sir?

8 A. Special benefits?

9 Q. Yeah, any money was paid or
10 anything like that?

11 A. None. I would be -- so,
12 certainly not that I'm aware of but I would be
13 surprised if that was the case.

14 Q. Okay.

15 A. Actually I'm not exactly sure
16 what you're implying, but there was no -- there was
17 a commercial negotiation.

18 Q. Just a second. Now, memorandum
19 of understanding was signed by the Korean Consortium;
20 correct?

21 A. I believe that. I'd have to
22 check whether it was Samsung.

23 Q. Go back to tab 2, I think you'll
24 find that it was signed by KEPCO and Samsung and --

25 A. Yes, yes.

1 Q. And if you look at page 2, it was
2 the Korean Consortium?

3 A. Yes, correct, and by the Minister
4 at the time.

5 Q. And who decided would be part of
6 the Korean Consortium, sir?

7 A. Well, I think it was -- Samsung
8 approached us initially but they then brought on KEPCO
9 as a partner.

10 Q. So Ontario allowed Korean
11 Consortium to decide who would be the members?

12 A. Well, we didn't disagree.
13 I guess if it was someone that we had disagreed with,
14 we might have raised it but KEPCO was a very large
15 electricity-generating company, they were not unknown
16 to us.

17 Q. You didn't, in fact, insist that
18 they open this opportunity to other entities. You
19 allowed Samsung to decide who the membership of the
20 Korean Consortium would be; right?

21 A. So I think if it had been some
22 entity that did not make sense being in the consortium
23 we might have raised it but KEPCO was a large
24 electricity utility that would have been known to us.
25 It would not have been a -- it wouldn't be a surprise

1 that they would participate, yes.

2 Q. In fact, after the contract was
3 signed, the Korean Consortium brought in Pattern;
4 right?

5 A. Yes.

6 Q. And you allowed the Korean
7 Consortium to decide that it would pick which
8 renewable energy entity it decided to partner with;
9 correct?

10 A. The government didn't make that
11 decision, no.

12 Q. You didn't insist that that be
13 put out to public bid or other competitors would be
14 able to compete to be part of the Korean Consortium;
15 right?

16 A. So, I'm not aware of how Pattern
17 and Samsung, how that was selected but I don't think
18 it's unusual for people to develop partnerships.
19 I don't know what exact mechanism they went through.

20 Q. And the fact that you recognize
21 that being part of the Korean Consortium was a pretty
22 good deal; right?

23 A. So I think that there were
24 certainly priorities. There were things that they had
25 out of that deal. Of course, there were things they'd

1 delivered to the government that were important to the
2 government.

3 In terms of the role of Pattern,
4 I think Pattern did have experience in developing
5 projects, so I don't think there was a question from
6 our part as to why they ended up with them as
7 a partner, for instance.

8 Q. Right, but my point is by being
9 in the Korean Consortium, a renewable energy project
10 doesn't have to go through a FIT Program; correct?

11 A. Yes.

12 Q. Okay, so you can get a power
13 purchase agreement, for example, Pattern was able to
14 be in this joint venture with the Korean Consortium
15 and get the benefits of the high rates for the
16 renewable energy without going through the FIT Program
17 because they were chosen by the Korean Consortium to
18 be a member of that group; is that correct?

19 A. So, I don't know, again, details
20 of how Pattern became affiliated with them but
21 certainly Pattern was a developer and that added
22 expertise to the group. In terms of the managers that
23 the Korean Consortium had, certainly there were
24 benefits they had. There were obligations they had.

25 But a point -- it certainly wasn't

1 a slam dunk. They were supposed to develop
2 2,500 megawatts and they were unable to do those in
3 time for the phases that were done so it wasn't a slam
4 dunk, if you were partners.

5 Q. Isn't it true, sir, that when
6 Pattern got invited to this special Korean Consortium
7 group, they dropped out of the FIT Program?

8 A. They may have. I don't know.

9 Q. And in fact what was happening is
10 once the FIT Program applicants started being ranked,
11 Pattern and the other members of the Korean Consortium
12 started buying up projects that were ranked lower than
13 in the FIT process; do you remember that, sir?

14 A. There was some -- because the
15 Korean Consortium did have priority access, there was
16 some benefit for them looking at projects that were
17 advanced in development and taking on those projects
18 but I'm not aware of the specific details but I know
19 there was incentive to do that.

20 Q. Thank you, sir. Now, when the
21 renewable energy initiative was going on, and we'll
22 say throughout 2009, when you're around, do you
23 remember any discussions within your Ministry or with
24 others, as to whether or not this program was going to
25 violate provisions of NAFTA?

1 A. So, the domestic content
2 provisions...

3 MR. SPELLISCY: Wait, wait.

4 BY MR. MULLINS:

5 Q. Outside the scope of privilege?

6 MR. SPELLISCY: I just want to caution
7 the witness of course that you can't disclose or
8 divulge any discussions with counsel that you might
9 have had about the FIT Program and its compliance with
10 international trade agreements.

11 THE WITNESS: Okay.

12 BY MR. MULLINS:

13 Q. So, in answer to my question,
14 you're claiming privilege on whether or not there was
15 discussions about NAFTA? You can refuse to answer my
16 question.

17 MR. SPELLISCY: I think you can
18 acknowledge whether there were but you can't disclose
19 the content of any of those discussions.

20 THE WITNESS: Yeah, so I don't
21 actually recall any discussions with respect to NAFTA,
22 no.

23 BY MR. MULLINS:

24 Q. Okay, well, let me try to refresh
25 your recollection. Could you go to tab 4?

1 A. Yep.

2 Q. Okay, this was a document,
3 Exhibit Number 692. Is it possible we could --

4 MR. APPLETON: I think we could
5 probably get up. It is Exhibit --

6 MR. MULLINS: Sorry, C-692.. It is
7 just the first page.

8 MR. APPLETON: It would be helpful.

9 MR. MULLINS: It would be helpful.

10 How are we doing on that?

11 THE CHAIR: If it's more complicated
12 than last time. It is almost 4 o'clock and so we
13 could have a break. Here it is. I take back what
14 I said. No break.

15 MR. MULLINS: We'll try to fix our
16 technical difficulties during the break. But we're
17 right on target to finish so I think --

18 THE CHAIR: Go ahead.

19 MR. MULLINS: And whenever the witness
20 wants to take a break.

21 BY MR. MULLINS:

22 Q. So do you recognise this
23 document, sir?

24 A. So, I don't actually recognise
25 this but I know what it's from.

1 Q. Okay?

2 A. I was involved in the
3 consultation session that it refers to.

4 Q. Well, why don't you identify for
5 the record because it is really not self-explanatory.

6 A. Okay, so in the development --
7 while the FIT Program was being developed, in a lot of
8 the consultations, details of the program itself would
9 have been with the Ontario Power Authority but it
10 involved the Ministry of Economic Development and
11 Trade -- they change their acronym quite often, but
12 anyway it was that Ministry. So we had joint sessions
13 with different stakeholder groups on how
14 domestic-content provisions could be put into the
15 Feed-in Tariff program.

16 Q. Are these your notes or do you
17 know?

18 A. So it doesn't look like my
19 writing. I'm not sure. They may be Ministry notes
20 though.

21 Q. We know they're not my notes
22 because you can read them. If I do go, if I read
23 this third one down there's you, right, Rick Jennings?

24 A. Yeah.

25 Q. And then we have CanSIA,

1 Elizabeth McDonald. Can you tell us who CanSIA and
2 who Ms. McDonald is?

3 A. That is the Canadian Solar
4 Industry Association and Liz McDonald was the CEO of
5 it.

6 Q. If you go two-thirds down right
7 where you're looking, I see that, it says CanSIA. How
8 does NAFTA relate to this? And then MEI, I think it
9 is a little cut off, you can't see it from there, MEI,
10 Quebec has been able to do this, no NAFTA, can you
11 read that?

12 A. So I think MEI that's the
13 Ministry of Energy and Infrastructure which is what we
14 were called at the time. I don't see the M either on
15 mine but I assume that's what that --

16 Q. You see that in the corner.
17 That's the Quebec?

18 A. So, one of the reasons that
19 I hadn't really recalled NAFTA being raised -- I know
20 that the WTO had been raised. I don't remember NAFTA
21 being raised but Quebec has had domestic-content
22 requirements in its RFPs, and in fact regional
23 requirements related to the Gaspé area of Quebec, so
24 I think that would have been a reference to that, to
25 another renewable-energy program that had had

1 domestic-content requirements.

2 Q. So, if I understand what you're
3 saying, it's that CanSIA, that is simply Ms. McDonald?

4 A. Yes.

5 Q. She asks does this local
6 requirement violate NAFTA? Is that what she was
7 asking, local content requirement?

8 A. How does NAFTA relate to this.
9 How do the NAFTA requirements relate to what would be
10 in the Feed-in Tariff program.

11 Q. So her concern was that the
12 local-content requirements did have a NAFTA issue; is
13 that fair?

14 A. So she would have been asking
15 about what our view is on that. Now, I would note in
16 my comments above, that the comment was really just to
17 say that the domestic-content requirement was actually
18 specified in the legislation.

19 Q. Okay, and so if I understand what
20 you're saying, you are saying that if there was
21 an issue for NAFTA, it wasn't the Ministry of Energy's
22 fault, it was the legislature's fault; is that what
23 you're saying?

24 A. I'm saying the domestic-content
25 provision was pursued because it was in the

1 legislation. It wasn't an option from our perspective
2 to not have it because it specifically said, "Shall
3 contain domestic content."

4 Q. Well, Ministry of Energy wasn't
5 against the global-content requirement, was it?

6 A. We didn't say it -- so, I don't
7 know if that's relevant. I can explain the sequence
8 of why it became shelved but I don't think that's --

9 Q. So the answer to my question is,
10 "No, the Ministry of Energy wasn't against the local
11 content requirement."

12 Correct?

13 A. Was not against it.

14 Q. And so this, again, was related
15 to the FIT Program; correct?

16 A. Yes.

17 Q. It couldn't be related to the
18 GEIA because that was still a secret, right, or the
19 deal with the Korean Consortium?

20 A. This was a consultation on the
21 FIT Program, the development of the FIT Program.

22 Q. And was there any discussion
23 during this meeting about other potential violations
24 of NAFTA?

25 A. I would have to look to these

1 notes to see if there is anything else that seems to
2 raise that.

3 Q. You don't remember?

4 A. I don't recall.

5 Q. You don't remember any
6 discussions about any other issues about maybe
7 Most-Favoured Nation or minimum standard of treatment?

8 A. So, I don't think that would have
9 been raised in this because certainly the FIT Program
10 was. I don't see how that would have come up and
11 I don't see anything in these notes referring to that.

12 Q. And if I understand what the
13 answer was, the answer was: Well, Quebec has been able
14 to do this before, and that was the response to the
15 question whether or not there was a NAFTA issue here.

16 A. So it was an example of
17 a renewable-energy program that had been launched in
18 Canada with domestic-content provisions that had not
19 been challenged under NAFTA.

20 Q. Just because somebody doesn't
21 challenge something, doesn't mean it's proper; isn't
22 that correct, sir?

23 A. That's correct but it obviously
24 doesn't mean it is not correct proper either.

25 Q. Okay. I promised you I'd go back

1 to the Star story so that's where we're going now and
2 we're going to tab 30. Again, if you want to take
3 a break, I'm perfectly fine. We've been going
4 a little over an hour but --

5 A. I'm fine.

6 Q. All right. Keep on going. So go
7 to tab 30. Do you recognise this document, sir?

8 MR. SPELLISCY: If you wanted to -- we
9 need an exhibit number.

10 BY MR. MULLINS:

11 Q. So it's R-68. Perfect, kind of,
12 more or less. Kyle, can we do a little better than
13 that.

14 I'm going to give an A to the Canadian
15 group technology and ours, pretty much a C plus.

16 So let's go back to tab 30. This is
17 R-68. So, I think, if I remember from your prior
18 testimony, what you said was you knew the story was
19 going to break, and is it fair to say that Samsung and
20 Ontario wanted to get ahead of the story, in news
21 terms?

22 A. So, that's dated at 10:00 p.m.
23 and there was a -- it was in response to an article,
24 maybe that they knew the article had come out, maybe
25 that it had been on the website before, so I'm not

1 sure of the sequence but it was in response to the
2 fact that it was reported on the Toronto Star.

3 Q. So, the first paragraph says:
4 "Recently, information
5 concerning the negotiations
6 between Samsung C&T
7 Corporation and the
8 Government of Ontario has
9 prematurely entered the
10 public domain." [As read]

11 Who is the corporation again?

12 A. I think that's -- so, Samsung,
13 I think that's just the two initials for the
14 corporation. That's one corporation, I believe.

15 Q. Oh, I'm sorry, I apologise.
16 I understand that. Samsung C&T Corporation?

17 A. Yes.

18 Q. I apologise. So at this point
19 you didn't think it important to identify that KEPCO
20 was a party to this joint venture?

21 A. So, that may have been referenced
22 to what was specifically in the article. And I'm
23 not -- I don't recall that now. Maybe they only
24 referred to Samsung in the article.

25 Q. Do you see KEPCO in here, sir?

1 A. No, I meant the article. This is
2 in response or in relation to an article in the
3 Toronto Star.

4 Q. Let me ask you a direct question,
5 sir: Why was it that KEPCO was not identified in the
6 joint release?

7 A. So, I'm speculating because
8 I just don't write the press releases, that the
9 article in the Toronto Star, that this was in response
10 to, talked about Samsung and may or may not have
11 mentioned KEPCO or not.

12 Q. So, because KEPCO was left out of
13 the media, you decided you didn't have to put it in
14 the press release; right?

15 A. So, this press release, and you
16 can see it went out at 10:00 p.m., which is not
17 normally when press releases go out, so it was
18 obviously put together quickly to deal with
19 a particular situation. So it was dealt with to deal
20 with the article that was in the Toronto Star. So it
21 would have been responding directly what was in the
22 Toronto Star article.

23 Q. So you basically just put the
24 limited amount of information possible that you felt
25 like you needed to, in this rushed press release;

1 right?

2 A. If it had been at 10:00 a.m., it
3 might have been more fulsome. I don't know.

4 Q. Okay. And if you go to the first
5 paragraph it says:

6 "Recently, information
7 concerning negotiations
8 between Samsung C&T
9 Corporation and the
10 Government of Canada has
11 prematurely entered the
12 public domain." [As read]

13 A. Yes.

14 Q. And that's a true statement.

15 A. Yes, again the sequence, whether
16 it had just been posted on the website, whether it had
17 actually come out, whether they were informed it was
18 coming out the next morning, I'm not sure what --
19 I don't recall which one of those it was, but it was
20 that they knew it was going to be out.

21 Q. Let me break this statement down
22 and make sure every statement is true:

23 "Recently information
24 concerning negotiations..."
25 [As read]

1 So it's accurate at this point as at
2 September 26th, 2009, that the parties were all in
3 negotiations; correct?

4 A. Well, it was advanced enough that
5 it was not long after that, that it went to Cabinet on
6 our side and discussions on their side. I mean it
7 was -- so, that would still be negotiation until
8 Cabinet agreed.

9 Q. Right. Again, on this point, the
10 chronology is very important so I want to make sure
11 we're all on the same page. It is accurate that as of
12 September 26th, 2009, that Ontario and Samsung C&T
13 were only in negotiations; correct? That's what you
14 told the public; correct?

15 A. But so we would -- but that
16 doesn't mean that the agreement was more or less in
17 the stage -- so the agreement was in the stage that it
18 was going for final decision so it isn't like...

19 Q. You told this to the public,
20 Mr. Jennings. I want to make sure this statement is
21 correct.

22 A. It is still in negotiation until
23 it is actually signed by both parties.

24 Q. Thank you. That's all I needed,
25 sir. Thank you, you told the public, so I assume this

1 was the truth.

2 A. Yes, I'm just saying that it's
3 not like we just started, it was an advanced stage.

4 Q. You wouldn't tell the public
5 something that wasn't true; right?

6 A. So it had not been signed. It
7 wasn't signed until January of 2010.

8 Q. The Ministry of -- sorry, I don't
9 want to cut you off. The Ministry of Energy would not
10 tell the public something that was not true; correct?

11 A. It was still in negotiations.
12 I'm just saying it was very advanced negotiations.

13 Q. Can you just answer my general
14 question, specific question, that the Ministry of
15 Energy would not tell the public something that wasn't
16 true regarding this renewable-energy project; yes or
17 no?

18 A. The Ministry of Energy would not
19 tell the public something that was not true.

20 Q. Because that wouldn't be
21 transparent; correct?

22 A. Correct.

23 THE CHAIR: Can I just ask one
24 question about what is your involvement in the
25 drafting the content of this press release?

1 THE WITNESS: So we would have
2 communications people, communications director.
3 I probably would have reviewed it at some point, but
4 I wouldn't be drafting it.

5 THE CHAIR: But you are the one who
6 provided the content to the communication people?

7 THE WITNESS: So, in this case,
8 because, as I said, the timing of it is obviously was
9 done fairly quickly, like 10:00 p.m., so, it would
10 have been a combination. They would have checked with
11 staff but probably the Minister's office would have
12 been involved. Like it would have been done at a very
13 high level. It is probably in response it to
14 an interview the Minister might have had.

15 THE CHAIR: I understand it was
16 a response and somewhat of a rushed response. I'm
17 just trying to understand what your personal knowledge
18 was because the communications people do not invent
19 what goes into the press release. Someone tells them
20 what to write.

21 THE WITNESS: So, it would have done
22 this with the Minister's office business it involved
23 the Minister. I would likely have seen a draft,
24 perhaps, at 9:50 or something like that, 10:00, and so
25 I would have reviewed it on a short-term basis. As

1 I say, I didn't write it.

2 THE CHAIR: Thank you.

3 BY MR. MULLINS:

4 Q. Mr. Jennings, I want to finish
5 this sentence. It goes on to say that the:

6 "Information has prematurely
7 entered the public domain."

8 [As read]

9 Do you see that?

10 A. Yes.

11 Q. And that's a true statement;
12 correct?

13 A. Yes.

14 Q. And what was the plan of putting
15 this information in the public domain?

16 A. So, normally it would have gone
17 through the sequence of getting Cabinet approval, once
18 it had Cabinet approval because, in effect, it
19 wouldn't have been an agreement until we had -- of
20 this making magnitude, until we had Cabinet approval.
21 The government or Minister on its own wouldn't have
22 been able to approve it. You go to Cabinet and you've
23 you have a communication plan and the communication
24 plan is approved and that's how it's released.

25 Q. So, if I understand your answer

1 then, the plan was to not publicly reveal the status
2 of these negotiations until you obtained Cabinet
3 approval; correct?

4 A. Which is -- yes, which is
5 standard practice for anything that goes to Cabinet.

6 Q. It is standard practice then to
7 enter into secret agreements and memorandum of
8 understandings?

9 A. It is standard practice that
10 until something has been approved by cabinet, it is
11 not official policy of the government and so it would
12 not -- an agreement would not normally be publicised
13 until it had been approved.

14 Q. You wouldn't keep it secret
15 though; correct? You just simply would not publicise
16 an agreement; there is no reason to keep it secret?

17 A. So, I wouldn't agree with what
18 you're characterising there. I mean if you are in
19 commercial negotiations, you don't have those
20 negotiations in the public. So the standard procedure
21 is usually that an agreement is negotiated
22 confidentially. It becomes public after it has been
23 approved and announced.

24 Q. You agree with me that
25 governments have different relationships with entities

1 than private entities have with each other, don't you,
2 sir?

3 A. In some ways different, in some
4 ways very much the same.

5 Q. Now it goes down to the next
6 paragraph:

7 "Both parties regret that
8 months of extraordinarily
9 cooperative effort have
10 become known even while
11 serious discussions are
12 ongoing." [As read]

13 That's a true statement?

14 A. Yes. So that would be reflecting
15 the pact that the normal procedure would be to do this
16 negotiate in confidence, negotiate a commercial
17 agreement and get approvals from the various sides and
18 then that would be announced through a -- at the time
19 it was signed.

20 Q. Why did you regret it?

21 A. So that this was, in effect, a
22 breach of the normal procedure.

23 Q. I see.

24 A. So you'd have -- so one of the
25 things that happens if you do have these -- some of

1 these things become public, then people who would view
2 it differently or have other ways of looking at it, it
3 gives them an opportunity to raise issues with the
4 people like Cabinet, people who would otherwise be
5 making the decision.

6 Q. Okay, the next paragraph says:

7 "However, since both Samsung
8 C&T Corporation and the
9 Government of Ontario are
10 pleased to confirm that
11 efforts are progressing well
12 towards the signing of
13 a historic framework
14 agreement." [As read]

15 Is that correct?

16 A. Yes.

17 Q. So it is accurate that as of
18 September 26th, 2009, there was no signing of
19 an actual framework agreement because you told us
20 earlier that that happened in 2010?

21 A. Yeah, yes.

22 Q. Now, go to Tab No. 7. I'm sorry,
23 I apologise. That's not the right tab number. I'm
24 sorry, it is the right tab number.

25 A. It is article --

1 Q. It is R-177. Yes, that's the
2 Star article that you referred to. This is the
3 article that required the rushed public, the joint
4 press statement; right?

5 A. I'm just looking because I know
6 there is another one. The date unfortunately is the
7 date that it is -- I've got June 20th is the --

8 Q. No, I think that's. Yeah,
9 exactly. I think though if you --

10 A. September 26th, yes.

11 Q. If you look at the byline?

12 A. Saturday, September 26th.

13 Q. Yes. Thank you. So what happens
14 here is this is the article that prompted the joint
15 press statement.

16 A. Yes, so I guess further to the
17 fairly quick nature that that was prepared, this was
18 a Saturday, and so that was at 10:00 p.m. on
19 a Saturday.

20 Q. Now, you've said in your
21 statement that no other investor came to Ontario in
22 the summer of 2008, throughout 2009 to do a similar
23 deal; correct?

24 A. That's correct, so we did have --
25 there was interest, people from a couple of companies

1 did talk to us, about various things they could do but
2 they were certainly not on the scale or the value-add
3 that the Samsung one had.

4 Q. You testified earlier, sir, that
5 those communications occurred after the designing of
6 the GEIA?

7 A. Yeah. Well, I wasn't saying in
8 '08, I was saying -- so '08 was just with Samsung but
9 there were discussions.

10 Q. Well, let me just put it this way
11 sir. The record is clear that no-one outside of
12 Ontario, the Minister of Energy and the members of the
13 Korean Consortium, even knew that you were
14 contemplating a joint venture, or this GEIA, rather --

15 A. Yes.

16 Q. -- until September 26th, 2009;
17 correct?

18 A. Yes, it was well known that the
19 Ontario Government had an interest in doing expansive
20 things in the green sector.

21 Q. What entity is responsible for
22 administering the renewable energy program existed?

23 A. One prior to this?

24 Q. During this time period, what
25 entity was responsible for administering the renewable

1 energy program? What entity, the Ministry of Energy,
2 the OPA?

3 A. So the Ministry of Energy had
4 policy oversight of the programs and procurements from
5 the Ontario Power Authority.

6 Q. Okay, and you did not even tell
7 the OPA about the proposed deal with the Korean
8 Consortium until the summer of 2009; isn't that
9 correct, sir?

10 A. That's correct.

11 Q. And why is it that you kept this
12 information away from the entity that is responsible
13 for administering it?

14 A. So, this would have been, you
15 know, decisions made obviously at the political level
16 but it was a decision to have this as a
17 directly-negotiated agreement and, as I said, there
18 was an interest in pursuing both a Feed-in-Tariff
19 program and a large investment agreement such as this
20 one at the same time.

21 Q. So you didn't tell the OPA
22 because you thought you might not end up doing the
23 GEIA at all and you might just do a FIT Program; is
24 that what you're saying?

25 A. I think there was probably

1 an interest in having the OPA focus on
2 an implementation of the FIT Program that was seen as
3 complicated.

4 I mean they had to run -- set up
5 a system for taking in bids, time stamping them,
6 dealing with them. It was obviously a very
7 complicated system to have in place in a short period
8 of time.

9 Q. So, during 2009 they're trying to
10 develop a FIT Program that is going to be fair, and
11 due process in developing all these FIT Rules; right?

12 A. Yes.

13 Q. And you didn't think it might be
14 relevant to them that at the same time you've entered
15 a secret agreement with the Korean Consortium?

16 A. So there were other exercises,
17 for instance, that the company can't see. As an
18 example, there were some things, the domestic content
19 provisions, for instance, that the Ministry did the
20 consultation on. And this was seen at that time as,
21 again, a separate agreement, Ministry and the Korean
22 Consortium.

23 Q. Well, ultimately the OPA ended up
24 having to essentially administer that program through
25 the GEIA; right?

1 as a developer will get the
2 same rate as any every other
3 developer taking part in the
4 program." [As read]

5 The program he's talking about is the
6 FIT Program; correct?

7 A. Yes.

8 Q. So that's a true statement,
9 correct, what I just read?

10 A. Yes, except he has -- as noted
11 here there is a potential for them to earn an economic
12 adder.

13 Q. But he didn't tell us how much
14 that would be; right?

15 A. So it is in the agreement which
16 did become public afterwards.

17 Q. The GEIA agreement?

18 A. Yes.

19 Q. Sir, the entire GEIA agreement
20 became public; when did that happen, sir?

21 A. So, I don't -- that would have
22 been, again, after my direct involvement in it, but
23 I believe it was in 2011.

24 Q. In fact, it didn't become public
25 until I filed a lawsuit in San Francisco and got it

1 from Pattern Energy; isn't that correct, sir?

2 A. So I don't know the sequence of
3 what it was but it wasn't made public on the
4 government website. I don't know if it's here or not.
5 I believe it was in 2011.

6 Q. Okay, now, go to tab 12, if we
7 could, sir. And this is a confidential, so --

8 A. Isn't email a wonderful thing?

9 Q. It is, sir. But this is
10 confidential, but I believe that our clients can stay.
11 This is confidential?

12 MR. APPLETON: Confidential, everybody
13 can see it, except the public.

14 MR. MULLINS: Except the public.
15 Thank you.

16 --- Upon resuming the confidential session

17 at 4:20 p.m. under separate cover

18 --- Upon resuming the public session at 4:21 p.m.

19 MR. MULLINS: So, the document number
20 I have is 683 and it is no longer confidential. So
21 going back to my -- well, going back to the question,
22 you said Mr. Lee worked for Samsung and he had the
23 best English?

24 THE WITNESS: So he was, in effect,
25 the kind of government relations person on from their

1 perspective and the other people that are on here, the
2 cc's, various of them were engineers and people doing
3 the negotiations.

4 BY MR. MULLINS:

5 Q. And he writes to Pearl, and who
6 is Pearl?

7 A. Pearl Ing worked for the deputy
8 Minister at the time.

9 Q. And Jennifer Morrison is the
10 chief of staff there?

11 A. Of the Ministry, yes.

12 Q. And what he wrote is:

13 "We have been in close
14 communications with Six
15 Nations and we propose to
16 execute the MOU ..." [As
17 read]

18 Could you just tell us about?

19 A. So the Six Nations is the First
20 Nations in the area around Haldimand, so Lake Erie
21 North.

22 They had wanted, for their first phase
23 project, to have solar and I think some wind projects
24 down in that area, and because it was sort of a large
25 reserve, but also traditional lands, they would have

1 had to get an agreement with the First Nations and so
2 this is about an MOU with the First Nations.

3 Q. Okay, and he's asking to -- he
4 wants to make this public; right?

5 A. Yes, that's what that email says.

6 Q. And Ms. Morris says:
7 "Hagen, you should not be
8 going ahead with any public
9 announcements on this or any
10 other piece of the deal until
11 we have resolved the issue of
12 the signing of the framework
13 agreement." [As read]

14 What she's saying and that's, again,
15 what you are referring to later is that the framework
16 agreement had not been approved yet by the right
17 parties?

18 A. Yes, so basically if you were to
19 announce the MOU with Six Nations at a time when you
20 had not announced the agreement that you had, then
21 there would be obviously lot of questions about what
22 the MOU was about and then that would lead to, in
23 a sense, making public an agreement that had not been
24 approved yet.

25 Q. Well, actually that's not what

1 she said at all, right? What she said was that this
2 will simply elicit more questions from the media --

3 A. Yeah, yeah.

4 Q. Let me finish reading:

5 "...and we're not in
6 a position to answer publicly
7 yet and will put us in
8 a difficult position." [As
9 read]

10 A. Yeah.

11 Q. What was the difficult position
12 they would be put in?

13 A. Well, I think that's what I was
14 just explaining. That you would be in the position of
15 having announced an MOU that was based on an agreement
16 that had not been approved. So you would have to
17 explain what the status of this agreement was, and if
18 the government had to explain that this was
19 an agreement that had not been approved there would be
20 questions about why you were doing an agreement with
21 the First Nations about it.

22 Q. Would Minister of Energy, as a
23 common practice, have entered into MOUs with strict
24 confidentiality or was this the only time?

25 A. Okay, so certainly we would do

1 them, if other provinces, for instance, they would
2 tend to be public -- well, once they got entered into,
3 they would be public.

4 Q. Well let me go now to tab 694.
5 Sorry, tab 3, C-694, and I believe this is public, as
6 well.

7 Now, again, this is just another
8 document that shows that similar to your testimony
9 before in February of 2009, if you go to page 48955
10 that, you're cc'd on this, where Samsung is asking
11 you: Is there any reason why we can't release the MOU?
12 Do you see that, sir?

13 A. Yes, that's what they're asking.

14 Q. And that refreshes your
15 recollection that it wasn't Samsung that wanted to
16 keep this confidential for business reasons; it was
17 the Ministry of Energy that wanted to keep it
18 confidential?

19 A. Well, this is two months after
20 the signing of the MOU, so I'm not sure what they
21 thought at the time of the MOU. Obviously this
22 indicates at a later stage they wanted to make it
23 public.

24 Q. You would agree with me, sir,
25 though Mr. Yoo from Samsung did not have any problem

1 releasing the MOU as of February of 2009?

2 A. Yeah, yes, he's looking to do
3 that.

4 Q. And in fact, that didn't happen.
5 Let's go to tab 10. This is 782. It is an email from
6 between Mr Lee, Samsung.

7 So, this is a document we obtained
8 from Samsung and through litigation in the United
9 States. And this, again, ask -- and email from Mr.
10 Lee and from Mohamed Dhanani. Can you tell us who who
11 that is?

12 A. Yes, he worked in the Minister's
13 office, Minister Smitherman's office. He was a policy
14 advisor.

15 Q. And this, again, refreshes your
16 recollection that as of October 1, 2009 there still
17 has not been a framework agreement; it looks like you
18 are planning on doing it by October 29.

19 A. So, this was the expectation that
20 we would get agreements from cabinet in time, that it
21 would be signed and I guess this would have been
22 Mohamed's expectation at the time, but as the reports
23 on the cabinet meeting that -- Toronto Star reports
24 that that didn't happen at that time, so again without
25 the approval it wouldn't be a signing of the

1 agreement.

2 Q. All right. So let's go to tab 9,
3 sir. And this is C-105. Now, could you identify this
4 document?

5 A. So, this is a directive from the
6 Minister of Energy George Smitherman to Colin Anderson
7 who is the -- and still is the Chief Executive Officer
8 at the Ontario Power Authority. So, what it is -- it
9 references the earlier directive on the Feed-in Tariff
10 and it talks about setting aside transmission
11 availability.

12 Q. Can you read -- let's go to the
13 third paragraph. It says:

14 "I now further direct the OPA
15 in carrying out the
16 transmission million
17 availability tests under the
18 FIT Rules to hold
19 250-megawatts of Haldimand
20 County in 260-megawatts for
21 transmission capacity in
22 Essex County and the
23 Municipality of
24 Chatham-Kent,"

25 Right?

1 A. Yes.

2 Q. And that was the original
3 500-megawatts that were reserved for the Korean
4 Consortium?

5 A. Yes, and Haldimand County is the
6 relation to the Six Nations discussion.

7 Q. So, if I'm reading this document
8 correct, then the Minister of Energy is directing the
9 OPA to withhold from the FIT Program, 500-megawatts
10 before it had the GEIA signed; was that accurate?

11 A. Yes.

12 Q. And now the last sentence of that
13 paragraph says:

14 "Jointly for renewable energy
15 facilities whose proponents
16 have signed." [As read]

17 Is there a reason why they need to
18 identify who the proponents were?

19 A. Well, because it had not been
20 signed yet.

21 Q. They could always change who it
22 was?

23 A. What this does, so it doesn't set
24 aside the capacity for somebody you haven't signed
25 an agreement with, because if you haven't signed

1 an agreement with, you are not going to ultimately set
2 it aside.

3 Now this -- had there not ended up
4 being an agreement, then you would no longer have set
5 this capacity aside.

6 Q. That's not what it says though.
7 It says that they've already signed an agreement,
8 doesn't it? Doesn't it say, sir, that I want you to
9 hold off.

10 A. Okay.

11 Q. Doesn't it say we're holding back
12 in reserve 500-megawatts of transmission jointly for
13 renewable energy-generating facilities whose
14 proponents have signed a province-wide framework
15 agreement with the province?

16 A. Okay, so, this could be parsed
17 a different ways, but the actual reference would be
18 to -- so proponents who will be signed -- who signed
19 one, so either it is written so it's proponents who
20 have or proponents who ultimately signed, so in this
21 case -- so that's what that -- who have signed, whose
22 proponents have signed so...

23 Q. So, if someone read that and
24 understood that an agreement had been signed, that
25 would be a false statement; right?

1 A. I think the sentence should be
2 read so it means that this is being set aside. It's
3 being set aside for proponents who enter into
4 a province-wide framework agreement with the province.

5 Q. All right. So, based on your
6 interpretation of this directive then, what you're
7 saying is that the Minister of Energy withheld
8 500-megawatts from the FIT Program for some future
9 agreement to some proponents, who we don't know who
10 are going to be, for an agreement that won't be
11 signed -- will be signed for some point in the future;
12 is that accurate?

13 A. So it was one that was in
14 advanced negotiations, but it had not yet been signed.

15 There was, at that point, because the
16 FIT Program had been launched, there was, I don't
17 think, any evidence that there were proponents yet in
18 those two areas, but it was -- so, if you were signing
19 this agreement, working on this agreement with Samsung
20 and you had not set megawatts aside, it would have
21 been very difficult for them to proceed with their
22 Phase I question.

23 Q. Mr. Jennings, I don't want to be
24 difficult, but I need an answer to that question. I
25 don't think you answered it. So I'm going to break it

1 down so we get a clear answer because your
2 interpretation of this directive is not what
3 I understood coming in here today, so I need to make
4 sure I understand it. Based on your interpretation of
5 this directive, what you're telling us is that the
6 Minister of Energy reserved 500-megawatts in these
7 areas for future agreement; correct?

8 A. Yes.

9 Q. Okay, thank you.

10 A. Yeah, so it's agreement...

11 Q. And, and -- let me finish, please

12 (Simultaneous speakers - unclear).

13 A. Yeah.

14 Q. I don't want to cut you off --

15 A. No. Sure.

16 Q. -- I was trying to break it down
17 because I need an answer to this so I understand what
18 this means because you're the witness.

19 And you're also saying is that it
20 would be -- from whatever proponents actually signed
21 that agreement because it's not identifying who those
22 two people are; right?

23 A. Yes.

24 Q. So what happens here, as of
25 September 30th, 2009, the Minister of Energy has

1 carved out from the FIT Program, capacity for some
2 future agreement, for some entities we haven't
3 identified, that would be signed some time in the
4 future; is that what you're saying?

5 A. So it reflects the fact that we
6 were in advanced negotiations with the Korean
7 Consortium. The agreement had to go to cabinet for
8 approval. It had not yet gone to cabinet for
9 approval, so if we had named them in the -- in this
10 directive here, and referred to them as if they had
11 signed, then that would be, in effect, presupposing
12 that we could tell cabinet what we -- they could do,
13 and, in turn, the legislature's content with the
14 legislation...

15 MR. MULLINS: Madam Chair, I am about
16 to go to a new area --

17 THE CHAIR: Maybe it is a good time to
18 have a break.

19 MR. MULLINS: I feel that I could get
20 done fairly quickly, and I'm confident that we could
21 get done with the witness today. It depends on
22 re-direct examination.

23 THE CHAIR: Certainly. How much more
24 time do you estimate you will need?

25 MR. MULLINS: Given your reaction to

1 counsel on the other side to that answer, I'm going to
2 try to get this down within 20 minutes, so we can get
3 this witness done today.

4 THE CHAIR: Fine, then we have -- we
5 will have redirect and we may have a few questions, so
6 that allow us to finish approximately by six o'clock,
7 I imagine.

8 MR. MULLINS: Right, and if we could
9 go -- we'll take a five, 10-minute break.

10 THE CHAIR: No, maybe 10. I know that
11 10 will not be 10. I say 10, and I hope for 15, but
12 I should not have said that. Mr. Jennings, throughout
13 the break, you should not speak to anyone about your
14 testimony about the case, please.

15 THE WITNESS: Yes.

16 THE CHAIR: But you can go and have
17 a coffee.

18 --- Recess taken at 4:35 p.m.

19 --- Upon resuming at 4:54 p.m.

20 MR. MULLINS: Back on the record.

21 THE COURT: Yes. Can we just close
22 the door and we're back on record, Mr. Mullins.

23 BY MR. MULLINS:

24 Q. Thank you, Madam Chair and you'll
25 be delighted. I'm going to keep my promise. I took

1 out a whole bunch of pages, (indiscernible) his pages.
2 I learned from the best, Mr. Oster...(indiscernible
3 phon.)

4 So, Mr. Jennings, just so we're clear,
5 can I ask you: Is it common for Ontario to enter into
6 this kind of agreement. Can you identify a single
7 project where you entered into a secret MOU, you kept
8 the negotiations quiet for six months and then you
9 entered into an MOU, you kept it quiet for nine months
10 and didn't tell anybody, including the administrative
11 agency that was going to be in charge of implementing
12 it. Anything like that, so I can use that as
13 a comparator; if you can remember anything?

14 A. No, I'm trying to think. I don't
15 think of one, as an exact example. No, this was
16 touted as a \$7 billion project, so it was seen as
17 a special deal.

18 Q. Special deal.

19 A. And it had -- I mean special from
20 the -- I don't mean special deal, in that sense.
21 I meant that it was something big. It was with -- as
22 you had talked about, large international company that
23 had proposed the project. Certainly there is, in most
24 cases where there are commercial negotiations with
25 someone, those commercial negotiations are not

1 publicized. The agreement only becomes public
2 afterwards. In some case, it doesn't become public.

3 Q. I see, sir, but isn't it true
4 though that for large projects, Ontario generally goes
5 through RFPs?

6 A. If it was the case -- so the FIT
7 Program which isn't an RFP in the sense we had done
8 FIT RFPs for renewables. We had done three, two of
9 which were managed initially by the government, but
10 this wasn't a -- this was a, again, a proposal that
11 came from the company. It was a unique proposal, so
12 it wasn't just a generation proposal; it was
13 an investment and generation proposal. So, I'm not
14 actually sure how you would have structured an RFP
15 where you would have been able to manage how many
16 industrial plants you were going to bring; what the
17 level of commitment was and --

18 Q. Sure.

19 A. How many generations. It would
20 be very complex to have an RFP on that basis.

21 Q. Now, Mr. Jennings, I promised the
22 Chair I would try to get through the questions.
23 You answered a different question than I asked you.

24 I'm asking you about large projects --
25 I wasn't asking about the FIT Program -- for large

1 projects doesn't Ontario normally go through an RFP
2 process for large projects?

3 A. Yes, unless there are unique
4 circumstances. I can think of the nuclear plants that
5 are leased by Bruce Power. We do that --

6 Q. What about the RESOP that you
7 mentioned; that was a similar RFP program; correct?

8 A. That was more a standard offer
9 program, so there was a price set as in the FIT
10 Program and people get access to it, but they don't --
11 weren't bidding on price. Those are small projects.

12 Q. Thank you. Now, if you could go
13 to your rejoinder statement, paragraph 8 and I'm going
14 to point you to the last sentence of that paragraph.
15 What you have written here is:

16 "No single investor,
17 including those under the FIT
18 Program..." [As read]

19 So, you agree with me then that --
20 well let me just read this first:

21 "No single investor,
22 including those under the FIT
23 Program stepped forward at
24 the time or any subsequent
25 time to commit to developing

1 such a large quantity of
2 renewable energy capacity in
3 Ontario or to commit to
4 manufacturing." [As read]

5 Do you see that?

6 A. Yes.

7 Q. And I think what your -- this
8 paragraph here, just in fairness to everyone, you're
9 talking about in the summer of 2008; correct?

10 A. Yes.

11 Q. But I think you made it
12 abundantly clear that it would be kind of odd,
13 wouldn't it, for any anybody to come and suggest
14 a similar program, when they didn't know that Samsung
15 was proposing this one; wouldn't you agree with me?

16 A. Well, Samsung came forward to
17 propose it when no-one else had proposed one, but it
18 certainly had been announced by the Minister at the
19 time that Ontario was very interested in launching
20 Green Energy program. It was interested in green
21 jobs. It was interested in green economy.

22 Q. I see what you're saying.

23 A. So, from the perspective of
24 whether would Ontario be receptive to such a program,
25 if somebody wanted to recommend it, I think -- just as

1 Samsung. I mean, they didn't approach us because they
2 had looked us up and they randomly went through the
3 map and thought we'd go there. They did that because
4 they knew there was a big interest.

5 Q. I won't argue with you sir. I
6 take it what you're saying is, it wasn't a secret that
7 premiere was encouraging investors to do renewable
8 energy, but you are saying -- but you do agree with me
9 that it's not unreasonable for an investor to not come
10 forward and try to match the deal, prior to the
11 September 2009, when the deal -- some terms of the
12 deal became public; do you agree with me, sir?

13 A. So, yes, no-one else knew that
14 the exact type of thing that Samsung, but we didn't
15 get comparable proposals either.

16 Q. And then what you're saying there
17 is no other single investor, including those under the
18 FIT Program, those are the type of people, that if
19 they were going to come forward with a similar program
20 would be the comparables, right? It would people who
21 would be in the FIT Program?

22 A. So, not...

23 (Simultaneous speakers - unclear)

24 Q. That's what you would --

25 A. So you probably would have had to

1 have a fairly large company to look into this type of
2 a program.

3 Q. But you said in your statement,
4 you looked -- you suggested that it would be those in
5 the FIT Program that would be the type of investors
6 that would be also looking to do a deal like the
7 Korean Consortium; right?

8 A. Yes, assuming --

9 Q. Assume they were developers.

10 A. Yes.

11 Q. So, in fact -- just so we're
12 clear for the record because I don't think it is
13 clear, maybe it is -- just so that we are clear, in
14 fact, Ontario did not do a deal with any investor like
15 GEIA, other than the Korean Consortium; correct?

16 A. So no-one else did propose a deal
17 of anywhere near that magnitude.

18 Q. So, the answer to my question is
19 yes, you did -- or sorry --

20 A. We did not do a deal with anyone
21 else comparable. I'm trying to think whether I'm
22 doing the double negative.

23 Q. I think I may have messed it up
24 too. I'm looking at the question and answer.

25 A. Yes.

1 Q. Just so we're clear --

2 A. Yes.

3 Q. -- this is the only deal that
4 Ontario did that looked like this?

5 A. Yes.

6 Q. In terms of the exact terms of
7 the deal?

8 A. Yes, and in terms of size and
9 manufacturing.

10 Q. Now, you talked about the fact
11 that no other investor stepped forward to do such
12 a large quantity, but we do know -- you do remember,
13 that certain entities did come forward and try to get
14 a similar deal anyway; right?

15 A. Tried to get a deal, yes.

16 Q. And for example, Recurrent
17 Energy -- sorry, this is confidential.

18 --- Upon resuming the confidential session
19 at 5:02 p.m. under separate cover

20 --- Upon commencing the restricted confidential session
21 at 5:10 p.m. under separate cover

22 --- Upon resuming the confidential session
23 at 5:21 p.m. under separate cover

24 --- Upon resuming the public session at 5:24 p.m.

25 CONTINUED RE-EXAMINATION BY MR. WATCHMAKER:

1 Q. So you were also asked questions
2 about the MOU, and you were specifically asked
3 a question about whether a feasibility study was done
4 and you said "No."

5 What I'd like to know is whether the
6 Ministry did study feasibility of the agreement,
7 though it didn't, perhaps, create a feasibility study?

8 A. We did work internally to assess
9 it, and when I say "the feasibility study" as
10 envisaged in here, the Deputy Minister at some point
11 decided he didn't need to proceed. He was satisfied
12 that we had done enough without a formal feasibility
13 study.

14 Q. You were also taken to the
15 Ontario Auditor General's report, and I believe you
16 said that there was no independent economic assessment
17 of the FIT Program and the GEIA done. Was the
18 government internally keeping tabs on the economic
19 impact on these programs?

20 A. In terms of job creation and in
21 terms of -- so, things like the cost, dollars per
22 megawatt of connections, those are obviously things
23 that the government tracked.

24 Q. And you'd be tracking those -- if
25 I recall your written witness statements -- you'd

1 raised issues such as reliability, cost and
2 sustainability.

3 Are those the reasons why you would be
4 tracking the -- ECID (phon.) doing internal economic
5 assessments in the FIT Program and the GEIA?

6 A. So, of course there would be
7 things that from the government's perspective, we
8 would want to keep track of, yes.

9 Q. Now I'd like you to turn to tab
10 -- I believe it's 17, and it's Exhibit R-76.

11 I don't believe you were taken to this
12 particular -- oops, sorry, I don't believe you were
13 taken to this particular document. I believe it's the
14 backgrounder to the news release of January 21st,
15 2010.

16 A. Yep.

17 Q. I'd just like to take you through
18 it. If you go to the third paragraph, the first
19 paragraph under "Creating jobs." You notice a dollar
20 figure attached to the investor of the Korean
21 Consortium. How much is that?

22 A. \$7 billion.

23 Q. Okay. Go down to "stimulating
24 manufacturing." Can you just read the first two or
25 three sentences there for the record?

1 A. (Reading):
2 "Renewable energy provided by
3 the consortium would qualify
4 for Feed-in Tariff prices
5 available to all eligible
6 projects. In addition to the
7 standard rates for
8 electricity generation, the
9 consortium will be eligible
10 for an economic development
11 adder." [As read]

12 Q. Would you continue to the next
13 sentence?

14 A. (Reading):
15 "The adder is contingent upon
16 the consortium manufacturing
17 partners operating four
18 manufacturing plants,
19 according to the following
20 schedule." [As read]

21 Q. And if you could go down to
22 ratepayer impact; could you read that sentence?

23 A. (Reading):
24 "The total cost of the EDA
25 (economic development adder),

1 assuming the manufacturing
2 facilities are built,
3 according to schedule set out
4 in the agreement, will be
5 approximately \$437 million
6 net present value over the
7 lifetime of the contracts."

8 [As read]

9 Q. And under "more renewable energy"
10 would you agree with me that it says that
11 "Construction of 2500-megawatts of renewable energy
12 including 2000-megawatts of wind power" is listed
13 there?

14 A. Yes.

15 Q. Further down it says:
16 "The first phase of the
17 project is scheduled to be
18 completed in 38 months. It
19 will be a 500-megawatt
20 cluster." [As read]

21 Do you see that?

22 A. Yes.

23 Q. The next paragraph says:
24 "Insurance of transmission in
25 subsequent phases is

1 contingent on delivery of
2 four manufacturing plants..."

3 [As read]

4 Then it says:

5 "As mentioned above."

6 Correct?

7 A. Yes.

8 Q. And that's a public document,
9 correct, Mr. Jennings?

10 A. Yes it is.

11 Q. Now, you were asked whether
12 Ontario normally does large projects through RFPs, by
13 counsel for the Claimant.

14 I believe you started to say something
15 about nuclear, but I didn't catch what you were trying
16 to say. I believe you were cut off. So, could you
17 please just finish what you were trying to say about
18 whether Ontario normally does projects or procures
19 projects through RFPs?

20 A. So, a lot of projects certainly
21 are done through RFPs. As the example I was giving,
22 so that Bruce Nuclear leases the nuclear power plant
23 on Lake Huron, so when the government entered into
24 a contract to have them refurbish those units and
25 extend the life, and because of the nature, they were

1 the ones leasing and operating the plant. We didn't
2 put that out to public tender.

3 Q. How much electricity is the first
4 nuclear generating facility ...

5 (Simultaneous speakers - unclear)

6 A. In total, 6300-megawatts.

7 Q. Thank you, Mr. Jennings. Those
8 are my questions, Madam Chair.

9 THE CHAIR: Thank you.

10 MR. MULLINS: Madam Chair, I just have
11 very few questions in follow up. Thank you.

12 THE CHAIR: Yes. Re-direct
13 examination.

14 FURTHER CROSS-EXAMINATION BY MR. MULLINS:

15 Q. Thank you, Mr. Jennings. Thank
16 you, Mr. Jennings. Can you hear me now?

17 A. Yes.

18 Q. Thank you. Going back to tab 24
19 of the Auditor General Report, which is C-228, Mr.
20 Jennings, I want to make sure you're not retracting
21 your prior testimony that you agreed with the finding
22 by the Auditor General, are you? It's on page 9928.

23 A. I think the reference there was
24 what were the known or the economic impacts of the
25 study. That's what I was just asked her.

1 Q. Let me just ask you, so the
2 record is clear, sir, page 9928; do you see it? It's
3 the number on the bottom.

4 A. Yep. Yeah.

5 Q. Great. And remember I asked you
6 when I did my questioning, in the left-hand column,
7 one quarter of the way through, that the
8 Auditor General said that:

9 "No economic analysis or
10 business case was done to
11 determine whether the
12 agreement with the consortium
13 was economically prudent and
14 cost effective." [As read]

15 And you said that was an accurate
16 statement.

17 A. I said that we were also
18 criticised for not having a business case done for the
19 Feed-in Tariff program, as well, or for the
20 Green Energy Act itself.

21 Q. Fair enough, Mr. Jennings.
22 I took that answer to mean that you were saying that
23 you agreed with that criticism, and that, in fact,
24 there were other criticisms. So, just so the record
25 is clear: You do agree with the finding by the

1 Auditor General that no economic analysis or business
2 case was done to determine whether the agreement with
3 the consortium was economically prudent and cost
4 effective -- "yes" or "no"?

5 A. So there was no formal economic
6 analysis that would have satisfied the
7 Auditor General. I think the reference here was just
8 to statements that were made in the news release
9 backgrounder, about the size of the investment and the
10 expected jobs.

11 Q. And you were pointed to the
12 backgrounder at tab 17, that we'd already prepared, so
13 obviously we were aware of it, and weren't trying to
14 hide it. Nowhere in this backgrounder does it
15 identify, sir, that the Korean Consortium could jump
16 ahead in line to proponents who had been listed in
17 a ranking in a FIT Program; correct?

18 A. So, I would have to read it
19 through to see. I think it was either in -- it was
20 certainly referenced in either a news release or
21 something of that particular directive that you had
22 drawn my attention to before that goes back to
23 September. So, in fact, they were given that for the
24 access for the Phase I advance of the FIT Program.

25 Q. You agree with me, sir, that

1 there's a difference between priority access and
2 jumping in line; don't you, sir?

3 A. Sir, they were given that
4 priority access in advance of anyone getting anything
5 done on the FIT Program.

6 Q. And, in fact, as you just told us
7 earlier today, when the FIT Program was announced and
8 the directive, the FIT proponents were told where the
9 500 was going to be; right? Do you remember that?
10 The directive said the 500 megawatts was going to be
11 in those certain areas?

12 A. Yes, Haldimand County and Essex,
13 yes.

14 Q. So, what you said is that the FIT
15 proponents knew that those areas were going to be
16 identified; right?

17 A. It was a -- yes, it was a public
18 directive.

19 Q. And, in fact, this backgrounder
20 never told anyone that the Korean Consortium was going
21 to take megawatts in the Bruce Region, right, because
22 at that time it hadn't selected that region; right?

23 A. So, that would be a lot of level
24 of detail to have in the backgrounder. I know --
25 I believe the news release -- I'd have to look at it

1 together with the news release to see everything that
2 was put out at the time.

3 Q. Well, sir, you do remember that
4 it wasn't until September 2010 that the Korean
5 Consortium -- the directive was issued that identified
6 that there would be a reservation in the Bruce Region
7 of 500-megawatts; does that refresh your recollection?

8 A. So, again that would have been
9 based on them having priority access in areas where
10 they were developing projects which was part of the
11 agreement.

12 Q. My only point being: If that was
13 done in September, it would have been impossible for
14 that to be in this document in January?

15 A. Yes, that's right.

16 Q. Thank you. And I did want to
17 point out one last thing because I think this is what
18 you're referring to. And this is confidential, but
19 it's not restricted access, just confidential.

20 --- Upon resuming the confidential session

21 at 5:35 p.m. under separate cover

22 --- Upon resuming the public sessions at 5:39 p.m.

23 THE CHAIR: You explained that there
24 were these two approaches. One was the FIT Program
25 and the other one was the agreement with the Korean

1 Consortium or commercial private negotiated agreement
2 or however you want to call it. And I have some
3 trouble understanding how you decide that one project
4 falls under one heading or under the other. You have
5 told us that it's just magnitude of the project you
6 have insisted in your explanation now, which I had
7 less understood from your written statement, than from
8 your oral explanation, seems that the fact that
9 Samsung took the initiative of approaching the
10 government was an important consideration, seems it
11 was important also that it was a large company, but
12 there were other large companies in the world, so what
13 exactly was the thinking behind having these two
14 tracks?

15 THE WITNESS: So, the Samsung -- the
16 Korean Consortium agreement -- again, it was
17 a proposal that they came forward with to the
18 government.

19 THE CHAIR: Yes, but if I come forward
20 tomorrow, they will not give me a contract.

21 THE WITNESS: So, the context was that
22 the government -- the Minister and the Premier were
23 very interested in having a Green Energy industry in
24 Ontario, and to show that Ontario would be a world
25 leader. And I guess so the fact that this company was

1 talking about -- so 2500-megawatts in the context,
2 there's now in total 2500-megawatts of wind in
3 Ontario, there was virtually none before this --

4 THE CHAIR: Yes.

5 THE WITNESS: -- before this started
6 and it's -- so, it's basically the whole wind capacity
7 we have now, so it was seen as a very important
8 measure. If you've got this wind and you wanted to
9 have manufacturing, you have these big projects, so
10 there are five phases of 500-megawatts, and they had
11 strict timelines on for doing the phases, so it was
12 like a huge jump start of the industry.

13 So, certainly, you know, and people
14 like the Auditor General would have criticised the
15 government for doing both, but it was a decision that
16 the government decided was very big on keen on
17 promoting Ontario as a big destination for green
18 manufacturing.

19 So, at the same time, we had the
20 proceedings so the Green Energy Act was really about
21 this Feed-in Tariff program, which is really basically
22 based on the program that Germany had. The Minister
23 had, in fact, visited Germany in the summer of 2008,
24 so that was really where most wind projects would
25 come, would come through this program.

1 We had previously had competitive RFPs
2 and, in fact, they had delivered fairly good pricing,
3 but the idea was we want this big program, less
4 limits. And so it certainly seemed that the
5 government at the time, that they weren't mutually
6 exclusive, they could both proceed, but where they
7 interacted -- so the Samsung generation basically got
8 the same price as the FIT price and the FIT price was
9 the price developed to cover the costs of generators
10 and give them a commercial rate of return, so the
11 difference was they were able -- because of the size
12 of it -- you wouldn't have been able to do this unless
13 you gave them priority transmission access.

14 The transmission becomes a very big
15 constraint; it's very valuable, and so they were given
16 priority transmission access. They had to bring in
17 manufacturing. They had to agree to this very
18 ambitious phases of projects.

19 THE CHAIR: Yes.

20 THE WITNESS: Whereas the FIT projects
21 were much more usually smaller, much smaller and while
22 they had to meet the domestic content requirements,
23 they didn't have a commitment to bring manufacturing
24 in, so there was actually some uncertainty as to how
25 that would really work out, whether you'd end up --

1 you'd have these contracts, and they'd say, "Well we
2 can't end up building because we can't meet domestic
3 content," or else they would say "Can we waive this
4 domestic content, so we could go ahead?"

5 So, the Samsung thing, in part, was we
6 would be get these big manufacturing projects so they
7 could serve other people besides GE.

8 BY MR. MULLINS:

9 Q. So, it was an opportunity for
10 a breakthrough and Green Energy; was that the idea?

11 A. So, the term that was used -- and
12 I think was quoted there -- was an anchor tenant, so
13 that when you have a mall, you have a big store that's
14 Macy's or whatever it is, and so that was what Samsung
15 was. It was going to be whatever the 2500, so it was
16 demand, there was going to be manufacturing and then
17 the other people coming in, smaller projects would
18 have people building blades, towers, and the solar
19 equipment.

20 THE CHAIR: And when this decision was
21 made to have the two tracks, was there some thought
22 given to the possible interaction of the two tracks?
23 I mean one could effect the other? One could hurt the
24 other or...

25 THE WITNESS: Yeah, so...

1 THE CHAIR: Or one could benefit the
2 other?

3 THE WITNESS: Yes, so I guess the main
4 area -- so as I said the pricing, so what Samsung
5 would get the FIT pricing -- FIT pricing was going to
6 come down year by year, as does the Samsung one for
7 new projects.

8 But the main area, I think where they
9 conflicted was on transmission access. So, this was
10 envisaged early on which is why there was the
11 directive to set aside 500-megawatts even before the
12 agreement was finalized because the agreement wouldn't
13 have been feasible unless you had set it aside. So
14 that was the major area. There was a lot of documents
15 in the evidence that would refer to of how we would
16 fit in the phases on a transmission perspective.

17 So that really became the big
18 constraint in the area that had to be dealt with and
19 that was quite complicated because transmission
20 systems are very complicated.

21 THE CHAIR: Thank you. That answers
22 my question.

23 MR. BROWER: Just a moment. Am
24 I correct that you've referred to 7000-megawatt
25 towers, as some sort of a goal or figure that you...

1 (Simultaneous speakers - unclear)

2 THE WITNESS: 10700-megawatts was the
3 capacity for -- we refer to it as non-hydro renewable,
4 so, wind, solar, biomap.

5 MR. BROWER: Right.

6 THE WITNESS: So, that's by 2018. So
7 that was the planning document. The most recent one
8 has moved that out 2021. So that reflects, in part,
9 looking at impacts on customers, looking at
10 transmission availability, looking at things like what
11 the contract is all about.

12 MR. BROWER: Was that adopted as part
13 of or the implementation of the Green Energy Act? Did
14 it -- did it relate to the FIT Program?

15 THE WITNESS: So it relates to all the
16 renewable energy. It was adopted in the long-term
17 energy plan, which was the end of 2010.

18 MR. BROWER: Yes.

19 THE WITNESS: So the Green Energy Act
20 was actually in the spring of '09.

21 MR. BROWER: Right.

22 THE WITNESS: The FIT was in -- the
23 FIT was September, October '09.

24 MR. BROWER: Right.

25 THE WITNESS: So, in effect, it was

1 originally seen as expansive, but we didn't know what
2 the take-up was, and so as you've got the customer --
3 the impact on ratepayers, there's also a lot of
4 opposition to wind projects which I don't think had
5 been contemplated before, so there's a variety of
6 reasons why the government moved to a cap on the
7 amount of wind solar.

8 MR. BROWER: But that amount, as it
9 turned out, couldn't have been taken up by FIT
10 projects?

11 THE WITNESS: So, yeah, so
12 certainly -- and I think that's partly -- if you look
13 at the Auditor General's there's a question whether
14 the government at the time did too much, did both
15 these agreements, whether they were necessary. Again,
16 the attraction for the Korean Consortium was that it
17 was actually going to bring four manufacturing
18 facilities, which it did, and which are still
19 operating. So, how the -- it would have operated
20 without them -- obviously the system would be
21 different. There might have been more space, more
22 stronger projects. We probably wouldn't have got to
23 Green Energy manufacturing.

24 MR. BROWER: All right. So
25 2500-kilowatt hours were taken out of the

1 10700 megawatts --

2 THE WITNESS: Yes, megawatts...

3 (Simultaneous speakers - unclear).

4 MR. BROWER: -- by the Korean
5 Consortium?

6 THE WITNESS: Yeah.

7 MR. BROWER: Okay.

8 THE CHAIR: No further questions.

9 MR. BROWER: That's it.

10 THE CHAIR: No further questions, then
11 Mr. Jennings, thank you very much for your explanation
12 and that concludes your examination.

13 THE WITNESS: Thank you very much.

14 Thank you.

15 THE CHAIR: And that concludes our
16 day. Tomorrow morning we will hear Ms. Lo. And then
17 we will continue with Mr. Chow. Is that --

18 No, no, no that was -- there was
19 a whole issue about that -- Mr. MacDougall and then
20 Mr. Chow.

21 MR. SPELLISCY: And then Mr.
22 Cronkwright.

23 THE CHAIR: Oh, yes, that's quite
24 an ambitious program we have. Yes. We have to -- one
25 has to be ambitious. Yes, Mr. Cronkwright, as well.

1 MR. APPLETON: Could the secretary
2 give us a rough idea of time, just if he has it.

3 THE CHAIR: Yes.

4 MR. DONDE: So, the total amount of
5 time consumed between yesterday and today by the
6 Claimant, and this is a rough estimate is about
7 4 hours and 36 minutes, and by the Respondents is
8 about 5 hours and 56 minutes, but I will send an email
9 out later today with the exact time.

10 THE CHAIR: We apologize. The email
11 went out in the morning for yesterday, but we will
12 send it after the hearing.

13 MR. APPLETON: Great.

14 THE CHAIR: Thank you. There is
15 another observation before we close. I realise that
16 we have in the rules, that there would be
17 a re-cross-examination in the discretion of the
18 Tribunal. So far you have systematically asked
19 re-cross questions. I'm not that sure that they're
20 very useful, and they do take time. So, since we have
21 the rule, we will, of course not prohibit asking
22 re-cross questions. But nevertheless, I think we
23 should be rather -- try to keep them as narrow as
24 possible and remember that only ask them, if you think
25 there is a very important point that was misunderstood

1 by the Tribunal. Good? Are there no further points
2 that we need to raise now in terms of organisational
3 procedure on the Claimant's side? No? On the
4 Respondent's side? No. Then I wish you all a good
5 evening and we will see each other tomorrow morning.

6 MR. APPLETON: Thank you.

7 --- Whereupon the hearing adjourned at 5:51 p.m.

8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I HEREBY CERTIFY THAT I have, to the
best of my skill and ability, accurately recorded by
Computer-Aided Transcription and transcribed
therefrom, the foregoing proceeding.

Lisa M. Barrett, RPR, CRR, CSR
Computer-Aided Transcription