

PCA Case No. 2013-22

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER
ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 2010 UNCITRAL ARBITRATION RULES
BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

TRANSCRIPT OF PROCEEDINGS
held at the offices of Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario,
on Monday, February 15, 2016 at 9:01 a.m.

FULL TRANSCRIPT
(including confidential information)

VOLUME 1 - REVISED MAY 12, 2016
CONDENSED TRANSCRIPT WITH INDEX

BEFORE:

Dr. Veijo Heiskanen (President)

Mr. R. Doak Bishop

Dr. Bernardo Cremades

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Nick Kennedy

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Sylvie Tabet for the Respondent

Shane Spelliscy

Rodney Neufeld

Raahool Watchmaker

Heather Squires

Laurence Marquis

Susanna Kam

Also Present:

Teresa Forbes Court Reporter

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1 Toronto, Ontario 09:01:25AM
2 --- Upon commencing on Monday, February 15, 2016 09:01:25AM
3 at 9:01 a.m. 09:01:25AM
4 OPENING REMARKS: 09:01:26AM
5 PRESIDENT: Good morning, 09:01:26AM
6 ladies and gentlemen. Welcome to the arbitration 09:01:28AM
7 proceedings conducted under the North American 09:01:33AM
8 Free Trade Agreement, Chapter 11, and the 2010 09:01:38AM
9 UNCITRAL Arbitration Rules between Windstream LLC 09:01:46AM
10 and the Government of Canada. 09:01:47AM
11 The secretary of services in 09:01:49AM
12 this arbitration are provided by the Permanent 09:01:52AM
13 Court of Arbitration, so the case has also been 09:01:56AM
14 assigned a PCA No. 2013-22. 09:01:58AM
15 We have met before. It's 09:02:02AM
16 quite some time ago. So I believe there's no need 09:02:05AM
17 to introduce the members of the Tribunal, but 09:02:08AM
18 there has been a change in the secretariat, so we 09:02:10AM
19 have Jennifer Nettleton acting as the secretary of 09:02:14AM
20 the Tribunal in the coming two weeks. 09:02:19AM
21 Arbitration Place has kindly 09:02:21AM
22 provided court reporting services as well as the 09:02:25AM
23 technicians for handling the audio and video feed 09:02:30AM
24 that will be provided during the next two weeks. 09:02:37AM
25 May I ask perhaps Mr. Terry to 09:02:40AM

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1 We have BRG and then a whole 09:04:05AM
2 slew of -- and URS, our expert witnesses, and a 09:04:08AM
3 whole slew of Ontario government people. Would 09:04:13AM
4 you like me to go through and introduce everyone? 09:04:15AM
5 I'm happy to do so if you'd like. 09:04:18AM
6 PRESIDENT: Perhaps not. We 09:04:20AM
7 will get to -- we will get to know them during the 09:04:21AM
8 next two weeks. 09:04:23AM
9 [Laughter.] 09:04:25AM
10 MR. NEUFELD: Thank you. 09:04:27AM
11 PRESIDENT: Just to go first 09:04:28AM
12 through a few of the preliminaries, the parties 09:04:29AM
13 have agreed and the Tribunal has decided in 09:04:33AM
14 Procedural Order No. 1 that this hearing will be 09:04:37AM
15 open to the public. Access to the public has been 09:04:40AM
16 organized by way of a video feed, which will go to 09:04:45AM
17 one of the rooms here in the Arbitration Place. 09:04:50AM
18 And there has been a certain 09:04:53AM
19 protocol that has been followed in order to 09:04:56AM
20 register those who are attending. After the 09:04:58AM
21 hearing, I understand there will also be a -- the 09:05:01AM
22 video will also be placed on the -- on the PCA 09:05:05AM
23 website will be available to the public there 09:05:08AM
24 after the hearing. 09:05:11AM
25 Now, because of -- because of 09:05:12AM

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1 introduce the -- the representatives of the 09:02:43AM
2 claimants in this -- in this hearing. 09:02:50AM
3 MR. TERRY: Yes. Thank you, 09:02:51AM
4 Mr. President. 09:02:52AM
5 There we go. Does that work? 09:02:59AM
6 Okay. John Terry, Myriam Seers, Nick Kennedy, and 09:03:01AM
7 Emily Sherkey are our legal team. David Mars is 09:03:09AM
8 our client representative. 09:03:11AM
9 And then in the next row we 09:03:13AM
10 have three of our experts from Deloitte: Robert 09:03:16AM
11 Lowe, Anna DiCerbo, and Richard Taylor. 09:03:22AM
12 And finally in the back, we 09:03:29AM
13 have Chris Walker from our office. He is 09:03:32AM
14 providing technical assistance. 09:03:33AM
15 PRESIDENT: Thank you. 09:03:36AM
16 And, Mr. Neufeld, for the 09:03:37AM
17 Respondent. 09:03:39AM
18 MR. NEUFELD: Yes. Good 09:03:40AM
19 morning. I'm Rodney Neufeld. My colleagues 09:03:41AM
20 Sylvie Tabet, Shane Spelliscy, Heather Squires, 09:03:45AM
21 Melissa Perrault, Darian Parsons, Jenna Wates, 09:03:55AM
22 Susanna Kam, and Valentina Amalraj are from the 09:03:55AM
23 Government of Canada. 09:03:59AM
24 Donnie Guillory is our -- is 09:03:59AM
25 our technical assistant from Core Legal. 09:04:02AM

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1 the fact that there will be some confidential 09:05:17AM
2 information on the record, which the parties will 09:05:19AM
3 address perhaps already during the opening 09:05:23AM
4 statements but also in particular during the 09:05:26AM
5 examination of the witnesses, I would ask counsel 09:05:29AM
6 to draw the Tribunal's attention when they are 09:05:32AM
7 about to enter into confidential information, draw 09:05:35AM
8 our attention so that we can interrupt the video 09:05:39AM
9 feed for that period. And then also indicate to 09:05:42AM
10 us when they are done with the confidential 09:05:48AM
11 information so that we can -- we can continue with 09:05:51AM
12 the -- with the video feed. 09:05:54AM
13 So this is a bit of an unusual 09:05:56AM
14 feature in an arbitration proceeding, but because 09:05:59AM
15 of the public access, we have to have -- have this 09:06:00AM
16 particular -- particular way of dealing with it. 09:06:04AM
17 I believe we will all get used to it in the coming 09:06:09AM
18 days. 09:06:12AM
19 Now, this hearing will run as 09:06:12AM
20 of today, February 15, until Friday February 26. 09:06:17AM
21 The Tribunal will be sitting on every day, except 09:06:23AM
22 next Saturday, February 20. There will be a 09:06:26AM
23 sitting also on Sunday, and we will have a day off 09:06:32AM
24 on Thursday, February 25 for the parties to 09:06:36AM
25 prepare for the -- for their closing statements. 09:06:40AM

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1 We will start each day at nine 09:06:44AM
2 o'clock, and we will have a one-hour lunch break 09:06:46AM
3 at a convenient time; coffee breaks, 15 minutes, 09:06:53AM
4 in the morning and in the afternoon. 09:06:55AM
5 There is no firm time for the 09:06:58AM
6 end of the day. That depends a little bit on us 09:07:02AM
7 as well, the members of the Tribunal, and the 09:07:07AM
8 questions we will put to the parties, but the idea 09:07:09AM
9 is that we will finish every day at the convenient 09:07:12AM
10 time, after the parties have used effective time 09:07:14AM
11 of approximately six hours during the day. So 09:07:18AM
12 there will be some flexibility in that regard. 09:07:21AM
13 The time spent by the Tribunal on their questions 09:07:25AM
14 will not be accounted against the time available 09:07:28AM
15 for the parties. 09:07:31AM
16 Effectively, this means six 09:07:33AM
17 hours per day that there will be a sixty hours 09:07:37AM
18 total hearing time, divided equally between the 09:07:41AM
19 parties, 30 hours for each party. And you will 09:07:45AM
20 receive at the end of each day, from the secretary 09:07:51AM
21 of the Tribunal, an accounting of the time spent 09:07:53AM
22 by each party, deducting the time spent by the 09:07:57AM
23 Tribunal on any questions. And if there are any 09:08:00AM
24 issues arising out of that accounting, please 09:08:03AM
25 raise them with the Tribunal the following 09:08:06AM

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1 each event in the chronology. Thank you again. 09:09:23AM
2 DR. CREMADES: We can thank 09:09:26AM
3 the parties for the very warm weather. 09:09:27AM
4 [Laughter.] 09:09:30AM
5 PRESIDENT: I was trying to 09:09:32AM
6 avoid that subject because there have been so many 09:09:33AM
7 jokes about it already since we arrived. But, 09:09:35AM
8 anyway, Mr. Terry, anything else? 09:09:40AM
9 MR. TERRY: The only thing I'd 09:09:43AM
10 say is at least it's sunny outside. 09:09:44AM
11 PRESIDENT: And Mr. Neufeld? 09:09:51AM
12 MR. NEUFELD: Nothing, thank 09:09:51AM
13 you. 09:09:52AM
14 PRESIDENT: Thank you very 09:09:52AM
15 much. 09:09:53AM
16 So we will then start with the 09:09:53AM
17 opening statements, and it will be the Claimant 09:09:54AM
18 first. Mr. Terry. 09:09:56AM
19 OPENING STATEMENT BY MR. TERRY: 09:09:59AM
20 MR. TERRY: Mr. President, I 09:09:59AM
21 will hand up the opening statements for the 09:10:05AM
22 PowerPoint slides. 09:10:11AM
23 --- [Reporter's note: Mr. Terry passes out 09:10:12AM
24 PowerPoint presentation.] 09:10:17AM
25 MR. TERRY: Mr. President, 09:10:18AM

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1 morning. 09:08:08AM
2 We'll also try to stick to the 09:08:09AM
3 preliminary timetable provided by the parties, and 09:08:13AM
4 which has been agreed by the parties, and we are 09:08:18AM
5 grateful for that, as to the tentative timetable 09:08:20AM
6 for the hearing of the -- of the witnesses. 09:08:26AM
7 Today's program will be 09:08:31AM
8 opening statements. Each party will have an 09:08:33AM
9 opening statement up to two hours. If you would 09:08:36AM
10 like to spend less than two hours, that is for 09:08:38AM
11 each party to decide. And according to the 09:08:41AM
12 tentative program, we will also start with the 09:08:44AM
13 examination of the -- of the witnesses in the 09:08:46AM
14 afternoon. 09:08:48AM
15 Are there -- is there anything 09:08:49AM
16 that my co-arbitrators would like to add to this? 09:08:54AM
17 Any administrative or housekeeping issues that 09:08:58AM
18 either party would like to raise? 09:09:01AM
19 I should just thank, on behalf 09:09:03AM
20 of the Tribunal, the parties for providing the 09:09:05AM
21 chronology last night or this morning, depends on 09:09:07AM
22 your time zone, that we are very grateful for 09:09:11AM
23 that. It's -- I'm sure it's going to be a useful 09:09:15AM
24 tool in particular because it also identifies at 09:09:19AM
25 least some of the documents that are relevant for 09:09:21AM

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1 Tribunal Members, Thursday of last week was the 09:10:28AM
2 fifth anniversary of Ontario's announcement that 09:10:34AM
3 it was putting a moratorium or deferral, as Canada 09:10:37AM
4 calls it, on offshore wind development, but that 09:10:41AM
5 Windstream's project would be frozen until the 09:10:44AM
6 science was done, five years ago last Thursday. 09:10:47AM
7 Five years later, now the moratorium is still in 09:10:52AM
8 effect, and Ontario has provided no indication 09:10:55AM
9 whatsoever as to if or when it might end. 09:10:58AM
10 Windstream's ability to 09:11:03AM
11 develop the project under its current FIT contract 09:11:04AM
12 has long since expired, and the five-year freeze 09:11:07AM
13 that it turned out was a maximum freeze that 09:11:12AM
14 Ontario was willing to offer to Windstream would 09:11:14AM
15 clearly have done Windstream no good, given the 09:11:18AM
16 length of time the moratorium has taken, which, as 09:11:21AM
17 I indicated, was five years ago last Thursday. 09:11:23AM
18 The studies that Ontario said 09:11:27AM
19 it would carry out, with the exception of a study 09:11:29AM
20 on noise and decommissioning costs that were 09:11:33AM
21 recently funded and apparently completed in draft 09:11:35AM
22 form, have not been carried out. And so we find 09:11:39AM
23 ourselves here today. 09:11:42AM
24 Now, if you can refer to the 09:11:44AM
25 slides, I'd like to structure the opening 09:11:50AM

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1 statement in four -- four main parts: First, to 09:11:55AM
2 take you through the facts as to the investment 09:12:00AM
3 that Windstream made in the Wolfe Island Shoals 09:12:02AM
4 Offshore Project and why it made those 09:12:06AM
5 investments. 09:12:08AM
6 Secondly, the moratorium and 09:12:09AM
7 the de facto project cancellation. And I'll be 09:12:11AM
8 going in some detail over the documents relevant 09:12:15AM
9 to those facts. 09:12:17AM
10 Third, Canada's NAFTA 09:12:18AM
11 breaches. And I will be spending some time on the 09:12:22AM
12 law, but consistent with the purpose of an 09:12:25AM
13 opening, the focus will be on the facts, law at 09:12:27AM
14 the more high level now. We'll come back to that 09:12:31AM
15 in our closing. 09:12:33AM
16 And finally the damages that 09:12:34AM
17 -- that we say arise from Canada's NAFTA breaches. 09:12:37AM
18 So we will start in the first 09:12:40AM
19 section, which, again, breaks down into four 09:12:44AM
20 sections. First of all, Ontario's encouragement 09:12:46AM
21 as to investment in offshore wind development, and 09:12:51AM
22 then I'll tell you about Windstream and its 09:12:54AM
23 investors, then the particular encouragements 09:12:56AM
24 Ontario made for Windstream to apply and enter 09:13:00AM
25 into the FIT contract and, finally, when 09:13:02AM

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1 And you can see that there's a 09:14:22AM
2 reference in the third bullet point there: 09:14:24AM
3 "I understand there were 09:14:26AM
4 a number of concerns 09:14:27AM
5 about the potential 09:14:28AM
6 impact of wind power 09:14:29AM
7 projects on the 09:14:30AM
8 environment, and we've 09:14:31AM
9 taken steps to address 09:14:32AM
10 these concerns." 09:14:33AM
11 And then there's a description 09:14:34AM
12 of some of the studies and the steps that have 09:14:35AM
13 been taken below that. 09:14:37AM
14 And if I can highlight this 09:14:38AM
15 section: 09:14:42AM
16 "Based on this work, we 09:14:44AM
17 believe the existing 09:14:45AM
18 environmental assessment 09:14:46AM
19 processes are sufficient 09:14:48AM
20 to address site-specific 09:14:48AM
21 issues and concerns 09:14:50AM
22 related to offshore 09:14:51AM
23 wind." 09:14:53AM
24 So a statement from the 09:14:53AM
25 Minister of Natural Resources and House notes 09:14:56AM

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1 Windstream moved the project forward. 09:13:04AM
2 So the case really begins with 09:13:05AM
3 Ministry of Natural Resources' decision in early 09:13:12AM
4 2008, January 2008, to lift its deferral on 09:13:15AM
5 offshore wind applications. The Ministry of 09:13:18AM
6 Natural Resources, MNR, had had a deferral on 09:13:22AM
7 offshore wind applications since 2006 while it 09:13:27AM
8 studied environmental and related issues. 09:13:32AM
9 And you'll see here the 09:13:34AM
10 announcement, the press release, that Ontario has 09:13:36AM
11 lifted the deferral and existing proposals for 09:13:40AM
12 offshore wind projects and will be accepting new 09:13:42AM
13 onshore and offshore applications, and you will 09:13:45AM
14 see, in the text highlighted at the bottom, a 09:13:47AM
15 description that they are preparing to accept new 09:13:51AM
16 applications for both onshore and offshore 09:13:53AM
17 developments. 09:13:56AM
18 At the same time that that 09:13:56AM
19 announcement is made, the Minister at the time, 09:14:02AM
20 Ms. Cansfield, is speaking in the House with 09:14:06AM
21 respect to this, and these are the House notes at 09:14:10AM
22 the time which we put in here to help explain, and 09:14:12AM
23 there are other documents in the record explaining 09:14:15AM
24 this exactly, the rationale for lifting the 09:14:16AM
25 deferral at that time. 09:14:21AM

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1 reflecting the Ministry of Natural Resources' 09:14:58AM
2 position at the time. 09:15:00AM
3 I should indicate, by the way, 09:15:01AM
4 it's not -- we -- we don't know from Hansard 09:15:06AM
5 exactly what was said in the House with respect to 09:15:09AM
6 these issues, but we're putting forward this as -- 09:15:12AM
7 as evidence, and it's -- it's supported by other 09:15:15AM
8 evidence in the record, which we will be taking 09:15:17AM
9 you through, that shows that certainly the 09:15:19AM
10 Ministry was stating that, from their perspective, 09:15:20AM
11 these site-specific issues had been examined, and 09:15:25AM
12 they were comfortable that they had dealt with the 09:15:29AM
13 environmental issues at the time. 09:15:31AM
14 And then we see this 09:15:33AM
15 statement, and I appreciate it's in a news 09:15:36AM
16 article, but certainly no one on the other side 09:15:41AM
17 has suggested the statement was not made. Donna 09:15:43AM
18 Cansfield, Minister of Natural Resources, says: 09:15:46AM
19 "We are open for business 09:15:48AM
20 on offshore wind." 09:15:50AM
21 This is in the Toronto Star, 09:15:51AM
22 one of the major newspapers in Ontario. 09:15:54AM
23 So that's where things stand 09:15:58AM
24 from the perspective of MNR in terms of lifting 09:16:01AM
25 the deferral, and you can see this is a document 09:16:05AM

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1 from April 2008 where Helimax, a consulting firm, 09:16:08AM
2 was retained by the OPA, the Ontario Power 09:16:15AM
3 Authority, to do a study of future offshore wind 09:16:19AM
4 development. They do a map, which you can see 09:16:21AM
5 covers the Great Lakes. And specifically, just to 09:16:23AM
6 draw your attention, because this is the area that 09:16:27AM
7 we'll be talking about here, in the area of 09:16:30AM
8 Kingston, they identify a number of areas that 09:16:32AM
9 have favourable wind conditions for offshore wind 09:16:36AM
10 development, so 2008 study for the OPA. 09:16:38AM
11 Now, as we move along, we get 09:16:41AM
12 to the adoption of the Green Energy Act, and this 09:16:49AM
13 is a fundamental part of our case, the adoption of 09:16:50AM
14 this Act, the reasons why this Act was adopted, 09:16:53AM
15 the very statements that were made at the time by 09:16:57AM
16 the government officials, Ministers, and the 09:16:59AM
17 documents at the time. 09:17:02AM
18 And this is a crucial piece, 09:17:04AM
19 as -- as Mr. Smitherman says in his witness 09:17:06AM
20 statement, a crucial fundamental piece of 09:17:08AM
21 legislation. It was -- it was not a -- a small 09:17:11AM
22 matter for the government at the time. It was one 09:17:14AM
23 of their fundamental policy platforms that they 09:17:16AM
24 were putting forward in this Act. 09:17:19AM
25 You will see what 09:17:21AM

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1 crisis far exceeded 09:18:17AM
2 anything that I or any 09:18:18AM
3 other members of our 09:18:19AM
4 government ever expected 09:18:20AM
5 to encounter. This was 09:18:21AM
6 uncharted terrain for 09:18:22AM
7 all of us." 09:18:24AM
8 At the time, the automotive 09:18:24AM
9 industry assembly and auto parts manufacturing was 09:18:26AM
10 at the risk of collapse, and as Mr. Smitherman 09:18:28AM
11 will explain, in Ontario, the auto industry, among 09:18:31AM
12 other places, is concentrated in Southwestern 09:18:33AM
13 Ontario, which was certainly a place which was 09:18:36AM
14 seen as a -- as a place where Green Energy 09:18:37AM
15 development could come in and replace some of 09:18:40AM
16 those lost economic opportunities. 09:18:42AM
17 Now, this statement, then, is 09:18:44AM
18 from the speech that Minister Smitherman makes 09:18:50AM
19 when he introduces the Green Energy Act in the 09:18:52AM
20 Ontario legislature, and I am going to spend some 09:18:54AM
21 time in this document, because it reflects a 09:18:57AM
22 number of very important statements that were -- 09:18:59AM
23 that are -- the Claimant here relied on in terms 09:19:05AM
24 of deciding to invest in Ontario. 09:19:09AM
25 First of all, he talks, again, 09:19:13AM

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1 Mr. Smitherman says. This is from his witness 09:17:24AM
2 statement in this proceeding: Two factors 09:17:26AM
3 motivating the Ontario government's decision, 09:17:28AM
4 number one was the government had committed to 09:17:30AM
5 close Ontario's coal-fired power plants, and it 09:17:33AM
6 made a commitment to close them by a particular 09:17:38AM
7 period of time. 09:17:41AM
8 And second was the need to 09:17:42AM
9 attract investment and create jobs following the 09:17:44AM
10 2007-2008 global financial crisis, which we all 09:17:46AM
11 remember and which was, as in many countries, 09:17:51AM
12 particularly severe in some parts of Ontario in 09:17:54AM
13 terms of its effects. 09:17:57AM
14 And you see this reflected in 09:17:59AM
15 Mr. Smitherman's witness statement: 09:18:01AM
16 "When I assumed the 09:18:05AM
17 office as Minister of 09:18:07AM
18 Energy and 09:18:08AM
19 Infrastructure, Ontario 09:18:10AM
20 was facing major economic 09:18:10AM
21 difficulties and severe 09:18:11AM
22 uncertainty. The 09:18:12AM
23 magnitude of these 09:18:13AM
24 difficulties is difficult 09:18:14AM
25 to express. The economic 09:18:15AM

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1 about the importance of job creation here and the 09:19:15AM
2 modelling that had been done by the government, 09:19:19AM
3 predicting that more than 50,000 direct and 09:19:21AM
4 indirect jobs in the next three years would be 09:19:24AM
5 created. 09:19:28AM
6 Secondly, he talks about 09:19:30AM
7 renewable energy and making the province a -- a 09:19:34AM
8 significant player in this area. If passed, the 09:19:39AM
9 Act would turbocharge the creation of renewable 09:19:43AM
10 energy in this province and set the standard for 09:19:46AM
11 Green Energy policy across this continent. It 09:19:48AM
12 would make this province the destination of 09:19:51AM
13 choice, the destination of choice, for green power 09:19:53AM
14 developers and incent proponents large and small 09:19:56AM
15 to develop projects by offering an attractive 09:19:59AM
16 price for renewable energy, which was key to what 09:20:02AM
17 Ontario was doing here, offering that attractive 09:20:07AM
18 long-term price, and the certainty that creates an 09:20:08AM
19 attractive investment climate. Certainty that 09:20:11AM
20 power would be purchased at a fair price, 09:20:14AM
21 certainty that, wherever feasible, the power would 09:20:18AM
22 be connected to the grid. Certainty that 09:20:20AM
23 government would issue permits in a timely way. 09:20:23AM
24 And he goes on: 09:20:26AM
25 "If passed the act would 09:20:35AM

1 ensure that new green 09:20:36AM
2 power doesn't get tripped 09:20:38AM
3 up in all kinds of red 09:20:39AM
4 tape, but instead that 09:20:40AM
5 new renewable generation 09:20:41AM
6 would be built and 09:20:42AM
7 flowing into the system 09:20:43AM
8 faster, complete with 09:20:44AM
9 service time guarantees 09:20:46AM
10 on our processes." 09:20:47AM
11 And he goes on to say: 09:20:51AM
12 "And it would enable the 09:20:53AM
13 government to set 09:20:54AM
14 reasonable domestic 09:20:55AM
15 content requirements for 09:20:56AM
16 renewable power projects 09:20:57AM
17 to ensure that more 09:20:59AM
18 dollars are spent right 09:20:59AM
19 here at home." 09:21:00AM
20 Because although it's not an 09:21:01AM
21 issue in our case, a key thing the government did 09:21:02AM
22 is it had a 50 percent domestic content 09:21:05AM
23 requirement, and that's why bringing in renewable 09:21:07AM
24 energy developers that had to purchase their goods 09:21:09AM
25 and services from 50 percent Ontario content, the 09:21:12AM

1 "We would also adopt a 09:21:59AM
2 new and very different 09:22:01AM
3 approach to the 09:22:02AM
4 development of the grid 09:22:03AM
5 infrastructure necessary 09:22:04AM
6 to take the energy to 09:22:04AM
7 market." 09:22:06AM
8 And then he talks about the 09:22:06AM
9 experiences, because Ontario had had a previous 09:22:11AM
10 programs, and you'll hear a little bit about this 09:22:15AM
11 during the evidence today. It had previous 09:22:18AM
12 programs in which renewable energy products had 09:22:19AM
13 been developed. So Ontario had experience with 09:22:22AM
14 this and -- and what was required to attract 09:22:24AM
15 investment. 09:22:26AM
16 "Our Green Energy 09:22:27AM
17 experience over these 09:22:28AM
18 past several years have 09:22:29AM
19 told us volumes about 09:22:30AM
20 where our best renewable 09:22:31AM
21 opportunities lie. 09:22:33AM
22 Working proactive with 09:22:33AM
23 our energy agencies, we 09:22:34AM
24 would initiate 09:22:35AM
25 investments in the 09:22:37AM

1 goal there was to stimulate the development of the 09:21:16AM
2 renewable energy industry here in Ontario, 09:21:18AM
3 everything from turbine blade manufacturing to all 09:21:21AM
4 the services that would be provided in relation to 09:21:24AM
5 this. 09:21:26AM
6 You can see, he goes on: 09:21:27AM
7 "Our proposed legislation 09:21:32AM
8 would create 09:21:34AM
9 best-in-class renewable 09:21:34AM
10 energy Feed-In Tariff, a 09:21:36AM
11 Feed-In Tariff that would 09:21:37AM
12 offer an attractive price 09:21:39AM
13 for renewable power, 09:21:40AM
14 including wind, both 09:21:42AM
15 onshore and offshore." 09:21:44AM
16 So very clearly stated in the 09:21:45AM
17 House when the Bill is introduced that it's going 09:21:47AM
18 to include offshore wind. 09:21:49AM
19 "With this single bold 09:21:50AM
20 move, Ontario would join 09:21:52AM
21 the ranks of global green 09:21:53AM
22 power leaders like 09:21:54AM
23 Denmark, Germany, and 09:21:55AM
24 Spain." 09:21:57AM
25 And he goes on to say: 09:21:57AM

1 development of new 09:22:38AM
2 transmission capacity, 09:22:39AM
3 and the Act would replace 09:22:39AM
4 the snail's pace with a 09:22:40AM
5 sense of urgency." 09:22:42AM
6 So the whole orientation here 09:22:43AM
7 was urgency. We have to get these projects 09:22:45AM
8 developed. We have to bring investment in. We 09:22:47AM
9 have to get shovels in the ground because not only 09:22:50AM
10 are we phasing out our coal-fired plants and we 09:22:52AM
11 need the electricity for this, but we are also 09:22:54AM
12 creating jobs to replace those that are being 09:22:57AM
13 lost. 09:23:00AM
14 And, finally, there is this 09:23:00AM
15 provision about streamlining coordination. The 09:23:04AM
16 proposed legislation would coordinate approvals 09:23:07AM
17 from the Ministries of the Environment and Natural 09:23:09AM
18 Resources -- because both Ministries, as you know 09:23:12AM
19 from reviewing the materials, are involved in the 09:23:14AM
20 review of these projects -- into a streamlined 09:23:16AM
21 process within a service guarantee. And so long 09:23:21AM
22 as all necessary documentation is successfully 09:23:22AM
23 completed, permits would be issued within a 09:23:24AM
24 six-month service window. You complete the 09:23:27AM
25 documentation, you have your six-month guarantee. 09:23:29AM

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1 "My Ministry, the energy 09:23:31AM
2 Ministry, would emerge 09:23:33AM
3 with new capabilities and 09:23:34AM
4 new leadership to support 09:23:36AM
5 the facilitation of 09:23:37AM
6 renewable energy 09:23:38AM
7 projects." 09:23:39AM
8 So that is what the Minister 09:23:39AM
9 states in the House on introducing the Bill. Very 09:23:45AM
10 clear statements to potential investors. 09:23:48AM
11 Now, this is a news release 09:23:51AM
12 that came out at the time which I would like to 09:23:54AM
13 take you to briefly. Again, this is September 09:23:55AM
14 2009. So the earlier remarks in the House were in 09:24:01AM
15 February 2009. This is the point at which the -- 09:24:04AM
16 the Act and the regulations have been worked out 09:24:07AM
17 and are being announced. 09:24:09AM
18 So there is a description of 09:24:11AM
19 the regulations here: 09:24:13AM
20 "Providing a stable 09:24:14AM
21 investment environment 09:24:15AM
22 where companies know what 09:24:17AM
23 the rules are, giving 09:24:18AM
24 them confidence to invest 09:24:20AM
25 in Ontario, hire workers, 09:24:21AM

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1 OPA -- because the Minister, as you know, has 09:25:01AM
2 these powers to direct the OPA to carry out 09:25:03AM
3 certain acts -- directs the OPA to establish a FIT 09:25:06AM
4 program, and it says: 09:25:10AM
5 "The FIT program should 09:25:11AM
6 provide for a 20-year 09:25:12AM
7 power purchase agreement 09:25:14AM
8 in respect of all 09:25:15AM
9 renewable fuels..." 09:25:16AM
10 Twenty years is significant, 09:25:17AM
11 and we'll hear more from the experts and others 09:25:18AM
12 about that amount of time. 09:25:21AM
13 "The contract should 09:25:23AM
14 require the developer to 09:25:25AM
15 design, build and operate 09:25:26AM
16 a renewable generating 09:25:27AM
17 facility and in exchange 09:25:29AM
18 should provide for 09:25:31AM
19 guaranteed, long-term 09:25:32AM
20 pricing for the output of 09:25:33AM
21 the renewable generating 09:25:34AM
22 facility." 09:25:36AM
23 So just to pause, there are 09:25:36AM
24 the contractors imposing obligations, once it's 09:25:38AM
25 signed, on the developer. The obligations are to 09:25:41AM

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1 and produce and sell 09:24:22AM
2 renewable energy." 09:24:23AM
3 The major components, the 09:24:24AM
4 press release says, would be a Feed-In Tariff 09:24:28AM
5 tariff which: 09:24:30AM
6 "Allows individuals and 09:24:31AM
7 companies to sell 09:24:32AM
8 renewable energy into the 09:24:32AM
9 grid at set rates." 09:24:34AM
10 And then skipping over the 09:24:36AM
11 domestic content: 09:24:38AM
12 "A streamlined approvals 09:24:38AM
13 process and a service 09:24:40AM
14 guarantee to bring 09:24:41AM
15 developers greater 09:24:41AM
16 certainty." 09:24:42AM
17 And: 09:24:43AM
18 "A new Ontario Renewable 09:24:43AM
19 Energy Facilitation 09:24:43AM
20 Office -- a one-stop shop 09:24:47AM
21 to help renewable energy 09:24:48AM
22 projects get off the 09:24:49AM
23 ground faster." 09:24:50AM
24 And as a result of this, the 09:24:51AM
25 Minister, pursuant to his authority to direct the 09:24:58AM

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1 design, build, and operate the facility. The 09:25:45AM
2 exchange is a guaranteed long-term pricing for the 09:25:47AM
3 output of renewable generating facilities, so 09:25:50AM
4 two-way obligations under the -- under the 09:25:53AM
5 contract once it's signed. 09:25:55AM
6 Now, this is an excerpt from 09:25:57AM
7 one of our expert witness reports. This is Sarah 09:26:02AM
8 Powell, who you'll hear is -- is a leading 09:26:06AM
9 environmental lawyer, and who is particularly in 09:26:08AM
10 the renewable industry here in Ontario. And she, 09:26:13AM
11 as you'll hear, has extensive experience in 09:26:17AM
12 dealing with developers and FIT contracts on 09:26:20AM
13 everything from obtaining the environmental 09:26:22AM
14 approvals to dealing with financing issues. 09:26:24AM
15 She explains here that a FIT 09:26:26AM
16 contract -- this is from the perception in the 09:26:28AM
17 industry as to how developers would have viewed 09:26:32AM
18 them: 09:26:35AM
19 "[a] FIT contract would 09:26:35AM
20 have been generally 09:26:36AM
21 viewed by the regulated 09:26:36AM
22 community as the key 09:26:38AM
23 'hard gate' (i.e., 09:26:39AM
24 required before any other 09:26:40AM
25 material milestone in the 09:26:42AM

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1 project development 09:26:43AM
2 process would have been 09:26:43AM
3 pursued. In other words, 09:26:44AM
4 in my experience, a 09:26:46AM
5 developer would not 09:26:47AM
6 typically invest heavily 09:26:47AM
7 in project development 09:26:49AM
8 activities until a FIT 09:26:50AM
9 contract is awarded." 09:26:51AM
10 So it's the key hard gate, the 09:26:53AM
11 material milestone, and then she goes on to say: 09:26:56AM
12 "Once awarded a FIT 09:27:00AM
13 contract for an offshore 09:27:01AM
14 wind project pursuant to 09:27:02AM
15 the FIT program, it would 09:27:03AM
16 have been commercially 09:27:05AM
17 reasonable for a 09:27:05AM
18 developer to assume that 09:27:06AM
19 it would obtain the 09:27:08AM
20 requisite Crown land 09:27:09AM
21 tenure in due course and 09:27:10AM
22 in a timely manner..." 09:27:11AM
23 And, again, that will be 09:27:15AM
24 important in the evidence you'll hear about that 09:27:19AM
25 issue because one of the disputes between the 09:27:21AM

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1 do the fieldwork. They would do the 09:28:37AM
2 investigations. Those studies would be provided 09:28:39AM
3 to the Ministries, MNR and MOE. And MNR and MOE 09:28:41AM
4 would have to be satisfied that those studies were 09:28:46AM
5 properly done and satisfied them as to the various 09:28:48AM
6 environmental issues. 09:28:51AM
7 So that was their -- an 09:28:52AM
8 extensive set of studies for -- for wind projects 09:28:54AM
9 in general, and then there were these additional 09:28:57AM
10 requirements under the REA regulations for an 09:29:00AM
11 offshore wind facility report, and there's a 09:29:02AM
12 general description here, and you'll see there are 09:29:06AM
13 more -- there are added further descriptions of it 09:29:10AM
14 as well that talks about the nature of what should 09:29:11AM
15 be provided for the offshore wind facility report. 09:29:13AM
16 Now, we'll be getting to 09:29:17AM
17 another slide in a moment because, in addition to 09:29:18AM
18 the REA regulation, there was a specific set of 09:29:20AM
19 requirements from the MNR as well as to what had 09:29:23AM
20 to be carried out in terms of -- of an offshore 09:29:25AM
21 wind project. 09:29:28AM
22 But the -- the essential point 09:29:29AM
23 to remember, from our perspective -- and -- and 09:29:32AM
24 you'll hear it also from Sarah Powell and others 09:29:34AM
25 -- is that this was a process that put the 09:29:37AM

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1 parties is what the expectations would have been 09:27:23AM
2 of Windstream as to -- as to whether it would be 09:27:26AM
3 able to obtain other permits, whether it was 09:27:28AM
4 reasonable for it to, assuming it got into the 09:27:32AM
5 process, to obtain those permits in a timely 09:27:34AM
6 manner. 09:27:37AM
7 Now, Ontario, at this time, in 09:27:37AM
8 terms of their adoption of the FIT -- the REA 09:27:42AM
9 regulation, this is an excerpt from the 09:27:44AM
10 regulation, which, as you might expect, is a long 09:27:48AM
11 and complex regulation. It required a number of 09:27:51AM
12 permitting requirements that had to be fulfilled 09:28:00AM
13 in order for a project to get REA approval. The 09:28:02AM
14 part that we have highlighted here is just making 09:28:05AM
15 it clear that there was a section dealing with 09:28:10AM
16 offshore wind. So offshore wind was clearly 09:28:12AM
17 included within the regulation. 09:28:14AM
18 And the regulation, we'll be, 09:28:16AM
19 again going over more of this during the hearing, 09:28:19AM
20 but for -- for wind projects in general, the whole 09:28:22AM
21 approach here was to have the developers and their 09:28:25AM
22 consultants carry out all the environmental 09:28:30AM
23 studies that the Ministries directed should be 09:28:32AM
24 done, both MNR and MOE. 09:28:34AM
25 They would go out. They would 09:28:36AM

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1 emphasis on the proponent to develop, to do the 09:29:40AM
2 investigation, to assess, to do the field studies, 09:29:44AM
3 to do all of the studies that were required to 09:29:47AM
4 determine whether or not the project was 09:29:48AM
5 environmentally safe, but -- but, without 09:29:50AM
6 question, gave the final say to the Ministry of 09:29:53AM
7 the Environment and the Ministry of Natural 09:29:56AM
8 Resources to evaluate those studies. If they 09:29:57AM
9 weren't sufficient to say, "Go back and do more 09:29:59AM
10 study," to, in the end, have the final say as to 09:30:02AM
11 whether or not the project was one that should go 09:30:06AM
12 ahead. 09:30:08AM
13 And I -- I make that point in 09:30:13AM
14 part because Canada, in their Memorial, at one 09:30:14AM
15 point says that -- that essentially what we're 09:30:17AM
16 asking for is for, you know, the project to go 09:30:20AM
17 ahead and for us to sort of hope for the best that 09:30:24AM
18 there wouldn't be any environmental issues that 09:30:27AM
19 arose. 09:30:29AM
20 And, in fact, that's a 09:30:30AM
21 mischaracterization of the system. It wasn't a 09:30:31AM
22 hope-for-the-best system. It was a system that 09:30:34AM
23 required developers to do all the studies 09:30:35AM
24 thoroughly that were required, to then have the 09:30:39AM
25 oversight from the Ministry of the Environment and 09:30:42AM

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1 Ministry of Natural Resources with respect to 09:30:44AM
2 those studies. 09:30:46AM
3 Now, there was another 09:30:47AM
4 document which came out at the time, a fact sheet 09:30:53AM
5 from the Ministry of Environment which, again, 09:30:55AM
6 sums up this approach here. Specific description 09:30:58AM
7 here of what has to happen for offshore wind 09:31:00AM
8 turbines. And you'll see that offshore wind 09:31:03AM
9 facilities require a REA. They do not have 09:31:05AM
10 province-wide standard setbacks at this time. 09:31:08AM
11 Now, with respect to 09:31:12AM
12 province-wide standard setbacks, there was, for 09:31:14AM
13 example, for onshore wind projects, there was a 09:31:17AM
14 noise requirement that -- that you had to be at 09:31:19AM
15 least 550 metres from a residence. 09:31:22AM
16 And at the time that the 09:31:25AM
17 offshore -- at the time, in September 2009, when 09:31:28AM
18 the -- these materials were -- were put forward, 09:31:32AM
19 there was no similar setback for offshore wind 09:31:34AM
20 turbines, and you'll see that this becomes 09:31:37AM
21 important later on when the Ministry makes certain 09:31:39AM
22 proposals as to what the setbacks should be. 09:31:42AM
23 So what they said instead with 09:31:44AM
24 respect to noise issues is that applicants need to 09:31:46AM
25 conduct noise studies demonstrating they do not 09:31:49AM

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1 appropriate Ministries. 09:32:45AM
2 And you will see at this time 09:32:47AM
3 the MOE, making the commitment we've highlighted, 09:32:57AM
4 is providing the six-month service guarantee so 09:32:59AM
5 that the same commitment that was reflected in 09:33:01AM
6 Mr. Smitherman's speech when he introduced this is 09:33:04AM
7 reflected in the news release September 2009. 09:33:06AM
8 And this is a document from 09:33:09AM
9 Ministry of Natural Resources. Two things to note 09:33:14AM
10 on this slide: First of all, if you look at the 09:33:18AM
11 orange box, there's a reference here to the MNR's 09:33:21AM
12 Approval and Permitting Requirement Document for 09:33:24AM
13 Renewable Energy Projects. And this was a 09:33:29AM
14 document -- you'll see a copy of it -- a lengthy 09:33:29AM
15 document that was provided at the time in 09:33:32AM
16 September 2009 when this was all being rolled out, 09:33:34AM
17 and it had various provisions for onshore wind 09:33:37AM
18 projects and detailed provisions for offshore wind 09:33:41AM
19 projects as well. 09:33:44AM
20 And you'll see the same 09:33:45AM
21 statement here from the MNR, that: 09:33:46AM
22 "The review of the 09:33:48AM
23 complete submission and 09:33:49AM
24 the issuance of most 09:33:50AM
25 approvals and permits 09:33:50AM

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1 exceed a noise level of 40 decibels. They say 09:31:52AM
2 approximately the noise level experienced in a 09:31:56AM
3 quiet office or a library. 09:31:58AM
4 And that was -- that was the 09:31:59AM
5 basis of the 550-metre exemption or the setback 09:31:59AM
6 for onshore wind turbines was that was designed to 09:32:03AM
7 avoid a situation in which wind turbine noise 09:32:06AM
8 would exceed 40 decibels. 09:32:08AM
9 So -- so there is -- there is 09:32:10AM
10 -- what, in our view, is being communicated here 09:32:14AM
11 is that, in the absence of such standards, the 09:32:18AM
12 applicants conduct the noise study, and they -- 09:32:20AM
13 you'll see in the last line: 09:32:23AM
14 "They must identify any 09:32:24AM
15 negative impacts to the 09:32:26AM
16 natural environment that 09:32:27AM
17 the project may have and 09:32:28AM
18 explain how they will 09:32:29AM
19 mitigate any impacts." 09:32:30AM
20 So, again, the 09:32:31AM
21 proponent-driven process where the developer does 09:32:33AM
22 the field testing, the science. The developer 09:32:35AM
23 assesses what the noise levels are likely to be. 09:32:38AM
24 They have to explain how they'll mitigate any 09:32:41AM
25 issues, and it has to be approved by the 09:32:44AM

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1 will be completed within 09:33:51AM
2 the established service 09:33:52AM
3 guarantee." 09:33:53AM
4 So, again, the emphasis on 09:33:53AM
5 "guarantees" from the Ministries in September 09:33:56AM
6 2009. 09:33:58AM
7 And you'll see here we've 09:33:58AM
8 included this reference from Mr. Smitherman's -- 09:34:01AM
9 Minister Smitherman's -- former Minister 09:34:04AM
10 Smitherman's witness statement: 09:34:06AM
11 "I intended for investors 09:34:07AM
12 to rely on the 09:34:09AM
13 commitments I made in 09:34:10AM
14 this speech --" 09:34:11AM
15 So he is talking here about 09:34:12AM
16 his February 2009 speech. 09:34:13AM
17 " -- and others 09:34:16AM
18 (including our commitment 09:34:18AM
19 to process REA 09:34:19AM
20 applications within a 09:34:19AM
21 six-month time frame)." 09:34:21AM
22 And you'll be hearing from 09:34:22AM
23 Mr. Smitherman during this proceeding. 09:34:24AM
24 And one more document here is 09:34:26AM
25 you see there's a -- there's a site release review 09:34:33AM

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1 proposal that is posted by the MNR in late 2009, 09:34:35AM
2 and the point I just want to make on this slide is 09:34:39AM
3 what you see here is an effort on behalf of MNR to 09:34:41AM
4 align its activities with the Green Energy Act 09:34:45AM
5 provisions to provide procedural clarity, to align 09:34:50AM
6 its processes with the Green Energy Act 09:34:53AM
7 direction -- and specifically we'll be talking 09:34:56AM
8 about the site release process, where it -- where 09:34:57AM
9 it goes through a process of determining whether 09:34:59AM
10 Crown land should be made available -- and to 09:35:01AM
11 eliminate duplication. 09:35:04AM
12 So the message, in our view, 09:35:06AM
13 is consistently -- is consistent between Minister 09:35:08AM
14 Smitherman's speech and what we -- what we hear 09:35:12AM
15 from the Ministries in the fall of 2009 with 09:35:14AM
16 respect to these issues. 09:35:17AM
17 Now, Windstream -- and I 09:35:18AM
18 apologize. It has been a while -- taken me a 09:35:24AM
19 while to introduce our -- the Claimant here, but I 09:35:27AM
20 wanted to -- you to understand fully what was in 09:35:29AM
21 front of them when they decided to make their 09:35:33AM
22 investments in this case. 09:35:36AM
23 So very briefly here, 09:35:37AM
24 Windstream, in the centre here, we have Windstream 09:35:40AM
25 Energy LLC, the U.S. investor. The chairman is 09:35:43AM

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1 explained in the witness statements -- and I'll 09:37:09AM
2 just take you briefly to them -- that they're 09:37:10AM
3 experienced marine environment project developers. 09:37:14AM
4 Mr. Ziegler has -- in particular, he's -- he's 09:37:15AM
5 worked in the areas of offshore drilling rig 09:37:18AM
6 operators, and you'll hear this is important 09:37:21AM
7 because there's actually a fair amount of 09:37:23AM
8 similarities between the vessels you need and -- 09:37:25AM
9 and the expertise you need to put into place 09:37:27AM
10 offshore drilling rigs and generally dealing with 09:37:30AM
11 offshore projects. 09:37:32AM
12 He has had experience in 09:37:33AM
13 land-based drill rig operation, oil and gas, 09:37:36AM
14 natural gas, so substantial experience in the -- 09:37:39AM
15 in the energy industry and, again, substantial 09:37:43AM
16 experience in the sort of activities that, in our 09:37:53AM
17 submission, were key to be able to develop this 09:37:57AM
18 project: building companies from the ground up, 09:38:00AM
19 hiring and managing staff, developing business 09:38:03AM
20 strategies, arranging financing. You'll hear a 09:38:05AM
21 lot about financing during this week, directing 09:38:08AM
22 the growth of these companies, because many of 09:38:09AM
23 these companies operate in the energy service 09:38:12AM
24 industry, which is highly technical and requires a 09:38:14AM
25 high degree of specific expertise, so a lot of 09:38:17AM

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1 William Ziegler, who has substantial experience in 09:35:46AM
2 the energy industry, and you'll be hearing from 09:35:50AM
3 him this week, and David Mars, who works with -- 09:35:53AM
4 with Mr. Ziegler and has basically been, you'll 09:35:58AM
5 hear, essentially running this project. He was 09:36:02AM
6 running this project at the time, together with 09:36:06AM
7 Mr. Baines, who is -- who was the -- is a Canadian 09:36:09AM
8 who had substantial expertise in developing wind 09:36:14AM
9 projects in Ontario. 09:36:18AM
10 Now, we have also Windstream 09:36:23AM
11 Energy Inc., which is a management company, but 09:36:25AM
12 the key in terms of the chain here, it's 09:36:27AM
13 Windstream Energy LLC, which has 100 percent 09:36:29AM
14 ownership of Windstream Wolfe Island Shoals, and 09:36:32AM
15 Windstream Wolfe Island Shoals Inc is the party 09:36:36AM
16 that -- that has the contract. 09:36:37AM
17 Ortech Consulting, you'll hear 09:36:40AM
18 from Mr. Roeper, is a key consultant who worked 09:36:43AM
19 early on with Windstream on this project, and we 09:36:48AM
20 have, at the top, the main investor group, a 09:36:52AM
21 series of high net worth individuals who have 09:36:56AM
22 worked together on a number of projects, 09:36:58AM
23 especially in the energy area over a number of 09:37:01AM
24 years. 09:37:03AM
25 And we explain in the -- we've 09:37:04AM

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1 work with -- with engineers, technicians, and 09:38:20AM
2 others, similar to the types of experience that 09:38:23AM
3 would be relevant to developing a wind project. 09:38:26AM
4 And -- and you'll know from 09:38:30AM
5 reading the materials that -- that Windstream, in 09:38:32AM
6 addition to its -- its projects in Ontario or its 09:38:35AM
7 attempted projects in Ontario before the 09:38:39AM
8 moratorium came into place, had also done off -- 09:38:41AM
9 onshore wind work in -- in the western United 09:38:44AM
10 States. 09:38:48AM
11 Now, and this is -- this is 09:38:48AM
12 Ian Baines, who I mentioned is the key person in 09:38:52AM
13 Canada who was working together with Mr. Mars as 09:38:54AM
14 -- as the key people in developing the project. 09:38:58AM
15 It's significant to pause briefly in his 09:39:01AM
16 experience. He had worked on two of the largest 09:39:03AM
17 and earliest wind projects developed in Ontario, 09:39:05AM
18 the Melancthon wind project, which has a 09:39:09AM
19 200-megawatt nameplate capacity, which is very 09:39:12AM
20 substantial and also, in particular, the onshore 09:39:15AM
21 Wolfe Island Wind Project, which is very close to 09:39:18AM
22 the island in which Wolfe Island Shoals was -- and 09:39:20AM
23 which required, for example, transportation of -- 09:39:25AM
24 it's an onshore project. It's not an offshore 09:39:27AM
25 project, but it required the use of vessels to get 09:39:29AM

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1 turbines to the island. It required the laying of 09:39:32AM
2 a cable across a portion of Lake Ontario at that 09:39:38AM
3 point, and it had a substantial megawatt capacity 09:39:41AM
4 as well. 09:39:44AM
5 So Ian Baines, engineer, had 09:39:45AM
6 that expertise and experience. 09:39:48AM
7 So what happens, then, in -- 09:39:50AM
8 that causes Windstream to make its investment? 09:39:55AM
9 First of all, as Mr. Mars says -- and we go back 09:39:59AM
10 to when Minister Cansfield lifted the deferral, 09:40:03AM
11 you will remember, in early 2008. So Mr. Mars 09:40:05AM
12 says that: 09:40:09AM
13 "After a detailed 09:40:10AM
14 assessment of potential 09:40:12AM
15 project areas and on the 09:40:13AM
16 basis of Minister 09:40:14AM
17 Cansfield's announcement 09:40:16AM
18 the deferral was lifted, 09:40:16AM
19 Premier McGuinty's public 09:40:18AM
20 support for offshore 09:40:20AM
21 wind, and MNR's 09:40:21AM
22 supporting actions, we 09:40:22AM
23 applied for applicant of 09:40:23AM
24 record status, and we did 09:40:27AM
25 this on February 8, 09:40:28AM

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1 priority position within 09:41:40AM
2 MNR site release process, 09:41:42AM
3 you must submit an 09:41:43AM
4 application to the FIT 09:41:44AM
5 program within the FIT 09:41:45AM
6 launch program launch 09:41:47AM
7 period." 09:41:47AM
8 So a clear statement here. 09:41:48AM
9 And we think this is important that, if you want 09:41:51AM
10 to preserve your rights to be able to develop an 09:41:53AM
11 offshore wind and get priority on that, you have 09:41:56AM
12 to apply into the FIT program. 09:41:58AM
13 And you see this followed up 09:42:00AM
14 in a letter sent in 2000 and -- in November of 09:42:04AM
15 2009: 09:42:11AM
16 "Existing Crown land 09:42:11AM
17 applicants who apply for 09:42:14AM
18 FIT during the launch 09:42:15AM
19 period and who are 09:42:17AM
20 awarded contracts by the 09:42:17AM
21 OPA --" 09:42:17AM
22 So if they get a FIT contract. 09:42:18AM
23 "-- will be given the 09:42:20AM
24 highest priority to the 09:42:21AM
25 Crown land sites applied 09:42:23AM

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1 2008." 09:40:29AM
2 And that, by the way, was 09:40:30AM
3 essentially exactly almost to the day when MNR 09:40:32AM
4 opened up their window to be able to apply, 09:40:35AM
5 because they had had this deferral on for close to 09:40:38AM
6 two years. They opened up the window to apply for 09:40:40AM
7 offshore wind, and -- and Windstream applies very 09:40:43AM
8 quickly, because, of course, it's important for, 09:40:46AM
9 in this process, to be, if possible, the first 09:40:48AM
10 person in to claim -- to -- to propose to use 09:40:51AM
11 Crown land for particular work ahead of other 09:40:55AM
12 people who may also be interested. 09:40:59AM
13 Now, what happened is the 09:41:01AM
14 application for site release was made in February 09:41:06AM
15 of 2008. It was supposed to, as you'll hear, have 09:41:10AM
16 been processed within 30 days and then go through 09:41:14AM
17 a series of steps. That didn't happen. There 09:41:17AM
18 were letters from the MNR explaining, "Sorry for 09:41:20AM
19 the delay." 09:41:24AM
20 But then what happens is, when 09:41:24AM
21 the -- the FIT program is launched, MNR decides 09:41:25AM
22 that it will send letters to applicants who have 09:41:31AM
23 applied for Crown land site release, telling them, 09:41:35AM
24 as you see, that: 09:41:38AM
25 "In order to maintain 09:41:39AM

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1 for. This means these 09:42:24AM
2 applicants will take 09:42:26AM
3 precedence over all 09:42:27AM
4 others for this site." 09:42:27AM
5 So if there are other people 09:42:27AM
6 who applied for this site, it'll take precedence. 09:42:27AM
7 "And, additionally, it 09:42:30AM
8 will receive priority 09:42:31AM
9 attention from MNR." 09:42:32AM
10 So this is the communication 09:42:33AM
11 that the investors are getting at the time. Apply 09:42:35AM
12 into this -- into the FIT contract process, and if 09:42:39AM
13 you get a FIT contract, you get priority 09:42:41AM
14 attention. 09:42:44AM
15 So this, again, is -- is from 09:42:44AM
16 Mr. Mars' statement, and you can see that they 09:42:51AM
17 decided to apply, and he lists here the various 09:42:54AM
18 bases on which they decide to apply for a FIT 09:42:56AM
19 contract: 09:42:59AM
20 Minister Cansfield's 09:42:59AM
21 announcement that Ontario was "open for business," 09:43:02AM
22 the various statements the Ministers have made 09:43:04AM
23 about wanting to attract investment, the 09:43:06AM
24 statements about certainty, inclusion of offshore 09:43:08AM
25 wind in the FIT program, Minister Cansfield's 09:43:11AM

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1 letter encouraging land applicants to apply for a 09:43:15AM
2 FIT contract, and the streamlined regulatory 09:43:18AM
3 process. 09:43:21AM
4 So he sets out there very 09:43:21AM
5 clearly the representations made that Windstream 09:43:23AM
6 relied on at that time in making this application. 09:43:24AM
7 And as he says: 09:43:29AM
8 "Without these 09:43:30AM
9 commitments from the 09:43:31AM
10 Ontario government, we 09:43:31AM
11 would not have put \$3 09:43:32AM
12 million at risk and 09:43:33AM
13 continued to develop the 09:43:34AM
14 project." 09:43:35AM
15 Because there was a 09:43:35AM
16 requirement when you -- when you put in your 09:43:37AM
17 initial FIT contract, when you apply for it, you 09:43:38AM
18 have to put \$3 million in with respect to this 09:43:40AM
19 project to show your seriousness. 09:43:43AM
20 Now, this is when the FIT 09:43:47AM
21 contract is awarded or the announcement of the 09:43:52AM
22 award: 09:43:54AM
23 "I'm writing to inform 09:43:54AM
24 you the OPA has approved 09:43:57AM
25 your FIT program 09:43:59AM

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1 whole idea of -- of the security and the other 09:44:56AM
2 provisions here was -- and you'll see this in 09:45:00AM
3 e-mails from MNR, within MNR. The idea was that 09:45:02AM
4 Ontario wanted to give priority in the MNR Crown 09:45:08AM
5 land site release process to those who had been 09:45:13AM
6 awarded FIT contracts and could show they were 09:45:15AM
7 serious about developing a project because they 09:45:19AM
8 wanted to weed out, as the -- as document says 09:45:21AM
9 that we will be showing you during the evidence, 09:45:24AM
10 they wanted to weed out speculators, various other 09:45:26AM
11 people who had applied for offshore wind projects 09:45:29AM
12 but weren't serious about them. 09:45:32AM
13 Now, what happens, and just to 09:45:34AM
14 pause for a moment here, is the FIT contract is 09:45:37AM
15 awarded in April of 2010. After that, Windstream 09:45:41AM
16 starts the process of doing their initial work on 09:45:48AM
17 the project or they're -- I mean, they carried out 09:45:50AM
18 initial work previously, but really going together 09:45:54AM
19 to meet with the Ministries to figure out what the 09:45:57AM
20 next steps are in the project. 09:45:59AM
21 And what happens here is there 09:46:01AM
22 is, in June of 2010, you'll recall I talked about 09:46:02AM
23 setbacks before. This is where the MOE proposes 09:46:06AM
24 their 5-kilometre offshore setback and posts this 09:46:09AM
25 out for -- for discussion. 09:46:14AM

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1 application for the 09:44:00AM
2 project identified above 09:44:02AM
3 --" 09:44:02AM
4 Which is the Windstream 09:44:02AM
5 project. 09:44:02AM
6 "-- for inclusion in the 09:44:03AM
7 FIT program. 09:44:05AM
8 Congratulations." 09:44:06AM
9 So this is in April of 2010. 09:44:06AM
10 And here we summarized the 09:44:09AM
11 various rights and obligations under the FIT 09:44:15AM
12 contract: A requirement to bring the project into 09:44:18AM
13 commercial operation by something called an MCOD, 09:44:20AM
14 which is a Milestone Commercial Operation Date; 09:44:21AM
15 subject to extension for force majeure -- we'll 09:44:25AM
16 talk more about that -- plus an additional eight 09:44:27AM
17 months' buffer before the default; a contract 09:44:30AM
18 price of 19 cents per kilowatt-hour; a requirement 09:44:34AM
19 that the OPA, following commercial operation, has 09:44:38AM
20 to purchase the electricity generated by the 09:44:42AM
21 project for a 20-year term, so all the electricity 09:44:44AM
22 generated by the project; and a requirement to 09:44:46AM
23 post \$6 million of security. 09:44:48AM
24 And you'll see, again, when we 09:44:50AM
25 -- in -- when we get into the evidence, that the 09:44:54AM

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1 This issue was one that, as 09:46:15AM
2 Mr. Baines explains in his -- in his witness 09:46:24AM
3 statement, is concerned about. And you'll see -- 09:46:26AM
4 and my friends on the other side have -- have 09:46:31AM
5 emphasized, you know, a lot of the correspondence 09:46:35AM
6 during this period where the investors are 09:46:38AM
7 expressing concerns about the setback and concerns 09:46:39AM
8 about -- about uncertainty and whether they'd be 09:46:42AM
9 able to finish their projects within the -- what 09:46:45AM
10 was then the four-year timeline. But what 09:46:47AM
11 Mr. Baines says here is: We were concerned about 09:46:51AM
12 it because what happened is -- here is the 09:46:53AM
13 5-kilometre setback would have prevented some of 09:46:55AM
14 the grid cells that Windstream had applied for, 09:46:58AM
15 for being used. 09:46:59AM
16 He suggested the possibility 09:47:00AM
17 of a grid cell swap, and -- and he agreed -- 09:47:02AM
18 Windstream agreed that they -- that they -- they 09:47:07AM
19 wanted to show support to work with MNR and MOE to 09:47:08AM
20 propose -- to comply with the proposed requirement 09:47:12AM
21 and that "We, in fact, supported it." 09:47:15AM
22 So -- so what -- what 09:47:18AM
23 Windstream did over this period when they were 09:47:19AM
24 hearing about this setback and the issues with 09:47:21AM
25 respect to that and the uncertainty is they went 09:47:22AM

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1 out of their way to meet with the various 09:47:25AM
2 Ministries and obtain comfort from them, 09:47:27AM
3 assurances from them, as you'll see, as to what 09:47:32AM
4 they expected would happen as the project 09:47:35AM
5 proceeded. 09:47:39AM
6 And you will see this, just to 09:47:39AM
7 -- to run through these examples, there's Mr. 09:47:41AM
8 Ungerman, who is the policy adviser for the Energy 09:47:46AM
9 Minister at the time on this. There was a key 09:47:49AM
10 meeting, which you'll hear about, in July 7th, 09:47:51AM
11 where Mr. Ungerman indicates -- this is from the 09:47:53AM
12 witness statement of Ian Baines -- that the 09:47:58AM
13 project had the support of the Ontario government. 09:48:00AM
14 And this was in a conference call that involved 09:48:07AM
15 not just Mr. Baines, but also Mr. Mars and 09:48:10AM
16 Mr. Ziegler. 09:48:12AM
17 There was an effort made and a 09:48:18AM
18 successful effort by Mr. Ungerman to intervene 09:48:19AM
19 with the Ontario Power Authority to obtain an 09:48:23AM
20 extension of the Milestone Date for Commercial 09:48:25AM
21 Operation from four years to five years, because, 09:48:28AM
22 as I said, there was concern at the time from 09:48:33AM
23 Windstream's part that they wouldn't be able to 09:48:35AM
24 finish the project within the four-year period 09:48:38AM
25 because of the uncertainty caused by this issue 09:48:41AM

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1 prepared to discuss 09:49:46AM
2 limited reconfiguration 09:49:47AM
3 of your existing 09:49:48AM
4 applications to allow a 09:49:48AM
5 sufficient size of area 09:49:50AM
6 to site your proposed 09:49:51AM
7 300-megawatt offshore 09:49:52AM
8 wind farm." 09:49:54AM
9 Now, just to go back, a 09:49:55AM
10 statement there, which certainly Windstream 09:50:04AM
11 acknowledged: 09:50:06AM
12 "That any discussion of 09:50:07AM
13 this would occur once the 09:50:08AM
14 policy proposal, 09:50:10AM
15 environmental registry 09:50:11AM
16 posting regarding the 09:50:12AM
17 5-kilometre shoreline 09:50:14AM
18 exclusion zone has been 09:50:15AM
19 concluded as well as 09:50:16AM
20 MNR's own consideration 09:50:17AM
21 of where, when, and how 09:50:19AM
22 the government will make 09:50:20AM
23 Crown land available for 09:50:21AM
24 offshore wind projects." 09:50:22AM
25 So it was understood that 09:50:24AM

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1 with respect to offshore setbacks at the time. 09:48:43AM
2 And then they also went to 09:48:47AM
3 obtain the following letter from the Ministry of 09:48:56AM
4 Natural Resources. And you'll recall that what -- 09:49:03AM
5 the way in which Mr. Baines and Windstream 09:49:06AM
6 proposed to deal with the 5-kilometre setback, in 09:49:07AM
7 addition to getting the extension of one year, was 09:49:12AM
8 to swap the grid cells they had applied for, for 09:49:15AM
9 other grid cells that were outside 5 kilometres, 09:49:18AM
10 so the project could be developed consistent with 09:49:20AM
11 the 5-kilometre setback. 09:49:22AM
12 And you'll see here that the 09:49:24AM
13 Ministry says -- this is -- this is August, August 09:49:27AM
14 9th, 2010: 09:49:31AM
15 "Given that Windstream 09:49:32AM
16 Wolfe Island Shoals was 09:49:35AM
17 successful in obtaining a 09:49:35AM
18 FIT contract offer from 09:49:36AM
19 the Ontario Power 09:49:37AM
20 Authority --" 09:49:38AM
21 So a recognition of the 09:49:38AM
22 importance of obtaining a FIT contract and how it 09:49:39AM
23 puts them in a different category than others. 09:49:41AM
24 "-- the Ministry of 09:49:44AM
25 Natural Resources is 09:49:46AM

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1 there had to be a determination first by the 09:50:24AM
2 government, which, as you'll see, in our 09:50:26AM
3 submission, was expected at the time soon with 09:50:29AM
4 respect to the 5-kilometre setback. Once that had 09:50:32AM
5 been settled, then, as the MNR is saying here, is 09:50:34AM
6 they would proceed with this issue of -- of 09:50:38AM
7 discussions of the grid cell swap. 09:50:41AM
8 And you will see that: 09:50:43AM
9 "Once the reconfiguration 09:50:45AM
10 of applications has been 09:50:46AM
11 finalized, the amended 09:50:49AM
12 applications can begin to 09:50:50AM
13 move through the normal 09:50:52AM
14 Crown land application 09:50:53AM
15 process, including 09:50:54AM
16 holding a site 09:50:55AM
17 information meeting, et 09:50:56AM
18 cetera." 09:50:56AM
19 So, again, once the 09:50:58AM
20 reconfiguration of applications has been 09:51:00AM
21 finalized, in our submission, a clear statement 09:51:01AM
22 that you will see that our -- that the Claimants 09:51:04AM
23 relied on of an intention to work with -- once the 09:51:08AM
24 setbacks were finalized, to work with Windstream 09:51:12AM
25 in dealing with their Crown land site release 09:51:16AM

1 applications. 09:51:18AM
2 And then you can see: 09:51:20AM
3 "Finally, an 09:51:21AM
4 understanding of your 09:51:22AM
5 need for certainty on 09:51:23AM
6 this file --" 09:51:24AM
7 We hear the word "certainty" 09:51:24AM
8 again. 09:51:27AM
9 "-- and a statement 09:51:27AM
10 they'll move as quickly 09:51:28AM
11 as possible through the 09:51:29AM
12 remainder of the 09:51:30AM
13 application review 09:51:31AM
14 process so you may obtain 09:51:32AM
15 applicant of record 09:51:34AM
16 status --" 09:51:35AM
17 That's the -- going through 09:51:35AM
18 the process that allows you then to do testing and 09:51:37AM
19 further work on the -- on the site. 09:51:39AM
20 "-- in a timely manner." 09:51:41AM
21 And just to see one 09:51:44AM
22 contemporaneous document here, the Premier's 09:51:46AM
23 Office, the official Sean Mullin in charge of the 09:51:51AM
24 energy file at the Premier's Office, sees this 09:51:54AM
25 letter and approves it. "It looks fine to me," he 09:51:56AM

1 "-- plan out various 09:52:37AM
2 notification steps and 09:52:38AM
3 plan out steps to achieve 09:52:40AM
4 the mythical 'applicant 09:52:41AM
5 of record' status." 09:52:42AM
6 So, in our submission, a clear 09:52:43AM
7 indication at that point in time MNR intended and 09:52:46AM
8 had made a bona fide statement to Windstream which 09:52:50AM
9 it intended to follow through on. 09:52:57AM
10 You can see here this is a 09:52:59AM
11 letter, again a contemporaneous document, from 09:53:04AM
12 David Mars to Windstream's investors. You saw the 09:53:07AM
13 group in the chart before. He says: 09:53:09AM
14 "We were able to 09:53:11AM
15 negotiate with multiple 09:53:12AM
16 agencies in the Ontario 09:53:15AM
17 government to give us 09:53:16AM
18 relief on the new 09:53:17AM
19 proposed setback rules 09:53:18AM
20 and the time frame in 09:53:19AM
21 which the site needs to 09:53:20AM
22 be construed. The 09:53:21AM
23 support we received from 09:53:22AM
24 the government agencies 09:53:23AM
25 was driven by the office 09:53:24AM

1 says. 09:52:02AM
2 And also another 09:52:02AM
3 contemporaneous document, this is an e-mail from 09:52:03AM
4 two days after that date, this is Eric Boysen, one 09:52:06AM
5 of the key MNR officials involved in -- in the 09:52:11AM
6 renewable energy file. 09:52:13AM
7 And he says: 09:52:16AM
8 "Again, while we've 09:52:17AM
9 cautioned that the 09:52:18AM
10 outcome of the EBR 09:52:19AM
11 consultation has not yet 09:52:20AM
12 concluded --" 09:52:21AM
13 So that's the -- the 09:52:22AM
14 5-kilometre setback. 09:52:24AM
15 "-- I would like to hold 09:52:25AM
16 a meeting with the 09:52:26AM
17 proponent to begin 09:52:27AM
18 discussions on which 09:52:28AM
19 additional cells may be 09:52:29AM
20 required outside of the 09:52:30AM
21 5-kilometre zone, 09:52:31AM
22 initiate a site 09:52:33AM
23 description meeting --" 09:52:35AM
24 Which is a process under the 09:52:35AM
25 site release process. 09:52:36AM

1 of the Premier of 09:53:25AM
2 Ontario, Dalton 09:53:26AM
3 McGuinty." 09:53:27AM
4 So you'll hear from Mr. Mars, 09:53:27AM
5 but, in our submission, again, a contemporaneous 09:53:29AM
6 document showing reliance on the statements, 09:53:32AM
7 showing reliance on the various meetings I've 09:53:34AM
8 described, including representations of government 09:53:36AM
9 and Premier's Office support, and showing reliance 09:53:39AM
10 on the statements made with respect to the setback 09:53:43AM
11 rules and when they would be dealt with and what 09:53:46AM
12 would be expected to happen after the setback 09:53:48AM
13 rules. 09:53:50AM
14 Now, just to briefly, again, 09:53:51AM
15 pause on this issue, because Canada talks about 09:53:59AM
16 the fact that -- that that particular reliance 09:54:05AM
17 that you saw there of Mr. Mars was not reasonable. 09:54:09AM
18 And our submission is that, first of all, 09:54:12AM
19 Windstream could not have reasonably anticipated 09:54:16AM
20 that a moratorium was forthcoming at this time. 09:54:18AM
21 No one ever suggested anything about a moratorium. 09:54:21AM
22 Clearly at the time there was the issue of the 09:54:24AM
23 5-kilometre setback that had to be completed by 09:54:28AM
24 the government, and clearly at that time 09:54:30AM
25 Windstream had a plan to resolve that by getting 09:54:32AM

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1 the additional time, the additional one year, and 09:54:38AM
2 by trading the grid -- the grid cell locations. 09:54:42AM
3 But no one -- and Canada has not suggested, and 09:54:46AM
4 there is no indication whatsoever that anyone ever 09:54:48AM
5 anticipated that the process would be pulled right 09:54:51AM
6 out from under the investors in this case, that a 09:54:53AM
7 moratorium was coming. 09:54:56AM
8 We say Windstream legitimately 09:54:57AM
9 expected that it would be allowed to proceed 09:55:01AM
10 through the regulatory approvals process, and 09:55:02AM
11 we're not -- I'm not -- I have to make it clear 09:55:05AM
12 here. We're not -- Windstream is not saying, you 09:55:07AM
13 know, "We deserve to be able to build this project 09:55:09AM
14 and -- and to be able to set up a wind project 09:55:11AM
15 with no environmental, you know, permitting 09:55:14AM
16 whatsoever." 09:55:16AM
17 Our clients are asking for the 09:55:16AM
18 ability here to proceed through the regulatory 09:55:22AM
19 approvals process, which, as I indicated before, 09:55:24AM
20 is a process that is -- and you'll see in further 09:55:26AM
21 documents -- that is a robust process that the 09:55:29AM
22 Ministries have designed to ensure the appropriate 09:55:31AM
23 studies are -- are carried out by the developers 09:55:34AM
24 and there's appropriate review of those. And 09:55:38AM
25 there was no indication whatsoever at the time 09:55:40AM

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1 testing. They obtain approval to the grid 09:57:01AM
2 connection, and this is very, very crucial for any 09:57:03AM
3 of these projects is to actually get a commitment 09:57:06AM
4 that they will be able to connect the project into 09:57:09AM
5 the large electrical grid, because, without that, 09:57:11AM
6 of course the project can't work. 09:57:14AM
7 They -- they went out and got 09:57:15AM
8 RFPs for their -- permitting their project design 09:57:19AM
9 work. They did studies on lake bottom, electrical 09:57:22AM
10 design, financial assessments, project scheduling, 09:57:24AM
11 and management. And that's all set out in the 09:57:28AM
12 various witness statements. 09:57:30AM
13 This is the grid connection 09:57:32AM
14 approval. And you'll see here the authority here 09:57:33AM
15 is the IESO, the Independent Electrical System 09:57:37AM
16 Operator, and they are granting conditional 09:57:42AM
17 approval for the grid connection. And the way 09:57:44AM
18 this works is, once you get its approval, then 09:57:48AM
19 once your project is up and running, you know that 09:57:50AM
20 you have guaranteed approval and connection to the 09:57:53AM
21 grid. 09:57:56AM
22 And you'll see here that 09:57:57AM
23 Windstream takes step to retain various 09:57:58AM
24 consultants, particularly consultants in the whole 09:58:00AM
25 environmental permitting area. And one of the 09:58:05AM

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1 that there would be a block on being able to 09:55:42AM
2 proceed at all through the regulatory approvals 09:55:45AM
3 process. 09:55:47AM
4 Windstream legitimately 09:55:48AM
5 expected it would be granted AOR status in a 09:55:50AM
6 timely manner, and Windstream relied on the 09:55:53AM
7 government's support of the FIT program and its 09:55:55AM
8 commitment to providing investor certainty. And I 09:55:58AM
9 can't overemphasize the importance of the 09:56:00AM
10 statements that were made early on and really 09:56:03AM
11 carried through until the date of the moratorium 09:56:06AM
12 was announced that this was a process that, once 09:56:13AM
13 it started, was going to be one that was 09:56:17AM
14 streamlined and focused on the Ministries working 09:56:21AM
15 together to support the Ministry of Energy's focus 09:56:24AM
16 on Green Energy and on investment. 09:56:28AM
17 So next, in terms of what 09:56:30AM
18 Windstream did to move the project forward here, 09:56:36AM
19 now this is before -- this is at a point at which 09:56:38AM
20 the 5-kilometre setback issue has not yet been 09:56:43AM
21 resolved, but the expectation is that it's going 09:56:45AM
22 to be resolved by the end of the year so that 09:56:48AM
23 they'll -- any regulations with respect to that 09:56:52AM
24 will be put into place in -- in January. 09:56:54AM
25 They do testing, wind resource 09:56:57AM

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1 leading consultants that they retain is Stantec, 09:58:09AM
2 who you'll see here -- and I don't think anyone on 09:58:15AM
3 the other side contests -- is -- is a leading 09:58:17AM
4 consulting firm in doing many, many environmental 09:58:20AM
5 assessments and many, many REA assessments. And 09:58:23AM
6 you'll see what they say in their November 2010 09:58:25AM
7 proposal: 09:58:29AM
8 "The following work plan 09:58:30AM
9 contains the minimum 09:58:35AM
10 required task components 09:58:36AM
11 that would allow 09:58:37AM
12 Windstream to meet the 09:58:38AM
13 requirements for this 09:58:39AM
14 project for a January 09:58:40AM
15 2012 REA application to 09:58:40AM
16 the Ministry of the 09:58:42AM
17 Environment." 09:58:43AM
18 So there's no -- there's no 09:58:43AM
19 concerns here from Stantec with respect to being 09:58:44AM
20 able to proceed, and of course there's no 09:58:48AM
21 anticipation from Stantec or anyone else at this 09:58:50AM
22 time that a moratorium might be on the works. 09:58:54AM
23 I mean, we see later on, of 09:58:57AM
24 course, in government documents, that there was a 09:58:59AM
25 discussion of that, but nothing whatsoever 09:59:01AM

1 communicated to the -- the developers or the 09:59:03AM
2 consultants about the prospect of a moratorium. 09:59:05AM
3 Now, let's get to the 09:59:08AM
4 moratorium. And I, first of all, would like to 09:59:15AM
5 take you to the announcement of the moratorium and 09:59:16AM
6 then the rationale. 09:59:19AM
7 Now, this is the -- the press 09:59:22AM
8 release which announces: 09:59:30AM
9 "Ontario is not 09:59:31AM
10 proceeding with any 09:59:31AM
11 development of offshore 09:59:32AM
12 winds projects until the 09:59:33AM
13 necessary scientific 09:59:35AM
14 research is completed and 09:59:36AM
15 an adequately informed 09:59:37AM
16 policy framework can be 09:59:39AM
17 developed." 09:59:40AM
18 Now, the next -- the next 09:59:42AM
19 slide after this, we should cut the feed because 09:59:43AM
20 we're going to go into internal government 09:59:45AM
21 documents, so if that can be done. 09:59:47AM
22 --- CONFIDENTIAL BEGIN 09:59:47AM
23 PRESIDENT: We should perhaps 09:59:54AM
24 have a protocol for this. The person who is 09:59:55AM
25 operating the video feed, can you please confirm 09:59:56AM

1 Now, that was before we 10:00:39AM
2 obtained disclosure of many different documents 10:00:40AM
3 from the government, both through freedom of 10:00:44AM
4 information processes and from the government and 10:00:46AM
5 from Canada. And you'll see how it evolves in 10:00:47AM
6 Canada's rejoinder. It now becomes in 10:00:50AM
7 consultation with three other Ministers who 10:00:53AM
8 brought the interests of their Ministries and 10:00:55AM
9 constituents to the table. They're talking about 10:00:58AM
10 the -- the way this decision was made. 10:00:59AM
11 This included consideration of 10:01:01AM
12 the cost of additional offshore and energy 10:01:04AM
13 procurement, so the cost considerations; demand 10:01:07AM
14 for renewable energy in the context of Ontario's 10:01:08AM
15 overall supply mix, so, again, financial 10:01:11AM
16 considerations about energy supply; and public 10:01:13AM
17 opposition to offshore wind. 10:01:14AM
18 So clearly, as Canada, to 10:01:17AM
19 their credit, saw here, once we saw the additional 10:01:21AM
20 documents, it's clear that there were -- there 10:01:23AM
21 were various other considerations that played a 10:01:27AM
22 part in this -- in this decision. 10:01:30AM
23 And, in our submission, the 10:01:31AM
24 key documents that show the decision being made 10:01:36AM
25 are the following: We see -- and this is -- this 10:01:40AM

1 the feed has been interrupted? Very good. 09:59:57AM
2 Please go ahead, Mr. Terry. 09:59:59AM
3 MR. TERRY: I want to draw 10:00:08AM
4 your attention, first of all, to Canada's 10:00:09AM
5 statements in its -- first of all, in its 10:00:12AM
6 Counter-Memorial and then in its -- in its 10:00:14AM
7 rejoinder, which I think illustrate the evolution 10:00:15AM
8 on this issue. 10:00:18AM
9 So in its Counter-Memorial, 10:00:19AM
10 which reflected also what -- what Canada said in 10:00:21AM
11 its response to the Notice of Arbitration, they 10:00:24AM
12 say: 10:00:26AM
13 "Contrary to the 10:00:26AM
14 Claimant's baseless 10:00:27AM
15 allegations of political 10:00:28AM
16 interference, the 10:00:29AM
17 Minister of the 10:00:30AM
18 Environment's decision 10:00:31AM
19 was grounded in the 10:00:32AM
20 precautionary principle. 10:00:33AM
21 He made the decision in 10:00:34AM
22 the discharge of his 10:00:36AM
23 duties to protect human 10:00:36AM
24 health and the 10:00:37AM
25 environment." 10:00:38AM

1 is in a period -- now, there had been a number of 10:01:46AM
2 discussions among Ministries in the fall of 10:01:48AM
3 October and November discussing different ways in 10:01:53AM
4 which offshore wind can be dealt with. [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 Now, this is a point in 10:02:12AM
12 December and January where there is a discussion 10:02:14AM
13 of using transmission capacity as a wall for 10:02:17AM
14 offshore wind. So the idea is to see whether or 10:02:21AM
15 not [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

[REDACTED]

[REDACTED]

5 And then what happens here -- 10:03:56AM

6 and this is really when we get down to the short 10:03:57AM

7 strokes in terms of days when this decision was 10:04:00AM

8 made -- we have a draft communications plan, which 10:04:02AM

9 is forwarded -- which is prepared by the Ministry 10:04:07AM

10 of Energy. And you will see here in the 10:04:12AM

11 communications plan: 10:04:13AM

12 "The government is 10:04:14AM

13 providing clarity today 10:04:15AM

14 on offshore wind by 10:04:16AM

15 designating eastern Lake 10:04:17AM

16 Ontario and eastern Lake 10:04:18AM

17 Erie areas for potential 10:04:20AM

18 development to be setback 10:04:21AM

19 at least 5 kilometres 10:04:22AM

20 from the shoreline." 10:04:23AM

21 So the proposal here is to 10:04:25AM

22 designate certain areas and so long as the 10:04:27AM

23 projects are 5 kilometres from the shoreline, 10:04:30AM

24 they'd be allowed. 10:04:32AM

25 And you'll see -- I want to 10:04:32AM

1 draw attention to this section. This is, again, 10:04:35AM

2 in the communications plan. The -- the plan is to 10:04:37AM

3 -- is to make clear that successful projects will 10:04:42AM

4 meet vigorous requirements, including REA 10:04:44AM

5 approval, which they describe here as: 10:04:48AM

6 "A vigorous process that 10:04:48AM

7 protects human and 10:04:50AM

8 environmental health on a 10:04:51AM

9 case-by-case basis for 10:04:53AM

10 each and every project." 10:04:54AM

11 And I -- I emphasize that 10:04:55AM

12 because, again, it's showing internally what the 10:04:56AM

13 government's perspective at that time, in 10:05:00AM

14 preparation of its communication plan is with 10:05:04AM

15 respect to the REA process, which, as I say, it's 10:05:06AM

16 not like you had to just hope for the best. There 10:05:08AM

17 was a process that was in place that the 10:05:11AM

18 government is recognizing with respect to this 10:05:15AM

19 proposal that would allow certain projects to be 10:05:17AM

20 developed. 10:05:19AM

21 So what happens? This is sent 10:05:21AM

22 out to the Premier's Chief of Staff, a very short 10:05:23AM

23 e-mail. So this is Chris Morley, Chief of Staff 10:05:29AM

24 of the Premier's Office to the Ministry of the 10:05:32AM

25 Environment -- or, sorry, Ministry of Energy 10:05:37AM

1 official who's forwarded this communications plan: 10:05:38AM

2 "Sorry folks. This isn't 10:05:41AM

3 good enough. The purpose 10:05:43AM

4 of this release is to 10:05:44AM

5 kill all projects except 10:05:45AM

6 the Kingston one, not 10:05:46AM

7 suck and blow. Please 10:05:48AM

8 turn this around so it 10:05:49AM

9 kills the projects, not 10:05:51AM

10 sounds like we're in 10:05:53AM

11 favour of offshore wind." 10:05:54AM

12 So this is Ministry of Energy: 10:05:55AM

13 [REDACTED] 10:06:08AM

14 [REDACTED]

15 And then not too long later 10:06:17AM

16 Chris Morley decided he's going to write the press 10:06:20AM

17 release himself: 10:06:22AM

18 [REDACTED]

19 [REDACTED]

1 [REDACTED] 10:06:50AM
 2 [REDACTED] 10:06:51AM
 3 [REDACTED] 10:06:54AM
 4 [REDACTED] 10:06:59AM
 5 [REDACTED] 10:07:04AM
 6 [REDACTED] 10:07:07AM
 7 [REDACTED] 10:07:10AM
 8 [REDACTED] 10:07:14AM
 9 [REDACTED] 10:06:50AM
 10 [REDACTED] 10:06:51AM
 11 [REDACTED] 10:06:54AM
 12 [REDACTED] 10:06:59AM
 13 [REDACTED] 10:07:04AM
 14 [REDACTED] 10:07:07AM
 15 [REDACTED] 10:07:10AM
 16 [REDACTED] 10:07:14AM
 17 [REDACTED] 10:06:50AM
 18 [REDACTED] 10:06:51AM
 19 [REDACTED] 10:06:54AM
 20 [REDACTED] 10:06:59AM
 21 [REDACTED] 10:07:04AM
 22 [REDACTED] 10:07:07AM
 23 [REDACTED] 10:07:10AM
 24 [REDACTED] 10:07:14AM
 25 [REDACTED] 10:07:14AM

1 And so here we see a 10:07:19AM
 2 communication. So this is an official in the 10:07:20AM
 3 Ministry of Energy communicating to her colleague 10:07:23AM
 4 in the Ministry of Environment, passing on the 10:07:27AM
 5 moratorium decision. And, again, this is 10:07:29AM
 6 significant because it shows, in our view, that 10:07:31AM
 7 the Ministry of Environment officials aren't 10:07:33AM
 8 involved in this decision, and they're being told 10:07:36AM
 9 about it from Ministry of Energy passing on what 10:07:38AM
 10 Premier's Office says. 10:07:41AM
 11 She says: 10:07:43AM
 12 "Following up on our 10:07:43AM
 13 teleconference, I've 10:07:45AM
 14 received further 10:07:47AM
 15 direction from the 10:07:47AM
 16 MO/PO/DMO. The 10:07:49AM
 17 communications plan will 10:07:49AM
 18 be developed with focus 10:07:49AM
 19 on the preferred option, 10:07:52AM
 20 being moratorium on 10:07:52AM
 21 offshore wind for the 10:07:54AM
 22 next three to five years 10:07:55AM
 23 to provide time to 10:07:56AM
 24 develop the science and 10:07:57AM
 25 create the uniform rules 10:07:58AM

1 and policies in 10:08:00AM
 2 collaboration with the 10:08:00AM
 3 Great Lakes states. 10:08:00AM
 4 "The preferred option 10:08:03AM
 5 will also involve 10:08:03AM
 6 discussions with the 10:08:05AM
 7 developer of the Wolfe 10:08:05AM
 8 Island Shoals project 10:08:08AM
 9 such that the project 10:08:08AM
 10 won't proceed until the 10:08:09AM
 11 science and uniform rules 10:08:10AM
 12 and policies have been 10:08:11AM
 13 developed." 10:08:12AM
 14 So I emphasize, again, that 10:08:12AM
 15 all the way through this -- and remember that our 10:08:14AM
 16 -- that our complaint is -- is the combination of 10:08:16AM
 17 the moratorium and the failure of the government 10:08:18AM
 18 to do what it said it was going to do with respect 10:08:21AM
 19 to the Windstream project. And throughout all of 10:08:23AM
 20 this, you see that there is a government intent to 10:08:25AM
 21 treat the Wolfe Island Shoals differently. And, 10:08:28AM
 22 here, the project won't proceed until the science 10:08:32AM
 23 and rules have been developed, so -- so the clear 10:08:34AM
 24 intention that the project will be able to proceed 10:08:37AM
 25 once these rules are developed. 10:08:40AM

1 And just briefly we highlight 10:08:46AM
 2 -- this, again, was a -- was a statement that 10:08:48AM
 3 Minister Wilkinson said in his witness statement 10:08:53AM
 4 that accompanied the Counter-Memorial. His -- he 10:08:55AM
 5 says that he made the decision as the Minister of 10:09:01AM
 6 the Environment. 10:09:04AM
 7 He says: 10:09:05AM
 8 "I understand the 10:09:06AM
 9 Claimant has alleged the 10:09:07AM
 10 deferral decision was 10:09:08AM
 11 made by the Premier's 10:09:09AM
 12 Office. That's not true. 10:09:10AM
 13 As explained above, I 10:09:11AM
 14 made the decision as the 10:09:12AM
 15 Minister of the 10:09:14AM
 16 Environment, a decision 10:09:14AM
 17 that was supported by my 10:09:15AM
 18 colleagues at the 10:09:17AM
 19 Ministries of Natural 10:09:18AM
 20 Resources and Energy." 10:09:19AM
 21 So that was his statement 10:09:20AM
 22 before we received these documents, and, of 10:09:21AM
 23 course, we'll have to see what he says in terms of 10:09:24AM
 24 his evidence here this week. 10:09:27AM
 25 Just to pause briefly on this 10:09:33AM

1 issue about the Premier's Office e-mails, because 10:09:35AM
 2 the Tribunal will remember the issues we had with 10:09:37AM
 3 respect to that. 10:09:39AM
 4 This is from a report by the 10:09:41AM
 5 Information and Privacy Commissioner, and she is 10:09:44AM
 6 discussing her investigation or complaints 10:09:46AM
 7 received to her with respect to deletion of 10:09:51AM
 8 e-mails in relation to the -- a project that's not 10:09:55AM
 9 related to Windstream but is related to the 10:10:00AM
 10 TransCanada project at the time, which we will 10:10:03AM
 11 come to. 10:10:06AM
 12 And she says: 10:10:07AM
 13 "While I cannot state 10:10:07AM
 14 with certainty that there 10:10:09AM
 15 was an inappropriate 10:10:10AM
 16 deletion of e-mails by 10:10:11AM
 17 the former Premier's 10:10:12AM
 18 staff, it is difficult to 10:10:14AM
 19 escape that conclusion." 10:10:16AM
 20 Certainly, our -- our 10:10:18AM
 21 perspective, given the interactions we've had with 10:10:19AM
 22 Canada -- Canada's counsel on this file, is that 10:10:28AM
 23 there -- there certainly were documents in the 10:10:30AM
 24 Premier's Office that were deleted. It's hard -- 10:10:31AM
 25 difficult to know, I think, for either side, you 10:10:34AM

1 know, how many of those documents might have 10:10:36AM
 2 related to this case, and -- and we're not 10:10:37AM
 3 alleging that there was a particular effort to 10:10:41AM
 4 delete documents for this case, just that it 10:10:43AM
 5 appears to be the case that there were deletions 10:10:46AM
 6 and that there may well have been documents in 10:10:49AM
 7 this case. 10:10:52AM
 8 We certainly know that we 10:10:52AM
 9 don't have documents that were just -- any 10:10:53AM
 10 documents or texts or other information from 10:10:55AM
 11 Premier's Office officials to other Premier's 10:10:58AM
 12 Office officials. 10:11:01AM
 13 So with respect to the adverse 10:11:02AM
 14 inference here, what we're asking for is that the 10:11:03AM
 15 deleted documents -- we say the adverse inference 10:11:06AM
 16 is the deleted documents would have further 10:11:08AM
 17 established the Premier's Office directed the 10:11:10AM
 18 adoption of the moratorium. And they would have 10:11:12AM
 19 further established the moratorium was motivated 10:11:14AM
 20 by concerns over costs and public opposition or 10:11:17AM
 21 other issues. 10:11:20AM
 22 Of course, we don't know what 10:11:20AM
 23 they would say, but we think it's reasonable to 10:11:22AM
 24 assume that there were documents from the 10:11:26AM
 25 Premier's Office with respect to these issues. 10:11:29AM

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

[REDACTED]

14 [REDACTED] What we don't see in the record is any [REDACTED] 10:13:31AM
15 involvement from him in the decision to put in [REDACTED] 10:13:33AM
16 place the moratorium or deferral, as Canada says, [REDACTED] 10:13:36AM
17 which, in our view, clearly was a decision from [REDACTED] 10:13:38AM
18 those e-mails that was made by the Premier's [REDACTED] 10:13:42AM
19 Office. [REDACTED] 10:13:44AM
20 Now, the intent, as we have [REDACTED] 10:13:45AM
21 said, was to -- was with respect to Windstream -- [REDACTED] 10:13:50AM
22 and this is a memo between energy political staff [REDACTED] 10:13:53AM
23 at the time -- was to keep the FIT contract whole [REDACTED] 10:13:57AM
and extended. [REDACTED]

[REDACTED]

[REDACTED]

10 And it is expressed to [REDACTED] 10:15:12AM
11 Windstream in this -- in this telephone call, [REDACTED] 10:15:14AM
12 which we have a transcript of. This is Andrew [REDACTED] 10:15:16AM
13 Mitchell. This is the senior Ministry of Energy [REDACTED] 10:15:22AM
14 adviser here: [REDACTED] 10:15:24AM
15 "We acknowledge your [REDACTED] 10:15:25AM
16 project is unique. It [REDACTED] 10:15:26AM
17 has a FIT contract. To [REDACTED] 10:15:27AM
18 that end, Perry from the [REDACTED] 10:15:28AM
19 OPA is here. We've asked [REDACTED] 10:15:29AM
20 him to sit down with you [REDACTED] 10:15:30AM
21 to negotiate a number of [REDACTED] 10:15:31AM
22 pieces, including the [REDACTED] 10:15:32AM
23 force majeure provisions, [REDACTED] 10:15:35AM
24 et cetera." [REDACTED] 10:15:36AM
25 And he says: [REDACTED] 10:15:37AM

1 "You know, we realize [REDACTED] 10:15:38AM
2 there is a uniqueness to [REDACTED] 10:15:39AM
3 your position, given that [REDACTED] 10:15:40AM
4 you have a FIT contract, [REDACTED] 10:15:41AM
5 and we're going to create [REDACTED] 10:15:42AM
6 -- attempt to create a [REDACTED] 10:15:43AM
7 solution that will be [REDACTED] 10:15:45AM
8 acceptable to you. That [REDACTED] 10:15:48AM
9 is Energy's position." [REDACTED] 10:15:50AM
10 And we see here a summary, [REDACTED] 10:15:52AM
11 Windstream's representative, saying: [REDACTED] 10:15:54AM
12 "Yes. So there will be [REDACTED] 10:15:56AM
13 no further movement on [REDACTED] 10:15:57AM
14 offshore wind development [REDACTED] 10:15:58AM
15 for anybody, but [REDACTED] 10:15:59AM
16 essentially the [REDACTED] 10:16:00AM
17 Windstream project is the [REDACTED] 10:16:00AM
18 only one that is, at this [REDACTED] 10:16:01AM
19 point -- I am going to [REDACTED] 10:16:02AM
20 use the word 'deferred' [REDACTED] 10:16:03AM
21 or 'frozen,' whereas all [REDACTED] 10:16:04AM
22 other projects are [REDACTED] 10:16:06AM
23 essentially quashed or [REDACTED] 10:16:07AM
24 cancelled or whatever you [REDACTED] 10:16:07AM
25 want to put it. The [REDACTED] 10:16:09AM

1 including the right to 10:20:51AM
 2 exercise any rights and 10:20:53AM
 3 remedies at any time and 10:20:55AM
 4 from time to time. 10:20:56AM
 5 So very clear here that the 10:20:56AM
 6 OPA is not in a mood to extend or to facilitate 10:20:57AM
 7 extension here. But it's very clear that it will 10:21:03AM
 8 rely on its rights to terminate the contract once 10:21:04AM
 9 force majeure has expired. 10:21:08AM
 10 And you'll know that we, in 10:21:10AM
 11 our submissions, have compared this treatment to 10:21:14AM
 12 the treatment that Ontario gave to TransCanada. 10:21:16AM
 13 And these slides show, in our submission -- and I 10:21:19AM
 14 think it's very clear from the public record -- 10:21:22AM
 15 that, in those cases, as a result of discussions 10:21:24AM
 16 with the Premier's Office and others, that the -- 10:21:27AM
 17 that the Premier's Office was able to ensure that 10:21:31AM
 18 the OPA, in that case, because of the cancellation 10:21:33AM
 19 of contracts that it had resulted, just prior to 10:21:37AM
 20 the Ontario election, that the OPA -- the 10:21:41AM
 21 Premier's Office ensured that the OPA kept the 10:21:44AM
 22 commitment to keep TransCanada whole. 10:21:47AM
 23 And you will see there the 10:21:52AM
 24 Premier's Office made its commitment to keep TCA 10:21:54AM
 25 whole. The OPA confirmed with the Premier's 10:21:58AM

1 not what happened in the case of Windstream. 10:23:08AM
 2 And where are we now, five 10:23:17AM
 3 years later? It's important I think to emphasize 10:23:19AM
 4 what's been done in terms of studies. And there 10:23:21AM
 5 was a work plan developed by the Ministry to carry 10:23:23AM
 6 out certain studies, and I won't go through this 10:23:28AM
 7 in detail because of the time, but you can see 10:23:30AM
 8 that there's two studies that have been done and 10:23:33AM
 9 at least there had been some draft results, a 10:23:37AM
 10 noise propagation scoping study, the top one, and 10:23:40AM
 11 also a study about decommissioning of the 10:23:43AM
 12 turbines. What happens to them when they have 10:23:45AM
 13 finished their term? 10:23:48AM
 14 There are six other studies 10:23:49AM
 15 which the Ministry of the Environment had in their 10:23:52AM
 16 research plan which have not been -- to the best 10:23:55AM
 17 of our knowledge and given the evidence of this 10:23:57AM
 18 case, have not been started: baseline, land base, 10:23:59AM
 19 noise measurements, noise propagation model 10:24:03AM
 20 research study, an offshore noise simulation field 10:24:05AM
 21 testing study -- so three of the four noise 10:24:09AM
 22 studies -- water and sediment quality. 10:24:11AM
 23 And you will remember what 10:24:13AM
 24 Ministry -- the Minister Wilkinson said about the 10:24:15AM
 25 importance to him of drinking water. Those 10:24:20AM

1 Office that this commitment had, in fact, been 10:22:01AM
 2 made. And TCA was kept whole through a set of 10:22:02AM
 3 negotiations. 10:22:08AM
 4 You can see here the Ministry 10:22:10AM
 5 of Energy announced the OPA had reached an 10:22:14AM
 6 agreement with TransCanada to build and operate a 10:22:16AM
 7 generation facility. And there were also damages 10:22:18AM
 8 paid as part of that agreement. And then we see 10:22:25AM
 9 here very clearly -- this is -- this is JoAnne 10:22:27AM
 10 Butler of the OPA. She has explained what the 10:22:29AM
 11 instructions were. 10:22:34AM
 12 The instructions basically 10:22:35AM
 13 were, the commitments that the government had made 10:22:36AM
 14 with TransCanada, prior to letting the OPA know, 10:22:38AM
 15 were basically outlined in the letter that the OPA 10:22:40AM
 16 wrote to TransCanada, because we had the contract 10:22:42AM
 17 which basically said, "We're going to work 10:22:44AM
 18 together to come up with a new proposal and that 10:22:47AM
 19 you would get the financial value of your 10:22:50AM
 20 contract." 10:22:51AM
 21 So in our submission, in that 10:22:52AM
 22 particular case, it's very clear that the OPA, on 10:22:54AM
 23 instructions from the government, carries out the 10:22:57AM
 24 steps to keep TransCanada, the company in that 10:23:01AM
 25 case, whole. And as we argue in this case, that's 10:23:05AM

1 studies have not been done. Technical standards 10:24:23AM
 2 and safety, those studies have not been -- not 10:24:25AM
 3 been done and, to the best of our knowledge, have 10:24:27AM
 4 not even been started. 10:24:29AM
 5 And it's important in terms of 10:24:31AM
 6 -- and here's another document which, again, just 10:24:34AM
 7 shows -- this is May 2012 -- MNR saying, "There is 10:24:38AM
 8 no funding for offshore wind power science." 10:24:41AM
 9 And the next slide we have to 10:24:44AM
 10 cut the feed again. 10:24:47AM
 11 --- CONFIDENTIAL BEGIN 10:24:55AM
 12 MR. TERRY: And this is -- to 10:24:55AM
 13 put this in context in terms of what caused the -- 10:24:57AM
 14 the Ministry of Environment to come up with that 10:25:03AM
 15 research proposal is you can see here there's a 10:25:05AM
 16 discussion here about: 10:25:10AM

17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

15 --- CONFIDENTIAL END 10:25:59AM

16 MR. TERRY: And just to 10:26:08AM

17 contrast this, throughout this period, Windstream 10:26:08AM

18 is making proposals to whoever it can reach in the 10:26:10AM

19 government -- the Premier's office, various 10:26:13AM

20 agencies -- saying, "Let us do the studies. We 10:26:15AM

21 can do the studies. We want to proceed with 10:26:17AM

22 this," and, again, in direct contrast to the 10:26:19AM

23 apparent lack of interest in the government in 10:26:23AM

24 pursuing the studies they had talked about 10:26:26AM

25 pursuing when they put into place the moratorium. 10:26:29AM

1 this force majeure. So if there is various events 10:27:58AM

2 that occurred, force majeure events, you can also 10:28:00AM

3 extend your timeline under the FIT contract by a 10:28:03AM

4 total of 24 months. 10:28:07AM

5 Now, in this particular case, 10:28:10AM

6 there's an automatic force majeure which the OPA 10:28:11AM

7 grants for an appeal of an environmental -- of a 10:28:14AM

8 REA decision. So when the Ministry of Environment 10:28:20AM

9 approves the REA, there's an automatic right of 10:28:22AM

10 appeal, if a citizen wants to bring a right of 10:28:24AM

11 appeal. That happens in most projects, so there's 10:28:28AM

12 been an automatic six months there. And that 10:28:30AM

13 means you use up six months of your 24 months of 10:28:33AM

14 force majeure. So you are left with 18 months. 10:28:36AM

15 Now, in this case, the project 10:28:38AM

16 was put into force majeure. The OPA granted force 10:28:40AM

17 majeure as of November 22, 2010. So what happens 10:28:43AM

18 here is you click by. Once you get past this 10:28:46AM

19 date, May 22, 2012, you've got no more force 10:28:51AM

20 majeure left. So the force majeure that you would 10:28:56AM

21 have, normally the six months for the ERT appeal, 10:28:59AM

22 has expired. 10:29:02AM

23 So at that point the project 10:29:04AM

24 is not financeable and cannot proceed, and that's 10:29:06AM

25 why we fix on that date of May 22, 2012. And you 10:29:09AM

1 And you can see some 10:26:31AM

2 description of the nature of the studies that were 10:26:37AM

3 being discussed here by Windstream. 10:26:38AM

4 So I want to pause on this 10:26:41AM

5 slide, which -- which sets out why our submission 10:26:49AM

6 is that the project is now worthless. And it's 10:26:54AM

7 important, again, to keep in mind this force 10:26:59AM

8 majeure provision, which allows the -- you 10:27:02AM

9 remember the contract is -- the basic timelines 10:27:05AM

10 are that you -- you have a certain period of time 10:27:09AM

11 to start after you signed the FIT contract to get 10:27:12AM

12 the project done. There is an idea -- there's a 10:27:16AM

13 milestone COD. 10:27:20AM

14 And then -- and in this 10:27:24AM

15 particular case, since the project had started, 10:27:26AM

16 the FIT contract date where it had been, it was 10:27:28AM

17 deemed to be the date when the offer was -- was 10:27:32AM

18 May 4, 2010. You count five years after that to 10:27:34AM

19 the COD date when it's supposed to come up in 10:27:40AM

20 commercial operation. You then have an additional 10:27:43AM

21 buffer there after that where you can still start 10:27:46AM

22 the project after that date, but you have to pay 10:27:48AM

23 certain penalties if you do that. But you have a 10:27:51AM

24 total of 18 months of buffer. 10:27:54AM

25 But importantly you also have 10:27:56AM

1 can see this in the report of Deloitte. They -- 10:29:13AM

2 they explain this date, and they say: 10:29:19AM

3 "Without an enforceable 10:29:20AM

4 contract, the project, 10:29:21AM

5 the FIT contract, and 10:29:22AM

6 Windstream became 10:29:24AM

7 substantially worthless 10:29:25AM

8 as of May 22, 2012...and 10:29:25AM

9 it continues to remain 10:29:29AM

10 substantially worthless." 10:29:31AM

11 Now we get to the NAFTA 10:29:39AM

12 breaches. And as I -- 10:29:41AM

13 PRESIDENT: Mr. Terry, please 10:29:50AM

14 let us know when would be a convenient time to 10:29:51AM

15 break. We could have a break in the middle of 10:29:53AM

16 your presentation or at the end. 10:29:56AM

17 MR. TERRY: We could break 10:29:57AM

18 right now. By my timing, I have somewhere maybe 10:29:58AM

19 just over 40 minutes left. I don't know the exact 10:30:01AM

20 time. But we could break now. That would be 10:30:04AM

21 fine. 10:30:05AM

22 PRESIDENT: Okay. Let's break 10:30:05AM

23 for 15 minutes, and we will continue at 10:45. 10:30:06AM

24 MR. TERRY: Thank you very 10:30:10AM

25 much. 10:30:11AM

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1 --- Recess at 10:30 a.m. 10:30:12AM
2 --- Upon resuming at 10:47 a.m. 10:45:43AM
3 PRESIDENT: Okay. Welcome. 10:47:58AM
4 Welcome back. 10:47:59AM
5 Mr. Terry, please go on. 10:48:00AM
6 MR. TERRY: Thank you, 10:48:03AM
7 Mr. President. So if I could start this section 10:48:04AM
8 about the NAFTA breaches with the events. So 10:48:07AM
9 we've got -- in this particular case, the sequence 10:48:11AM
10 is the moratorium does apply to the project. Now, 10:48:14AM
11 of course, it's stated at the time in February 10:48:19AM
12 2011 when it's announced that Windstream will be 10:48:23AM
13 frozen. So to that extent, the intent, you know, 10:48:28AM
14 there seems to be evidence that the intent was not 10:48:32AM
15 to have a bite at the project. It becomes applied 10:48:37AM
16 to the project when the promise to freeze is not 10:48:40AM
17 implemented. 10:48:42AM
18 The actual -- when the force 10:48:43AM
19 majeure time is used up -- and remember that, in 10:48:44AM
20 the case of force majeure, once the 24 months -- 10:48:46AM
21 once the project has exceeded its particular 10:48:48AM
22 timeline and used up all its force majeure time of 10:48:54AM
23 the 24 months, it's clear then that the OPA is 10:49:00AM
24 entitled to terminate the contract. That's why 10:49:02AM
25 the force majeure is so key. 10:49:05AM

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1 an ability for the Minister of Energy to direct 10:50:17AM
2 the OPA to do certain things, and we also see the 10:50:20AM
3 informal control, both through the materials in 10:50:23AM
4 our case, for example, Mr. Ungerman arranging in 10:50:27AM
5 July and August 2010 for OPA to provide an 10:50:34AM
6 extension and coordinate with the OPA on that, and 10:50:37AM
7 we also see it most clearly in the materials from 10:50:40AM
8 the TransCanada episode where we see the senior 10:50:42AM
9 official in the OPA saying that they were directed 10:50:46AM
10 by the Premier's Office to -- to enter into 10:50:48AM
11 negotiations with TransCanada to keep them whole. 10:50:52AM
12 So formal, informal control. 10:50:55AM
13 So that's the focus and, 10:50:57AM
14 there's been some -- there's been a back-and-forth 10:50:58AM
15 in the materials about this. 10:51:00AM
16 We are saying it was Energy 10:51:01AM
17 that made the promise; energy that had the 10:51:04AM
18 capability to carry out the promise. The 10:51:07AM
19 government had the capability to ensure that OPA 10:51:08AM
20 would keep Windstream frozen. 10:51:10AM
21 If you disagree and if you 10:51:13AM
22 find that, in fact, it's not -- wasn't the 10:51:16AM
23 Ministry of Energy's obligation and they weren't 10:51:19AM
24 the actor that was responsible for this, we say, 10:51:21AM
25 in the alternative, that the OPA is a state 10:51:23AM

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1 So force majeure time gets 10:49:06AM
2 used up, and the project then becomes worthless, 10:49:07AM
3 we say. And I think everyone on this side agrees 10:49:10AM
4 that the project now, once that force majeure is 10:49:14AM
5 used up, is not -- no longer has value. 10:49:17AM
6 Now, in this particular case, 10:49:19AM
7 we explain why the failure to freeze the FIT 10:49:23AM
8 contract is attributable to Canada. 10:49:26AM
9 First of all, it's a failure 10:49:29AM
10 of the Ministry of the Energy. The Ministry of 10:49:32AM
11 Energy promised that the FIT contract would be 10:49:36AM
12 "frozen," and we see that both in the internal 10:49:37AM
13 e-mails that led to the -- to the statement and in 10:49:41AM
14 the statement itself. 10:49:46AM
15 We see MEI's involvement, 10:49:47AM
16 Ministry of Energy, when they approve OPA's 10:49:50AM
17 counteroffer to Windstream and how meetings with 10:49:52AM
18 OPA about negotiations with Windstream. So, 10:49:55AM
19 again, MEI is involved. 10:49:57AM
20 We also see energy's 10:49:59AM
21 involvement here in their failure because they 10:50:01AM
22 exercise both formal and informal control over the 10:50:04AM
23 OPA. And that's set out in more detail in our -- 10:50:06AM
24 in our materials, but the reality is that -- that 10:50:10AM
25 we see this both in the legislation where there is 10:50:13AM

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1 agency, and to the extent to which it was 10:51:27AM
2 exercising the authority of Energy to carry out 10:51:30AM
3 this direction from Energy, it failed to exercise 10:51:32AM
4 that authority, and, therefore, it's attributable 10:51:35AM
5 to them. So that's our alternative argument. But 10:51:37AM
6 the three planks above emphasize our main 10:51:39AM
7 argument. 10:51:44AM
8 Now, in terms of a breach of 10:51:44AM
9 1110, we've got the provision, the familiar 10:51:47AM
10 formulation of the expropriation provision. 10:51:52AM
11 And we set out here what we 10:51:54AM
12 say has been expropriated: Windstream Wolfe 10:51:57AM
13 Island Shoals Inc., the company, that's Windstream 10:52:02AM
14 U.S.A.'s investment in Canada; the project, which 10:52:05AM
15 is all elements associated with the project in 10:52:09AM
16 this case; and the FIT contract. And we emphasize 10:52:12AM
17 here that the FIT contract -- and we have expert 10:52:18AM
18 evidence, again, from Sarah Powell -- is an 10:52:21AM
19 investment capable of being expropriated. It is 10:52:24AM
20 an inherently valuable contract. It is -- it's 10:52:27AM
21 capable of being sold. It's capable of -- it is 10:52:32AM
22 used for providing security. It's not, itself, 10:52:36AM
23 conditional on any particular permits. It's a 10:52:41AM
24 valid enforceable and valuable contract which has 10:52:45AM
25 value. 10:52:47AM

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1 And this is -- this is the 10:52:48AM
2 only expert before -- the only expert evidence 10:52:49AM
3 from an Ontario lawyer before the Tribunal as to 10:52:52AM
4 the inherent value of the FIT contract. 10:52:54AM
5 And we emphasize this, in 10:52:58AM
6 part, because of the position Canada is taking in 10:53:00AM
7 this case, that, in fact, FIT contract had no 10:53:02AM
8 value, they say. It's not capable of being 10:53:04AM
9 expropriated because it had no value. It was a 10:53:07AM
10 contingent -- excuse me -- a contingent interest. 10:53:10AM
11 And -- and we have, first of 10:53:11AM
12 all, the expert evidence which shows very clearly 10:53:14AM
13 it did have value, and, in our submission, it's 10:53:16AM
14 clear that, to the extent to which you, of course, 10:53:20AM
15 had to obtain permitting approvals in order to be 10:53:22AM
16 able to build a wind project, that doesn't say 10:53:25AM
17 that the FIT contract itself doesn't have value. 10:53:29AM
18 It just makes it clear that, 10:53:32AM
19 if you find the FIT contract has been expropriated 10:53:34AM
20 and then you go to find out what the damages are, 10:53:37AM
21 what the valuation is for damages purposes, then 10:53:39AM
22 you have to look at whether or not the permits 10:53:41AM
23 were likely to have been granted, and you have to 10:53:43AM
24 go through that and the damages analysis. 10:53:45AM
25 But that factor -- it's like 10:53:48AM

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1 be decisive in assessing whether there is a 10:55:02AM
2 substantial deprivation is the loss of economic 10:55:04AM
3 value or economic viability. This does not, 10:55:07AM
4 thusly, imply a loss of management or control. 10:55:12AM
5 Again, responding to a 10:55:13AM
6 submission Canada has made in at least of their 10:55:15AM
7 Counter-Memorial or rejoinder that, in this 10:55:19AM
8 particular case, yes, it's true Windstream Wolfe 10:55:21AM
9 Island Shoals still exists. They haven't 10:55:25AM
10 interfered with the management or control, but 10:55:25AM
11 they have, through the actions and the fact of the 10:55:28AM
12 FIT contract and the project, and WIS, therefore, 10:55:31AM
13 has no value, they have substantially deprived the 10:55:34AM
14 investment and the contract of having economic 10:55:40AM
15 value because the project at this point in time, 10:55:44AM
16 unless -- unless anything were to change and 10:55:52AM
17 there's been no signs of that whatsoever -- that 10:55:54AM
18 the project -- there is a complete loss of 10:55:56AM
19 economic value or economic viability of the 10:55:58AM
20 investment. 10:56:00AM
21 And we also -- we put in this 10:56:01AM
22 point just to make the point that, in the case of 10:56:06AM
23 a temporary measure, the case law shows that it 10:56:10AM
24 can cause permanent deprivation and, therefore, be 10:56:14AM
25 expropriatory. 10:56:20AM

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1 -- it's like saying that a mining concession isn't 10:53:50AM
2 of value because you can't actually produce from a 10:53:53AM
3 mine until you have obtained all the permits. So 10:53:56AM
4 when you get from a state or with state agency a 10:53:59AM
5 particular mining concession, it's not valuable 10:54:01AM
6 because you have to go through a bunch of permits 10:54:04AM
7 before you can actually produce. The same thing 10:54:06AM
8 here, the FIT contract. Certainly you have to 10:54:08AM
9 obtain these permits in order to get the revenue 10:54:10AM
10 stream that comes from them. That doesn't stop 10:54:13AM
11 them from being inherently valuable and capable of 10:54:15AM
12 being expropriated. 10:54:18AM
13 We rely -- and I will go just 10:54:20AM
14 quite briefly, as I said I would, through the -- 10:54:23AM
15 through the law here because we will return to 10:54:26AM
16 this, of course, in closings in more detail. 10:54:27AM
17 But we rely on -- on the case 10:54:30AM
18 law, such as the ADM case that has talked about an 10:54:33AM
19 expropriation occurring if the interference is 10:54:37AM
20 substantial and depriving the investor of all or 10:54:43AM
21 most of the benefits of the investment. 10:54:44AM
22 We rely on Burlington 10:54:46AM
23 Resources, among others. When a measure effects 10:54:56AM
24 the environment or conditions under which an 10:54:58AM
25 investor carries on its business, what appears to 10:55:00AM

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1 And -- and, for example, here, 10:56:20AM
2 again, the facts are very clear, in our 10:56:23AM
3 submission, that the -- that the investment is no 10:56:24AM
4 longer of any value as a result of a moratorium -- 10:56:27AM
5 which Canada may still say is going to be 10:56:32AM
6 temporary, but has now lasted for five years and 10:56:35AM
7 has deprived the project of value. 10:56:37AM
8 We included some case law here 10:56:40AM
9 just to respond to arguments Canada has made about 10:56:44AM
10 a broad public purpose exemption, and we pick up 10:56:47AM
11 on the case law that has essentially said that, if 10:56:50AM
12 public purpose automatically immunizes a measure 10:56:54AM
13 from being found to be expropriatory, there would 10:56:57AM
14 never be a compensable taking for a public 10:57:01AM
15 purpose. 10:57:03AM
16 And the -- in Pope and Talbot, 10:57:04AM
17 the point here that a blanket exception for 10:57:10AM
18 regulatory measures would create a gaping loophole 10:57:14AM
19 in international protections against investment. 10:57:17AM
20 And they make the point here 10:57:19AM
21 that Canada, in this particular case, an early 10:57:20AM
22 NAFTA case, was claiming that, because the 10:57:23AM
23 measures under consideration were cast in the form 10:57:25AM
24 of regulations, they constituted an exercise of 10:57:27AM
25 police powers, which, if non-discriminatory, are 10:57:31AM

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1 supposedly beyond the reach of the NAFTA rules 10:57:34AM
2 regarding expropriations. 10:57:37AM
3 And very clearly rejected in 10:57:38AM
4 that particular case, appropriately, in our 10:57:40AM
5 submission, because a broad public purpose 10:57:43AM
6 exemption is clearly gutting the NAFTA of the 10:57:47AM
7 protections that are provided to investors when an 10:57:50AM
8 action, a measure of the state, is expropriatory. 10:57:56AM
9 Now, there have been instances 10:57:59AM
10 in which Tribunals have applied police powers 10:58:02AM
11 doctrine which -- in justifying certain 10:58:09AM
12 expropriations that occur as a result of 10:58:13AM
13 government measures. But in those particular 10:58:17AM
14 instances, what the Tribunals have looked at is 10:58:21AM
15 whether the measure was proportionate or necessary 10:58:24AM
16 for a legitimate purpose and whether it interfered 10:58:26AM
17 with an investor's legitimate expectations. 10:58:30AM
18 And we see that 10:58:32AM
19 proportionality in this decision, and also in the 10:58:34AM
20 Tecmed decision: 10:58:37AM
21 "The Arbitral Tribunal 10:58:39AM
22 will consider, in order 10:58:41AM
23 to determine if they are 10:58:42AM
24 to be characterized as 10:58:45AM
25 expropriatory, whether 10:58:46AM

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1 such actions or measures 10:58:47AM
2 are proportional to the 10:58:48AM
3 public interest 10:58:49AM
4 presumably protected 10:58:50AM
5 thereby and to the 10:58:51AM
6 protection legally 10:58:52AM
7 granted to 10:58:53AM
8 investments..." 10:58:54AM
9 And we apply -- if we were to 10:58:54AM
10 take and examine the police powers doctrine as it 10:58:56AM
11 might apply to this case, we say that, first of 10:59:01AM
12 all, it's not proportionate or necessary, again, 10:59:03AM
13 looking to the purpose as expressed in the 10:59:07AM
14 e-mails, the fact that there is no end in sight to 10:59:11AM
15 this particular moratorium. 10:59:14AM
16 The fact which is crucial here 10:59:15AM
17 is, when we're looking at any public purpose, you 10:59:17AM
18 have to examine not just the public purpose for 10:59:19AM
19 the moratorium, but the public purpose that 10:59:21AM
20 relates to the failure to keep Windstream -- to 10:59:24AM
21 freeze the Windstream project. 10:59:27AM
22 What is the public purpose in 10:59:28AM
23 the failure to freeze Windstream's project? You 10:59:30AM
24 know, Canada has not suggested there is a public 10:59:33AM
25 purpose that could justify that. 10:59:35AM

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1 And, of course, the fact that, 10:59:36AM
2 in this particular case, Windstream was already 10:59:38AM
3 required, as I have indicated, to conduct 10:59:40AM
4 site-specific studies for review by the 10:59:44AM
5 Ministries, and so when you look into 10:59:46AM
6 proportionality, there's simply no reasonable 10:59:50AM
7 basis in this case that a police powers type of 10:59:52AM
8 proportionality analysis could be applied to 10:59:55AM
9 justify the expropriation. 10:59:57AM
10 And the same with respect to 11:00:00AM
11 -- you'll recall the statement in the ADM case 11:00:02AM
12 about looking at legitimate expectations in the 11:00:06AM
13 context of expropriation, and Canada appears to be 11:00:09AM
14 making an argument in their rejoinder that -- that 11:00:14AM
15 it's important that somehow an expropriation can 11:00:17AM
16 be justified if the investor does not have 11:00:19AM
17 reasonable investor-backed expectations. 11:00:24AM
18 And, again, we argue that the 11:00:26AM
19 moratorium and the failure to freeze is contrary 11:00:29AM
20 to Windstream's legitimate expectations, contrary 11:00:31AM
21 to the commitment to freeze the FIT contract, 11:00:35AM
22 express commitment, contrary to the investor 11:00:38AM
23 certainty commitments, contrary to the commitment 11:00:41AM
24 to grant approvals in a timely manner, and 11:00:44AM
25 contrary to statements that the government 11:00:46AM

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1 supported the project. 11:00:48AM
2 And, again, I have to 11:00:49AM
3 emphasize that, when the Tribunal's examining this 11:00:50AM
4 expropriation issue, you have to look not only at 11:00:53AM
5 arguments Canada makes about how the moratorium 11:00:56AM
6 might have -- or the deferral might have been 11:00:59AM
7 justified, you know, but how it is that they could 11:01:00AM
8 justify not freezing the Windstream project and 11:01:03AM
9 how that would fit with the public purpose of 11:01:07AM
10 protecting the environment. 11:01:08AM
11 1105, and the Tribunal is 11:01:10AM
12 aware, and we have seen from your questions, which 11:01:18AM
13 we will address in more detail in our closing, 11:01:21AM
14 about the 1105 concepts and the FTC note of 11:01:24AM
15 interpretation, customary international law, 11:01:30AM
16 minimum standards. What we -- at a high level, 11:01:32AM
17 what we rely on for the purpose of our opening is, 11:01:36AM
18 first of all, that MST does include fair and 11:01:40AM
19 equitable treatment. 11:01:43AM
20 Of course, the debate -- I'm 11:01:45AM
21 not sure if we have much of a debate on that, 11:01:46AM
22 because I think the main debate is: What is the 11:01:49AM
23 standard of fair and equitable treatment that's 11:01:52AM
24 included in MST? But this is Pope and Talbot here 11:01:54AM
25 saying that: 11:01:59AM

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1 "The interpretation does 11:01:59AM
2 not require that fair and 11:02:01AM
3 equitable treatment and 11:02:03AM
4 full protection and 11:02:04AM
5 security be ignored, but 11:02:05AM
6 rather they be considered 11:02:07AM
7 included as part of the 11:02:07AM
8 minimum standard of 11:02:07AM
9 treatment." 11:02:07AM
10 And, parenthetically, any 11:02:07AM
11 other construction of the interpretation whereby 11:02:10AM
12 the fairness elements were treated as having no 11:02:11AM
13 effect would be to suggest the commission require 11:02:14AM
14 the word "including" in Article 1105, that is, 11:02:18AM
15 including fair and equitable treatment to be read 11:02:20AM
16 as excluding. And they reject -- they reject that 11:02:22AM
17 approach. 11:02:25AM
18 In terms of -- we rely on -- 11:02:26AM
19 on the point made in Mondev case, among others, 11:02:33AM
20 that the whole question of outrageous and 11:02:37AM
21 egregious from the Neer standard has to be seen to 11:02:42AM
22 have evolved over that period. As I say, to the 11:02:46AM
23 modern eye, what is unfair and equitable need not 11:02:49AM
24 equate with the outrageous or the egregious. 11:02:54AM
25 And, of course, there's also 11:02:57AM

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1 -- in terms of what's outrageous and egregious, 11:02:58AM
2 which is part of what -- what, in our submission, 11:03:01AM
3 must be considered here has also evolved with the 11:03:02AM
4 -- over the, I guess, close to 100 years since the 11:03:06AM
5 Neer decision was established. So you have to 11:03:11AM
6 look at standards that were -- that were applied 11:03:13AM
7 in a case in the 1920s in the modern context. 11:03:18AM
8 And our -- in our view, the 11:03:21AM
9 approach to be taken here is -- is the approach 11:03:27AM
10 that was adopted in Waste Management and has been 11:03:31AM
11 followed by a number of NAFTA Tribunals, perhaps 11:03:34AM
12 followed by, in terms of an approach, followed by 11:03:37AM
13 more NAFTA Tribunals than have followed other 11:03:43AM
14 approaches. 11:03:45AM
15 And the statement there is: 11:03:46AM
16 "The minimum standard of 11:03:47AM
17 treatment of fair and 11:03:49AM
18 equitable treatment is 11:03:50AM
19 infringed by conduct 11:03:51AM
20 attributable to the State 11:03:52AM
21 and harmful to the 11:03:53AM
22 Claimant if the conduct 11:03:55AM
23 is arbitrary, grossly 11:03:55AM
24 unfair, unjust, or 11:03:57AM
25 idiosyncratic, is 11:04:00AM

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1 discriminatory..." 11:04:00AM
2 Et cetera. 11:04:03AM
3 Then: 11:04:03AM
4 "In applying this 11:04:04AM
5 standard, it is relevant 11:04:05AM
6 that the treatment is in 11:04:06AM
7 breach of representations 11:04:07AM
8 made by the host state 11:04:08AM
9 which were reasonably 11:04:09AM
10 relied on by the 11:04:10AM
11 Claimant." 11:04:11AM
12 And that's -- that's a 11:04:12AM
13 standard, that, as I say, has been applied in a 11:04:13AM
14 number of NAFTA decisions and is appropriate to be 11:04:16AM
15 applied in this particular case. 11:04:20AM
16 We also draw the Tribunal's 11:04:22AM
17 attention to the Mobil case and the test it 11:04:23AM
18 applies there in terms of examining 11:04:27AM
19 representations as a factor in applying the fair 11:04:31AM
20 and equitable treatment test. 11:04:35AM
21 And as I say, we will return 11:04:38AM
22 to these in more detail in our closing. Bottom 11:04:39AM
23 line, though, is that -- is that, in our view, 11:04:45AM
24 whatever approach you take to fair and equitable 11:04:48AM
25 treatment, whether it's an interpretation of 11:04:50AM

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1 what's egregious and outrageous in a modern 11:04:53AM
2 context or whether it's an approach that is more 11:04:56AM
3 like a -- like a Waste Management approach, if 11:05:01AM
4 it's an approach that looks at -- at legitimate 11:05:05AM
5 considerations as a relevant factor. All of 11:05:10AM
6 those, those approaches, in my view, lead one to 11:05:14AM
7 the conclusion that, in these circumstances of 11:05:17AM
8 this case, we have the elements of arbitrariness, 11:05:20AM
9 gross unfairness, unjustness, and idiosyncrasy 11:05:24AM
10 that we have in -- set out in the Waste Management 11:05:30AM
11 case. 11:05:34AM
12 And, again -- and I know I 11:05:34AM
13 appreciate we've been through this a few times 11:05:34AM
14 before, but, you know, contrary to the commitment 11:05:37AM
15 to "freeze" the FIT project, contrary to the 11:05:39AM
16 commitment to process regulatory approvals in a 11:05:42AM
17 timely way, contrary to the commitment to consider 11:05:44AM
18 AOR status, contrary to the commitment to provide 11:05:47AM
19 an investor certainty, unnecessary to achieve 11:05:51AM
20 environmental goals, moratorium motivated by a 11:05:54AM
21 desire to kill offshore wind projects certainly 11:05:57AM
22 raising questions as to what the -- what the real 11:05:59AM
23 reasons were for the moratorium, little or no 11:06:01AM
24 research. And this is key in terms of assessing, 11:06:03AM
25 you know, the bona fides of the reason that was 11:06:05AM

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1 put out by the government for the moratorium. 11:06:07AM
2 The fact, post fact, that 11:06:09AM
3 little or no research has been done has been 11:06:12AM
4 crucial and an abrupt repudiation of the 11:06:13AM
5 regulatory framework. 11:06:17AM
6 We are not talking about 11:06:18AM
7 changing or tweaking the regulations here. We're 11:06:19AM
8 talking about -- about removing completely the 11:06:22AM
9 regulatory process that had been anticipated, and 11:06:25AM
10 no one has suggested, in this case that, at the 11:06:29AM
11 time that Windstream entered into the FIT 11:06:31AM
12 contract, that anyone had told Windstream that 11:06:34AM
13 there was going to be a moratorium on offshore 11:06:36AM
14 wind; that they were going to lose the process 11:06:39AM
15 that they had -- they had reasonably expected to 11:06:42AM
16 -- to be applying -- applying under. 11:06:44AM
17 And -- and so to the extent to 11:06:47AM
18 which -- and I appreciate that the 1105 is an 11:06:49AM
19 important issue for -- for the Canadian government 11:06:52AM
20 in terms of these issues, but -- but I want to 11:06:53AM
21 make it clear that there's no need for the 11:06:57AM
22 Tribunal to find, for example, that the so-called 11:06:59AM
23 autonomous FET standard from other agreements, you 11:07:03AM
24 know, should be part of the MST customary law 11:07:07AM
25 standard under the NAFTA. There's no reason for 11:07:10AM

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1 the Tribunal to have to determine whether 11:07:13AM
2 legitimate expectations is an independent basis 11:07:16AM
3 for a breach. 11:07:19AM
4 You can look at how the NAFTA 11:07:20AM
5 cases, in my submission, have appropriately 11:07:21AM
6 treated these issues. You look at the particular 11:07:23AM
7 cases. You look at the bundle of issues that 11:07:26AM
8 arise there, and there is more than sufficient to 11:07:28AM
9 determine that there's been a violation, in my 11:07:31AM
10 submission, of 1105. 11:07:34AM
11 And an 1102, this is our 11:07:36AM
12 discrimination provision -- perhaps I could just 11:07:42AM
13 get a sense of the time left. 11:07:47AM
14 MS. NETTLETON: Twenty-one 11:07:54AM
15 minutes left. 11:07:55AM
16 MR. TERRY: Thank you very 11:07:56AM
17 much. 11:07:57AM
18 So the test to establish a 11:07:58AM
19 violation of 1102 is set out in the UPS case. The 11:08:00AM
20 foreign investor has to establish that Canada 11:08:06AM
21 accorded treatment to it. It has to be in "like 11:08:10AM
22 circumstances" with a particular, in this case, 11:08:14AM
23 Canadian investor, TransCanada. And there has to 11:08:20AM
24 be a showing of less favourable treatment. 11:08:25AM
25 And we've set out two slides 11:08:27AM

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1 which demonstrate, in our view, the facts 11:08:32AM
2 underlying these circumstances, first of all, in 11:08:35AM
3 terms of the like circumstances between Windstream 11:08:38AM
4 and TransCanada, and we fully admit, you know, 11:08:40AM
5 TransCanada was not an offshore energy project. 11:08:45AM
6 But it was, in our submission, sufficiently under 11:08:48AM
7 the legal and regulatory system in Ontario under 11:08:50AM
8 sufficient like circumstances to be an appropriate 11:08:53AM
9 comparator. 11:08:55AM
10 Both had power purchase 11:08:57AM
11 agreements from the OPA. A FIT is a form of a 11:08:58AM
12 power purchase agreement. Both had contracts that 11:09:01AM
13 were under force majeure that did not yet have the 11:09:03AM
14 necessary permits, and if they were kept under 11:09:07AM
15 force majeure, could not avoid triggering the 11:09:11AM
16 OPA's force majeure termination right, because as 11:09:13AM
17 I say, as I explained, once the force majeure time 11:09:15AM
18 elapses, then the OPA can terminate. 11:09:18AM
19 Both projects were cancelled. 11:09:21AM
20 TransCanada, you will recall, was cancelled as a 11:09:24AM
21 result of, essentially, electoral politics issues, 11:09:28AM
22 and Windstream was cancelled, you know, for the 11:09:32AM
23 reasons we have described in our factual 11:09:35AM
24 submissions. 11:09:38AM
25 In terms of the treatment -- 11:09:44AM

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1 comparing the treatment between Windstream and 11:09:46AM
2 TransCanada, as we focus here, it's -- we're 11:09:46AM
3 really talking about the same people in the 11:09:49AM
4 government side, senior officials within the 11:09:50AM
5 Ontario government, the same time frame, and we 11:09:56AM
6 see different treatment, and we see a different 11:09:58AM
7 outcome. 11:10:01AM
8 On the TransCanada side, 11:10:01AM
9 Premier's Office promises to keep TransCanada 11:10:03AM
10 whole. MEI decides to keep Windstream whole. You 11:10:07AM
11 will have seen the document on that, and they 11:10:10AM
12 promised to freeze their FIT contract. 11:10:12AM
13 On the TransCanada side, the 11:10:13AM
14 Premier's office directs the OPA to enter into 11:10:15AM
15 negotiations with TransCanada. The Windstream 11:10:17AM
16 side, MEI directs the OPA to enter into 11:10:22AM
17 negotiations with Windstream. 11:10:25AM
18 TransCanada receives a new 11:10:26AM
19 contract to construct a new 900-megawatt 11:10:28AM
20 generating facility. OPA refuses to amend the FIT 11:10:31AM
21 contract. And you'll recall that the consultation 11:10:34AM
22 of -- with the MEI in those negotiations so that 11:10:36AM
23 it would be frozen. 11:10:39AM
24 TransCanada receives in 11:10:40AM
25 addition compensation of at least \$253 million in 11:10:42AM

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1 addition to the new contract so it would be kept 11:10:46AM
2 whole. Windstream receives no new contract and no 11:10:48AM
3 new compensation. So, in our submission, we have 11:10:51AM
4 like circumstances, and we have different 11:10:54AM
5 treatment. 11:10:57AM
6 Now, I want to spend some time 11:10:58AM
7 in the remaining time on the damages analysis. 11:11:02AM
8 You will be hearing from a number of witnesses 11:11:05AM
9 over the next two weeks on that issue, and we 11:11:08AM
10 should cut the feed at this point in time, please. 11:11:11AM
11 --- CONFIDENTIAL BEGIN 11:11:16AM
12 MR. TERRY: Thank you. So, 11:11:16AM
13 first of all, the Tribunal will be familiar with 11:11:19AM
14 the Chorzow Factory Case: 11:11:22AM
15 "Reparation must, as far 11:11:27AM
16 as possible, wipe out all 11:11:29AM
17 the consequences of the 11:11:30AM
18 illegal act, re-establish 11:11:31AM
19 the situation which 11:11:31AM
20 would, in all 11:11:31AM
21 probability, have existed 11:11:31AM
22 if that act had not been 11:11:31AM
23 committed." 11:11:34AM
24 So we start from that 11:11:34AM
25 principle. We have, in our submission, an 11:11:35AM

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1 They explain that it's their 11:12:34AM
2 opinion that the project could have been 11:12:42AM
3 developed, permitted, and constructed within the 11:12:44AM
4 timelines of the FIT contract. However, the 11:12:46AM
5 possibility that the project might not have been 11:12:48AM
6 developed, permitted, and constructed within the 11:12:49AM
7 time constraints is accounted for in the discount 11:12:51AM
8 rate. 11:12:55AM
9 So they conclude that DCF is 11:12:55AM
10 appropriate, and, as you will know in doing a DCF 11:12:57AM
11 analysis, you -- a discount rate is crucial. How 11:13:00AM
12 do they account for the risks around development, 11:13:03AM
13 permitting, and constructed? They do that through 11:13:05AM
14 the adoption of an appropriate discount rate. 11:13:08AM
15 We cite here some of the case 11:13:10AM
16 law which -- which establishes, in our view, that 11:13:19AM
17 the application of the DCF method in this case is 11:13:21AM
18 consistent with other arbitral jurisprudence. And 11:13:24AM
19 this is from the Stati case, a reference here 11:13:27AM
20 that: 11:13:27AM
21 "To meet the standard to 11:13:31AM
22 apply DCF, an investor 11:13:32AM
23 must show that their 11:13:35AM
24 project either has a 11:13:36AM
25 track record of 11:13:37AM

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1 unlawful expropriation, and we also have the 11:11:37AM
2 unlawful acts of 1105 and 1102 and 1103 11:11:40AM
3 violations. 11:11:44AM
4 By the way, I should say with 11:11:45AM
5 respect to our 1103 argument, we rely on the 11:11:46AM
6 submissions we made in the -- in our Counter -- in 11:11:49AM
7 our Memorial and reply on that. But given the 11:11:51AM
8 time we have in the opening, I'm not going to 11:11:55AM
9 spend time on that. 11:11:57AM
10 Our experts in this particular 11:11:58AM
11 case, Deloitte, have concluded that the discounted 11:12:04AM
12 cash flow methodology is the most appropriate. 11:12:06AM
13 And a key factor here, as they say in 4.10(a) -- 11:12:09AM
14 this is from the report -- is that revenues can be 11:12:14AM
15 forecasted with a relatively high degree of 11:12:16AM
16 confidence. 11:12:18AM
17 And they explain the other 11:12:19AM
18 factors with respect to capital costs, operating 11:12:21AM
19 costs, engineering, and conclude: 11:12:24AM
20 "As a result, the inputs 11:12:27AM
21 to the DCF approach can 11:12:28AM
22 be estimated in a 11:12:29AM
23 reliable manner with a 11:12:30AM
24 relatively high degree of 11:12:32AM
25 confidence." 11:12:33AM

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1 profitability, rooted in 11:13:37AM
2 operations, or has 11:13:39AM
3 binding contractual 11:13:41AM
4 revenue obligations in 11:13:42AM
5 place that establish the 11:13:43AM
6 expectation of profit at 11:13:45AM
7 a certain level over a 11:13:46AM
8 given number of years. 11:13:48AM
9 This is true even for 11:13:49AM
10 projects in the early 11:13:51AM
11 stages." 11:13:51AM
12 Because we acknowledge, of 11:13:52AM
13 course, this project was in the early stage. It 11:13:53AM
14 was never because of the government -- government 11:13:55AM
15 steps you are able to get beyond the -- the stage 11:13:57AM
16 of being able to obtain the permits that it needed 11:14:01AM
17 to obtain. 11:14:06AM
18 It did, however, have the 11:14:07AM
19 crucial FIT contract. It had the crucial grid 11:14:09AM
20 connection. It had done all the work that needed 11:14:13AM
21 to be done as far as it could go, but it was 11:14:16AM
22 stopped, of course, by the fact that there was a 11:14:18AM
23 moratorium. It could never apply for its REA -- 11:14:20AM
24 for its REA approval. It could never work with 11:14:24AM
25 the Ministry of Environment and MNR to go ahead in 11:14:26AM

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1 that particular circumstance. 11:14:30AM
2 So we're in a situation, in 11:14:31AM
3 our submission, where we do have the 11:14:33AM
4 predictability of the revenue obligations, which, 11:14:37AM
5 of course, will not exist until the permitting is 11:14:40AM
6 obtained, but the way that's dealt with in the 11:14:44AM
7 damages analysis is through the discount rate. 11:14:47AM
8 And Deloitte also indicates 11:14:50AM
9 that, if the Tribunal doesn't adopt the DCF 11:14:56AM
10 approach, that the appropriate approach is a 11:14:59AM
11 market approach. And you will be familiar in 11:15:03AM
12 other cases of the use of experts in analyzing, 11:15:06AM
13 assessing both those approaches. 11:15:10AM
14 And they also make the point 11:15:12AM
15 from -- in their expert opinion that, by 11:15:18AM
16 suggesting that only sunk costs should be awarded, 11:15:20AM
17 Canada ascribes no value to the FIT contract, 11:15:23AM
18 which is Windstream's most valuable asset. This 11:15:26AM
19 is inconsistent with our market research and 11:15:28AM
20 conclusions which establish that, in fact, the 11:15:30AM
21 contracts have significant value. 11:15:33AM
22 And we cite here from the 11:15:35AM
23 Karaha Bodas case a statement in paragraph 122: 11:15:35AM
24 "To limit the recovery of 11:15:45AM
25 the victim of a breach to 11:15:46AM

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1 She's dealing with the 11:16:37AM
2 argument that is you have lower sunk costs, it 11:16:38AM
3 should -- it should, you know, somehow lower your 11:16:40AM
4 damages assessment. 11:16:42AM
5 She says: 11:16:43AM
6 "-- the amounts invested 11:16:44AM
7 and the value of the 11:16:45AM
8 investment are not always 11:16:47AM
9 in proportional relation. 11:16:47AM
10 On the contrary, if an 11:16:47AM
11 investment turns out to 11:16:48AM
12 be particularly 11:16:49AM
13 promising, the host state 11:16:50AM
14 could be motivated to 11:16:51AM
15 expropriate it or 11:16:52AM
16 otherwise impair it. 11:16:53AM
17 Great care must, 11:16:54AM
18 therefore, be taken not 11:16:55AM
19 to link the amount of 11:16:56AM
20 compensation or damages 11:16:57AM
21 closely to the investment 11:16:58AM
22 actually undertaken, if 11:16:59AM
23 the investment has good 11:17:00AM
24 future prospects." 11:17:01AM
25 What we say this one does. 11:17:03AM

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1 its actual expenditures 11:15:48AM
2 is to transform it into a 11:15:48AM
3 lender, which is 11:15:51AM
4 commercially intolerable 11:15:52AM
5 when the party was at 11:15:53AM
6 full risk for the amount 11:15:54AM
7 of investments made on 11:15:56AM
8 the strength of the 11:15:57AM
9 contract. The loss of a 11:15:57AM
10 business opportunity is a 11:15:58AM
11 widely recognized basis 11:16:00AM
12 for the lost profits and 11:16:01AM
13 damages component." 11:16:02AM
14 So to the point that it's not 11:16:03AM
15 appropriate to, in these particular cases, to 11:16:05AM
16 somehow suggest that sunk costs should only be 11:16:08AM
17 appropriate, even where -- and my friends make -- 11:16:11AM
18 emphasize the difference between the actual costs 11:16:16AM
19 and the amount that's being claimed here, but in 11:16:18AM
20 our submission, that is not unusual and not 11:16:21AM
21 surprising for projects in these circumstances -- 11:16:24AM
22 and you can look here at this statement from 11:16:28AM
23 Marboe where she says -- she says: 11:16:34AM
24 "From a valuation 11:16:35AM
25 perspective --" 11:16:36AM

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1 I want to spend a bit of time 11:17:05AM
2 on the but-for scenarios that we apply here, and 11:17:08AM
3 just to take you to, briefly, to the Lemire case, 11:17:15AM
4 which essentially is saying that you want to adopt 11:17:22AM
5 reasonable assumptions: 11:17:24AM
6 "So the Tribunal has to 11:17:26AM
7 accept certain 11:17:27AM
8 assumptions. These 11:17:28AM
9 assumptions can and must 11:17:29AM
10 be checked, applying 11:17:30AM
11 tests of reasonableness. 11:17:31AM
12 In the end, there's no 11:17:33AM
13 denying the calculation 11:17:34AM
14 of damages in a case like 11:17:36AM
15 this inevitably requires 11:17:37AM
16 a certain amount of 11:17:39AM
17 conjecture as to how 11:17:39AM
18 things would have evolved 11:17:41AM
19 but-for the actual 11:17:43AM
20 behavior of the parties." 11:17:44AM
21 So you're in the but-for 11:17:45AM
22 world. You use conjecture. Been informed by the 11:17:46AM
23 reasonableness of your assumptions. 11:17:49AM
24 And as Lemire says: 11:17:51AM
25 "When constructing the 11:17:56AM

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1 but-for scenario, the 11:17:57AM
2 Tribunal must assume not 11:17:58AM
3 only the authorities 11:18:00AM
4 adhered to the investment 11:18:01AM
5 treaty standards but also 11:18:04AM
6 the Claimant reacted in 11:18:05AM
7 the manner to be expected 11:18:06AM
8 from a diligent and 11:18:07AM
9 reasonable investor." 11:18:08AM
10 Now, here is our two but-for 11:18:09AM
11 scenarios. One assumes there was never a 11:18:15AM
12 moratorium, and the project was permitted to 11:18:19AM
13 proceed through the regulatory approvals process 11:18:21AM
14 unimpeded by regulatory delays. The other assumes 11:18:23AM
15 that there was a three-year moratorium, during 11:18:27AM
16 which time the FIT contract remained under force 11:18:31AM
17 majeure without triggering any termination rights. 11:18:34AM
18 So the first one takes away 11:18:36AM
19 the moratorium and, therefore, assumes there'd be 11:18:39AM
20 no need for a freeze, because no moratorium. The 11:18:42AM
21 second one on the right assumes the moratorium is 11:18:44AM
22 there, but it assumes the government complied with 11:18:47AM
23 its obligation to freeze the project. Three years 11:18:49AM
24 is just -- you know, it could be five years. 11:18:52AM
25 Three years, in our view, is consistent with what 11:18:55AM

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1 The crucial -- and I want to 11:19:53AM
2 emphasize this. If you look at the orange 11:19:55AM
3 version, there's also an additional 16 months of 11:19:59AM
4 force majeure that's available under this 11:20:02AM
5 scenario. And that's consistent with what was 11:20:04AM
6 available at the time at which the moratorium was 11:20:06AM
7 put into place. There was 16 months left, because 11:20:08AM
8 you will recall what happens is that moratorium 11:20:11AM
9 time gets used up by May. 11:20:14AM
10 The problem with Canada's 11:20:16AM
11 but-for scenario, they started on May 2012. They 11:20:18AM
12 assumed that that's the point that the project 11:20:22AM
13 would restart in the but-for world. But they 11:20:25AM
14 don't include -- they take out the 16 months of 11:20:27AM
15 force majeure because, of course, it was all used 11:20:34AM
16 up by that point, but Canada doesn't put it back 11:20:36AM
17 in. They don't put Windstream in the place it 11:20:38AM
18 would have been but-for the moratorium. 11:20:41AM
19 So that's the point we make on 11:20:43AM
20 the left-hand side there. All available force 11:20:44AM
21 majeure time is used up before the project 11:20:47AM
22 restart. 11:20:49AM
23 It's also, in our submission, 11:20:49AM
24 unreasonable, given everything that was being 11:20:51AM
25 said, to assume that Ontario would lift the 11:20:54AM

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1 internally the government was thinking at the 11:18:57AM
2 time, three to five years. 11:18:59AM
3 In both of these scenarios we 11:19:00AM
4 say the project would have achieved commercial 11:19:05AM
5 operation within the time frames in this but-for 11:19:07AM
6 world. 11:19:09AM
7 And we can go back on the feed 11:19:09AM
8 now. 11:19:11AM
9 --- CONFIDENTIAL END 11:19:11AM
10 --- Upon resuming the public session. 11:19:14AM
11 MR. TERRY: Thanks. So I want 11:19:14AM
12 to compare the but-for scenarios we have to the 11:19:18AM
13 one that Canada has offered. 11:19:21AM
14 So the first scenario across 11:19:21AM
15 the top here is the one that starts at the time 11:19:22AM
16 of the moratorium, assuming there's no moratorium. 11:19:24AM
17 And you can see the dates up there. The second 11:19:27AM
18 one is three years after the moratorium. 11:19:29AM
19 They proceed on the basis 11:19:32AM
20 there's a project restart. There's 59 months to 11:19:33AM
21 the MCOB date. It takes another four months after 11:19:37AM
22 that to get the project to actual commercial 11:19:41AM
23 operation, so we're buying into the 18-month 11:19:44AM
24 buffer area. Then there's 14 months after that 11:19:49AM
25 time before the actual default. 11:19:51AM

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1 moratorium only after 16 months, so not consistent 11:20:56AM
2 with reasonable assumptions. 11:20:59AM
3 And it's important to see that 11:21:01AM
4 BRG and Green Giraffe both agree that Canada's 11:21:05AM
5 but-for scenario would lead to certain project 11:21:09AM
6 failure. And why is it? We see this excerpt from 11:21:10AM
7 the URS reports: 11:21:12AM
8 "URS considers this 11:21:14AM
9 schedule, Canada's one 11:21:15AM
10 and BRG's one, to be 11:21:16AM
11 unrealistic since both 11:21:17AM
12 investors and lenders 11:21:19AM
13 would not be willing to 11:21:20AM
14 accept the proposed 11:21:21AM
15 timeline. No investor 11:21:22AM
16 would be willing to 11:21:24AM
17 partake in a project 11:21:24AM
18 where no further 11:21:25AM
19 extensions to the MCOB 11:21:27AM
20 were allowed because of 11:21:28AM
21 force majeure. Green 11:21:29AM
22 Giraffe confirms this 11:21:30AM
23 view." 11:21:31AM
24 So the -- in our submission, 11:21:32AM
25 Canada's own witnesses are confirming that this is 11:21:33AM

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1 an inappropriate date because it takes out the 11:21:36AM
2 force majeure that was available at the time the 11:21:39AM
3 moratorium was put in place and to which we were 11:21:41AM
4 fully entitled under the contract. 11:21:44AM
5 And I just include this side 11:21:46AM
6 -- this slide to show what's involved in force 11:21:50AM
7 majeure: inabilities to obtain renewals, 11:21:53AM
8 amendments of permits, certificates, various 11:21:58AM
9 orders, strikes, and other labour disputes, act of 11:21:59AM
10 God. 11:22:02AM
11 And as you'll hear in the 11:22:02AM
12 evidence, force majeure, for example, is granted, 11:22:04AM
13 if, regularly, if there is a situation in which 11:22:06AM
14 the six-month service guarantee that the Ministry 11:22:10AM
15 of Environment provides is not granted. 11:22:14AM
16 So here is the schedule. You 11:22:16AM
17 will be hearing more about this in terms of 11:22:18AM
18 but-for. And our experts have worked in the 11:22:21AM
19 various dates. And -- and I won't talk in detail 11:22:24AM
20 about our experts now other than to say that those 11:22:27AM
21 involved in setting out these dates are among the 11:22:30AM
22 very most expert in terms of engineers working on 11:22:34AM
23 offshore projects in the world. 11:22:37AM
24 And you will see that this 11:22:39AM
25 incorporates not only the ultimate supplier 11:22:41AM

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1 default date, but that is extendable up to 16 11:22:44AM
2 months of additional force majeure. So you'll see 11:22:47AM
3 when you look at the expert reports it's very 11:22:49AM
4 important to keep in mind the force majeure time 11:22:51AM
5 that is available in addition to this supplier 11:22:53AM
6 default date. 11:22:56AM
7 And it's appropriate, in our 11:22:56AM
8 view, to assume the February 2011 restart in the 11:22:59AM
9 first scenario because this is exactly what MOE 11:23:03AM
10 had been planning at the time was to have their 11:23:06AM
11 revised regulations and for MNR to have the Crown 11:23:12AM
12 land procedure in place in January 2011. 11:23:15AM
13 If you could cut the feed, 11:23:17AM
14 please for this next slide. 11:23:19AM
15 --- CONFIDENTIAL BEGIN 11:23:22AM
16 MR. TERRY: So you will see 11:23:22AM
17 this. And we also see on the MNR, in terms of the 11:23:24AM
18 reasonableness of the assumptions on the side of 11:23:31AM
19 MNR, that there is an intention to work with 11:23:33AM
20 Windstream, to grant applicant of record status, 11:23:37AM
21 and it's anticipated to be six weeks following 11:23:39AM
22 Windstream's decision to proceed with the 11:23:42AM
23 contract. 11:23:44AM
24 Now, we make a point here 11:23:44AM
25 about the appropriate date evaluation being the 11:23:46AM

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1 date of the award in the case of unlawful 11:23:49AM
2 expropriation. And it's not so much that it 11:23:51AM
3 changes the actual damages calculation, but -- and 11:23:53AM
4 I'll leave that to the experts to say the effect 11:23:57AM
5 of that, but it allows you to consider current 11:23:59AM
6 information. 11:24:02AM
7 And it's important, in that -- 11:24:04AM
8 in that case, because one of the allegations 11:24:06AM
9 that -- one of the statements that's made by 11:24:08AM
10 Canada's experts is that we shouldn't -- the 11:24:10AM
11 permitting schedule that our experts have put in 11:24:14AM
12 place, you know, relies on new information, 11:24:17AM
13 doesn't -- is different than some of the 11:24:20AM
14 permitting schedules that were put in place 11:24:22AM
15 contemporaneously. And, in our view, it's 11:24:27AM
16 perfectly appropriate when you are determining a 11:24:28AM
17 but-for analysis and you are making reasonable 11:24:30AM
18 assumptions about what investors and government 11:24:32AM
19 would have done in that but-for world to make 11:24:34AM
20 schedules on that basis, and it's perfectly 11:24:36AM
21 appropriate, in these circumstances, to consider 11:24:39AM
22 the current information. 11:24:41AM
23 And we can see from the 11:24:42AM
24 Quiborax case here what matters is that the victim 11:24:48AM
25 of the harm is placed in the situation it would 11:24:49AM

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1 have been in real life, not more, not less. Using 11:24:51AM
2 actual information is better suited for this 11:24:54AM
3 purpose than projections based on information 11:24:56AM
4 available at the date of expropriation as it 11:24:57AM
5 allows to better reflect reality, including market 11:25:00AM
6 fluctuations, when attempting to re-establish the 11:25:03AM
7 situation which would, in all possibility, have 11:25:05AM
8 existed if the act had not been committed. 11:25:07AM
9 Very important in our view to 11:25:09AM
10 take that into account. 11:25:11AM
11 Finally, we have set out very 11:25:12AM
12 briefly -- and I don't want to go through these 11:25:16AM
13 slides in more detail than necessary. 11:25:18AM
14 MS. SEERS: Just to confirm, 11:25:25AM
15 though, we are off. 11:25:26AM
16 MR. TERRY: Yes, we are off. 11:25:27AM
17 We set out just to assist the 11:25:34AM
18 Tribunal to show some of the differences between 11:25:35AM
19 the experts in terms of the amounts in issue. 11:25:37AM
20 So we have Deloitte's 11:25:43AM
21 valuation and -- on one side, and you can see a 11:25:44AM
22 substantial difference between positive and 11:25:50AM
23 negative between the two. In terms of the main 11:25:51AM
24 areas of disagreement, we've got the weighted 11:25:57AM
25 average cost of capital differences there between 11:26:00AM

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1 Deloitte and BRG. We've got the cost of equity, 11:26:03AM
2 substantial difference there between Deloitte and 11:26:07AM
3 BRG, although BRG has -- has decreased between 11:26:09AM
4 their -- their first expert report and the 11:26:12AM
5 responding expert report has moved from 23 percent 11:26:15AM
6 decrease -- or from 23 percent in their first 11:26:18AM
7 report to 18 percent cost of equity. 11:26:20AM
8 Cost of debt, you will see the 11:26:22AM
9 differences isn't as substantial. So primarily on 11:26:24AM
10 the WACC and the cost of equity. And there is 11:26:27AM
11 some statements below as to why, in our 11:26:31AM
12 submission, BRG adopts some inappropriate 11:26:36AM
13 indicators for assessing the cost of equity. 11:26:39AM
14 There are disagreements also 11:26:42AM
15 with respect to turbine costs, the turbine supply 11:26:46AM
16 agreement, and whether that was a placeholder or 11:26:50AM
17 was somehow binding, and if it was -- as, for 11:26:53AM
18 example, both -- witnesses on both sides seem to 11:26:58AM
19 suggest that it was only a placeholder. But if 11:27:00AM
20 that's the case, whether the price would have gone 11:27:03AM
21 up or down. You will hear expert evidence on that 11:27:04AM
22 as well as there's evidence from Mr. Mars. 11:27:08AM
23 Issues with respect to the 11:27:09AM
24 delivery schedule and whether that -- how that 11:27:11AM
25 would be negotiated, market prices which are set 11:27:14AM

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1 which is a special step under the -- under the FIT 11:28:23AM
2 contract would occur, when manufacturing and 11:28:26AM
3 installation of a particular process to 11:28:29AM
4 manufacture the turbines' foundations, the 11:28:33AM
5 manufacturing plant, when that could occur, and 11:28:35AM
6 various issues around timing for delivering and 11:28:38AM
7 installation of the turbines. 11:28:41AM
8 So you can see differences on 11:28:42AM
9 either side in the case of our experts, and their 11:28:45AM
10 reports say -- and I would expect our experts to 11:28:49AM
11 confirm -- that the project could be completed 11:28:53AM
12 within the schedules as provided. On the side of 11:28:55AM
13 Canada's experts, of course, for various reasons, 11:28:59AM
14 they contend that the projects would not have been 11:29:02AM
15 completed within those dates. 11:29:05AM
16 And, of course, I make -- I 11:29:09AM
17 come back to the point again about force majeure, 11:29:10AM
18 and in our submission one of the things that the 11:29:12AM
19 other side's experts do not properly take into 11:29:12AM
20 account is the availability of force majeure with 11:29:16AM
21 respect to these permitting deadlines. 11:29:17AM
22 And I'm hoping that I'm just 11:29:21AM
23 under time. 11:29:23AM
24 PRESIDENT: Mr. Terry. You 11:29:24AM
25 are perfectly on -- precisely on two hours. Any 11:29:25AM

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1 out by -- on our side, by 4C Offshore, which is a 11:27:18AM
2 -- which is a company in the U.K. that assembles 11:27:22AM
3 price and other information with respect to the 11:27:27AM
4 offshore industry. 11:27:28AM
5 So we've got -- we've got -- 11:27:30AM
6 our argument here is that it's clear on the face 11:27:34AM
7 of the agreement that there was going to be a new 11:27:36AM
8 agreement that would have dealt with these issues 11:27:39AM
9 and that this turbine supply agreement, you know, 11:27:42AM
10 should not be -- the fact it was negotiated 11:27:44AM
11 particularly in the middle of the moratorium 11:27:46AM
12 should not be seen as holding -- as creating 11:27:48AM
13 binding costs that bind the damages determination 11:27:51AM
14 in this case. 11:27:54AM
15 And then we have issues with 11:27:54AM
16 respect to the project schedule. And you can 11:27:56AM
17 just -- just, again, to assist the Tribunal -- I 11:27:59AM
18 don't want to go through all of these, but I'm 11:28:02AM
19 hopeful it will assist them in trying to focus in 11:28:04AM
20 on some of the key points of difference between 11:28:06AM
21 the experts with respect to these issues. 11:28:09AM
22 And these are things, for 11:28:11AM
23 example, that have field studies done to have the 11:28:13AM
24 REA -- the renewal energy approval done, timings 11:28:14AM
25 of financial close, when the Notice to Proceed, 11:28:19AM

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1 questions? 11:29:28AM
2 [Laughter.] 11:29:28AM
3 QUESTIONS FROM THE TRIBUNAL: 11:29:29AM
4 DR. CREMADES: Yes. I had a 11:29:33AM
5 question out of curiosity: Why -- which are the 11:29:34AM
6 criteria to put in and out of the public, 11:29:36AM
7 interrupting the video program? 11:29:41AM
8 MR. TERRY: Well, there are 11:29:44AM
9 really two, in my submission -- and Canada may 11:29:45AM
10 have additional submissions -- two main concerns. 11:29:48AM
11 One is sort of confidential or proprietary 11:29:51AM
12 information, commercial-type of information. The 11:29:54AM
13 other is information with respect to certain 11:29:57AM
14 internal e-mails, conversations, or other dealings 11:29:59AM
15 in the Government of Ontario. I think those are 11:30:03AM
16 the two primary reasons why the parties -- why 11:30:06AM
17 certain matters have been marked as confidential. 11:30:08AM
18 DR. CREMADES: Thank you. 11:30:12AM
19 PRESIDENT: Mr. Terry, just 11:30:13AM
20 one clarifying question about the -- going back to 11:30:18AM
21 the early part of your presentation. You made the 11:30:22AM
22 point about the Ontario or the newly-established 11:30:26AM
23 Ontario renewable energy facilitation office. 11:30:31AM
24 MR. BISHOP: Which page are 11:30:35AM
25 you looking at? 11:30:36AM

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1 PRESIDENT: This is page 13 of 11:30:36AM
2 your slides. You describe this as a one-stop 11:30:37AM
3 shop. Just to understand organizationally, was it 11:30:42AM
4 a standalone entity, or was it under a particular 11:30:45AM
5 Ministry? 11:30:49AM
6 MR. TERRY: It was -- I stand 11:30:50AM
7 to be corrected, but my recollection is it was 11:30:51AM
8 under the Ministry of Energy. And it was -- it 11:30:53AM
9 was -- and certainly these aren't my words, but 11:30:59AM
10 the press release describes it as a one-stop shop 11:31:00AM
11 to help renewable energy projects get off the 11:31:04AM
12 ground faster. 11:31:06AM
13 My understanding it was 11:31:07AM
14 supposed to be there as a facilitator of office to 11:31:09AM
15 ensure that the Ministries -- because we're 11:31:11AM
16 talking about three main Ministries here. The 11:31:13AM
17 Ministry of Energy, the Ministry of Environment, 11:31:15AM
18 and the Ministry of Natural Resources were working 11:31:18AM
19 in a coordinated fashion and would work with 11:31:20AM
20 project developers to the extent they needed 11:31:23AM
21 assistance. 11:31:25AM
22 That's -- and I don't want to 11:31:26AM
23 give evidence here, but that's my understanding as 11:31:27AM
24 to the role that office would play. 11:31:30AM
25 PRESIDENT: Well, perhaps this 11:31:33AM

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1 with new capabilities and 11:32:47AM
2 new leadership to support 11:32:47AM
3 the facilitation of 11:32:47AM
4 renewable energy 11:32:47AM
5 projects." 11:32:55AM
6 That quote from page 12. So, 11:32:55AM
7 in my respectful submission, those were examples 11:32:57AM
8 where the policy intent has been stated by 11:33:00AM
9 Minister Smitherman and is carried out with 11:33:03AM
10 respect to the establishment of his office. 11:33:06AM
11 PRESIDENT: And perhaps that's 11:33:11AM
12 also for witness examination, to understand 11:33:13AM
13 whether the role of this office remained the same 11:33:15AM
14 throughout this relevant period so that the 11:33:17AM
15 investors could approach all three Ministries 11:33:19AM
16 through this one office and what were the 11:33:22AM
17 limitations to that, whether there were issues 11:33:26AM
18 that should be approached directly with the 11:33:29AM
19 Ministry, or whether there were all the issues or 11:33:31AM
20 any issues that the investor had could be 11:33:34AM
21 channelled through this office, just to understand 11:33:37AM
22 the mechanics. We are also trying to understand 11:33:39AM
23 the role of the division of the functions between 11:33:42AM
24 the three different Ministries because that is not 11:33:45AM
25 always so clear, but that is, perhaps, for witness 11:33:48AM

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1 can be clarified, you know, during the witness 11:31:33AM
2 examination or in the closing, but the question is 11:31:37AM
3 simply to understand whether the idea of the 11:31:40AM
4 office was to create a facility that would allow 11:31:43AM
5 the investors to approach all three relevant 11:31:49AM
6 Ministries through one office. That's how I 11:31:53AM
7 understand it, but if I'm mistaken, I would like 11:31:55AM
8 to stand corrected. 11:31:57AM
9 MR. TERRY: Yeah. My -- my -- 11:31:58AM
10 my understanding is the same as yours. It was an 11:32:01AM
11 initiative that arose out of the Ministry of 11:32:05AM
12 Energy. Part of Minister Smitherman's 11:32:09AM
13 initiatives, and he might be an appropriate person 11:32:10AM
14 to whom to put that question. I think we also 11:32:14AM
15 have a Ministry of Energy official testifying who 11:32:16AM
16 it may also be appropriate to ask. 11:32:19AM
17 And there is -- if you go back 11:32:21AM
18 to Slide 20, the whole provision about -- the 11:32:23AM
19 quote about not getting tripped up in all kinds of 11:32:29AM
20 red tape was designed to -- in my submission, that 11:32:31AM
21 was the underlying purpose of this particular 11:32:40AM
22 office. 11:32:42AM
23 And you can also see inside 11:32:43AM
24 12, a reference to: 11:32:45AM
25 "My Ministry would emerge 11:32:47AM

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1 examination and perhaps for the closing 11:33:53AM
2 statements. 11:33:55AM
3 MR. TERRY: I appreciate your 11:33:57AM
4 questions, and we will certainly do what we can to 11:33:58AM
5 facilitate there being answers from witnesses. 11:34:00AM
6 PRESIDENT: Okay. Thank you 11:34:05AM
7 very much, Mr. Terry. 11:34:06AM
8 I suggest we have a brief 11:34:07AM
9 five-minute technical break to change teams, and I 11:34:09AM
10 would ask people to stay in the room unless there 11:34:14AM
11 is compelling business, and we continue in five 11:34:18AM
12 minutes. Thank you. 11:34:21AM
13 --- CONFIDENTIAL END 11:34:22AM
14 --- Recess at 11:34 a.m. 11:34:22AM
15 --- Upon resuming at 11:39 a.m. 11:39:19AM
16 PRESIDENT: Okay. We will 11:39:38AM
17 continue, Mr. Neufeld. As agreed, we will go 11:39:39AM
18 until around 12:30. Let us know when is a 11:39:44AM
19 convenient time to break. 11:39:47AM
20 MR. NEUFELD: We have a very 11:39:49AM
21 convenient break in about 35 minutes, which should 11:39:52AM
22 put us about 15 minutes before that time. Would 11:39:54AM
23 that make sense? 11:39:56AM
24 PRESIDENT: That would be... 11:39:57AM
25 MR. NEUFELD: We can advise 11:39:59AM

1 the kitchen maybe that we will break that early or 11:40:01AM
2 -- or I could, if you would prefer, delve into the 11:40:03AM
3 next section. We are doing a little by of 11:40:08AM
4 Yo-Yo'ing today up and down. So that's why I'm 11:40:12AM
5 saying it would be convenient. 11:40:14AM
6 PRESIDENT: Let's keep this 11:40:16AM
7 off the record now just for a second. 11:40:17AM
8 --- Off the record discussion 11:40:38AM
9 PRESIDENT: Back on the 11:40:38AM
10 record. Mr. Neufeld. 11:40:39AM
11 OPENING STATEMENT BY MR. NEUFELD: 11:40:43AM
12 MR. NEUFELD: Good morning, 11:40:43AM
13 Messrs. Heiskanen, Bishop, and Cremades. As you 11:40:45AM
14 know, I am Rodney Neufeld, and I'm counsel for 11:40:48AM
15 Canada, and it's a real honour to be before you 11:40:49AM
16 today. 11:40:52AM
17 I'd like to thank you for your 11:40:52AM
18 efforts to prepare questions to be addressed by 11:40:54AM
19 the parties. There's perhaps no better way to 11:40:57AM
20 focus our minds, and we will do our best to 11:40:59AM
21 address those questions throughout our remarks 11:41:01AM
22 today, which are organized into three parts. 11:41:04AM
23 After I provide a 10-minute 11:41:06AM
24 introduction to the case, a little less than 10, 11:41:11AM
25 actually, I will turn the floor over to Ms. Sylvie 11:41:13AM

1 matters, nor will I address Article 1103 since the 11:42:29AM
2 Claimant didn't spend any time on that this 11:42:33AM
3 morning. However, if the Tribunal has questions, 11:42:35AM
4 we'd be more than happy to address them. 11:42:37AM
5 Finally, my colleague Shane 11:42:41AM
6 Spelliscy will conclude Canada's opening 11:42:44AM
7 statement. Although Canada maintains that 11:42:46AM
8 Ontario's measures do not breach NAFTA, in the 11:42:49AM
9 event that the Tribunal disagrees, Mr. Spelliscy 11:42:52AM
10 will demonstrate that it resulted in no harm to 11:42:54AM
11 the Claimant. Therefore, no damages should be 11:42:57AM
12 awarded. 11:43:00AM
13 Over the course of the next 11:43:01AM
14 two weeks, you are going to hear a lot of 11:43:04AM
15 testimony and see many, many exhibits. Thousands 11:43:07AM
16 of exhibits have been filed along with many 11:43:10AM
17 witness statements and expert reports. 11:43:13AM
18 And despite the voluminous 11:43:14AM
19 materials before you, the facts aren't that 11:43:17AM
20 complicated. And the law isn't either. 11:43:20AM
21 The Tribunal must really only 11:43:23AM
22 satisfy itself with two simple questions: First, 11:43:25AM
23 is the Ontario Government's decision to take the 11:43:32AM
24 time it needed to adopt an adequately informed 11:43:35AM
25 policy framework on offshore wind development with 11:43:39AM

1 Tabet, the director of Canada's Trade Law Bureau. 11:41:16AM
2 She will provide an overview of the law at issue. 11:41:18AM
3 She will focus primarily on 11:41:21AM
4 two provisions. That's Article 1110 and 1105. 11:41:23AM
5 She will be starting with Articles 1102 and 1103, 11:41:28AM
6 the MFN and national treatment provisions, and 11:41:32AM
7 then focusing more so on Article 1110 and Article 11:41:36AM
8 1105, expropriation and minimum standard of 11:41:39AM
9 treatment, but will not address jurisdiction or 11:41:42AM
10 procurement. Canada relies on our written 11:41:44AM
11 pleadings which fully brief these matters. 11:41:45AM
12 Afterwards, I will return to 11:41:48AM
13 apply the legal principles outlined by Ms. Tabet 11:41:53AM
14 to the facts of this case, and that will happen 11:41:56AM
15 after lunch, then, the way we have planned things. 11:41:58AM
16 My intention isn't to address 11:42:01AM
17 every factual allegation that has been raised in 11:42:03AM
18 this dispute. Instead I will focus on the flaws 11:42:06AM
19 of the Claimant's Article 1105 claims, and then 11:42:10AM
20 I'll turn to the problems with its Article 1110 11:42:13AM
21 case before touching briefly on its Article 1102 11:42:16AM
22 claims. 11:42:20AM
23 Again, there are no 11:42:20AM
24 controversial issues with respect to jurisdiction 11:42:23AM
25 or procurement, so I won't be addressing these 11:42:25AM

1 clear, upfront rules a breach of Article 1105? 11:43:41AM
2 Second, did the government 11:43:46AM
3 violate NAFTA Articles 1102, 1103, 1105, and 1110 11:43:51AM
4 by failing to complete the approvals framework and 11:43:58AM
5 lift the deferral within a time frame dictated by 11:44:00AM
6 the Claimant? 11:44:03AM
7 You see, according to the 11:44:04AM
8 Claimant, the deferral had to be lifted or the 11:44:06AM
9 Claimant needed to be insulated from the 11:44:08AM
10 deferral's effects in time for it to meet its 11:44:10AM
11 obligations under the Feed-In Tariff contract with 11:44:13AM
12 the Ontario Power Authority, with the OPA. 11:44:16AM
13 The answer to both of these 11:44:19AM
14 questions must be no, and, as a result, the claims 11:44:21AM
15 must be dismissed. 11:44:26AM
16 The Claimant would like the 11:44:27AM
17 Tribunal to overlook the fact that the government 11:44:31AM
18 was in the process of reviewing its policies to 11:44:33AM
19 inform the development of its approvals framework. 11:44:36AM
20 In its 23rd slide this morning, it actually 11:44:41AM
21 acknowledged that the MNR was in the midst of a 11:44:45AM
22 policy review on Crown land site release. It 11:44:48AM
23 cited as well to the MOE's policy review, which my 11:44:52AM
24 friend said was -- was going to lead to regulatory 11:44:56AM
25 or policy changes. 11:44:59AM

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1 But it would prefer you -- 11:45:00AM
2 prefer that you ignore those things, and it wants 11:45:05AM
3 you to believe that it was not necessary -- it was 11:45:07AM
4 not necessary for the Government of Ontario to 11:45:08AM
5 develop province-wide setbacks and standards 11:45:10AM
6 before allowing the Claimant to pursue the 11:45:13AM
7 development of its project. 11:45:15AM
8 You see, the Claimant attempts 11:45:16AM
9 to -- attempts set the policy. Then it 11:45:20AM
10 effectively asks the Tribunal to stand in for the 11:45:23AM
11 government, the Government of Ontario, to conduct 11:45:26AM
12 an environmental assessment of its project. For 11:45:28AM
13 that purpose, it has filed dozens of reports in an 11:45:32AM
14 attempt to show that its project would not have 11:45:37AM
15 been detrimental to birds, to fish, to bats, to 11:45:38AM
16 water quality, navigation, and so on. 11:45:43AM
17 These findings distract from 11:45:45AM
18 the central issue that you must determine, and 11:45:46AM
19 that is whether Canada breached NAFTA through the 11:45:49AM
20 Province of Ontario's decision to take the time 11:45:53AM
21 necessary to finalize its approvals framework. 11:45:56AM
22 As I am sure you agree, the 11:46:01AM
23 role of the Tribunal is not to conduct an 11:46:02AM
24 environmental assessment. Instead your role is to 11:46:06AM
25 determine whether the government's decision to 11:46:08AM

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1 renegotiation of three specific provisions of the 11:47:20AM
2 FIT contract. These terms were specifically 11:47:23AM
3 identified in the audio recording and the 11:47:28AM
4 transcript of the call filed by the Claimant. 11:47:31AM
5 Now, unsatisfied, the Claimant 11:47:34AM
6 declined the OPA's offer, demanding instead to 11:47:36AM
7 rewrite the standard form FIT contract that it had 11:47:40AM
8 with the OPA. And here we are today. 11:47:43AM
9 That concludes my introduction 11:47:47AM
10 to the case. I would like to turn now to 11:47:50AM
11 Ms. Tabet to provide you an introduction of the 11:47:52AM
12 law at issue. 11:47:54AM
13 OPENING STATEMENT BY MS. TABET: 11:47:54AM
14 PRESIDENT: Thank you. 11:47:57AM
15 Ms. Tabet. 11:47:57AM
16 MS. TABET: Thank you. 11:47:59AM
17 --- [Reporter's note: Technical problems re 11:48:37AM
18 realtime feed.] 11:50:02AM
19 PRESIDENT: Let's go. 11:50:02AM
20 Ms. Tabet. 11:50:03AM
21 MS. TABET: Sure. Thank 11:50:04AM
22 you. Mr. President, members of the Tribunal, it 11:50:04AM
23 is telling that this morning Mr. Terry spent, in 11:50:06AM
24 fact, very little time talking about the 11:50:09AM
25 applicable legal framework, but it is important to 11:50:11AM

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1 defer the development of offshore wind projects 11:46:10AM
2 pending scientific research and the development of 11:46:13AM
3 an adequately informed policy framework violates 11:46:15AM
4 NAFTA. 11:46:19AM
5 And, second, you must 11:46:19AM
6 determine whether the government's alleged failure 11:46:22AM
7 to lift the deferral or otherwise insulate the 11:46:25AM
8 Claimant from its effects breaches the NAFTA. 11:46:28AM
9 Again, as my friend emphasized 11:46:33AM
10 this morning, it's the combination of these two 11:46:35AM
11 measures that the Claimant challenges. 11:46:37AM
12 The evidence you will hear 11:46:40AM
13 over the next two weeks will confirm that the 11:46:43AM
14 government's decision to pause the development of 11:46:45AM
15 offshore wind was a prudent policy decision and 11:46:47AM
16 that its concern over the regulatory framework was 11:46:51AM
17 consistent with concerns expressed by Ontario's 11:46:53AM
18 U.S. neighbours and by the public. 11:46:56AM
19 It was entirely legitimate for 11:47:00AM
20 the government to take the time necessary to 11:47:03AM
21 conduct further scientific research to justify the 11:47:05AM
22 setbacks and other rules to approve projects. 11:47:08AM
23 The evidence will also 11:47:12AM
24 demonstrate that the terms to the OPA's offer to 11:47:13AM
25 freeze the Claimant's contract were based on the 11:47:17AM

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1 look at those applicable legal standards in order 11:50:15AM
2 for you to assess the claims, the facts, and the 11:50:20AM
3 witness statements that you will be hearing this 11:50:24AM
4 week. 11:50:26AM
5 Canada has extensively set out 11:50:26AM
6 these legal standards in its submissions, and 11:50:31AM
7 today I will focus only on a few key points. 11:50:33AM
8 First I will address the 11:50:38AM
9 nature of the non-discriminatory obligation under 11:50:39AM
10 Articles 1102 and 1103. 11:50:42AM
11 Second, I will comment on the 11:50:45AM
12 applicable legal analysis for an indirect 11:50:48AM
13 expropriation under Article 1110. 11:50:52AM
14 And, third, I will comment on 11:50:55AM
15 the proper standard to be applied under Article 11:50:57AM
16 1105, and in doing so, I will address the 11:51:02AM
17 Tribunal's questions. 11:51:04AM
18 Before I start, I want to 11:51:06AM
19 emphasize that Canada's position on the proper 11:51:11AM
20 interpretation of these articles is consistent 11:51:14AM
21 with its long-held and -- position in previous 11:51:17AM
22 arbitration as well as the interpretation given by 11:51:21AM
23 the other NAFTA parties. 11:51:23AM
24 Article 31(3) of the Vienna 11:51:24AM
25 Convention provides that: 11:51:29AM

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1 "Tribunals shall take 11:51:30AM
2 into account any 11:51:31AM
3 subsequent agreement 11:51:33AM
4 between the parties on 11:51:34AM
5 the interpretation of a 11:51:35AM
6 treaty and any subsequent 11:51:36AM
7 practice that establishes 11:51:39AM
8 the agreement of the 11:51:40AM
9 parties on the 11:51:41AM
10 interpretation of the 11:51:42AM
11 treaty." 11:51:43AM
12 So, here, the Article 1128 11:51:44AM
13 submissions of the United States and of Mexico and 11:51:48AM
14 Canada's reply to these submissions clearly 11:51:51AM
15 provide evidence of a common shared interpretation 11:51:55AM
16 of the provisions, and, therefore, the Tribunal 11:51:58AM
17 should give them significant weight. 11:52:00AM
18 Previous NAFTA Tribunals, like 11:52:02AM
19 in the Canadian Cattlemen case, have recognized 11:52:08AM
20 the weight that should be given to such common 11:52:12AM
21 concordant and consistent positions. 11:52:16AM
22 Now, having set out the 11:52:18AM
23 importance that must be given to these shared 11:52:23AM
24 interpretations, let me look at what this means in 11:52:25AM
25 the context of Articles 1102 and 1103. 11:52:29AM

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1 object of the taking -- of the alleged taking. 11:53:59AM
2 So the Tribunal must consider 11:54:02AM
3 the nature and the scope of the investment that is 11:54:04AM
4 alleged to have been expropriated, and a right 11:54:06AM
5 that is only potential or speculative cannot be 11:54:15AM
6 expropriated. This is well recognized. 11:54:19AM
7 Now, Mr. Terry recognized this 11:54:20AM
8 morning that the Claimant had no guarantee that 11:54:22AM
9 the projects would be approved in the course of an 11:54:24AM
10 environmental assessment. And the Claimant 11:54:27AM
11 certainly had no right to the revenue under the 11:54:30AM
12 FIT contract until those relevant permits were 11:54:33AM
13 obtained. Therefore, the Claimant cannot claim it 11:54:36AM
14 has a right to these revenue streams or to the 11:54:39AM
15 project, let alone that it has been expropriated. 11:54:43AM
16 And Mr. Neufeld will come back 11:54:46AM
17 to that in his comments later on this afternoon. 11:54:48AM
18 So but if the Tribunal is 11:54:51AM
19 satisfied that there is a right that can be 11:54:55AM
20 expropriated, several factors must be considered 11:54:57AM
21 to determine whether this is indeed an indirect 11:55:00AM
22 expropriation or if it's only the legitimate 11:55:03AM
23 exercise of police powers by the state. 11:55:06AM
24 The first factor to which 11:55:09AM
25 Mr. Terry has referred to and is well recognized 11:55:12AM

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1 So as the NAFTA parties have 11:52:33AM
2 indicated, these two Articles are strictly 11:52:37AM
3 concerned with nationality-based discrimination. 11:52:44AM
4 They don't require governments to treat all 11:52:47AM
5 investors identically in all circumstances. And 11:52:50AM
6 obviously government programs can affect different 11:52:53AM
7 investors differently, and that is not sufficient 11:52:56AM
8 in itself to establish nationality-based 11:52:59AM
9 discrimination. 11:53:02AM
10 The necessary element to the 11:53:03AM
11 analysis of a violation of Articles 1102 and 1103 11:53:06AM
12 have been referred to by Mr. Terry, and they're 11:53:11AM
13 well established, and they have been agreed to by 11:53:13AM
14 the NAFTA parties. 11:53:17AM
15 So I won't go through them 11:53:18AM
16 today, but as my colleague Mr. Neufeld will 11:53:20AM
17 elaborate further later, the Claimant has not met 11:53:22AM
18 the burden of establishing all three necessary 11:53:26AM
19 elements. What it did is simply point to 11:53:28AM
20 different treatment received by other investors 11:53:31AM
21 under other procurement -- government procurement 11:53:34AM
22 contracts or programs or contracts. 11:53:37AM
23 So next I will turn to Article 11:53:40AM
24 1110. The prerequisite to any analysis under this 11:53:49AM
25 article is to, first, correctly identify the 11:53:55AM

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1 is the impact of the measure on the investment. 11:55:16AM
2 But the Claimant would have the analysis stop 11:55:18AM
3 here. That is inconsistent with customary 11:55:21AM
4 international law on expropriation. 11:55:26AM
5 It is also inconsistent with 11:55:30AM
6 the NAFTA parties' understanding of what 11:55:34AM
7 constitutes indirect expropriation under Article 11:55:36AM
8 1110, as is reflected in subsequent practice, for 11:55:39AM
9 example, in the recently concluded TPP Agreement. 11:55:43AM
10 So the second factor that must 11:55:47AM
11 be considered is the extent to which the measure 11:55:52AM
12 interferes with investment-backed expectations. 11:55:54AM
13 Contrary to what the Claimant argues, interference 11:55:59AM
14 with the expectation itself is not a breach of the 11:56:02AM
15 treaty. It is only one of the relevant 11:56:05AM
16 considerations in the context of an indirect 11:56:08AM
17 expropriation analysis. 11:56:11AM
18 So the Tribunal would have to 11:56:12AM
19 consider whether, for example, there was a 11:56:15AM
20 commitment not to regulate offshore wind or 11:56:17AM
21 further develop setbacks and whether there was a 11:56:20AM
22 commitment not -- that the Claimant did not have 11:56:24AM
23 to go through the permitting process. But, in 11:56:27AM
24 fact, the FIT contract specifically required the 11:56:30AM
25 Claimant to go through those -- this process. 11:56:33AM

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1 So the third factor to be 11:56:35AM
2 considered is the character of the measure, and, 11:56:39AM
3 in this case, the fact that Ontario was seeking 11:56:41AM
4 time to put in place the appropriate regulation 11:56:44AM
5 for offshore wind. Contrary to the what the 11:56:47AM
6 Claimant asserts, Canada is not claiming a broad 11:56:52AM
7 public purpose exception to compensation. Rather, 11:56:55AM
8 as is well recognized under international law, a 11:56:59AM
9 measure that is non-discriminatory and designed 11:57:05AM
10 and applied to protect legitimate public welfare 11:57:08AM
11 objectives, such as the environment, do not 11:57:11AM
12 constitute indirect expropriations except in rare 11:57:13AM
13 circumstances. 11:57:18AM
14 Now, the reference to 11:57:19AM
15 proportionality in the Tecmed case that Mr. Terry 11:57:20AM
16 pointed to has been heavily criticized as 11:57:24AM
17 inappropriately borrowing from the ECA 11:57:27AM
18 jurisprudence. And rather, as is set out in the 11:57:33AM
19 NAFTA parties' subsequent agreement, in TPP, the 11:57:36AM
20 analysis is much more general and should amount 11:57:39AM
21 to -- only in very rare circumstances are these 11:57:44AM
22 type of legislations an expropriation. 11:57:48AM
23 So, in summary, and to 11:57:51AM
24 conclude, the NAFTA does not require governments 11:57:53AM
25 to compensate all investors that may be negatively 11:57:55AM

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1 NAFTA parties rejected the subjective 11:59:21AM
2 determination of fairness that it would entail, 11:59:25AM
3 that this interpretation would entail. And, 11:59:28AM
4 instead, what the parties invite the Tribunal to 11:59:30AM
5 do is to look at the content of the standard at 11:59:33AM
6 customary international law. 11:59:37AM
7 So in light of the Tribunal's 11:59:39AM
8 task, it is useful to recall how custom is 11:59:42AM
9 established, who bears the burden of proof, and 11:59:45AM
10 what this means in practice. According to Article 11:59:48AM
11 38(1)(b) of the statute of the ICJ, custom has two 11:59:57AM
12 elements. The first element requires 12:00:00PM
13 consideration of whether there is an extensive, 12:00:02PM
14 uniform, consistent general practice by states. 12:00:05PM
15 And the second refers to the state's belief that 12:00:09PM
16 such practice is required by law, which is the 12:00:13PM
17 element that is generally referred to as the 12:00:17PM
18 opinio juris. And NAFTA Tribunals have recognized 12:00:22PM
19 this double requirement to identifying whether a 12:00:23PM
20 rule of customary international law exists. 12:00:26PM
21 A good example is in the UPS 12:00:30PM
22 Tribunal's consideration of whether the minimum 12:00:35PM
23 standard had evolved to include a rule against 12:00:38PM
24 anti-competitive conduct. 12:00:41PM
25 Well, in that case, the 12:00:43PM

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1 affected when the government regulates in the 11:57:58AM
2 public interest. The Claimant's interpretation of 11:58:00AM
3 Article 1110 would have the Tribunal do so. 11:58:04AM
4 So I will now turn to Article 11:58:07AM
5 1105, and I will organize my comments in this 11:58:13AM
6 section on -- in two parts. First, I will 11:58:17AM
7 summarize Canada's position on Article 1105 and 11:58:20AM
8 address the Tribunal's questions with respect to 11:58:24AM
9 the applicable standards, and the second part of 11:58:26AM
10 my presentation will be with respect to the 11:58:29AM
11 fundamental errors that the Claimant adopted in 11:58:31AM
12 its approach on this article. 11:58:35AM
13 Article 1105 guarantees 11:58:38AM
14 investors the customary international law minimum 11:58:44AM
15 standard of treatment with respect to the 11:58:49AM
16 treatment of foreigners and this -- and their 11:58:49AM
17 property. And this was definitely determined by 11:58:52AM
18 the Free Trade Commission 2001 Note of 11:58:55AM
19 Interpretation. And that has also been recognized 11:58:59AM
20 by every NAFTA Tribunal since the note was issued. 11:59:01AM
21 So to answer the Tribunal's 11:59:04AM
22 question, the Note of Interpretation leaves really 11:59:07AM
23 no space for a Tribunal to construe the meaning of 11:59:11AM
24 the words "fair and equitable treatment" as an 11:59:13AM
25 ordinary-meaning interpretation, and, in fact the 11:59:18AM

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1 Tribunal considered the prevalence of domestic 12:00:45PM
2 competition legislation in various legal systems 12:00:48PM
3 around the world, the scope and nature of that 12:00:51PM
4 legislation, and whether the legislation was 12:00:53PM
5 adopted out of a sense of legal obligation. 12:00:56PM
6 It also looked to the WTO 12:00:58PM
7 framework to see if there were any general rules 12:01:02PM
8 prohibiting anti-competitive behaviour. 12:01:06PM
9 And ultimately because of the 12:01:08PM
10 lack of conformity in the domestic competition law 12:01:10PM
11 and the lack of a opinio juris, the UPS Tribunal 12:01:12PM
12 concluded that there was simply no rule 12:01:15PM
13 prohibiting anti-competitive conduct at customary 12:01:18PM
14 international law. 12:01:23PM
15 Now, the Tribunal asked 12:01:24PM
16 whether the content of the standard depends upon 12:01:29PM
17 the general consensus of most states or whether 12:01:32PM
18 there can be a rule of customary international law 12:01:36PM
19 that is regional only and, specifically, whether 12:01:39PM
20 the standard referred to is based upon a general 12:01:45PM
21 consensus of most states or only of the NAFTA 12:01:48PM
22 states. 12:01:52PM
23 Now, in the case of Article 12:01:56PM
24 1105, which refers to the minimum standard of 12:01:58PM
25 treatment that is recognized as binding on all 12:02:00PM

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1 states under customary international law, the 12:02:03PM
2 Tribunal would have to consider general, not 12:02:05PM
3 regional, state practice and opinio juris. 12:02:08PM
4 Now, while it's not necessary 12:02:13PM
5 to show the specific and actual consent of Canada 12:02:15PM
6 to a rule or in the formation of a general custom, 12:02:18PM
7 nevertheless the fact that many states, including 12:02:21PM
8 the NAFTA parties, object to a rule such as 12:02:24PM
9 legitimate expectation is certainly a strong 12:02:27PM
10 indication that such rules have not crystallized 12:02:30PM
11 into custom. 12:02:33PM
12 Now, I have addressed what is 12:02:34PM
13 required to establish the content. Let me say a 12:02:37PM
14 few words about who bears the burden. And the 12:02:40PM
15 Tribunal has asked whether both parties bear the 12:02:45PM
16 burden of proving their affirmative assertions as 12:02:48PM
17 to the content of the standard. 12:02:52PM
18 As the International Court of 12:02:54PM
19 Justice and scholars and the NAFTA parties all 12:02:56PM
20 agree, and Tribunals have confirmed, the burden of 12:02:59PM
21 proving a rule rests on the party that alleges it, 12:03:03PM
22 and specifically so in the context of customary 12:03:05PM
23 international law. 12:03:10PM
24 In the words of the NAFTA 12:03:11PM
25 Cargill Tribunal: 12:03:12PM

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1 position in this arbitration. However, certainly 12:04:27PM
2 the statement of Canada and those of other NAFTA 12:04:31PM
3 parties as to the content of the standard are 12:04:34PM
4 relevant as they constitute state practice. 12:04:37PM
5 Moreover, the Tribunal is bound by the record 12:04:41PM
6 before it, and the Claimant has not adduced any 12:04:44PM
7 evidence of state practice and the opinio juris 12:04:47PM
8 necessary to support its allegation regarding the 12:04:51PM
9 content of that standard. 12:04:54PM
10 So what is the content then? 12:04:56PM
11 The United States has referred 12:04:59PM
12 to it as an umbrella concept reflecting a 12:05:00PM
13 different set of rules that, over time, have 12:05:03PM
14 crystallized into custom in specific content -- 12:05:06PM
15 contexts, sorry. 12:05:09PM
16 The OECD and UNCTAD have 12:05:09PM
17 recently attempted to identify this content, and 12:05:15PM
18 what they concluded was that it applied in certain 12:05:18PM
19 contexts like administration of justice cases 12:05:21PM
20 involving foreign nationals usually linked to 12:05:25PM
21 denial of justice, treatment of aliens under 12:05:28PM
22 detention and full protection and security. And 12:05:32PM
23 they also later noted that this led to the 12:05:37PM
24 development of a rule providing for compensation 12:05:39PM
25 in case of expropriation, which was very much at 12:05:42PM

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1 "It is for the party 12:03:14PM
2 asserting the custom to 12:03:15PM
3 establish the content of 12:03:16PM
4 that custom." 12:03:18PM
5 The Cargill Tribunal also 12:03:21PM
6 recognized that the proof of change in a custom is 12:03:23PM
7 not an easy matter to establish. However, as the 12:03:26PM
8 Tribunal said, the burden of doing so clearly 12:03:29PM
9 falls on the Claimant. If the Claimant does not 12:03:33PM
10 provide the Tribunal with the proof of such 12:03:36PM
11 evolution, it is not the place of the Tribunal to 12:03:38PM
12 assume this task. Rather, the Tribunal in such an 12:03:42PM
13 instance should hold that the Claimant fails to 12:03:49PM
14 establish the particular standard asserted. 12:03:53PM
15 So, again, here the Claimant 12:03:59PM
16 bears the burden of proving that custom has 12:04:01PM
17 changed to include certain rules that it inserts 12:04:03PM
18 such as legitimate expectation. 12:04:06PM
19 Now this brings me to the 12:04:08PM
20 content of the standard, and the Tribunal has 12:04:11PM
21 asked whether it is bound by the parties' position 12:04:14PM
22 on that content. 12:04:16PM
23 Interpreting 1105 is a 12:04:17PM
24 question of law, of course, and, therefore, the 12:04:22PM
25 Tribunal is not strictly bound by the parties' 12:04:24PM

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1 the origin of the standard. 12:05:46PM
2 Now, to clarify, Canada's 12:05:47PM
3 position -- what -- what can be shown in -- in the 12:05:51PM
4 standards that I just referred to is that the 12:05:56PM
5 types of standards that have crystallized into 12:06:00PM
6 custom are the type of -- a certain type of 12:06:03PM
7 egregious conduct. 12:06:06PM
8 And while Canada's position is 12:06:08PM
9 not that egregious is the standard for a minimum 12:06:10PM
10 standard of treatment, in the abstract, it's 12:06:15PM
11 certainly an indication of the type of conduct 12:06:17PM
12 that have crystallized into rules of customary 12:06:21PM
13 international law vis-à-vis the protection of 12:06:25PM
14 foreigners and their property. 12:06:26PM
15 So, for example, the Tribunal 12:06:28PM
16 has asked whether bad faith is required, and while 12:06:38PM
17 bad faith will often be present in the types of 12:06:42PM
18 extreme conduct that will breach the minimum 12:06:45PM
19 standard of treatment, it will not always be the 12:06:48PM
20 case. 12:06:50PM
21 The Tribunal then has posited 12:06:51PM
22 whether conduct that surprises the judicial mind 12:07:01PM
23 would be sufficient. And I think that language is 12:07:04PM
24 taken from a context where the -- where a 12:07:08PM
25 particular Tribunal was looking at the minimum 12:07:11PM

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1 standard of treatment in relation to a court 12:07:14PM
2 decision. And, really, the answer to that 12:07:18PM
3 question will depend on the nature and the context 12:07:21PM
4 of the governmental action at issue and where it's 12:07:24PM
5 -- the type of measure. Is it a court measure or 12:07:28PM
6 a government measure? But it is important not to 12:07:31PM
7 turn the minimum standard of treatment into a 12:07:33PM
8 mechanism for judicial review of the type that 12:07:35PM
9 domestic courts would undertake. 12:07:39PM
10 So, to conclude, the nature of 12:07:41PM
11 the standard as a floor, because it is a minimum 12:07:44PM
12 standard, means that government action must meet a 12:07:48PM
13 very high threshold for a breach to be 12:07:51PM
14 established. But to establish the content of the 12:07:53PM
15 standard, one must look at custom. 12:07:57PM
16 So it may be that standards 12:07:59PM
17 beyond those identified by the OECD and UNCTAD 12:08:03PM
18 that I've just referred to are in the process of 12:08:08PM
19 becoming a rule of custom, but the burden would be 12:08:11PM
20 on the investor to establish that they have 12:08:13PM
21 crystallized into such rule. 12:08:15PM
22 Okay. So with respect to the 12:08:17PM
23 prohibition, for example, on arbitrary measures on 12:08:24PM
24 which the Claimant has relied and Mr. Terry has 12:08:26PM
25 referred to in his opening statements, I would 12:08:29PM

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1 government 12:09:38PM
2 decision-making." 12:09:39PM
3 In fact, domestic courts 12:09:40PM
4 themselves have recognized that it is not their 12:09:46PM
5 role to question core policy decisions of 12:09:49PM
6 government unless they are irrational or taken in 12:09:51PM
7 bad faith. It would really be surprising, 12:09:53PM
8 therefore, that a broader, a more large role would 12:09:55PM
9 be imparted on international arbitration tribunals 12:10:02PM
10 by virtue of the minimum standard of treatment. 12:10:04PM
11 And as my colleague 12:10:07PM
12 Mr. Neufeld will develop and explain a little bit 12:10:09PM
13 later, Ontario courts in this case have considered 12:10:13PM
14 the Ontario government measure, the moratorium on 12:10:16PM
15 offshore wind, and they have concluded that it was 12:10:20PM
16 not in their rational government action. 12:10:22PM
17 So let me turn to my 12:10:28PM
18 presentation on 1105, which is the interpretation 12:10:30PM
19 advanced by the Claimant is fundamentally flawed 12:10:34PM
20 and really is meant to enlarge the minimum 12:10:37PM
21 standard of treatment without the requirement to 12:10:39PM
22 prove state practice and opinio juris. 12:10:42PM
23 The first error the Claimant 12:10:46PM
24 makes is to improperly rely on arbitral awards as 12:10:47PM
25 evidence of -- that the standard has evolved, and 12:10:51PM

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1 note that a number of NAFTA Tribunals have 12:08:32PM
2 suggested that a certain level of arbitrariness 12:08:35PM
3 would form part of the standard, but really none 12:08:38PM
4 of these Tribunals have looked at what constitute 12:08:41PM
5 or have done a proper analysis of state practice 12:08:43PM
6 and opinio juris to identify any content to that 12:08:46PM
7 rule. 12:08:50PM
8 And whether or not the 12:08:51PM
9 prohibition against -- a general prohibition 12:08:53PM
10 against arbitrary conduct falls outside of 12:08:56PM
11 expropriation, for example, where it originates, 12:09:00PM
12 whether this has crystallized into a custom or has 12:09:03PM
13 yet to crystallize, what is very clear is that it 12:09:06PM
14 should not be assimilated to a standard of 12:09:09PM
15 reasonableness or an invitation to second-guess 12:09:11PM
16 government action. 12:09:14PM
17 Arbitrariness entails the 12:09:15PM
18 complete lack of legitimate justification for 12:09:18PM
19 government action, or really any absence of 12:09:21PM
20 rational connection between the government measure 12:09:24PM
21 and the purported justification. 12:09:27PM
22 So in the words of the S.D. 12:09:29PM
23 Myers Tribunal: 12:09:35PM
24 "It is not an open-ended 12:09:35PM
25 mandate to second-guess 12:09:37PM

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1 I will simply refer you to Article 38 -- sorry. 12:10:56PM
2 Could you go back to Article 38 of the Statute of 12:11:01PM
3 the International Court of Justice, which clearly 12:11:03PM
4 sets out the fact that judicial decisions are a 12:11:07PM
5 subsidiary mean for the determination of rules of 12:11:10PM
6 law. So states, not Tribunals, create customs, 12:11:13PM
7 and awards can only be relied on to the extent 12:11:17PM
8 that they provide appropriate evidence of such 12:11:20PM
9 custom. 12:11:23PM
10 As special representer Michael 12:11:24PM
11 Wood notes in his third report: 12:11:31PM
12 "The weight to be given 12:11:33PM
13 to such a decision will 12:11:34PM
14 depend on the 12:11:35PM
15 authoritative nature, 12:11:36PM
16 stature of the Court 12:11:38PM
17 which has rendered the 12:11:39PM
18 decision as well as the 12:11:40PM
19 quality of the 12:11:41PM
20 reasoning." 12:11:43PM
21 The Tribunal has asked how, in 12:11:44PM
22 practice, customary international law has been 12:11:47PM
23 properly proved to the satisfaction of Tribunals 12:11:50PM
24 in past cases. 12:11:53PM
25 One recent example of this is 12:11:54PM

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1 in the Jurisdictional Immunities Case where the 12:11:57PM
2 ICJ recognized the rule of state immunity at 12:12:02PM
3 customary international law and did so 12:12:06PM
4 specifically by making reference to an extensive 12:12:08PM
5 survey of state practice that was done by the ILC 12:12:10PM
6 and to national legislation, judicial decisions, 12:12:14PM
7 and assertions of the right to immunity and the 12:12:18PM
8 comments of States on what became the United 12:12:21PM
9 Nations. 12:12:26PM
10 The Court went on to examine 12:12:26PM
11 whether there was an exception -- exceptions to 12:12:30PM
12 state immunity and concluded that Italy had failed 12:12:33PM
13 to meet its burden of proving these exceptions. 12:12:36PM
14 So I will return in a minute 12:12:40PM
15 to why the arbitral awards cited by the Claimants, 12:12:43PM
16 such as Waste Management and Mobil, do not 12:12:47PM
17 establish or confirm the existence of a rule of 12:12:50PM
18 law related to frustration of legitimate 12:12:53PM
19 expectations. 12:12:56PM
20 But let me quickly deal with 12:12:57PM
21 the Claimant's second error, which is to try to 12:13:03PM
22 refer to the content of the standalone FET 12:13:06PM
23 provisions and BITs to establish the content of 12:13:10PM
24 custom. 12:13:15PM
25 The Tribunal has asked whether 12:13:16PM

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1 The Court in Diallo also 12:14:38PM
2 considered specifically the issues of whether BITs 12:14:43PM
3 could establish a new rule of customary 12:14:45PM
4 international law, and in that case it referred to 12:14:50PM
5 the fact that BITs allow for a corporation, 12:14:52PM
6 incorporated locally but owned by foreign 12:14:58PM
7 nationals, to sue the whole state. 12:15:01PM
8 The Court rejected this and 12:15:03PM
9 noted the fact that such propositions are often 12:15:04PM
10 included in BITs is not sufficient, and in the 12:15:07PM
11 words of the Court: 12:15:11PM
12 "It could equally show 12:15:12PM
13 the contrary." 12:15:13PM
14 Professor Dunberry in his soon 12:15:14PM
15 to be published book on the formation and 12:15:20PM
16 identification of rules of customary international 12:15:22PM
17 law in investment law specifically considered this 12:15:24PM
18 question, and he concluded that the FET standards 12:15:28PM
19 and BITs had not transformed into a customary 12:15:33PM
20 rule. 12:15:37PM
21 And he cites a number of 12:15:37PM
22 reasons, including the fact that FET provisions 12:15:38PM
23 are not uniform; they're worded differently; and 12:15:41PM
24 the practice of states outside of this treaty is 12:15:46PM
25 not to recognize -- is, in fact, to reject the 12:15:48PM

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1 these BITs are relevant to determining the meaning 12:13:19PM
2 of the minimum standard of treatment, and Canada's 12:13:22PM
3 position is that they are not. Mr. Terry, in his 12:13:25PM
4 opening remarks, seems to be backing away from 12:13:29PM
5 this proposition, but has put forward an 12:13:31PM
6 interpretation of the standard that is really 12:13:35PM
7 equivalent and more appropriate in the case of an 12:13:37PM
8 autonomous FET provision. 12:13:40PM
9 Now, for BITs to establish new 12:13:42PM
10 rule of custom and -- it would require something 12:13:46PM
11 more significant than the sheer number of 12:13:52PM
12 treaties. So it's true that treaties can 12:13:54PM
13 contribute to the crystallization or development 12:13:57PM
14 of a rule, but certain requirements must be met. 12:14:00PM
15 And there is certainly no presumption that just 12:14:03PM
16 the number of BITs would do so. 12:14:05PM
17 I would refer to the ICJ case 12:14:07PM
18 in the North Sea Continental Shelf where the Court 12:14:12PM
19 referred to the elements that are required for 12:14:17PM
20 treaties to result in a new rule of custom. 12:14:19PM
21 The provision must be of a 12:14:23PM
22 fundamentally norm-creating character. State 12:14:27PM
23 practice should be extensive and virtually 12:14:30PM
24 uniform, and the practice must show a general 12:14:33PM
25 recognition that a legal obligation is involved. 12:14:36PM

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1 application of this broader standard. And, 12:15:51PM
2 indeed, the NAFTA parties have done so. 12:15:57PM
3 As the Cargill Tribunal noted 12:16:02PM
4 in its analysis of Article 1105, such clauses -- 12:16:05PM
5 referring to the autonomous FET provisions were 12:16:08PM
6 adopted precisely because they set a standard 12:16:11PM
7 other than that required by custom. 12:16:13PM
8 So for these reasons, as the 12:16:15PM
9 Glamis Tribunal stated, arbitral awards under 12:16:20PM
10 these other treaties cannot serve to identify and 12:16:20PM
11 don't provide any guidance in determining the 12:16:26PM
12 contents of Article 1105. 12:16:28PM
13 Now, let me just briefly go 12:16:30PM
14 through some of the standards asserted by the 12:16:34PM
15 Claimant to show why they are not a proper basis 12:16:37PM
16 against which to consider Canada's conduct. 12:16:40PM
17 On discrimination, I will just 12:16:43PM
18 say that Canada, as set out in our pleadings, does 12:16:46PM
19 not believe that there is a general rule of custom 12:16:52PM
20 preventing host states from providing different 12:16:55PM
21 treatment to foreign investors, and, in the case 12:16:57PM
22 of NAFTA, the rule on discrimination is set out in 12:16:59PM
23 Articles 1102 and 1103. 12:17:04PM
24 The Claimant has also alleged 12:17:06PM
25 that failure to meet an investor's legitimate 12:17:09PM

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1 expectation can be a breach of Article 1105, and, 12:17:11PM
2 in fact, it seems much of the case is based on 12:17:15PM
3 that proposition. 12:17:17PM
4 In Canada's view, there is 12:17:18PM
5 simply no general obligation under custom to -- to 12:17:22PM
6 guarantee or protect these expectations nor is 12:17:27PM
7 there any obligation not to change the applicable 12:17:32PM
8 regulatory framework. 12:17:34PM
9 Now, while some professors and 12:17:35PM
10 arbitrators like Professor Walde may believe that 12:17:40PM
11 this is a desirable standard, if it is not 12:17:42PM
12 accepted by law or by state, and by most states, 12:17:47PM
13 virtually uniform practice, this cannot become 12:17:51PM
14 custom. 12:17:54PM
15 The NAFTA parties and several 12:17:54PM
16 other states have confirmed that no such 12:17:55PM
17 obligations exists, and, in fact, I will refer to 12:17:58PM
18 the TPP text which clearly establishes that. In 12:18:01PM
19 fact legitimate expectations are not part of 12:18:11PM
20 custom, and they are not found in most domestic 12:18:14PM
21 legal regimes, and many countries only offer some 12:18:18PM
22 protection for legitimate expectation in the 12:18:22PM
23 context of procedural rights. 12:18:24PM
24 The Tribunal has asked whether 12:18:27PM
25 a breach of contract or a violation of domestic 12:18:31PM

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1 law could amount to a breach of Article 1105, and 12:18:34PM
2 I will simply say that, notwithstanding how the 12:18:39PM
3 Claimant tries to characterize the legality of the 12:18:42PM
4 measure by using terms like "abrupt repudiation of 12:18:44PM
5 the legal framework," a breach of the legal 12:18:47PM
6 standard under domestic law is not a breach of 12:18:51PM
7 minimum standard of treatment. Otherwise it would 12:18:54PM
8 turn this Tribunal into a Court of Appeal or 12:18:56PM
9 judicial review. 12:18:59PM
10 And the Claimants here have 12:19:00PM
11 not even sought -- contrary to some Canadian 12:19:03PM
12 companies, they have not sought recourse to 12:19:05PM
13 Canadian courts to have a judicial review of this 12:19:08PM
14 decision. So the Tribunal should not engage in 12:19:11PM
15 this inquiry. 12:19:14PM
16 So let me just conclude by 12:19:16PM
17 recalling that the Tribunal's role is really 12:19:18PM
18 limited to considering the applicable legal 12:19:21PM
19 framework that I have set out, and my colleague 12:19:23PM
20 Mr. Neufeld, after the break, will explain why, 12:19:27PM
21 applying this legal framework, the Tribunal should 12:19:29PM
22 reject the Claimant's case, and thank you for your 12:19:32PM
23 time this morning. 12:19:36PM
24 PRESIDENT: Thank you, 12:19:37PM
25 Ms. Tabet. There are some questions from the 12:19:38PM

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1 members of the Tribunal, if you don't mind. 12:19:43PM
2 QUESTIONS FROM THE TRIBUNAL: 12:19:48PM
3 MR. BISHOP: Could I take you 12:19:48PM
4 back for a moment to the burden of proof issue? 12:19:48PM
5 Your position -- and I have 12:19:51PM
6 certainly seen it in -- in various NAFTA cases -- 12:19:55PM
7 is that it's the Claimant's burden to prove what 12:19:59PM
8 the custom is for purposes of the minimum 12:20:03PM
9 standard. 12:20:07PM
10 But there's no disagreement 12:20:07PM
11 that there is a minimum standard of treatment as 12:20:12PM
12 part of customary international law; correct? 12:20:16PM
13 MS. TABEL: Certainly Canada 12:20:21PM
14 does not disagree with that. 12:20:22PM
15 MR. BISHOP: Yeah. And so the 12:20:24PM
16 question is: What is the content of that minimum 12:20:25PM
17 standard? What -- what does it mean? 12:20:27PM
18 MS. TABEL: Yes. 12:20:28PM
19 MR. BISHOP: In that -- in 12:20:29PM
20 this situation, where there is no question that 12:20:33PM
21 there is a customary international law standard 12:20:36PM
22 and there is a difference as to what the standard 12:20:40PM
23 is, when the two parties disagree about what the 12:20:42PM
24 standard is and each of them makes an assertion as 12:20:48PM
25 to what the standard is, isn't there a burden on 12:20:52PM

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1 both of them, under international law, to prove 12:20:55PM
2 what is the standard that they are asserting, 12:21:00PM
3 particularly where there is no doubt that there is 12:21:05PM
4 such a standard, just a question as to what it is? 12:21:07PM
5 MS. TABEL: Well, if I take 12:21:11PM
6 you back to my comment about the minimum standard 12:21:12PM
7 treatment being an umbrella concept, that itself 12:21:15PM
8 includes different rules of custom. It is the 12:21:18PM
9 Claimant that is alleging the brief of certain 12:21:22PM
10 rules of custom. And in order to establish those 12:21:24PM
11 rules of custom, the Claimant must establish that 12:21:26PM
12 they are part of custom, and, therefore, that 12:21:30PM
13 there is the two required elements. 12:21:32PM
14 And Canada is not asserting or 12:21:35PM
15 alleging that there is any particular rule at 12:21:38PM
16 issue here, and in that case, it is not Canada's 12:21:43PM
17 burden to establish the content. 12:21:47PM
18 MR. BISHOP: So then is it 12:21:55PM
19 open to us to determine that neither party has 12:21:57PM
20 proved what the contents of the minimum standard 12:22:02PM
21 of treatment is and to bring back a decision that 12:22:07PM
22 the law is unclear? Is that within our realm, or 12:22:12PM
23 is that something that would be frowned upon by 12:22:17PM
24 both parties? 12:22:22PM
25 MS. TABEL: I think the UNCTAD 12:22:23PM

1 2012 report actually makes that kind of a 12:22:27PM
 2 statement that it is a highly imprecise standard, 12:22:31PM
 3 but there are clear rules that are part of it 12:22:33PM
 4 that, if you go back even to the Amidor reports in 12:22:36PM
 5 the -- in 1959, at that time, certain of the rules 12:22:40PM
 6 were more or less clear. But over time, I think 12:22:43PM
 7 they have become clearer, like denial of justice, 12:22:46PM
 8 like compensation for expropriation. 12:22:50PM
 9 So certainly there is no 12:22:53PM
 10 question that there are some rules that have 12:22:55PM
 11 crystallized as part of that standard, physical 12:22:57PM
 12 full protection and security. 12:23:00PM
 13 The question is, going beyond 12:23:01PM
 14 these rules that everybody agree are part of the 12:23:03PM
 15 standard, what -- what else is there? 12:23:06PM
 16 And if the Claimant alleges 12:23:08PM
 17 that there is more, such as legitimate 12:23:11PM
 18 expectation, that is certainly beyond what most 12:23:14PM
 19 states recognize are part of the standard, and the 12:23:19PM
 20 Claimant would have to positively establish that 12:23:20PM
 21 the rules are part of the standard. 12:23:23PM
 22 MR. BISHOP: Just one more 12:23:26PM
 23 question in that regard. You say that everyone 12:23:27PM
 24 agrees that certain things are part of the 12:23:31PM
 25 standard. 12:23:33PM

1 applicable laws, we're certainly of the view that 12:24:53PM
 2 these things are not part of customs. 12:24:56PM
 3 So we have not gone through 12:24:58PM
 4 the trouble of establishing that, you know, 12:25:00PM
 5 anything else is part of custom. It would be a 12:25:02PM
 6 bit irrelevant to the case before you today. 12:25:04PM
 7 And you don't have to 12:25:07PM
 8 pronounce on what, in the abstract, is part of the 12:25:09PM
 9 standard as part of your role. You have to 12:25:12PM
 10 consider what are the allegations? Here. And are 12:25:14PM
 11 things like legitimate expectations or this vague 12:25:18PM
 12 notion of arbitrariness that the Claimant has put 12:25:21PM
 13 forward -- what is the content of these rules? 12:25:24PM
 14 Have they been established as part of customary 12:25:27PM
 15 international law? And to what -- what is the 12:25:30PM
 16 content of the rule and custom? 12:25:31PM
 17 MR. BISHOP: Thank you. 12:25:34PM
 18 DR. CREMADES: Well, I will 12:25:38PM
 19 ask you just a concrete question. I mean, the 12:25:39PM
 20 problem is the expectations. Where do we find the 12:25:42PM
 21 opinio juris? 12:25:47PM
 22 MS. TABEL: Yes. Well, where 12:25:49PM
 23 would you find opinio juris? Because, as I said, 12:25:51PM
 24 I think most states don't recognize the doctrine. 12:25:55PM
 25 It has been introduced into 12:25:59PM

1 And certainly there's 12:23:35PM
 2 international case law out there that asserts 12:23:38PM
 3 certain things are part of the standard. I don't 12:23:43PM
 4 think there is any doubt about that. 12:23:46PM
 5 But you have made the point 12:23:47PM
 6 that, to prove a custom, it's not sufficient to 12:23:50PM
 7 simply cite the case law, although both parties 12:23:54PM
 8 clearly do, and as everyone does, but that you 12:23:58PM
 9 have to prove what is general state practice and 12:24:01PM
 10 opinio juris. And you don't try, in the course of 12:24:05PM
 11 your submissions, to prove what state practice is 12:24:11PM
 12 or opinio juris on any of the issues that you say 12:24:15PM
 13 are agreed. 12:24:19PM
 14 Where do we find the agreement 12:24:20PM
 15 and, thus, where do we find evidence what is 12:24:23PM
 16 customary international law on the minimum 12:24:26PM
 17 standard? 12:24:29PM
 18 MS. TABEL: Well, to be 12:24:30PM
 19 honest, Canada has not done so in this case, 12:24:32PM
 20 because none of the standards that we believe are 12:24:34PM
 21 agreed as part of the standard are at issue here. 12:24:38PM
 22 So, you know, when it comes to legitimate 12:24:42PM
 23 expectation or the -- what is called abrupt 12:24:43PM
 24 repudiation of the legal framework, which seems to 12:24:48PM
 25 be allowing the government to change the 12:24:51PM

1 international investment law by -- it seems like 12:26:02PM
 2 it has been introduced by Professor Walde and has 12:26:06PM
 3 been certainly repeated in a number of arbitral 12:26:10PM
 4 awards relying on that comment by Professor Walde. 12:26:13PM
 5 But, you know, if you look at 12:26:17PM
 6 most domestic legislations, they don't contain a 12:26:19PM
 7 substantive protection for a legitimate 12:26:22PM
 8 expectation. Sometimes, in some legal systems, 12:26:26PM
 9 there is such a concept in the content -- sorry, 12:26:27PM
 10 in the context of procedural rights, but it's 12:26:31PM
 11 often limited to that. 12:26:37PM
 12 So it can't be that states 12:26:38PM
 13 believe they have an obligation to protect 12:26:40PM
 14 investors' expectations at large. They certainly 12:26:41PM
 15 don't -- have not adopted domestic legislation 12:26:45PM
 16 pursuant to that sense of international 12:26:49PM
 17 obligation, sorry. 12:26:51PM
 18 And when you look at it in the 12:26:57PM
 19 broader context, for example, international law 12:26:59PM
 20 does not recognize that a violation of contract, 12:27:02PM
 21 even, is a breach of minimum standard of 12:27:05PM
 22 treatment. And in that context, there is 12:27:08PM
 23 certainly -- you could assert that there is an 12:27:12PM
 24 expectation, if it's a contract between the State 12:27:13PM
 25 and the investor, that the terms of the contract 12:27:16PM

1 would be met. But most international lawyers will 12:27:19PM
2 reject the notion that a breach of contract is 12:27:22PM
3 automatically a breach of legitimate expectation. 12:27:24PM
4 So this idea of trying to 12:27:28PM
5 introduce the standard as something, a protection 12:27:30PM
6 from legitimate expectations where there is -- as 12:27:33PM
7 -- as a -- a concept to, by which investors who 12:27:37PM
8 rely on general statements of politicians are now 12:27:40PM
9 compensated for every deception that they incur or 12:27:44PM
10 disappointment that they incur is really not 12:27:49PM
11 reflective of what states believe they have 12:27:51PM
12 committed to. 12:27:54PM
13 DR. CREMADES: Thank you. 12:27:57PM
14 PRESIDENT: On the same 12:27:58PM
15 subject, would decisions of domestic courts 12:28:01PM
16 relating to protection of property be relevant in 12:28:04PM
17 establishing or relevant as evidence of a state 12:28:09PM
18 practice in relation to protection of foreign 12:28:13PM
19 investment? 12:28:22PM
20 MS. TABEL: Generally, yes, in 12:28:23PM
21 the sense that, to the extent that all domestic 12:28:33PM
22 legislation or virtually all domestic legislation 12:28:37PM
23 provided certain types of protection for foreign 12:28:41PM
24 property would certainly be a relevant factor. 12:28:44PM
25 Now, I'm not quite sure I 12:28:48PM

1 The Claimant alleges that two 01:31:31PM
2 measures happened, the deferral and the failure to 01:31:35PM
3 lift the deferral or otherwise insulate the 01:31:36PM
4 Claimant from it. 01:31:39PM
5 The date of the first measure 01:31:39PM
6 is clear. It's February 11, 2011. However, this 01:31:42PM
7 date is irrelevant for the second measure. A 01:31:48PM
8 deferral lasting only a day could not amount to an 01:31:52PM
9 expropriation or a breach of national treatment. 01:31:54PM
10 It's no wonder the Claimant hasn't even attempted 01:31:58PM
11 to value a one-day deferral for the sake of its 01:32:00PM
12 damages claim. It's only the failure to lift the 01:32:04PM
13 deferral or insulate the Claimant from its effects 01:32:06PM
14 after some meaningful point in time that could 01:32:09PM
15 breach these three articles. 01:32:13PM
16 For an expropriation to have 01:32:15PM
17 occurred requires a substantial deprivation, and 01:32:18PM
18 by the Claimant's own admission, its investments 01:32:21PM
19 became substantially worthless, not on February 01:32:25PM
20 11, 2011, but on the date that it was no longer 01:32:28PM
21 possible to finance its project. That date, 01:32:31PM
22 according to the Claimant is May 22, 2012. 01:32:33PM
23 Indeed, had the deferral been 01:32:36PM
24 lifted prior to this date or had the Claimant been 01:32:40PM
25 insulated from its effects, the Claimant's view is 01:32:43PM

1 fully understood your question, so perhaps there 12:28:52PM
2 is something more that I'm missing 12:28:54PM
3 PRESIDENT: There is perhaps 12:28:56PM
4 more It goes to the question of the relationship 12:28:56PM
5 between the concepts of investment and property, 12:29:00PM
6 but perhaps this is an issue to which the Tribunal 12:29:03PM
7 will revert in the coming days There will be an 12:29:06PM
8 opportunity to address this issue in the closing 12:29:10PM
9 statements 12:29:13PM
10 MS TABEL: Okay Thank you 12:29:13PM
11 PRESIDENT: Okay Thank you 12:29:14PM
12 very much We will break for one hour, and we 12:29:15PM
13 will continue at 1:30 p m 12:29:18PM
14 --- Luncheon recess at 12:29 p m 12:29:23PM
15 --- Upon resuming at 1:30 p m 01:30:21PM
16 PRESIDENT: Mr Neufeld, we 01:30:23PM
17 are ready to go on, please 01:30:58PM
18 CONTINUED OPENING STATEMENT BY MR NEUFELD: 01:31:03PM
19 MR NEUFELD: Good afternoon 01:31:03PM
20 I will now apply the law that 01:31:14PM
21 Ms Tabet presented in the morning to the facts of 01:31:18PM
22 the dispute, starting with one of the most 01:31:21PM
23 important questions that you have asked, namely, 01:31:24PM
24 what's the precise event that constituted the 01:31:25PM
25 alleged breach? When did it occur? 01:31:28PM

1 that it would not have been harmed, as such, prior 01:32:45PM
2 to this date, there could have been no 01:32:48PM
3 expropriation. 01:32:51PM
4 The same holds true for the 01:32:51PM
5 Claimant's Article 1102 and 1103 claims. The 01:32:53PM
6 claimant has not alleged that the mere 01:32:57PM
7 implementation of the deferral constitutes a 01:33:00PM
8 breach of either of these articles. According to 01:33:02PM
9 the Claimant, it's only the failure to treat the 01:33:05PM
10 Claimant like TransCanada or Samsung after the 01:33:09PM
11 deferral that leads to the alleged discriminatory 01:33:11PM
12 treatment. 01:33:14PM
13 Therefore, the only NAFTA 01:33:14PM
14 article that the deferral allegedly breached in 01:33:16PM
15 and of itself is article 1105. Let's turn to that 01:33:19PM
16 claim now. 01:33:22PM
17 The conduct complained of does 01:33:23PM
18 not come close to breaching Article 1105. The 01:33:28PM
19 decision to defer offshore wind development was a 01:33:31PM
20 policy decision that the government took after 01:33:34PM
21 balancing relevant considerations. It was based 01:33:37PM
22 principally on the need to provide the time to 01:33:40PM
23 finalize a regulatory framework and was in no way 01:33:41PM
24 manifestly arbitrary. 01:33:45PM
25 There was a suggestion this 01:33:47PM

1 morning that our -- our defence has somehow 01:33:48PM
 2 morphed in this regard. It hasn't. We have 01:33:52PM
 3 always said that the decision was based on the 01:33:54PM
 4 need to finalize a regulatory framework. 01:33:56PM
 5 In the face of Canada's 01:33:58PM
 6 argument, the Claimant clings to its scatter gun 01:34:00PM
 7 of allegations that the deferral was arbitrary, 01:34:04PM
 8 taken in bad faith, grossly unfair, contrary to 01:34:07PM
 9 its expectations and discriminatory. And not only 01:34:10PM
 10 do these allegations lack a legal basis, as 01:34:13PM
 11 Ms. Tabet has pointed out, they're also 01:34:16PM
 12 unsupported by the facts. 01:34:19PM
 13 It's worth pausing here on the 01:34:20PM
 14 matter of legitimate expectations. Our pleadings 01:34:23PM
 15 show clearly that the Claimant was well aware of 01:34:26PM
 16 the regulatory uncertainty surrounding offshore 01:34:28PM
 17 wind development, but that's a matter I'll come 01:34:31PM
 18 back to with respect to Article 1110. As 01:34:34PM
 19 Ms. Tabet pointed out, an investor's expectations 01:34:37PM
 20 impose no obligations on a state under the minimum 01:34:39PM
 21 standard of treatment. 01:34:42PM
 22 And all three NAFTA parties 01:34:43PM
 23 have made that clear. Therefore, the Claimant's 01:34:46PM
 24 reliance on public statements of alleged 01:34:48PM
 25 inducement cannot amount to a breach of Article 01:34:51PM

1 because MOE had not yet established prescriptive 01:36:13PM
 2 rules and requirements. 01:36:17PM
 3 The regulation provided for 01:36:19PM
 4 clear, upfront rules for onshore wind, solar 01:36:21PM
 5 power, and bioenergy, but not for offshore wind. 01:36:28PM
 6 No specific prescriptions were included. In fact, 01:36:33PM
 7 the decision notice explicitly stated that MOE and 01:36:40PM
 8 MNR continue to work on a coordinated approach to 01:36:44PM
 9 offshore wind facilities, which made clear that 01:36:48PM
 10 the REA process for offshore wind was unfinished; 01:36:51PM
 11 changes were coming. In that sense, the deferral 01:36:54PM
 12 wasn't a repudiation of a functioning policy 01:36:58PM
 13 framework on offshore wind since the only thing it 01:37:01PM
 14 could have repudiated, to use the words of the 01:37:04PM
 15 Claimant's expert, Mr. Roeper, are rules that had 01:37:07PM
 16 yet to be written. 01:37:09PM
 17 You have asked whether the 01:37:11PM
 18 moratorium decision was made for environmental 01:37:13PM
 19 reasons. Yes, it was. The evidence demonstrates 01:37:17PM
 20 that the regulatory framework contained a 01:37:22PM
 21 placeholder for offshore wind. The government was 01:37:25PM
 22 transparent about the fact that the regulatory 01:37:29PM
 23 framework was still being developed and that 01:37:32PM
 24 further changes were on the horizon. Again, my 01:37:35PM
 25 friend recognized this in the morning when he 01:37:38PM

1 1105. 01:34:55PM
 2 The Claimant also argues that 01:34:55PM
 3 the deferral violates Article 1105 because it's 01:34:57PM
 4 arbitrary or grossly unfair, and it abruptly 01:35:01PM
 5 repudiates the applicable regulatory framework. 01:35:05PM
 6 Again, as Ms. Tabet pointed, out the Claimant is 01:35:09PM
 7 incorrect on the law here too because Article 1105 01:35:11PM
 8 was never meant to be a guarantee against 01:35:15PM
 9 regulatory change, but again the Claimant's 01:35:17PM
 10 position is not defensible on the facts either. 01:35:18PM
 11 As the 2009 decision notice 01:35:22PM
 12 for the REA regulation made clear, the new 01:35:26PM
 13 regulation would operate through transparent, 01:35:30PM
 14 clear, upfront provincial rules, unlike before. 01:35:32PM
 15 The REA requires the regulator to decide in 01:35:37PM
 16 advance what criteria proponents have to fulfil. 01:35:41PM
 17 It communicates those requirements and evaluates a 01:35:46PM
 18 proponent's application against the standards 01:35:48PM
 19 specified in those rules. 01:35:51PM
 20 However, when the REA 01:35:53PM
 21 regulation was adopted, as Dr. Wallace has 01:35:56PM
 22 explained, it included a placeholder for the yet 01:35:58PM
 23 to be adopted technology-specific rules on 01:36:02PM
 24 offshore wind. The requirements were left 01:36:06PM
 25 intentionally broad, non-specific, and descriptive 01:36:09PM

1 recognized the review that MNR was -- the policy 01:37:41PM
 2 review that MNR was undertaking on site release. 01:37:44PM
 3 And, third, the steps were 01:37:48PM
 4 taken to develop the specific rules, which, in 01:37:49PM
 5 turn, raised the issue of uncertainty, scientific 01:37:51PM
 6 uncertainty. 01:37:55PM
 7 Fourth, the government 01:37:55PM
 8 determined that it needed more time to undertake 01:37:57PM
 9 research to develop an adequately informed policy 01:37:59PM
 10 framework. 01:38:02PM
 11 So, in sum, the evidence 01:38:03PM
 12 demonstrates that the decision was anything but 01:38:06PM
 13 arbitrary. 01:38:08PM
 14 Consider, for example, the 01:38:10PM
 15 MOE's discussion paper that accompanied the EBR 01:38:13PM
 16 policy proposal of June 25, 2010. It begins -- it 01:38:16PM
 17 begins with a process to come up with the 01:38:21PM
 18 requirements. It's entitled, "Offshore Wind 01:38:22PM
 19 Facilities, Renewable Energy Approval 01:38:26PM
 20 Requirements." And it poses a minimum shoreline 01:38:28PM
 21 exclusion zone 5 kilometres from the water's edge. 01:38:31PM
 22 MOE proposed a 5-kilometre setback in the belief 01:38:35PM
 23 that it would address the concerns around near 01:38:38PM
 24 shore activities, including drinking water, noise, 01:38:40PM
 25 both traffic and tourism, and habitat for fish, 01:38:45PM

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1 animals, and birds. 01:38:49PM
2 It also calls for 01:38:50PM
3 shipping-related exclusionaries, and it states 01:38:53PM
4 that, once fully developed, once fully developed, 01:38:55PM
5 the proposed policy and associated regulatory 01:38:59PM
6 amendments will be the subject of future -- a 01:39:01PM
7 future posting that will outline requirements for 01:39:04PM
8 offshore wind developments as proposed amendments 01:39:07PM
9 to the REA process. 01:39:09PM
10 Throughout the summer of 2010, 01:39:12PM
11 MOE held technical workshops with subject matter 01:39:15PM
12 experts on noise, on water quality and sediment 01:39:18PM
13 management, and technical and safety standards to 01:39:20PM
14 learn more about offshore wind. These workshops 01:39:23PM
15 made clear that the science was insufficient to 01:39:26PM
16 determine whether a 5-kilometre setback would be 01:39:28PM
17 sufficient, sufficient -- a sufficient minimum 01:39:31PM
18 setback. The experts advised that further 01:39:34PM
19 research was needed, and it would take years. 01:39:37PM
20 At the same time, the 1,400 01:39:40PM
21 responses to the posting -- and this is an 01:39:45PM
22 unprecedented number in MOE's experience -- they 01:39:47PM
23 made clear that the public was very concerned 01:39:50PM
24 about offshore wind development which reinforced 01:39:53PM
25 the need to adopt rules that were scientifically 01:39:55PM

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1 based and clearly justifiable. 01:39:58PM
2 But this wasn't just a matter 01:40:00PM
3 of concern for the Ontario public. How to 01:40:05PM
4 regulate offshore wind was a matter across -- was 01:40:09PM
5 a matter of concern across the Great Lakes. The 01:40:13PM
6 jurisdictional review that MOE conducted in the 01:40:15PM
7 summer of 2010 showed that U.S. States were 01:40:17PM
8 considering even larger setbacks and that they 01:40:20PM
9 didn't have established regulatory requirements 01:40:22PM
10 for Ontario to draw from. 01:40:24PM
11 The council of Great Lakes 01:40:26PM
12 research managers was particularly concerned. 01:40:30PM
13 This council is the principal adviser on research 01:40:33PM
14 to the International Joint Commission of the 1972 01:40:35PM
15 U.S./Canada Great Lakes Water Quality Agreement. 01:40:38PM
16 It flagged the disparate regulatory schemes in the 01:40:42PM
17 region that created an atmosphere of disarray and 01:40:46PM
18 uncertainty. 01:40:50PM
19 And on September 20, 2010, the 01:40:50PM
20 council urged the commission to open a dialogue 01:40:53PM
21 between the various Great Lakes governments to 01:40:57PM
22 stimulate more foundational research, coordination 01:41:01PM
23 and planning on offshore wind development as it 01:41:04PM
24 applies to the waters of the Great Lakes. 01:41:07PM
25 The council emphasized the 01:41:10PM

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1 critical importance of consistent, informed, 01:41:13PM
2 research-based decision-making to address the 01:41:15PM
3 environmental impacts of wind farms based on sound 01:41:17PM
4 science. 01:41:22PM
5 So in January 2011, the 01:41:22PM
6 question remained whether the 5-kilometre setback 01:41:24PM
7 would be sufficient to address noise, water 01:41:27PM
8 quality concerns, ecological concerns mand the 01:41:30PM
9 answer from the jurisdictional scan and the answer 01:41:33PM
10 from the experts was that they couldn't be sure 01:41:35PM
11 until further research was conducted. 01:41:38PM
12 Therefore, the question has 01:41:41PM
13 never been whether wind projects can be 01:41:43PM
14 scientifically justified, but whether the 01:41:47PM
15 Government of Ontario had the science to adopt and 01:41:51PM
16 back up the rules necessary to approve offshore 01:41:54PM
17 wind facilities. 01:41:57PM
18 Despite all of the evidence, 01:41:58PM
19 according to the Claimant, environmental concerns 01:42:03PM
20 were nothing but a pretext. It argues that the 01:42:06PM
21 real reason to adopt the moratorium was MEI's 01:42:09PM
22 realization that offshore wind energy was 01:42:12PM
23 expensive and not needed. It suggests that MEI 01:42:15PM
24 proposed to slow down wind development through the 01:42:18PM
25 pretext of needing more research, and it argues 01:42:21PM

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1 that MEI came up with the pretext, not MOE. 01:42:24PM
2 The Claimant spins this 01:42:27PM
3 complicated tale through its skewed interpretation 01:42:28PM
4 of a handful of notes and e-mails, while at the 01:42:31PM
5 same time ignoring the vast quantity of evidence 01:42:34PM
6 disproving its theory. 01:42:37PM
7 In particular, it relies on 01:42:39PM
8 two sets of documents related to MEI. The first, 01:42:41PM
9 a set of four documents, one-line e-mails and 01:42:45PM
10 handwritten notes, suggesting to slow down 01:42:47PM
11 offshore wind or buy time because the energy was 01:42:51PM
12 no longer needed. 01:42:54PM
13 Now, put in context, these 01:42:55PM
14 documents are innocuous. It should come as no 01:42:57PM
15 surprise that MEI, the Ministry charged with 01:43:00PM
16 overseeing the province's electricity needs, would 01:43:02PM
17 provide its policy input on the matter, 01:43:05PM
18 particularly when it was working on a long-term 01:43:09PM
19 energy plan. 01:43:12PM
20 We're going to have to go to a 01:43:12PM
21 confidential session for the next five minutes or 01:43:16PM
22 so to deal with the second set of documents. 01:43:17PM
23 --- CONFIDENTIAL BEGIN 01:43:24PM
24 MR. NEUFELD: Now, MOE's 01:43:24PM
25 expert workshops had already concluded in July and 01:43:25PM

1 courts have considered this very issue. In 01:47:47PM
 2 response to an argument that a Canadian offshore 01:47:51PM
 3 wind developer raised, by the name of Trillium, 01:47:54PM
 4 that the deferral was based on political and 01:47:59PM
 5 electoral expediency rather than on science, the 01:48:02PM
 6 Court of Appeal, the Ontario Court of Appeal, held 01:48:05PM
 7 that, even if true, even if this were true, this 01:48:07PM
 8 might make the decision debatable, but not 01:48:12PM
 9 irrational. 01:48:14PM
 10 It also held that a core 01:48:15PM
 11 policy decision made by the executive based on 01:48:18PM
 12 political considerations or electoral expediency 01:48:21PM
 13 does not, on its own, constitute bad faith, and it 01:48:25PM
 14 added: 01:48:29PM
 15 "There is nothing 01:48:31PM
 16 unlawful in the nature 01:48:31PM
 17 of -- or in the nature of 01:48:33PM
 18 bad faith about a 01:48:34PM
 19 government taking into 01:48:35PM
 20 account public response 01:48:37PM
 21 to a policy matter and 01:48:38PM
 22 reacting accordingly. 01:48:39PM
 23 That's what governments 01:48:41PM
 24 do in pursuit of their 01:48:43PM
 25 political and partisan 01:48:45PM

1 goals in a democratic 01:48:46PM
 2 society." 01:48:48PM
 3 The only thing I would add in 01:48:49PM
 4 the context of your question is that a decision 01:48:52PM
 5 may be based on reason even if it's completely 01:48:56PM
 6 divorced from the publicly-stated rationale. 01:48:59PM
 7 Whether a government is communicating in good 01:49:02PM
 8 faith is a different question than whether it was 01:49:04PM
 9 acting in good faith when it made that decision. 01:49:06PM
 10 And as the Court of Appeal 01:49:09PM
 11 said, for the decision to be taken in bad faith, 01:49:10PM
 12 the officer must have deliberately engaged in 01:49:13PM
 13 conduct that he or she knows to be inconsistent 01:49:17PM
 14 with the obligations of the office. 01:49:20PM
 15 Now, ratepayer concerns, 01:49:22PM
 16 energy supply and demand considerations, and 01:49:24PM
 17 responding to public pressure are -- these are all 01:49:26PM
 18 legitimate public policy concerns. Heeding these 01:49:30PM
 19 considerations does not violate a rule of 01:49:33PM
 20 customary international law. 01:49:37PM
 21 As Ms. Tabet pointed out this 01:49:37PM
 22 morning, customary international law prohibits 01:49:40PM
 23 manifestly arbitrary or unfair treatment, meaning, 01:49:42PM
 24 treatment that is devoid of any legitimate 01:49:46PM
 25 rationale. A decision based on legitimate public 01:49:49PM

1 policy considerations but communicated to the 01:49:52PM
 2 public for other reasons would not necessarily 01:49:55PM
 3 show a manifest arbitrariness. And even if the 01:49:58PM
 4 communication lacked good faith, what harm could 01:50:03PM
 5 have flowed to the Claimant based on the 01:50:06PM
 6 communication as opposed to the actual decision to 01:50:08PM
 7 defer? 01:50:10PM
 8 But in the end, none of that 01:50:13PM
 9 matters. None of that matters in this case 01:50:15PM
 10 because the decision was based on the 01:50:16PM
 11 publicly-stated rationale as former Minister 01:50:20PM
 12 Wilkinson has testified. When he asked his 01:50:24PM
 13 officials whether a 5-kilometre setback would be 01:50:25PM
 14 sufficient to address his water quality concerns, 01:50:29PM
 15 they did not know. 01:50:32PM
 16 In his words: 01:50:33PM
 17 "Ultimately, I did not 01:50:33PM
 18 feel we could resolve my 01:50:35PM
 19 concerns around offshore 01:50:38PM
 20 wind development through 01:50:39PM
 21 the regulatory process as 01:50:40PM
 22 things stood. As a 01:50:41PM
 23 result, rather than 01:50:43PM
 24 moving forward with 01:50:44PM
 25 regulatory amendments to 01:50:45PM

1 establish rules and 01:50:46PM
 2 requirements without 01:50:47PM
 3 scientific foundation, I 01:50:49PM
 4 thought it best to wait 01:50:50PM
 5 until sufficient research 01:50:51PM
 6 had been conducted to 01:50:52PM
 7 allow a science-based 01:50:54PM
 8 approach that was 01:50:55PM
 9 protective of human 01:50:56PM
 10 health and the 01:50:58PM
 11 environment." 01:51:00PM
 12 Ultimately, there is no 01:51:00PM
 13 evidence to suggest that the government's decision 01:51:03PM
 14 was manifestly arbitrary. Having decided that a 01:51:05PM
 15 deferral was necessary, that left the government 01:51:09PM
 16 with the issue of whether it could and whether it 01:51:11PM
 17 should take any measures to protect the Claimant 01:51:14PM
 18 from the deferral's effects on the Claimant's FIT 01:51:17PM
 19 contract with the OPA. 01:51:20PM
 20 Before we turn to that second 01:51:21PM
 21 measure, I would like to remind the Tribunal of 01:51:24PM
 22 where the relation stood between the two 01:51:27PM
 23 contractual counterparties at this time, the OPA 01:51:29PM
 24 and the -- and the Claimant. 01:51:31PM
 25 When the deferral was 01:51:32PM

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1 announced, the Claimant had entered into a 01:51:33PM
2 contract with a five-year deadline to reach 01:51:36PM
3 commercial operation, meaning by May 4, 2015. And 01:51:38PM
4 that contract was in force majeure. The Claimant 01:51:43PM
5 had written to the OPA in December 2010, and it 01:51:46PM
6 requested force majeure relief due to the 01:51:49PM
7 regulatory issues faced by MNR in particular and 01:51:51PM
8 the inability to get to its permitting. 01:51:54PM
9 Now, note here, based on your 01:51:56PM
10 question this morning about the REFO, the 01:51:58PM
11 renewable energy facilitation office, they didn't 01:52:00PM
12 request it based on actions or non-actions of 01:52:03PM
13 REFO. REFO is just a facilitative office. It's 01:52:06PM
14 not -- it -- they -- what they do is they point to 01:52:10PM
15 the finger -- point the finger to the regulatory 01:52:11PM
16 people that have to make the decisions in this 01:52:13PM
17 regard, and that's MNR and MOE. REFO was never 01:52:15PM
18 meant to be a permitting or approving office of 01:52:20PM
19 any kind. It was purely facilitative. And you 01:52:22PM
20 can find that at our rejoinder at 159, if you'd 01:52:25PM
21 like. 01:52:29PM
22 Now, the Claimant remained at 01:52:29PM
23 the initial stage of its Crown land site release 01:52:30PM
24 process. It had been unsuccessful in its request 01:52:34PM
25 to swap out its Crown land, unsuccessful in 01:52:36PM

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1 the measure did not interfere with the Claimant's 01:53:53PM
2 reasonable investment-backed expectations. 01:53:56PM
3 Now, the first issue of the 01:53:59PM
4 matter of right. The parties have spilled a lot 01:54:02PM
5 of ink over the matter of what is the investment 01:54:05PM
6 at issue in this case and whether it includes a 01:54:08PM
7 vested right. 01:54:10PM
8 The Claimant maintains -- and 01:54:11PM
9 you heard it again this morning -- that its 01:54:14PM
10 investment is not just the FIT contract. It's its 01:54:16PM
11 enterprise too. It's a project, which it, in 01:54:19PM
12 turns, defines as the enterprise's work product 01:54:21PM
13 and the data it has collected of MET Tower its 01:54:25PM
14 turbine sales agreements and land leases that it 01:54:28PM
15 has on the island. 01:54:30PM
16 Canada has never disputed that 01:54:31PM
17 the Claimant has made an investment. But there is 01:54:33PM
18 a difference between making an investment and 01:54:36PM
19 making an investment that is capable of 01:54:38PM
20 expropriation. 01:54:40PM
21 And the Claimant is mistaken 01:54:41PM
22 in thinking that for the purpose of making this 01:54:45PM
23 case -- its case it can establish that it made an 01:54:48PM
24 investment through the incorporation of an 01:54:50PM
25 enterprise or the acquisition of data or releases, 01:54:53PM

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1 getting the approval to set up a MET tower to 01:52:39PM
2 conduct wind testing, and it hadn't begun its 01:52:43PM
3 permitting work. So by February 11, 2011, it was 01:52:43PM
4 six and a half months into a five-year deadline, 01:52:43PM
5 and it used up two and a half months of its force 01:52:52PM
6 majeure time. 01:52:54PM
7 Now, this brings us to the 01:52:55PM
8 second measure: the alleged failure to insulate 01:52:56PM
9 the Claimant from the effects of the deferral, as 01:52:59PM
10 I noted at the outset, the Claimant argues that 01:53:03PM
11 this measure constitutes a breach of the minimum 01:53:06PM
12 standard of treatment as well as other provisions, 01:53:08PM
13 including expropriation. So before we delve into 01:53:11PM
14 the facts, it's worth recapping what the legal 01:53:15PM
15 test is under Article 1110. 01:53:18PM
16 As Ms. Tabet has made clear, 01:53:20PM
17 Article 1110 analysis starts with an identification 01:53:29PM
18 of the right that was taken. I will address this 01:53:32PM
19 matter first before turning to the economic impact 01:53:36PM
20 of the measure. I will then address the 01:53:38PM
21 temporariness of the measure, but not the fact 01:53:42PM
22 that the project has no value. I will leave that 01:53:44PM
23 to Mr. Spelliscy who can contend with that in the 01:53:46PM
24 -- when he talks about damages. 01:53:49PM
25 Finally, I will explain why 01:53:50PM

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1 and somehow that's what makes the revenue stream 01:54:55PM
2 under its FIT contract an investment capable of 01:54:58PM
3 expropriation. 01:55:01PM
4 Besides, the only asset that 01:55:02PM
5 the Claimant has valued for the purposes of 01:55:05PM
6 assessing his damages is the FIT contract or, more 01:55:07PM
7 specifically, the right to a guaranteed revenue 01:55:10PM
8 stream that the contract supposedly offers. 01:55:13PM
9 The Claimant has abandoned 01:55:16PM
10 claims to anything else. It has adduced no 01:55:18PM
11 evidence whatsoever to value its enterprise or 01:55:21PM
12 other assets. Its argument this morning, again, 01:55:23PM
13 mentioned the enterprise and the project, but it 01:55:26PM
14 stressed the importance of that FIT contract and 01:55:29PM
15 the 20-year -- the 20-year fixed term guarantee 01:55:32PM
16 that it provided. 01:55:35PM
17 So let's call a spade a spade. 01:55:36PM
18 The only investment at issue here is the revenue 01:55:39PM
19 stream under the FIT contract which is both 01:55:42PM
20 incapable of being expropriated on account of it 01:55:45PM
21 being highly speculative and contingent and has 01:55:49PM
22 also been proven to have no value. 01:55:52PM
23 To answer your question about 01:55:55PM
24 whether the FIT contract gave the Claimant a 01:55:56PM
25 vested or special right of any kind, what it 01:55:59PM

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1 certainly did not grant was the right to a revenue 01:56:02PM
2 stream. What the Claimant had was an opportunity, 01:56:04PM
3 an opportunity to develop a project, not a right. 01:56:08PM
4 And the opportunity turned on 01:56:11PM
5 the terms of the FIT contract. In particular, 01:56:14PM
6 section 2.4(b) of the contract requires: 01:56:16PM
7 "The submission of a 01:56:20PM
8 completed REA and all 01:56:21PM
9 other necessary permits 01:56:22PM
10 before constructing a 01:56:24PM
11 facility." 01:56:25PM
12 Which Section 2.6 includes as 01:56:26PM
13 a requirement that must be met prior to the 01:56:30PM
14 Claimant's Milestone Commercial Operation Date. 01:56:35PM
15 As Mr. Cecchini explains -- 01:56:35PM
16 this is the OPA witness: 01:56:39PM
17 "It is the responsibility 01:56:43PM
18 of each FIT applicant to 01:56:44PM
19 decide, based on the 01:56:45PM
20 existing regulatory 01:56:46PM
21 framework, whether it is 01:56:48PM
22 able to comply with the 01:56:49PM
23 terms of the FIT 01:56:50PM
24 contract, including the 01:56:51PM
25 requirement to bring 01:56:52PM

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1 their project into 01:56:54PM
2 commercial operation. 01:56:55PM
3 Public statements of 01:56:56PM
4 government officials do 01:56:58PM
5 not create rights and 01:56:59PM
6 obligations and whatever 01:57:00PM
7 former Minister 01:57:02PM
8 Smitherman or other 01:57:03PM
9 officials pronounced did 01:57:04PM
10 not alter the terms of 01:57:06PM
11 that FIT contract." 01:57:07PM
12 Likewise, Windstream didn't 01:57:13PM
13 have a vested right to have its permits issued in 01:57:14PM
14 its favour, and it didn't have a right to the 01:57:17PM
15 consummation of the project. 01:57:19PM
16 The FIT contract creates no 01:57:21PM
17 such right, nor do public statements of officials. 01:57:24PM
18 For example, consider the Minister's direction to 01:57:28PM
19 the OPA to develop a FIT program. It states 01:57:31PM
20 clearly that proponents would be subject to all 01:57:35PM
21 laws and regulations of the Province of Ontario 01:57:37PM
22 and the Government of Canada, while the 01:57:39PM
23 accompanying press release said that proponents 01:57:42PM
24 had to navigate through the regulatory approvals. 01:57:45PM
25 Obtaining a FIT contract does 01:57:47PM

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1 not make it any more likely that a project will be 01:57:50PM
2 permitted. Or that it will reach commercial 01:57:52PM
3 operation. According to the contract, it's the 01:57:57PM
4 proponent's obligation to obtain them. 01:58:00PM
5 And as Perry Cecchini makes 01:58:03PM
6 clear: 01:58:06PM
7 "The OPA assumes no risk 01:58:07PM
8 in this regard." 01:58:09PM
9 Now, numerous regulatory 01:58:11PM
10 approvals were required at both the provincial and 01:58:13PM
11 the federal levels. So even if the Claimant had 01:58:15PM
12 mistakenly understood that the province would 01:58:19PM
13 smooth its way through the provincial permitting, 01:58:21PM
14 it still had to obtain all the necessary federal 01:58:24PM
15 permits and approvals. These include fisheries 01:58:26PM
16 and species at risk permits as well as navigable 01:58:31PM
17 waters permit for both its offshore site and the 01:58:33PM
18 changes it would need to make to its manufacturing 01:58:36PM
19 facility and its port. 01:58:38PM
20 Key among the approvals is the 01:58:39PM
21 REA, of course, at the provincial level, which 01:58:42PM
22 Ms. Dumais explains, is not a mere rubber stamp, 01:58:45PM
23 as she states and the Claimant's expert, Sarah 01:58:48PM
24 Powell, agrees there's no guarantee that an 01:58:51PM
25 applicant will receive a REA for its proposed 01:58:53PM

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1 energy project, and there is precedent for MOE 01:58:56PM
2 refusing to issue an REA. The process is 01:58:59PM
3 rigorous. It can be lengthy, and the approval is 01:59:02PM
4 often subject to conditions on a project's 01:59:05PM
5 construction or operation, particularly, 01:59:07PM
6 particularly, for a first-of-a-kind project. The 01:59:09PM
7 Claimant's expert Sarah Powell agrees that the REA 01:59:14PM
8 regulation does not establish a right to an REA. 01:59:17PM
9 Another important but separate 01:59:20PM
10 permitting process would eventually determine 01:59:23PM
11 whether the Claimant could get access to its Crown 01:59:25PM
12 land. The Claimant remained at the earliest stage 01:59:28PM
13 of that process, the site verification stage. As 01:59:32PM
14 Ms. Lawrence explains, even if the Claimant had 01:59:36PM
15 moved on to become the applicant of record for 01:59:38PM
16 that site, a process that would normally take more 01:59:40PM
17 than two years, such status still did not entitle 01:59:43PM
18 it to an expedited or predetermined process. In 01:59:46PM
19 her words: 01:59:49PM
20 "The process provides no 01:59:50PM
21 guarantees about timing 01:59:52PM
22 of Crown land permits and 01:59:53PM
23 approvals." 01:59:54PM
24 Moreover, site release, which 01:59:55PM
25 the Claimant has not yet obtained, does not permit 01:59:58PM

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1 development. It merely awards the opportunity to 02:00:02PM
2 proceed to the permitting stages and apply for the 02:00:04PM
3 necessary approvals to develop a wind facility. 02:00:09PM
4 Now, the Claimant's expert 02:00:12PM
5 Sarah Powell agrees with us too. She attests that 02:00:15PM
6 developers face an inherent risk in the Crown land 02:00:18PM
7 tenure process. Developers of any project on 02:00:21PM
8 Crown land are subject to this regulatory risk. 02:00:23PM
9 The question of rights 02:00:25PM
10 bestowed by permits can be a tricky one, but in 02:00:28PM
11 this case, the Claimant hadn't even applied for 02:00:31PM
12 its permits, so there is no question that it had 02:00:34PM
13 no right to them. And, likewise, no right to the 02:00:36PM
14 consummation of its project. Ontario never raised 02:00:39PM
15 any specific objections to any environmental 02:00:43PM
16 aspects of the Claimant's project, but given that 02:00:46PM
17 the Claimant had not applied for any permits, this 02:00:49PM
18 isn't surprising. 02:00:53PM
19 As Ms. Tabet pointed out, 02:00:53PM
20 NAFTA does not provide a legal basis for 02:00:56PM
21 compensation where no legal right to consummation 02:00:58PM
22 of the project is vested. 02:01:01PM
23 And as the Emmis Tribunal 02:01:02PM
24 held, the question for the purposes of an 02:01:05PM
25 expropriation claim is whether the contractual 02:01:09PM

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1 right -- the contractual rights that were 02:01:11PM
2 allegedly taken amounted to actual property 02:01:13PM
3 interests or assets held by the Claimant. 02:01:16PM
4 It's only if the right 02:01:19PM
5 conferred by the contract gives rise to an asset 02:01:21PM
6 owned by the Claimant to which value can be 02:01:25PM
7 ascribed that it is capable of giving rise to a 02:01:27PM
8 claim of expropriation. 02:01:30PM
9 That is simply not true of the 02:01:31PM
10 Claimant's FIT contract. Without a project site 02:01:34PM
11 and without the means of getting its project 02:01:37PM
12 permitted, the Claimant didn't have a right to 02:01:40PM
13 anything. In the words of the Merrill & Ring 02:01:42PM
14 Tribunal, the Claimant -- oh, sorry, the FIT 02:01:45PM
15 contract didn't confer an actual and demonstrable 02:01:48PM
16 entitlement to a certain benefit. 02:01:51PM
17 NAFTA Chapter 11 is not an 02:01:56PM
18 insurance policy for investors in their 02:01:58PM
19 contractual dealings with state enterprises. It 02:02:00PM
20 imposes no obligation on NAFTA parties where a 02:02:03PM
21 right has not vested. 02:02:05PM
22 When an investor applies for, 02:02:06PM
23 and enters into a contract with a third party, for 02:02:09PM
24 an industry for which the rules have yet to be 02:02:12PM
25 written, and that contract imposes strict 02:02:14PM

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1 conditions on permitting and aggressive timelines 02:02:16PM
2 for commercial operation, it is especially wrong 02:02:19PM
3 for the Claimant to turn to NAFTA as its insurance 02:02:22PM
4 policy. 02:02:25PM
5 I would like to turn now to 02:02:26PM
6 the question of whether the deferral is temporary 02:02:29PM
7 or a permanent measure. 02:02:31PM
8 The reason that the Claimant 02:02:33PM
9 wasn't cancelled along with other FIT and Crown 02:02:35PM
10 land applicants on February 11, 2011 is because 02:02:38PM
11 the OPA was willing to preserve its opportunity to 02:02:40PM
12 pursue a contract. This was made clear in the 02:02:44PM
13 conference call immediately preceding the February 02:02:47PM
14 11 announcement. As the Claimant's lobbyists 02:02:50PM
15 summed up, the OPA offered to place the Claimant's 02:02:54PM
16 FIT contract on hold until the province can 02:02:56PM
17 establish the rules necessary for the MOE to 02:02:59PM
18 assess its project under the REA regulation. 02:03:01PM
19 The OPA didn't want the 02:03:04PM
20 Claimant's project to fail because the -- because 02:03:06PM
21 of government's lack of readiness to approve it. 02:03:09PM
22 It was prepared to wait five years for the 02:03:13PM
23 approval framework to be finalized as long as the 02:03:16PM
24 Claimant was also prepared to wait. 02:03:19PM
25 And as Mr. Cecchini has 02:03:20PM

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1 stated, the OPA would speak to Windstream about 02:03:23PM
2 contractual amendments that would freeze the FIT 02:03:25PM
3 contract during the deferral. Specifically, it 02:03:28PM
4 was willing to discuss three aspects: security, 02:03:31PM
5 force majeure, and termination rights associated 02:03:34PM
6 with force majeure. 02:03:36PM
7 But instead of negotiating a 02:03:37PM
8 solution around these provisions, the Claimant 02:03:38PM
9 insisted on contract amendments that would not 02:03:40PM
10 just have frozen the contract; it would have 02:03:43PM
11 rewritten it. In particular, it insisted on the 02:03:46PM
12 right to perpetual force majeure, the return of 02:03:48PM
13 its security deposit in its entirety, and other 02:03:51PM
14 demands, including domestic content requirements 02:03:55PM
15 and restrictions on assignments. They wanted 02:03:57PM
16 those to be waived. 02:04:00PM
17 In response, the OPA reminded 02:04:00PM
18 the Claimant that it wasn't in a position to grant 02:04:02PM
19 these unreasonable requests. So the Claimant's 02:04:05PM
20 contract remains in force majeure to this day. 02:04:09PM
21 This is the legal status of the contract. Well, 02:04:12PM
22 the legal status of other assets of its project, 02:04:14PM
23 including the Windstream Wolfe Island Shoals 02:04:17PM
24 enterprise and study and leases they remain 02:04:22PM
25 unaffected. 02:04:23PM

1 From the government's point of 02:04:24PM
 2 view, nothing prevents the Claimant from going 02:04:25PM
 3 through the Crown land site release process and 02:04:27PM
 4 from applying for a REA once the policy framework 02:04:29PM
 5 is finally in place. However, as the Claimant has 02:04:32PM
 6 indicated, it's no longer in a position to secure 02:04:34PM
 7 financing, which makes moving forward impossible. 02:04:37PM
 8 Now, the Claimant only has 02:04:40PM
 9 itself to blame in this regard. In its reply, it 02:04:42PM
 10 admits to having declined the OPA's offer of a 02:04:44PM
 11 five-year freeze, arguing that it shouldn't be 02:04:47PM
 12 faulted for doing so because the government never 02:04:50PM
 13 intended to conduct the science necessary to put 02:04:52PM
 14 in place the framework for offshore wind 02:04:55PM
 15 development within five years. Its allegation is 02:04:57PM
 16 baseless. 02:05:00PM
 17 There is absolutely no 02:05:01PM
 18 documentary evidence to support its premise in 02:05:02PM
 19 contrast to all the evidence that shows the 02:05:05PM
 20 efforts made by the Government of Ontario to 02:05:07PM
 21 undertake the necessary scientific research in 02:05:09PM
 22 collaboration with its southern neighbours. 02:05:11PM
 23 I will come back to that 02:05:13PM
 24 evidence in a moment, but in terms of the 02:05:15PM
 25 Claimant's decision to decline the offer, its 02:05:16PM

1 decision must be assessed at the time it was made, 02:05:18PM
 2 not retrospectively five years later, as my friend 02:05:22PM
 3 now asks you to do. 02:05:25PM
 4 The fact is that the Claimant 02:05:26PM
 5 was not satisfied with the offer of a freeze. It 02:05:27PM
 6 responded to the OPA's offer with totally 02:05:31PM
 7 unreasonable demands, which demonstrate what the 02:05:33PM
 8 Claimant wanted all along: the right to have the 02:05:35PM
 9 option to develop a project on its own terms, on 02:05:37PM
 10 its own timeline, rather than the terms stipulated 02:05:40PM
 11 in the standard form FIT contract. They wanted to 02:05:44PM
 12 dump its deal, and it wanted something different, 02:05:47PM
 13 something better. 02:05:50PM
 14 Not only has the Claimant not 02:05:51PM
 15 proven this measure -- that this measure has 02:05:54PM
 16 breached a rule of customary international law or 02:05:57PM
 17 expropriation, the fact is that any negotiated 02:05:59PM
 18 solution to put the Claimant's project on hold 02:06:01PM
 19 depended on the Claimant to negotiate within the 02:06:03PM
 20 parameters that have been set. It was simply not 02:06:06PM
 21 willing to do that. 02:06:08PM
 22 You have asked what the status 02:06:09PM
 23 is of the scientific research projects necessary 02:06:13PM
 24 for a decision on moving forward with offshore 02:06:16PM
 25 wind projects. 02:06:18PM

1 You will recall that the 02:06:20PM
 2 deferral was adopted following three signals, and 02:06:26PM
 3 the public response to the policy proposal, work 02:06:28PM
 4 undertaken within the Ministries, including on 02:06:30PM
 5 noise and drinking water and the various 02:06:33PM
 6 communications from U.S. governments and 02:06:36PM
 7 international bodies. 02:06:38PM
 8 These signals, which it must 02:06:39PM
 9 be said, highlighted the international -- or the 02:06:41PM
 10 collaboration that needed to happen with the 02:06:43PM
 11 federal government as well as U.S. government. It 02:06:45PM
 12 started in the summer of 2010. And became 02:06:48PM
 13 stronger throughout the fall. 02:06:51PM
 14 I am going to have to flip to 02:06:52PM
 15 confidential session for a second again. 02:06:54PM
 16 --- CONFIDENTIAL BEGIN 02:06:59PM
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 MS. NETTLETON: One moment, 02:07:04PM
 21 the photographer, sorry, could you step out 02:07:05PM
 22 please? It's confidential. You just missed that. 02:07:07PM
 23 Thanks. 02:07:12PM
 24 --- Photographer steps outside hearing room. 02:07:15PM
 25 [REDACTED]

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 4 [REDACTED]
 5 [REDACTED]
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6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
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16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] 02:10:49PM
8 Now, we can resume the public 02:10:50PM
9 feed again. 02:10:51PM
10 --- CONFIDENTIAL END 02:10:54PM
11 MR. NEUFELD: And with respect 02:10:54PM
12 to drinking water quality, Minister Wilkinson's 02:10:54PM
13 concerns were partially addressed in an internal 02:10:57PM
14 study on water quality impacts within Lake Ontario 02:10:59PM
15 and near shore. 02:11:02PM
16 The literature review, 02:11:03PM
17 fieldwork, and modelling were conducted, and a 02:11:05PM
18 report provided a preliminary conclusion in 02:11:07PM
19 December 2012 that, in Lake Ontario at least, any 02:11:09PM
20 impacts from construction of an offshore wind 02:11:13PM
21 turbine would likely be quite small. Similar 02:11:16PM
22 studies would have to be conducted in other Great 02:11:19PM
23 Lakes. 02:11:19PM
24 Ontario's not planning to 02:11:23PM
25 commence further scientific studies in the near 02:11:25PM

1 term to address areas initially set out in its 02:11:28PM
2 earlier plans. However, it should not be faulted 02:11:31PM
3 for not prioritizing this work. Given the 02:11:33PM
4 Claimant's decision not to freeze its FIT 02:11:36PM
5 contract, no project will be proceeding in the 02:11:40PM
6 near future. By the Claimant's own admission, its 02:11:42PM
7 project failed as of May 2012. So any science 02:11:47PM
8 that Ontario undertook after this point is 02:11:50PM
9 irrelevant to the Claimant's ability to develop 02:11:53PM
10 its project. 02:11:55PM
11 That said, once the noise and 02:11:56PM
12 decommissioning studies are completed, Ontario 02:12:00PM
13 will analyze the findings, look to see whether 02:12:02PM
14 there are any gaps, and determine whether any 02:12:05PM
15 study -- any further study is required. 02:12:07PM
16 And you've asked whether any 02:12:10PM
17 scientific research projects since 2011 have shown 02:12:11PM
18 whether offshore wind projects can be -- are 02:12:14PM
19 environmentally safe or sound. And the quick 02:12:17PM
20 answer to that is no. But, again keep, in mind 02:12:19PM
21 the purpose that Ontario is undertaking for the 02:12:21PM
22 studies was never to test whether the project 02:12:23PM
23 itself was sound, but whether it could adopt the 02:12:25PM
24 prescriptions, the rules necessary for its 02:12:28PM
25 approvals framework. 02:12:31PM

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1 Looking at the issue from this 02:12:32PM
2 perspective also answers your question at C.9 of 02:12:37PM
3 whether Ontario has any present intent with regard 02:12:43PM
4 to the future of the Windstream project. You see, 02:12:45PM
5 the issue has never been about Windstream and 02:12:48PM
6 always about the lack of provincial rules for 02:12:51PM
7 offshore wind. Once those rules are in place, MOE 02:12:54PM
8 will have the necessary benchmarks to approve any 02:12:58PM
9 project. 02:13:01PM
10 The fact that the Claimant's 02:13:01PM
11 project will not be able to proceed to permitting 02:13:03PM
12 is because the Claimant declined the opportunity 02:13:05PM
13 to have its contract frozen. 02:13:08PM
14 Lastly, I would like to spend 02:13:10PM
15 some time on one of the factors used to determine 02:13:13PM
16 whether there's been an indirect expropriation, 02:13:16PM
17 namely, the investor's reasonable 02:13:18PM
18 investment-backed expectations. 02:13:21PM
19 The questions you have posed 02:13:23PM
20 in Section A go to this issue, this issue of 02:13:25PM
21 inducement. In September 2009, the Minister of 02:13:28PM
22 Energy directed the OPA to develop a FIT program 02:13:33PM
23 to procure energy. We know that. And it was from 02:13:35PM
24 a wide source of -- of energy sources that 02:13:38PM
25 included wind, water, biomass, biogas, biofuel, 02:13:41PM

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1 He has since admits to having 02:15:02PM
2 overlooked the barriers presented by the 02:15:04PM
3 government's own regulatory structures. 02:15:06PM
4 It is those regulatory 02:15:08PM
5 structures that a reasonable investor would have 02:15:09PM
6 relied on in assessing whether it could bring a 02:15:12PM
7 FIT project to commercial operation, not the 02:15:15PM
8 general statements of the Energy Minister made 02:15:17PM
9 prior to their implementation. 02:15:19PM
10 Now, I could take you to 02:15:20PM
11 Minister Cansfield's statements as well in 2008 02:15:24PM
12 and 2009 as well as her letter. But I think you 02:15:27PM
13 can -- you can turn to our pleadings to -- to find 02:15:31PM
14 -- to find -- to find that these issues have been 02:15:35PM
15 fully briefed. Her first speech was made in 2008, 02:15:36PM
16 before the system was created. It specifically 02:15:39PM
17 referred to an environmental assessment that 02:15:42PM
18 needed to be done, not an REA. 02:15:45PM
19 Her second speech was purely 02:15:47PM
20 prospective. It called for greater clarity 02:15:49PM
21 upfront around permits because that's what -- 02:15:54PM
22 that's what investors need. That's where investor 02:15:59PM
23 confidence is created, when companies know exactly 02:16:00PM
24 what the rules are, as you said. Of course, this 02:16:02PM
25 was true for the onshore rules, just not for the 02:16:05PM

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1 solar energy, geothermal, tidal, the specific 02:13:46PM
2 rules on offshore, they weren't dealt with in that 02:13:49PM
3 Act. Define mention of offshore when you've had 02:13:51PM
4 to turn to the REA. 02:13:54PM
5 But when the MOE -- MOE 02:13:57PM
6 decided to adopt that regulation, it specifically 02:13:58PM
7 stated that MOE and MNR continue to work on a 02:14:00PM
8 collaborative approach to wind facilities. And, 02:14:03PM
9 some, while the framework legislation was aimed at 02:14:07PM
10 attracting investment, in any type of renewable 02:14:10PM
11 energy the message that the REA communicated was 02:14:13PM
12 the government was ready to receive applications 02:14:15PM
13 for onshore wind, solar, bioenergy, but it was 02:14:18PM
14 still working on the rules for offshore wind. 02:14:20PM
15 Former Minister Smitherman's 02:14:23PM
16 statements don't change that fact. They were made 02:14:26PM
17 in 2009, February 2009, before the REA was even 02:14:28PM
18 crafted and interestingly, they cite the words -- 02:14:32PM
19 his -- his statement cite the words "universal" or 02:14:36PM
20 province-wide setback. As we know, those setbacks 02:14:40PM
21 were never created for offshore wind. 02:14:43PM
22 And Mr. Smitherman's testimony 02:14:45PM
23 today doesn't change this fact. What is perhaps 02:14:47PM
24 most interesting for Mr. Smitherman is what he has 02:14:55PM
25 released after stepping down as Minister. 02:14:57PM

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1 offshore rules. 02:16:08PM
2 And -- and in her letter, as 02:16:09PM
3 well, what's most interesting about her letter to 02:16:13PM
4 every Crown land applicant is that it specifically 02:16:15PM
5 said that it did not grant any right to enter onto 02:16:18PM
6 Crown land. It does not constitute any 02:16:22PM
7 commitment, obligation, or approval. 02:16:25PM
8 But there is better evidence 02:16:27PM
9 than all that, that the Claimant was not, in fact, 02:16:28PM
10 induced by these statements. It's its own 02:16:31PM
11 contemporaneous view of whether it had a clear 02:16:33PM
12 path to regulatory approvals that clearly 02:16:36PM
13 indicates that it did not think so. Our Rejoinder 02:16:40PM
14 Memorial raises over 20 instances of 02:16:46PM
15 acknowledgment by the Claimant that it understood 02:16:47PM
16 the rules for offshore wind were not yet written 02:16:48PM
17 and that the Crown land site release process was 02:16:51PM
18 under review. 02:16:53PM
19 Prior to applying for a FIT 02:16:54PM
20 contract, the Claimant understood that the REA was 02:16:56PM
21 brand new. Yet it didn't even pick up the phone 02:16:58PM
22 to inquire with MOE about what it might 02:17:01PM
23 involve. And shortly after being offered a FIT 02:17:01PM
24 contract, its advisers and expert, warned that -- 02:17:01PM
25 Offshore permitting is a new area and lacks 02:17:11PM

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1 well-defined study criteria; that many of the 02:17:12PM
2 rules governing offshore projects have yet to be 02:17:15PM
3 written; and that we cannot assess the permitting 02:17:18PM
4 risk related to assigning the contract. 02:17:23PM
5 The Claimant hemmed and hawed 02:17:25PM
6 about entering into that contract, writing 02:17:29PM
7 multiple times that the OPA and the regulatory 02:17:29PM
8 agencies, and in own words, it: 02:17:32PM
9 "The uncertainty caused 02:17:34PM
10 by unknown setback 02:17:37PM
11 requirements on certainty 02:17:37PM
12 and site release and 02:17:38PM
13 uncertainty in the 02:17:38PM
14 detailed requirements of 02:17:39PM
15 the REA made it question 02:17:40PM
16 whether it should enter 02:17:42PM
17 into the contract." 02:17:43PM
18 It hired a government lobbyist 02:17:44PM
19 to try to solve these problems, and in the midst 02:17:46PM
20 of all this uncertainty, without having any 02:17:48PM
21 specific commitments back from the government that 02:17:52PM
22 this uncertainty had been resolved, it entered 02:17:54PM
23 into the FIT contract, advising its board shortly 02:17:58PM
24 after that the regulatory agencies still did not 02:18:01PM
25 have well-established guidelines for accessing 02:18:03PM

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1 control of offshore property rights available for 02:18:06PM
2 renewable energy projects, adding to the 02:18:08PM
3 uncertainty of the REA process. 02:18:11PM
4 In the face of all these 02:18:13PM
5 acknowledgements, it's impossible that the public 02:18:14PM
6 statements of the Ministers induce the Claimant to 02:18:17PM
7 enter into a FIT contract. As Canada has shown 02:18:20PM
8 and its Rejoinder Memorial, the Claimant knew it 02:18:23PM
9 did not have a clear regulatory path to develop 02:18:28PM
10 its project. 02:18:30PM
11 As my friend said this 02:18:30PM
12 morning, it anticipated that it would, but it 02:18:33PM
13 certainly knew that it didn't when it signed back 02:18:36PM
14 that FIT contract. To argue now it held a 02:18:38PM
15 different view is disingenuous. 02:18:41PM
16 The record shows that the 02:18:43PM
17 Claimant gambled, and its gamble was not based on 02:18:45PM
18 any government inducements, promises, or 02:18:49PM
19 commitments. It simply cannot argue that it was 02:18:51PM
20 promised the rules of its choice let alone the 02:18:54PM
21 timeline that it needed them. If that is what the 02:18:56PM
22 Claimant believed, then it was not a reasonable 02:18:59PM
23 investment-backed expectation. 02:19:01PM
24 I need one more minute to 02:19:10PM
25 address Article 1102, and then I'll turn things 02:19:12PM

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1 over to Mr. Spelliscy to address damages. 02:19:15PM
2 Above all, what the Claimant's 02:19:17PM
3 national treatment case shows is that it didn't 02:19:19PM
4 want to be treated like any other offshore wind 02:19:22PM
5 proponent. It wanted much better treatment. It 02:19:25PM
6 wanted the treatment that was accorded to 02:19:28PM
7 TransCanada's project, a gas-fired energy plant. 02:19:30PM
8 TransCanada operated outside 02:19:33PM
9 the FIT program, and understandably so because it 02:19:35PM
10 wasn't a renewable energy producer. Its Power 02:19:39PM
11 Purchase Agreement was entered into under totally 02:19:42PM
12 different procurement program. Its project was 02:19:44PM
13 not subject to the renewable energy approvals 02:19:46PM
14 process, again, because it was a gas plant. 02:19:49PM
15 It operated under a separate 02:19:50PM
16 legal framework and in completely different 02:19:53PM
17 commercial realities. Its circumstances were 02:19:55PM
18 nothing like the Claimant's. In contrast, there 02:19:57PM
19 are offshore winds operators operating in -- or, 02:20:00PM
20 sorry, comparators, operating in much more similar 02:20:04PM
21 circumstances such as those other wind projects 02:20:06PM
22 that applied to the OPA's FIT program and that had 02:20:08PM
23 Crown land. 02:20:11PM
24 But the Claimant chooses to 02:20:11PM
25 ignore them because it knows that it received more 02:20:13PM

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1 favourable treatment than they did. Their Crown 02:20:16PM
2 land applications were cancelled whereas the 02:20:19PM
3 Claimant's were not. The Claimant doesn't attempt 02:20:21PM
4 to show that there was any nationality-based 02:20:24PM
5 discrimination because it simply can't. 02:20:27PM
6 It was not accorded treatment 02:20:29PM
7 in like circumstances with TransCanada. Rather, 02:20:30PM
8 it was -- it received different treatment. Those 02:20:33PM
9 are their exact words this morning, "different 02:20:37PM
10 treatment." As Ms. Tabet made clear, different 02:20:39PM
11 treatment does not amount to a breach of Article 02:20:41PM
12 1102. 02:20:43PM
13 In conclusion, the 02:20:44PM
14 government's decision to defer offshore wind 02:20:46PM
15 development and its alleged failure not to direct 02:20:48PM
16 the OPA to accept the Claimant's demands do not 02:20:50PM
17 amount to a violation of NAFTA Chapter 11. 02:20:54PM
18 Neither decision is discriminatory, expropriatory, 02:20:57PM
19 or contrary to the minimum standard of treatment 02:21:01PM
20 at customary international law. Thank you. 02:21:04PM
21 PRESIDENT: Thank you, 02:21:09PM
22 Mr. Neufeld. 02:21:10PM
23 Mr. Spelliscy? 02:21:11PM
24 OPENING STATEMENT BY MR. SPELLISCY: 02:21:14PM
25 MR. SPELLISCY: Thank you, 02:21:14PM

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1 Mr. Neufeld, Ms. Tabet, and good afternoon, 02:21:28PM
2 members of the Tribunal. 02:21:30PM
3 As Mr. Neufeld noted, my task 02:21:30PM
4 today is to give you some context for the 02:21:35PM
5 information that will be offered to you over the 02:21:38PM
6 course of the next couple of weeks on one 02:21:39PM
7 particular topic: What economic damage, if any, 02:21:41PM
8 was caused to the Claimant's investments by the 02:21:46PM
9 measures the Claimant alleges breach NAFTA? That 02:21:48PM
10 is, after all, the fundamental question that must 02:21:52PM
11 be answered in any damages analysis: Did the 02:21:55PM
12 breaching measures cause the loss? 02:21:58PM
13 We see that reflected in 02:22:02PM
14 Articles 1116(1) and 1117(1) of the NAFTA, which 02:22:05PM
15 state that: 02:22:08PM
16 "A claim may be submitted 02:22:08PM
17 to arbitration only if 02:22:09PM
18 there is a breach of a 02:22:11PM
19 relevant obligation and 02:22:12PM
20 the investor has incurred 02:22:15PM
21 loss or damage by reason 02:22:16PM
22 of or arising out of that 02:22:17PM
23 breach." 02:22:20PM
24 We see the notion also 02:22:20PM
25 reflected in the decisions of other tribunals. 02:22:22PM

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1 Canadian in damages. That's a lot of money, 02:23:38PM
2 especially considering that the Claimant's 02:23:43PM
3 proposed project did not have a single turbine 02:23:45PM
4 installed, has never generated a single megawatt 02:23:48PM
5 of power and has never produced a single dollar of 02:23:52PM
6 revenue. 02:23:55PM
7 In fact, to even call it a 02:23:57PM
8 proposed measure or proposed project is generous. 02:23:59PM
9 Prior to the alleged breach, there was no site, no 02:24:02PM
10 permits, no financing, and no real plan. 02:24:06PM
11 So, in these circumstances, 02:24:10PM
12 the Claimant is asking that the Tribunal do 02:24:12PM
13 something unprecedented. The Claimant is asking 02:24:14PM
14 that this Tribunal award it the value of all of 02:24:17PM
15 the future lost profits that it believes it could 02:24:20PM
16 have earned with this venture, and it is asking 02:24:23PM
17 this Tribunal to do so despite the fact that it 02:24:26PM
18 only ever invested a minimal amount in the project 02:24:29PM
19 itself. 02:24:32PM
20 The Claimant is asking that 02:24:33PM
21 this Tribunal speculate that it could have brought 02:24:36PM
22 this project into operation. As all Tribunal -- 02:24:38PM
23 previous tribunals have, this Tribunal should also 02:24:43PM
24 reject that invitation to speculation. As aptly 02:24:47PM
25 put by the exit Tribunal in the case of PSEG v.

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1 For example, the Tribunal in Biwater Gauff in 02:22:25PM
2 Tanzania refused to award any compensation for an 02:22:30PM
3 identified breach, because the project was already 02:22:32PM
4 valueless by the time of the breaching measure, 02:22:35PM
5 and, thus, there was no causation. 02:22:38PM
6 As that Tribunal explained, 02:22:41PM
7 compensation for any violation of the BIT, whether 02:22:43PM
8 in the context of unlawful expropriation or the 02:22:47PM
9 breach of any other treaty standard, will only be 02:22:50PM
10 due if there is a sufficient causal link between 02:22:53PM
11 the actual breach of the BIT and the loss 02:22:56PM
12 sustained. 02:22:59PM
13 Now, in this case, the 02:23:00PM
14 Claimant's request for damages is far from clear. 02:23:05PM
15 They provide ranges of hundreds of millions of 02:23:07PM
16 dollars, and this I would suggest is evidence in 02:23:10PM
17 and of itself of just how speculative their claims 02:23:12PM
18 are. They can't even pin it down to a reasonable 02:23:16PM
19 range. 02:23:18PM
20 If one takes the midpoints of 02:23:18PM
21 these massive ranges, at least as they appear in 02:23:20PM
22 the Deloitte reply report, it appears that the 02:23:23PM
23 Claimant is alleging that it suffered losses of 02:23:26PM
24 \$225 million plus interest plus a tax gross-up 02:23:29PM
25 plus sunk costs for a total of around \$361 million 02:23:35PM

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1 Turkey, tribunals are reluctant to award profits 02:24:56PM
2 for beginning industry and unperformed work. 02:24:58PM
3 What I hope to be able to 02:25:03PM
4 offer you today is a simple way to understand why 02:25:04PM
5 there is such a general reluctance and, more 02:25:07PM
6 importantly, why you should refuse to award lost 02:25:10PM
7 profits in this case, whether through a DCF 02:25:12PM
8 methodology, as the Claimant suggests, or any 02:25:15PM
9 other methodology. 02:25:17PM
10 And as we proceed through the 02:25:17PM
11 rest of this morning, I'm going to be discussing 02:25:20PM
12 two different heads of damages. The Claimant has 02:25:21PM
13 made a claim for lost profits. 02:25:25PM
14 Now, earlier today, my 02:25:28PM
15 colleague Mr. Terry said that Windstream is not 02:25:29PM
16 claiming a right to build its project; that all 02:25:32PM
17 they are asking for is the ability to proceed 02:25:34PM
18 through the regulatory approval process. If that 02:25:37PM
19 is true, it is certainly not what they have valued 02:25:40PM
20 in their damages claim using a DCF analysis. They 02:25:43PM
21 are asking you to award the value of the future 02:25:47PM
22 lost profits this project could have earned, if it 02:25:49PM
23 had been built. But a claim for lost profits must 02:25:51PM
24 be grounded upon appropriate data which can be 02:25:55PM
25 known with a sufficient degree of certainty. 02:25:57PM

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1 There is no such certainty in this case. 02:26:00PM
2 The Claimant wants to focus on 02:26:04PM
3 the alleged certainty that the FIT contract, it 02:26:05PM
4 says, gave it. But as Mr. Neufeld has 02:26:08PM
5 highlighted, the FIT contract gave no certainty 02:26:12PM
6 that the project would be permitted, no certainty 02:26:15PM
7 that it could be built, no certainty regarding how 02:26:18PM
8 much it would cost, and no certainty of how much 02:26:21PM
9 the wind will blow. 02:26:23PM
10 The Claimant has to speculate 02:26:25PM
11 about all of this. The Claimant is also asked to 02:26:28PM
12 recover its sunk costs. However, it has failed to 02:26:33PM
13 prove the amount of the money that it actually 02:26:37PM
14 invested in the development of this project. An 02:26:38PM
15 audit done by Canada's experts was able to 02:26:42PM
16 substantiate and validate only one-tenth of the 02:26:44PM
17 amount the Claimant's claimed as actual 02:26:48PM
18 development costs. 02:26:50PM
19 And, moreover, there is no 02:26:51PM
20 evidence that it was the alleged breach that 02:26:53PM
21 resulted in the loss of any of the meager 02:26:56PM
22 investment that Windstream has made in Ontario to 02:26:58PM
23 date. 02:27:01PM
24 There is one simple 02:27:02PM
25 fundamental fact that I think allows all of us to 02:27:05PM

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1 reach the same conclusion here about the value of 02:27:08PM
2 this project regardless of whether we're talking 02:27:10PM
3 about lost profits or sunk costs. Projects fail, 02:27:13PM
4 especially when they are no more than the nascent 02:27:17PM
5 ideas forming in the heads of adventurous 02:27:20PM
6 entrepreneurs. 02:27:24PM
7 To understand this, we can 02:27:24PM
8 look to the conclusions in a presentation prepared 02:27:26PM
9 by General Electric for the World Bank regarding 02:27:28PM
10 the wind power industry. And we see that, for 02:27:31PM
11 wind projects, the reality is that most projects 02:27:33PM
12 fail. Almost all of them fail. For every 20 02:27:36PM
13 projects representing the hopes and dreams of 02:27:39PM
14 investors, half will fail because of a failure to 02:27:41PM
15 obtain the land required or because wind 02:27:44PM
16 measurements prove insufficient. Half of the 02:27:47PM
17 remaining ones will fail during the permitting 02:27:49PM
18 phases. Half of the remaining will then fail to 02:27:52PM
19 obtain financing. 02:27:55PM
20 In the end, some may even fail 02:27:56PM
21 during construction so that ultimately only 2 out 02:28:00PM
22 of every 20 conceptualized wind farms ever come 02:28:03PM
23 into operation. And this ratio of success to 02:28:07PM
24 failure includes onshore wind projects, which are 02:28:10PM
25 far more common and with respect to which there 02:28:13PM

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1 are far more experience. 02:28:17PM
2 For offshore wind projects, 02:28:18PM
3 the reality is even more difficult. There has yet 02:28:20PM
4 to be an offshore wind farm developed anywhere in 02:28:23PM
5 North America. 02:28:26PM
6 Now, I think we should pause 02:28:27PM
7 here for a minute or two to understand what it 02:28:30PM
8 means when I talk about project failure, because I 02:28:33PM
9 think doing so will make sure that you are able to 02:28:35PM
10 ask yourself the correct questions with respect to 02:28:37PM
11 much of the expert testimony you are going to 02:28:40PM
12 hear. 02:28:43PM
13 Over the course of the next 02:28:45PM
14 several days and weeks, I expect that you will 02:28:46PM
15 hear from Claimant's experts that there was, as 02:28:48PM
16 they call it, no material impediment to developing 02:28:51PM
17 the project. Now, if the question they are trying 02:28:54PM
18 to answer is, with time, money, resources, and an 02:28:58PM
19 ability to tolerate lengthy delays, unplanned 02:29:03PM
20 partial failures, and major setbacks, could 130 02:29:06PM
21 wind turbines be physically placed off the -- on 02:29:10PM
22 the shoals off Wolfe Island in Lake Ontario? Then 02:29:12PM
23 they might be right. But that is a completely 02:29:15PM
24 irrelevant question in this arbitration. 02:29:19PM
25 The Claimant did not have 02:29:21PM

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1 unlimited time. It did not have unlimited money 02:29:23PM
2 and resources. And it could not tolerate lengthy 02:29:26PM
3 delays. 02:29:29PM
4 Earlier today my colleague 02:29:29PM
5 Mr. Terry explained that, under the FIT program 02:29:32PM
6 and the FIT contract, a developer was obligated to 02:29:34PM
7 design, build, and operate a renewable generating 02:29:38PM
8 facility in exchange for the terms offered by the 02:29:40PM
9 OPA. That is true, but only partially true, 02:29:44PM
10 because the obligation was to design, build, and 02:29:48PM
11 bring the renewable generating facility into 02:29:51PM
12 operation in accordance with very specific 02:29:53PM
13 timelines, timelines which meant for Windstream 02:29:56PM
14 that everything had to work exactly as planned the 02:30:00PM
15 first time, every time. 02:30:04PM
16 And this point is important to 02:30:06PM
17 emphasize because the extreme sensitivity of this 02:30:08PM
18 project to even minor variations shows just how 02:30:10PM
19 speculative the whole enterprise was. Should any 02:30:13PM
20 number of small setbacks occur, there would not be 02:30:17PM
21 just a diminution in value. The project would 02:30:20PM
22 become worthless. 02:30:23PM
23 So let's take a little bit of 02:30:24PM
24 time to understand why those time pressures are so 02:30:28PM
25 important for Windstream. Under the FIT contract 02:30:31PM

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1 that the Claimant signed, if things went smoothly, 02:30:35PM
2 meaning that it did not suffer a force majeure 02:30:38PM
3 event, its Milestone Date for Commercial Operation 02:30:41PM
4 would be five years following its contract date. 02:30:43PM
5 Now, by signing the FIT 02:30:46PM
6 contract, a developer made a commitment to bring 02:30:49PM
7 its project into nearly complete operation by that 02:30:52PM
8 milestone date. If it breached that contractual 02:30:56PM
9 commitment, it was subject to penalties. And the 02:31:00PM
10 consequences for a continued breach of the 02:31:03PM
11 contract escalated until the project would fall 02:31:05PM
12 off the cliff 18 months after the milestone date 02:31:09PM
13 had passed. At that time, the breach would amount 02:31:12PM
14 to an event of supplier default, and you heard my 02:31:14PM
15 colleague Mr. Terry, talk about this. 02:31:17PM
16 If you look at Article 9 of 02:31:18PM
17 the FIT contract, after 18 months of missing your 02:31:20PM
18 Commercial Operation Date, the contract could be 02:31:24PM
19 unilaterally terminated by the OPA. 02:31:25PM
20 So let's look at the 02:31:28PM
21 Claimant's timeline specifically. Its FIT 02:31:31PM
22 contract had an effective date of May 4, 2010. 02:31:35PM
23 The Milestone Commercial Operation Date was, thus, 02:31:40PM
24 May 4th, 2015. We talked about this, this 02:31:43PM
25 morning. The supplier default date at which point 02:31:48PM

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1 information, but we can all see it, and we can 02:32:55PM
2 proceed on that basis. 02:32:58PM
3 After signing the FIT 02:32:59PM
4 contract, Mr. Baines writes to Windstream's board 02:33:04PM
5 of directors on August 30, 2010. And he writes of 02:33:08PM
6 a comprehensive project management plan for the 02:33:10PM
7 next eight-month period to set the priorities and 02:33:14PM
8 budget for this period. 02:33:17PM
9 He explains that adherence to 02:33:18PM
10 this plan is essential to achieve commercial 02:33:22PM
11 success with the project. Mr. Baines' plan 02:33:26PM
12 required the spending of substantial sums over 02:33:30PM
13 eight months and recommended a substantial amount 02:33:33PM
14 more. 02:33:36PM
15 Mr. Baines' plan identified 02:33:38PM
16 certain critical tasks, explaining that tasks 02:33:41PM
17 deemed critical must be initiated in September, 02:33:45PM
18 and, if delayed, the project is at high risk of 02:33:49PM
19 not being completed by COD. 02:33:53PM
20 Now, the task that needed to 02:33:57PM
21 be initiated included obtaining access to their 02:33:59PM
22 site and beginning numerous tests, studies, and 02:34:03PM
23 designs, including environmental field studies, 02:34:05PM
24 such as the minimum one-year field studies 02:34:09PM
25 required in support of project development, which 02:34:12PM

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1 the OPA could unilaterally terminate the 02:31:50PM
2 Claimant's FIT contract was, thus, November 4, 02:31:54PM
3 2016. 02:31:56PM
4 However, the Claimant didn't 02:31:57PM
5 sign its FIT contract in May of 2010. It waited 02:31:59PM
6 until August 20, 2010 to do so. And, as a result, 02:32:03PM
7 when it signed its FIT contract, it had just over 02:32:07PM
8 56 months, 60, 56 to bring the project into 02:32:10PM
9 operation before it would breach its contractual 02:32:13PM
10 obligations. 02:32:15PM
11 And at that time where were 02:32:17PM
12 they in their development process? In reality, 02:32:18PM
13 nowhere. They had achieved none of the milestones 02:32:22PM
14 required to proceed with their project. In fact, 02:32:25PM
15 the audit of the claims expenditures done by BRG 02:32:29PM
16 shows they had spent only a few hundred thousand 02:32:32PM
17 dollars. 02:32:38PM
18 And you will see on the screen 02:32:38PM
19 -- and I'm going to do it a couple times -- I'm 02:32:42PM
20 referring to a public version of the document 02:32:42PM
21 here, so there is no need to cut the confidential 02:32:44PM
22 feed, if the information is redacted. We're going 02:32:46PM
23 to do that for a little bit further. You have the 02:32:48PM
24 non-redacted versions in the paper copy in front 02:32:51PM
25 of you, so I won't refer to the confidential 02:32:53PM

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1 had to be started no later than February 2011. 02:34:15PM
2 And on this permitting side, 02:34:18PM
3 Mr. Baines states that: 02:34:22PM
4 "Based on this field 02:34:24PM
5 study schedule and what 02:34:26PM
6 is known about the time 02:34:27PM
7 required for reporting, 02:34:28PM
8 public consultation, 02:34:29PM
9 agency review, and 02:34:32PM
10 approval, timeline 02:34:33PM
11 concessions will be 02:34:35PM
12 required to achieve this 02:34:36PM
13 REA milestone." 02:34:39PM
14 So essentially Mr. Baines knew 02:34:40PM
15 in August 2010 that meeting the FIT contract 02:34:45PM
16 timelines would not be possible for Windstream 02:34:49PM
17 without timeline concessions even if his proposed 02:34:52PM
18 development plan was followed. But his proposed 02:34:57PM
19 development plan wasn't followed. The Claimant 02:35:02PM
20 did not complete the items or spend the money 02:35:05PM
21 identified as essential by Mr. Baines in 2010. 02:35:07PM
22 In December 2010, the Claimant 02:35:11PM
23 actually requested the OPA allow it to enter into 02:35:15PM
24 force majeure status, effective as of November 22, 02:35:18PM
25 because the Ministry of Natural Resources was 02:35:21PM

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1 still determining how and in what circumstances it 02:35:25PM
2 would allocate Crown land for offshore wind 02:35:27PM
3 developments. 02:35:29PM
4 Now, what was the effect of 02:35:30PM
5 doing that? As my colleague Mr. Terry mentioned 02:35:32PM
6 this morning, under Section 10.1(f) and (g) of the 02:35:35PM
7 FIT contract, a developer was allowed to extend 02:35:40PM
8 its promised commercial operation date into the 02:35:43PM
9 future for a maximum of 24 months of force 02:35:45PM
10 majeure. 02:35:48PM
11 So in the precious essential 02:35:48PM
12 few months between August and late November of 02:35:53PM
13 2010, what did the Claimant accomplish in its 02:35:57PM
14 developments? Again, very little of actual 02:36:01PM
15 import. 02:36:05PM
16 By this time, they had used up 02:36:06PM
17 over six months of their time period to bring the 02:36:08PM
18 project into operation. BRG's audit shows that, 02:36:10PM
19 by this time, they had not spent really any of the 02:36:13PM
20 money recommended by Mr. Baines. In fact, they 02:36:17PM
21 had still spent only about \$500,000. 02:36:22PM
22 Now, let's come to February 02:36:26PM
23 11, 2011, the date that Ontario decided to defer 02:36:30PM
24 the development of offshore wind farms pending 02:36:33PM
25 further development of scientific -- science-based 02:36:36PM

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1 They had used seven months of 02:37:50PM
2 the total period, 10 percent of the time. Time 02:37:52PM
3 was of the essence. But, again, what had the 02:37:55PM
4 Claimant done? Not enough. It had certainly not 02:37:58PM
5 met its own deadlines as they were laid out by 02:38:02PM
6 Mr. Baines. 02:38:04PM
7 Its own experts had prepared 02:38:06PM
8 for this arbitration for the first time using 2014 02:38:09PM
9 and 2015 hindsight, schedules and development 02:38:14PM
10 plans for all of the activities that would need to 02:38:17PM
11 be done, all the studies, all the work required to 02:38:21PM
12 bring this project into commercial operation. 02:38:25PM
13 None of these had been completed as of February 02:38:28PM
14 11, 2011. The activities in their schedule start 02:38:31PM
15 on or after that date. 02:38:34PM
16 Further, as BRG has shown, by 02:38:36PM
17 the time of the February 11 deferral, the Claimant 02:38:40PM
18 had still not spent even \$1 million out of the 02:38:43PM
19 total budget required for the project of \$1.7 02:38:47PM
20 billion. 02:38:52PM
21 So, in short, by the time the 02:38:53PM
22 deferral was adopted, the Claimant had wasted 10 02:38:57PM
23 percent of the total time it had to develop the 02:39:00PM
24 project, had not begun a single essential 02:39:03PM
25 development activity, and had spent about one-half 02:39:06PM

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1 regulations. If the deferral had not been 02:36:39PM
2 imposed, would things have been different for the 02:36:42PM
3 Claimant? In short, no. It still would not have 02:36:44PM
4 had access to the site upon which it proposed to 02:36:49PM
5 develop its project. And it's important to recall 02:36:51PM
6 that the Claimant has not alleged that their 02:36:55PM
7 inability to access Crown land is in any way a 02:36:57PM
8 violation of NAFTA. 02:37:00PM
9 Now, even if we assumed that 02:37:02PM
10 the Claimant was granted access to the Crown land 02:37:04PM
11 they needed to be -- we assume that -- that, the 02:37:06PM
12 timelines still can't work. 02:37:08PM
13 The Claimant would have 02:37:11PM
14 emerged from force majeure on February the 11th, 02:37:12PM
15 2011, 81 days of force majeure used up. Now, as 02:37:16PM
16 we talked about, as a result, its new milestone 02:37:21PM
17 date for commercial operation would be July 25, 02:37:23PM
18 2015. And its new supplier default date would 02:37:27PM
19 have been January 20, 2017. 02:37:30PM
20 So now from February 11, they 02:37:34PM
21 would have about 53 months until it would be -- 02:37:37PM
22 they would be in breach of their contract, and 02:37:41PM
23 only 71 months left to develop a -- the project to 02:37:43PM
24 completion before the OPA could unilaterally 02:37:46PM
25 terminate. 02:37:49PM

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1 of 1 percent of the money needed. By the time of 02:39:09PM
2 the deferral, the Claimant had still done nothing 02:39:14PM
3 of essence -- nothing importance except hope and 02:39:16PM
4 dream. 02:39:19PM
5 Now, they ask this Tribunal to 02:39:21PM
6 engage in utter speculation and conclude with 02:39:25PM
7 certainty that they could have brought this 02:39:27PM
8 project into operation within the timelines 02:39:29PM
9 required by the FIT contract. 02:39:32PM
10 Now, earlier today my 02:39:35PM
11 colleague Mr. Terry explained and focused on the 02:39:38PM
12 additional force majeure time that could be used 02:39:41PM
13 to withstand the deadlines in the FIT contract. 02:39:44PM
14 And we saw earlier how that worked. 02:39:46PM
15 But that is true, but force 02:39:48PM
16 majeure is not an extension of development time. 02:39:52PM
17 You get put into force majeure because of an event 02:39:55PM
18 that prevents you from developing your project. 02:39:59PM
19 That is, of course, the nature of a force majeure 02:40:02PM
20 event. 02:40:04PM
21 So contrary to what Mr. Terry 02:40:05PM
22 suggested this morning, force majeure is not extra 02:40:08PM
23 development time for the Claimant to complete its 02:40:10PM
24 project. It may move that end bar, but you still 02:40:12PM
25 have all the activities that need to be completed 02:40:15PM

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1 in the same amount of time. 02:40:18PM
2 But I think even when you come 02:40:19PM
3 back to focus on what the real world experience 02:40:25PM
4 has been to date, there was still not enough time 02:40:28PM
5 for this project, given where the Claimant started 02:40:31PM
6 when it signed its FIT contract. 02:40:34PM
7 As Green Giraffe has 02:40:37PM
8 explained, they're aware of only three projects 02:40:39PM
9 worldwide that were able to go from site control 02:40:41PM
10 to the start of construction, not to operation, to 02:40:45PM
11 the start of construction in 60 months. 02:40:48PM
12 And URS has concluded using 02:40:50PM
13 data compiled by the Claimant's own experts, 4C, 02:40:55PM
14 that the average time from permitting to 02:40:56PM
15 operations, so that construction period, for a 02:40:59PM
16 project the size of Windstream's is 65 months. 02:41:03PM
17 We're talking 10 years here from start to finish, 02:41:08PM
18 not 53 months. Not even enough time if you add in 02:41:14PM
19 the additional buffer for force majeure. 02:41:17PM
20 And this time period of 10 02:41:19PM
21 years is, in fact, a favourable assumption for the 02:41:21PM
22 Claimant when compared with the experience of 02:41:24PM
23 projects in North America. Cape Wind was an 02:41:26PM
24 offshore wind project in the U.S. of roughly the 02:41:32PM
25 same size of the Claimant's proposed project, and 02:41:33PM

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1 Tribunal to ignore reality, the reality of what 02:42:43PM
2 had already been done and what remained to be done 02:42:46PM
3 in favour of their own hopes and wishes. For 02:42:49PM
4 example, the Claimant signed a binding contract 02:42:52PM
5 with Siemens for wind turbines. 02:42:55PM
6 My colleague Mr. Terry 02:42:58PM
7 addressed this, this morning and suggested this 02:43:00PM
8 was merely a placeholder. He even suggested that 02:43:02PM
9 it was only somehow binding. But it was more than 02:43:05PM
10 somehow binding. It is a signed, binding, legally 02:43:08PM
11 enforceable contract. 02:43:11PM
12 Now, why does the Claimant 02:43:13PM
13 want you to pay no attention to this contract? 02:43:16PM
14 The reason is simple. As BRG has shown, merely 02:43:18PM
15 having to comply with this contract wipes out the 02:43:23PM
16 entire value of the Claimant's project. So what 02:43:27PM
17 does the Claimant ask? 02:43:31PM
18 For you to assume that not 02:43:33PM
19 only that they could renegotiate the contract to 02:43:34PM
20 get about a 10 percent reduction in the price, but 02:43:36PM
21 that they would also, at the same time, be able to 02:43:39PM
22 renegotiate a faster delivery schedule and more 02:43:43PM
23 favourable payment terms, faster and cheaper. It 02:43:46PM
24 sounds pretty good. 02:43:51PM
25 It's simply not reasonable. 02:43:52PM

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1 it took 10 years of development alone before 02:41:37PM
2 obtaining its permits. And after all of that 02:41:40PM
3 work, all of the money, and after receiving its 02:41:44PM
4 permits, Cape Wind has still not proceeded to 02:41:47PM
5 construction. In essence, its project has ground 02:41:50PM
6 to a halt because it lost its contracts when it 02:41:52PM
7 did not hit construction and development 02:41:55PM
8 milestones. That should sound familiar when we 02:41:57PM
9 think about the Windstream project. And Cape 02:42:00PM
10 Wind's experience is not generally different than 02:42:05PM
11 other offshore projects even when those other 02:42:06PM
12 projects are being built by experienced wind 02:42:08PM
13 developers in markets with not only revenue 02:42:11PM
14 support like a FIT contract, but an established 02:42:14PM
15 regulatory regime with a history of operation and 02:42:16PM
16 with supporting local industries and financing. 02:42:19PM
17 None of these things existed 02:42:21PM
18 with respect to this project, and yet the Claimant 02:42:23PM
19 asks that the Tribunal ignore all of this and 02:42:27PM
20 speculate that its project would essentially be 02:42:29PM
21 the best and most successfully developed in the 02:42:31PM
22 world. 02:42:34PM
23 In fact, the Claimant asks 02:42:35PM
24 that the Tribunal grant it three indulgent 02:42:37PM
25 assumptions. First, the Claimant asks the 02:42:40PM

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1 The Claimant also asks the 02:43:55PM
2 Tribunal to ignore the realities about the fact of 02:43:58PM
3 where it was trying to site its project, and that 02:43:59PM
4 it was impossible. Prior to its signature of the 02:44:03PM
5 FIT contract the government had announced it was 02:44:06PM
6 considering a 5-kilometre shoreline exclusion 02:44:09PM
7 zone. The Claimant wants this Tribunal to believe 02:44:11PM
8 that this was proposed as an average 5-kilometre 02:44:13PM
9 setback. There is no evidence for that. It was 02:44:15PM
10 proposed as a minimum setback from shoreline, and 02:44:19PM
11 the science was ongoing. 02:44:22PM
12 Twenty-four turbines are sited 02:44:23PM
13 within 5 kilometres of shore. That's almost 20 02:44:28PM
14 percent of the project's turbines that would not 02:44:30PM
15 be able to be installed. And that is with the 02:44:32PM
16 reconfiguration of the Claimant's project that it 02:44:35PM
17 has asked you to assume it could obtain. 02:44:38PM
18 The Claimant has also ignored 02:44:40PM
19 the existence of an international shipping lane 02:44:43PM
20 when designing its layout. They asked the 02:44:45PM
21 Tribunal to believe that the permitting 02:44:48PM
22 authorities at the federal government would not 02:44:49PM
23 require any sort of buffer from this shipping lane 02:44:52PM
24 for the wind farm, a manmade obstruction. This is 02:44:54PM
25 simply not reasonable. 02:44:59PM

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1 If the buffer is one nautical 02:45:00PM
2 mile, you lose a number of turbines. If the 02:45:03PM
3 buffer is two nautical miles, you lose 62 02:45:06PM
4 turbines. In fact, together, with the shipping 02:45:11PM
5 lane and the shoreline exclusion zone, nearly 65 02:45:15PM
6 percent of the turbines planned by the Claimant 02:45:18PM
7 would be lost, down to 44 turbines. 02:45:20PM
8 Now, why do they do this? Why 02:45:23PM
9 did this Claimant ask you to assume that they 02:45:26PM
10 could place the turbines in an area where they 02:45:28PM
11 almost certainly could not be placed? Because 02:45:30PM
12 they must. The Claimant was already intending to 02:45:32PM
13 put its turbines on gravity-based foundations in 02:45:36PM
14 deeper water than had ever been used before, and, 02:45:38PM
15 thus, they had to stay on the shoals off of Wolfe 02:45:42PM
16 Island. 02:45:45PM
17 And if you look at the map as 02:45:45PM
18 it appears on the screen now, you can see the 02:45:46PM
19 contour lines under the turbine locations. Those 02:45:49PM
20 are the shoals. As you can see, Windstream has 02:45:52PM
21 turbines using the full extent of those shoals. 02:45:55PM
22 There is nowhere else to go, 02:45:59PM
23 but into substantially deeper water which would 02:46:01PM
24 change the whole nature of the project. 02:46:04PM
25 So they have no choice but to 02:46:05PM

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1 critical bottleneck for offshore wind projects. 02:47:15PM
2 These vessels are in short 02:47:19PM
3 supply worldwide. There is no reason to assume 02:47:21PM
4 that this shortage would somehow suddenly 02:47:23PM
5 alleviate just when the Claimant needed it to. 02:47:26PM
6 Third, the Claimant asks the 02:47:28PM
7 Tribunal to assume that they had or could get the 02:47:32PM
8 money or financing to do all of this. As URS 02:47:34PM
9 explains, in their opinion, deep pocket investors 02:47:38PM
10 would have been needed even to entice banks to 02:47:41PM
11 participate in the financing. As they further 02:47:44PM
12 explain on the Claimant's plans, those investors 02:47:48PM
13 would need to be willing to put over tens of 02:47:50PM
14 millions of dollars and possibly over \$300 million 02:47:52PM
15 at risk before even obtaining the permits required 02:47:56PM
16 to build the site. 02:47:59PM
17 Green Giraffe makes clear that 02:48:01PM
18 is massive and unreasonable and even Claimant's 02:48:04PM
19 own expert agrees, noting that it would have been 02:48:07PM
20 financially imprudent to spend the money that the 02:48:10PM
21 Claimant has said it would spend prior to 02:48:14PM
22 governmental authorization. 02:48:16PM
23 Again, why would the Claimant 02:48:17PM
24 adopt this imprudent and unreasonable approach in 02:48:20PM
25 its schedule and its financing plan? Because it 02:48:23PM

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1 ask you to make unreasonable assumptions and 02:46:10PM
2 ignore the relevant facts, because the fact is 02:46:12PM
3 they cannot do a project with only 44 turbines. 02:46:15PM
4 It would be impermissible under their FIT 02:46:17PM
5 contract, which requires them to achieve 75 02:46:20PM
6 percent of their promised capacity. 02:46:22PM
7 Second, the Claimant asks the 02:46:24PM
8 Tribunal to assume that everything is going to 02:46:30PM
9 work out exactly the way it needs it to work out 02:46:32PM
10 every single time the first time. This is most 02:46:35PM
11 evident in its schedule which contains 02:46:38PM
12 unreasonably optimistic assumptions often that are 02:46:40PM
13 simply impossible. 02:46:43PM
14 For example, it proposes a 02:46:46PM
15 rate of manufacturing for the gravity-based 02:46:47PM
16 foundations, which is just impossible using the 02:46:49PM
17 design, the specific design they have proposed. 02:46:52PM
18 It employs a logic that assumes, as URS explains, 02:46:55PM
19 that the next workstation in the production line 02:46:58PM
20 will always be free. But according to their 02:47:01PM
21 design, that's not the case. 02:47:03PM
22 As another example, the 02:47:04PM
23 Claimant assumes it could simply access the 02:47:06PM
24 vessels needed to erect its wind turbines. But as 02:47:09PM
25 Green Giraffe notes, availability of vessels was a 02:47:13PM

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1 had to. It is clear that the Claimant has 02:48:25PM
2 developed its schedule working backwards from the 02:48:28PM
3 date that it needed, using 2015 hindsight, and 02:48:30PM
4 just making whatever assumptions were required to 02:48:34PM
5 make the schedule fit. 02:48:36PM
6 The reality is that the 02:48:38PM
7 Claimant has not put in sufficient evidence to 02:48:42PM
8 prove that it had the resources necessary to 02:48:44PM
9 develop and construct this project. And nor has 02:48:45PM
10 it put in sufficient evidence to prove that anyone 02:48:50PM
11 with the required funds was willing to do so. 02:48:51PM
12 So where does this leave us? 02:48:54PM
13 There is no presumption at international law that 02:48:59PM
14 damages will be due for every breach of an 02:49:02PM
15 obligation. Damages in international law are 02:49:05PM
16 about compensating for loss caused by a breach. 02:49:08PM
17 They're not punitive. 02:49:10PM
18 Over the next couple of weeks 02:49:12PM
19 all of the experts presented by Canada will show 02:49:14PM
20 the many ways to the same result in this case. 02:49:16PM
21 This project had failed by the time of the 02:49:19PM
22 allegedly breaching measures in question, from a 02:49:22PM
23 scheduling perspective, from a cost perspective, 02:49:25PM
24 from a valuation perspective. 02:49:27PM
25 URS, Green Giraffe, and BRG 02:49:30PM

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1 will explain this week and next how they have only 02:49:32PM
2 suggested a few adjustments, but, alone, these 02:49:35PM
3 adjustments eliminate all of the value. 02:49:39PM
4 The evidence which has been 02:49:41PM
5 presented to you already throughout the course of 02:49:47PM
6 this arbitration and the discussions that will 02:49:48PM
7 come lead to a single conclusion: The measures in 02:49:50PM
8 question did not cause the Claimant the massive 02:49:53PM
9 windfall that it demands as alleged compensation. 02:49:56PM
10 And yet what does the Claimant seek in this 02:50:00PM
11 arbitration? 02:50:02PM
12 This project would cost at 02:50:03PM
13 least \$1.7 billion to develop and construct 02:50:07PM
14 according to Canada's experts. The Claimant 02:50:10PM
15 claims it spent about \$17 million so far, about 1 02:50:12PM
16 percent. The vast majority of that was spent, 02:50:15PM
17 though, not on the project, but on this 02:50:19PM
18 arbitration. The substantiated and verified costs 02:50:21PM
19 related to the development of the project are no 02:50:26PM
20 more than 1.7 million by the valuation date of May 02:50:28PM
21 2012. 1.7 million is about one one-tenth of 1 02:50:31PM
22 percent of the total required investment and only 02:50:36PM
23 about three-tenths of a percent of the total 02:50:38PM
24 equity required. 02:50:41PM
25 And yet with 99 percent of the 02:50:41PM

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1 money still to be put in, what does the Claimant 02:50:43PM
2 ask? It doesn't ask for its money back. It 02:50:45PM
3 doesn't ask for the money back that it invested in 02:50:49PM
4 developing the project in alleged reliance on 02:50:52PM
5 general statements made. The Claimant asks you to 02:50:55PM
6 give it 100 persons of the value of the project, 02:50:57PM
7 what it claims is over \$225 million. That would 02:51:01PM
8 be a windfall of 13,000 percent. Quite the rate 02:51:05PM
9 of return. 02:51:11PM
10 Now, my colleague Mr. Terry 02:51:12PM
11 suggested this morning that such a windfall should 02:51:13PM
12 not be surprising. He is wrong. It is shocking. 02:51:16PM
13 And there is no justification for it. 02:51:20PM
14 As I believe that Canada has 02:51:23PM
15 already shown in its submissions and as the 02:51:25PM
16 independent experts retained by Canada will 02:51:27PM
17 further explain this week and next, the Claimant 02:51:29PM
18 is not entitled to any damages in this case let 02:51:31PM
19 alone a windfall of such an enormous amount. 02:51:35PM
20 Now, before I sit down, let me 02:51:38PM
21 just offer very briefly some overarching thoughts 02:51:44PM
22 on what you have heard from Canada today. 02:51:47PM
23 In my discussions on the 02:51:49PM
24 issues of damages, there have been several 02:51:51PM
25 instances where we have had to ask ourselves the 02:51:53PM

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1 question of why the Claimant would make what seems 02:51:55PM
2 like such an unreasonable assumption. And the 02:51:58PM
3 answer in each case was because they had no 02:52:01PM
4 choice. If they made more reasonable assumptions, 02:52:03PM
5 their project would fail. 02:52:06PM
6 The same can be said for the 02:52:08PM
7 Claimant's arguments on both the law and the 02:52:11PM
8 merits. This morning Mr. Terry suggested that the 02:52:13PM
9 claimant's legal interpretations are consistent 02:52:17PM
10 with those accepted under the NAFTA. This is not 02:52:19PM
11 right. As Ms. Tabet has made apparent in her 02:52:22PM
12 explanation of the law, the Claimant has been 02:52:25PM
13 forced to try to stretch the language of NAFTA in 02:52:27PM
14 ways that the NAFTA parties have consistently 02:52:29PM
15 rejected as inappropriate. 02:52:32PM
16 Why is it forced to go to such 02:52:34PM
17 lengths to legally support its claims? Again, 02:52:38PM
18 because if it used more reasonable and appropriate 02:52:40PM
19 interpretations, its claims would fail. 02:52:42PM
20 And as Mr. Neufeld has 02:52:44PM
21 explained in discussing the merits of the 02:52:46PM
22 Claimant's allegations, the Claimant is forced to 02:52:49PM
23 suggest that this Tribunal ignore what the 02:52:50PM
24 documents and evidence say on their face, instead 02:52:52PM
25 to adopt a grand conspiracy theory. And they seek 02:52:55PM

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1 to explain away the complete and utter lack of 02:52:59PM
2 evidence with a suggestion saying it's been 02:53:01PM
3 destroyed, and the Tribunal should just assume it 02:53:04PM
4 existed and draw an inference. 02:53:08PM
5 Why, again, is the Claimant 02:53:10PM
6 forced to take this position? Because if the 02:53:12PM
7 Tribunal does not engage in a speculation about 02:53:14PM
8 conspiracy theories, its claims fail. 02:53:17PM
9 Over the course of the next 02:53:21PM
10 week, you will hear from the Ontario officials who 02:53:23PM
11 were there when the decision was made. They will 02:53:25PM
12 confirm that Ontario decided to wait on the 02:53:28PM
13 development of offshore wind projects in its 02:53:30PM
14 sources of drinking water and its Great Lakes 02:53:32PM
15 until it had the opportunity to complete further 02:53:35PM
16 science. That science was necessary for Ontario 02:53:37PM
17 to ensure that the regulatory framework that it 02:53:40PM
18 was still developing would provide adequate 02:53:43PM
19 protections for human health and the environment. 02:53:45PM
20 This was a prudent and 02:53:47PM
21 entirely appropriate decision. NAFTA does not 02:53:49PM
22 require a state to rush headlong into adopting 02:53:52PM
23 policies and regulations without appropriate 02:53:55PM
24 forethought. And nor does NAFTA require an 02:53:58PM
25 extraordinary amount of compensation to be awarded 02:54:00PM

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1 to Claimants who choose to commit a small amount 02:54:03PM
2 of money to a project that could not be developed. 02:54:05PM
3 That is not what these treaties are for. 02:54:10PM
4 I thank you for your time 02:54:15PM
5 today, and I look forward to presenting our 02:54:16PM
6 evidence to you over the course of the next couple 02:54:19PM
7 of weeks. Also, of course, if you have any 02:54:20PM
8 questions, I would be happy to answer them. 02:54:22PM
9 PRESIDENT: Thank you, 02:54:24PM
10 Mr. Spelliscy. 02:54:25PM
11 Any questions? 02:54:26PM
12 QUESTIONS FROM THE TRIBUNAL: 02:54:30PM
13 MR. BISHOP: Yeah. I have 02:54:30PM
14 just one question. With respect to the time 02:54:30PM
15 deadlines issue under the FIT contract, what was 02:54:33PM
16 the purpose of the time deadlines being imposed in 02:54:37PM
17 the FIT contract. 02:54:44PM
18 MR. SPELLISCY: The FIT 02:54:45PM
19 program, as you will hear from evidence this 02:54:46PM
20 week -- and there are witnesses who can speak to 02:54:47PM
21 it -- was designed as the Claimant mentioned this 02:54:49PM
22 morning, in the context of the financial collapse 02:54:51PM
23 of the system. There was a financial crisis, so 02:54:55PM
24 the FIT program was designed to bring jobs. It 02:54:57PM
25 didn't want to bring jobs 15 years from now. It 02:55:01PM

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1 couldn't start from scratch. That was the point 02:56:01PM
2 of the FIT program in terms of those timelines, to 02:56:04PM
3 get those shovels in the ground and get people 02:56:07PM
4 working. 02:56:09PM
5 MR. BISHOP: Doesn't that -- 02:56:11PM
6 well, as part of the FIT contract process of -- of 02:56:20PM
7 agreeing to that contract, was there any due 02:56:29PM
8 diligence done by the OPA itself with respect to 02:56:34PM
9 whether the project met whatever criteria it had 02:56:38PM
10 to be able to be done within the -- the time 02:56:42PM
11 periods? 02:56:46PM
12 MR. SPELLISCY: Mr. Cecchini 02:56:47PM
13 here from the OPA will be able to answer that 02:56:49PM
14 specifically in his evidence. But as I understand 02:56:51PM
15 it, the answer is the regulatory -- the risk of 02:56:53PM
16 being able to meet the deadlines in the FIT 02:56:56PM
17 contract was placed entirely upon the proposed 02:56:59PM
18 developer. The OPA did not do checks into whether 02:57:02PM
19 those proposed developers could meet the 02:57:05PM
20 timelines. 02:57:06PM
21 The consequences for meeting 02:57:07PM
22 those deadlines are spelled -- or not meeting the 02:57:08PM
23 timelines were spelled out in the contract, and 02:57:11PM
24 the developers bore that risk 100 percent. 02:57:13PM
25 MR. BISHOP: One last 02:57:18PM

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1 wanted to bring jobs and investment now. 02:55:04PM
2 And so in order to incentivize 02:55:07PM
3 and create that, the FIT contract was looking for 02:55:09PM
4 shovel-ready projects, projects that could 02:55:12PM
5 actually get people working in Ontario soon. And 02:55:14PM
6 so the specific timelines that are imposed are to 02:55:17PM
7 get those projects and to get those projects into 02:55:19PM
8 construction so that the program could serve what 02:55:22PM
9 its purpose was. 02:55:26PM
10 And so when we talk about some 02:55:26PM
11 of the extensions and the deadlines and we talk 02:55:28PM
12 about the short time periods and tight time 02:55:32PM
13 pressure -- even the Claimant's documents admit 02:55:33PM
14 they were under -- that is the exact reason. One 02:55:36PM
15 can't look necessarily at the FIT program and 02:55:38PM
16 think, "Okay. Well, why would there be five years 02:55:40PM
17 if they didn't -- if their experience says they 02:55:42PM
18 couldn't meet it?" 02:55:43PM
19 I think one has to understand 02:55:45PM
20 the context. Only two companies applied for FIT 02:55:46PM
21 contracts who were offshore wind developers. Why 02:55:49PM
22 is that? Because most people looking at that 02:55:53PM
23 would look at that and understand that, in order 02:55:55PM
24 to meet such an aggressive timeline, you needed to 02:55:57PM
25 be in advance stage of your development. You 02:55:59PM

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1 question, then. If the -- if the province wanted 02:57:20PM
2 the project to go forward, wouldn't it be 02:57:26PM
3 reasonable to assume that, if reasonable progress 02:57:29PM
4 was being made to meet the goals and they -- they 02:57:39PM
5 went off track somewhat, that there would be 02:57:44PM
6 extensions granted as part of that process? 02:57:47PM
7 MR. SPELLISCY: Yeah. I think 02:57:50PM
8 that one has to -- to understand that the -- the 02:57:52PM
9 intent of the FIT program was to create a general 02:57:55PM
10 procurement process that would apply to everybody, 02:57:57PM
11 and that once extensions started being granted in 02:57:59PM
12 sort of an individual way, along the way there 02:58:02PM
13 would be concerns. 02:58:05PM
14 Mr. Cecchini here can -- from 02:58:06PM
15 the OPA can testify as to the OPA's practice in 02:58:07PM
16 this. And that, once the deadlines come through 02:58:10PM
17 and once the deadlines aren't met, there will be 02:58:13PM
18 consequences under the contract. 02:58:17PM
19 One also has to understand 02:58:18PM
20 that, in the terms of the procurement of energy in 02:58:20PM
21 terms of this, the OPA had -- had targets that it 02:58:22PM
22 was reaching. It also has transmission capacity 02:58:27PM
23 constraints. For people who get a FIT contract 02:58:30PM
24 and they have transmission capacity allocated to 02:58:32PM
25 them, they're essentially taking up space in the 02:58:33PM

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1 queue. And so if you don't enforce your 02:58:35PM
2 contractual rights, they remain there taking up 02:58:38PM
3 space in the queue to the prejudice of other 02:58:41PM
4 developers. 02:58:43PM
5 So I think the answer to the 02:58:43PM
6 question is, again, I guess, for Windstream's 02:58:45PM
7 particular project, they were nowhere near it. So 02:58:47PM
8 we won't know. But in terms of the OPA's 02:58:50PM
9 practice, in terms of what the goals of the policy 02:58:52PM
10 program were and why it was done in the way that 02:58:55PM
11 it was, I don't think that such extensions -- and 02:58:57PM
12 you'll hear from the witnesses -- were consistent 02:58:59PM
13 with what they were trying to achieve. 02:59:01PM
14 MR. BISHOP: One other 02:59:04PM
15 question. 02:59:05PM
16 MR. SPELLISCY: Sure. 02:59:06PM
17 MR. BISHOP: Is Windstream in 02:59:07PM
18 breach of the FIT contract today? 02:59:11PM
19 MR. SPELLISCY: This is, 02:59:15PM
20 again, probably a question that Mr. Cecchini can 02:59:17PM
21 answer. And Windstream remains in force majeure 02:59:19PM
22 today on -- on the contract. They have not been 02:59:22PM
23 terminated by the OPA. They remain in force 02:59:24PM
24 majeure. 02:59:28PM
25 So I think technically -- and 02:59:28PM

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1 I'm not sort of an Ontario domestic contract law 02:59:31PM
2 expert, so I won't -- I won't opine, but they 02:59:34PM
3 remain in force majeure. They have not been 02:59:37PM
4 declared in breach, and the OPA has not tried to 02:59:38PM
5 terminate their contract. 02:59:40PM
6 MR. BISHOP: Thank you. 02:59:42PM
7 PRESIDENT: Just a related 02:59:44PM
8 question on the -- on the timelines: I understand 02:59:48PM
9 that the FIT contracts were standard contracts, so 02:59:50PM
10 they were essentially identical. Were the 02:59:54PM
11 timelines also the same for each project 02:59:56PM
12 regardless of the size of the project? 02:59:59PM
13 MR. SPELLISCY: Yes, they 03:00:01PM
14 were. So regardless -- 03:00:02PM
15 PRESIDENT: So you would have 03:00:03PM
16 -- you would have the same timeline for a 03:00:04PM
17 300-megawatt project and a 410, 15? 03:00:06PM
18 MR. SPELLISCY: Yes. If the 03:00:11PM
19 program was standardized in that way -- 03:00:12PM
20 standardized in that way, yes. There was no -- 03:00:13PM
21 there wasn't -- you'll hear evidence this week 03:00:15PM
22 about the -- the extension that was negotiated by 03:00:17PM
23 Windstream for its offshore contract, the only one 03:00:20PM
24 to get an offshore project, and I think you'll 03:00:23PM
25 hear evidence about how that would have applied to 03:00:25PM

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1 other offshore projects, should that extension -- 03:00:27PM
2 should they have actually gotten contracts in the 03:00:30PM
3 future. 03:00:32PM
4 But as for the size of the 03:00:32PM
5 particular projects, yes, it was not relevant. So 03:00:34PM
6 a 5-megawatt project had five years to be built, 03:00:37PM
7 and a 300-megawatt project had five years to be 03:00:39PM
8 built. 03:00:42PM
9 PRESIDENT: Okay. Thank you. 03:00:43PM
10 So we will start next with the 03:00:45PM
11 examination of witnesses. I suggest we have a 03:00:50PM
12 break of 15 minutes now. We will continue at 03:00:52PM
13 3:15. Thank you. 03:00:57PM
14 --- Recess at 3:01 p.m. 03:01:02PM
15 --- Upon resuming at 3:18 p.m. 03:17:30PM
16 --- Off the record discussion re procedural issue. 03:18:49PM
17 PRESIDENT: On the record. 03:19:21PM
18 MS. NETTLETON: Sure. The 03:19:27PM
19 video is not yet recording. It's definitely not 03:19:27PM
20 on the live stream, yeah. 03:19:28PM
21 PRESIDENT: But we go -- you 03:19:30PM
22 would like to have this on the record? 03:19:30PM
23 MR. TERRY: Yes. 03:19:32PM
24 PRESIDENT: Okay. Yep, 03:19:44PM
25 please. When it's informal, it's more 03:19:44PM

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1 complicated. 03:19:46PM
2 [Laughter.] 03:19:47PM
3 MR. TERRY: The issue that has 03:19:48PM
4 arisen is just Mr. Mars is, as the Tribunal knows 03:19:49PM
5 or as he will explain, the founder of Windstream 03:19:56PM
6 and -- 03:20:00PM
7 MS. NETTLETON: It should not 03:20:04PM
8 be on live stream? 03:20:04PM
9 PRESIDENT: No. 03:20:08PM
10 MR. TERRY: -- the key player 03:20:08PM
11 in making determinations as to expenditures on the 03:20:09PM
12 project. As I have discussed with my friend 03:20:13PM
13 Mr. Spelliscy -- and I'm happy to be corrected on 03:20:15PM
14 this, but I asked him -- 03:20:20PM
15 MS. NETTLETON: It's not 03:20:22PM
16 working. 03:20:22PM
17 --- [Reporter's Note: Technical issues.] 03:20:38PM
18 MR. TERRY: So the issue is 03:20:43PM
19 simply that Mr. Spelliscy, in his opening 03:20:50PM
20 argument, is making various assertions basically 03:20:53PM
21 stating that Windstream should have been spending 03:20:59PM
22 money it had apparently budgeted or at least 03:21:02PM
23 considered budgeting in the fall of 2010. And he 03:21:06PM
24 made a number of allegations as to the fact that 03:21:10PM
25 they should have been expending this money, and 03:21:14PM

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1 they weren't expending the money. 03:21:16PM
2 That is an issue that, to the 03:21:19PM
3 best of our knowledge is not something -- it arose 03:21:21PM
4 for, at least in this form, the first time in oral 03:21:23PM
5 argument this morning as opposed to in the 03:21:29PM
6 materials before it. 03:21:31PM
7 Mr. Mars is the individual who 03:21:32PM
8 is best placed to respond to that, and I simply 03:21:34PM
9 want to make sure he has an opportunity during his 03:21:37PM
10 examination to respond. I'm happy to -- we do 03:21:39PM
11 have a procedure which the parties have agreed on 03:21:43PM
12 that witnesses, whether expert or fact witnesses, 03:21:45PM
13 can respond to new matters that have arisen. And 03:21:49PM
14 we had agreed, for example, that Mr. Mars could 03:21:52PM
15 respond to new matters that had arisen in the BRG 03:21:54PM
16 Rejoinder report or URS' Rejoinder report because, 03:21:59PM
17 again, they related to issues that involve his 03:22:02PM
18 involvement in the project. 03:22:04PM
19 But this is an issue that we 03:22:05PM
20 would say would be in the same category as a new 03:22:11PM
21 assertion, a new allegation that's being made that 03:22:14PM
22 he is the appropriate person to respond to. 03:22:17PM
23 And, as I say, we -- we were 03:22:19PM
24 really hearing this for the first time put in this 03:22:22PM
25 way, and I just want to make sure that there's an 03:22:25PM

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1 documents that are in the record, in fact, the 03:23:24PM
2 Claimant's documents that are in the record, 03:23:26PM
3 documents that were directed to and, I think, from 03:23:28PM
4 Mr. Mars in 2010, August 30, 2010. 03:23:32PM
5 He filed two witness 03:23:36PM
6 statements since then. The way that we might look 03:23:38PM
7 at it and characterize those documents now, I 03:23:40PM
8 don't think makes that new evidence or new opinion 03:23:42PM
9 in any particular way. These are their documents 03:23:45PM
10 from 2010. He has had the full opportunity to 03:23:47PM
11 address it knowing the entire time, and in the two 03:23:51PM
12 minutes that we had to look at it, I couldn't find 03:23:54PM
13 a specific way to this. But the idea that 03:23:57PM
14 Windstream was not moving this project forward has 03:23:59PM
15 clearly been an issue in this arbitration right 03:24:02PM
16 from the very beginning. 03:24:04PM
17 So the fact that we have tied 03:24:05PM
18 this particular document, the Claimant's own 03:24:07PM
19 document, into the story in a particular way now, 03:24:09PM
20 I don't think affects the fact that it's new 03:24:13PM
21 evidence at all, and I don't think that it would 03:24:15PM
22 apply here. 03:24:17PM
23 Now, here is my more general 03:24:18PM
24 fairness consideration. It arises from the 03:24:20PM
25 particular status of Mr. Mars. 03:24:22PM

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1 opportunity that Mr. Mars will have to respond or 03:22:28PM
2 provide the appropriate evidence in the record on 03:22:31PM
3 this. That's -- that's my concern. 03:22:34PM
4 PRESIDENT: You would like to 03:22:35PM
5 be able to put questions to -- 03:22:36PM
6 MS. NETTLETON: What Franco? 03:22:40PM
7 PRESIDENT: You would like to 03:22:43PM
8 be able to put questions on direct examination to 03:22:44PM
9 Mr. Mars on what was just -- 03:22:47PM
10 MR. TERRY: I mean to -- I'm 03:22:50PM
11 happy to have anyone put the questions. In fact, 03:22:51PM
12 if -- if they were put in cross-examination, if 03:22:54PM
13 the Tribunal wanted to put it to him, I just 03:22:56PM
14 wanted him to have an opportunity to provide 03:22:59PM
15 evidence in response to that, and I think it would 03:23:01PM
16 be helpful to the Tribunal because I don't believe 03:23:03PM
17 we have evidence -- well, there's -- there's 03:23:05PM
18 certainly evidence that the project was being 03:23:08PM
19 blocked in various ways at the time, but we don't 03:23:10PM
20 have evidence responding to that specific 03:23:14PM
21 allegation. 03:23:16PM
22 PRESIDENT: Mr. Spelliscy. 03:23:17PM
23 MR. SPELLISCY: Yes, thank 03:23:18PM
24 you. I guess I would wanted to point out that 03:23:19PM
25 what I was doing was really actually pointing to 03:23:22PM

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1 All the other fact witnesses 03:24:24PM
2 in this case are sequestered. There were 03:24:26PM
3 certainly statements, insinuations or allegations, 03:24:29PM
4 or whatever Mr. Terry would like to call it, that 03:24:32PM
5 the Claimant has made in its opening presentations 03:24:34PM
6 that we could have fact witnesses respond to on 03:24:37PM
7 direct examination. But we're prohibited from 03:24:39PM
8 discussing those with our witnesses because 03:24:41PM
9 they're not designated client representatives. 03:24:45PM
10 Mr. Mars is a designated 03:24:47PM
11 client representative. We don't have any concern 03:24:49PM
12 with him being here. But it seems to put our own 03:24:51PM
13 witnesses at a bit of a disadvantage in that he 03:24:54PM
14 has now had the opportunity to hear what we've 03:24:57PM
15 said. He's now had the break to discuss it with 03:25:00PM
16 counsel. And that's an opportunity that we won't 03:25:02PM
17 have with our witnesses. 03:25:05PM
18 So I guess my concern is both 03:25:06PM
19 -- I don't think this is a new evidence argument 03:25:07PM
20 at all. I think the claimant made a choice not to 03:25:10PM
21 proceed with Mr. Mars in his testimony in this way 03:25:13PM
22 in their witness statements, but even, you know, 03:25:16PM
23 if the Tribunal is interested, I recognize sort of 03:25:17PM
24 a fundamental imbalance in the way that we can 03:25:19PM
25 proceed here, and I think that's my concern from a 03:25:22PM

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1 fairness point of view. 03:25:24PM
2 PRESIDENT: Okay. The 03:25:32PM
3 Tribunal will withdraw and consider that. 03:25:32PM
4 --- Tribunal withdraws from hearing room at 3:25 03:25:36PM
5 p.m. 03:25:40PM
6 --- Upon resuming at 3:27 p.m. 03:27:57PM
7 TRIBUNAL'S RULING: 03:28:12PM
8 PRESIDENT: Okay. The 03:28:12PM
9 Tribunal has considered the request, and we will 03:28:14PM
10 allow the Claimant to put questions to the witness 03:28:17PM
11 what was stated in the Respondent's opening 03:28:23PM
12 statement. The Respondent will have the same 03:28:26PM
13 opportunity. If you want to put questions on 03:28:29PM
14 direct examination to your witnesses as to what 03:28:34PM
15 was argued in the Claimant's opening statement, 03:28:36PM
16 the same opportunity will be available to you. 03:28:39PM
17 MR. TERRY: Thank you. 03:28:41PM
18 MR. SPELLISCY: Can I ask one 03:28:42PM
19 clarifying question? Are our witnesses then 03:28:44PM
20 sequestered still from the opening statement? 03:28:47PM
21 PRESIDENT: They are 03:28:48PM
22 sequestered, but if there is a specific allegation 03:28:50PM
23 that you -- that has been made that you think 03:28:52PM
24 should be addressed by your witnesses or commented 03:28:53PM
25 on your -- by your witnesses, that can be -- that 03:28:56PM

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1 will be allowed. 03:28:58PM
2 MR. TERRY: And I can 03:29:01PM
3 certainly confirm that I didn't make any 03:29:02PM
4 assertions that have not already been made in our 03:29:03PM
5 materials. 03:29:06PM
6 I will get the witness. 03:29:10PM
7 PRESIDENT: Just to qualify 03:30:17PM
8 that: The witnesses won't be able to read the 03:30:18PM
9 transcript, which is what has been agreed before, 03:30:21PM
10 but if there is something that arose out of the 03:30:22PM
11 opening statements, you can ask the witness -- you 03:30:26PM
12 can confer with the witness and ask whether they 03:30:30PM
13 have any comment on that, and that can be then put 03:30:32PM
14 as a question on direct examination if need be. 03:30:34PM
15 03:30:44PM
16 PRESIDENT: Mr. Mars, good 03:31:15PM
17 afternoon. 03:31:17PM
18 THE WITNESS: Good afternoon. 03:31:17PM
19 PRESIDENT: Can you please 03:31:19PM
20 state your full name to the record and then also 03:31:21PM
21 read the declaration of fact witness that you 03:31:26PM
22 should have in front of you? 03:31:29PM
23 THE WITNESS: Yes. My name is 03:31:31PM
24 David Michael Mars. I solemnly declare, upon my 03:31:32PM
25 honour and conscience, that this is my evidence 03:31:38PM

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1 before the Tribunal. I shall speak the truth, the 03:31:41PM
2 whole truth, and nothing but the truth. 03:31:44PM
3 AFFIRMED: DAVID MICHAEL MARS: 03:31:48PM
4 PRESIDENT: Thank you. You 03:31:48PM
5 have submitted two witness statements in this 03:31:51PM
6 arbitration proceeding, one dated 18 April, 2014, 03:31:52PM
7 and the other one 17 June, 2015. Is that correct? 03:31:58PM
8 THE WITNESS: That is correct. 03:32:03PM
9 PRESIDENT: And you confirm 03:32:04PM
10 that these are your statements? 03:32:06PM
11 THE WITNESS: I confirm that 03:32:09PM
12 these are my statements. 03:32:10PM
13 PRESIDENT: And you confirm 03:32:11PM
14 their contents? 03:32:12PM
15 THE WITNESS: I confirm their 03:32:13PM
16 contents. 03:32:15PM
17 PRESIDENT: Do you have any 03:32:15PM
18 corrections to make? 03:32:16PM
19 THE WITNESS: I have no 03:32:17PM
20 corrections to make. 03:32:18PM
21 PRESIDENT: The way it will 03:32:19PM
22 work now, you will be asked a few questions by 03:32:20PM
23 counsel for the Claimant, and then there will be a 03:32:23PM
24 cross-examination and possibly further questions 03:32:27PM
25 on redirect. 03:32:29PM

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1 Mr. Terry. 03:32:32PM
2 EXAMINATION-IN-CHIEF BY MR. TERRY: 03:32:32PM
3 Q. Good afternoon, Mr. Mars. 03:32:40PM
4 A. Hi, John. 03:32:42PM
5 Q. Could you give the 03:32:43PM
6 Tribunal some background as to your occupation and 03:32:46PM
7 your role with respect to the project? 03:32:51PM
8 A. Yes. So I'm an 03:32:53PM
9 early-stage investor. I have business partners, 03:32:55PM
10 high net worth individuals, and in relation to 03:32:58PM
11 this project -- I don't know if I'm too close to 03:33:00PM
12 this -- in 2007, I founded this company after 03:33:02PM
13 coming up with, essentially, a thematic approach 03:33:06PM
14 to investing in -- in renewable. We started with 03:33:09PM
15 renewables, wound up in wind. 03:33:11PM
16 And I founded this company in 03:33:13PM
17 2007, brought in Mr. Baines. My business partner 03:33:15PM
18 is Mr. Ziegler that I think you'll hear from 03:33:19PM
19 tomorrow, and our investor group. And we decided 03:33:21PM
20 that we wanted to go forth and build a wind 03:33:24PM
21 development company, and we looked at all the 03:33:27PM
22 jurisdictions that were out there, and we -- 03:33:29PM
23 focusing on Europe, the United States, Canada, and 03:33:31PM
24 realized that Ontario at that time, in 2007, was 03:33:35PM
25 particularly appealing, specifically because they 03:33:38PM

1 were shutting down the coal plants and seemed to 03:33:40PM
 2 have a government and regulatory regime that was 03:33:43PM
 3 pushing forward with doing that and really 03:33:46PM
 4 embracing renewables, specifically wind. 03:33:49PM
 5 And so we built this company, 03:33:51PM
 6 and from there, we -- we're sort of here. Well, a 03:33:53PM
 7 number of years later, nine years later, we're 03:33:58PM
 8 here. 03:34:00PM
 9 Q. Okay. Mr. Mars, before 03:34:01PM
 10 my friend from Canada asks you some questions, I'd 03:34:05PM
 11 like to ask you questions with respect to things 03:34:08PM
 12 that have arisen out of -- well, first of all, 03:34:10PM
 13 Canada's counsel, Mr. Spelliscy, in his opening, 03:34:18PM
 14 asserted that -- made assertions that Windstream 03:34:21PM
 15 had not been expending the funds that it had 03:34:27PM
 16 stated it intended to spend in the fall of 2010. 03:34:29PM
 17 Could you comment on that 03:34:34PM
 18 assertion, please? 03:34:37PM
 19 A. Sure. So the funds that 03:34:38PM
 20 were detailed specifically in the document that I 03:34:41PM
 21 believe was -- was raised in the opening 03:34:44PM
 22 statements, those were funds to push the project 03:34:46PM
 23 forward. We began to expend those funds and I had 03:34:48PM
 24 approved the expenditure of those funds, and 03:34:51PM
 25 unfortunately, a lot of the funds that were in 03:34:53PM

1 that budget were related to REA work as well as to 03:34:55PM
 2 specific drilling, then different things that you 03:35:00PM
 3 would need to do about the site attributes. 03:35:03PM
 4 We tried to get permits for 03:35:05PM
 5 those, from the Ontario government or from the 03:35:07PM
 6 relevant agencies, but were not awarded any 03:35:10PM
 7 permits to actually move forward. And ultimately 03:35:13PM
 8 most of which was basically -- I don't want to say 03:35:16PM
 9 blocked because it was just not approved because 03:35:20PM
 10 they said there was not setback rules in place, so 03:35:22PM
 11 they couldn't actually allow us to go forward, at 03:35:24PM
 12 which point we wound up claiming a force majeure 03:35:27PM
 13 that got backdated to -- to November 22, although 03:35:31PM
 14 we had asked for it from the start of the 03:35:36PM
 15 contract, but -- they backdated it to November 22. 03:35:39PM
 16 And we spent every penny that we could, but we 03:35:43PM
 17 were blocked in many instances from spending the 03:35:45PM
 18 money, not through our sources, but, really, 03:35:48PM
 19 through regulatory non-approval, I guess you would 03:35:51PM
 20 call it. 03:35:55PM
 21 Q. Secondly, in response to 03:35:56PM
 22 -- this is a question in response to Green 03:36:02PM
 23 Giraffe's Rejoinder report. And in that report, 03:36:04PM
 24 Green Giraffe makes comments about the turbine 03:36:09PM
 25 supply agreement and talks about the fact that it 03:36:13PM

1 wasn't bankable and also says that, if it was to 03:36:16PM
 2 be negotiated further, that the prices would 03:36:19PM
 3 actually go up. And he also makes comments in the 03:36:24PM
 4 schedule. Could you respond to those, please? 03:36:28PM
 5 A. Yes. So on -- on the 03:36:30PM
 6 surface of it being bankable, I agree 100 percent 03:36:33PM
 7 with what the gentleman from Green Giraffe said. 03:36:36PM
 8 It wasn't bankable. [REDACTED] [REDACTED]
 9 [REDACTED] The purpose of that 03:36:40PM
 10 contract was we were signing up to a FIT contract 03:36:42PM
 11 specifically for something that was put in front 03:36:45PM
 12 of us by the OPA and really put in front of all 03:36:47PM
 13 wind proponents, and it was a waiver of an NTP -- 03:36:49PM
 14 or it was called the NTP waiver, it was a waiver 03:36:53PM
 15 of a clause in the contract. And you had to sign 03:36:55PM
 16 up for a turbine supply agreement to get that. 03:36:57PM
 17 We basically had four months 03:37:01PM
 18 from beginning to end to actually do that, and, in 03:37:03PM
 19 that time frame, we also needed to certify that 03:37:05PM
 20 that turbine supply -- supplier would be able to 03:37:08PM
 21 meet the 50 percent domestic content requirements 03:37:11PM
 22 along with other parties that we were bringing in 03:37:14PM
 23 to the -- to the contract. 03:37:17PM
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED] 03:37:36PM
 7 and Siemens, and we wound up selecting Siemens 03:37:39PM
 8 and -- however, with that said, you can't really 03:37:42PM
 9 enter into a turbine supply agreement if you don't 03:37:45PM
 10 have a date of delivery. 03:37:48PM
 11 So we were sort of in this -- 03:37:49PM
 12 this position where we were being asked to do one 03:37:51PM
 13 thing, and, on the other side, had no ability to 03:37:54PM
 14 really effect it. 03:37:57PM
 15 So we focused our primary 03:37:58PM
 16 negotiations with Siemens on our ability to 03:38:00PM
 17 renegotiate this contract with them or with other 03:38:04PM
 18 suppliers, had we not -- had we gone forward and 03:38:07PM
 19 the moratorium be lifted. 03:38:11PM
 20 In terms of the price 03:38:13PM
 21 schedule, which this is -- I know a lot has been 03:38:14PM
 22 made about the price schedule, the payment terms, 03:38:16PM
 23 and the delivery date. We didn't actually 03:38:18PM
 24 negotiate that at all. It was put in at the end 03:38:19PM
 25 of the process. And it was put in specifically 03:38:22PM

1 because Siemens [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 03:38:36PM
6 So they put in the schedules. 03:38:37PM
7 We signed the contract effectively probably the 03:38:38PM
8 next day or the day after, and we moved forward, 03:38:41PM
9 but there was no reason for us to actually 03:38:43PM
10 negotiate on those points because, at the end of 03:38:45PM
11 the day, what was important to us was the ability 03:38:48PM
12 to truly negotiate at the time that we would have 03:38:51PM
13 been able to go forward, and we didn't know what 03:38:54PM
14 that was. That could have been, you know, months. 03:38:56PM
15 It could have been years. It could have been 03:38:58PM
16 decades. We just didn't know because we with 03:39:00PM
17 weren't provided -- we weren't provided from the 03:39:02PM
18 -- the OPA, the Ministries, anything in terms of 03:39:06PM
19 how long the moratorium was going to be or what 03:39:10PM
20 they were studying at all. They never have -- as 03:39:12PM
21 a proponent to the contract, they have never 03:39:15PM
22 actually spoken to us about, even up to this day 03:39:17PM
23 as we sit here, about what it is they're studying 03:39:20PM
24 and how long it's going to take. 03:39:23PM
25 Q. And, finally, Mr. Mars, 03:39:26PM

1 in URS' Rejoinder report, there's some specific 03:39:29PM
2 additional statements about investors' willingness 03:39:35PM
3 and ability to expend funds before financial 03:39:37PM
4 close. Could you please respond to those 03:39:39PM
5 statements? 03:39:41PM
6 A. Yes. So I believe -- and 03:39:42PM
7 I'm not looking at their report in front of me, so 03:39:44PM
8 if I -- if I misstate anything, you know, I'm 03:39:46PM
9 happy to grab that section of the report and read 03:39:48PM
10 it to you. 03:39:51PM
11 But I believe what they were 03:39:51PM
12 inferring is they were stating that, number one, 03:39:53PM
13 we had no commitment to actually expend funds on 03:39:56PM
14 development, and, you know, that's false. It's in 03:39:59PM
15 multiple witness statements, including that of my 03:40:02PM
16 business partner. And, two, we had no ability to 03:40:04PM
17 do that. 03:40:07PM
18 And so from the same time 03:40:07PM
19 frame as actually being awarded this contract back 03:40:09PM
20 in May of 2010 to today, our business partners, 03:40:12PM
21 all of our investors, our investor group, we have 03:40:17PM
22 expended substantial funds in many other 03:40:19PM
23 countries, many other companies, including a 03:40:22PM
24 pipeline business. One of our business partners 03:40:25PM
25 has expended, I think at this point with the 03:40:28PM

1 currency exchange rate, about a billion dollars 03:40:30PM
2 for new vessels in the exact same time frame, and 03:40:31PM
3 they're all -- actually, as of today, I think 03:40:35PM
4 they're all launched and operating. And other 03:40:37PM
5 projects that we are involved in. 03:40:39PM
6 So for them to make the 03:40:41PM
7 statement in there, I just want to clarify that we 03:40:42PM
8 were prepared to spend the money to get to 03:40:45PM
9 financial close, and we were prepared to move this 03:40:46PM
10 forward. Unfortunately, we were unable to 03:40:49PM
11 actually do that because it was blocked, and then 03:40:51PM
12 with the -- first with sort of the setback and 03:40:54PM
13 then ultimately with the moratorium. 03:40:56PM
14 And you can see in the record 03:40:59PM
15 we put in numerous times requests to do lots of 03:41:00PM
16 different steps, and none of which was actually -- 03:41:04PM
17 you know, we weren't allowed to do any of them. 03:41:08PM
18 Q. Those were my questions. 03:41:11PM
19 Thank you. 03:41:13PM
20 PRESIDENT: Thank you, 03:41:15PM
21 Mr. Terry. 03:41:15PM
22 And it will be? 03:41:17PM
23 MR. NEUFELD: Ms. Kam. 03:41:20PM
24 PRESIDENT: Ms. Kam for the 03:41:27PM
25 Respondent. 03:41:28PM

1 CROSS-EXAMINATION BY MS. KAM: 03:41:28PM
2 Q. Good afternoon, Mr. Mars. 03:42:11PM
3 My name is Susanna Kam, and I am counsel for the 03:42:12PM
4 Government of Canada. I will be asking you a 03:42:15PM
5 series of questions today regarding your testimony 03:42:17PM
6 in this arbitration. It's important that we 03:42:20PM
7 understand each other, so if at any time you don't 03:42:23PM
8 understand my question, please just let me know, 03:42:26PM
9 and I can clarify. 03:42:28PM
10 If the answer to my question 03:42:30PM
11 is a yes or no, please ensure that you answer that 03:42:31PM
12 way first. Then you may offer additional 03:42:34PM
13 explanation if you feel it's necessary. 03:42:37PM
14 If you need to take a break, 03:42:40PM
15 please also let me know, and I can find an 03:42:42PM
16 appropriate time to do so as soon as possible. 03:42:44PM
17 So before we begin, I just 03:42:46PM
18 want to mention that I will be referring to a 03:42:49PM
19 number of exhibits during my questions, and 03:42:51PM
20 they're contained in the binder in front of you. 03:42:53PM
21 What I when I ask you to turn to these documents, 03:42:56PM
22 I will refer to the exhibit number, for the 03:42:59PM
23 record, as well as the tab number in your binder 03:43:00PM
24 so you can locate the document. 03:43:03PM
25 Donnie will also be helping me 03:43:05PM

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1 to pull up exhibits electronically, so if you 03:43:07PM
2 prefer you can look up at the screens around the 03:43:09PM
3 room to -- to refer to the documents. 03:43:12PM
4 So I would like to start by 03:43:14PM
5 asking you some general questions regarding your 03:43:15PM
6 prior investment experience, and I just want to 03:43:18PM
7 caution you that some of the information regarding 03:43:21PM
8 specific investments has been designated as 03:43:23PM
9 confidential. So if you wish to elaborate on the 03:43:26PM
10 details of a specific investment in your response, 03:43:29PM
11 please just let me know in advance, and I can ask 03:43:32PM
12 to cut the public feed. 03:43:34PM
13 So you're a private equity 03:43:36PM
14 investor with more than 10 years of experience; 03:43:39PM
15 correct? 03:43:41PM
16 A. That is correct. 03:43:42PM
17 Q. And this includes 03:43:43PM
18 companies in the energy, technology, and media 03:43:45PM
19 sectors? 03:43:47PM
20 A. That's correct. 03:43:49PM
21 Q. However, prior to 03:43:50PM
22 founding White Owl, you were not involved in 03:43:52PM
23 investing in any renewable energy companies? 03:43:54PM
24 A. That's correct. 03:43:57PM
25 Q. And prior to Windstream, 03:43:58PM

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1 Q. Okay. So aside from 03:45:00PM
2 White Owl, Windstream has other private investors; 03:45:02PM
3 correct? 03:45:04PM
4 A. Well, yes. 03:45:05PM
5 Q. And prior to investing in 03:45:08PM
6 Windstream, none of these other investors had any 03:45:09PM
7 prior experience in renewable energy? 03:45:13PM
8 A. I'm not sure, so I can't 03:45:14PM
9 -- I can't answer that 100 percent. I -- I 03:45:19PM
10 believe they haven't, but I'm not entirely sure, 03:45:21PM
11 because some of our investors are pretty large in 03:45:23PM
12 LPs and big private equity funds -- 03:45:27PM
13 Q. Okay. 03:45:29PM
14 A. -- as well as they do a 03:45:30PM
15 lot of co-investing and direct investing, so I 03:45:31PM
16 can't speak to -- and in terms of them not being 03:45:35PM
17 part of White Owl, we -- we consider them what you 03:45:37PM
18 call limited partners, so I would be a general 03:45:39PM
19 partner, and they would be limited partners. So 03:45:43PM
20 we do the primary amount of the work, and they -- 03:45:45PM
21 they'll put money in and as well, you know, 03:45:48PM
22 participate as requested. 03:45:49PM
23 Q. Okay. And are you aware 03:45:50PM
24 of any prior experience that these other investors 03:45:50PM
25 might have in developing other offshore wind 03:45:52PM

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1 you were not involved in the development of any 03:44:00PM
2 offshore wind project? 03:44:03PM
3 A. That's correct. 03:44:04PM
4 Q. So in 2007, you and 03:44:05PM
5 Mr. William Ziegler founded White Owl, which is a 03:44:09PM
6 private equity firm; right? 03:44:11PM
7 A. 2007? Yes. 03:44:14PM
8 Q. And other than Windstream 03:44:16PM
9 Energy LLC, none of White Owl's investments are 03:44:18PM
10 renewable energy companies? 03:44:21PM
11 A. None of White Owl's other 03:44:22PM
12 investments are renewable energy companies. It's 03:44:25PM
13 -- well, no, I actually take that back. 03:44:27PM
14 We have an investment in a 03:44:30PM
15 company called West Wind Energy. They're a 03:44:31PM
16 Wyoming-based wind farm company. We also have 03:44:34PM
17 some other investments that are no longer in our 03:44:38PM
18 portfolio, but one was a biocrude investment and 03:44:41PM
19 -- but it's not in our portfolio anymore. It was 03:44:47PM
20 sold. 03:44:51PM
21 Q. Okay. But other than 03:44:51PM
22 Windstream Wolfe Island Shoals Inc., none of these 03:44:54PM
23 companies were involved in the development of an 03:44:56PM
24 offshore wind project? 03:44:58PM
25 A. That is correct. 03:44:59PM

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1 projects? 03:45:54PM
2 A. I do not believe they 03:45:55PM
3 have any experience in offshore wind. They have a 03:45:57PM
4 lot of experience in the marine space and 03:46:00PM
5 developing offshore drill rigs and obviously -- I 03:46:02PM
6 stated earlier -- in developing ships, but I'm not 03:46:06PM
7 -- I don't believe they have specific direct 03:46:10PM
8 offshore wind experience, but they have developed 03:46:11PM
9 -- I think they -- you know, I'd say it's probably 03:46:14PM
10 about \$10 or \$15 billion worth of offshore drill 03:46:16PM
11 rigs. 03:46:20PM
12 Q. Okay. So let's turn to 03:46:20PM
13 paragraph 23 of your first witness statement in 03:46:22PM
14 the Memorial. 03:46:25PM
15 A. Is that in here or in 03:46:26PM
16 here? 03:46:28PM
17 Q. I believe your counsel 03:46:28PM
18 provided you with copies of your witness 03:46:29PM
19 statement. 03:46:31PM
20 A. Okay. Which page? 03:46:31PM
21 Q. Paragraph 23. And it 03:46:32PM
22 states here that, in 2007, you and Mr. William 03:46:43PM
23 Ziegler began looking at opportunities in the 03:46:46PM
24 renewable energy sector. Do you see that? 03:46:49PM
25 A. Yes. 03:46:52PM

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1 Q. And in paragraph 25 -- 03:46:52PM
2 so, in paragraph 25, it states that you were first 03:47:06PM
3 introduced to Mr. Ian Baines in July 2007. 03:47:09PM
4 A. Yes, that's what it 03:47:15PM
5 states. 03:47:16PM
6 Q. And so you were 03:47:16PM
7 interested in working with Mr. Baines because of 03:47:17PM
8 his past experience in the wind energy sector; 03:47:19PM
9 right? 03:47:22PM
10 A. Yes. We were interested 03:47:23PM
11 in working with him because of his experience, 03:47:24PM
12 specifically with the projects that were detailed 03:47:27PM
13 in the opening statement, Melancthon and the Wolfe 03:47:29PM
14 Island project, as well as he had experience in 03:47:32PM
15 hydro and gas-fired power plants and a number of 03:47:36PM
16 other projects in Ontario. So we were interested 03:47:41PM
17 in it from the perspective of he had developed 03:47:43PM
18 wind projects in Ontario or he had developed wind 03:47:45PM
19 projects and then had specific experience in the 03:47:48PM
20 province of Ontario that we were attempting to 03:47:50PM
21 enter. 03:47:52PM
22 Q. Okay. But you would 03:47:53PM
23 agree that Mr. Baines did not have any prior 03:47:54PM
24 experience in developing an offshore wind project? 03:47:56PM
25 A. Other than the overlap in 03:48:00PM

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1 logistics for the current Wolfe Island project and 03:48:03PM
2 bringing the turbines here and -- and developing 03:48:06PM
3 something that -- that needed underwater cables 03:48:10PM
4 and everything else, he did not have experience in 03:48:13PM
5 developing an offshore wind farm. 03:48:15PM
6 Q. Right. But that prior 03:48:17PM
7 experience related to the onshore Wolfe Island 03:48:18PM
8 Shoals project; correct? 03:48:21PM
9 A. Yes, that's correct. 03:48:22PM
10 Which is, as you guys have obviously seen, it's 5 03:48:23PM
11 kilometres from the -- the project we were 03:48:27PM
12 proposing. 03:48:29PM
13 Q. So let's turn now to 03:48:30PM
14 paragraph 40 of your Memorial witness statement. 03:48:32PM
15 And it states here that you first learned about 03:48:47PM
16 the possibility of developing an offshore wind 03:48:49PM
17 project on the Wolfe Island Shoals from Mr. Baines 03:48:52PM
18 in 2007; correct? 03:48:54PM
19 A. That's correct. I don't 03:48:56PM
20 remember exactly when it was, but at some point -- 03:49:00PM
21 it was either 2007 or very early 2008 -- we 03:49:02PM
22 actually travelled to Wolfe Island, and I got the 03:49:05PM
23 opportunity to ride the ferry over with Mr. Baines 03:49:08PM
24 and, you know, see the response he got from the 03:49:11PM
25 landowners. Actually, one of them on the ferry 03:49:14PM

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1 hugged him and said, "Thank you. I get to keep my 03:49:17PM
2 farm in my family for the next three or four 03:49:19PM
3 generations because of the project he built." 03:49:22PM
4 And we stood on the shore of 03:49:24PM
5 -- of Wolfe Island, and we were able to look out 03:49:25PM
6 into the water, and we were talking, and I said to 03:49:28PM
7 him, you know, "How come nobody has developed 03:49:31PM
8 here?" And he said, "It's funny you ask. I have 03:49:33PM
9 been thinking about this since I started this 03:49:35PM
10 project, and it's partially because you can see 03:49:37PM
11 the bottom of the water there. So you can tell 03:49:39PM
12 the depths are not very much." 03:49:43PM
13 Q. Great. And in order to 03:49:45PM
14 develop an offshore wind project, Windstream 03:49:47PM
15 needed access to the lake bed; right? Which in 03:49:50PM
16 Ontario is considered Crown land? 03:49:52PM
17 A. That's correct. 03:49:54PM
18 Q. Okay. But in 2007, there 03:49:56PM
19 was a deferral on offshore wind Crown land 03:49:59PM
20 applications; right? 03:50:01PM
21 A. Right. That's correct. 03:50:03PM
22 So that's why, in 2007, this was just a discussion 03:50:03PM
23 topic amongst the group, but not actually a 03:50:07PM
24 project that we were pursuing at that point, 03:50:10PM
25 because we had no ability to do it. 03:50:12PM

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1 What Mr. Baines informed me at 03:50:14PM
2 that point was that offshore wind was in a 03:50:17PM
3 moratorium or -- I think it's now called a 03:50:20PM
4 deferral, but offshore wind was in a deferral to 03:50:22PM
5 study the science necessary to be able to actually 03:50:24PM
6 move forward. So that began in '06. There was no 03:50:26PM
7 commitment or knowledge of when that would end. 03:50:30PM
8 Q. Okay. So I'd like to 03:50:32PM
9 turn now to paragraph 20 of your reply witness 03:50:35PM
10 statement. So it lists a number of 03:50:38PM
11 representations that you state that you relied on 03:50:52PM
12 in deciding to move forward with developing your 03:50:55PM
13 offshore wind project; right? And so this 03:50:57PM
14 includes Minister Cansfield's announcement that 03:51:00PM
15 Ontario was open for business for offshore wind, 03:51:03PM
16 numerous speeches by members of the Ontario 03:51:05PM
17 Government, positive investment climate created by 03:51:08PM
18 the Green Energy Act, the inclusion of offshore 03:51:11PM
19 wind in the FIT program, Minister Cansfield's 03:51:13PM
20 letter encouraging Crown land applicants to apply 03:51:16PM
21 for a FIT contract, and a streamlined regulatory 03:51:19PM
22 regime; right? 03:51:21PM
23 A. That's correct. Because 03:51:24PM
24 prior to these things happening, we had no ability 03:51:25PM
25 to actually move forward. 03:51:27PM

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1 So as each of these steps 03:51:29PM
2 happened in sort of sequential order, we looked at 03:51:31PM
3 each one, and we moved the project a little bit 03:51:34PM
4 more forward, a little bit more forward, a little 03:51:37PM
5 bit more forward. Had any of these steps, like, 03:51:40PM
6 for instance, it not be included in the FIT 03:51:44PM
7 program, we clearly wouldn't have applied for the 03:51:46PM
8 FIT program. 03:51:49PM
9 If it -- if they hadn't said, 03:51:49PM
10 encouraged us with the FIT application, you know, 03:51:51PM
11 to apply, we not only wouldn't have done it, but 03:51:53PM
12 we physically couldn't because one of the 03:51:56PM
13 attributes of the FIT program was that you had to 03:51:59PM
14 have the land. 03:52:01PM
15 And so we actually had no 03:52:02PM
16 ability to apply into the FIT program without the 03:52:04PM
17 land until the MNR, through this letter, said: 03:52:08PM
18 Are you guys not only must apply or should apply, 03:52:11PM
19 but you must apply to keep that Crown land 03:52:15PM
20 position, and you must apply. 03:52:17PM
21 And the FIT program had 03:52:19PM
22 multiple stages, and the first of which was this 03:52:20PM
23 -- what they called this early -- I'm blanking on 03:52:24PM
24 it. It was the -- the original period. It was a 03:52:28PM
25 very small window that you had to apply to be 03:52:30PM

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1 of the representations. There were probably 03:53:34PM
2 additional things that we were -- I mean, we were 03:53:36PM
3 in the marketplace. We were speaking to other 03:53:40PM
4 investors. We were speaking to banks. We were 03:53:42PM
5 doing a lot of other diligence. 03:53:43PM
6 So beyond this set of 03:53:45PM
7 representations, there was a lot of other 03:53:46PM
8 information that was available to us as we went 03:53:49PM
9 through our diligence process as we moved this 03:53:51PM
10 project along. 03:53:53PM
11 Q. Okay. So let's go to 03:53:54PM
12 Exhibit C-0058, which is at Tab 1 of your binder. 03:53:56PM
13 A. Tab 1? 03:54:04PM
14 Q. Mm-hmm. 03:54:05PM
15 A. Yes. 03:54:06PM
16 Q. And so, for the record, 03:54:07PM
17 this is a press release from the Ministry of 03:54:08PM
18 Natural Resources, which is titled, "Ontario Lays 03:54:10PM
19 Foundation for Offshore Wind Power," dated January 03:54:13PM
20 17, 2008; right? 03:54:15PM
21 And in this press release 03:54:18PM
22 Natural Resources Minister Donna Cansfield 03:54:22PM
23 announced that the Ontario government has lifted 03:54:22PM
24 the deferral on existing proposals for offshore 03:54:24PM
25 wind projects and that it would be accepting new 03:54:27PM

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1 first in line, and they were requiring us to apply 03:52:32PM
2 in that period. 03:52:35PM
3 So at all of these steps along 03:52:36PM
4 the way, they weren't -- were to some degree. 03:52:38PM
5 [Reporter's note: Technical problem with 03:52:43PM
6 microphone.] 03:52:44PM
7 THE WITNESS: They were to 03:52:49PM
8 some degree binary. If the government or -- I'm 03:52:51PM
9 sorry. I apologize. If the agencies of the 03:52:55PM
10 government had not said, "You can do this step," 03:52:58PM
11 we couldn't move forward, and you can do this 03:53:01PM
12 step, and you can do this step. So some of them 03:53:03PM
13 were speeches that we relied on the certainty, but 03:53:05PM
14 some of them were very specific gating periods 03:53:08PM
15 that had the government not stepped up and said, 03:53:11PM
16 "Please go forward. Here's what we're going to 03:53:14PM
17 propose to you," we wouldn't actually be sitting 03:53:16PM
18 here right now. 03:53:19PM
19 Q. Okay. So we're going to 03:53:20PM
20 get into each of those specific documents, but I 03:53:21PM
21 just want to confirm, though, these are all of the 03:53:24PM
22 representations that you relied on in determining 03:53:26PM
23 that you would move forward with the project? 03:53:28PM
24 A. I don't know that these 03:53:30PM
25 are all of the representations. These are a set 03:53:31PM

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1 Crown land applications for onshore and offshore 03:54:29PM
2 wind projects. 03:54:32PM
3 Do you see that? 03:54:33PM
4 A. Yes. 03:54:34PM
5 Q. And so approximately 03:54:36PM
6 two-thirds down the page, it states that: 03:54:38PM
7 "All applicants must 03:54:41PM
8 undergo a review before 03:54:42PM
9 they can be awarded 03:54:43PM
10 applicant of record 03:54:44PM
11 status." 03:54:45PM
12 It is about two-thirds down. 03:54:46PM
13 So if you look at the screen. Donnie has 03:54:51PM
14 highlighted it for you. 03:54:54PM
15 So, Mr. Mars, you would agree 03:54:56PM
16 that merely applying for Crown land did not 03:55:05PM
17 guarantee that Applicant of Status would have been 03:55:08PM
18 awarded? 03:55:10PM
19 A. I don't know that we've 03:55:12PM
20 ever made the assertion that applying for Crown 03:55:13PM
21 land meant that it would be awarded and that we 03:55:16PM
22 would -- we would move forward. 03:55:20PM
23 You know, we relied on -- on 03:55:21PM
24 obviously this to -- to put in the application, 03:55:22PM
25 but, again, had the Ministry not come back and 03:55:26PM

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1 come back with this letter, we wouldn't have been 03:55:30PM
2 able to move forward. 03:55:32PM
3 THE WITNESS: So if they -- Im 03:55:34PM
4 killing these mics. Is it because you need it in 03:55:36PM
5 the system, or can I just speak loudly? 03:55:41PM
6 MS. NETTLETON: It needs to be 03:55:44PM
7 in the system. 03:55:45PM
8 --- [Reporter's Note: Technical difficulty with 03:55:48PM
9 mic system.] 03:55:51PM
10 BY MS. KAM: 03:56:04PM
11 Q. I think you have to turn 03:56:04PM
12 it on. 03:56:05PM
13 A. Sorry. So I think what I 03:56:06PM
14 was -- thank you. Seriously technologically 03:56:07PM
15 challenged here for me; right? 03:56:11PM
16 MR. TERRY: Take that one. 03:56:14PM
17 THE WITNESS: So I think where 03:56:23PM
18 I was and what I was saying is that, you know -- 03:56:24PM
19 this -- this only granted -- this -- this 03:56:27PM
20 press release here basically said, look, we're 03:56:31PM
21 going to actually now lift this deferral or move 03:56:33PM
22 on from this deferral and allow people to apply in 03:56:36PM
23 for offshore wind. 03:56:39PM
24 So, as I said when I -- 03:56:41PM
25 before, we stood on the shore of, you know, this 03:56:42PM

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1 Q. Mr. Mars, you understood 03:57:43PM
2 that the Crown land applications that you 03:57:45PM
3 submitted would have been subject to a review 03:57:47PM
4 process; right? That's -- that's my question. 03:57:49PM
5 A. Absolutely. And it says 03:57:51PM
6 here that it would have gone through an 03:57:52PM
7 environmental assessment, and even with what was 03:57:55PM
8 stated earlier today in relation to our 03:57:57PM
9 expectations for the environmental assessment or 03:57:59PM
10 what is now called the REA, which I know at some 03:58:02PM
11 point we will probably discuss the differentials, 03:58:06PM
12 but as I understood them, they were almost the 03:58:08PM
13 same except the REA offered guarantees and 03:58:11PM
14 criteria to push it forward. 03:58:14PM
15 We -- we only wanted the 03:58:15PM
16 opportunity to go through that. We never thought 03:58:17PM
17 that we were promised the -- the permits. We 03:58:19PM
18 never -- and I don't know that we have ever made 03:58:23PM
19 the statement that we would get these things. 03:58:25PM
20 What we have made is we've 03:58:28PM
21 said, "We believe that, based on the framework, 03:58:29PM
22 the rules in place, the certainty, and the 03:58:32PM
23 speeches and everything else was that we would be 03:58:35PM
24 afforded the opportunity to do the things, to show 03:58:37PM
25 the province that the project actually made sense 03:58:41PM

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1 island and said, this... 03:56:44PM
2 PRESIDENT: Please go ahead. 03:56:50PM
3 THE WITNESS: I'm sorry. So 03:56:52PM
4 as I said before, we stood on that -- that shore 03:56:53PM
5 of the island and said, "Wow, this would be 03:56:55PM
6 something that would be -- would be something we 03:56:57PM
7 would have some interest in moving forward with." 03:56:59PM
8 Obviously on that date -- I mean, I -- you know, 03:57:01PM
9 we didn't do the proper due diligence on that date 03:57:04PM
10 way back in either late 2007 or early 2008. 03:57:06PM
11 However, as we started to step 03:57:09PM
12 through this, the first thing was they said, "Can 03:57:12PM
13 you apply? You can now apply." 03:57:14PM
14 So from this step forward, we 03:57:15PM
15 went and we did a whole bunch of work to see, 03:57:17PM
16 well, where do we want to apply? And -- because 03:57:20PM
17 we weren't trying to go which a pray-and-spray 03:57:22PM
18 approach. We wanted to be very conscious in what 03:57:25PM
19 we were doing, and it wasn't just offshore. As 03:57:27PM
20 you can see here, it was onshore. 03:57:30PM
21 And so we actually applied for 03:57:31PM
22 hundreds of thousands of acres in total, and it 03:57:33PM
23 was after doing a lot of research, but that did 03:57:36PM
24 not mean that, at that point, we were committed to 03:57:39PM
25 building a project. 03:57:41PM

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1 to move forward." 03:58:44PM
2 Q. Okay. And, Mr. Mars, I 03:58:45PM
3 just want to focus on this announcement in 03:58:47PM
4 particular, because it does not provide any 03:58:49PM
5 details as to the requirement or the timing of 03:58:51PM
6 this review process. 03:58:54PM
7 A. That's correct. 03:58:55PM
8 Q. Okay. So I'd like to now 03:58:56PM
9 turn to Exhibit C-0110, which is at Tab 2 of your 03:59:01PM
10 binder. This document is dated February 20, 2009, 03:59:06PM
11 and it's titled, "The Green Economy," and it 03:59:13PM
12 contains the speaking notes of former Minister of 03:59:15PM
13 the Environment -- or Energy and Infrastructure -- 03:59:18PM
14 excuse me -- George Smitherman, to the Toronto 03:59:21PM
15 Board of Trade. 03:59:23PM
16 All right. And during his 03:59:24PM
17 speech, Mr. Smitherman talks about the Green 03:59:27PM
18 Energy Act, which he was intending to introduce to 03:59:29PM
19 the legislature on Monday. Do you see that? It's 03:59:32PM
20 on the first page. 03:59:37PM
21 A. Yes. 03:59:38PM
22 Q. So you would agree that, 03:59:39PM
23 at this point, the Green Energy Act had not yet 03:59:40PM
24 been enacted as law? 03:59:43PM
25 A. I believe it hadn't been 03:59:45PM

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1 enacted as law. I think the previous process, 03:59:47PM
2 which we thought was going to be in place at the 03:59:50PM
3 time, was the RFP process that pre-dated this. 03:59:52PM
4 This was just an exciting new, you know, program 03:59:57PM
5 that captured everything that an investor could 04:00:00PM
6 possibly want, you know, simplicity, certainty, 04:00:03PM
7 you know, something really exciting. Something 04:00:06PM
8 that was building upon the amazingness that was 04:00:08PM
9 going on in -- in Europe. 04:00:11PM
10 Q. And now, Mr. Mars, you 04:00:12PM
11 would agree that, in deciding to invest in an 04:00:14PM
12 offshore wind project, that a prudent investor 04:00:17PM
13 would not rely solely on the general statements of 04:00:19PM
14 public officials, but instead on specific rules 04:00:21PM
15 and regulatory requirements; right? 04:00:25PM
16 A. We relied on a lot of 04:00:29PM
17 things. So I don't think that any prudent 04:00:30PM
18 investor would rely on any one of those individual 04:00:32PM
19 items you just -- you just mentioned. 04:00:34PM
20 We -- we do a lot of due 04:00:37PM
21 diligence. And the way that -- that projects work 04:00:38PM
22 or even investments is you start at the top of the 04:00:40PM
23 funnel with a lot of projects, and you go through 04:00:44PM
24 various screens, and at the end of it, what comes 04:00:46PM
25 out is the purest of the pure. 04:00:49PM

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1 end of the day to avoid this tomorrow. Yes, 04:01:58PM
2 please. 04:02:04PM
3 THE WITNESS: All I was 04:02:05PM
4 saying -- is this on? 04:02:06PM
5 BY MS. KAM 04:02:06PM
6 Q. Yes. 04:02:06PM
7 A. Sorry. All I was saying 04:02:10PM
8 is that, at the end of the day, you look at 04:02:11PM
9 everything as an investor. You don't just base it 04:02:13PM
10 on one individual thing. 04:02:15PM
11 Q. But part of the things 04:02:16PM
12 that you would have looked at would have included 04:02:18PM
13 regulatory requirements; right? The regulations 04:02:20PM
14 themselves? 04:02:22PM
15 A. Absolutely. 04:02:22PM
16 Q. Okay. So let's turn now 04:02:23PM
17 to C-0123, which is at tab 3 of your binder. This 04:02:27PM
18 document is titled: 04:02:32PM
19 "Enact to Enact the Green 04:02:34PM
20 Energy Act 2009 and to 04:02:35PM
21 Build a Green Economy to 04:02:36PM
22 Repeal the Energy 04:02:38PM
23 Conservation Leadership 04:02:38PM
24 Act, 2006, and the Energy 04:02:41PM
25 Efficiency Act and to 04:02:43PM

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1 And so we were not relying on 04:00:50PM
2 any one individual thing. We were relying on the 04:00:53PM
3 aggregation of everything that we knew, learned, 04:00:56PM
4 studied, and all of these things that were put out 04:01:00PM
5 there into -- into public domain. 04:01:03PM
6 Q. But you would agree 04:01:06PM
7 what's important are the specific regulatory 04:01:07PM
8 requirements that applied to your project; right? 04:01:10PM
9 A. I would actually say 04:01:13PM
10 what's most important is that your counterparty in 04:01:14PM
11 an agreement is 100 percent behind building it and 04:01:18PM
12 100 percent behind wanting it. 04:01:24PM
13 And so, you know, if none of 04:01:26PM
14 this had existed, none of this framework, you 04:01:28PM
15 know, all of the -- from the Ministers all the way 04:01:32PM
16 up to the Premier pushing this, I would agree with 04:01:35PM
17 maybe what you're saying. But I think, at the end 04:01:39PM
18 of the day, for me, we have to look at everything 04:01:41PM
19 in aggregate. 04:01:43PM
20 And I don't think this 04:01:44PM
21 permits... 04:01:46PM
22 --- [Reporter's Note: Technical difficulty with 04:01:48PM
23 mic.] 04:01:49PM
24 PRESIDENT: Maybe we should 04:01:54PM
25 have a technical review of the microphones at the 04:01:55PM

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1 amend other statutes." 04:02:43PM
2 A. It's a pretty long title. 04:02:45PM
3 Q. Right. And despite the 04:02:46PM
4 long title, you would agree that this is the 04:02:47PM
5 legislation enacted by the government, which is 04:02:49PM
6 also known as the Green Energy and Green Economy 04:02:51PM
7 Act and GEGEA -- or GEGEA, which Mr. Smitherman 04:02:55PM
8 was talking about in his speech. 04:02:57PM
9 A. I would assume so. 04:03:00PM
10 Q. Okay. And just below the 04:03:02PM
11 title of the Act it states that: 04:03:03PM
12 "The legislation received 04:03:04PM
13 Royal Assent on May 14, 04:03:06PM
14 2009." 04:03:08PM
15 Right? 04:03:09PM
16 A. I don't know why I am not 04:03:11PM
17 seeing this. 04:03:13PM
18 Q. It's just under the 04:03:13PM
19 title. 04:03:14PM
20 A. Okay. Yes, I see it 04:03:15PM
21 says, "Assented to May 14, 2009." 04:03:16PM
22 Q. And so this was several 04:03:18PM
23 months after Mr. Smitherman's speech to the 04:03:20PM
24 Toronto Board of Trade; right? 04:03:22PM
25 A. Okay, yes. 04:03:25PM

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1 Q. Okay. So let's go to 04:03:26PM
2 Section 25.35(1) of the Electricity Act, and I've 04:03:29PM
3 flagged it for you. It's around page 15. 04:03:32PM
4 A. 25? Say again. 04:03:36PM
5 Q. 25.35(1). 04:03:38PM
6 A. Yep. 04:03:41PM
7 Q. And for the record, this 04:03:42PM
8 provision is titled, "The Feed-In Tariff program," 04:03:43PM
9 and it states that: 04:03:46PM
10 "The Minister may direct 04:03:46PM
11 the OPA to develop a 04:03:47PM
12 Feed-In Tariff program 04:03:49PM
13 that is designed to 04:03:50PM
14 procure energy from 04:03:51PM
15 renewable energy sources 04:03:53PM
16 under such circumstances 04:03:54PM
17 and conditions, in 04:03:55PM
18 consideration of such 04:03:57PM
19 factors and within such 04:03:58PM
20 period as the Minister 04:03:59PM
21 may require." 04:04:01PM
22 Do you see that? 04:04:02PM
23 A. Yes. 04:04:03PM
24 Q. But you would agree that 04:04:03PM
25 the GEGEA does not provide any details regarding 04:04:05PM

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1 energy project except 04:05:03PM
2 under the authority of 04:05:04PM
3 and in accordance with a 04:05:06PM
4 renewable energy approval 04:05:07PM
5 issued by the Director." 04:05:08PM
6 Right? 04:05:10PM
7 A. I mean, that's what it 04:05:13PM
8 says, and then it clearly has a whole set of other 04:05:14PM
9 things here. 04:05:16PM
10 Q. Okay. But you would 04:05:17PM
11 agree that nothing in the GEGEA specifies the 04:05:18PM
12 requirements or the process for applying for 04:05:22PM
13 renewable energy approval? 04:05:24PM
14 A. I mean, I don't know 04:05:27PM
15 because I haven't -- like I said, I haven't seen 04:05:29PM
16 this in many years. You know, I know, when we 04:05:31PM
17 signed up for the FIT contract, it did have all 04:05:35PM
18 these definitions that you're referring to, but I 04:05:38PM
19 don't know specifically, right here, in this set 04:05:41PM
20 of documents if it does or doesn't. 04:05:43PM
21 Q. So, sorry I, just want to 04:05:43PM
22 clarify your answer. When you applied to the FIT 04:05:48PM
23 program, the requirements that you are referring 04:05:50PM
24 to for the REA, you understood that to be included 04:05:52PM
25 in the FIT program rules and contract, or where 04:05:56PM

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1 the rules or the requirements for the FIT program 04:04:08PM
2 or how it would operate? 04:04:11PM
3 A. I'm not sure based on 04:04:14PM
4 that definition. I would agree with that. I 04:04:15PM
5 would have to go back and -- and -- you know, it's 04:04:18PM
6 been -- it's been five years, so I'd have to go 04:04:20PM
7 back and reread all of this. 04:04:22PM
8 Q. Okay. But you're not 04:04:24PM
9 specifically aware of any provision in the GEGEA? 04:04:25PM
10 A. I'm not specifically 04:04:28PM
11 aware in here, but it's possible that it exists, 04:04:31PM
12 but obviously this was one part of a program, you 04:04:34PM
13 know. You weren't applying at this point. You 04:04:38PM
14 were applying once you had this entire program 04:04:39PM
15 defined. 04:04:42PM
16 Q. Okay. So let's turn now 04:04:42PM
17 to Schedule G and go to the amendment of Section 04:04:44PM
18 47.3 of Part 501 of the Environmental Protection 04:04:47PM
19 Act. And I flagged that for you as well. 04:04:50PM
20 A. That's this right here? 04:04:53PM
21 Q. Yes. And so this 04:04:54PM
22 provision is titled, "Requirement for renewable 04:04:56PM
23 energy Approval." And it states that: 04:05:00PM
24 "A person shall not 04:05:01PM
25 engage in a renewable 04:05:02PM

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1 did you understand that to be? 04:05:59PM
2 A. I honestly don't remember 04:06:02PM
3 exactly where it was, but it was a strong tenet of 04:06:04PM
4 the FIT program. You know, there were a number of 04:06:08PM
5 -- a number things that were part of the FIT 04:06:10PM
6 contract effectively or this entire program that 04:06:11PM
7 made up ultimately what you would be required to 04:06:15PM
8 do. 04:06:17PM
9 Q. Okay. So let's go to 04:06:18PM
10 Exhibit R-0072, which is at Tab 4 of your binder. 04:06:21PM
11 And this is a Regulation Decision Notice, which 04:06:29PM
12 was posted on Ontario's Environmental Bill of 04:06:31PM
13 Rights Registry, titled "Proposed Ministry of the 04:06:34PM
14 Environment Regulations to Implement the Green 04:06:38PM
15 Energy and Green Economy Act 2009." 04:06:41PM
16 So it states in the first 04:06:43PM
17 sentence that: 04:06:45PM
18 "On September 24, 2009, 04:06:45PM
19 O.Reg 359.09, Renewable 04:06:49PM
20 Energy Approvals, under 04:06:51PM
21 Part 501, made under the 04:06:52PM
22 Environmental Protection 04:06:52PM
23 Act came into force." 04:06:54PM
24 Right? 04:06:55PM
25 A. Yes, it does state that. 04:06:59PM

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1 Q. And you would agree that 04:07:00PM
2 September 24, 2009 was also the date on which the 04:07:01PM
3 Minister of Energy and Infrastructure directed the 04:07:06PM
4 OPA to create the FIT program? 04:07:08PM
5 A. I don't remember the 04:07:12PM
6 specific date, but if you are stating it 04:07:13PM
7 factually, like if you are telling me it is, I 04:07:16PM
8 know it was somewhere around this date. 04:07:17PM
9 Q. I have included the 04:07:19PM
10 direction at Tab 38 for your reference, if you 04:07:20PM
11 want to quickly flip to it to double-check. 04:07:22PM
12 So that letter is dated 04:07:27PM
13 September 24, 2009; correct? 04:07:29PM
14 A. It is. I'm not sure why 04:07:31PM
15 it has a cross through Andersen, and it just says 04:07:35PM
16 Mr. Colin. 04:07:39PM
17 Q. That's his first name, 04:07:39PM
18 but I think it was to informalize the letter? 04:07:41PM
19 A. Okay. So this -- so this 04:07:44PM
20 is a final letter, then? 04:07:44PM
21 Q. Yes. 04:07:46PM
22 A. Okay. 04:07:47PM
23 Q. Okay. So let's turn to 04:07:48PM
24 page 2 of the tab that you were on, Tab 4, and 04:07:51PM
25 let's look under the heading "Requirements for

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1 Renewable Energy Approval." 04:08:00PM
2 Can you please read the last 04:08:00PM
3 paragraph above the heading "Solar Energy 04:08:03PM
4 Facilities"?. 04:08:09PM
5 A. The one that starts with 04:08:09PM
6 there are special rules for -- 04:08:10PM
7 Q. Yes. 04:08:11PM
8 A. "There are special rules 04:08:12PM
9 for wind facilities that 04:08:13PM
10 include turbines in 04:08:14PM
11 contact with surface 04:08:15PM
12 water other than 04:08:16PM
13 wetlands. These 04:08:18PM
14 facilities require an REA 04:08:19PM
15 and are required to 04:08:21PM
16 submit an offshore wind 04:08:22PM
17 facility report as part 04:08:24PM
18 of the application. The 04:08:25PM
19 Ministry of Environment 04:08:27PM
20 and Ministry of Natural 04:08:28PM
21 Resources continue to 04:08:30PM
22 work on a coordinated 04:08:30PM
23 approach to offshore wind 04:08:31PM
24 facilities which will 04:08:33PM
25 include province-wide 04:08:34PM

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1 minimum separation 04:08:36PM
2 distance standards for 04:08:37PM
3 noise." 04:08:39PM
4 Q. Okay. So you would agree 04:08:40PM
5 that, prior to Windstream's application to the FIT 04:08:43PM
6 program, it was known that Ontario was continuing 04:08:45PM
7 to work on a coordinated approach for offshore 04:08:48PM
8 wind projects? 04:08:50PM
9 A. Well, I mean, it was 04:08:52PM
10 known, and I don't know that we've ever said it 04:08:53PM
11 wasn't, but it was known that they were trying to 04:08:56PM
12 set a setback in place, and obviously, you know, 04:08:58PM
13 we've always assumed a setback is based upon 04:09:02PM
14 noise, because the setbacks for onshore were 04:09:04PM
15 deemed 550 metres from the nearest receptor point, 04:09:08PM
16 and the reason for that is it was based upon 04:09:12PM
17 noise. They believed that noise impacted people 04:09:15PM
18 who lived there. 04:09:18PM
19 And so what we knew at that 04:09:19PM
20 time was that they were going to impose this 04:09:21PM
21 setback or they were going to come up with a 04:09:23PM
22 setback, and we assumed -- and you can see it here 04:09:26PM
23 -- that it was going to be based upon noise. 04:09:28PM
24 And so, you know, what we 04:09:30PM
25 looked at is we understood that noise travels a

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1 little bit further over water because it's not -- 04:09:34PM
2 it's the same reason why wind blows stronger over 04:09:37PM
3 water. And one of the attractive things about 04:09:40PM
4 this project, but we knew it travelled further. 04:09:42PM
5 So we, internally, had always 04:09:44PM
6 thought that the setback would be -- we never 04:09:48PM
7 thought it would be 5 kilometres, but we did think 04:09:50PM
8 that 550 metres was not going to be what it was. 04:09:52PM
9 And so we took a distance of 2 04:09:54PM
10 kilometres from shore, and specifically on this 04:09:58PM
11 project the nearest home to shore is not right on 04:10:00PM
12 the shoreline. So we knew that there was 04:10:03PM
13 additional distance from shore to sensitive 04:10:05PM
14 receptor. 04:10:08PM
15 So we thought that we had, you 04:10:10PM
16 know, planned for an adequate amount of distance. 04:10:12PM
17 It's the reason we never thought about putting a 04:10:15PM
18 wind turbine, you know, 3 feet from shore, which 04:10:18PM
19 technically, based on the requirements that were 04:10:20PM
20 in place at the time, at least from a noise 04:10:23PM
21 perspective, actually could have happened. And 04:10:25PM
22 you can see it on Wolfe Island because Wolfe 04:10:27PM
23 Island has a nearly 200-megawatt spinning wind 04:10:29PM
24 farm that our management team originally 04:10:33PM
25 developed. 04:10:35PM

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1 And you can see the proximity 04:10:36PM
2 to the homes of those turbines, and we were 04:10:37PM
3 proposing to utilize almost the identical turbines 04:10:39PM
4 for the offshore project. 04:10:43PM
5 Q. But you understood that 04:10:45PM
6 the province was continuing work to develop a 04:10:47PM
7 province-wide minimum separation distance 04:10:51PM
8 standard, so a setback. And so that minimum 04:10:53PM
9 setback would have applied to Windstream's 04:10:57PM
10 project; right? 04:10:59PM
11 A. Right. And like I said, 04:11:00PM
12 you could see above it talks about the 550-metre 04:11:02PM
13 minimum setback. And so based upon noise, the 04:11:06PM
14 likely outcome of 5 kilometres was actually not 04:11:08PM
15 something that was likely. I mean, we never 04:11:11PM
16 contemplated this, because we didn't know. But, 04:11:15PM
17 yes, we contemplated it, and we were told at the 04:11:17PM
18 time when we received our contract that this was 04:11:20PM
19 the issue that they still needed to work out. And 04:11:23PM
20 it's a reason why our contract was extended. We 04:11:25PM
21 didn't just sign our contract back. We wanted to 04:11:29PM
22 understand what that meant and get clarity around, 04:11:31PM
23 what was the setback; right? 04:11:34PM
24 Again, you asked about being a 04:11:36PM
25 prudent investor and a prudent developer. Well, I 04:11:38PM

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1 counterparty which ultimately is the province. I 04:12:42PM
2 know there's some discussion about the OPA, but 04:12:44PM
3 the reality is the province is the counterparty to 04:12:46PM
4 these contracts. Otherwise, you know, to be 04:12:48PM
5 honest, a thinly capitalized company wouldn't be 04:12:50PM
6 viewed as credible for maintaining tens of 04:12:53PM
7 billions of dollars worth of contracts. 04:12:57PM
8 So we always believed that, at 04:13:00PM
9 the end of the day, if the province is pushing 04:13:02PM
10 you, if the province is making announcements, if 04:13:04PM
11 the province is providing you with a contract, you 04:13:07PM
12 go forward; right? You look at your screens to 04:13:11PM
13 make sure you feel comfortable about investing, 04:13:14PM
14 but, you know, every single sign was: We want you 04:13:17PM
15 guys to move forward, and they were making 04:13:19PM
16 announcements that they wanted to be the leaders, 04:13:22PM
17 or they're making announcements, and effectively 04:13:25PM
18 they wanted to be the leaders in offshore wind in 04:13:27PM
19 North America. 04:13:30PM
20 And we thought, wow, this is a 04:13:31PM
21 great support of what they're trying to do, which 04:13:33PM
22 is to build jobs, manufacturing jobs, and how do 04:13:36PM
23 you do that? Well, you build projects, and 04:13:40PM
24 specifically in offshore wind, because there are 04:13:43PM
25 some different attributes than onshore. You get 04:13:45PM

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1 think we were pretty prudent in May of 2010 when 04:11:40PM
2 we said, "We're not signing this contract until 04:11:43PM
3 you provide us information on when this setback is 04:11:45PM
4 going to happen and what exactly it is." 04:11:48PM
5 So we went through a series of 04:11:50PM
6 steps along that continuum until we actually 04:11:52PM
7 signed it back in August. 04:11:55PM
8 Q. So in terms of when you 04:11:57PM
9 applied to the FIT program, though, that setback 04:11:59PM
10 had not been finalized; right? 04:12:02PM
11 A. No. 04:12:04PM
12 Q. You didn't know -- 04:12:05PM
13 A. I think we -- we assumed 04:12:06PM
14 at the time of applying for the FIT contract that, 04:12:08PM
15 if they didn't feel comfortable moving forward 04:12:12PM
16 with an offshore wind project, they wouldn't give 04:12:15PM
17 us a contract. 04:12:18PM
18 So we -- we applied and the 04:12:19PM
19 province, or at least the Ontario Power Authority, 04:12:24PM
20 provided us with a winning contract that I think 04:12:26PM
21 you guys saw earlier in the day, the notice. 04:12:29PM
22 So, you know, as you go 04:12:31PM
23 through these things, we never anticipated that 04:12:33PM
24 the counterparty -- and I know I said it in my 04:12:36PM
25 witness statement, but we never anticipated the 04:12:39PM

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1 to build a lot more jobs, and you get to build a 04:13:48PM
2 lot more industry by issuing these contracts. 04:13:50PM
3 So the fact that two people -- 04:13:53PM
4 you know, two people applied, I don't know that 04:13:56PM
5 that's relevant. The fact that you gave -- the 04:13:58PM
6 province provided a contract to us, I do believe 04:14:01PM
7 is relevant. 04:14:03PM
8 Q. Okay. So, Mr. Mars, we 04:14:04PM
9 will get to the FIT contract in a bit, but perhaps 04:14:06PM
10 before we get there, I'd just like to go through a 04:14:08PM
11 few more letters and exhibits relating to the 04:14:11PM
12 Ontario Government. 04:14:15PM
13 A. Sure. 04:14:16PM
14 Q. Okay? So let's go to 04:14:16PM
15 Exhibit C-0140, which is at Tab 5 of your binder. 04:14:18PM
16 And so this is a policy proposal notice, which is 04:14:26PM
17 also posted on the EBR registry, titled: 04:14:28PM
18 "Review of the Water 04:14:30PM
19 Power and Wind Power Site 04:14:30PM
20 Release Policies and 04:14:35PM
21 Procedures." 04:14:35PM
22 Right? 04:14:35PM
23 A. Yes. 04:14:36PM
24 Q. Under the first 04:14:36PM
25 paragraph, it states that: 04:14:37PM

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1 "His notice was 04:14:39PM
2 originally published on 04:14:39PM
3 the Environmental 04:14:41PM
4 Registry on September 24, 04:14:42PM
5 2009." 04:14:43PM
6 Do you see that? 04:14:45PM
7 A. I do see that, yes. 04:14:46PM
8 Q. And so this was also the 04:14:48PM
9 same date as the REA regulations, the date when 04:14:50PM
10 they came into force as well as the Minister of 04:14:54PM
11 Energy and infrastructure's direction to the OPA 04:14:57PM
12 to create the FIT program; correct? 04:14:59PM
13 A. Yes. 04:15:02PM
14 Q. Okay. So let's turn to 04:15:02PM
15 the second page. And it states in the first 04:15:04PM
16 paragraph that: 04:15:08PM
17 "MNR is undertaking a 04:15:10PM
18 review of its water power 04:15:11PM
19 and wind power site 04:15:12PM
20 release policies and 04:15:12PM
21 procedures over the 04:15:16PM
22 coming year." 04:15:16PM
23 And so you would agree that, 04:15:17PM
24 prior to Windstream's application to the FIT 04:15:19PM
25 program, it was also known MNR was undergoing a 04:15:21PM

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1 review of its site release policies and 04:15:23PM
2 procedures; right? 04:15:26PM
3 A. I would say the answer to 04:15:27PM
4 this is yes. It appears -- if you go back and you 04:15:32PM
5 look at sort of all of the -- all of the EBR stuff 04:15:36PM
6 and legislations is that the MNR was always 04:15:39PM
7 continually reviewing their site release process 04:15:42PM
8 and procedures. 04:15:44PM
9 And so I don't know at this 04:15:45PM
10 point that we fully believed that our project, 04:15:47PM
11 which had already applied into an existing 04:15:51PM
12 process, and you can see there is a number of 04:15:53PM
13 places where they say the process was in place 04:15:56PM
14 sort of over and over. I don't know that we could 04:15:58PM
15 have anticipated that, all of a sudden, the 04:16:01PM
16 process for somebody who already applied, who 04:16:03PM
17 already put money down, who already did work would 04:16:05PM
18 all of a sudden just change. 04:16:08PM
19 And the other thing is that 04:16:10PM
20 this is, you know, water power and offshore wind. 04:16:12PM
21 And the province has a lot of hydro power and a 04:16:15PM
22 lot of hydro that's been applied into the FIT 04:16:19PM
23 program. 04:16:21PM
24 So, you know, I think for both 04:16:22PM
25 parties, it makes sense. And I know, since then, 04:16:25PM

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1 the hydro guys have gotten blanket extensions on 04:16:28PM
2 their projects of three years to actually go 04:16:31PM
3 through this process from the FIT contract, only 04:16:35PM
4 FIT contract holders specifically because the 04:16:38PM
5 Ministries have taken a lot longer than was 04:16:41PM
6 guaranteed and promised. 04:16:44PM
7 Q. Right. But that 04:16:46PM
8 statement says that the Ministry of Natural 04:16:47PM
9 Resources will be undertaking a review, so not 04:16:50PM
10 only of water power but wind power sites as well; 04:16:52PM
11 right? 04:16:52PM
12 A. Yes. 04:16:52PM
13 Q. And it was coming in the 04:16:55PM
14 -- it was going to take place over the coming 04:16:56PM
15 year? 04:16:58PM
16 A. Yes. 04:16:59PM
17 Q. Okay. 04:16:59PM
18 A. Which would mean it would 04:17:00PM
19 be over in, what, September 2010 at the latest? 04:17:02PM
20 Q. 2010? Okay. So let's go 04:17:06PM
21 now to Exhibit C-0144, which is at Tab 6. 04:17:09PM
22 A. I don't believe that we 04:17:13PM
23 actually, on September 29th, did we already -- you 04:17:14PM
24 know, these letters that were sent to us, I would 04:17:17PM
25 have to look at the letters, but were they of 04:17:20PM

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1 inclusion into the FIT program? Were they 04:17:23PM
2 actually provided to us in September 29th, 2010. 04:17:25PM
3 Q. These were publicly 04:17:27PM
4 posted on the -- 04:17:29PM
5 A. No, I wasn't questioning 04:17:29PM
6 this. But I was saying the letters that we got 04:17:30PM
7 that said, "You must move forward with applying 04:17:33PM
8 into the Feed-In Tariff program," so the ones that 04:17:37PM
9 were directed to us, were they prior or post 04:17:40PM
10 September 29? 04:17:44PM
11 Q. That's actually Tab 6, so 04:17:45PM
12 we can go there right now. 04:17:47PM
13 A. Perfect. Fantastic. 04:17:49PM
14 Q. You will see here that it 04:17:50PM
15 is dated September 24, 2009. And so for the 04:17:51PM
16 record, this is a letter titled: 04:17:54PM
17 "Wind Power on Crown Land 04:17:58PM
18 Acknowledgement Letter." 04:17:59PM
19 And it's Exhibit C-0144. And 04:17:59PM
20 it's addressed to Mr. Baines from the Minister of 04:18:02PM
21 Natural Resources, Donna Cansfield. 04:18:06PM
22 And so you would agree that 04:18:07PM
23 this letter was sent to all Crown land applicants 04:18:08PM
24 in Ontario; right? 04:18:11PM
25 A. As best as I understand 04:18:12PM

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1 it was, but I don't know, because I don't know 04:18:15PM
2 what they received. 04:18:18PM
3 Q. Okay. 04:18:18PM
4 A. But as I understand, it 04:18:19PM
5 was sent to all Crown land, people who applied, 04:18:21PM
6 specifically in the block when Donna Cansfield 04:18:25PM
7 opened it up prior to. 04:18:27PM
8 Q. Okay. And so in the 04:18:30PM
9 sixth paragraph, which is the third from the 04:18:32PM
10 bottom, if that's easier to count up, the letter 04:18:33PM
11 informs applicants that: 04:18:36PM
12 "In order to maintain a 04:18:37PM
13 priority position within 04:18:38PM
14 MNR's site release 04:18:40PM
15 policy, you must submit 04:18:41PM
16 an application to the FIT 04:18:43PM
17 program within the FIT 04:18:44PM
18 program launch period." 04:18:45PM
19 Right? 04:18:46PM
20 A. Yes, yes. 04:18:47PM
21 Q. You would agree, though, 04:18:48PM
22 that this letter doesn't actually encourage 04:18:49PM
23 Windstream to apply to the FIT program, to develop 04:18:52PM
24 its offshore wind project? 04:18:54PM
25 A. No. I think I would 04:18:58PM

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1 to lose your priority 04:19:52PM
2 position." 04:19:54PM
3 So, I mean, I guess if 04:19:56PM
4 everybody was willing to lose their priority 04:19:57PM
5 position, then they wouldn't have applied; right? 04:20:00PM
6 Q. Okay. Well, I would like 04:20:03PM
7 to stay on this letter for a little bit longer and 04:20:04PM
8 take a look now at the fourth paragraph because it 04:20:06PM
9 states that: 04:20:09PM
10 "The initial applicants 04:20:09PM
11 may make a business 04:20:10PM
12 decision not to apply to 04:20:11PM
13 the FIT program." 04:20:13PM
14 So you would agree that the 04:20:14PM
15 decision to apply to the FIT program was optional 04:20:16PM
16 for Crown land applicants; right? 04:20:19PM
17 A. Absolutely. I don't 04:20:21PM
18 think that anything was forced in this process. 04:20:22PM
19 We were never forced to do anything. 04:20:26PM
20 Q. Okay. And then you 04:20:28PM
21 mentioned that you applied in order to maintain 04:20:29PM
22 priority position; right? 04:20:32PM
23 A. No. We -- we applied 04:20:34PM
24 because we thought we had a really wonderful 04:20:37PM
25 project. You know, we knew so many of the 04:20:40PM

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1 actually disagree with that. And I think the -- 04:18:59PM
2 at least the intent as we understood it of this 04:19:03PM
3 letter came at the behest of various 04:19:07PM
4 counterparty -- or various industry people who 04:19:11PM
5 said, "How can these -- how can these specific 04:19:14PM
6 sites be applied into the FIT if they don't have 04:19:18PM
7 the land?" 04:19:21PM
8 So as I said earlier, there is 04:19:21PM
9 a gating issue on the FIT contract. And the 04:19:23PM
10 gating issue is, if you don't have land, you 04:19:26PM
11 cannot apply. 04:19:28PM
12 So if you don't have site 04:19:28PM
13 access, you can't apply. 04:19:30PM
14 So this letter was sent to 04:19:31PM
15 proponents as best as I understand in relation to 04:19:33PM
16 telling them, "No, no, no, you can apply, because 04:19:35PM
17 of this." 04:19:39PM
18 And it actually, for me, it 04:19:40PM
19 not only says you can apply, but it's actually -- 04:19:42PM
20 I think it's encouraging by saying: 04:19:44PM
21 "You must submit an 04:19:47PM
22 application to the FIT 04:19:48PM
23 program within the FIT 04:19:49PM
24 program launch period. 04:19:51PM
25 Otherwise you are going 04:19:52PM

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1 attributes about this. 04:20:42PM
2 So we actually looked at 04:20:43PM
3 multiple offshore projects when we put our FIT 04:20:45PM
4 applications in. And one of them was off the 04:20:47PM
5 coast of the Nanticoke coal plant, which we knew 04:20:50PM
6 they were closing, so we knew the grid was 04:20:53PM
7 incredibly strong there. We knew the depth of 04:20:55PM
8 water. We knew -- we had a pretty good 04:20:57PM
9 understanding of the wind resource, but we didn't 04:20:59PM
10 actually apply that into the FIT specifically, 04:21:01PM
11 because we didn't know -- we didn't feel we knew 04:21:03PM
12 enough about it. 04:21:06PM
13 Wolfe Island was very, very 04:21:07PM
14 unique to -- to us, because our management team 04:21:08PM
15 had developed the original Wolfe Island project. 04:21:12PM
16 So they knew so many attributes about it, 04:21:16PM
17 inclusive of doing the EA -- all the EA work on 04:21:18PM
18 it, knowing the people in the town, the objections 04:21:26PM
19 there would be, the support there would be. They 04:21:27PM
20 knew what it was like to bring turbines all the 04:21:30PM
21 way through the process from Europe, although this 04:21:33PM
22 changed a bit because there was a blade factory 04:21:36PM
23 built by Siemens in Tilsonburg as part of this FIT 04:21:39PM
24 program and as part of some of the Samsung, I 04:21:42PM
25 think, inducements. But they knew how to bring 04:21:46PM

1 the stuff all the way through, which logistics is 04:21:48PM
 2 actually very hard. 04:21:51PM
 3 And the reality is we would 04:21:52PM
 4 have actually staged all the turbines on Wolfe 04:21:53PM
 5 Island or somewhere in the vicinity. So we knew 04:21:56PM
 6 how to get it from Europe, anything we needed, all 04:22:00PM
 7 the way through. We knew that an underwater cable 04:22:02PM
 8 could be laid in that area because it had already 04:22:05PM
 9 been done. EA work was done on that also, which 04:22:07PM
 10 we knew because our team did a lot of these 04:22:10PM
 11 things. 04:22:12PM
 12 So we applied, and then we had 04:22:12PM
 13 to deal with -- I think it was CanHydro at the 04:22:15PM
 14 time, which ultimately turned into TransAlta, for 04:22:18PM
 15 all of the data on the -- the wind data on the 04:22:21PM
 16 shore. 04:22:24PM
 17 So you're talking about tons 04:22:25PM
 18 of points on that shore which would allow us, in 04:22:26PM
 19 conjunction with the data we ultimately acquired, 04:22:29PM
 20 to extrapolate out what does the wind resource 04:22:32PM
 21 look like offshore. 04:22:35PM
 22 You know, one of the questions 04:22:36PM
 23 that was asked earlier was in relation to the 04:22:37PM
 24 predictability of revenue. Well, we had 04:22:40PM
 25 predictability of the dollar amount to be paid. 04:22:42PM

1 we had all of the money, we had everything in 04:23:42PM
 2 place, we actually couldn't apply. 04:23:44PM
 3 Q. Okay. But in terms of 04:23:47PM
 4 actually proceeding with your project, if we look 04:23:48PM
 5 to the second-last paragraph on the first page, it 04:23:51PM
 6 states that: 04:23:53PM
 7 "This letter and the 04:23:54PM
 8 attached mapping 04:23:55PM
 9 information do not in any 04:23:56PM
 10 way constitute any 04:23:57PM
 11 commitments, obligation, 04:23:59PM
 12 or approval of your 04:23:59PM
 13 project by the Government 04:24:01PM
 14 of Ontario." 04:24:02PM
 15 Do you see that? 04:24:02PM
 16 A. Yes. We have never once 04:24:04PM
 17 taken for granted the work that we needed to do to 04:24:06PM
 18 get this approved. And, you know, even in the 04:24:09PM
 19 financial models we're going to present here, you 04:24:12PM
 20 know, it's all discounted. So we've never taken 04:24:14PM
 21 for granted that there is a lot of work that needs 04:24:18PM
 22 to be done. All I know is, at the time of this 04:24:20PM
 23 letter, our management team had done three EAs on 04:24:23PM
 24 Wolfe Island and understood -- and had done 04:24:27PM
 25 numerous EAs, which I understand REA and EA aren't 04:24:29PM

1 We had predictability that they had to accept the 04:22:45PM
 2 power if we were awarded the contract, and we also 04:22:47PM
 3 had significant predictability of what the wind 04:22:51PM
 4 resource was, which, since then, we have done a 04:22:53PM
 5 ton more modelling on and feel pretty comfortable 04:22:56PM
 6 with the three companies that we've utilized to do 04:22:59PM
 7 that. 04:23:01PM
 8 Q. So, Mr. Mars, I am trying 04:23:01PM
 9 to understand what you understood from this 04:23:03PM
 10 letter, then. So are you saying that you applied 04:23:04PM
 11 to the FIT program regardless of this letter? And 04:23:07PM
 12 what did you interpret from this letter, then? 04:23:09PM
 13 A. Well, again, without this 04:23:11PM
 14 letter, we couldn't apply to the FIT program. So 04:23:13PM
 15 this letter gave us the ability to apply to the 04:23:17PM
 16 FIT program. This letter told us that we were 04:23:19PM
 17 going to lose our land without maintaining this 04:23:22PM
 18 priority position, but we decided to apply to the 04:23:26PM
 19 FIT program based upon all the knowledge we had, 04:23:28PM
 20 all aggregated and reviewed. This was one of the 04:23:32PM
 21 parts. 04:23:35PM
 22 Q. Okay. 04:23:36PM
 23 A. And, again, I just want 04:23:37PM
 24 to be clear. This was a gating issue. If we 04:23:37PM
 25 didn't get this letter, even if we had -- even if 04:23:40PM

1 exactly the same, but had done a lot of work and 04:24:33PM
 2 what we knew is, "Look, we're going to hire the 04:24:36PM
 3 best of the best," and I think Mr. Terry 04:24:38PM
 4 previously showed you Stantec, who has probably 04:24:41PM
 5 done more EA work or REA work and EA work in this 04:24:44PM
 6 province than any other firm. 04:24:47PM
 7 You know, we were going to 04:24:49PM
 8 hire the best of the best to push this forward. 04:24:50PM
 9 Q. Okay. So I understand 04:24:51PM
 10 you did a lot of work. But I just want to focus 04:24:52PM
 11 on my question specifically. 04:24:55PM
 12 A. That's correct. We did 04:24:56PM
 13 do a lot of work. 04:24:57PM
 14 Q. But you would agree that 04:24:58PM
 15 there's no commitment in this letter that MNR 04:25:00PM
 16 would approve your Crown land applications; right? 04:25:02PM
 17 A. Absolutely agree. 04:25:05PM
 18 Q. And there is no 04:25:06PM
 19 assurances that Windstream could proceed with 04:25:06PM
 20 developing its project; right? 04:25:08PM
 21 A. Absolutely agree. 04:25:10PM
 22 Q. And in this letter, there 04:25:11PM
 23 is no commitment? 04:25:13PM
 24 A. There is also no 04:25:14PM
 25 assurance they would provide us with a contract 04:25:15PM

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1 because they weren't the contracting body, so no 04:25:17PM
2 assurances. 04:25:19PM
3 Q. Okay. And you would 04:25:20PM
4 agree that there's no commitment as to when the 04:25:20PM
5 review of applications would actually take place? 04:25:22PM
6 A. That's correct. We just 04:25:25PM
7 assumed that, if you were given a contract that -- 04:25:28PM
8 I mean I guess, as we understood, based on the 04:25:32PM
9 Green Energy Act, is that the agencies were 04:25:36PM
10 working in concert to acquire -- to achieve the 04:25:38PM
11 goal which was to add jobs and investment in the 04:25:42PM
12 province. 04:25:45PM
13 So we just assumed they were 04:25:46PM
14 working in concert, and that REFO office that was 04:25:47PM
15 discussed earlier, the job of what REFO, at least 04:25:50PM
16 explained to us, was they were supposed to be the 04:25:53PM
17 people that, if you weren't getting responsiveness 04:25:55PM
18 from MOE, MNR, and MEI, that you would go to REFO, 04:25:59PM
19 and REFO had the ability to push in the other 04:26:03PM
20 direction. 04:26:06PM
21 I mean, there's a reason why 04:26:07PM
22 guarantees were provided and a reason why there 04:26:08PM
23 were requirements of the project holder. It was 04:26:11PM
24 pushing in both directions to get this built. If 04:26:15PM
25 there are no guarantees on one side, well, then I 04:26:19PM

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1 yourself and Mr. Ziegler who authorized WWIS to 04:27:13PM
2 enter into the FIT contract? 04:27:16PM
3 A. It was actually myself, 04:27:18PM
4 Mr. Ziegler, and Mr. Baines -- 04:27:19PM
5 Q. Okay. 04:27:21PM
6 A. -- in concert with our 04:27:22PM
7 investors that authorized this, yes. 04:27:23PM
8 Q. And so in deciding to 04:27:26PM
9 enter into the FIT contract, you would have 04:27:27PM
10 reviewed its terms and conditions? 04:27:29PM
11 A. 100 percent correct, yes. 04:27:32PM
12 Q. Okay. So let's take a 04:27:34PM
13 look at Exhibit R-0092, which is at Tab 7 of your 04:27:35PM
14 binder. 04:27:40PM
15 A. Yes. 04:27:44PM
16 Q. And this is Version 1.3 04:27:45PM
17 of the FIT contract, which is dated March 9, 2010. 04:27:46PM
18 And I know you made some statements prior about 04:27:51PM
19 the contract counterparty being with the 04:27:55PM
20 Government of Ontario, but it clearly states here 04:27:57PM
21 that the contract counterparty is with the OPA; 04:27:59PM
22 right? 04:28:02PM
23 A. Yes. The signatory on 04:28:04PM
24 this contract is with the OPA. But, you know, I 04:28:06PM
25 think the industry, the banks all large investors 04:28:08PM

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1 guess the agencies can take forever. And if there 04:26:21PM
2 are -- you know, from a government perspective. 04:26:24PM
3 And if there's no requirement of the proponent to 04:26:25PM
4 build the project, well, then that could take 04:26:29PM
5 forever too. So pushing in both directions 04:26:32PM
6 achieves the goal of jobs now, investment, and 04:26:35PM
7 spinning turbines. 04:26:39PM
8 Q. Okay. So I understand 04:26:40PM
9 there's a lot of factors at play, but I want to 04:26:42PM
10 focus on the documents that I'm asking. 04:26:45PM
11 So if we have some limited 04:26:46PM
12 time. So if you could just focus on answering the 04:26:48PM
13 questions that I ask you, that would be 04:26:50PM
14 appreciated. 04:26:52PM
15 A. Okay. 04:26:53PM
16 Q. Okay. So you were 04:26:54PM
17 personally involved in overseeing the details of 04:26:54PM
18 Windstream's FIT applications; right? 04:26:57PM
19 A. I have been involved 04:27:00PM
20 every day since 2007 in all the decisions of this 04:27:01PM
21 company. 04:27:05PM
22 I take that back. I have been 04:27:06PM
23 involved in all of the major decisions of this 04:27:07PM
24 company and inclusive of a lot of smaller ones. 04:27:10PM
25 Q. And so ultimately it was 04:27:12PM

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1 know that the counterparty of these contracts is 04:28:11PM
2 the province because, otherwise, you're talking 04:28:14PM
3 about an agency that, you know, at the time, I 04:28:17PM
4 don't even think they had \$50 million worth of 04:28:19PM
5 assets. 04:28:21PM
6 So you are stating that it 04:28:22PM
7 would be bankable to have a very thinly 04:28:24PM
8 capitalized agency guaranteeing all of these 04:28:28PM
9 contracts. I mean. I don't think that is -- it 04:28:32PM
10 doesn't make sense to me and I know in the 04:28:36PM
11 industry it was known. The province stood behind 04:28:37PM
12 this. 04:28:41PM
13 Q. So that was your 04:28:41PM
14 understanding that -- 04:28:42PM
15 A. That was absolutely my 04:28:43PM
16 understanding as well as, you know, all of the 04:28:44PM
17 people I was speaking with and have since spoken 04:28:45PM
18 with. 04:28:48PM
19 Q. So let's turn to Section 04:28:49PM
20 2.5, which is titled "Milestone Date for 04:28:53PM
21 Commercial Operation." It is on page 9. 04:28:56PM
22 A. Okay. 04:29:01PM
23 Q. And this provision states 04:29:02PM
24 in the first sentence that: 04:29:05PM
25 "The supplier 04:29:06PM

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1 acknowledges that time is 04:29:07PM
2 of the essence to the OPA 04:29:08PM
3 with respect to attaining 04:29:10PM
4 commercial operation of 04:29:11PM
5 the contract facility by 04:29:12PM
6 the Milestone Date for 04:29:13PM
7 Commercial Operation." 04:29:17PM
8 Do you see that? 04:29:17PM
9 A. Yes. 04:29:18PM
10 Q. And so, as the FIT 04:29:20PM
11 supplier, you would agree that Windstream's 04:29:23PM
12 responsibility was to bring its project into 04:29:25PM
13 commercial operation by the Milestone Date of 04:29:27PM
14 Commercial Operation; right? 04:29:30PM
15 A. It was our responsibility 04:29:32PM
16 to bring it into -- to develop the project by the 04:29:34PM
17 Milestone Date of Commercial Operation or by 04:29:37PM
18 additional time as contemplated in this contract 04:29:41PM
19 and/or be extended by force majeure provisions, so 04:29:45PM
20 yes. 04:29:47PM
21 Q. Were you intending to 04:29:48PM
22 rely on those extensions? 04:29:49PM
23 A. We were not intending to 04:29:51PM
24 rely on force majeure. Force majeure is clearly 04:29:52PM
25 -- I mean, well, we were not intending to rely on 04:29:56PM

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1 Section 2.4; right? 04:31:10PM
2 A. That's what it says 04:31:13PM
3 there. 04:31:14PM
4 Q. Okay. So let's take a 04:31:14PM
5 look now at Section 2.4 (b), which is on page 8. 04:31:16PM
6 And you would agree that this subsection sets out 04:31:22PM
7 the NTP prerequisites; right? 04:31:24PM
8 A. NTP prerequisites is 04:31:28PM
9 defined in the -- at the end of the subsection. I 04:31:37PM
10 mean, it appears that what -- that's what it is, 04:31:40PM
11 yes. 04:31:42PM
12 Q. Okay. And so under 04:31:43PM
13 subsection (b)(i), it states that: 04:31:44PM
14 "In order for 04:31:47PM
15 Windstream's project to 04:31:48PM
16 reach commercial 04:31:48PM
17 operation, it was 04:31:49PM
18 required to obtain a REA 04:31:50PM
19 as well as other 04:31:53PM
20 equivalent environmental 04:31:53PM
21 and site plan approvals." 04:31:55PM
22 Right? 04:31:56PM
23 A. Yes. We knew that at the 04:31:57PM
24 time, and that is exactly what it says, and we 04:31:59PM
25 were prepared to undertake the studies and 04:32:01PM

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1 force majeure, which happened after is that 04:29:59PM
2 everybody has more or less used six months of 04:30:01PM
3 force majeure, as Mr. Terry alluded to earlier, 04:30:04PM
4 for the REA approval. It's pretty consistent. 04:30:07PM
5 Beyond that, no, we were 04:30:10PM
6 definitely not intending to rely on force majeure. 04:30:12PM
7 We thought our counterparty wanted this project 04:30:14PM
8 and wanted to move forward. 04:30:17PM
9 In terms of the 18 months that 04:30:18PM
10 we could purchase, we were hopeful not to, but we 04:30:20PM
11 did understand that that existed and that we could 04:30:23PM
12 utilize that. 04:30:25PM
13 Q. Okay. So let's take a 04:30:27PM
14 look now at Section 2.6(a) which is at the bottom 04:30:28PM
15 of Page 9, which sets out the requirements for 04:30:31PM
16 commercial operation. And under subsection (a), 04:30:35PM
17 under paragraph (i)... 04:30:40PM
18 --- [Reporter's Note: Technical difficulty with 04:30:46PM
19 mic.] 04:30:47PM
20 BY MS. KAM: 04:30:54PM
21 Q. So we're looking at 04:30:54PM
22 Section 2.6(a). And under subsection (a)(i), the 04:30:56PM
23 first requirement for bringing a project into 04:31:01PM
24 commercial operation is that the OPA issue a 04:31:04PM
25 notice to proceed to the supplier pursuant to 04:31:07PM

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1 activities necessary to hopefully be granted that. 04:32:05PM
2 Q. So you would agree that 04:32:08PM
3 it was Windstream's responsibility to ensure that 04:32:09PM
4 it obtained an REA in order to reach commercial 04:32:11PM
5 operation? 04:32:14PM
6 A. Yes, 100 percent. I 04:32:14PM
7 mean, this process has always been 04:32:16PM
8 proponent-driven, and we've never -- even when 04:32:18PM
9 later on we were in the moratorium and we proposed 04:32:21PM
10 -- aside from the pilot, we proposed to actually 04:32:25PM
11 pay and utilize our project as an active -- I 04:32:27PM
12 think we called it an active research project. 04:32:30PM
13 What we were doing there was the REA work. 04:32:33PM
14 So, yes, we have always known 04:32:36PM
15 it was up to us to do and up to us to make sure 04:32:37PM
16 that it got finished. 04:32:40PM
17 Q. But you would agree that 04:32:41PM
18 there is nothing in this FIT contract that 04:32:42PM
19 guarantees that Windstream would be able to obtain 04:32:45PM
20 an REA; right? 04:32:47PM
21 A. No. The only thing that 04:32:48PM
22 was in this contract was basically that we would 04:32:50PM
23 have the ability to go through the process. 04:32:53PM
24 We've -- I don't know that 04:32:56PM
25 we've have ever stated that we were going to be 04:32:57PM

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1 granted an REA. Like I said, we never viewed the 04:33:01PM
2 REA as like this rubber stamp or anything like 04:33:04PM
3 that. We viewed the REA as an essential part of 04:33:06PM
4 doing these projects. 04:33:09PM
5 And prior to the FIT, we 04:33:10PM
6 reviewed the EA as an essential part of doing 04:33:11PM
7 these projects, and we knew there might be 04:33:14PM
8 mitigation points that we would have to -- we knew 04:33:16PM
9 there might be some extra studies. So some of the 04:33:18PM
10 things that weren't told to us, you know, as 04:33:22PM
11 myself and then to our investor group is that 04:33:25PM
12 there was some uncertainty around kind of what was 04:33:27PM
13 going to be precisely in the box of the REA for 04:33:29PM
14 offshore wind, but that, you know, the box existed 04:33:32PM
15 and you would meet -- you would meet with MOE, and 04:33:35PM
16 they would say, "Well, you know, we want you to do 04:33:38PM
17 all this stuff, but we'd also like you to study -- 04:33:40PM
18 I don't know -- how many waves hit the shore or 04:33:45PM
19 something -- you know, something in addition. 04:33:48PM
20 And so what was told to me by 04:33:49PM
21 our management team was that we're going to have 04:33:51PM
22 to spend more money on this EA. It's not going to 04:33:54PM
23 be cheap. 04:33:57PM
24 Q. So you spent -- 04:33:57PM
25 A. And we were prepared to 04:33:58PM

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1 spend that money, and we said, "Look, whatever the 04:33:59PM
2 province wants us to do in relation to that, we're 04:34:01PM
3 doing it, and we're going to do it right, and 04:34:03PM
4 we're going to do it with the right firm, and 04:34:05PM
5 we're going to spend the money." 04:34:07PM
6 Q. So you said that this 04:34:09PM
7 contract provided for Windstream to have the 04:34:09PM
8 ability to go through the REA process. Can you 04:34:13PM
9 point to where it states that? 04:34:15PM
10 A. I may have... 04:34:20PM
11 --- [Reporter Note: Microphone technical 04:34:22PM
12 difficulty.] 04:34:23PM
13 THE WITNESS: You're getting a 04:34:25PM
14 workout. 04:34:26PM
15 I may have misspoken in terms 04:34:28PM
16 of if it was in this contract or if it was in the 04:34:33PM
17 surrounding rules and regulations that were part 04:34:35PM
18 of this entire Green Energy Act. I don't 04:34:37PM
19 remember. But what I know is that we had -- what 04:34:41PM
20 we were signing up to and what I believe at the 04:34:45PM
21 time was the right to go through the REA process, 04:34:48PM
22 not to be blocked at the front end of that. 04:34:51PM
23 Q. But you would agree, 04:34:54PM
24 based on the EBR postings that we just looked at 04:34:55PM
25 that, that MNR and MOE were both continuing to 04:34:58PM

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1 work on a coordinated approach for offshore wind 04:35:00PM
2 at this time; right? 04:35:04PM
3 A. Well, so at that time, in 04:35:05PM
4 September 2009, there was no offshore wind 04:35:08PM
5 project; right? And so they were going through a 04:35:13PM
6 coordinated effort, but, as a proponent, I'm not 04:35:15PM
7 sure that you could understand that there were 04:35:20PM
8 things that were going on in the background that 04:35:22PM
9 nobody was telling us. 04:35:24PM
10 What we understood is, 04:35:26PM
11 "Listen, you told us to" -- not you, sorry. The 04:35:27PM
12 province told us to apply for this contract or 04:35:31PM
13 gave us the opportunity, gave us all of these 04:35:33PM
14 reasons why, and then we applied, and then they 04:35:35PM
15 provided us a contract. They didn't have to. 04:35:38PM
16 Q. Well, you would agree 04:35:42PM
17 that there's nothing in this FIT contract that 04:35:43PM
18 guarantees that the regulatory requirements would 04:35:45PM
19 be in place to develop its project? 04:35:47PM
20 A. I don't know that there 04:35:50PM
21 is anything that would guarantee any regulatory 04:35:51PM
22 for any of the sources of power, because there 04:35:55PM
23 were a number of sources of power being acquired 04:35:57PM
24 at the same time. But, you know, I guess -- I 04:35:59PM
25 guess, you know, what I understood and what our 04:36:03PM

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1 investors understood, and, you know, in working 04:36:05PM
2 with experts what we understood was that, you 04:36:07PM
3 know, we could -- we would have the ability to 04:36:10PM
4 push this forward. 04:36:11PM
5 And at the end of the day, 04:36:14PM
6 again, I get back to this, you know, I've never 04:36:16PM
7 been in a situation before -- I've actually never 04:36:19PM
8 had to testify either, but I have never been in a 04:36:21PM
9 situation before where somebody issued me a 04:36:23PM
10 contract and then later on said, "Oh, sorry, 04:36:26PM
11 there's not a lot of things in place for you to go 04:36:30PM
12 forward." 04:36:33PM
13 You know, we felt pretty 04:36:34PM
14 comfortable. What was on the record was what we 04:36:35PM
15 needed to push forward. Would we have to do extra 04:36:38PM
16 work? Sure. Would there be some unique things 04:36:41PM
17 because the project was offshore? Absolutely. 04:36:43PM
18 But, you know, the province 04:36:45PM
19 had built bridges in the water. The province had 04:36:46PM
20 built lots of hydro. The province had built a lot 04:36:49PM
21 of things. And, you know, conceivably they're 04:36:52PM
22 pretty similar. 04:36:58PM
23 Q. But in terms of the 04:36:59PM
24 obligation to bring your project into commercial 04:37:00PM
25 operation, that was Windstream's responsibility; 04:37:02PM

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1 right? And there was no guarantee in this 04:37:05PM
2 contract that the REA could be attained within the 04:37:07PM
3 timelines of this FIT contract? 04:37:10PM
4 A. Well, I mean there were 04:37:12PM
5 service level guarantees that were provided to us, 04:37:13PM
6 and it was a central tenet of the Green Energy 04:37:16PM
7 Act. I mean, there's a reason why they put those 04:37:20PM
8 in there. If they didn't want to obligate the 04:37:21PM
9 agencies to meeting these, they would have never 04:37:24PM
10 put them in there. I mean, using the word 04:37:27PM
11 "guarantee" in the things you are writing is 04:37:30PM
12 pretty specific as far as I am concerned and, you 04:37:32PM
13 know, as far as we believed as investors. You 04:37:34PM
14 know, we relied on these things. 04:37:37PM
15 Q. But in terms of this 04:37:38PM
16 six-month service guarantee, you understood that 04:37:40PM
17 it applied to a complete REA application? Right? 04:37:42PM
18 A. That's right. And we 04:37:46PM
19 were prepared to put one forth. You know, we were 04:37:48PM
20 prepared to meet with MOE. We were prepared to 04:37:49PM
21 spend the money, and we were prepared to move 04:37:52PM
22 forward. 04:37:54PM
23 Q. But you would agree, at 04:37:55PM
24 this point, when Windstream was offered a FIT 04:37:56PM
25 contract, it had not initiated a REA process yet? 04:37:58PM

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1 that we worked with, KeyBank, they -- they -- they 04:39:14PM
2 were tasked with helping LEEDCo because it was a 04:39:18PM
3 Cleveland project. 04:39:23PM
4 And so we actually had been 04:39:24PM
5 approached by LEEDCo a couple of times to invest 04:39:26PM
6 in the project, and the reason why, you know, we 04:39:28PM
7 shied away from it was because they don't have any 04:39:31PM
8 sort of PPA. 04:39:33PM
9 So the gating factor that they 04:39:34PM
10 have is they have to actually negotiate a PPA with 04:39:36PM
11 the various utilities in Ohio, and the utilities 04:39:39PM
12 don't want to pay the price that they're 04:39:43PM
13 requesting. So the utilities have said, we're not 04:39:45PM
14 giving you a PPA, and they're trying to utilize 04:39:48PM
15 this. I know the U.S. government has given them a 04:39:51PM
16 bunch of money for testing and such, but on top of 04:39:53PM
17 it, LEEDCo is a US company. So I don't know what 04:39:55PM
18 their process is specifically for them, but they 04:39:59PM
19 wouldn't go through the REA. 04:40:02PM
20 In terms of Trillium, Trillium 04:40:03PM
21 was in a similar area to us. They were trying to 04:40:05PM
22 work through their REA, and, to be honest, you 04:40:08PM
23 know, the government actually accepted their REA. 04:40:12PM
24 So the idea that -- you know, 04:40:16PM
25 the idea that it didn't exist, why would the MOE 04:40:18PM

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1 A. We couldn't initiate a 04:38:02PM
2 REA process because, number one, it didn't exist 04:38:05PM
3 ahead of these contracts. So nobody in the 04:38:08PM
4 province had initiated an REA process. You know, 04:38:10PM
5 big, small, it didn't matter. Nobody had 04:38:14PM
6 initiated. It was a new process. 04:38:16PM
7 A lot of people had done EAs. 04:38:18PM
8 REA and EA are very, very similar, and I think the 04:38:22PM
9 experts can talk about that better than I can. 04:38:24PM
10 But the tenets of the REA was 04:38:27PM
11 that it offered guarantees. It offered more 04:38:30PM
12 teeth. And the reason for it was because -- and 04:38:34PM
13 you can see it in the speeches. You can see it in 04:38:37PM
14 everything -- is that they said, you know, "We 04:38:39PM
15 want to eliminate all of the delay that has been 04:38:41PM
16 created by local requirements and agencies not 04:38:46PM
17 finishing work and so forth." So they bound 04:38:50PM
18 themselves to this. 04:38:54PM
19 Q. In terms of no other 04:38:56PM
20 proponents starting -- initiating this REA process 04:38:57PM
21 you're not aware of other offshore wind proponents 04:39:00PM
22 such as Trillium or Erie who had applied for a REA 04:39:03PM
23 or initiated that process? 04:39:08PM
24 A. Well, you know, I'm aware 04:39:10PM
25 of Erie -- the LEEDCo project because the bankers 04:39:11PM

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1 accept Trillium's application or accept their REA? 04:40:21PM
2 Now, they haven't ruled on it, but why would they 04:40:26PM
3 accept it if the process didn't exist at all? 04:40:28PM
4 Q. Right. So they initiated 04:40:31PM
5 the process for the REA; right? Because you had 04:40:32PM
6 said that no one had initiated the process for an 04:40:35PM
7 REA. 04:40:37PM
8 A. I don't remember the 04:40:38PM
9 exact timing of that, but I think the question you 04:40:38PM
10 asked was ahead of the FIT contract, and I don't 04:40:40PM
11 believe -- I think their REA came in post-FIT 04:40:43PM
12 contract. Like, they pushed their REA and 04:40:47PM
13 post-FIT contract even though they didn't have a 04:40:50PM
14 FIT contract or apply for a FIT contract. 04:40:51PM
15 The REA process -- and I'm not 04:40:54PM
16 exactly sure of the date that it came into effect, 04:40:58PM
17 but the REA process didn't exist prior to the FIT 04:41:01PM
18 contract. I mean, did it -- do you know the date 04:41:05PM
19 that it actually started? 04:41:08PM
20 Q. Well, I'm not going to 04:41:10PM
21 enter any evidence in, but my questions are 04:41:11PM
22 relating to when Windstream was offered a FIT 04:41:13PM
23 contract. And that was in April 2010; correct? 04:41:16PM
24 A. Yes, in April 2010. With 04:41:20PM
25 a -- I think it was a May 4, 2010 effective date, 04:41:23PM

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1 I guess. 04:41:26PM
2 Q. Okay. Let's turn now to 04:41:27PM
3 paragraph 67 of your Memorial witness statement. 04:41:31PM
4 A. Is that -- that's the 04:41:33PM
5 first one? 04:41:34PM
6 Q. The first one. So it 04:41:34PM
7 states here that: 04:41:42PM
8 "Before signing the FIT 04:41:42PM
9 contract, Windstream 04:41:45PM
10 sought comfort from the 04:41:45PM
11 Ontario Government that 04:41:45PM
12 certain regulatory issues 04:41:46PM
13 would be resolved." 04:41:47PM
14 See that? 04:41:49PM
15 A. Sorry, I didn't get there 04:41:51PM
16 yet. Paragraph 67 you said? 04:41:52PM
17 Q. Yes. So you see that; 04:41:55PM
18 right? That: 04:41:55PM
19 "Windstream sought 04:41:55PM
20 comfort from the Ontario 04:41:55PM
21 Government that certain 04:41:55PM
22 regulatory issues would 04:42:11PM
23 be resolved." 04:42:11PM
24 A. Yes. This was, you know, 04:42:13PM
25 primarily and specifically around the setback 04:42:14PM

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1 Can you please read the second 04:43:20PM
2 paragraph out loud for the record: 04:43:22PM
3 A. As the developer of the 04:43:23PM
4 first offshore wind 04:43:25PM
5 facility in Ontario, 04:43:26PM
6 Windstream is struggling 04:43:27PM
7 with the expectation in 04:43:30PM
8 the FIT contract that the 04:43:31PM
9 project will achieve 04:43:32PM
10 commercial operation in 04:43:34PM
11 four years, on the one 04:43:35PM
12 hand, and considerable 04:43:36PM
13 regulatory uncertainty 04:43:38PM
14 caused by unknown setback 04:43:38PM
15 requirements for offshore 04:43:41PM
16 wind, uncertainty in the 04:43:41PM
17 site release process for 04:43:43PM
18 Crown land, and 04:43:44PM
19 uncertainty in the 04:43:45PM
20 detailed requirements of 04:43:46PM
21 the REA, on the other." 04:43:47PM
22 Q. Okay. So you would agree 04:43:50PM
23 that, when Windstream was offered a FIT contract, 04:43:51PM
24 it was facing considerable regulatory uncertainty? 04:43:53PM
25 A. It was facing uncertainty 04:43:58PM

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1 issue that was, you know, raised after we received 04:42:17PM
2 the contract. 04:42:20PM
3 Q. Okay. So in paragraph 04:42:21PM
4 68, it states that Mr. Baines reported to you 04:42:23PM
5 daily with respect to the meetings and discussions 04:42:25PM
6 he had with various government officials, which 04:42:28PM
7 you reported back to Windstream's investors, 04:42:30PM
8 including Mr. Ziegler; right? 04:42:32PM
9 A. Yeah. You know, Ian and 04:42:34PM
10 I speak pretty much on a daily basis, inclusive of 04:42:36PM
11 weekends, sadly. My wife doesn't like him very 04:42:41PM
12 much. 04:42:44PM
13 And we -- I speak to 04:42:44PM
14 Mr. Ziegler every single day because he's my 04:42:48PM
15 business partner. He has been my business partner 04:42:50PM
16 since 2007, so yes. 04:42:53PM
17 Q. Okay. Let's take a look 04:42:54PM
18 at Exhibit C-0258, which is at tab 15 of your 04:42:55PM
19 binder. Tab 15. 04:42:59PM
20 A. Tab 15, yes. This 04:43:07PM
21 letter? 04:43:09PM
22 Q. Yes. And this is a 04:43:09PM
23 letter from Ian Baines to Mirrun Zaveri of the 04:43:11PM
24 Ministry of Energy's Renewable Energy Facilitation 04:43:11PM
25 Office, dated May 13, 2010. 04:43:18PM

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1 in the setback. It was facing uncertainty in 04:43:59PM
2 relation to, you know, when that was going to be 04:44:03PM
3 set, how far it was going to be offshore, and then 04:44:06PM
4 obviously exactly what was going to sit in that 04:44:09PM
5 box because we weren't allowed to go and sit with 04:44:13PM
6 the MOE until this setback was put in place. 04:44:15PM
7 So we wanted to have -- you 04:44:18PM
8 know, we wanted to have those meetings, and we 04:44:20PM
9 wanted to really understand exactly what they 04:44:21PM
10 wanted us to do, but we weren't actually provided 04:44:23PM
11 that opportunity because of the setback. 04:44:26PM
12 Q. Were you ever refused a 04:44:29PM
13 meeting with MOE to discuss the setback 04:44:30PM
14 requirements? 04:44:34PM
15 A. Well, as we understood 04:44:34PM
16 it, the setback requirements were to be discussed 04:44:35PM
17 -- were being handled. We discussed it with -- we 04:44:38PM
18 met with MNR because it was a specific outcome of 04:44:41PM
19 this, but I don't think MOE was actually handling 04:44:44PM
20 at that point the setbacks. 04:44:48PM
21 Q. Well, let's turn to 04:44:49PM
22 Exhibit C-0296, which is at tab -- 04:44:51PM
23 A. Plus I think we may have 04:44:54PM
24 requested meetings, and we may have had meetings 04:44:56PM
25 with them, but, you know, it was still open. It 04:44:58PM

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1 was still open here. Which one? 04:45:01PM
2 Q. Tab 16. C-0296. 04:45:02PM
3 A. Yes. Yes. 04:45:05PM
4 Q. And so this is a Policy 04:45:09PM
5 Proposal Notice on Ontario's EBR Registry, which 04:45:10PM
6 is dated June 25, 2010, titled: 04:45:13PM
7 "Renewable Energy 04:45:16PM
8 Approval Requirements for 04:45:18PM
9 Offshore Wind Facilities, 04:45:19PM
10 an Overview of the 04:45:19PM
11 Proposed Approach." 04:45:22PM
12 And if you look at page 2, 04:45:22PM
13 about four lines down, it states that: 04:45:27PM
14 "The Ontario government 04:45:29PM
15 is proposing an approach 04:45:30PM
16 and is seeking input from 04:45:31PM
17 interested members of the 04:45:32PM
18 public early in the 04:45:33PM
19 process to inform the 04:45:35PM
20 work that will be 04:45:36PM
21 completed to finalize the 04:45:37PM
22 approach and the offshore 04:45:38PM
23 wind specific 04:45:39PM
24 requirements under the 04:45:40PM
25 REA regulation." 04:45:42PM

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1 Do you see that? 04:45:43PM
2 A. Yes, I see it. The REA 04:45:44PM
3 regulation that was in place, correct. And we 04:45:46PM
4 hadn't signed the contract at this point. It was 04:45:49PM
5 one of the reasons why we delayed signing of the 04:45:51PM
6 contract. 04:45:53PM
7 So we received it in April and 04:45:54PM
8 had the May 5 date, but June 25, we hadn't signed 04:45:57PM
9 it. We didn't sign it until, I think, August 10 04:46:01PM
10 or August 20. I forget the exact date. But this 04:46:04PM
11 was one of the reasons why. 04:46:06PM
12 Q. Okay. So if we look at 04:46:08PM
13 the bottom of page 2, it states that: 04:46:09PM
14 "This proposal was posted 04:46:11PM
15 for a 74-day public 04:46:13PM
16 review and comment 04:46:15PM
17 period, ending September 04:46:16PM
18 7, 2010." 04:46:18PM
19 A. Yes. 04:46:19PM
20 Q. Right? And so you would 04:46:20PM
21 agree that both before and after Windstream signed 04:46:21PM
22 its FIT contract, in -- I believe it's August 20, 04:46:24PM
23 2010, the Ontario government was consulting on its 04:46:27PM
24 proposed policy for -- setback policy for offshore 04:46:30PM
25 wind? 04:46:34PM

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1 A. I assume they were. We 04:46:36PM
2 had met with them. We had discussed, you know, a 04:46:37PM
3 -- because we found out it was going to be a 04:46:41PM
4 5-kilometre setback, and obviously that severely 04:46:43PM
5 impacted the project that we were going forward 04:46:46PM
6 with. So we went, and we met with them, and 04:46:49PM
7 proposed a grid cell swap. We did a bunch of work 04:46:51PM
8 and research around whether that was possible, 04:46:59PM
9 because as you guys detailed earlier, you know, 04:46:59PM
10 you have to be considerate of depth of water. You 04:46:59PM
11 have to be considerate of a lot of other factors. 04:47:02PM
12 So we actually did that 04:47:05PM
13 research, realized that it was doable. Figured 04:47:07PM
14 out what the cost impact of the 5-kilometre 04:47:10PM
15 setback would be on us, and we went about meeting 04:47:12PM
16 with the different agencies and trying to get -- 04:47:15PM
17 you know, in an ideal world, you would have 100 04:47:18PM
18 percent locked down, you know, answer. But we 04:47:20PM
19 tried to get as much as we could, and then we had 04:47:23PM
20 to make the decision whether we were comfortable 04:47:26PM
21 with that. 04:47:28PM
22 Q. Okay. So let's turn now 04:47:29PM
23 to Exhibit C-0844, which is at Tab 18. And I just 04:47:30PM
24 want to caution you that some of the information 04:47:38PM
25 is marked "Confidential" in this document, but to 04:47:39PM

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1 avoid going into confidential session, I will be 04:47:41PM
2 referring only to the publicly-available 04:47:44PM
3 information. But you have the confidential 04:47:47PM
4 version in front of you. 04:47:48PM
5 So this is an internal 04:47:50PM
6 Windstream memorandum which you -- which is dated 04:47:52PM
7 August 20, 2010; right? 04:47:56PM
8 A. That's correct. 04:47:58PM
9 Q. And you sent this memo. 04:47:59PM
10 Is that correct? 04:48:01PM
11 A. That's correct. I 04:48:01PM
12 authored it and sent it. 04:48:02PM
13 Q. Okay. And this informs 04:48:04PM
14 Windstream's investors of the decision to sign the 04:48:06PM
15 FIT contract that day. 04:48:08PM
16 A. It goes through a number 04:48:12PM
17 of things, but, you know, that would be one of 04:48:13PM
18 them, yes. 04:48:16PM
19 Q. Okay. And so in the 04:48:16PM
20 second sentence, it states that: 04:48:19PM
21 "As you are already 04:48:21PM
22 aware, we were able to 04:48:22PM
23 negotiate with multiple 04:48:23PM
24 agencies in the Ontario 04:48:24PM
25 government to give us 04:48:25PM

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1 relief on new proposed 04:48:26PM
2 setback rules in the time 04:48:29PM
3 frame in which the site 04:48:31PM
4 needs to be constructed." 04:48:32PM
5 Right? 04:48:34PM
6 A. That's correct. It says 04:48:34PM
7 that. We had -- we started with the MNR. We 04:48:36PM
8 wound up negotiating. 04:48:40PM
9 So the reason why there's a 04:48:41PM
10 five-year term on this and not a four-year term 04:48:42PM
11 was because we were able to negotiate with MEI, 04:48:45PM
12 who then went and directed OPA to change the 04:48:48PM
13 contract. 04:48:52PM
14 We were asking for something 04:48:53PM
15 of, you know, and we have asked for similar things 04:48:55PM
16 throughout. I know there has been some discussion 04:48:57PM
17 that we were asking for wholesale rewrites of the 04:48:59PM
18 contract. 04:49:01PM
19 But all we were asking for was 04:49:01PM
20 delays until decisions were made. We didn't 04:49:04PM
21 really ask for anything else. So we were asking 04:49:06PM
22 for -- well, we asked for other things, but mostly 04:49:09PM
23 we were asking for delays of when decisions were 04:49:11PM
24 made so that we weren't penalized under this 04:49:14PM
25 contract. 04:49:17PM

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1 sign the contract or not sign the contract. Had 04:50:08PM
2 they said, "We're not adding this year to the 04:50:11PM
3 contract," we likely wouldn't have signed it. 04:50:13PM
4 If they said -- when we came 04:50:16PM
5 to them and said, "Listen, we need to swap these 04:50:17PM
6 cells," if MNR said either, "Hey, we have no 04:50:20PM
7 interest in meeting with you," or, "We're just not 04:50:24PM
8 willing to do this," it would have impacted our 04:50:25PM
9 decision to sign this contract. So, yes, that's 04:50:27PM
10 what I'm referring to in this e-mail. 04:50:30PM
11 Q. Okay. So I want to 04:50:32PM
12 explore these two items with you because you would 04:50:33PM
13 agree that Ontario never provided Windstream with 04:50:35PM
14 a land swap; right? 04:50:38PM
15 A. No. They didn't. They 04:50:40PM
16 said they wanted to wait until the setback was in 04:50:41PM
17 place, and then they would sit with us, and I 04:50:43PM
18 believe the letter, which you may have in here, it 04:50:46PM
19 said very specifically, in -- essentially in an 04:50:49PM
20 expedited manner. 04:50:52PM
21 It would be better if I read 04:50:53PM
22 the letter. 04:50:54PM
23 Q. Yes. Let's go to that 04:50:54PM
24 document. 04:50:56PM
25 A. Right. 04:50:56PM

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1 And what -- I think it was 04:49:17PM
2 Ungerman, Mr. Ungerman. He was able to negotiate 04:49:19PM
3 with the OPA so that MEI was sort of negotiating 04:49:22PM
4 with the OPA on our behalf. He was able to 04:49:26PM
5 convince them to add one year to our contract to 04:49:28PM
6 account for delays that were happening in the 04:49:31PM
7 province in relation to the setback rules. 04:49:34PM
8 Q. So, Mr. Mars, I will get 04:49:35PM
9 to that in a bit, but I just want to confirm. The 04:49:37PM
10 last sentence in this memo states that: 04:49:40PM
11 "The two agreed changes 04:49:43PM
12 that will benefit the 04:49:45PM
13 project are the land swap 04:49:47PM
14 and the contract 04:49:49PM
15 amendments." 04:49:49PM
16 Right? 04:49:50PM
17 A. Can you ask that again? 04:49:51PM
18 Q. So according to the last 04:49:52PM
19 sentence, the changes that were agreed that will 04:49:54PM
20 benefit the project are the land swap and the 04:49:56PM
21 contract amendment. That's what you're referring 04:49:59PM
22 to? 04:50:01PM
23 A. Yes. I'm saying these 04:50:01PM
24 are things that would -- would tell us or would 04:50:02PM
25 give us some more clarity around whether we should 04:50:05PM

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1 Q. It is Exhibit C-0334, 04:50:56PM
2 which is at Tab 17. 04:50:59PM
3 A. Seventeen. 04:51:01PM
4 Q. And so this is a letter 04:51:06PM
5 dated August 9, 2010, titled "Reconfiguration of 04:51:07PM
6 Wind Power Applications," and it is addressed to 04:51:13PM
7 Mr. Baines from Eric Boysen, Director of Renewable 04:51:14PM
8 Energy Program at the Ministry of Natural 04:51:20PM
9 Resources? 04:51:22PM
10 In the first sentence, it 04:51:22PM
11 states that: 04:51:24PM
12 "This letter was in 04:51:24PM
13 response to Windstream's 04:51:25PM
14 request to initiate 04:51:26PM
15 discussions on the 04:51:27PM
16 potential reconfiguration 04:51:28PM
17 of Crown land 04:51:29PM
18 applications." 04:51:30PM
19 Right? 04:51:31PM
20 A. That's what it says. 04:51:32PM
21 Q. And so just so I 04:51:33PM
22 understand, to comply with MOE's proposed 04:51:34PM
23 5-kilometre setback, Windstream had requested to 04:51:37PM
24 swap some of its grid cells that it had applied 04:51:39PM
25 for within the 5-kilometre zone for other grid 04:51:42PM

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1 cells located outside of the 5-kilometre zone? 04:51:45PM
2 A. Correct. We were -- you 04:51:48PM
3 know, we were basically trying to adapt the 04:51:50PM
4 project. We had a contract at this point that was 04:51:53PM
5 issued to us. Although we hadn't signed the 04:51:55PM
6 contract, we did have a contract that was issued 04:51:58PM
7 to us. And a new rule was being effectively 04:52:00PM
8 thrust upon us at that moment in time. 04:52:04PM
9 So we said, okay. You know, 04:52:05PM
10 the first reaction is, "Oh, my God, this could 04:52:07PM
11 kill the project"; right? I mean that was the 04:52:10PM
12 first reaction. 04:52:12PM
13 And I think we actually sent a 04:52:13PM
14 letter saying something to that effect to the MNR, 04:52:15PM
15 saying, like, "What's going on here? You know, 04:52:19PM
16 and what's the basis?" 04:52:22PM
17 And then what we had 04:52:23PM
18 essentially been told by our GR rep is that, you 04:52:25PM
19 know, this is a fait accompli. This is what 04:52:31PM
20 they're doing. And so we set out for several days 04:52:32PM
21 trying to figure out, like, what could we do, what 04:52:34PM
22 could we do. And we cranked through financial 04:52:36PM
23 models. We cranked through proposed layouts. We 04:52:38PM
24 looked at the depth of water. We looked at, where 04:52:40PM
25 the -- you know, the stuff that we knew were 04:52:43PM

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1 move through their normal Crown land application 04:53:41PM
2 process, and then they kind of go on further to 04:53:43PM
3 say here that: 04:53:46PM
4 "I appreciate your need 04:53:47PM
5 for certainty on this 04:53:48PM
6 file, and we will move as 04:53:49PM
7 quickly as possible 04:53:50PM
8 through the remainder of 04:53:51PM
9 the application review 04:53:52PM
10 process in order that you 04:53:53PM
11 may obtain applicant of 04:53:56PM
12 record status in a timely 04:53:57PM
13 manner." 04:53:58PM
14 So we read this. I'm sorry. 04:53:59PM
15 Go ahead. I apologize. 04:54:01PM
16 Q. Okay. So but I just want 04:54:02PM
17 to confirm with you, though, that you agree that 04:54:04PM
18 there was no guarantee that MNR would approve 04:54:06PM
19 Windstream's reconfiguration request; right? It 04:54:09PM
20 just merely stated that they're willing to have a 04:54:12PM
21 discussion? 04:54:13PM
22 A. I mean, I guess there is 04:54:15PM
23 no explicit guarantee in here. But when you read 04:54:18PM
24 the letter, you know, in context, the entire 04:54:21PM
25 letter, we felt -- you know, our understanding of 04:54:24PM

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1 things we couldn't be building near or around. 04:52:46PM
2 And we got comfort on, if the 04:52:48PM
3 MNR was willing to provide us with a grid cell 04:52:51PM
4 swap, so take the closer to shore cells we had 04:52:54PM
5 applied for and swap them for -- essentially, I 04:52:57PM
6 don't want to say it was an exact equal number of 04:53:01PM
7 acres, because the way the cells work is they kind 04:53:03PM
8 of have like blocks across. 04:53:05PM
9 But it was -- it was an equal 04:53:07PM
10 amount of land that would allow us to build this 04:53:09PM
11 300-megawatt project. 04:53:13PM
12 Q. Okay. So -- 04:53:15PM
13 A. And -- 04:53:16PM
14 Q. I just want to walk 04:53:17PM
15 through this letter itself; right? 04:53:18PM
16 A. Okay. 04:53:20PM
17 Q. So MNR's response to 04:53:20PM
18 Windstream is that it was prepared to discuss the 04:53:22PM
19 limited reconfiguration of Windstream's existing 04:53:24PM
20 Crown land applications; right? 04:53:27PM
21 A. Yeah. And if you turn to 04:53:29PM
22 the second page, you can see they went into this 04:53:30PM
23 where they basically said, once the 04:53:32PM
24 reconfiguration of applications has been 04:53:35PM
25 finalized, the amended applications will begin to 04:53:38PM

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1 it and our understanding of the expediency with 04:54:26PM
2 which they met with us and were willing to discuss 04:54:29PM
3 this was their willingness to work with us to be 04:54:32PM
4 able to move this forward, and there was, again, a 04:54:36PM
5 gating factor. They wanted this setback to be in 04:54:38PM
6 place. 04:54:41PM
7 So if the setback wound up 04:54:41PM
8 being two and a half kilometres instead of five, 04:54:43PM
9 that's a completely different grid cell swap. 04:54:46PM
10 So they didn't want to swap 04:54:48PM
11 grid cells without knowing where to swap the grid 04:54:50PM
12 cells. 04:54:53PM
13 So I read this letter, and 04:54:54PM
14 this is my and my management team and our 04:54:56PM
15 consultants and our lawyers and our investors. We 04:55:00PM
16 read this letter as saying, you know, we're going 04:55:05PM
17 to do this. It's just uncertain exactly the time. 04:55:07PM
18 Q. But there is no 04:55:10PM
19 commitment -- 04:55:11PM
20 A. But we're going to do it 04:55:11PM
21 in a timely fashion, and we're going to move 04:55:14PM
22 forward as quick as possible to give you this 04:55:15PM
23 applicant of record status. 04:55:17PM
24 Q. But, Mr. Mars, there's no 04:55:19PM
25 actual commitment that they would guarantee that 04:55:19PM

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1 they would do the swap? 04:55:20PM
2 A. There is no actual 04:55:21PM
3 commitment in here explicitly stating that they 04:55:22PM
4 would guarantee they would do this. 04:55:24PM
5 Q. And you would also agree 04:55:26PM
6 that this letter doesn't have any assurances 04:55:27PM
7 regarding the outcome of the setback policy 04:55:29PM
8 review. They don't guarantee you what the outcome 04:55:33PM
9 would be. 04:55:35PM
10 A. I don't know that they 04:55:36PM
11 were entirely driving it. So I'm not really sure 04:55:37PM
12 that they could actually guarantee the 100 percent 04:55:40PM
13 outcome of this. 04:55:43PM
14 Q. And in terms of timing, 04:55:43PM
15 the statement that MNR would move as quickly as 04:55:46PM
16 possible through the remainder of the application 04:55:49PM
17 review process, as you read in the paragraph 04:55:52PM
18 above, it states that: 04:55:55PM
19 "The applications cannot 04:55:55PM
20 begin to move through the 04:55:57PM
21 Crown land process until 04:55:58PM
22 after the successful 04:56:00PM
23 reconfiguration of 04:56:01PM
24 Windstream's 04:56:02PM
25 applications." 04:56:03PM

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1 understood that certainty is what we were looking 04:56:59PM
2 for, and this Green Energy Act was effectively 04:57:01PM
3 built on the idea of certainty. 04:57:04PM
4 Q. And so in terms of 04:57:05PM
5 timing, though, you would agree that the letter 04:57:06PM
6 didn't provide any specific assurances as to when 04:57:08PM
7 Windstream could receive applicant of record 04:57:12PM
8 status? 04:57:14PM
9 A. I would agree, other than 04:57:15PM
10 the expediency that they were going to employ. 04:57:16PM
11 Q. So I'd like to discuss 04:57:19PM
12 Windstream's FIT contract amendment, which you 04:57:22PM
13 brought up already, which is -- so let's turn to 04:57:24PM
14 Exhibit C-0341, which is at Tab 19 of your binder. 04:57:27PM
15 And so what I would like to do 04:57:32PM
16 first is just to walk through the document, and 04:57:34PM
17 then we can talk about it. 04:57:35PM
18 So let's go to the first 04:57:37PM
19 e-mail, which is on page 3. And it's titled, 04:57:39PM
20 "Windstream Request to Amend the Contract Date," 04:57:43PM
21 and it's from Chris Benedetti to JoAnne Butler of 04:57:45PM
22 the OPA on August 9, 2010; right? 04:57:49PM
23 A. Yes. Yes. Is that 04:57:53PM
24 French, the language there? 04:57:55PM
25 Q. Actually, I think it's 04:57:57PM

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1 Right? 04:56:03PM
2 So you understood that MNR 04:56:04PM
3 could not proceed through the Crown land 04:56:08PM
4 application process until the grid cell swap had 04:56:10PM
5 occurred? 04:56:13PM
6 A. Yes. That's correct, 04:56:15PM
7 because they didn't know where -- what they were 04:56:16PM
8 going to give us. So they didn't know -- you 04:56:18PM
9 can't move through the process until they 04:56:21PM
10 determine exactly what they're going to provide us 04:56:23PM
11 with. 04:56:25PM
12 So once they would figure -- 04:56:25PM
13 once they knew the setback, they, as I understood 04:56:27PM
14 the process would be, they would then be able to 04:56:30PM
15 look at what we had requested and make sure that 04:56:32PM
16 that fits with the setback and then they would 04:56:35PM
17 immediately begin moving it through the Crown land 04:56:37PM
18 process, and ultimately would do this, you know, 04:56:40PM
19 in -- as quickly as possible. And they really did 04:56:43PM
20 recognize that, hey, we needed certainty around 04:56:47PM
21 this because you're asking us to put \$6 million at 04:56:49PM
22 risk, which we ultimately did, in addition to the 04:56:52PM
23 money we were going to spend to build this 04:56:54PM
24 project. 04:56:57PM
25 You know, we -- they 04:56:57PM

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1 Spanish? 04:57:58PM
2 A. Or Spanish. It says 04:57:59PM
3 that; right? It says August 9; right? 04:58:00PM
4 Q. I believe that's the 04:58:05PM
5 date. 04:58:06PM
6 A. Okay. 04:58:06PM
7 Q. So in his e-mail, 04:58:07PM
8 Mr. Benedetti requests that the date -- the 04:58:10PM
9 contract date in Windstream's FIT contract be 04:58:12PM
10 amended to the date that applicant of record 04:58:14PM
11 status is granted by the MNR; right? 04:58:16PM
12 A. Can you repeat that? I'm 04:58:19PM
13 sorry. 04:58:22PM
14 Q. So in Mr. Benedetti's 04:58:23PM
15 e-mail, he requests that the contract date in 04:58:26PM
16 Windstream's FIT contract be amended to the date 04:58:28PM
17 that applicant of record status is granted by the 04:58:30PM
18 Ministry of Natural Resources; right? 04:58:34PM
19 A. That's correct. 04:58:36PM
20 Q. And so in response, 04:58:38PM
21 Ms. Butler states: 04:58:40PM
22 "We do not intend to 04:58:41PM
23 amend the Milestone Date 04:58:42PM
24 for Commercial Operation 04:58:43PM
25 in this contract. Your 04:58:44PM

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1 client knew that, when it 04:58:46PM
2 submitted their 04:58:47PM
3 application, that there 04:58:48PM
4 were many unknowns, and 04:58:49PM
5 they were obviously 04:58:50PM
6 prepared to take those 04:58:52PM
7 risks." 04:58:53PM
8 Right? 04:58:54PM
9 A. It does say that. I 04:58:55PM
10 mean, I think there is a set of missing e-mails 04:58:57PM
11 that -- maybe they weren't on this string -- that 04:58:59PM
12 shows Mr. Ungerman effectively telling the OPA to 04:59:02PM
13 do this and the OPA doing -- giving us an 04:59:06PM
14 amendment of one year. And I think that that's 04:59:09PM
15 the -- I think that's the relatively normal 04:59:13PM
16 process is that the OPA -- the Ministry of Energy 04:59:16PM
17 instructs the OPA on what to do, and the OPA is 04:59:19PM
18 the contract administrators for all of these 04:59:23PM
19 contracts. 04:59:26PM
20 And I know now they're 04:59:26PM
21 absorbed into the IESO, and there is a whole bunch 04:59:28PM
22 of things going on, but as best I understand, the 04:59:30PM
23 Ministry of Energy directs the OPA, and the OPA 04:59:33PM
24 does what the Ministry of Energy wants, and you 04:59:36PM
25 can see it sort of consistently throughout this 04:59:39PM

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1 Q. Well, I would like to 05:00:44PM
2 continue walking through this e-mail chain 05:00:46PM
3 because, in response, Chris Benedetti -- and it's 05:00:48PM
4 in the bolded paragraph towards the end of his 05:00:51PM
5 e-mail. He revises his request, and he proposes 05:00:53PM
6 that the contract date be amended to the earlier 05:00:56PM
7 of the date upon which applicant of record status 05:00:58PM
8 is obtained by Windstream or April 24, 2011, which 05:01:02PM
9 would allow for two months for the setbacks to be 05:01:06PM
10 finalized and six months for the applicant of 05:01:08PM
11 record status to be determined. 05:01:10PM
12 Right? Do you see that in the 05:01:12PM
13 bolded section of this e-mail. 05:01:14PM
14 A. Yes, I see that. 05:01:15PM
15 Q. And so you would agree 05:01:16PM
16 that, as explained in the paragraphs above, this 05:01:17PM
17 proposal was based on Mr. Benedetti's expectation 05:01:20PM
18 that the decision -- the decision on the setbacks 05:01:23PM
19 would likely not come for two months or more and 05:01:27PM
20 that the MNR would take several months to finalize 05:01:30PM
21 its site release process and that the 05:01:32PM
22 consideration of Windstream's application could 05:01:35PM
23 take in excess of six months; right? 05:01:37PM
24 I'm summarizing his e-mail. 05:01:41PM
25 A. Yeah. I mean that's what 05:01:43PM

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1 case as well as the TransCanada case where the 04:59:42PM
2 Premier's Office and Ministry of Energy was 04:59:45PM
3 directing the OPA to settle the claim, make 04:59:47PM
4 offers. And the OPA does what they say. 04:59:50PM
5 Q. So I understand that you 04:59:54PM
6 may have had conversations with Mr. Ungerman, but 04:59:55PM
7 in JoAnne's response, she does not mention that 04:59:58PM
8 she is being directed by the OPA, or she -- Paul 05:00:01PM
9 Ungerman is not on this e-mail chain, is he? 05:00:05PM
10 A. Right. It -- right, 05:00:07PM
11 because I think it happened after this date, and, 05:00:07PM
12 you know, our reaction to this was clearly not one 05:00:09PM
13 of, "What is this?" We felt, you know, this is 05:00:11PM
14 not the resolution we needed, and, therefore, how 05:00:14PM
15 can we sign this? I don't think at this point 05:00:19PM
16 we've even signed the contract. 05:00:22PM
17 Q. No. 05:00:23PM
18 A. So we weren't going to 05:00:24PM
19 sign the contract until we got that amendment. So 05:00:25PM
20 we went to the people we understood effectively 05:00:28PM
21 directed and controlled the OPA, and we told them 05:00:31PM
22 our issue. They got involved. There is a whole 05:00:34PM
23 series of e-mails that I think we have put on the 05:00:37PM
24 record in relation to what happened, and I guess 05:00:39PM
25 JoAnne Butler got overruled. 05:00:42PM

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1 our GR rep put forward in this -- this e-mail, 05:01:45PM
2 correct. 05:01:48PM
3 Q. And according to 05:01:49PM
4 Mr. Benedetti's e-mails, all of these elements 05:01:50PM
5 taken together could have seen AOR status being 05:01:52PM
6 obtained in July 2011 or later. That was his 05:01:56PM
7 expectation? 05:02:01PM
8 A. July of 2011? So... 05:02:03PM
9 Q. So that is stated in the 05:02:08PM
10 third paragraph from the top. 05:02:10PM
11 A. This is August. If 05:02:11PM
12 that's what that, I guess, adds up to, but -- this 05:02:14PM
13 part right here? 05:02:19PM
14 Q. The third paragraph from 05:02:20PM
15 the top. So you would expect the MNR to take 05:02:21PM
16 several months, and in the last sentence he states 05:02:25PM
17 that: 05:02:27PM
18 "Adding all elements 05:02:27PM
19 described above together 05:02:28PM
20 could see applicant of 05:02:30PM
21 record status being 05:02:31PM
22 obtained in July 2011 or 05:02:33PM
23 later." 05:02:35PM
24 Right? 05:02:36PM
25 A. I think -- with the 05:02:37PM

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1 information that we had at the time, I think that 05:02:38PM
2 that's what he was looking at, yes. 05:02:40PM
3 Q. Okay. In August 11th, 05:02:43PM
4 2010 -- 05:02:46PM
5 A. But just to be clear, 05:02:47PM
6 that doesn't mean that we wouldn't have been able 05:02:48PM
7 to go forward with work, you know. Once this 05:02:50PM
8 site -- this setback that was the gating issue was 05:02:54PM
9 resolved, we sort of assumed that we could turn on 05:02:57PM
10 the rest of the work again. 05:02:59PM
11 I mean, you guys -- you guys 05:03:01PM
12 presented a budget earlier, and you showed work 05:03:02PM
13 that we wanted to do, and we still wanted to do 05:03:06PM
14 it. So the fact of the matter is a lot of these 05:03:08PM
15 things in this project, they run in parallel. 05:03:11PM
16 It's not -- everything is not sequential. You're 05:03:14PM
17 doing multiple things in parallel. You have a 05:03:15PM
18 team of experts in different areas doing different 05:03:18PM
19 levels of work. 05:03:21PM
20 Q. But in terms of the 05:03:21PM
21 obtaining applicant of record status, 05:03:23PM
22 Mr. Benedetti's e-mail states that it would be 05:03:26PM
23 obtained in July 2011 or later. That was his 05:03:28PM
24 expectation? 05:03:32PM
25 A. That is what he states. 05:03:32PM

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1 she's being directed by the Ministry of the 05:04:33PM
2 Energy? 05:04:33PM
3 A. Well, there's other 05:04:35PM
4 e-mails with Mr. Ungerman that are on the record 05:04:36PM
5 that show that he says, "I'm going to talk to 05:04:38PM
6 them." I think he says, "Nothing's easy -- 05:04:41PM
7 nothing's easy with OPA," or something to that 05:04:42PM
8 effect. 05:04:46PM
9 And then right after that, you 05:04:47PM
10 know, we get this e-mail. So I'm pretty certain 05:04:50PM
11 that, you know, you can link -- there's a causal 05:04:52PM
12 link there. Somebody is saying I'm going to talk 05:04:55PM
13 to a specific person, and I'm going to resolve 05:04:57PM
14 this, and then we get an e-mail from that specific 05:04:59PM
15 person pretty much same exact time frame, saying 05:05:02PM
16 we found a mutually agreeable solution, for me, 05:05:05PM
17 says that they got direction. 05:05:09PM
18 Q. So in terms of your 05:05:11PM
19 recollection, though, Mr. Ungerman said he would 05:05:12PM
20 speak to the OPA, but he never stated that he was 05:05:14PM
21 directing the OPA or he was going to order them to 05:05:16PM
22 do what he told them to do? 05:05:19PM
23 A. I guess -- I don't 05:05:21PM
24 remember. We would have to look at the e-mails, 05:05:23PM
25 but I don't know that he said, "I'm going to order 05:05:25PM

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1 Q. Okay. So on August 11th, 05:03:34PM
2 2010, Ms. Butler then responds to state that she 05:03:36PM
3 has found a mutually agreeable solution. 05:03:39PM
4 A. Yes, exactly. And what 05:03:42PM
5 she is referring to there is that is where 05:03:43PM
6 Mr. Ungerman got involved and directed OPA to 05:03:46PM
7 resolve this. 05:03:49PM
8 And I don't know -- I don't 05:03:51PM
9 remember in the e-mails to the exact extent of 05:03:52PM
10 what he asked them to do. But it was effectively 05:03:54PM
11 to resolve our situation. 05:03:57PM
12 So this e-mail here, it meant 05:03:58PM
13 to us that MEI wanted this project to go forward, 05:04:02PM
14 and MEI directs the OPA. So the two elements 05:04:06PM
15 there, and then OPA is listening to direction from 05:04:11PM
16 MEI. 05:04:13PM
17 So it was a very, very 05:04:14PM
18 important thing for us, because it showed that 05:04:15PM
19 this -- the people who are procuring power 05:04:19PM
20 ultimately and in charge of this whole thing, 05:04:22PM
21 they're behind this project and want to move it 05:04:23PM
22 forward. 05:04:26PM
23 Q. But you would agree that 05:04:26PM
24 Mr. -- or Ms. Butler's e-mail does not mention the 05:04:29PM
25 Ministry of Energy, and she doesn't state that 05:04:31PM

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1 them to do this." 05:05:26PM
2 Q. Or direct them. 05:05:27PM
3 A. But he -- he called them 05:05:28PM
4 and said, "I am going to resolve this." I think 05:05:30PM
5 he used the words, "I'm going to resolve this." 05:05:32PM
6 And he -- I mean, he resolved 05:05:34PM
7 it. Whether he said, "You're doing this," or 05:05:37PM
8 rather he said, you know, "Please do this, or I 05:05:39PM
9 really want you to do this. Here is all of the 05:05:43PM
10 reasons to do it." I don't know. I wasn't there. 05:05:46PM
11 But all I can say is he gave 05:05:48PM
12 us the commitment he was going to do it, and, you 05:05:50PM
13 know, I respect the fact that he followed through 05:05:53PM
14 on his commitment and made sure that it happened. 05:05:55PM
15 Q. You don't recall him 05:05:58PM
16 actually stating he was directing the OPA to do 05:05:59PM
17 this -- 05:06:02PM
18 MR. TERRY: If I could just 05:06:03PM
19 make one suggestion, not so much an objection, but 05:06:06PM
20 there's been some discussion of e-mails that 05:06:10PM
21 aren't before the witness right now. And I would 05:06:12PM
22 just encourage counsel, if she is going to ask the 05:06:13PM
23 witness about e-mails, it would be appropriate to 05:06:16PM
24 put the e-mails in front of him rather than have 05:06:19PM
25 him try to recollect what was said. 05:06:21PM

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1 MS. KAM: Right. And I'm not 05:06:24PM
2 -- okay. But I'm just asking generally. I don't 05:06:25PM
3 have the e-mails here. 05:06:27PM
4 THE WITNESS: Generally, you 05:06:28PM
5 know, like I said, the chain of events, I'm 05:06:29PM
6 certain of. The exact language that Mr. Ungerman 05:06:32PM
7 utilized or -- I'm not sure. So... 05:06:35PM
8 BY MS. KAM: 05:06:38PM
9 Q. And you would agree that 05:06:38PM
10 Windstream's extensions that it sought were 05:06:39PM
11 conditional on it receiving applicant of record 05:06:41PM
12 status; right? That's the request made in this 05:06:44PM
13 e-mail chain that we are looking at. 05:06:47PM
14 A. Yeah. I mean, this is 05:06:49PM
15 what we're requesting here is that, you know, we 05:06:50PM
16 move through the process as sort of stated 05:06:53PM
17 throughout all of these e-mails, throughout all of 05:06:56PM
18 this communication and back and forth. 05:06:59PM
19 And, you know, it's just -- we 05:07:01PM
20 stuck to the position we had, and we continued to 05:07:04PM
21 reiterate it, so that's what's happening here. 05:07:06PM
22 Q. Well, let's take a look 05:07:09PM
23 at the OPA's offer which is at Tab 14, and it's 05:07:10PM
24 Exhibit C-0343. 05:07:13PM
25 MR. TERRY: Mr. President, 05:07:22PM

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1 PRESIDENT: That's okay. 05:08:22PM
2 Whenever is a convenient time. 05:08:25PM
3 BY MS. KAM: 05:08:25PM
4 Q. Okay. So let's go 05:08:25PM
5 through this document first. 05:08:25PM
6 A. Maybe they will be able 05:08:26PM
7 to charge the microphones in the break. 05:08:27PM
8 Q. Yeah. So this is an 05:08:30PM
9 e-mail dated August 12, 2010 from Perry Cecchini 05:08:31PM
10 of the OPA to yourself and Adam Chamberlain, which 05:08:34PM
11 confirms that the OPA will be issuing a revised 05:08:37PM
12 offer notice for Windstream's FIT contract; right? 05:08:40PM
13 A. That's correct. 05:08:43PM
14 Q. And specifically it 05:08:44PM
15 states that the Milestone Date for Commercial 05:08:46PM
16 Operation will be amended from four years 05:08:48PM
17 following the contract date to five years; right? 05:08:50PM
18 A. That's correct. 05:08:54PM
19 Q. So you would agree that 05:08:54PM
20 the OPA did not grant Windstream's request for an 05:08:56PM
21 extension of the FIT contract to when it received 05:09:00PM
22 applicant of record status? 05:09:02PM
23 A. Yes. So what we believed 05:09:04PM
24 here is that what they were doing is they -- only 05:09:06PM
25 they knew the internal workings of how long this 05:09:08PM

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1 could I just ask through you, looking at the time, 05:07:23PM
2 the parties had talked about concluding the days 05:07:26PM
3 at five o'clock. I'm just not sure how much my 05:07:28PM
4 friend has to go or whether it might be 05:07:31PM
5 appropriate to at least take a break. The witness 05:07:33PM
6 has been at it for some time. 05:07:35PM
7 PRESIDENT: Well, yes. The 05:07:38PM
8 understanding was that we would spend at least 05:07:39PM
9 minimum of six hours per day, and we would then 05:07:41PM
10 break at a convenient time when we go beyond six 05:07:45PM
11 hours. I think we are now slightly above six 05:07:48PM
12 hours, effective time? 05:07:51PM
13 MS. NETTLETON: We are about 05:07:53PM
14 25 minutes shy of six hours of party time. 05:07:54PM
15 PRESIDENT: Yes. Because 05:07:57PM
16 there have been questions from the -- from the 05:07:58PM
17 Tribunal. So we still have 25 minutes to go to 05:08:01PM
18 reach the six hours. 05:08:04PM
19 Now the question is: How long 05:08:06PM
20 do you still have? Would this be a convenient 05:08:07PM
21 time to have a short break? Ten minutes perhaps? 05:08:10PM
22 MS. KAM: Is it possible for 05:08:13PM
23 us to go through this one more document and then 05:08:15PM
24 take a break afterwards? I was proposing -- I was 05:08:18PM
25 going to propose a break. 05:08:21PM

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1 stuff was going to take. And so what we believed 05:09:11PM
2 was that the extra year was enough time for them 05:09:15PM
3 to do all of the things they needed to do and then 05:09:18PM
4 get back to us so that we could move the project 05:09:21PM
5 forward. 05:09:24PM
6 I mean, again, everything that 05:09:25PM
7 I state and I am going to -- you know, it's what I 05:09:27PM
8 believe, you know. It's my opinion, and what I 05:09:30PM
9 believe is that the counterparty to this contract 05:09:33PM
10 in the province and in the OPA, that they really 05:09:36PM
11 wanted this contract to go forward. 05:09:38PM
12 And I know Mr. Bishop asked 05:09:40PM
13 the question earlier in relation to extensions and 05:09:43PM
14 if you were moving the project forward and 05:09:45PM
15 everything. And my experience has always been 05:09:47PM
16 that, you know, when you have a contract with 05:09:50PM
17 another party and you are really pushing it 05:09:52PM
18 forward and you are doing everything you can, the 05:09:54PM
19 other party has intent to actually fulfil the 05:09:56PM
20 contract. And so, for that reason, they're going 05:09:59PM
21 to extend, and they're going to do things that are 05:10:01PM
22 meant for you to be able to build it. 05:10:05PM
23 Now, with that said, they 05:10:06PM
24 don't want to create completely open-ended 05:10:08PM
25 extensions and things because they had a specific 05:10:11PM

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1 purpose with the Green Energy Act, which was to 05:10:14PM
2 build projects, add jobs now, or in whatever that 05:10:18PM
3 time frame was and have investors invest. 05:10:22PM
4 And so with that said, we 05:10:25PM
5 believe this extra year was being given to us as 05:10:27PM
6 an agreeable solution because they had already 05:10:30PM
7 figured out how long it was going to take, and it 05:10:34PM
8 was going to work within what they knew we needed 05:10:36PM
9 to do to build this project. 05:10:38PM
10 Q. So that was your 05:10:40PM
11 understanding; correct? 05:10:42PM
12 A. That was my 05:10:43PM
13 understanding, correct. 05:10:44PM
14 Q. But if we take a look at 05:10:45PM
15 the offer itself, there is no mention of the 05:10:46PM
16 setback requirements; right? 05:10:50PM
17 A. That's correct. 05:10:52PM
18 Q. And it doesn't make any 05:10:53PM
19 reference to how long it would take to finalize 05:10:56PM
20 those setback requirements. There is no 05:10:58PM
21 commitment there? 05:11:01PM
22 A. That's correct. It's 05:11:02PM
23 just I'm looking at the context under which this 05:11:03PM
24 extra year was added. That's all. And I'm 05:11:07PM
25 telling you the -- I am trying to give you the 05:11:10PM

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1 you know, the knowledge of what we needed to do. 05:12:10PM
2 I mean, they did a lot of research at the front 05:12:12PM
3 end to come up with the program, to come up with 05:12:14PM
4 the pricing, to come up with all of these things. 05:12:17PM
5 And, I mean, you know, we 05:12:19PM
6 believed they did research as well, and, you know, 05:12:20PM
7 I know there's a lot of made about how long it 05:12:23PM
8 takes to build an offshore wind farm, but the 05:12:27PM
9 reality is what we need to start with is we 05:12:30PM
10 started this project in 2008, not in 2011. So 05:12:33PM
11 there is three years of work that we did do. 05:12:36PM
12 Would we have liked to have done more? 05:12:38PM
13 Absolutely, and we tried but there's a -- there 05:12:40PM
14 was a lot of work that was going on here, and we 05:12:42PM
15 just -- I guess we assumed. Clearly it hasn't 05:12:45PM
16 proved out that way, but that's what we assumed. 05:12:48PM
17 Q. Right. That was your 05:12:50PM
18 assumption? 05:12:51PM
19 A. Yes. 05:12:52PM
20 Q. I believe we can take a 05:12:52PM
21 break now. 05:12:53PM
22 PRESIDENT: Okay. Thank you 05:12:54PM
23 very much. Let's break for 10 minutes, and we 05:12:55PM
24 will continue at 6:25 -- 5:25. 05:12:57PM
25 --- Recess at 5:13 p.m. 05:27:17PM

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1 perspective of where we were at that time and what 05:11:12PM
2 the context was and who we were talking to, and so 05:11:15PM
3 forth. 05:11:18PM
4 And then this is -- this is a 05:11:18PM
5 one, you know, paragraph e-mail detailing what 05:11:20PM
6 they were going to do. But I am just trying to 05:11:23PM
7 give a little context for the Tribunal members. 05:11:26PM
8 Q. Right. But this e-mail 05:11:28PM
9 also doesn't state that Windstream would be able 05:11:30PM
10 to achieve commercial operation by the timing of 05:11:32PM
11 this new MCO date; right? 05:11:36PM
12 A. That's correct. It 05:11:39PM
13 doesn't state that. 05:11:39PM
14 Q. Did you obtain any 05:11:40PM
15 specific commitments from any government officials 05:11:41PM
16 that one year was sufficient for the regulatory 05:11:44PM
17 framework to be established? 05:11:47PM
18 A. I think there were 05:11:50PM
19 different discussions, but I don't know that we 05:11:51PM
20 had any specific commitment. 05:11:53PM
21 Like I said, we're working 05:11:55PM
22 with a counterparty that we believed wanted to 05:11:58PM
23 build this project, and, therefore, we believed 05:12:00PM
24 the proposals they were making back to us were 05:12:03PM
25 proposals that worked within the knowledge of -- 05:12:06PM

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1 --- Upon resuming at 5:27 p.m.. 05:27:17PM
2 PRESIDENT: Okay. Yes, 05:28:24PM
3 please, go on. 05:28:25PM
4 MS. KAM: Great. Thank you. 05:28:27PM
5 BY MS. KAM: 05:28:27PM
6 Q. So I've looked at my 05:28:28PM
7 questions, and I think, Mr. Mars, I only have 05:28:29PM
8 about 15 to 20 minutes left, but could we please 05:28:32PM
9 just stay focused on the questions themselves and 05:28:36PM
10 not go into too much greater context, and that 05:28:39PM
11 will make it go faster? 05:28:44PM
12 A. Okay. 05:28:46PM
13 Q. So I would like to turn 05:28:47PM
14 now to Exhibit C-0484, which is at Tab 30 of the 05:28:48PM
15 binder. So this is a document titled 05:28:53PM
16 "Transcription of Conference Call, February 11, 05:29:04PM
17 2011"; correct? 05:29:05PM
18 A. That's correct. 05:29:07PM
19 Q. And this was a transcript 05:29:08PM
20 taken from an audio recording of the call between 05:29:10PM
21 Windstream Ontario and the OPA prior to the 05:29:12PM
22 announcement of the deferral? 05:29:14PM
23 A. That's correct. 05:29:16PM
24 Q. Okay. So let's -- 05:29:17PM
25 A. I think. Only because I 05:29:19PM

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1 think they may have put their press release out 05:29:20PM
2 during the phone call. 05:29:22PM
3 Q. Okay. 05:29:23PM
4 A. I don't know if it was 05:29:25PM
5 necessarily prior. I think it was, while they 05:29:26PM
6 were announcing this to the public, they were 05:29:28PM
7 telling us. They did start the conversation ahead 05:29:30PM
8 of the press release, but I believe the press 05:29:33PM
9 release may have come out while we were on the 05:29:35PM
10 phone. 05:29:37PM
11 Q. Okay. But it was the 05:29:37PM
12 same day? 05:29:38PM
13 A. Yes. 05:29:40PM
14 Q. Okay. So I would like to 05:29:42PM
15 turn to the bottom of page 2. This is where 05:29:43PM
16 Andrew Mitchell -- he's a senior policy adviser of 05:29:50PM
17 the Minister of Energy's office. 05:29:53PM
18 And he states that -- sorry. 05:29:55PM
19 So, in particular, Mr. Mitchell states that the 05:30:02PM
20 OPA would negotiate the force majeure provisions, 05:30:04PM
21 the two-year force majeure termination clause 05:30:07PM
22 associated with those provisions, and the security 05:30:09PM
23 deposits in Windstream's FIT contract; correct? 05:30:11PM
24 A. Can I read it? Is it all 05:30:14PM
25 right if I read it really quick? 05:30:16PM

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1 associated provisions with security deposits. 05:31:44PM
2 Q. Okay. 05:31:47PM
3 A. And there's some 05:31:48PM
4 terminology later on, I believe, in here that 05:31:49PM
5 talks about sort of something to the effect of 05:31:53PM
6 keeping us, you know, in a position that we're in 05:31:56PM
7 now, freezing us, or something to that effect. 05:31:59PM
8 Q. Right. I believe the 05:32:01PM
9 terminology is "deferred" or frozen, which is on 05:32:02PM
10 page 7? 05:32:05PM
11 A. Yes. Okay, yes. 05:32:06PM
12 Q. Okay. So I would like to 05:32:07PM
13 discuss Windstream and the OPA's post-deferral 05:32:09PM
14 discussions, and for that, we're going to have to 05:32:11PM
15 cut the feed and go into confidential session. 05:32:13PM
16 --- CONFIDENTIAL BEGIN 05:32:20PM
17 BY MS. KAM: 05:32:20PM
18 Q. Okay. So let's turn now 05:32:20PM
19 to Exhibit R-0223, which is at Tab 31 of your 05:32:22PM
20 binder. And so taking a look at Windstream's 05:32:25PM
21 proposal, there is 11 requests in this letter; 05:32:34PM
22 correct? 05:32:37PM
23 A. It appears that, yes. 05:32:38PM
24 Q. Right. And you would 05:32:45PM
25 agree, though, that there was no express agreement 05:32:46PM

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1 Q. Sure. 05:30:19PM
2 A. Okay. 05:30:19PM
3 Q. So my question is that he 05:30:35PM
4 specifically referred to those three provisions. 05:30:37PM
5 A. Yes. It says that we're 05:30:48PM
6 -- we're particularly unique because we have a FIT 05:30:53PM
7 contract and that they're going to -- the OPA is 05:30:55PM
8 going to sit down with us and negotiate inclusive 05:30:57PM
9 of those provisions, a number of pieces including 05:31:02PM
10 those provisions. 05:31:05PM
11 So, I mean, I think it -- it 05:31:06PM
12 sort of states that it's broader than just those 05:31:08PM
13 pieces, but it does specifically list those 05:31:10PM
14 pieces. 05:31:12PM
15 Q. Okay. But it was never 05:31:13PM
16 stated during the call that the OPA would agree to 05:31:16PM
17 negotiate any other specific provisions; right? 05:31:19PM
18 These were the only three provisions that were 05:31:22PM
19 listed? 05:31:24PM
20 A. So I haven't reviewed 05:31:25PM
21 this in a long time. The call was more than five 05:31:30PM
22 years ago. So I believe that what you're stating 05:31:33PM
23 is accurate. However, you know, it does say a 05:31:35PM
24 number of pieces including the force majeure, the 05:31:38PM
25 two-year force majeure termination clause, and 05:31:41PM

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1 during the February 11 call that the OPA would 05:32:49PM
2 negotiate amendments relating to its general offer 05:32:51PM
3 of a one-year extension to the MCOB for all FIT 05:32:53PM
4 contract holders and domestic content 05:32:56PM
5 requirements, the change of control and assignment 05:32:59PM
6 provisions, the contract facility amendment, the 05:33:01PM
7 reporting requirements, and preconstruction 05:33:03PM
8 development costs provisions; right? There was no 05:33:06PM
9 express agreement? 05:33:09PM
10 A. Well, I think we were 05:33:10PM
11 being faced with a great deal of uncertainty. You 05:33:11PM
12 know, on February 11, when they announced this, we 05:33:16PM
13 had no indication at all that there would be a 05:33:18PM
14 moratorium. And, you know, we knew there was a 05:33:21PM
15 moratorium, so we sort of never anticipated the 05:33:24PM
16 idea of another moratorium, because it seems like 05:33:27PM
17 they're stating they're going to study the same 05:33:29PM
18 things as they previously said they studied. 05:33:31PM
19 You know, so there was a bit 05:33:33PM
20 of uncertainty. So we proposed what -- you know, 05:33:38PM
21 with no knowledge of the length of time, the -- 05:33:40PM
22 you know, what they were doing, so on and so 05:33:43PM
23 forth. We proposed the items that we believed 05:33:46PM
24 were most appropriate to be changed to give us 05:33:48PM
25 some level of certainty. There were some things 05:33:53PM

1 in here, like domestic content requirements, that 05:33:55PM
2 we had previously discussed with other people, and 05:33:57PM
3 we were saying, listen, if you're going to fix the 05:33:59PM
4 contract, just fix just fix that. 05:34:01PM
5

[REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
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25 [REDACTED]

1 Q. Well, we'll get to the 05:37:04PM
2 OPA's proposal in a minute. I just want to look 05:37:05PM
3 at Windstream's proposal. 05:37:07PM
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 Q. So, in your view, was 05:37:48PM
21 Windstream in force majeure as of the date it was 05:37:51PM
22 formally offered the FIT contract? 05:37:54PM
23 A. No. But right at that 05:37:56PM
24 period of time, they imposed the setback. And, 05:38:00PM
25 you know, we didn't sign until August 2010. So 05:38:03PM

1 knowing that our inability -- knowing that our 05:38:06PM
 2 inability to get the land because of the setback 05:38:09PM
 3 issue, that didn't start on November 22. I 05:38:12PM
 4 actually never understood why somebody would 05:38:15PM
 5 arbitrarily pick November 22nd, 2010. That 05:38:17PM
 6 started the day we received the contract. 05:38:20PM
 7 So we were trying to rectify 05:38:22PM
 8 what we believe was an absolute wrong in the way 05:38:24PM
 9 that the OPA ruled in terms of our original force 05:38:26PM
 10 majeure. And, you know, I still even, as I sit 05:38:31PM
 11 here today, to be honest, I still don't understand 05:38:33PM
 12 the logic of going from -- and maybe Mr. Cecchini 05:38:35PM
 13 could actually -- would be able to provide this in 05:38:39PM
 14 his testimony, but I didn't understand the logic 05:38:41PM
 15 of we got a contract on May 4th. 05:38:43PM
 16 They prevented us from going 05:38:46PM
 17 forward, but then they didn't give us a full, all 05:38:47PM
 18 the way back to May 4th, force majeure, which is 05:38:50PM
 19 what they should have done, in my opinion. So we 05:38:52PM
 20 were requesting it here. 05:38:55PM
 21 Q. But you would agree the 05:38:56PM
 22 purpose of the post-deferral discussions with the 05:38:57PM
 23 OPA to freeze or defer the project was meant to 05:38:59PM
 24 address the effects of the February 11, 2011 05:39:03PM
 25 deferral? 05:39:06PM

1 A. That's -- that's what it 05:39:09PM
 2 was meant to do. I believe your answer is 05:39:10PM
 3 correct. But all of the stuff that led up to that 05:39:13PM
 4 was part of that decision, I guess. 05:39:16PM
 5 So we were just trying to fix 05:39:19PM
 6 it. I mean, I don't -- like I said, I mean, you 05:39:21PM
 7 know, you're not the contracting part, so I can't 05:39:24PM
 8 ask you, but the logic to go back to May 4, 2010, 05:39:26PM
 9 I think -- I think, again, just me -- I think it's 05:39:31PM
 10 reasonably sound, and I don't think it penalizes 05:39:33PM
 11 the OPA in any way, shape, or form. 05:39:36PM
 12 It just gives us -- you know, 05:39:38PM
 13 it just -- it just -- we wanted to perform under 05:39:40PM
 14 this contract. We -- we -- we believe that 05:39:43PM
 15 there's a sanctity to a contract, when you sign 05:39:45PM
 16 it, and you're signing up to obligations, and we 05:39:48PM
 17 just wanted -- we just wanted to correct that, 05:39:51PM
 18 make sure that it was on face value, and when we 05:39:53PM
 19 were allowed to move forward, move forward. 05:39:56PM
 20 Now, remember, we're taking on 05:39:59PM
 21 a lot of costs and a lot of -- a lot of detriment 05:40:00PM
 22 to this -- you know, having this moratorium in 05:40:05PM
 23 place; right? You start a project. You can't 05:40:08PM
 24 just turn it off and then start it again some 05:40:11PM
 25 point in the future, and it starts from the exact 05:40:14PM

1 same place. I mean, you're mothballing something; 05:40:17PM
 2 right? So you have to remobilize. You have to 05:40:20PM
 3 restart. You have to do all this stuff. 05:40:22PM
 4 And so we're agreeing to that, 05:40:23PM
 5 and we're just asking for what I believed was a 05:40:25PM
 6 pretty simple give on the OPA's part. 05:40:27PM
 7 I don't -- I still don't see 05:40:31PM
 8 why they wouldn't do that. And what it would cost 05:40:32PM
 9 them. I don't think it cost them anything. 05:40:35PM
 10 Q. Okay. Well, let's take a 05:40:37PM
 11 look at Windstream's proposal for the security 05:40:39PM
 12 requirements, which is at the bottom of page 3. 05:40:41PM
 13 A. Yes. 05:40:44PM
 14 Q. And Windstream requested 05:40:44PM
 15 a waiver of the obligation to provide completion 05:40:46PM
 16 and performance security for the duration of the 05:40:48PM
 17 event of force majeure; right? 05:40:51PM
 18 A. Right. And we stated 05:40:53PM
 19 here that, you know, ultimately we would have put 05:40:55PM
 20 this back -- we would have given them this 05:40:59PM
 21 security back when they told us the project could 05:41:01PM
 22 go forward. 05:41:04PM
 23 I mean, why -- what's the 05:41:04PM
 24 sense in holding our money which they have done 05:41:05PM
 25 now for, what, six years? They have held our 05:41:08PM

1 money. And then if you pre-date that, because we 05:41:11PM
 2 had a original LC in place all the way back to 05:41:13PM
 3 November 2010 -- I might be wrong on the date, but 05:41:16PM
 4 I'm pretty sure -- they have held our money. 05:41:19PM
 5 And what you have to 05:41:21PM
 6 understand is we actually have money in a bank 05:41:22PM
 7 account that is frozen to our access. So we 05:41:24PM
 8 cannot only -- we can't use it for other 05:41:28PM
 9 investments. So there's a big opportunity cost to 05:41:29PM
 10 it but it's also 100 percent at risk. 05:41:31PM
 11 So they have made commentary 05:41:34PM
 12 around -- you guys have made commentary around 05:41:37PM
 13 sunk costs. We'll get into line item detail, but 05:41:39PM
 14 one of the sunk costs for us is \$6 million sitting 05:41:42PM
 15 in a bank account that we can't access [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 Q. But you would agree, 05:41:56PM
 21 Mr. Mars, that all FIT applicants are required to 05:41:57PM
 22 provide security in order to participate in the 05:41:59PM
 23 FIT program? 05:42:02PM
 24 A. Correct. And we provided 05:42:02PM
 25 that exactly as detailed in the FIT program. We 05:42:04PM
 did everything they asked us to do. But we 05:42:07PM

1 believed we were put into a unique position by 05:42:11PM
 2 having a moratorium. So we're the only project 05:42:14PM
 3 that has a moratorium imposed on us, and all we 05:42:16PM
 4 were asking for was return the letter of credit, 05:42:19PM
 5 at which point we will then put it up when this 05:42:22PM
 6 project is ready, because, again, we didn't know 05:42:26PM
 7 if this was going to be an extra year or -- from 05:42:28PM
 8 this date, or, you know, 10 years from now. 05:42:30PM
 9 I mean, it's already proven 05:42:33PM
 10 that it's more than five years. And, you know, I 05:42:35PM
 11 think Canada already admitted today that they're 05:42:37PM
 12 not actually doing any more work, which means it's 05:42:40PM
 13 indefinite forever. So you guys are holding our, 05:42:43PM
 14 like, is the proposal right now on Canada's side 05:42:48PM
 15 that you're going to hold our letter of credit for 05:42:50PM
 16 the next 50 years? Because it's... 05:42:53PM
 17 Q. In terms of the security 05:42:55PM
 18 requirement, which is what I am trying to focus 05:42:57PM
 19 on, you understand that this requirement applies 05:42:59PM
 20 whether or not an applicant is offered a FIT 05:43:02PM
 21 program. It's merely just to participate in the 05:43:04PM
 22 FIT program and to be put in the FIT queue. 05:43:06PM
 23 A. No. That's not accurate, 05:43:09PM
 24 [REDACTED] 05:43:10PM
 25 [REDACTED]

[REDACTED]

05:44:10PM

22 PRESIDENT: Mr. Mars, can you 05:44:12PM
 23 just answer the question? We understand you want 05:44:13PM
 24 to elaborate, but in the interests of time, let's 05:44:15PM
 25 be a bit more effective and answer the question. 05:44:17PM

1 THE WITNESS: Yes. 05:44:20PM
 2 BY MS. KAM: 05:44:21PM
 3 Q. Well, why don't we go to 05:44:21PM
 4 the OPA's response and that's at Tab 32 and 05:44:23PM
 5 Exhibit R-0226. And so this is a letter dated 05:44:26PM
 6 March 18 from Michael Killeavy of the OPA to Adam 05:44:33PM
 7 Chamberlain, [REDACTED]
 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14 Q. Okay. So let's turn to 05:48:59PM
15 Exhibit R-0254, which is at Tab 35 of your binder. 05:49:00PM
16 So this is a letter dated July 5, 2011 from Adam 05:49:10PM
17 Chamberlain to Ron Clark, who was the OPA counsel; 05:49:13PM
18 correct? 05:49:17PM
19 A. Yes. I think that's 05:49:18PM
20 their outside counsel, Ron Clark at Aird & Berlis. 05:49:20PM
21 Q. And you would agree that 05:49:23PM
22 this is Windstream's last letter to the OPA with 05:49:24PM
23 respect to the discussions to freeze its FIT 05:49:26PM
24 contract? 05:49:29PM
25 A. I don't know. And I'm 05:49:30PM

1 not sure when the OPA sent their letter saying or 05:49:32PM
2 -- you know, we -- I just don't remember the 05:49:36PM
3 timing, [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 then, yes, this is probably our last 05:49:47PM
7 letter to them. 05:49:50PM
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED] 05:50:37PM
2 [REDACTED]
3 A. Can you just tell me 05:50:40PM
4 where that is? Is that right? 05:50:41PM
5 Q. Yes. That is the -- 05:50:44PM
6 A. Specifically the -- 05:50:46PM
7 Q. Fourth paragraph of the 05:50:47PM
8 third page. 05:50:49PM
9 A. Yes. I mean, that is 05:51:08PM
10 exactly what we were asking for, yes. And, you 05:51:10PM
11 know, it's... 05:51:13PM
12 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 05:53:59PM
7 Q. Okay. So we can go back 05:54:00PM
8 into public session? 05:54:03PM
9 -- CONFIDENTIAL END 05:54:11PM
10 BY MS. KAM: 05:54:11PM
11 Q. So I would like to turn 05:54:11PM
12 to paragraph 60 of your reply witness statement, 05:54:13PM
13 which is the second witness statement. 05:54:16PM
14 A. Yes. 05:54:25PM
15 Q. And it states here that: 05:54:25PM
16 "After the deferral, the 05:54:27PM
17 OPA continued to 05:54:27PM
18 encourage Windstream to 05:54:28PM
19 develop its project by 05:54:30PM
20 offering to waive its 05:54:31PM
21 pre-NTP termination 05:54:33PM
22 rights." 05:54:35PM
23 Correct? 05:54:35PM
24 A. Yes. We assumed that, 05:54:36PM
25 you know, by coming to us and asking us to move 05:54:38PM

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1 forward with this, that they still had intent on 05:54:40PM
2 the contract one day moving forward. 05:54:42PM
3 Q. Okay. So let's turn to 05:54:45PM
4 Exhibit R-0258, which is at Tab 37 of your binder. 05:54:46PM
5 And so, for the record, this 05:54:51PM
6 is a Letter of Direction from the Minister of 05:54:57PM
7 Energy, Brad Duguid, to Colin Anderson of the OPA, 05:55:00PM
8 dated August 2, 2011. 05:55:03PM
9 And so at the bottom of page 05:55:06PM
10 1, Minister Duguid states that: 05:55:08PM
11 "The changes in his 05:55:10PM
12 direction are designed to 05:55:10PM
13 eliminate existing 05:55:11PM
14 contractual risk, firm up 05:55:13PM
15 financing for equipment 05:55:14PM
16 orders and support 05:55:15PM
17 purchase orders with 05:55:16PM
18 Ontario manufacturers, 05:55:17PM
19 which would sustain 05:55:20PM
20 continued growth in the 05:55:21PM
21 sector." 05:55:22PM
22 Right? 05:55:23PM
23 A. That is what that says. 05:55:23PM
24 Q. Okay. So, on page 2, 05:55:25PM
25 Minister Duguid directs the OPA to allow FIT 05:55:28PM

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1 contract holders to elect to obtain a waiver of 05:55:31PM
2 the OPA's termination rights under Section 2.4(a) 05:55:33PM
3 of the FIT contract. Do you see that? 05:55:37PM
4 A. Yes, I see that. 05:55:40PM
5 Q. And so this was 05:55:41PM
6 conditional on the supplier submitting a domestic 05:55:42PM
7 content plan and providing evidence that it had 05:55:44PM
8 entered into an agreement for the purpose of 05:55:47PM
9 generating equipment. 05:55:52PM
10 A. That's correct. They 05:55:53PM
11 wanted to show -- I mean they wanted to continue 05:55:54PM
12 their jobs growth. So they did this, and then I 05:55:57PM
13 think it was a political decision that was based 05:56:00PM
14 on industry information. And the Conservative 05:56:03PM
15 Party, saying they're going to cancel all these 05:56:07PM
16 contracts if they're elected. 05:56:09PM
17 Q. Right. And you would 05:56:10PM
18 agree that this offer was made available to all 05:56:11PM
19 FIT contract holders? 05:56:13PM
20 A. I know it was made 05:56:15PM
21 available to all wind contract holders. I don't 05:56:15PM
22 know if it was made available to water, power, and 05:56:18PM
23 biomass and such, but I believe it was. 05:56:21PM
24 Q. Okay. And so this was 05:56:23PM
25 not a specific offer that was made to Windstream? 05:56:24PM

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1 A. No. This was not -- I 05:56:27PM
2 mean, it was a specific offer in that they sent it 05:56:29PM
3 to us, but it wasn't a Windstream-only offer. 05:56:31PM
4 Q. Okay. And the waiver of 05:56:34PM
5 Section 2.4(a) was also optional for all FIT 05:56:36PM
6 contract holders; right? 05:56:40PM
7 A. Yes. 05:56:41PM
8 Q. And this provision 05:56:43PM
9 existed in Windstream's standard FIT contract 05:56:45PM
10 prior to the announcement of the deferral on 05:56:47PM
11 offshore wind; right? 05:56:50PM
12 A. It did. I understood it 05:56:51PM
13 was a section of the contract that was put in 05:56:55PM
14 place in case the province had to cancel all of 05:56:57PM
15 the FIT contracts or the FIT program, and they 05:57:00PM
16 wanted some level of flexibility. But in 2011, 05:57:03PM
17 when it got to the place where the banks began 05:57:06PM
18 financing these projects, the banks objected to 05:57:08PM
19 this language, you know, sort of across the Board. 05:57:11PM
20 And so between that and the 05:57:13PM
21 Conservatives saying they were going to cancel the 05:57:16PM
22 contracts, they decided that this language was not 05:57:18PM
23 something that would help them in the program, so 05:57:21PM
24 they offered this to everyone. 05:57:23PM
25 Q. So you would agree, 05:57:24PM

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1 though, that whether or not Windstream accepted 05:57:25PM
2 this offer, it didn't have any impact on the 05:57:28PM
3 deferral in offshore wind? 05:57:32PM
4 A. It didn't have any impact 05:57:33PM
5 on the deferral in offshore wind. 05:57:37PM
6 Q. Okay. 05:57:39PM
7 Thank you, Mr. Mars. That 05:57:40PM
8 concludes my questions. 05:57:42PM
9 THE WITNESS: Thank you very 05:57:46PM
10 much. 05:57:46PM
11 PRESIDENT: Thank you, 05:57:47PM
12 Ms. Kam. 05:57:48PM
13 MR. SPELLISCY: One minute. 05:57:50PM
14 05:57:58PM
15 MS. KAM: I just have two 05:58:41PM
16 questions. 05:58:42PM
17 PRESIDENT: Please go on. 05:58:43PM
18 BY MS. KAM: 05:58:45PM
19 Q. My colleague just wanted 05:58:45PM
20 me to clarify one thing, and that is the statement 05:58:47PM
21 that you didn't understand why November 22, 2010 05:58:49PM
22 was selected as the force majeure date. 05:58:55PM
23 A. As best as I recollect, I 05:58:58PM
24 don't know exactly why, and maybe they gave a 05:59:01PM
25 reason. But at the end of the day, we still 05:59:03PM

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1 believe that May 4, 2010 was the appropriate date. 05:59:05PM
2 Q. But you would agree that 05:59:08PM
3 November 22, 2010 was the date that Windstream 05:59:10PM
4 selected for its force majeure notice? 05:59:14PM
5 A. I don't remember, and I 05:59:18PM
6 think it was based, if it was, it was based upon 05:59:19PM
7 legal advice of actually, you know, trying to get 05:59:22PM
8 this force majeure, and I think it was just based 05:59:25PM
9 on their legal advice, but it wasn't contemplating 05:59:28PM
10 the idea that the province would be putting forth 05:59:31PM
11 a moratorium. 05:59:33PM
12 Q. But you would agree that 05:59:34PM
13 this date did not come from the OPA or from the 05:59:35PM
14 Government of Ontario? 05:59:39PM
15 A. I can't honestly 05:59:40PM
16 remember, so you would have to show me the 05:59:42PM
17 evidence of that, and, you know, if the evidence 05:59:43PM
18 of that is there, then I would say yes. 05:59:45PM
19 Q. Okay. Well, let's -- 05:59:47PM
20 Donnie, do you mind pulling up Exhibit C-0408? 05:59:49PM
21 MR. TERRY: We need a copy for 05:59:58PM
22 the witness. 05:59:59PM
23 MS. KAM: We don't have a 06:00:00PM
24 copy. 06:00:01PM
25 THE WITNESS: I can probably 06:00:01PM

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1 was because it had to do with very specific things 06:01:03PM
2 under the law. But you can see, the -- we went to 06:01:06PM
3 REFO, the REFO office, on May 13 to explain to 06:01:09PM
4 them that, you know, we were in this position and 06:01:13PM
5 so forth. So we didn't wait all the way to this 06:01:16PM
6 point to start notifying agencies that, you know, 06:01:19PM
7 the other agencies weren't meeting their 06:01:22PM
8 requirements. 06:01:24PM
9 Q. Right. But the date 06:01:25PM
10 itself is selected by you? 06:01:27PM
11 A. Yes, yes, yes. 06:01:29PM
12 Q. Okay. Now, I just want 06:01:29PM
13 to ask you a question about the letter of credit 06:01:31PM
14 because you would not have terminated your FIT 06:01:33PM
15 contract for force majeure; right? Sorry, you 06:01:36PM
16 would not have terminated your FIT contract for 06:01:42PM
17 force majeure. You have not terminated your 06:01:44PM
18 contract for force majeure; right? Sorry I can't 06:01:49PM
19 read the writing? 06:01:52PM
20 A. We have not. If we were 06:01:53PM
21 to terminate our contract right now, for force 06:01:54PM
22 majeure, or any other reason, we would be 06:01:57PM
23 basically losing our \$6 million letter of credit. 06:01:58PM
24 The OPA could seize it based on the language of 06:02:02PM
25 the contract. 06:02:04PM

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1 see it. 06:00:02PM
2 MS. KAM: Donnie can you zoom 06:00:04PM
3 in to the document? Okay. 06:00:05PM
4 MS. SEERS: If you could 06:00:10PM
5 repeat the exhibit number, I can find it for the 06:00:10PM
6 witness. 06:00:14PM
7 MS. KAM: C-0408. 06:00:14PM
8 BY MS. KAM: 06:00:19PM
9 Q. Okay. And so this is 06:00:19PM
10 Windstream's force majeure notice to the OPA. 06:00:20PM
11 A. Okay. 06:00:20PM
12 Q. And your counsel has 06:00:28PM
13 provided it in front of you. And so the date 06:00:29PM
14 specified on this is November 22, 2010; correct? 06:00:30PM
15 A. This's what it says. 06:00:34PM
16 Q. And based on this 06:00:35PM
17 document, you would agree that it was Windstream 06:00:36PM
18 who selected this date? 06:00:37PM
19 A. Yes. Obviously it was 06:00:41PM
20 Windstream who selected this date. 06:00:43PM
21 Q. Okay. Now, with the 06:00:44PM
22 issue of the letter of credit -- 06:00:56PM
23 A. You can see, though, that 06:00:57PM
24 a lot of the attachments that are in here, I think 06:00:59PM
25 that there's -- the reason we selected this date 06:01:02PM

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1 Q. But you would agree that, 06:02:04PM
2 if you did terminate your contract, you understand 06:02:06PM
3 that you would get your \$6 million letter of 06:02:09PM
4 credit back? 06:02:11PM
5 A. At some point in the 06:02:13PM
6 future, that's -- I think there is that 06:02:14PM
7 possibility. I think it's exactly May -- it's 06:02:16PM
8 either May 4 or May 22, 2017, I think. We could 06:02:21PM
9 have the ability to do that. 06:02:25PM
10 But, again, we wanted to build 06:02:26PM
11 this project, and, you know, our assertion is that 06:02:28PM
12 this contract had real value. So us going forward 06:02:31PM
13 and cancelling it, it wasn't -- it wasn't on the 06:02:34PM
14 horizon, but I can't tell you that, if we've 06:02:37PM
15 gotten nowhere with it on -- in May 2017, we 06:02:40PM
16 wouldn't move forward in cancelling it. But at 06:02:43PM
17 this point, it's completely at risk. 06:02:45PM
18 Q. So your decision not to 06:02:47PM
19 terminate your contract means that your \$6 million 06:02:48PM
20 letter of credit is still at risk, or as you 06:02:51PM
21 said -- 06:02:55PM
22 A. There's no decision, 06:02:55PM
23 because we can't cancel it. So if I decided today 06:02:56PM
24 or any day prior to today or any day up till at 06:03:00PM
25 least May 2000 -- May whatever the date is, 2017, 06:03:04PM

1 I would lose my money. 06:03:07PM
 2 Q. Your understanding is 06:03:11PM
 3 that you would lose your letter of credit? 06:03:12PM
 4 A. They have the ability to 06:03:14PM
 5 -- I mean, we can bring up the specific language, 06:03:15PM
 6 and I'm sorry this is going long, but the OPA has 06:03:17PM
 7 the ability to basically be awarded an equivalent 06:03:20PM
 8 amount to the letter of credit. So, yes, we would 06:03:24PM
 9 lose our money. 06:03:27PM
 10 MS. KAM: Can I just take a 06:03:29PM
 11 minute? 06:03:30PM
 12 PRESIDENT: Sure. 06:03:31PM
 13 MS. KAM: That concludes my 06:03:36PM
 14 cross-examination. 06:03:38PM
 15 THE WITNESS: Thank you very 06:03:39PM
 16 much, and thank you to the Panel here and 06:03:40PM
 17 everybody working here. 06:03:42PM
 18 PRESIDENT: Just a second. 06:03:44PM
 19 Thank you, Ms. Kam. The question is whether there 06:03:45PM
 20 will be any questions in redirect from counsel for 06:03:49PM
 21 Claimant. 06:03:51PM
 22 MR. TERRY: I just have a few 06:03:51PM
 23 questions arising out of my friend's questions. 06:03:53PM
 24 PRESIDENT: Okay. Please go 06:03:56PM
 25 ahead. 06:03:57PM

1 RE-EXAMINATION BY MR. TERRY: 06:04:07PM
 2 Q. Mr. Mars, I just want to 06:04:07PM
 3 put a few documents to you that arise out of 06:04:17PM
 4 documents that my friend put to you and just ask 06:04:20PM
 5 you some questions with respect to them. This is 06:04:25PM
 6 a Document R-264. 06:04:52PM
 7 And, Mr. Mars, do you 06:05:02PM
 8 recognize this document? 06:05:03PM
 9 A. Yes. I mean, this is the 06:05:05PM
 10 response that I referred to previous that the OPA 06:05:06PM
 11 basically believes that -- that their views remain 06:05:10PM
 12 unchanged to the previous letters. 06:05:16PM
 13 Q. And I'm just going to ask 06:05:18PM
 14 you a couple of questions with respect to this 06:05:19PM
 15 document. 06:05:21PM
 16 A. Sure. 06:05:21PM
 17 Q. So you will recall that 06:05:22PM
 18 Canada's counsel had asked you questions about the 06:05:29PM
 19 correspondence between the OPA and Windstream with 06:05:32PM
 20 respect to contract negotiations? 06:05:35PM
 21 A. Yes. 06:05:39PM
 22 Q. Now, I'm not 100 percent 06:05:39PM
 23 sure whether this is confidential or not. 06:05:43PM
 24 MS. KAM: It is confidential. 06:05:46PM
 25 MR. TERRY: Okay. So we 06:05:48PM

1 should just make sure that that is -- that the 06:05:49PM
 2 feed has been turned off. 06:05:51PM
 3 --- CONFIDENTIAL BEGIN 06:06:01PM
 4 BY MR. TERRY: 06:06:01PM
 5 Q. And this letter is dated 06:06:01PM
 6 October 12, 2011. Could you just explain to me 06:06:03PM
 7 where this letter falls in the chronology of the 06:06:11PM
 8 correspondence going back and forth between 06:06:14PM
 9 Windstream and -- or Windstream's counsel and the 06:06:17PM
 10 OPA. 06:06:20PM
 11 A. Well, I believe it's a 06:06:20PM
 12 response to the letter that we sent on July 5, 06:06:22PM
 13 2011. So whatever number of months later, they 06:06:25PM
 14 responded to that letter, I believe. 06:06:29PM
 15 Q. Okay. And just so the 06:06:31PM
 16 Tribunal has it, that's at Tab 35, the July 5, 06:06:33PM
 17 2011 letter. 06:06:38PM

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

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

23 Q. I have a couple of other 06:07:50PM
 24 documents to show you, Mr. Mars, if you could put 06:07:51PM
 25 that one to the side. These are C-338 and 340. 06:07:54PM

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1 A. Thank you. 06:08:24PM
2 Q. Mr. Mars, if you could 06:08:40PM
3 flip back in the document book that Canada gave to 06:08:41PM
4 you to Tab 19, which is Document C-341. 06:08:45PM
5 A. Yes. 06:08:50PM
6 Q. And is this confidential 06:08:50PM
7 or not? I don't think so. I think we can go back 06:08:54PM
8 on the live stream for this. 06:08:57PM
9 --- CONFIDENTIAL ENDS 06:09:04PM
10 BY MR. TERRY: 06:09:04PM
11 Q. Do you recall when 06:09:04PM
12 Canada's counsel was discussing this document at 06:09:05PM
13 Tab 19 with you? 06:09:08PM
14 A. Yes. 06:09:09PM
15 Q. All right. And do you 06:09:10PM
16 recollect that you mentioned to her that there 06:09:11PM
17 were other e-mails that you recalled in the record 06:09:14PM
18 at the time that explained the role of 06:09:18PM
19 Mr. Ungerman? 06:09:23PM
20 A. Yes, I do. 06:09:25PM
21 Q. Okay. I would like you 06:09:28PM
22 to look at, first of all, Document 338. 06:09:28PM
23 A. Yes. 06:09:38PM
24 Q. And if you could -- so 06:09:38PM
25 338, 340, and 341, if we've all got those out. If 06:09:41PM

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1 you could just look at those and, please, 06:09:45PM
2 explain -- 06:09:50PM
3 A. I don't have 341. 06:09:50PM
4 Q. 341 is Tab 19. 06:09:52PM
5 A. Oh, okay. I'm sorry. 06:09:54PM
6 I'm sorry. 06:09:55PM
7 Q. So if you could please 06:09:55PM
8 explain what you understand from your review of 06:09:57PM
9 these documents, and perhaps you could also 06:10:02PM
10 indicate whether you received copies of these 06:10:07PM
11 documents at the time. 06:10:09PM
12 A. Yeah. I had these. I 06:10:13PM
13 believe I had these copies at the time, and, you 06:10:15PM
14 know, I communicated these -- this, effectively, 06:10:19PM
15 but yes. And so, you know, what I believe this to 06:10:21PM
16 say is what I testified to before, which was that 06:10:25PM
17 Mr. Ungerman got involved and said that he would 06:10:29PM
18 help resolve it. And as you can see, you know, 06:10:32PM
19 the e-mail that was sent to Chris was forwarded to 06:10:36PM
20 Mr. Ungerman with the language of this is not 06:10:39PM
21 good. 06:10:42PM
22 Q. And just for the 06:10:42PM
23 record -- 06:10:44PM
24 A. Sorry, I apologize. 06:10:44PM
25 Q. -- what is the exhibit 06:10:45PM

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1 number for that e-mail? 06:10:46PM
2 A. 338. C-0338. 06:10:47PM
3 Q. Okay. 06:10:50PM
4 A. And he responded with: 06:10:51PM
5 "I've dealt with it. 06:10:52PM
6 It's okay. But need to 06:10:53PM
7 work on it today." 06:10:54PM
8 And that was on August 10, 06:10:55PM
9 2010 at 2:51 p.m. And then on August 11, 2010, at 06:10:58PM
10 3:25 p.m., JoAnne Butler responded to Chris saying 06:11:03PM
11 that she thinks they found a mutually agreeable 06:11:07PM
12 solution. 06:11:10PM
13 Q. And which document are we 06:11:10PM
14 looking at for that? 06:11:12PM
15 A. I think it's 41; right? 06:11:13PM
16 C-0341. 06:11:14PM
17 Q. Right. 06:11:16PM
18 A. And the comment that I 06:11:21PM
19 had made earlier about nothing ever being easy 06:11:22PM
20 with the OPA, I was clearly wrong. He didn't say 06:11:24PM
21 that. He just said: 06:11:27PM
22 "Nothing is ever easy on 06:11:29PM
23 this one." 06:11:30PM
24 So, you know, and that's in 06:11:30PM
25 response to -- effectively to JoAnne's -- 06:11:31PM

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1 Ms. Butler -- I'm sorry -- to Ms. Butler's 06:11:36PM
2 response about them not intending to -- to 06:11:38PM
3 honour -- you know, to amend our milestone COD. 06:11:43PM
4 That was what I was referring 06:11:46PM
5 to earlier. I apologize. I misstated it. 06:11:47PM
6 Q. Okay. 06:11:51PM
7 A. And that's C-0340. 06:11:52PM
8 Q. All right. I have 06:11:54PM
9 perhaps one or question. I just need to -- the 06:11:57PM
10 last question that Canada's counsel had I need to 06:12:00PM
11 have a look at a document which actually is in 06:12:03PM
12 front of the witness. So I am going to borrow 06:12:05PM
13 that and just -- I may have another question 06:12:08PM
14 arising from that. 06:12:10PM
15 MR. TERRY: So, Mr. President, 06:14:40PM
16 I may need your indulgence or perhaps the 06:14:41PM
17 assistance of Canada's experts, who are very good 06:14:43PM
18 at getting documents up on the screen. There was 06:14:46PM
19 a question -- I think the last question that 06:14:48PM
20 Canada's counsel had -- which had to do with the 06:14:51PM
21 termination rights under the contract. I just 06:14:56PM
22 thought it would be helpful for everyone's sake to 06:14:58PM
23 take us to those termination provisions. 06:15:01PM
24 You heard the witness's 06:15:04PM
25 testimony as to his understanding of those 06:15:05PM

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1 provisions, and I've got the document reference, 06:15:06PM
2 which is Tab C-245. 06:15:10PM
3 THE WITNESS: Is that the FIT 06:15:21PM
4 contract? 06:15:22PM
5 MR. TERRY: That's the FIT 06:15:22PM
6 contract. 06:15:23PM
7 PRESIDENT: That would be tab 06:15:23PM
8 7. 06:15:25PM
9 MR. BISHOP: Tab 7. 06:15:26PM
10 MR. TERRY: Okay. Perfect. 06:15:27PM
11 Perfect. 06:15:27PM
12 BY MR. TERRY: 06:15:29PM
13 Q. And if we could turn -- 06:15:29PM
14 if you could turn, please, Mr. Mars to section -- 06:15:38PM
15 page 7, Section 2.4, Notice to Proceed." 06:15:43PM
16 A. Yes. 06:15:52PM
17 Q. And I don't know how well 06:15:52PM
18 you know this contract. I know you know it 06:15:55PM
19 somewhat well, but if you could just familiarize 06:15:59PM
20 yourself. Take a moment with what it says in 06:16:01PM
21 2.4(a). And then... 06:16:05PM
22 A. Okay. 06:16:30PM
23 Q. If you could turn the 06:16:31PM
24 next page to page 8, and look at the paragraph, 06:16:32PM
25 the little (ii) at the very top, which starts: 06:16:36PM

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1 your examination. And that also concludes the 06:17:32PM
2 hearing of today. We will continue tomorrow 06:17:35PM
3 morning at nine o'clock and it will be 06:17:37PM
4 Mr. Ziegler, I understand, on the bench. 06:17:42PM
5 Thank you very much. 06:17:46PM
6 --- Whereupon hearing adjourned at 6:17 p m. 06:17:48PM
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1 "If the supplier 06:16:40PM
2 terminates this agreement 06:16:41PM
3 in accordance with 06:16:42PM
4 Section 2.4(a)..." 06:16:43PM
5 The section you were just 06:16:44PM
6 reading. 06:16:46PM
7 A. Yes. This is -- this is 06:16:47PM
8 what I was referring to. You know, if we 06:16:48PM
9 terminated it, we would have to pay liquidated 06:16:51PM
10 damages, which are equivalent to the amount of the 06:16:54PM
11 \$6 million dollars. 06:16:58PM
12 So the completion and 06:16:58PM
13 performance security was the \$6 million. So I 06:17:00PM
14 guess -- I guess I was wrong. We could get our LC 06:17:03PM
15 back, but we would have to pay them \$6 million to 06:17:05PM
16 get our LC back. So what I stated was not 100 06:17:08PM
17 percent accurate. 06:17:12PM
18 Q. I think that is all I 06:17:13PM
19 wanted to clarify. 06:17:19PM
20 PRESIDENT: Thank you, 06:17:20PM
21 Mr. Terry. I understand there are no questions 06:17:21PM
22 from the members of the Tribunal so, Mr. Mars, 06:17:25PM
23 thank you very much. Thank you for your time. 06:17:28PM
24 THE DEPONENT: Thank you. 06:17:30PM
25 PRESIDENT: That concludes 06:17:31PM

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability accurately
transcribed the foregoing proceeding.

Teresa A. Forbes, RMR, CRR, CSR
Real-time Court Reporter

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