



PCA (PERMANENT COURT OF ARBITRATION)

PCA Case No. 2013-22

WINDSTREAM ENERGY LLC V. THE GOVERNMENT OF CANADA

PROCEDURAL ORDER NO. 1

16 September 2013

Tribunal:

[Veijo A. Heiskanen](#) (President)

[Bernardo M. Cremades Sanz-Pastor](#) (Appointed by the State)

[Doak Bishop](#) (Appointed by the investor)

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Procedural Order No. 1

This first procedural order sets out the procedural rules to which the Claimant and the Respondent (the "Parties") have agreed, or which the Arbitral Tribunal has determined shall govern this arbitration.

1. The Parties and their Representatives

1.1. The Claimant is:

Windstream Energy LLC

338 Harris Hill Road, Suite 102

Williamsville, NY 14221

U.S.A.

The Claimant is represented in this arbitration by:

Mr. John Terry

Ms. Ishaat Reza

Mr. James Gotowiec

Torys LLP

Suite 3000

79 Wellington St. West

Box 270, TD Centre

Toronto, Ontario, M5K 1N2

Canada

E-mail: jterry@torys.com

ireza@torys.com jgotowiec@torys.com

All hard copy correspondence and documents in this arbitration will be delivered to the attention of Mr. John Terry at this address of counsel for the Claimant and all email correspondence will be delivered to the three e-mail addresses above.

1.2. The Respondent is:

The Government of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario, KIA OH8
Canada

The Respondent is represented in this arbitration by:

Ms. Sylvie Tabet, General Counsel and Director

Mr. Shane Spelliscy, Counsel

Mr. Rodney Neufeld, Counsel

Mr. Raahool Watchmaker, Counsel

Ms. Heather Squires, Counsel

Ms. Laurence Marquis, Counsel

Ms. Susanna Kam, Counsel

Trade Law Bureau (JLT)

Foreign Affairs, Trade and Development Canada

125 Sussex Drive

Ottawa, Ontario, KIA 0G2, Canada

E-mail: shane.spelliscy@international.gc.ca

melissa.perrault@international.gc.ca

All hard copy correspondence and documents in this arbitration will be delivered to the attention of Mr. Shane Spelliscy at this address of counsel for the Respondent and all e-mail correspondence will be delivered to both of the e-mail addresses above.

2. The Arbitral Tribunal

- 2.1. The Tribunal is composed of:
Dr. Veijo Heiskanen

LALIVE

35, Rue de la Mairie

P.O. Box 6569

1211 Geneva 6

Switzerland

E-mail: vheiskanen@lalive.ch

Mr. R. Doak Bishop King & Spalding

1100 Louisiana Street, Suite 4000

Houston, TX 77002-5213

U.S.A.

E-mail: dbishop@kslaw.com

Dr. Bernardo Cremades

Cremades y Asociados

Goya, 18 — 2a Planta

28001 Madrid

Spain

E-mail: bcremades@bcremades.com

- 2.2. Each arbitrator is and shall remain at all times impartial and independent of the Parties and the Tribunal will take into account the IBA Guidelines on Conflict of Interest, 2004. Each arbitrator will provide the Parties with a Statement of Independence.
- 2.3. The Parties confirm that the Tribunal has been duly constituted in accordance with Article 1123 of the NAFTA. The Parties have no objections to the constitution of the Tribunal and to the appointment of the Arbitrators in respect of matters known to them on the date of this Procedural Order.

3. Legal Seat of the Arbitration

- 3.1. The Parties agree that the seat of the arbitration and subject to Section 3.2, the location of the hearings, shall be Toronto, Ontario, Canada.
- 3.2. The Tribunal may, in its discretion, convene hearings at any location after hearing the Parties and

taking into account all relevant circumstances.

4. Applicable Procedural Law

- 4.1. In addition to the provisions of this procedural order, the procedure in this arbitration shall be governed by the 2010 UNCITRAL Arbitration Rules ("UNCITRAL Rules") (per the agreement of the Parties) as modified by the provisions of Section B of Chapter 11 of the NAFTA (per Article 1120(2) of the NAFTA).'
- 4.2. If these provisions and rules do not address a specific procedural issue, the Tribunal shall, after consultation with the Parties, determine the applicable procedure. In addition, the Tribunal may seek guidance from, but shall not be bound by, the 2010 IBA Rules on the Taking of Evidence in International Arbitration ("2010 IBA Rules").

5. Language

- 5.1. The proceedings shall be conducted in English.

6. Calendar

- 6.1. The calendar for this arbitration (the "Calendar") is attached as Annex A and made an integral part of this Order.

7. Document Production

- 7.1. The Calendar sets out the steps and applicable dates that shall govern the production of documents in this proceeding.
- 7.2. Each Party's request for production shall identify each document or category of documents sought with a sufficient degree of precision and establish its relevance to the dispute, and shall take the form of a so-called "Redfern Schedule", as attached at Annex B. For the purposes of this order, the term "relevance" encompasses both the term "relevance" and "materiality".
- 7.3. Documents produced by a Party in response to a request for production or Tribunal order shall be transmitted to the other Party by sending via post or courier a CD-ROM, USB key or other similar media containing the documents in electronic format with each individual document clearly labelled with a unique identifying number. The documents shall be transmitted on or before the date specified in the Calendar or otherwise fixed by the Tribunal for such disclosure. The media should also contain an Index of the documents contained therein.
- 7.4. Each Party may withhold from production documents that it considers not subject to production

based on specific grounds of privilege. The Tribunal shall rule upon any disputes related to document production, pursuant to its authority under Articles 27(3) and (4) of the UNCITRAL Rules, including disputes as to whether a claimed privilege applies, and, in doing so, may seek guidance from, but is not bound by, Articles 3 and 9 of the 2010 IBA Rules.

- 7.5. Documents produced to the other Party shall not be considered to be part of the record unless and until one of the Parties subsequently submits them in evidence to the Tribunal. In such a case, Section 9 below establishes the procedure for the submission as exhibits of documents disclosed to the requesting Party by the other Party.
- 7.6. In addition to the above, the Tribunal may of its own motion order a Party to produce documents.

8. Written Submissions

- 8.1. The Calendar sets out the steps and applicable dates that shall govern the exchanges and filing of written submissions in this proceeding.
- 8.2. Except with the leave of the Tribunal or the consent of the other Party, the Parties may only include with their Reply and Rejoinder submissions evidence responding to or rebutting matters raised by the other Party's immediately preceding written submission or documents produced in the period following that submission.
- 8.3. On the date on which a written submission is due, the relevant Party shall submit an electronic version of its written submissions, including its memorials, expert reports and witness statements, and an index of its exhibits and legal authorities by e-mail (preferably in "searchable" PDF format) to the other Party, to each arbitrator, and to the Registry. Together with or within three days following the filing of its written submissions by e-mail, the submitting Party shall send by post or courier to the other disputing party, to each arbitrator, and to the Registry, CD-Roms or a USB key containing its submissions, exhibits and legal authorities in electronic format (preferably, in MS Word format or "searchable" PDF format). In addition, one hard copy of its written submissions (without exhibits or legal authorities) in A5 format and one copy of its exhibits in standard letter size shall be sent by post or courier to each arbitrator and to the Registry.

9. Exhibits and Legal Authorities

- 9.1. The Parties shall identify each exhibit submitted to the Tribunal with a distinct number.
- 9.2. Each exhibit submitted by the Claimant shall commence with the letter "C" followed by the applicable consecutive number, i.e. C-1, C-2, and so forth. Each exhibit submitted by the Respondent shall commence with the letter "R" followed by the applicable consecutive number, i.e. R-1, R-2, and so forth.
- 9.3. Each legal authority submitted by the Claimant shall commence with the letters "CL" followed by the applicable consecutive number, i.e. CL-1, CL-2, and so forth. Each legal authority submitted by

the Respondent shall commence with the letters "RL" followed by the applicable consecutive number, i.e. RL-1, RL-2, and so forth.

- 9.4. The Parties shall submit all exhibits in chronological or other appropriate order with separate folders for each exhibit. An index describing each of the exhibits by exhibit number, date, type of document, author and recipient, as applicable, shall be included on each CD-ROM or USB key containing the exhibits.
- 9.5. The Parties shall submit their exhibits together with the written submissions that make reference to or rely upon them. The Tribunal may allow a Party to submit additional exhibits at a later stage of the proceedings if appropriate in view of all the relevant circumstances.
- 9.6. All exhibits and legal authorities shall be submitted in the original language together with a translation into English (if the document is in a language other than English). Whenever lengthy documents need to be translated, the translation may be limited to the relevant passages together with such other portions of the document as may be necessary to put those passages in proper context. Nonetheless, the Tribunal or the other Party may request a full translation into English of exhibits or legal authorities which are deemed of special importance to the dispute.
- 9.7. Upon request of the Tribunal or of the other Party, a Party shall identify the author of any translation by name and capacity, and the author shall confirm that, to the best of his or her knowledge, the translation accurately reflects the contents of the original document. Non-certified translations shall be considered sufficient unless questioned by the other Party or by the Tribunal. For ease of reference, the Parties shall paginate any translation in the same way as the original document.
- 9.8. All documents, including both originals and copies, submitted to the Tribunal shall be deemed to be authentic unless disputed by the other Party.
- 9.9. The Parties shall either submit all documents to the Tribunal in complete form or indicate the respects in which any document is incomplete.
- 9.1. The use of demonstrative exhibits (such as charts, diagrams, tabulations, Power Point slides (electronic and hard copies), etc.) shall be permitted at the hearing, provided that no new evidence or argument is contained therein. A hard copy of any such exhibit shall simultaneously be provided by the Party submitting such an exhibit to the other Party and each member of the Tribunal.

10. Witnesses

- 10.1. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
- 10.2. For each witness, a written and signed witness statement shall be submitted to the Tribunal. A witness who has not submitted a written witness statement may provide testimony to the Tribunal only in extraordinary circumstances and upon a showing of good cause. If these conditions are met,

the opposing Party shall be given an appropriate opportunity to respond to such testimony.

- 10.3. Each witness statement shall state the witness' name, involvement in the case, and the evidence the witness is offering including, if applicable, an indication of the source for the witness' knowledge.
- 10.4. Witness statements shall be submitted together with the Parties' written memorials. The witness statements shall be numbered discretely from other documents and include each witness' surname (e.g. "CWS (Claimant's witness statement) - [surname of witness]"). Where a witness submits more than one witness statement, his or her subsequent witness statements shall be numbered accordingly (e.g. "CWS-[surname of witness]-2").
- 10.5. Only witnesses that are called to be cross-examined by the other Party, or who are directed to appear by the Tribunal, shall testify at the hearing. Notwithstanding the above, at the request of a Party, the Tribunal may allow, in limited circumstances where it is reasonable and appropriate to do so, a witness offered by that Party but not called to be cross-examined by the other Party, or directed by the Tribunal to appear, to testify at the hearing.
- 10.6. Each Party shall be responsible for ensuring the attendance of its own witnesses at the applicable hearing, except when the other Party has waived cross-examination of a witness, the Tribunal does not direct his or her appearance, and the Party decides not to call the witness.
- 10.7. Each Party shall advance the costs of appearance of its own witnesses. The Tribunal will decide upon the appropriate allocation of such costs in the final award or at the time the arbitration is concluded.
- 10.8. If a witness cannot appear during the scheduled dates or without notice fails to appear at a hearing, the Tribunal may, at its discretion, summon the witness to appear a second time, if it is satisfied that: (1) there was a compelling reason for the witness' first failure to appear; (2) the testimony of the witness is relevant to the adjudication of the dispute; and (3) providing a second opportunity for the witness to appear will not unduly delay the proceeding.
- 10.9. The Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear at a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. A witness who is not called for cross-examination has a valid reason not to appear. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason.
- 10.10. At any hearing, the examination of each witness shall proceed as follows:
 - 10.10.1 the Party summoning the witness may briefly examine the witness for the purpose of introducing the witness, correcting, if necessary, any errors in the witness statement and addressing matters arisen after the witness statement was given, if any;
 - 10.10.2 the adverse Party may then cross-examine the witness;
 - 10.10.3 the Party presenting the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross examination - limited to the

witness' testimony on re-examination - at the discretion of the Tribunal; and

10.10.4 the Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties.

10.11.If required, the Tribunal shall make a procedural order prior to the first hearing with respect to the language in which the witnesses will testify and the requirements for the translation of any testimony in a language other than English.

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

10.13.The Tribunal shall at all times have complete control over the procedure for hearing a witness. In particular, the Tribunal may, at its discretion:

10.13.1 refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant;

10.13.2 limit or refuse the right of a Party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or

10.13.3 direct that a witness be recalled for further examination at any time.

10.14.It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.

10.15.A decision by a Party not to cross-examine a witness to appear for testimony at a hearing shall not be considered to reflect an agreement between the parties as to the correctness of the contents of the witness statement.

11. Experts

11.1. Each Party may retain and submit the evidence of one or more experts to the Tribunal. Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted as exhibits with the Parties' memorials, in which case reference to such exhibits shall be sufficient. The procedural rules set out in the above Section 10 shall apply by analogy to the evidence of experts.

11.2. Subject to Article 1133 of the NAFTA, the Tribunal may, on its own initiative or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of appointment - including expert fees - and conclusions of any such expert. The Tribunal may, on its own initiative or at the request of any Party, take oral evidence of such expert(s). The procedural rules set out in Section 10 above shall apply by analogy.

11.3. Each expert report shall include a statement of qualifications of the expert in the claimed area of expertise, and shall attach a current curriculum vitae evidencing such qualifications.

12. Procedural Requests

12.1. All requests with respect to procedural issues shall be made in writing. Unless otherwise ordered by the Tribunal, the other disputing party shall have five business days, not including the day on which the request was made, to reply in writing to a request. No further submissions on a request shall be made by either party without the express authorization of the Tribunal in advance.

13. Notifications and Communications

13.1. Each Party shall address all communications, submissions and documents directly to each member of the Tribunal, with a copy to the other disputing party and to the Registry.

13.2. All notifications and communications in this arbitration shall be valid, provided that they are made: (a) in the case of the Tribunal, to each of its members at the addresses set out in Section 2 above, or as subsequently notified during the course of the proceedings; (b) in the case of the Parties, to their respective counsel at the addresses set out in Section 1 above, or as subsequently notified during the course of the proceedings. Any changes in the addresses or other particulars set out in Section 1 above shall be notified to the Parties' counsel and the Tribunal. Prior to the receipt of such notification, all communications and notifications may be validly made to addresses set out in Section 1 above.

13.3. Subject to Section 8.4 above, all notifications and communications by the Parties and by the Tribunal, except for awards, shall be made, by e-mail.

14. Non-disputing Parties

14.1. The Governments of Mexico and the United States may make submissions to the Tribunal within the meaning of Article 1128 of the NAFTA. They shall be entitled to receive a copy of the evidence and submissions referred to in Article 1129 of the NAFTA.

15. Amici

15.1. If a request for the submission of an *amicus curiae* brief is filed, the Tribunal will give the appropriate directions in the exercise of its powers under Article 17 of the UNCITRAL Rules and take into consideration the recommendation of the North American Free Trade Commission on non-disputing party participation of 7 October 2003.

16. Procedural Rulings

16.1. The arbitrators and the Parties agree that the Presiding Arbitrator may sign procedural rulings alone provided that the Presiding Arbitrator consults with the other arbitrators, excepting requests for an extension of time where the urgency of the request is such that no consultation with the other arbitrators is feasible.

17. Status of Orders

17.1. Any Order of the Tribunal may, at the request of a Party or at the Tribunal's own initiative, be varied if the circumstances so require.

18. Transparency

18.1. All filings to the Tribunal, hearing transcripts, orders and awards generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information.

18.2. Hearings shall be open to the public. The Tribunal may hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information.

19. Fees and Expenses of the Members of the Arbitral Tribunal

19.1. Each member of the Tribunal shall receive;

19.1.1 a fee of US \$3,000, or such other fee as may be set forth from time to time in the ICSID Schedule of Fees, for each day of participation in meetings of the Tribunal or 8 hours of other work performed in connection with the proceeding or pro rata; and

19.1.2 subsistence allowances and reimbursement of travel (in business class) and other expenses within the limits set forth in Regulation 14 of the ICSID Administrative and Financial Regulations and the Memorandum on the Fees and Expenses of ICSID Arbitrators.

19.2. Subject to the disbursement of any fees and expenses from the sums deposited in accordance with Section 20, all fees and expenses shall be paid within 30 days of their quarterly invoice. The Tribunal may withhold any award or decision until such fees and expenses have been paid.

20. Case Administration

20.1. The International Bureau of the Permanent Court of Arbitration shall act as registry ("the Registry")

in this arbitration under the following terms:

20.1.1 The Registry shall manage deposits made by the Parties to cover the costs of the arbitration, subject to the Tribunal's supervision;

20.1.2 The Registry shall maintain an archive of filings and submissions;

20.1.3 If needed, the Registry shall make its hearing and meeting rooms at the Peace Palace in the Hague available to the Parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the Parties;

20.1.4 The Registry shall provide such other registry services as the Tribunal may direct; and

20.1.5 Work carried out by the Registry will be paid in accordance with the PCA's Schedule of Fees. PCA fees and expenses will be paid in the same manner as the Tribunal's fees and expenses.

20.2. The contact details of the Registry are as follows:

Permanent Court of Arbitration

Attn: Hanno Wehland

Peace Palace

2517 KJ The Hague

The Netherlands

Tel: +31 70 302 4289

Fax: +31 70 302 4167

Email: hwehland@pca-cpa.org

21. Advance of Arbitration Costs

21.1. In accordance with Article 41(1) of the UNCITRAL Rules and in order to ensure sufficient funds for the Tribunal's fees and expenses, the Tribunal requests the Parties to deposit, within a period of 30 days, a sum of CAD 200,000 in equal parts (i.e. CAD 100,000 each) on the following account:
ING Bank N.V.

Bank Schenkade 65

2595 AS The Hague

The Netherlands

Bank Identifier Code (BIC): INGBNL2A

Account number: 68 55 45 369

IBAN: NL71 INGB 068 554 5369

Beneficiary: Permanent Court of Arbitration

- 21.2. The Tribunal will review the adequacy of the deposit from time to time and may invite the Parties to make supplementary deposits.
- 21.3. When making a request for a supplementary deposit, or upon the request of a Party, the Tribunal shall provide the Parties with a statement of accounts detailing the fees and expenses of the Tribunal to date.
- 21.4. Any transfer fees or other bank charges will be charged to the deposit. No interest will be paid on the deposit.
- 21.5. The unused balance held on deposit at the end of the arbitration shall be returned to the Parties as directed by the Tribunal.

22. Record of Hearings

- 22.1. The hearings before the Tribunal shall be transcribed.
- 22.2. Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the disputing parties and Members of the Tribunal in the hearing room. The transcripts of proceedings should be made available on a same day service basis.
- 22.3. The Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. If the disputing parties disagree on corrections to be made to transcripts, the Tribunal shall determine whether or not any such corrections are to be adopted.

23. Disposal of Record

- 23.1. Six months after the Tribunal has notified the final award to the Parties, the arbitrators shall be at liberty to dispose of the record of the arbitration, unless the Parties ask that the documents be returned to them or to their counsel, which will be done at the expense of the requesting Party.